From: **Alphonse Talarico** contact@lawofficeofalphonsetalarico.com
Subject: Cases subsequently citing Suburban
Date: January 5, 2024 at 10:16 AM
To: Paul Dulberg pdulberg@icloud.com, Paul Dulberg Paul_Dulberg@comcast.net, T Kost tkost999@gmail.com

AT

Gentlemen,

Please see the attached.

PFLA Dulberg v
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2022 IL App (1st) 201115-U

TONI A. ROSA, Plaintiff-Appellant,
v.
ANNA M. BUSH and BUSH AND HEISE, Defendants-Appellees.

No. 1-20-1115

Court of Appeals of Illinois, First District, Fourth Division

March 24, 2022

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

Appeal from the Circuit Court of Cook County. No. 17 L 63020 Honorable Martin S. Agran, Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court. Presiding Justice Reyes and Justice Martin concurred in the judgment.

ORDER

LAMPKIN, JUSTICE

¶ 1 *Held:* (1) The trial court's order granting defendants' motion for summary judgment is affirmed; and (2) the trial court's order granting defendants' motion to strike plaintiffs affidavit is affirmed.

¶ 2 Plaintiff Toni A. Rosa appeals from the circuit court's order granting summary judgment for plaintiffs former attorneys Anna M. Bush (Bush) and the law firm of Bush and Heise.

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Plaintiff's first amended complaint alleged legal malpractice against defendants based on Bush's representation of plaintiff in an underlying divorce action.

¶ 3 On November 27, 2019, the trial court granted summary judgment for defendants and also granted defendants' motion to strike plaintiff's affidavit. On December 23, 2019, plaintiff filed a motion to reconsider both rulings. On September 16, 2020, the trial court denied plaintiff's motion to reconsider. On October 15, 2020, plaintiff filed a timely notice of appeal. We

have jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. July 1, 2017).[1]

¶ 4 For the reasons that follow, we affirm the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 A. The Underlying Divorce Action

¶ 7 On November 22, 1997, plaintiff and Timothy R. Wujcik were married. Between 2000 and 2004, the couple had three children, two boys, and one girl. After an unsuccessful attempt at mediation, the parties hired attorneys to represent them. Plaintiff hired and later fired attorney Margaret Zuleger while Wujcik hired attorney Patti S. Levinson. On September 30, 2014, plaintiff hired Bush to represent her in the divorce proceeding brought by Wujcik.

¶ 8 On April 17, 2015, judgment was entered on the marital settlement agreement reached by plaintiff and Wujcik. Wujcik's attorney drafted the agreement. As is pertinent to the claims raised on appeal, the agreement contained the following provisions:

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> " 1.05 Without collusion in the pending proceedings, and without any intent to stimulate a dissolution of marriage, [Wujcik] and [plaintiff] believe that it is in their best interest to settle between themselves all rights and claims against each other, including, but not limited to, past, present, and future maintenance and spousal support, and attorneys' fees and costs, and to forever, finally and fully settle between themselves all other rights and obligations growing out of any relationship now or previously existing between them and to fully and finally settle any and all rights of every kind, nature, description, which either of them now has or may hereafter have or claim against the other, including, but not limited to homestead, dower, and all rights and claims in and to the property of the other of every kind, nature, and description, whether real, personal, beneficial, community, marital, non-marital, or mixed, now owned or which hereafter may be acquired by either of them and further including all rights and claims in and to the estate of the other. The parties also agree that it is in the best interest of their children to settle all issues relating to their respective obligations regarding their children, including, but not limited to, child custody, parenting time, college expenses and support.

To this end, the parties have each made complete disclosure of all assets.

1.06 Each party acknowledges that each is sufficiently conversant with regard to all of the wealth, property and income of the other and any of their respective rights thereto to enter into this Agreement. The parties acknowledge that each has been informed to their respective satisfaction as to the wealth, property,

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estate and income of the other, and that each has been fully informed of his or her respective rights and obligations in the premises. The parties have been advised that they may attempt to compel discovery and inspection of the personal and business financial books and records of the other party with accountants, appraisers, attorneys, and other investigating, appraising and evaluating *[sic]* any and all of the personal and business assets, liabilities, and income of the other. Each party has specifically waived the exercise of these rights to the extent not pursued and has elected to take no further steps in connection with such discovery, investigation, appraisal, or evaluation. Each party expressly states that no representation has been made to him or her by the other party or his or her attorney other than what is contained in this Agreement.

1.07 [Wujcik] and [plaintiff] expressly state that they have voluntarily entered into this Agreement free from any duress and coercion and with full knowledge and understanding of each and every provision contained in this Agreement. After carefully considering the terms and provisions of this Agreement, each of the parties states that he or she believes that this Agreement is fair and reasonable under the present circumstances and is not unconscionable.

* * *

2.02 Until the entry of a Judgment of Dissolution of Marriage which incorporates this Agreement, either directly or by reference, each party reserves the right to prosecute any action that he or she has brought or may hereafter bring

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against the other, including the pending action, and each party reserves the right to defend against any action which may be commenced by the other.

* * *

11.01 [Wujcik] and [plaintiff] each represent and warrant to the other that he or she has duly reported all state and federal income taxes due and owing as a result of his or her income both prior and throughout the marriage from all sources to and including the year 2014.

***

11.03 With respect to all joint tax returns filed by the parties, [Wujcik] and [plaintiff] agree as follows:

A. The parties shall notify the other immediately, in writing, of any deficiency assessment. Either of the parties shall have the right to contest any deficiency assessment received in connection with the filing of joint returns. In the event a party so elects, the other party hereby agrees to cooperate fully with the contesting party's selected representative in contesting said assessment, including the execution of any and all documents and the furnishing of testimony, if necessary and appropriate in pursuing said contest. [Wujcik] shall be solely responsible for payment of the amount ultimately determined to be due thereon, together with interest and penalties, and any and all expenses that may be incurred if he decides to contest the assessment.

B. Should either party hereafter deem it necessary or advisable to file an amended joint state or federal return for any previous year or years, the other party agrees to execute such returns. Each party's agreement herein to execute such amended returns is conditioned upon the requesting party providing the other party with a written agreement that any Amended Tax Return shall pay and defray any tax, interest, penalties and all expenses ultimately determined to be due thereon, and save, indemnify and hold harmless the other with respect to any such return to the same extent and in the same respects as any other joint tax return referred to in this Agreement."

¶ 9 The parties also executed a joint parenting agreement. In it, the parties agreed that it was in the best interests of their three minor children that Wujcik have custody, parenting rights, and responsibilities for the children and that their primary residence remain with him. Wujcik also assumed all of the financial obligations for the children, including medical, dental, psychiatric, psychological, orthodontic, health insurance, and extracurricular activities. He also assumed responsibilities for the children's college education expenses, for which college accounts had already been created and substantial sums of money set aside.

¶ 10 The marital settlement agreement provided that Wujcik would pay plaintiff $5, 000 per month in maintenance until September 1, 2019. The amount and duration of the maintenance term were made nonmodifiable and nonreviewable. Wujcik also agreed to pay plaintiff's car lease payments and car insurance premiums until November of 2016, when the lease expired. At the

expiration of the lease, Wujcik would pay plaintiff $25, 000 towards the purchase of another vehicle.

¶ 11 The marital settlement agreement contained a "ride-through" provision, *i.e.,* maintenance payments would not terminate upon plaintiff's remarriage or entry into another conjugal relationship. Wujcik waived his right to receive maintenance, alimony, or spousal support of any kind from plaintiff, whether past, present, or future. These terms were also made nonmodifiable. Wujcik also agreed to maintain a life insurance policy unencumbered in at least $500, 000 with his children as the sole, irrevocable beneficiaries of such policy.

¶ 12 The parties agreed that title to the family residence at 3123 Old McHenry Road in Long Grove, Illinois, would be held solely in Wujcik's name. Upon entry of judgment on the agreement, plaintiff would execute a quitclaim deed conveying her rights in the property to Wujcik. In consideration of this agreement, plaintiff retained assets described in "Exhibit B," the asset division sheet. Plaintiff's assets included the leased 2013 Cadillac SRX, and her non-marital property, totaling $145, 000. Wujcik's non-marital property totaled $787, 115.

¶ 13 The parties agreed that the fair market value of the Long Grove home was $1, 200, 000. The property was mortgaged for $563, 726 and had an equity value of $635, 274. Prior to the execution of the marital settlement agreement, Wujcik gave plaintiff the equivalent of her share of the equity in the home from money realized from Wujcik's sale of another property.

Wujcik would retain sole possession of the marital residence and be responsible for monthly mortgage payments and real estate taxes.

¶ 14 On April 29, 2015, the court entered judgment for dissolution of marriage.

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¶ 15 B. Post-Judgment Litigation

¶ 16 Nearly two years after the entry of judgment for dissolution of marriage, plaintiff retained attorney Sally Lichter to explore the possibility of obtaining child support for the couple's daughter, who had begun living with plaintiff in May of 2017. In a letter dated March 9, 2017, Lichter informed Wujcik that plaintiff was seeking an additional $1, 500 per month to assist her with their daughter's living expenses.

¶ 17 Wujcik replied via email, informing Lichter that he continued to maintain sole residential custody of their children, but that plaintiff had accepted his offer of increased visitation. Wujcik maintained that plaintiff was reimbursed for any and all expenditures related to their children while in her care. She personally incurred no costs nor provided any monetary benefits to the children. Plaintiff did not pay for any meals, entertainment costs, supplies, or purchases, including clothes.

¶ 18 On April 14, 2017, plaintiff informed Lichter that she did not wish to pursue the matter of child support any further.

¶ 19 In the meantime, on March 3, 2017, plaintiff had filed a complaint in the instant case. Plaintiff alleged that defendant committed legal malpractice in her representation of plaintiff in the divorce proceeding.

¶ 20 On August 8, 2017, the trial court granted defendants' motion to dismiss. Plaintiff was granted 28 days to file a first amended complaint.

¶ 21 On September 5, 2017, plaintiff filed her first amended complaint. In it, she alleged that in early 2014, Wujcik instituted a dissolution of marriage proceeding against her in Lake County,

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Illinois. After consulting with another attorney, plaintiff retained Bush to represent her in the dissolution proceeding.

¶ 22 Plaintiff alleged that defendant breached the standard of care by: (1) failing to conduct discovery to determine Wujcik's true income and

assets; (2) failing to determine whether the marital residence was marital or non-marital property; (3) failing to depose Wujcik; (4) failing to conduct discovery against third parties or non-party witnesses to determine Wujcik's true income; (5) failing to obtain Wujcik's 2014 and 2015 tax returns prior to advising plaintiff to accept the agreement; (6) falsely informing plaintiff that until the judgment for dissolution was entered she could still litigate the matter; (7) advising plaintiff that the agreement was the best deal she could get and would not get as good a deal after a trial; (8) advising plaintiff to accept a non-permanent, nonreviewable maintenance award of $5, 000 per month for only four years; (9) failing to utilize the financial planner's valuation numbers for retirement accounts and assets in drafting the agreement; and (10) otherwise breaching the retainage agreement.

¶ 23 Plaintiff alleged that absent "complete discovery" to determine the true value of Wujcik's business and assets that Bush should not have dispensed advice to her. Plaintiff averred that Bush's actions and inaction damaged her in excess of $840, 000. The alleged damages included a $100, 000 shortfall in marital assets where the calculations of a financial planner had been disregarded.

¶ 24 Plaintiff maintained that she should have received maintenance for 80% of the years that she was married, *i.e.,* a total of 13 years. Plaintiff opined that her maintenance award for the first four years should have been $480, 000 and that she should have received an additional $500, 000 for the nine remaining years.

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¶ 25 Plaintiff alleged that defendant pressured her into accepting the maintenance award and that in addition to being half of what it ought to have been that it should not have been made nonreviewable. Plaintiff admitted, however, that her calculation of maintenance was based on her belief that Wujcik's business was worth several million dollars, a belief that resulted in calculations that were "just rhetorical." In actuality, plaintiff had no idea how much money Wujcik actually made, and plaintiff admitted that she had nothing to substantiate these numbers, which were simply based on her and Wujcik's "lifestyle." Plaintiff also admitted that she was the one who had determined the $5, 000 per month maintenance amount, which Wujcik agreed to, and that this number was used as a baseline thereafter.

¶ 26 On October 27, 2017, defendants filed a motion to dismiss plaintiff's first amended complaint.

¶ 27 On November 27, 2017, plaintiff filed a response to defendants' motion to dismiss plaintiff's first amended complaint.

¶ 28 On December 4, 2017, defendants filed a reply to plaintiff's response to defendants' motion to dismiss plaintiff's first amended complaint.

¶ 29 On December 13, 2017, the trial court denied defendants' motion to dismiss plaintiff's first amended complaint. Defendants were ordered to answer the complaint within 28 days, and discovery commenced.

¶ 30 On January 10, 2018, defendants filed an answer to plaintiff's complaint. The respective parties filed answers to interrogatories. In the 15 months that followed, depositions were also taken.

¶ 31 On September 24, 2018, plaintiff was deposed. Plaintiff testified that her marriage deteriorated after Wujcik bought the family home in Long Grove at an auction without her knowledge or consent. The house was everything that plaintiff did not want. Plaintiff stayed with Wujcik for the next five years but eventually decided to divorce him.

¶ 32 Initially, the parties attempted to achieve a divorce through mediation. Such efforts failed when the mediator, Sara Stolberg informed her that based on the materials that the parties had provided, Stolberg believed that plaintiff would have to pay Wujcik maintenance. Plaintiff testified that with respect to the couple's assets, Wujcik felt that "every penny belonged to him" because their assets were derived from a trust held by him that he established prior to the marriage.

¶ 33 When the mediation failed, Stolberg gave plaintiff and Wujcik the names of two attorneys. Plaintiff and Wujcik each picked one to represent them. After hiring and firing Margaret Zuleger, plaintiff, hired Bush. Plaintiff gave Bush the same documents that she had previously given Zuleger.

¶ 34 Plaintiff stated that the couple's jointly filed tax returns showed that Wujcik's annual income was between $80, 000 and $130, 000. Plaintiff testified that she "was not involved with any financial stuff" and neither reviewed nor approved the filed tax returns. When plaintiff saw a document that indicated Wujcik made $80, 000 one year and $100, 000 another year, plaintiff thought that this was impossible given their lifestyle. Plaintiff testified that she shared these thoughts with Bush, informing her that the couple spent about $30, 000 a month so that it did not "add up."

¶ 35 Plaintiff testified that Wujcik owned a recruiting company, Chase Winters, and operated out of the family home. After Wujcik initiated the divorce action, plaintiff learned that she was named an employee of the company. Additionally, she learned that a 401(k) plan had been set up in her name, despite the fact that she never signed any paperwork and was never an employee of the company. Plaintiff had, however, seen some W-2s in her name for 2007 and 2008 and had asked Wujcik about them because she had never received any money from his company.

¶ 36 Plaintiff alleged that Wujcik forged her name on a number of documents, including the mortgage for a previous house in Highland Park and the current Long Grove house, but also admitted that she had occasionally signed documents without asking what they were or knowing their contents.

¶ 37 Plaintiff was "deflated" by the settlement offer because she knew Wujcik had more money. Plaintiff testified that Bush "lacked confidence" to try to get plaintiff more money by investigating the business and said that Bush told her that if she went to trial, it would cost plaintiff more money and possibly result in her receiving the same sum or even less than what Wujcik had offered.

¶ 38 Plaintiff admitted that Bush was "the one that suggested we could possibly get a forensic attorney to do that, but she didn't encourage it because, once again, it was very costly and people who own their own business, such as Tim, the outcome might not have been what we were hoping for."

¶ 39 Plaintiff also admitted receiving a letter from Bush dated January 14, 2015, memorializing a conversation between the two of them that day. Plaintiff said that when she and Bush discussed the discrepancy between the filed tax returns and the couple's lifestyle, it was "more of a

discouragement and not a debate." Plaintiff agreed to the terms set out in the marital settlement agreement because she was "frustrated." She admitted to signing each page of the agreement but, when asked whether she understood its contents, stated: "probably not."

¶ 40 Plaintiff also admitted that while Bush represented her, that cost was a concern because Wujcik had refused to assume plaintiff's attorney fees. Plaintiff testified: "I was wanting to be done with it, but I also felt like - I truly feel had [defendant] given me the encouragement to go further

because we could get more, I would have; but when I didn't get that encouragement, yes, I was ready to settle."

¶ 41 Plaintiff testified that when she settled with Wujcik based on Bush telling her that this was the best deal that she was going to get, that plaintiff felt like she "lost." Deep down inside plaintiff felt like she could get more. Plaintiff had put her faith in Bush to fight for her, and if Bush did not do so, plaintiff did not know what she could do about it. Plaintiff did not think about going to see another attorney because she was exhausted, did not want to, and because she believed that Wujcik would put up a hard fight.

¶ 42 As her marriage was ending, plaintiff began a relationship with Chip Woods, who lived in Texas. Plaintiff intended to move to Texas but changed her mind immediately after arriving there.

¶ 43 Two years after the divorce, plaintiff's daughter began living with her. Plaintiff consulted attorney Sally Lichter to see if she could get additional monetary support from Wujcik. According to plaintiff, Lichter recommended that she seek out an attorney to determine whether she had a potential malpractice claim against defendant.

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¶ 44 Lichter was deposed on January 10, 2019. In 2017, plaintiff consulted with her on a post-divorce matter. Plaintiff wanted child support for the couple's daughter, who was now living with plaintiff. Lichter prepared a letter for plaintiff addressed to Wujcik requesting an additional $1, 500 per month in child support. In the process of representing plaintiff, Lichter looked at the marital settlement agreement. She asked plaintiff why the agreement only provided for five years' maintenance and why the house was considered a nonmarital asset.

¶ 45 Lichter provided no testimony regarding the standard of care and explicitly testified that she had no opinion on whether Bush violated the standard of care. Lichter testified that plaintiff decided not to go forward with her efforts to gain child support because she believed that it would be extremely difficult to work with Wujcik and, if successful, her daughter might be forced to change schools.

¶ 46 Bush was deposed on April 11, 2019. Bush had practiced law in Barrington, Illinois, for 42 years, and her practice was limited to family law. In 2014, Super Lawyers recognized Bush as one of Illinois's top 50 women lawyers. Bush testified that plaintiff was initially represented by Margaret Zuleger but later hired Bush because plaintiff felt that Zuleger was not moving the case quickly enough.

¶ 47 Plaintiff told Bush that she did not want to pay for a valuation of Wujcik's business, which was, according to plaintiff, a non-marital asset. Bush testified that she encouraged plaintiff to value the assets by conducting a forensic accounting or at least some discovery to "find out what there was." Discovery would have included depositions, written interrogatories, request of production of documents, forensic accounting, and appraisals. Plaintiff decided not to investigate further

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because she wanted the divorce to be quickly concluded. Bush's January 14, 2015 letter memorialized her conversation with plaintiff wherein plaintiff instructed Bush not to initiate any further discovery.

¶ 48 Defendant determined that a $5, 000 monthly maintenance award was adequate based on what plaintiff would have been statutorily entitled to. The sum was arrived at based on joint tax returns filed by plaintiff and Wujcik. While the maintenance term was shorter than what plaintiff was statutorily entitled to (750 ILCS 5/504(b-1) (West 2014)), based on Wujcik's income, the dollar amount of the award was higher than what was statutorily required. Additionally, the agreement had a "ride-through" provision that disallowed any change to the maintenance amount even if plaintiff entered into a conjugal relationship or remarried. The agreement also prohibited Wujcik from seeking any modification to the maintenance amount, even if his income decreased. Plaintiff had expressed concern that Wujcik's income could decrease in the future.

¶ 49 Bush testified that no issue existed as to the status of the Long Grove home because it was included in Wujcik's assets, and plaintiff's portion of the equity in the home had been paid out to her from the sale of another one of Wujcik's properties.

¶ 50 On July 15, 2019, defendants filed a motion for summary judgment pursuant to 735 ILCS 5/2-1005 (West 2014). In it, defendants alleged that summary judgment should be granted for several reasons. Defendants maintained that the undisputed facts established that Bush advised plaintiff of the opportunity to conduct discovery, and plaintiff declined to do so. Defendants maintained that the deposition testimony established that Bush complied with the standard of care. Defendants further maintained that no named expert supported plaintiff's malpractice claim.

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Plaintiff also failed to establish proximate cause or damages based on Bush's representation of her.

¶ 51 Defendants maintained that the evidence showed that when plaintiff inquired whether an investigation into or discovery of Wujcik's business could be conducted based on her belief that he had more money than was reflected on their joint tax returns or financial disclosures, Bush told her that it could but would cost additional time and money. Despite Bush encouraging plaintiff to conduct discovery, including forensic accounting, depositions, interrogatories, requests for production, and appraisals, plaintiff decided not to investigate further. The conversation between Bush and plaintiff was memorialized in Bush's January 14, 2015 letter.

¶ 52 Defendants maintained that the evidence established that plaintiff told defendant that Wujcik's business was a non-marital asset that predated her marriage and that she did not want to pay for its valuation. Defendants maintained that plaintiff failed to provide any support to establish that Wujcik's business was part of the couple's marital assets or that plaintiff had any interest in the business.

¶ 53 Relying on *Barth v. Reagan,* 139 Ill.2d 399 (1990), defendants maintained that plaintiff failed to present evidentiary facts to support the elements of a legal malpractice claim. Such an action required that plaintiff establish (1) an attorney-client relationship, (2) a breach of the standard of care, and (3) but for the breach of the standard of care, plaintiff would have received a different sum of money or benefit. Defendants alleged that plaintiff had only established the existence of an attorney-client relationship and failed to show a breach of the standard of reasonable care, proximate cause, or damages. Attorney Lichter's deposition testimony failed to

satisfy plaintiff's burden of proof. Defendants also alleged that plaintiff failed to establish that, but for the alleged breach of duty by defendant, that plaintiff would have been successful in obtaining a better result.

¶ 54 Defendants further maintained that it was plaintiff's responsibility to ensure the accuracy of her own tax filings and was reasonable for defendants to rely on the joint filings. Defendants also relied on portions of the marital settlement agreement to support their request for summary judgment.

¶ 55 On August 19, 2019, plaintiff filed a response to defendants' motion for summary judgment. In her first argument, plaintiff opposed the

motion based on her failure to name an expert witness. Plaintiff alleged that the trial court should deny defendants' motion on this basis where the motion was premature. Alternatively, plaintiff argued that the court should grant her leave to disclose an expert's opinions prior to the court ruling on defendants' motion.

¶ 56 In the three arguments that followed, plaintiff maintained that the evidence produced in the course of discovery established a breach of the standard of care, proximate cause, and resulting damages. Plaintiff relied on "Exhibit A," an affidavit authored by her, to support her claim that a genuine issue of material fact existed as to whether or not she told Bush not to conduct discovery. In pertinent part, the affidavit alleged:

> "4. I never told [Bush] that I did not want her to conduct discovery in my divorce.
>
> 5. [Bush] did not encourage nor advise me that discovery was necessary.

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> 6. When reviewing my former husband's financial documents with [Bush] I told her the numbers were wrong and that he makes more money than he claimed.
>
> 7. [Bush] never explained to me what nonreviewable maintenance was, prior to signing the Marital Settlement Agreement.
>
> * * *
>
> 11.I did not become aware that I was on the Highland Park home and Long Grove home mortgages until after the divorce.
>
> 12. Sally Lichter told me that my maintenance award should have been for thirteen years, not for four years.
>
> 13. Sally Lichter told me that my maintenance award should not have been nonreviewable."

¶ 57 Plaintiff also relied on her affidavit to support her claim that she had sufficiently shown that, but for the actions and inactions of Bush that plaintiff would have gotten a better result.

¶ 58 The conclusion of plaintiff's response to defendants' motion for summary judgment averred:

> "Due to the factual questions that exist as to all of the issues raised by [Bush]; *i.e.,* breach, proximate cause, and damages, summary judgment at this point must be denied and reserved for a trier of fact. Factual disputes further demonstrate that summary judgment would be improper. More importantly, all of the evidence has not yet been presented before this Court, the parties have yet to begin expert testimony on the factual issues. Thus, this Honorable Court must deny the Motion

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> for Summary Judgment and set expert disclosure dates or in the alternative, allow for [plaintiff] to obtain an expert affidavit prior to ruling on the motion for Summary Judgment.
>
> WHEREFORE, your Plaintiff, TONI A. ROSA, prays this Honorable Court denies Defendants' ANNA M. BUSH AND BUSH & HEISE'S Motion for Summary Judgment, or in the alternative, your Plaintiff TONI A. ROSA prays for a reasonable time to obtain an expert affidavit prior to the Court's ruling on this Motion, and for any other relief deemed equitable and just."

¶ 59 On September 16, 2019, defendants filed a "Motion to Strike Plaintiff's Affidavit and Extension of Time to File Reply in Support of Summary Judgment." Defendants maintained that plaintiff's affidavit was noncompliant with Illinois Supreme Court Rule 191 (Ill. S.Ct. R. 191 (eff. Jan. 4, 2013)), where it contained statements that were both conclusory and inadmissible and further directly contradicted evidence and testimony adduced in this matter. Defendants maintained that plaintiff's assertion that she was not encouraged to conduct discovery nor advised on such matter were "self-serving statements made to attempt to contradict a detailed, unequivocal and conclusive record." Defendants further maintained that plaintiff's reference to what Lichter told her was hearsay and inadmissible.

¶ 60 On November 27, 2019, the court held a hearing on defendants' motion for summary judgment and motion to strike plaintiff's affidavit. After making extensive findings, the trial court granted both defense motions.

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¶ 61 On December 23, 2019, plaintiff filed a motion to reconsider the trial court's granting of defendants' motion for summary judgment and motion to strike plaintiff's affidavit. Plaintiff requested that the trial court

grant her leave to amend her stricken affidavit to create a genuine material fact issue. The proposed amended affidavit now alleged:

> "4. I never told [Bush] that I did not want her to conduct discovery in my divorce. I did not at any time receive the letter dated January 14, 2015. The only materials I ever received from [Bush] in the U.S. mail were bills. All written communication was through email.
>
> 5. [Bush] did not encourage nor advise me that discovery was necessary. In fact, [Bush], prior to January 14, 2015, advised me that discovery would cost so much that it was not worth it. I do not recall the exact date of our conversation, but it was in-person and not on the telephone. It would not be part of the December phone conferences.
>
> 6. When reviewing my former husband's financial documents with [Bush] I told her that he makes more money than he claimed. I do not recall the date of this conversation, but this conversation was verbal.
>
> 7. [Bush] never explained to me, verbally or in writing, what nonreviewable maintenance meant nor did she inform me of any statute as to nonreviewable maintenance. Instead [Bush] told me, verbally, that the maintenance award that I received is a good deal and that I should accept it because trial will be costly, and I

> may get less at trial. I do not recall the date of this conversation, but it was prior to the prove up on April 29, 2015.
>
> 8. If [Bush] would have explained to me what the statute as to maintenance stated as to the statutory basis and the amount for maintenance based on the length of my marriage, I would not have agreed to signing the Marital Settlement Agreement, which only gave me maintenance for only four years.
>
> 9. I entered into the Marital Settlement Agreement based on the advice [Bush] gave me prior to April 29, 2015, that this was the best outcome I was going to receive.
>
> 10. For the first time, I became aware that I was on home mortgages for the Highland Park home and the Long Grove

> after the divorce, sometimes after April 29, 2015, when I was reviewing my credit score and noticed the mortgages listed."

¶ 62 On February 11, 2020, defendants filed a response to plaintiff's motion to reconsider.

¶ 63 On September 16, 2020, the trial court denied plaintiff's motion to reconsider.

¶ 64 On October 15, 2020, plaintiff filed a notice of appeal.

¶ 65 II. ANALYSIS

¶ 66 On appeal, plaintiff alleges that the trial court erroneously granted defendants' motion for summary judgment. Plaintiff maintains that the trial court should have (1) denied the motion based on the evidence before it, (2) denied the motion based on her claim that it was prematurely brought, or (3) deferred ruling on the motion. Additionally, plaintiff avers that the trial court erroneously granted defendants' motion to strike her affidavit, specifically, paragraphs 4 and 5.

¶ 67 Defendants maintain that the trial court's entry of judgment in their favor on both motions was proper. For the reasons that follow, we agree with defendants.

¶ 68 A. The Trial Court Properly Granted Defendants' Motion for Summary Judgment Where the Evidence Established That There Was No Genuine Issue of Material Fact

¶ 69 1. Standard of Review

¶ 70 Summary judgment is appropriate where the pleadings, depositions, and admissions on file, together with any affidavits and exhibits, when viewed in the light most favorable to the nonmoving party, indicate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Suburban Real Est. Servs., Inc. v. Carlson,* 2022 IL 126935, ¶ 15; *Universal Underwriters Insurance Company v. Judge & James, Ltd.,* 372 Ill.App.3d 372, 377-78 (2007).

¶ 71 "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Gilbert v. Sycamore Municipal Hospital,* 156 Ill.2d 511, 518 (1993). We

review cases involving summary judgment *de novo*. *Suburban Real Estate Services,* 2022 IL 1269365, ¶ 15; *Universal Underwriters,* 372 Ill.App.3d at 377-78. We may affirm the trial court's ruling on any basis appearing in the record. *Jinkins v. Evangelical Hospitals Corp.,* 336 Ill.App.3d 377, 384-85 (2002).

¶ 72 2. Claims of Legal Malpractice

¶ 73 A complaint of legal malpractice requires that plaintiff prove the existence of an attorney-client relationship establishing a duty on the part of the attorney, a negligent act or omission

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constituting a breach of that duty, a proximate causal relationship between the breach and the damages sustained, and actual damages. *Governmental Interinsurance Exchange v. Judge,* 221 Ill.2d 195, 199 (2006); *Universal Underwriters,* 372 Ill.App.3d at 377.

¶ 74 "An attorney must exercise a reasonable degree of care and skill in the representation of his clients." *Los Amigos Supermarket, Inc. v. Metropolitan Bank and Trust Co.,* 306 Ill.App.3d 115, 130 (1999). The plaintiff bears the burden of pleading and proving that "but for" the attorney's negligence, the plaintiff would have succeeded in the underlying suit. *Universal Underwriters,* 372 Ill.App.3d at 377. Therefore, a legal malpractice plaintiff must litigate a "case within a case." *Tri-G, Inc. v. Burke, Bosselman Weaver,* 222 Ill.2d 218, 226-27 (2006). This is because malpractice cannot exist in the absence of the loss of an underlying suit. *Fabricare Equipment Credit Corp v. Bell, Boyd & Lloyd,* 328 Ill.App.3d 784, 788 (2002).

¶ 75 "Even if negligence on the part of the attorney is established, no action will lie against the attorney unless that negligence proximately caused damage to the client." *Northern Illinois Emergency Physicians v. Landau, Omahana, & Kopka, Ltd.,* 216 Ill.2d 294, 306-07 (2005). The "injury" in a legal malpractice claim is the pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission. *Northern Illinois Emergency Physicians,* 216 Ill.2d at 306.

¶ 76 Where a plaintiff contends that her attorney negligently represented her in a divorce action, she must prove that, but for the defendant's negligence, she would have received a larger share of the marital estate. *Weisman v. Schiller, Ducanto and Fleck, Ltd,* 368 Ill.App.3d 41, 52 (2006). Actual damages are never presumed. *Northern Illinois Emergency Physicians,* 216 Ill.2d at 306-07.

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Damages are established by showing that the plaintiff suffered a monetary loss as a result of the attorney's negligence and may not be proved by speculation or conjecture. *Id.*

¶ 77 Where the pleadings, depositions, and admissions on file, along with the affidavits, show that there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014). Summary judgment should only be allowed where the right of the moving party is clear and free from doubt. *Bagent v. Blessing Care Corp.,* 224 Ill.2d 154, 163 (2007).

¶ 78 In a motion for summary judgment, the movant bears the initial burden of production. *Universal Underwriters,* 372 Ill.App.3d at 378. The burden is satisfied where the movant presents evidence that left unrebutted would entitle it to judgment as a matter of law or by the movant demonstrating that the plaintiff is unable to prove an element of his cause of action. *Id.* If a plaintiff fails to establish any element of their cause of action, summary judgment in favor of the defendant is proper. *Judge,* 221 Ill.2d 195, 214-15 (2006).

¶ 79 With these principles in place, we now turn to the trial court's ruling in this matter.

¶ 80 3. The Trial Court's Ruling

¶ 81 In granting the defendants' motion for summary judgment, the trial court made the following findings:

> "As to defendants' motion for summary judgment, in the case of *Adams v. Northern Illinois Gas,* 211 Ill.2d 32, it says in pertinent part, the purpose of summary judgment is not to try a question of fact, but rather, to determine whether a genuine issue of material fact exists. Summary judgment is appropriate

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> only where the pleadings, depositions, and admissions on file, together with the affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> In determining whether a genuine issue as to any material fact exists, the court must construe the pleadings, depositions,

admissions, and affidavits strictly against the movant and liberally in favor of the opponent.

A triable issue precluding summary judgment exists where the material facts are disputed or where the material facts being undisputed, reasonable persons might draw different inferences from the undisputed facts.

The use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit; however, it is a drastic means of disposing of litigation, and therefore, should be allowed only when the right of the moving party is clear and free from doubt.

In the case of *First National Bank of LaGrange v. Lowrey,* 375 Ill.App.3d 181, it says in pertinent part, to prevail in an action for legal malpractice, plaintiff must prove the following elements.

1, the existence of an attorney-client relationship that 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 attorney's negligence, the plaintiff would have prevailed in the underlying action. 4, damages. An attorney must exercise a reasonable degree of care and skill in the representation of his clients.

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The plaintiff must generally present expert testimony to establish the standard of care against which the attorney's conduct must be measured. Failure to present such testimony is generally fatal to a legal malpractice action unless the attorney's negligence is so apparent that a lay person would have no difficulty seeing it.

Proximate causation in a legal malpractice case is generally a factual issue to be decided by the trier of fact. Our Supreme Court has explained that the basis for this principle is that issues that could cause reasonable persons to reach different results should never be determined as questions of law. The debatable qualities of issues such as proximate cause, the fact that fair-minded persons might reach different conclusions, emphasize the appropriateness of leaving such issues to a fact-finding body.

The case of *Barth v. Reagan,* 139 Ill.2d 399, it says in pertinent part, attorneys are liable to their clients for damages in malpractice actions only when they fail to exercise a reasonable degree of care and skill. The law distinguishes between errors of negligence and those of mistaken judgment.

Generally, the rules of evidence which govern medical malpractice litigation are applicable to legal malpractice suits, except where it is necessary to accommodate differences in the nature of the two professions. Because the concept of *res ipsa loquitur is* not applicable in legal malpractice cases, the standard of care against which the attorney defendants' conduct will be measured must generally be established through expert testimony.

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Failure to present expert testimony is usually fatal to a plaintiff's legal malpractice action; however, Illinois courts have recognized that where the common knowledge or experience of lay persons is extensive enough to recognize or infer negligence from the facts or where an attorney's negligence is so grossly apparent that a lay person would have no difficulty in appraising it, expert testimony as to the standard of care is not required.

In the case of *Leon v. Max E. Miller & Son, Inc.,* 23 Ill.App.3d 694, it says in pertinent part, one is under a duty to learn or know the contents of a written contract before he signs it and is under a duty to determine the obligations which he undertakes by the execution of a written agreement. And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations.

Apart from the above rules, to avoid a contract for false representations, the character of the representation and the circumstances under which it was uttered must have been such as to give the injured person a right to rely thereon.

The gist of plaintiff's amended complaint is that Defendant Bush conducted little or no meaningful discovery, including the valuation of the plaintiff's then husband's company and what

his true income was, received very minimal tax return information, did little or nothing to ascertain the true nature of the marital

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home being marital or nonmarital, and did little or nothing to discover the true income and assets of the parties.

In an email from the plaintiff to the defendant on November 26, 2014, plaintiff asked defendant what can we do to get this process going, what can we do to make this go quicker.

In an email from the defendant to plaintiff on November 29th, 2014, defendant asked the plaintiff if she was trying to settle this quickly or are we doing the complete investigation that we discussed.

On January 13th, 2015, plaintiff sent a text to Defendant Bush indicating the possibility of looking under rocks and scheduled a phone conference with defendant for January 14th, 2015. Defendant Bush's January 14th, 2015 letter to plaintiff memorializes the phone conversation with plaintiff, in which defendant encouraged and plaintiff declined to proceed with formal discovery.

And that email reads as follows.

'Dear Toni, I want to memorialize our conversation of today, mostly so that you can have this information in black and white letter format rather than just an email or phone conversation.

We talked today about the possibility of looking under the rocks, which means, as we discussed, full discovery. That means that we would issue written interrogatories, a request for the production of documents, income and expense affidavits, (which are actually required by statute but which we have not -- which

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have not been exchanged). And based on the responses, future depositions or subpoenas issued to third parties.

To do this and receive any response would likely take 30 to 90 or more days. In all likelihood, in your -- if you issued discovery,

they will also do so. This will extend the case for several more months. You can begin the process and later cancel it, if you wish. It can also be very costly to do formal discovery and could cost more than $2, 000, if both sides do so.

I always encourage clients to do formal discovery if they have any doubt at all about the honesty of the other party or feel that they are not informed about the finances of either or both parties.

Based on my statements to you about the length of time and cost, you have chosen not to do formal discovery or even complete the income and expense affidavit and you believe that you are comfortable enough with the finances to finish the case. If this is not your understanding of our conversation, please let me know immediately. Very truly yours, Anna Markley Bush.'

Plaintiff acknowledged that she received this letter in her deposition on Page 134. Furthermore, the marriage settlement agreement contains the following language in pertinent part.

[Paragraph] 1.05. In pertinent language, [']Timothy and Toni believe that it is in their best interest to settle between themselves all rights and claims against each other. To this end, the parties have made complete disclosure of all assets. [']

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Paragraph 1.06. [']Timothy has had the benefit of counsel of Patti S. Levinson of Patti S. Levinson, P.C. and Toni has had the benefit of counsel of Anna Markley Bush of Bush & Heise. Each party acknowledges that each is sufficiently conversant with regard to all of the wealth, poverty, and income of the other and any of their respective rights to -- thereto to enter into this agreement.

The parties acknowledge that each has been informed to their respective satisfaction as to the wealth, property, estate, and income of the other and that each has been fully informed of his or her respective rights or obligations in the premises.

The parties have been advised that they may attempt to compel discovery and inspection of the personal and business financial books and records of the other party with accountants, appraisers, attorneys, and others investigating, appraising, and

> evaluating any and all of the persona and business assets -- personal and business assets, liabilities, and income of the other.
>
> Each party has specifically waived the exercise of these rights to the extent not pursued and has elected to take no further steps in connection with such discovery, investigation, appraisal, or evaluation. Each party expressly states that no representation has been made to him or her by the other party or his attorney other than that which is contained in this agreement. [']
>
> Paragraph 1.07. [']Timothy and Toni expressly state that they have voluntarily entered into this agreement free from any duress and coercion and with full

> knowledge and understanding of each and every provision contained in this agreement.
>
> After carefully considering the terms and provisions of this agreement, each of the parties states that he or she believes that the agreement is fair and reasonable under the circumstances and is not unconscionable. [']
>
> Plaintiff initialed each page of the settlement agreement and signed the last page. Based on the various emails and depositions, in my opinion, no genuine issue as to any material fact exists, and as such, defendants' motion for summary judgment is granted. Thanks."

¶ 82 4. Application of *De Novo* Review

¶ 83 We have set forth the trial court's findings verbatim because they provide ample support for our determination that the trial court properly granted defendants' motion for summary judgment. The trial court correctly determined that plaintiff failed to establish a breach of the standard of care based on her deposition testimony and emails.

¶ 84 Plaintiff's allegations all stemmed from her belief that Bush failed to undertake the necessary discovery to value Wujcik's income and assets properly. According to plaintiff, such failure resulted in a marital settlement agreement that deprived plaintiff of what she should have received in terms of her monthly maintenance, the duration of that maintenance, proceeds from Wujcik's business, and a correctly calculated amount of proceeds from a retirement fund.

¶ 85 Plaintiff's allegations were insufficient to withstand summary judgment based on the evidence presented. The evidence established no breach in the duty of care where Bush's failure

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to conduct additional discovery resulted from plaintiff's knowingly made decision not to have her do so. We have reviewed the record in its entirety and agree with the trial court's conclusion that plaintiff failed to establish a genuine issue of material fact.

¶ 86 Defendant misplaces reliance on *Wolfe v. Wolf,* 375 Ill.App.3d 702, 704-05 (2007). *Wolfe* involved the dismissal of a complaint under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619) (West 2000)), not an order of summary judgment. Additionally, the case is distinguishable where the trial court's ruling in *Wolfe* was based on the doctrine of judicial estoppel. *Id.* at 704-05.

¶ 87 In this case, while the trial court referenced the terms of the marital settlement agreement in its findings, it did so to underscore that such terms were consistent with plaintiff's deposition testimony and emails, which indicated her waiver of the right to conduct additional discovery. The trial court did not grant summary judgment based on the doctrine of judicial estoppel, and we find no error in the trial court's reference to the contents of the marital settlement agreement.

¶ 88 We next address plaintiff's affidavit wherein she denies that she told Bush to not conduct additional discovery. For reasons that will later be discussed in greater detail, we find that the trial court properly granted defendants' motion to strike the affidavit. Even if we were to consider plaintiff's assertion in her affidavit that she never told Bush that she did not want Bush to conduct discovery, that assertion stands in clear contradiction to Bush's own deposition testimony and email communications. Even if considered, it did not create a genuine issue of material fact. *Pedersen v. Joliet Park Dist,* 136 Ill.App.3d 172, 175-76 (1985) (Plaintiff cannot create a genuine issue of material fact by contradicting a statement made in his deposition with a later affidavit.)

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¶ 89 The evidence did not establish the existence of a genuine issue of material fact where it showed that plaintiff knew that additional discovery could be conducted, knew that it was customarily conducted, knew what such discovery could consist of, and instructed Bush not to do so. Bush, in

turn, followed her client's instructions, as she was obliged to do. Ill. R. Prof'l Conduct R. 1.2(a) (eff. Jan 1, 2016).

¶ 90 In pertinent part, Rule 1.2 provides:

> "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. ***"

¶ 91 The first comment to Rule 1.2 further provides:

> "[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a) (1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and

> may take such action as is impliedly authorized to carry out the representation." Ill. R. Prof 'l Conduct (201) R. 1.2, Committee Comments (eff. Jan. 1, 2010).

¶ 92 In turn, Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Ill. R. Prof l Conduct R. 1.4(a)(2) (eff. Jan. 1, 2010).

¶ 93 We conclude that plaintiffs deposition testimony and emails showed that plaintiff relieved Bush of any obligation to conduct further discovery in this matter. Bush's conduct also comported with the aforementioned Rules of Professional Conduct.

¶ 94 We agree with defendants that plaintiff's claim boils down to a complaint that Bush failed to properly "encourage" her to undertake additional discovery:

> "I was wanting to be done with it, but I also felt like - I truly feel [Bush] given me the encouragement to go further because we

> could get more, I would have; but when I didn't get that encouragement, yes, I was ready to settle."

¶ 95 Coercion has been defined as "the imposition, oppression, undue influence, or the taking of undue advantage of the stress of another, whereby that person is deprived of the exercise of her free will." *In re Marriage of Gorman,* 284 Ill.App.3d 171, 180 (1996) (citing *Flynn v. Flynn,* 232 Ill.App.3d 394, 401 (1992)). Plaintiff allegations of "coercion" or undue "pressure" are neither borne out by the evidence nor supported by relevant case law.

¶ 96 In conclusion, having reviewed the pleadings, depositions, and admissions on file, together with any affidavits and exhibits presented, when viewed in the light most favorable to the plaintiff, we find that summary judgment was proper in the absence of any genuine issue of material fact.

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¶ 97 B. The Trial Court Did Not Rule Prematurely on Defendants' Motion for Summary Judgment

¶ 98 Plaintiff also contends that the trial court's order granting summary judgment was premature since she had not yet named an expert witness. Plaintiff maintains that the trial court should have denied defendants' motion for summary judgment or deferred ruling on it until controlled expert discovery was completed pursuant to Rule 213(f)(3). Ill. S.Ct. R. 213 (eff. Jan. 1, 2018).

¶ 99 Having previously found summary judgment proper, based on grounds wholly unrelated to the failure to obtain an expert, we fail to see, as a threshold matter, how an expert could alter that conclusion. Put differently, it is difficult to conceive how any expert could cure the deficiency that resulted from the evidence, which showed that plaintiff waived her right to conduct additional discovery.

¶ 100 Nevertheless, to ensure full consideration of plaintiff's claims on appeal, we consider her charge that the trial court's ruling was premature. For the reasons that follow, we find that it was not.

¶ 1011. Standard of Review

¶ 102 A trial court has extremely broad discretionary powers regarding pretrial discovery. *Hayward v. C.H. Robinson Co.,* 2014 IL App (3d) 130530, ¶ 45. As such, our review of such rulings is highly deferential. *People v. Taylor,* 2011 IL App (1st) 093085, ¶ 23. A trial court's pretrial discovery rulings will not be interfered with on appeal absent a manifest

abuse of discretion. *Hayward,* 2014 IL App (3d) 130530, ¶ 45. A court abuses its discretion when its

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discovery ruling is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Taylor,* 2011 IL App (1st) 093085, ¶ 23.

¶ 103 2. The Pleadings

¶ 104 We begin with a discussion of the factual development of this claim in the trial court. Defendant issued interrogatories requesting disclosure of experts pursuant to Rule 213(f)(3). Specifically, defendant sought the following information:

> "8. State the names and addresses and identities of all lawyers and attorneys or experts in any field who have been contacted for expert opinion (excluding purely consulting experts) by you or your attorney, or anyone acting on your behalf, regarding any facts alleged in the complaint. As to each person, state the following:
>
> (a) Name, business and residence address, and telephone number;
>
> (b) Area of expertise;
>
> (c) Whether his opinion relates to the liability aspect or to the damages aspect of your claim or both;
>
> (d) Identify, with particularity, any and all statements, reports, letters, tape recordings, photographs, memoranda, or documentation of any type furnished by said expert or experts."

¶ 105 Plaintiff responded to this request in the following manner:

> "See 213F disclosures. Experts will be disclosed in the time frame set forth by the Court, when they do so.

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> Investigation continues, Plaintiff reserves the right to supplement this answer."

¶ 106 Defendants also sought disclosure of any "controlled expert witnesses" who would testify on plaintiff's behalf. In response to this

request, plaintiff replied, "Rule 213(f)(3) witnesses will be disclosed in the time frame set by the court in any 218 Case Management Order."

¶ 107 As has been previously discussed, defendants' motion for summary judgment rested on multiple grounds. One such ground was plaintiff's failure to disclose the name of any expert witness to support plaintiff's malpractice claims. Another was that the affirmative evidence adduced in the discovery process affirmatively disproved three elements of a claim of attorney malpractice: no breach of the standard of care, no proximate cause, and no resulting injury to plaintiff.

¶ 108 Plaintiff responded to defendants' motion on two bases. First, plaintiff defended against defendants' charge that she failed to name an expert, maintaining that such disclosure was not required until the trial court ordered discovery pursuant to Rule 213(f) (3) and that the trial court should defer ruling on defendants' motion until she was given an opportunity to do so. This alternative request was not accompanied by a Rule 191(b) affidavit.

¶ 109 Second, plaintiff disputed defendants' claim that the evidence to date supported the granting of summary judgment, maintaining that it established the existence of highly disputed questions of fact.

¶ 110 We now turn our attention to the question of whether the trial court abused its discretion by ruling prematurely on defendants' motion for summary judgment.

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¶ 111 3. The Trial Court Did Not Abuse Its Discretion

¶ 112 At the hearing on defendants' motion for summary judgment, plaintiff abandoned her written request that the trial court permit her to produce an expert witness before ruling on the motion. She neither sought a continuance nor urged the trial court to defer ruling on defendants' motion. Rather, the parties engaged in a disputed hearing devoted to whether the evidence developed until that point supported a grant of summary judgment. And as has been extensively discussed, the trial court granted defendants' motion for summary judgment based solely on its determination that the evidence affirmatively established no genuine issue of material fact, not based on plaintiff's failure to disclose an expert opinion.

¶ 113 Defendants maintain that plaintiff s claim fails where she did not comply with Rule 191 (b). Illinois Supreme Court Rule 191(b) provides:

> " (b) When Material Facts Are Not Obtainable by Affidavit. If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing documents in the possession of those persons or furnishing sworn copies thereof.

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> The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of documents so furnished, shall be considered with the affidavits in passing upon the motion."

¶ 114 A party that fails to attach a Rule 191 (b) affidavit to its pleading to assert his need for additional discovery in order to oppose a motion for summary judgment may not later seek reversal of the trial court's order on the basis that it was denied important discovery. *Cordeck Sales, Inc. v. Construction Systems Inc.,* 382 Ill.App.3d 334, 345 (2008). The failure to comply with Rule 191(b) will defeat a claim of error based on a trial court's disallowance of additional time to conduct discovery. *Kane v. Motorola, Inc.,* 335 Ill.App.3d 214, 225 (2002). A plaintiff may not complain on appeal that a circuit court improperly denied discovery when it failed to explain the need for discovery in Rule 191(b) affidavit. *MEP Construction, LLC v. Truco MP, LLC,* 2019 IL App (1st) 180539, ¶ 20.

¶ 115 Plaintiff maintains, however, that her failure to file a Rule 191(b) affidavit does not preclude judgment in her favor. She relies on *Besco v. Henslee, Monek & Kenslee,* 297 Ill.App.3d 778 (1998), and *Williams v. Covenant Medical Center,* 316 Ill.App.3d 682 (2000), to support her claim.

¶ 116 *Besco* is inapposite. In *Besco,* the appellate court found that the trial court imposed an unduly harsh discovery sanction of barring plaintiffs from naming an expert witness based on their failure to meet a deadline or appear at a scheduled case management conference. *Besco,* 297 Ill.App.3d at 784-85.

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¶ 117 Before we explain why *Williams* fails to support the plaintiff's claim, we believe it is helpful to begin with a discussion of a case that followed it; the court's decision in *Jiotis v. Burr Ridge Park District,* 2014 IL App (2d) 121293. In *Jiotis,* the appellate court considered defendants' claim that the trial court abused its discretion by not ruling on his motion for summary judgment, continuing the motion until additional discovery had been conducted, despite plaintiff's failure to file a Rule 191(b) affidavit. *Id.* ¶ 12.

¶ 118 The court noted that there are two separate bases for seeking a summary judgment: (1) the "traditional" method, where the movant affirmatively disproves an element of the nonmovant's case, or (2) a" *Celotex-type"* [2] motion, where the movant establishes that the nonmovant's evidence is insufficient to avoid judgment as a matter of law. *Id.* ¶ 25. The characterization of a motion as traditional or as *Celotex-type* is significant because strict compliance with Rule 191(b)' s affidavit requirement is only applicable to traditional motions. *Id.* ¶ 26. On the other hand, compliance with the requirement is not automatically necessary when a defendant files a *Celotex-type* motion. *Id.* ¶ 26. *Celotex-type* motions require that the nonmovant have an adequate opportunity to conduct discovery before summary judgment is granted. *Id.* (citing *Williams v. Covenant Medical Center,* 316 Ill.App.3d 682, 692 (2000)).

¶ 119 Having noted the two distinct forms of summary judgment, we now turn to a discussion of *Williams, a* medical malpractice case involving a *Celotex* motion. In *Williams, a* medical malpractice case, the defendants filed a motion for summary judgment based on the injured

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individual's inability to remember how she came to be injured. *Williams,* 316 Ill.App.3d at 685. The plaintiffs filed a response and attached depositions from multiple witnesses, including two registered nurses and the plaintiff's treating physician. *Id.* at 685-86. The defendants filed a *Celotex-type* reply in which they now asserted that the plaintiffs had no expert testimony to establish the standard of care and a breach of that standard. *Id.* at 687. The plaintiffs moved to strike the motion as untimely because it attempted to circumvent expert discovery. *Id.*

¶ 120 When the trial court denied the plaintiffs' motion to strike that portion of the defendants' motion that sought summary judgment based on *Celotex* grounds, the plaintiffs orally moved for a continuance to obtain the affidavit of an expert to respond to the summary judgment motion. *Id.* The trial court denied the plaintiffs' motion for a continuance and granted summary judgment. *Id.*

¶ 121 On review, the appellate court found that the defendants' motion was insufficient to place the burden on the plaintiffs to come forward with expert opinions where the motion contained no affidavits and only a bare assertion that the plaintiffs failed to establish proximate cause in the absence of expert testimony. *Id.* at 690. Additionally, the court found that the trial court prematurely granted the motion for summary judgment, where the plaintiffs should have been given adequate time to gather evidence-based on the defendants' *Celotex-type* motion *Id.* at 690-91. The trial court erred by denying the plaintiffs' oral motion for a continuance, and the plaintiffs' failure to file a Rule 191(b) affidavit was inconsequential where they sought to continue the hearing on the defendants' premature motion for summary judgment. *Id.* at 690-92.

¶ 122 In this case, unlike *Williams,* we are presented with a hybrid situation where defendants' motion invoked both forms of summary judgment. Plaintiff was placed on full notice that

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defendants had alleged a traditional basis for granting summary judgment. Defendants did not bring a premature motion. Nevertheless, we find it unnecessary to decide whether Rule 191(b) strictly applies under these circumstances where we find that plaintiff's actions as a whole were insufficient to require the trial court to *sua sponte* defer the entry of judgment on defendants' motion for summary judgment.

¶ 123 Our conclusion is supported by the marked distinction between this case and *Williams*. In this case, plaintiff effectively abandoned the alternative request contained in her response to defendants' motion for summary judgment by only addressing the traditional basis alleged by defendant as a basis for granting summary judgment in this matter. In light of plaintiff's silence at the hearing, we cannot find that the trial court abused discretion that it was never asked to exercise.

¶ 124 Our conclusion finds support in *Hayward v. C.H. Robinson Co.,* 2014 IL App (3d) 130530. In *Hayward,* the plaintiff died from severe injuries she sustained when her vehicle collided with a tractor-trailer driven by an employee of an independent contractor for the defendant. *Id.* ¶ 1. In the negligence suit that followed, the defendants filed a motion for summary judgment which the plaintiffs opposed. *Id.* ¶ 6.

¶ 125 Prior to a hearing held on the defendants' motion for summary judgment, the plaintiffs filed a motion to compel disclosure of records in the defendants' possession regarding their knowledge of the previous poor safety record of another tractor-trailer company owned by the independent

contractor. *Id.* ¶¶ 7, 11. The plaintiffs alleged that they had not previously requested such discovery because they believed they had a sufficient basis for the court to deny the motion for summary judgment. *Id.* ¶ 8.

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¶ 126 The trial court set both motions for a combined hearing on the same day. *Id.* The trial court granted the defendants' motion for summary judgment and denied the plaintiffs' motion to compel disclosure in a single written order. *Id.* ¶¶ 22-23.

¶ 127 The appellate court found that the trial court's entry of summary judgment was proper and that it need not address the merits of plaintiffs' motion to compel where:

> "Here, plaintiffs advised the court they were willing to proceed with the motion for summary judgment without the additional discovery. Therefore, we observe the time to establish the plaintiffs' case of negligent hiring against Robinson was at that summary judgment motion hearing. [citation].
>
> Since plaintiffs agreed the court should consider both motions at the same time, without requesting a continuance and further discovery pursuant to Rule 191(b) (Ill. S.Ct. R. 191(b) (eff. July 1, 2002)), once the trial court granted the motion for summary judgment in favor of Robinson, the court did not abuse its discretion in denying plaintiffs motion to compel further discovery at that stage of the proceedings." *Id.* ¶¶ 47-48.

¶ 128 As in *Hayward,* we decline to find that the trial court's actions were in error. Plaintiff cannot establish that the trial court abused its discretion by ruling on defendants' motion for summary judgment on the date that the motion was heard where he acquiesced to having it decided on the basis of the traditional grounds alleged by defendants.

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¶ 129 C. The Trial Court Properly Exercised its Discretion in Striking Paragraphs Four and Five of Plaintiff's Affidavit

¶ 130 In her final claim of error, plaintiff alleges that the trial court erred in striking paragraphs four and five of her affidavit, which accompanied her response to defendants' motion for summary judgment. For the reasons that follow, we disagree.

¶ 1311. Standard of Review

¶ 132 A court's determination whether an affidavit offered in connection with a motion for summary judgment complies with Illinois Supreme Court Rule 191 is a question of law subject to *de novo* review. *Roe v. Jewish Children's Bureau of Chicago,* 339 Ill.App.3d 119, 128 (2003). In determining whether an affidavit following a deposition is properly stricken, we consider the entirety of the deposition testimony. *Chmielewski v. Kahlfeldt,* 237 Ill.App.3d 129, 134 (1992).

¶ 133 2. Supreme Court Rule 191(a)

¶ 134 In pertinent part, Supreme Court Rule 191(a) provides:

> "Affidavits in support of and opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible into evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

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¶ 135 3. Trial Court's Findings

¶ 136 In ruling on defendants' motion to strike plaintiff's affidavit, the court made the following findings:

> "All right. Thanks. All right. As to the defendants' motion to strike the affidavit, in the case *of. Madden v. F.H. Paschen, S.N. Nielson, Inc.,* 395 Ill.App.3d 362, it says in pertinent part, an affidavit satisfies the requirements of 191(a) if -- Rule 191(a) if from the document as a whole, it appears that the affidavit is based on the personal knowledge of the affiant and there is reasonable inference that the affiant could competently testify as to its contents.
>
> Conversely, an affidavit will be stricken under Rule 191(a) to the extent that it contains unsupported assertions and self-serving or conclusory statements.
>
> In *Roe v. Jewish Children's Bureau of Chicago,* 339 Ill.App.3d 119, it says in pertinent part, when only portions of an affidavit are improper under Supreme Court Rule 191(a), the Trial Court should only strike those portions.

> In the case of *Beauvoir v. Rush,* 137 Ill.App.3d 294, it says in pertinent part, hearsay statements will not be considered except for the purpose of impeachment.
>
> In the case of *Morris v. Margulis,* 197 Ill.2d 28, it says in pertinent part, a party's later submission of an affidavit inconsistent with that party's deposition testimony will not raise a disputed issue of fact or prevent the entry of summary judgment.

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> Paragraphs 4 and 5 of [plaintiff's] affidavit contradict her deposition testimony and will not be considered. Paragraphs 12 and 13 are hearsay and will not be considered. Paragraph 9 is speculative and self-serving. The remaining paragraphs of the affidavit are in direct contradiction with Sections 1.05, 1.06, and 1.07 of the marital settlement agreement which plaintiff initialed and signed. For those reasons, defendants' motion to strike the affidavit is granted."

¶ 137 4. *De Novo* Review of Plaintiff's Claim

¶ 138 In *Chmielewski,* as in this case, after he was deposed, plaintiff attached an affidavit to his response to the defendant's motion for summary judgment that contradicted his deposition testimony. *Chmielewski,* 237 Ill.App.3d at 132. Plaintiff maintained that the affidavit should be considered where the defendant's attorney did not take an exhaustive deposition of him and where later-named parties sought to use the deposition to their advantage. *Id.* at 135-36. Plaintiff argued that striking an affidavit on such a basis was improper where it essentially means that a plaintiff could not amend a complaint to add a new theory of liability after a deposition is taken. *Id.* at 136.

¶ 139 The court rejected plaintiff's claim. *Id.* As is relevant to this case, the court held:

> "A party may not create a genuine issue of material fact by taking contradictory positions, nor may he remove a factual question from consideration just to raise it anew when convenient." [Citations.]" Admissions at pretrial depositions which are so deliberate, detailed, and unequivocal, as to matters within the party's personal knowledge, will conclusively bind the party-deponent, and he will not be heard to contradict the admissions at trial." [Citation.]" The

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> judicial policy behind this rule, which is well accepted in summary judgment cases, is that once a party has given sworn testimony he should not be allowed to change his testimony to avoid the consequences of his prior testimony." "[Citation.]" *Id.* at 132-33.

¶ 140 In *Morris v. Margulis,* 197 Ill.2d 28, 36 (2001), plaintiff relied on his affidavit to defeat the defendant's motion for summary judgment where the motion alleged that plaintiff's complaint was untimely. The court found plaintiff's reliance to be misplaced:

> "This affidavit, however, contradicts his deposition testimony, and we have held previously that a party's later submission of an affidavit inconsistent with that party's deposition testimony will not raise a disputed issue of fact or prevent the entry of summary judgment." *Id.* at 37 (citing *Vesey v. Chicago Housing Authority,* 145 Ill.2d 404, 422 (1991)).

¶ 141 Here, plaintiff alleges that the trial court erroneously struck paragraphs four and five of her affidavit, wherein plaintiff alleged that she never told Bush that she did not want her to conduct discovery and that Bush did not encourage or advise her that discovery was necessary.

¶ 142 We agree with the trial court's determination that these allegations contradicted plaintiff's deposition testimony wherein she admitted that defendant was the one who raised the issue of conducting additional discovery, admitted receiving January 14, 2015 letter that memorialized the substance of the conversation held by plaintiff and Bush that same day, and never contested its contents after being confronted with the letter during her deposition. Additionally, the letter instructed plaintiff to immediately contact her if anything contained in the letter did not comport

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with plaintiff's account of what had transpired that day, yet plaintiff took no further actions to countermand Bush's understanding of plaintiff's wishes as expressed in the letter. Based on the foregoing, we conclude that the trial court properly struck paragraphs four and five of plaintiff's affidavit.

¶ 143 We further reject plaintiff's undeveloped claim that the trial court also erred by disallowing her to file an amended affidavit. In the proposed amended affidavit, which was offered in support of plaintiff's motion to

reconsider, plaintiff now alleged, *inter alia,* that she never received Bush's January 14, 2015 letter.

¶ 144 The trial court has discretion as to whether to consider new evidence presented for the first time after a motion for summary judgment. *Soderlund Brothers, Inc. v. Carrier Corp.,* 278 Ill.App.3d 606, 617 (1995). A party may not submit new evidence in a motion to reconsider following a ruling on a motion for summary judgment without providing a reasonable explanation as to why the evidence was late. *Delgatto v. Brandon Associates, Ltd.,* 131 Ill.2d 183, 195 (1989).

¶ 145 We reject plaintiff's unsupported apparent belief that a motion to reconsider a trial court's granting of a motion to strike an affidavit is an appropriate vehicle for curing an otherwise defective affidavit by supplanting it with a new one as was done in this case. Even if we could imagine a circumstance where such an amendment might be allowed, in this case, this newest iteration of plaintiff's complaint is flatly contradicted by her deposition testimony wherein she admitted receiving Bush's letter. In sum, we reject plaintiff's contention of error.

¶ 146 III. CONCLUSION

¶ 147 For the foregoing reasons, we affirm the judgment of the circuit court.

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¶ 148 Affirmed.

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Notes:

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

[2] A" *Celotex-type* motion" references the rule articulated in *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986).

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2022 IL App (3d) 200245-U

PEORIA-TAZEWELL PATHOLOGY GROUP, S.C., an Illinois Corporation, for Itself and as Plan Sponsor and Administrator for PEORIA-TAZEWELL PATHOLOGY GROUP, SC CASH BALANCE PENSION PLAN #010, a Cash Balance Pension Plan, and PEORIA-TAZEWELL PATHOLOGY GROUP, SC PROFIT SHARING 401(K) PLAN, a Profit Sharing 401(k) Plan, Plaintiffs-Appellants,
v.
SUTKOWSKI LAW OFFICE LTD., an Illinois Corporation f/k/a SUTKOWSKI & RHOADS LTD. and EDWARD F. SUTKOWSKI, Defendants-Appellees.

No. 3-20-0245

Court of Appeals of Illinois, Third District

March 24, 2022

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

Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Circuit No. 15-L-267 Honorable Michael P. McCuskey, Judge, Presiding.

HAUPTMAN, JUSTICE delivered the judgment of the court. Presiding Justice O'Brien and Justice Lytton concurred in the judgment.

ORDER

HAUPTMAN, JUSTICE

¶ 1 *Held:* The circuit court did not err by dismissing counts I and II of plaintiffs' fourth amended complaint, with prejudice, based on the limitations period contained in section 13-214.3(b) of the Code of Civil Procedure. As a result, we do not address the repose period contained in section 13-214.3(c) of the Code of Civil Procedure.

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¶ 2 Plaintiffs, Peoria-Tazewell Pathology Group, SC (Pathology Group), and Peoria- Tazewell Pathology Group, S.C., Cash Balance Pension Plan #010 (Pension Plan), filed a six-count fourth amended complaint against

defendants, Sutkowski Law Office, Ltd. and Edward F. Sutkowski. In counts I and II, plaintiffs alleged defendants committed legal malpractice as plan practitioners of the Pension Plan. Defendants requested a dismissal of counts I and II under section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a) (5) (West 2018)), arguing those counts were barred by the limitations and/or repose periods contained in section 13-214.3(b) and (c) of the Code. 735 ILCS 5/13-214.3(b), (c) (West 2018). After a hearing, the circuit court dismissed counts I and II with prejudice. Plaintiffs appeal.

¶ 3 I. BACKGROUND

¶ 4 Plaintiffs filed this lawsuit on December 29, 2015.[1] On July 15, 2019, plaintiffs filed a six-count fourth amended complaint. In counts I and II, plaintiffs asserted the same allegations separately against each defendant. Plaintiffs alleged, between 1980 and 2014, defendants provided legal services as plan practitioners of the Pension Plan. Defendants allegedly committed legal malpractice by failing to amend the Pension Plan to eliminate a 62% hypothetical allocation group that became effective on January 1, 2007, for the sole intended benefit of a single medical professional. That single medical professional retired on June 30, 2010, yet defendants took no action to eliminate the 62% hypothetical allocation group.[2]

¶ 5 In early-2012, the Pathology Group was recruiting a subsequent medical professional. On March 7, 2012, the subsequent medical professional emailed a representative of the Pathology

Group to inquire about the qualifications for the 62% hypothetical allocation group. That same day, the representative of the Pathology Group forwarded the subsequent medical professional's email to defendants. Between March and July 2012, when the Pathology Group hired the subsequent medical professional, defendants allegedly failed to investigate or respond to the inquiries about the 62% hypothetical allocation group. The subsequent medical professional, who qualified for the 62% hypothetical allocation group, was not afforded that benefit. As such, plaintiffs alleged the Pension Plan began to operate contrary to its terms, resulting in the loss of its tax-qualified status with the Internal Revenue Service (IRS). Plaintiffs alleged, when a retirement plan loses its tax-qualified status, "the employer loses some or all of its income tax deduction for contributions made to the plan," "the income of the retirement plan is subject to current income taxation," "all employees must report the vested value of their accrued benefit as taxable income[] and may be subject to early withdrawal penalties," and

"accumulated retirement plan benefit[s] cannot be transferred to an IRA or other tax deferred vehicle." Defendants allegedly "regularly billed" plaintiffs for services, including the review, revision, and amendment of the Pension Plan, to ensure the Pension Plan retained its tax-qualified status.

¶ 6 Plaintiffs alleged, in December 2013, representatives of the Pathology Group and defendants exchanged various communications regarding the subsequent medical professional and the 62% hypothetical allocation group. Plaintiffs alleged defendants "exchanged correspondence with *** [the Pathology Group] and the Pension Plan that *** [the subsequent medical professional] may be entitled to the 62% hypothetical allocation [group] based upon a 'miscalculation.'" At that time, plaintiffs also alleged the parties "discussed strategies for recouping th[e] excess benefits, such as reducing *** [the subsequent medical professional's] future compensation." Between December 19 and 27, 2013, defendants allegedly drafted an

amendment to eliminate the Pension Plan's 62% hypothetical allocation group. Representatives of the Pathology Group executed that amendment on December 27, 2013. On March 18, 2014, defendants allegedly advised the Pathology Group that the subsequent medical professional had no reasonable expectation of claiming the benefit of the 62% hypothetical allocation group.

¶ 7 Defendants' legal representation of plaintiffs allegedly ended in April 2014. Plaintiffs then allegedly retained legal counsel to review and correct the defects resulting in the loss of the Pension Plan's tax-qualified status. Plaintiffs eventually received compliance letters from the IRS that stated the tax-qualified status was retroactively restored.

¶ 8 On May 19, 2015, and February 5, 2016, respectively, the subsequent medical professional filed an administrative claim and a federal lawsuit against plaintiffs, claiming an entitlement to the benefit of the 62% hypothetical allocation group. The subsequent medical professional's administrative claim was denied. However, in January 2017, summary judgment was entered for the subsequent medical professional in the federal lawsuit. As a result, on May 6, 2017, the subsequent medical professional and plaintiffs entered a settlement agreement. As relief for counts I and II, plaintiffs requested monetary damages and reimbursement for the costs of this lawsuit.

¶ 9 On August 14, 2019, defendants requested a dismissal of counts I and II of plaintiffs' fourth amended complaint under section 2-619 (a)(5),

arguing those counts were barred by the two-year limitations period and/or the six-year repose period contained in section 13-214.3(b) and (c). On November 6, 2019, plaintiffs filed a response to defendants' motion to dismiss. Thereafter, plaintiffs and defendants each filed a reply in support of their respective positions.

¶ 10 On June 3, 2020, the circuit court held a hearing on defendants' motion to dismiss. On June 9, 2020, the circuit court entered a written order, formally granting the dismissal of counts I

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and II, with prejudice, on the basis that those counts were barred by the limitations and repose periods contained in section 13-214.3(b) and (c). On July 6, 2020, plaintiffs filed a timely appeal.

¶ 11 II. ANALYSIS

¶ 12 In this appeal, plaintiffs challenge the circuit court's dismissal of counts I and II of their fourth amended complaint based on the limitations and repose periods contained in section 13-214.3(b) and (c). The limitations and repose periods contained in those statutory provisions are independent timing requirements in legal malpractice actions. See *Sorenson v. Law Offices of Theodore Poehlmann,* 327 Ill.App.3d 706, 708 (2002); 735 ILCS 5/13-214.3(b), (c) (West 2018). Therefore, plaintiffs' inability to comply with either timing requirement is fatal to this case. Since we conclude section 13-214.3(b) independently forecloses plaintiffs' lawsuit, we decline to address the parties' arguments under section 13-214.3(c).

¶ 13 Initially, defendants' motion to dismiss was filed under section 2-619(a) (5). As such, defendants admitted the legal sufficiency of counts I and II but asserted, as a basis for involuntary dismissal, those counts were "not commenced within the time limited by law." See 735 ILCS 5/2-619(a) (5) (West 2018); *Scheinblum v. Schain Banks Kenny & Schwartz, Ltd.,* 2021 IL App (1st) 200798, ¶ 22. When ruling on such a motion, the circuit court interprets the pleadings and supporting documents in the light most favorable to the plaintiff. *Snyder v. Heidelberger,* 2011 IL 111052, ¶ 8. Well-pleaded facts and reasonable inferences are admitted as true. See *id.* If the facts are undisputed and only one conclusion is evident, then the circuit court may determine, as a matter of law, when a limitations period began. See *Brummel v. Grossman,* 2018 IL App (1st) 162540, ¶ 22. Our court reviews *de novo* whether a genuine issue of material fact precluded the dismissal or, absent such a genuine issue of material fact, whether the dismissal was proper as a matter of law. See *id.* ¶ 24; *Snyder,* 2011 IL 111052, ¶ 8.

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¶ 14 A limitations period requires the prosecution of a cause of action within a reasonable time to prevent the loss or impairment of evidence and discourage delays in the filing of claims. See *Khan v. Deutsche Bank AG,* 2012 IL 112219, ¶ 21 (quoting *Nolan v. Johns-Manville Asbestos,* 85 Ill.2d 161, 170-71 (1981)). As such, a limitations period determines the time within which a lawsuit may be filed after the accrual of a cause of action. See *Folta v. Ferro Engineering,* 2015 IL 118070, ¶ 33; accord *Evanston Insurance Co. v. Riseborough,* 2014 IL 114271, ¶ 16. A cause of action accrues when facts authorizing a lawsuit exist. *Khan,* 2012 IL 112219, ¶ 20.

¶ 15 Relevantly, section 13-214.3(b) states, an "action for damages *** against an attorney arising out of an act or omission in the performance of professional services *** must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2018). This provision incorporates the discovery rule, which postpones the commencement of a limitations period until the injured party knows or reasonably should know of the injury and its wrongful cause. See *id.; Snyder,* 2011 IL 111052, ¶ 10; *Khan,* 2012 IL 112219, ¶ 20. After discovering the injury and its wrongful cause, the injured party has the burden of inquiring about the existence of a cause of action. See *Khan,* 2012 IL 112219, ¶¶ 20-21 (quoting *Nolan,* 85 Ill.2d at 170-71). Once it reasonably appears there was an injury and it was wrongfully caused, an injured party may not slumber on his or her rights. *Id.* ¶ 21 (quoting *Nolan,* 85 Ill.2d at 170-71).

¶ 16 In this context, "wrongfully caused" does not connote knowledge of negligent conduct, a cause of action, or the full extent of an injury. See *id.* ¶ 22; *Scheinblum,* 2021 IL App (1st) 200798, ¶¶ 25, 29. That term must be viewed generically and not as a term of art. *Khan,* 2012 IL 112219, ¶ 22 (citing *Knox College v. Celotex Corp.,* 88 Ill.2d 407, 416 (1981)). A person knows or reasonably should know an injury was "wrongfully caused" when there is sufficient

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information concerning the injury and its cause to put a reasonable person on inquiry about whether actionable conduct occurred. See *Scheinblum,* 2021 IL App (1st) 200798, ¶¶ 25, 29 (quoting *Janousek v. Katten Muchin Rosenman LLP,* 2015 IL App (1st) 142989, ¶ 13); accord *Carlson v. Michael Best & Friedrich LLP,* 2021 IL App (1st) 191961, ¶ 81.

¶ 17 Moreover, the necessary injury is not a personal injury or the attorney's mere negligence. See *Northern Illinois Emergency Physicians v.*

Landau, Omahana & Kopka, Ltd., 216 Ill.2d 294, 306 (2005). The necessary injury "is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission." *Id.* (citing *Eastman v. Messner,* 188 Ill.2d 404, 411 (1999); *Palmros v. Barcelona,* 284 Ill.App.3d 642, 646 (1996)). As a result, a party is not injured by an attorney's legal malpractice unless and until there is a loss for which monetary damages may be sought. *Id.;* accord *Zweig v. Miller,* 2020 IL App (1st) 191409, ¶ 30. Indeed, even if negligence is established, a cause of action does not exist unless the injury proximately caused monetary damages. See *Northern Illinois Emergency Physicians,* 216 Ill.2d at 306-07.

¶ 18 For this reason, monetary damages are "essential to a viable cause of action for legal malpractice." *Id.* at 307. Those monetary damages must be affirmatively established by the aggrieved client and are never presumed. *Id.* (citing *Eastman,* 188 Ill.2d at 411; *Griffin v. Goldenhersh,* 323 Ill.App.3d 398, 404 (2001)). If there is merely a possibility of harm or the monetary damages are speculative, then monetary damages are absent and no legal malpractice action exists. *Id.;* see also *Zweig,* 2020 IL App (1st) 191409, ¶ 30. Monetary damages are speculative only if their existence is uncertain. *Northern Illinois Emergency Physicians,* 216 Ill.2d at 307; accord *Zweig,* 2020 IL App (1st) 191409, ¶ 30. We emphasize that monetary damages are not speculative if their amount is merely uncertain or yet to be fully determined. *Northern Illinois Emergency Physicians,* 216 Ill.2d at 307; accord *Zweig,* 2020 IL App (1st) 191409, ¶ 30.

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¶ 19 A loss for which a party may seek monetary damages in a legal malpractice action will generally not occur until after an adverse judgment, settlement, or dismissal of the underlying action caused by the attorney's negligence. *Zweig,* 2020 IL App (1st) 191409, ¶ 30; accord *Construction Systems, Inc. v. FagelHaber, LLC,* 2019 IL App (1st) 172430, ¶ 20. However, a legal malpractice action may accrue before that time if it is "plainly obvious" the plaintiff has been injured by professional negligence or the attorney's neglect is a direct cause of legal expenses incurred by the plaintiff. See *Zweig,* 2020 IL App (1st) 191409, ¶¶ 30, 35, 38 (holding the limitations period for a legal malpractice claim commenced, at the latest, when the plaintiff paid attorney fees to successor counsel to rectify defendants' professional neglect and where the plaintiff, who was not sued for that neglect, argued those attorney fees were directly caused by the neglect and any success in a lawsuit against third-parties would not negate those attorney fees); *Construction Systems, Inc.,* 2019 IL App (1st) 172430, ¶¶ 29-30 (finding, when the successor counsel learned of the defendant's neglect and was paid to minimize that neglect, it was obvious the plaintiff suffered a nonspeculative injury, such that a legal malpractice lawsuit would not be

premature or dependent upon the underlying case); *Nelson v. Padgitt,* 2016 IL App (1st) 160571, ¶¶ 22-23 (finding the plaintiff, a sophisticated businessman who eventually retained successor counsel, knew his economic loss stemmed from an employment agreement negotiated by an attorney who failed to include provisions for economic protection, as instructed, such that he did not need an adverse judgment to know he was injured). Our supreme court has recognized this may be the case where, before an adverse judgment or settlement, there is a pecuniary loss directly attributable to an attorney's neglect and the client knew or should have known of the loss when taking affirmative action to mitigate the pecuniary loss. See *Suburban Real Estate Services, Inc. v. Carlson,* 2022 IL 126935, ¶¶ 28, 35 (discussing *Zweig, Construction Systems, Inc.*,

and *Nelson* in the context of pecuniary losses for which a party may seek monetary damages for attorney neglect before an adverse judgment or settlement).

¶ 20 Here, plaintiffs concede, as early as December 20, 2013, they "became undoubtedly aware of the possibility of damages" due to defendants' legal malpractice. Plaintiffs alleged, in December 2013, they became aware of a "miscalculation" related to the subsequent medical professional's accruals and the "strategies for recouping th[e] excess benefits." Similarly, plaintiffs admit emails exchanged with defendants on December 8 and 9, 2013, "discussed whether *** [the subsequent medical professional] should be included in the 62% category." On December 19, 2013, plaintiffs acknowledge defendants "calculated the potential excess benefits that *** [the subsequent medical professional] could claim and scheduled a conference with Plaintiffs." For that conference, defendants "prepared a detailed memorandum for Plaintiffs *** acknowledging] the consequences of disqualification of the Pension Plan."

¶ 21 However, plaintiffs argue the possibility of monetary damages was insufficient to trigger the limitations period contained in section 13-214.3(b). Plaintiffs note the subsequent medical professional initiated an administrative claim and a federal lawsuit on May 19, 2015, and February 5, 2016, respectively. The federal lawsuit resulted in summary judgment for the subsequent medical professional in January 2017 and a settlement agreement was executed on May 6, 2017. As such, plaintiffs argue their claims of legal malpractice accrued on May 6, 2017. Plaintiffs argue their alleged injuries were not "plainly obvious" before that date. At the earliest, plaintiffs suggest their cause of action accrued within the limitations period in April 2014, when successor counsel was actually hired to review and correct the defects in the Pension Plan.

¶ 22 In response, defendants argue plaintiffs were alerted of the issues related to the 62% hypothetical allocation group and the subsequent medical professional as early as March 7, 2012,

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when the subsequent medical professional inquired about that benefit. Further, defendants argue the parties' communications in December 2013 evince plaintiffs' knowledge of those issues and their resultant injuries. To determine benefit accruals for 2013, defendants, on December 8, 2013, inquired about the subsequent medical professional's qualifications. A representative of plaintiffs replied," [d]oes this mean that the accruals for *** [the subsequent medical professional] have been miscalculated?" Likewise, on December 19, 2013, the Pathology Group was informed of the amount required to make the Pension Plan IRS-compliant. Defendants then prepared to eliminate the 62% hypothetical allocation group. At the latest, defendants argue plaintiffs knew of their injuries when the Pathology Group took that action on December 27, 2013. Since plaintiffs filed this lawsuit on December 29, 2015-2 years and 2 days after that action-defendants argue plaintiffs' legal malpractice claims are barred by section 13-214.3(b).

¶ 23 Based on the undisputed facts of record, we conclude plaintiffs knew or reasonably should have known, before December 29, 2013, *i.e.,* more than two years before the filing of this lawsuit, that defendants wrongfully caused monetary damages. Plaintiffs may not have known the full extent or amount of the monetary damages, but they possessed sufficient information about defendants' administration of the Pension Plan to timely inquire about the existence of monetary damages and a cause of action for legal malpractice. See *Khan,* 2012 IL 112219, ¶¶ 20, 22; *Northern Illinois Emergency Physicians,* 216 Ill.2d at 307; *Scheinblum,* 2021 IL App (1st) 200798, ¶¶ 25, 29; *Carlson,* 2021 IL App (1st) 191961, ¶ 81; *Zweig,* 2020 IL App (1st) 191409, ¶ 30. Plaintiffs knew, contrary to their intent, that the 62% hypothetical allocation group remained in existence and was applicable to the subsequent medical professional. Plaintiffs also knew the subsequent medical professional, despite his qualifications, was not receiving the benefit of the 62% hypothetical allocation group, which partly caused the Pension Plan to lose its

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tax-qualified status. Importantly, defendants informed plaintiffs of the amount in excess benefits claimable by the subsequent medical professional, the amount required for the Pension Plan to become IRS-compliant, and the consequences of the Pension Plan losing its tax-qualified status. See *Carlson,* 2021 IL App (1st) 191961, ¶¶ 82-83 (holding the plaintiff was on

notice of legal malpractice, due to sufficient information about an injury and its cause, when the plaintiff's accountant informed him he "potentially [had] a real problem" after he "left 12 million on the table" in negotiations).

¶ 24 Therefore, as of December 29, 2013, the subsequent medical professional may not have claimed any amount in excess benefits under the 62% hypothetical allocation group, but it was "plainly obvious," before that time, defendants' neglect caused a pecuniary injury related to the loss of the Pension Plan's tax-qualified status. See *Northern Illinois Emergency Physicians,* 216 Ill.2d at 306-07; *Zweig,* 2020 IL App (1st) 191409, ¶¶ 30, 35, 38; *Construction Systems, Inc.,* 2019 IL App (1st) 172430, ¶¶ 20, 29-30; *Nelson,* 2016 IL App (1st) 160571, ¶¶ 22-23. The disqualification of that tax status, at a minimum, resulted in the loss of some or all of plaintiffs' income tax deduction for contributions to the Pension Plan. Further, at that time, plaintiffs realized the need to incur IRS compliance fees and associated attorney fees and costs from defendants or other legal counsel to regain the Pension Plan's tax-qualified status. Indeed, the record clearly indicates, before December 29, 2013, plaintiffs worked with defendants to correct the issues related to the subsequent medical professional and the 62% hypothetical allocation group, which partly caused the loss of the Pension Plan's tax-qualified status. Plaintiffs ultimately chose to eliminate the 62% hypothetical allocation group but other "strategies for recouping th[e] excess benefits, such as reducing *** [the subsequent medical professional's] future compensation," were considered. Presumably, for IRS compliance, this action would be

taken after plaintiffs, despite their initial intent for the 62% hypothetical allocation group, voluntarily paid the subsequent medical professional the amount claimable in excess benefits. Importantly, the subsequent medical professional's success in claiming those excess benefits under the 62% hypothetical allocation group could fully determine or add to, but not negate, the otherwise independent and nonspeculative pecuniary injuries related to the Pension Plan's tax-qualified status. See *Northern Illinois Emergency Physicians,* 216 Ill.2d at 307; *Zweig,* 2020 IL App (1st) 191409, ¶¶ 30, 35; *Construction Systems, Inc.,* 2019 IL App (1st) 172430, ¶¶ 29-30.

¶ 25 In sum, well before the adverse settlement with the subsequent medical professional on May 6, 2017, plaintiffs suffered a pecuniary loss that was directly attributable to defendants' alleged professional neglect when administering the Pension Plan. See *Carlson,* 2022 IL 126935, ¶¶ 28, 35. Plaintiffs knew of that pecuniary loss before December 29, 2013, when they considered and decided upon affirmative action, *i.e.,* the elimination of the 62% hypothetical allocation group, to mitigate their pecuniary loss. See *id.*

Therefore, we hold counts I and II of plaintiffs' fourth amended complaint were properly dismissed under section 13-214.3(b). By virtue of this holding, we decline to review the parties' arguments under section 13-214.3(c).

¶ 26 III. CONCLUSION

¶ 27 The judgment of the circuit court of Peoria County is affirmed.

¶ 28 Affirmed.

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Notes:

[1]This lawsuit was also filed by plaintiff, Peoria-Tazewell Pathology Group, SC Profit Sharing 401(k) Plan. The issues presented on appeal pertain only to the Pathology Group and the Pension Plan.

[2]Unlike in three prior complaints, plaintiffs did not allege defendants failed, in 2007, to draft the provision for a 62% hypothetical allocation group so that it applied only to the single medical professional.

1

CONCEPTS DESIGN FURNITURE, INC., et al., Plaintiffs-Appellants,
v.
FISHERBROYLES, LLP and ALASTAIR J. WARR, Defendants-Appellees.

No. 22-2303

United States Court of Appeals, Seventh Circuit

March 31, 2023

NONPRECEDENTIAL DISPOSITION

Argued February 28, 2023

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 22-cv-01086 Jeffrey Cole, Magistrate Judge.

Before FRANK H. EASTERBROOK, Circuit Judge DIANE P. WOOD, Circuit Judge AMY J. ST. EVE, Circuit Judge

ORDER

David Quaknine and several of his companies sued their former attorney and his law firm for alleged malpractice connected to a 2014 suit. The district court granted the defendants' motion to dismiss. It ruled that the two-year limitations period, which at

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the latest began to run in September 2019, expired before the plaintiffs sued in December 2021. Because the suit is indeed untimely, we affirm.

I

We begin by reciting the well-pleaded facts in the complaint. *See Pierce v. Zoetis, Inc.*, 818 F.3d 274, 277 (7th Cir. 2016). We also consider "documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012).

David Quaknine and several of his companies (collectively Comptoir), which did business from Quebec, Canada, were sued for intellectual-property infringement in 2014. Over a year later, Comptoir hired Alastair Warr and his law firm to negotiate a settlement or, failing that, represent Comptoir in court. Comptoir told Warr that it had a policy with Intact Insurance Company that potentially could cover defense costs and indemnify it for claims. Warr did not advise Comptoir to submit a claim to Intact.

The lawsuit did not go well for Comptoir, but it continued to retain Warr. About four months after Warr began his relationship with Comptoir, he changed law firms, to FisherBroyles, LLP, which Comptoir hired. Warr still did not advise Comptoir to submit a claim to Intact; to the contrary, the disclosures in the suit under Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure stated that Comptoir had "no insurance agreement." A jury eventually found against Comptoir, assessing it over three million dollars in damages. Comptoir was also permanently enjoined from certain operations and advertising. In February 2018, Comptoir-through other counsel-told Intact about the attorney's fees. This was the first time Intact learned of the intellectual-property suit.

Comptoir reorganized after the adverse judgment. First it filed for bankruptcy protection. And Quaknine created two new entities-also plaintiffs here-which purchased Comptoir's assets and assumed some of its liabilities. The bankruptcy court declared Comptoir bankrupt and appears to have discharged the judgment debt from the 2014 litigation.

Comptoir demanded insurance coverage for its defense fees from the 2014 suit, and Intact denied coverage on September 10, 2019. (Comptoir also demanded fees for another suit that we need not discuss.) When it demanded coverage, Comptoir sent to Intact (apparently for the first time) a copy of the complaint in the 2014 suit. In denying

Comptoir's demand in September 2019, Intact gave three reasons: First, the suit against Comptoir was not covered under the policy. Second, because Comptoir "failed to promptly notify Intact of the [2014] Complaint and to immediately upon receipt thereof, deliver to Intact a copy of the Complaint," it violated the policy and forfeited its right to and was "time barred" from reimbursement. Third, Comptoir listed its defense fees "as amounts due to creditors," which implied that only the bankruptcy trustee could collect them.

Intact followed up with a suit seeking a declaration in Cook County Circuit Court that it was not obligated to pay defense fees or indemnify Comptoir. Comptoir answered and counterclaimed in that suit on February 13, 2020, asserting that Intact had a duty to pay defense fees. On May 14, 2021, the state court ruled for Intact. It explained that Comptoir failed to notify Intact "as soon as" it "became aware" of the 2014 suit, as the policy required, and thus "forfeited all rights to coverage under the [p]olicy." *Intact Ins. Co. v. Comptoir Des Indes, Inc.*, No. 2019CH13088 at 7 (Ill. Cir. Ct. May 14, 2021) (emphasis removed). It also ruled that Comptoir made its defense-fees claim outside the three-year statute of limitations applicable under Quebec law. *Id.* Thus, Comptoir's "complaint and subsequent demand for reimbursement of fees" was "time barred." *Id.*

On December 17, 2021, over two years after Intact's September 2019 denial of Comptoir's demand for insurance coverage, Comptoir sued Warr and FisherBroyles for legal malpractice. Comptoir filed in Illinois state court, alleging that the defendants negligently failed to advise it to file a timely insurance claim with Intact. Had it filed a timely claim with Intact, Comptoir asserted, Intact may have covered its legal fees and settlement funds, which could have allowed it to avoid the judgment and bankruptcy. The defendants removed the suit to federal court, and Comptoir amended its complaint to add as plaintiffs the new entities created during the bankruptcy proceedings. The parties consented to proceed before a magistrate judge. (The consent form was signed before the complaint was amended, but the panel can infer from the new entities' conduct that they also consented. *See Roell v. Withrow*, 538 U.S. 580, 590 (2003).)

The district court granted Warr and FisherBroyles's motion to dismiss the suit as untimely under Illinois law. It reasoned that Comptoir reasonably should have known of the alleged injury by, at the latest, September 10, 2019-the date Intact sent the letter denying coverage. Comptoir had two years to sue, *see* ILCS 5/13-214.3(b), but it waited until December 17, 2021, more than two years later. Because the court found that the suit was untimely, it did not consider the defendants' other arguments.

II

On appeal, Comptoir argues that the district court erroneously found that the malpractice action accrued in September 2019. Comptoir asserts that it was not "injured" (and thus could not have sued) until after the declaratory judgment on May 14, 2021. Even if it was harmed earlier, Comptoir argues next, the two-year clock did not start until it "knew or should have known" of its injury, and in its view this date depends on the

resolution of disputed facts; the date might be September 2019, February 2020 (when it counterclaimed in the declaratory suit), or May 14, 2021. Last, it adds that the district court should have granted it leave to amend its complaint.

Before reaching these arguments, we confirm that this case-removed from Illinois court to federal court based on the diversity of the parties' citizenship-has diverse parties. *See* 28 U.S.C. §§ 1332, 1441. The plaintiff corporations are citizens of, and have their principal places of business in, Quebec, Canada. *See* 28 U.S.C. § 1332(c)(1). Quaknine-the only person on the plaintiff side of the ledger-is also a citizen of Quebec, Canada. The defendants' citizenship is diverse from the plaintiffs'. FisherBroyles consists of two partners: Broyles Law Firm, P.C., and Fisher Legal Services, P.C., both of which are corporations for purposes of diversity jurisdiction. *See Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix & von Gontard, P.C.*, 385 F.3d 737, 739 (7th Cir. 2004). Broyles Law Firm is incorporated in, and has its principal place of business in, Georgia. Fisher Legal Services is incorporated in Texas with its principal place of business in Puerto Rico. Warr is a citizen of Indiana. Thus, these parties are diverse. Finally, the amount in controversy exceeds $75,000, exclusive of interests and costs. *See* 28 U.S.C. § 1332(a). Jurisdiction is therefore secure.

On the merits, both parties accept that Illinois's two-year statute of limitations for malpractice suits applies to this case. *See* ILCS 5/13-214.3(b). They also do not dispute that the Illinois statute of limitations incorporates the so-called "discovery" rule, which "delays the commencement of the relevant statute of limitations until the plaintiff knows or reasonably should know that he has been injured and that his injury was wrongfully caused." *Jackson Jordan, Inc. v. Leydig, Voit &Mayer,* 633 N.E.2d 627, 630-31 (Ill. 1994); *Snyder v. Heidelberger*, 953 N.E.2d 415, 418 (Ill. 2011).

As stated above, Comptoir first argues that it was not "injured" until it received a declaratory judgment in Intact's suit. The injury in a malpractice action is a pecuniary one, so a plaintiff is not injured until the plaintiff suffers "a loss for which monetary damages may be sought." *See Suburban Real Est. Servs., Inc. v. Carlson*, 193 N.E.3d 1187, 1191 (Ill. 2022).

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To determine the date of injury, Comptoir relies heavily on the oft-cited principle that a malpractice claim against a lawyer for bungling litigation "will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which" the plaintiff "has become entangled due to the purportedly negligent advice" of the plaintiff's attorney. *Blue Water Partners, Inc., v. Mason*, 975 N.E.2d 284, 300 (Ill.App.Ct. 2012)

(quoting *Lucey v. Law Offs. of Pretzel &Stouffer, Chartered*, 703 N.E.2d 473, 479 (Ill.App.Ct. 1998)). This is generally because a plaintiff will not know whether an attorney's malpractice led to damages until the underlying litigation ends. *See Suburban Real Est. Servs.*, 193 N.E.3d at 1192.

But this argument fails because, as the district court observed, Comptoir's claim is not "based on the mishandling of litigation." *Cf. Praxair, Inc. v. Hinshaw &Culbertson*, 235 F.3d 1028, 1032 (7th Cir. 2000). Rather, its claim arises out of the defendants' alleged failure to advise Comptoir to file a timely claim with its insurer. The pecuniary injuries from this alleged malpractice, according to Comptoir's own complaint, included the defense fees that Intact refused to cover in September 2019, the judgment in the 2014 suit, and the resulting bankruptcy. These damages existed before-and regardless of- the outcome of the declaratory-judgment suit. Comptoir contends that the district court did not find that its injuries occurred before the declaratory judgment. But the court did, and rightly so, stating, "win or lose, Comptoir suffered damages long before the loss of the case."

Comptoir next argues that even if it did suffer a pecuniary injury before the declaratory judgment, *when* it should have known of the injury is a disputed fact issue. We disagree. It admits that the letter from Intact in September 2019, stating that Intact was denying coverage, could have alerted it to a malpractice claim against its attorneys for failing to advise it to file a claim. We reject Comptoir's contention that, because the letter listed three reasons for the denial, it did not put Comptoir on adequate notice of its injury. It is undisputed that one explicit reason for Intact's denial was that Comptoir "failed to promptly notify Intact of the Complaint and to immediately upon receipt thereof, deliver to Intact a copy of the complaint," and that the policy stated that failure to notify meant a forfeiture of "rights to compensation." This statement adequately alerted Comptoir to "an injury that may have been caused by wrongful conduct" of its attorney that required it to "investigate further." *See Khan v. Deutsche Bank AG*, 978 N.E.2d 1020, 1036-37 (Ill. 2012). Thus, the district court rightly ruled that Comptoir reasonably should have known of its injury in September 2019.

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Comptoir responds that the evidence could support a finding that notice of its injury occurred on two other dates. First, it argues that a better date for when it discovered its injuries is February 2020, when it knew enough to counterclaim in Intact's declaratory-judgment action. Second, it suggests that it learned of its injuries in May 2021, the date of judgment. Those dates may be when Comptoir gained better certainty of its injury. But certainty "is not a necessary condition to trigger the running of the statute of limitations." *See Blue Water Partners, Inc.*, 975 N.E.2d. at 298. Otherwise,

even the declaratory judgment is not sufficient to start the clock because Comptoir might have appealed the judgment, putting it in doubt. Further, Comptoir's view wrongly implies that the limitations clock started only if Intact made a discretionary decision to sue for declaratory judgment. But all it takes to allege malpractice is a breach of duty that resulted in an injury. *See N. Ill. Emergency Physicians v. Landau, Omahana &Kopka, Ltd.*, 837 N.E.2d 99, 106 (Ill. 2005). Once a malpractice plaintiff is aware of that injury, the plaintiff is not required to wait for a court's judgment certifying that the plaintiff's attorneys erred. Thus, the limitations clock for Comptoir started when it reasonably should have known of the alleged malpractice, *Jackson Jordan, Inc.*, 633 N.E.2d at 630-31, and that occurred at the latest when Intact sent its letter in September 2019 denying coverage to Comptoir.

Comptoir's last argument is that the district court should have granted it leave to amend its complaint. Comptoir did not move to amend in the district court, let alone submit a proposed amended complaint or explain how it might correct deficiencies. *See Doermer v. Callen*, 847 F.3d 522, 528 (7th Cir. 2017). Regardless, the argument is meritless. Granted, the statute of limitations is an affirmative defense, and Comptoir was not required to anticipate the defense in its complaint. Even so, dismissal on this ground without the chance to amend was proper because Comptoir alleged facts and relied on documents that establish the defense. *See O'Gorman v. City of Chicago*, 777 F.3d 885, 889 (7th Cir. 2015). As already discussed, Comptoir accepts that Intact denied coverage in September 2019, starting the two-year clock that expired before it sued in December 2021. Any amendment would be "futile" because the claim is barred for reasons that an amendment could not cure. *See Doermer*, 847 F.3d at 528.

AFFIRMED

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2023 IL App (1st) 211327

FUZZY MAIAVA TUNA, Plaintiff-Appellant,
v.
FLOYD A. WISNER, ALEXANDRA M WISNER, and WISNER LAW FIRM, P.C., Defendant-Appellees.

No. 1-21-1327

Court of Appeals of Illinois, First District, Second Division

August 1, 2023

Appeal from the Circuit Court of Cook County 2019 L 006619 Honorable Margaret A. Brennan, Judge Presiding

Attorneys for Appellant: George W. Spellmire, of Spellmire Bruck LLP, and Steven S. Shonder, both of Chicago, for appellant.

Attorneys for Appellee: Joseph R. Marconi, David M. Macksey, Carlos A. Vera, and Adam J. Sedia, of Johnson & Bell, Ltd., of Chicago, for appellees.

JUSTICE ELLIS delivered the judgment of the court, with opinion. Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment and opinion.

OPINION

ELLIS, JUSTICE

¶ 1 New Zealand has a no-fault personal injury payment scheme that would send shivers down the spine of plaintiffs' attorneys in America. If a person is hurt in New Zealand, or a New Zealander is injured elsewhere in the world, that country's Accident Compensation Act (Accident Compensation Act 2001 (N.Z.)) reimburses the injured party without requiring that person to prove fault. These payments come from a government-overseen corporation tasked with distributing compensation to an injured party.

¶ 2 In exchange for this no-fault scheme, New Zealand bars injured persons from filing tort actions in New Zealand courts seeking compensatory damages. In essence, New Zealand has

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abolished all common-law claims for compensatory damages arising from personal injuries and replaced it with a no-fault compensation scheme.

¶ 3 Fuzzy Tuna, plaintiff here, is a New Zealand citizen. In 2010, he was working for Qantas Airlines as a flight attendant on a flight from Singapore to Perth, Australia. While the plane was in the air, it unexpectedly pitched toward the ground twice. Though it thankfully did not crash, many of the passengers and crew-including plaintiff-were violently tossed about the cabin. Plaintiff suffered significant injuries and has been unable to work since the accident.

¶ 4 As a New Zealander, plaintiff qualified for reimbursement and has received money from the Accident Compensation Act. But he also filed a personal injury lawsuit in Cook County, Illinois against several companies he believed were responsible for the accident, seeking compensatory damages. That case was eventually dismissed, as the circuit court ruled that the New Zealand ban on suing for compensatory damages applied and barred plaintiff's claim.

¶ 5 Plaintiff's attorneys at the time, now defendants in this legal malpractice case, filed a notice of appeal in this court to challenge that ruling but later dismissed it and tried to resurrect the claim in the circuit court. Ultimately, that did not succeed, and plaintiff found himself with an adverse ruling in the circuit court and no right to appeal it.

¶ 6 So plaintiff filed this malpractice action against his lawyers, defendants here, for dismissing an appeal that, in his mind, would have been meritorious and which would have allowed him to return to circuit court to successfully prosecute his claim.

¶ 7 The circuit court here, in the malpractice action, ruled that New Zealand law was, indeed, the governing law in the underlying action and did, indeed, bar that underlying action. Thus, any negligence that defendants may have committed in their representation of plaintiff did not lead to damages, because he would have lost the appeal even had one been prosecuted.

¶ 8 Plaintiff appeals. He claims the court did not properly conduct the choice-of-law analysis. He finds no conflict between New Zealand law and Illinois law on the relevant question.

¶ 9 For the reasons that follow, we affirm the judgment of the circuit court, because we agree that a conflict exists between New Zealand law and

Illinois law. We do not delve further into the choice-of-law analysis to decide which jurisdiction's governing law would have ultimately applied, because plaintiff has limited his appeal only to the question of whether a conflict existed and has not otherwise argued the issue. Given that we agree with the circuit court on the limited question raised in this appeal, we have no basis to reverse its judgment.

¶ 10 BACKGROUND

¶ 11 Like many legal malpractice actions, this one involves a "case within a case." The alleged legal malpractice concerns a lawsuit filed in the circuit court of Cook County on behalf of plaintiff here, Fuzzy Maiava Tuna, who was represented by defendants here, Floyd A. Wisner, Alexandra M. Wisner, and the Wisner Law Firm, P.C. (collectively, the Wisner defendants). See *Tuna v. Airbus, S.A.S.*, 2017 IL App (1st) 153645. We refer to this underlying action as "the *Airbus* action." Our factual background understandably revolves in large part around the history of that lawsuit.

¶ 12 I. The *Airbus* Action

¶ 13 Plaintiff was a flight attendant on a Qantas flight flying between Singapore and Perth, Australia, on October 7, 2008. While the plane was in the air somewhere over the Indian Ocean, it suddenly pitched down twice, throwing passengers and crew (including plaintiff) throughout the cabin. Plaintiff, a permanent resident and citizen of New Zealand, was severely injured and has not been able to work since the accident.

¶ 14 Plaintiff and several others filed actions for negligence and products liability against various defendants in the circuit court of Cook County. One of those defendants, Motorola, Inc., was an Illinois defendant. The other defendants included Airbus, S.A.S, a French company that built the plane involved in the accident, and California-based Northrop Grumman Guidance and Electronics Company (Northrop Grumman), which designed the aircraft's air data inertial reference unit that may have helped cause the sudden drop. Motorola and the other defendants were eventually dismissed from the suit, leaving just Airbus and Northrop Grumman.

¶ 15 Both Airbus and Northrop Grumman acquiesced to jurisdiction in Illinois. They did not contest liability but moved for summary judgment on the issue of damages. They argued that New Zealand substantive law governed the issue of damages and that, while Illinois permitted recovery for a wide array of damages in a personal injury action, New Zealand's Accident

Compensation Act, a no-fault compensation system, barred injured plaintiffs from suing for compensatory damages. (More on this later.)

¶ 16 In support of their claim that New Zealand law, not that of Illinois, governed the substantive issue of damages, Airbus and Northrup Grumman attached several affidavits from attorneys and legal scholars in New Zealand. Plaintiff, represented by the Wisner defendants, argued that there was no conflict in the law because the New Zealand statute in question only applied to actions filed in New Zealand. Plaintiff also attached affidavits from two New Zealand attorneys who concluded that the New Zealand law in question did not apply to proceedings brought in courts outside of New Zealand, such as Cook County, Illinois.

¶ 17 The circuit court granted Airbus's and Northrup Grumman's motion to apply New Zealand law and entered summary judgment in their favor, finding that New Zealand law barred plaintiff's claim for compensatory damages. The court also found no just reason to delay

enforcement or appeal of that ruling under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). (There were other claims still pending in the case.) Plaintiff's attorneys, the Wisner defendants, filed a timely notice of appeal with this court.

¶ 18 On April 2, 2015, and while the appeal was pending in this court, the circuit court *sua sponte* vacated the summary judgment order and requested that the parties provide additional briefing on the choice-of-law issue. Four days later and in the circuit court, plaintiff's attorneys moved to voluntarily dismiss their appeal. See Ill. S.Ct. R. 309 (eff. Feb. 1, 1981) (circuit court may dismiss appeal before record on appeal has been filed).

¶ 19 Airbus and Northrup Grumman objected, arguing that the court's April 2, 2015 order was void because the notice of appeal that plaintiffs had filed divested the circuit court of jurisdiction. See, *e.g.*, *People v. Bounds*, 182 Ill.2d 1, 3 (1998) ("When the notice of appeal is filed, the appellate court's jurisdiction attaches *instanter*, and the cause is beyond the jurisdiction of the trial court."). Airbus and Northrup Grumman issued what would prove to be a prophetic warning, saying that if "Plaintiffs voluntarily dismiss their appeal, they cannot then file a postjudgment motion to vacate, nor can the Court grant such relief." They also argued that plaintiff would not be able to revest the court with jurisdiction or qualify for relief using section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), which allows the court, in certain situations, to vacate or modify final orders or judgments more than 30 days after entry.

¶ 20 The circuit court granted plaintiff's motion to dismiss the appeal, but because of a filing error, that order never reached the appellate court; instead, we dismissed it for want of prosecution a few months later. *Tuna*, 2017 IL App (1st) 153645, ¶ 13. Either way, the appeal was dismissed. The circuit court then realized it did not have jurisdiction on April 2, 2015, to vacate the summary judgment. With the summary judgment order final, and the appeal of that

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order dismissed, the circuit court recommended that plaintiff file a section 2-1401 petition to attempt to revive the claim. See 735 ILCS 5/2-1401 (West 2014) (allowing attack on final judgment more than 30 days after entry).

¶ 21 Plaintiff, still through his attorneys, the Wisner defendants, filed that section 2-1401 petition. He attached a letter from Aric Shakur, a legal clerk working for the Accident Compensation Corporation, the government agency responsible for paying accident victims who qualify for New Zealand's compensation scheme. Shakur averred that the relevant New Zealand law "does not prevent claimants from bringing proceedings in overseas courts." Airbus and Northrup Grumman objected to the petition, arguing that Shakur's letter did not address Illinois choice-of-law rules and that Shakur, a law clerk, was not a licensed attorney in New Zealand.

¶ 22 The circuit court denied the section 2-1401 petition, concluding that Shakur's letter would not have changed the outcome of the previous decision; his letter merely summarized what the court had already considered in the affidavits from the other attorneys, and Shakur, as a clerk, would not be qualified as an expert on New Zealand law. Thus, plaintiff had not presented any new evidence that he had a meritorious claim. Plaintiff, still through the Wisner defendants, appealed to this court, and a different panel affirmed the denial of the section 2-1401 petition. See *Tuna*, 2017 IL App (1st) 153645, ¶¶ 38-39.

¶ 23 II. The Present Action

¶ 24 His original claim now dead, plaintiff hired new attorneys who filed this legal malpractice claim against the Wisner defendants. Plaintiff alleged that defendants were negligent in the underlying action at both the trial and appellate level by having failed to support their argument that New Zealand law did not bar the *Airbus* action and prematurely (and, it turns out, irrevocably) dismissing his initial appeal from the summary judgment order.

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¶ 25 Defendants later moved for summary judgment, arguing that New Zealand law did, in fact, bar the *Airbus* action, and thus neither additional supporting material nor an appeal would have led to a successful result for plaintiff. In legal terms, they argued that any negligence they may have committed was not the proximate cause of plaintiff's injury-his defeat in the *Airbus* action-because his defeat in *Airbus* was based on proper legal grounds.

¶ 26 More specifically, defendants argued that (1) there was a conflict between the laws of New Zealand and Illinois; (2) Illinois's choice-of-law rules favored the application of New Zealand law; (3) New Zealand law barred any claim for compensatory damages in the *Airbus* action; and thus (4) plaintiff suffered no damages as a result of defendants' representation, even if it was negligent. In support, defendants attached an affidavit from John Billington, a New Zealand barrister, who opined that New Zealand law barred the action, and that a recent New Zealand court decision, *McGougan v. Depuy International Ltd.*, [2018] NZCA 91, [2018] 2 NZLR 916 (N.Z.), settled any outstanding questions on the issue.

¶ 27 In response, plaintiff essentially reiterated what the Wisner defendants, when they were representing him in the *Airbus* action, argued. Namely, the New Zealand statute at issue only barred actions for compensatory damages in a *New Zealand* court, not a court in the United States. So there was no conflict between the substantive laws of New Zealand law and Illinois- and thus no need for the court to even entertain a choice-of-law analysis.

¶ 28 In support, plaintiff attached affidavits from some of the same experts he used in the original action, who concluded that the New Zealand statutory bar did not apply to courts outside of New Zealand. Absent a conflict, plaintiff argued, Illinois law would apply. Since the Wisner defendants had failed to successfully make that argument and incorrectly dismissed the appeal, their negligence prevented plaintiff from successfully prevailing in the underlying action.

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¶ 29 The circuit court granted summary judgment to defendants, concluding that New Zealand law governed the *Airbus* action and barred plaintiff's claim for compensatory damages. The court found *McGougan* and defendants' experts more persuasive on the choice-of-law question law than plaintiff's proof. The court did not explicitly address whether New Zealand had the most significant relationship to the case, only that its law conflicted with Illinois, and that it would apply New Zealand law. Thus, because New Zealand law governed the *Airbus* action and barred plaintiff's claim for

compensatory damages, plaintiff could not prove that any negligence committed by the Wisner defendants proximately caused damages of any kind.

¶ 30 ANALYSIS

¶ 31 Plaintiff challenges the grant of summary judgment. Summary judgment is appropriate where" 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2018)). Our review is *de novo*. *Id.*

¶ 32 I

¶ 33 As noted, a legal malpractice action involving underlying litigation, as here, involves a "case within a case," whereby a client complains that it would have won the underlying action but for its attorney's negligence in litigating that action. *Governmental Interinsurance Exchange v. Judge*, 221 Ill.2d 195, 200 (2006). To succeed, the plaintiff must show that an attorney's negligent representation proximately caused the plaintiff damages in that the result of the underlying litigation was unsatisfactory-either the plaintiff was forced to pay money or, as here, the plaintiff did not obtain a recovery. *Id.* Here, plaintiff claims that, absent his lawyers'

malpractice in the underlying *Airbus* action, he would have won that case-and his "damages" in this action are the award he would have and should have received in the *Airbus* action.

¶ 34 But if the plaintiff cannot show that his lawyers' negligence was the proximate cause of his unsatisfactory outcome-for example, because that underlying case was unwinnable-the malpractice claim fails. *Id.* at 199. That, in essence, is the Wisner defendants' position: the *Airbus* action was unwinnable, because the substantive law of New Zealand would have governed and would have barred a claim for compensatory damages in the *Airbus* action. Thus, any negligence they may have committed in their representation of plaintiff was not a proximate cause of any damages at all.

¶ 35 The circuit court agreed with defendants. So the question is whether the circuit court properly determined that New Zealand law was the governing substantive law of the *Airbus* action and, if so, whether that conclusion compelled summary judgment in favor of defendants. ¶ 36 In our

analysis, we must obviously consider laws passed in New Zealand. But we may not take judicial notice of the law of foreign countries. 735 ILCS 5/8-1007 (West 2022); *Bangaly v. Baggiani*, 2014 IL App (1st) 123760, ¶ 145. The laws of foreign countries must be pleaded and proved like any other fact. *Baggiani*, 2014 IL App (1st) 123760, ¶ 145. That said, the interpretation of a foreign law is one for the court, not a jury. 735 ILCS 5/8-1007 (West 2022). When the parties dispute the interpretation of a foreign law, expert testimony and other authorities on the meaning and interpretation of that law is helpful and encouraged. *Atwood Vacuum Machine Co. v. Continental Casualty Co. of Chicago*, 107 Ill.App.2d 248, 263 (1969).

¶ 37 II

¶ 38 Based on the evidence in the record-case law provided, affidavits submitted, and the statutes themselves-we now proceed to a brief discussion of New Zealand law on this issue.

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¶ 39 New Zealand has taken a very different approach to making injured accident victims whole, embodied in its Accident Compensation Act. The Accident Compensation Act (Accident Compensation Act 1972 (N.Z.)) was borne from a "Royal Commission" report, released in 1967, which concluded that, under the existing common law system of recovering damages through tort actions, "only a small number of accident victims received adequate or any compensation." *McGougan*, [2018] NZCA 91, [2018] 2 NZLR 916 at [26].

¶ 40 To replace this so-called "lottery," the commission recommended that New Zealand adopt a no-fault scheme, to which citizens and corporations in New Zealand would contribute, that would "channel much of those funds to victims, rather than participants in the common law system such as insurers and lawyers." *Id.* The crux of the report was that "the Court action based on fault should now be abolished in respect of all cases of personal injury, no matter how occurring." (Emphases omitted.) *Id.*

¶ 41 From this, in 1972, the Accident Compensation Act was born, and it has been continued by a succession of statutes, most recently in 2001. *Allen v. DePuy International Ltd.*, [2015] EWHC (QB) 926 [16] (Eng.). The scheme is overseen by the Accident Compensation Corporation, a government entity tasked with determining coverage, providing entitlements, collecting levies, managing accounts, and administering deputies. *Id.*

¶ 42 In exchange for this no-fault compensation to victims, New Zealand has closed the courthouse doors to tort claims for compensatory damages for personal injuries. This bar is found in section 317 of the Accident Compensation Act, which reads in pertinent part as follows: "No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, in any court in New Zealand, for damages arising directly or indirectly out of-(a)

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personal injury covered by this Act[.]" Accident Compensation Act 2001, s 317(1) (N.Z.); *McGougan*, [2018] NZCA 91, [2018] 2 NZLR 916 at [21].

¶ 43 "The bar in [section] 317(1) on proceedings for damages for personal injury has the effect of precluding any claim for compensatory damages for personal injury in New Zealand where there is cover under the Scheme." *Allen*, [2015] EWHC (QB) 926 [26]. The Act's overarching goal was to substitute the common-law action with a comprehensive no-fault payment scheme overseen by the Accident Compensation Corporation. See *id.* at [72] (concluding that the Accident Compensation Act's effect was to "remove or render unavailable the right to recover common law (compensatory) damages for personal injuries").

¶ 44 Simply put, the Accident Compensation Act is "a comprehensive administrative scheme of no-fault compensation for persons injured there. *** There is simply no longer, under New Zealand substantive law, a common law tort action for persons covered by the [Accident] Compensation Act," at least for claims for compensatory damages for personal injury. *Bennett v. Enstrom Helicopter Corp.*, 679 F.2d 630, 631-32 (6th Cir. 1982) (applying Michigan choice-of-law principles). The "whole point of the statutory bar is that the lottery of compensatory damages based on fault, and all of its associated cost, was to be substituted by a comprehensive compensation scheme. Section 317 is an explicit and unequivocal prohibition on proceedings for compensatory damages to achieve that objective." *McGougan*, [2018] NZCA 91, [2018] 2 NZLR 916 at [55].

¶ 45 The parties agree that plaintiff has suffered a personal injury covered by the Accident Compensation Act, and that, as a resident and citizen of New Zealand, he is entitled to payment from the Accident Compensation Corporation. Nobody disputes that, if this lawsuit were filed in New Zealand, it would be barred by the Accident Compensation Act. (There is evidence in the

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record that the Accident Compensation Corporation is compensating plaintiff for the injury at issue here; we have few details, but we do not consider that fact germane to the outcome.)

¶ 46 With that general understanding of New Zealand law in mind, we turn to our choice-of-law question.

¶ 47 III

¶ 48 Plaintiff claims that Illinois law is the substantive governing law here, while defendants claims that New Zealand substantive law governs.

¶ 49 When a tort lawsuit is filed in an Illinois court, and a party raises an issue as to the governing substantive jurisdictional law, we apply the choice-of-law rules from Illinois. *Townsend v. Sears, Roebuck &Co.*, 227 Ill.2d 147, 155 (2007). The first step is to determine whether an actual conflict exists between Illinois law and the law of the other jurisdiction, such that the choice of governing law would have an impact on the outcome of the lawsuit. *Id.* If there is no conflict-that is, if there is no outcome-determinative difference in the two jurisdictions' substantive law-then there is no need to proceed further, because it will make no difference, and we apply the law of the forum. *RS Investments Ltd. v. RSM US, LLP*, 2019 IL App (1st) 172410, ¶ 18 (" 'In the absence of a conflict, Illinois law applies as the law of the forum.'" (quoting *SBC Holdings, Inc. v. Travelers Casualty &Surety Co.*, 374 Ill.App.3d 1, 13 (2007))).

¶ 50 If the court determines that a conflict exists, the court then proceeds to the second step of the analysis-determining which of the two jurisdictional laws (or some other one) applies. *Townsend*, 227 Ill.2d at 159-60. In a tort case, we usually begin with the presumption that the situs of the plaintiff's injury is the governing substantive law and adhere to that presumption unless another jurisdiction has a more significant relationship to the case. *Id.* at 163; *Ingersoll v. Klein*, 46 Ill.2d 42, 47-48 (1970). When the site of the injury owes to mere fortuity, as may be

the case here with the plane dipping mid-flight over the Indian Ocean, this presumption is not applied or may be relaxed. See *Perkinson v. Courson*, 2018 IL App (4th) 170364, ¶ 53; Restatement (Second) of Conflict of Laws § 145, cmt. e (1971).

¶ 51 The second-step analysis of whether another jurisdiction has the more significant relationship to the lawsuit is a lengthy and rigorous one, employing two different sections of the Second Restatement of Conflict of

Laws and involving the consideration of numerous factors. See *Townsend*, 227 Ill.2d at 160; Restatement (Second) of Conflict of Laws §§ 6, 145. We consider, to name a few, such factors as the policies of the forum and other interested jurisdictions, the relative interests of those jurisdictions in the determination of the particular issue in question, and such factual questions as the situs of the injury, the place where the conduct causing the injury occurred, the domicile and place of business of the parties, and any place where the relationship between the parties is centered. *Townsend*, 227 Ill.2d at 160, 170; see *Kleronomos v. Aim Transfer &Storage Inc.*, No. 19-CV-01844, 2021 WL 1546428, at *1-3 (N.D. Ill. Apr. 20, 2021) (applying Illinois law).

¶ 52 We would note, as well, that yet another question would typically arise were an Illinois court to determine, as the circuit court did here, that a foreign jurisdiction's law governed- whether application of that foreign law would violate Illinois public policy. See, *e.g.*, *Marchlik v. Coronet Insurance Co.*, 40 Ill.2d 327, 333-34 (1968) (Wisconsin direct-action statute violated Illinois public policy, and Illinois courts would not enforce it); *Pancotto v. Sociedade de Safaris de Mocambique, S.A.R.L.*, 422 F.Supp. 405, 411 (N.D. Ill. 1976) (applying Illinois law; "our educated prediction is that the Illinois courts would refuse to enforce the Portuguese limitation [on compensatory damages] as unreasonable and contrary to Illinois public policy").

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¶ 53 But we need not elaborate further on this second step or on the public-policy question. As defendants note, plaintiff has not argued either of these issues. Plaintiff has not claimed that the court committed any error regarding this second step of the analysis. He has not argued any of these second-step factors detailed above. Nor has plaintiff made any argument regarding public policy. Plaintiff has raised one and only one challenge to the circuit court's ruling-that the court erred in the *first* step of the analysis by finding a conflict between the substantive laws of New Zealand law and Illinois.

¶ 54 So we obviously must limit our consideration to that single challenge to the court's first-step finding that a conflict exists. See Ill. S.Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (points not argued on appeal are forfeited); *Vancura v. Katris*, 238 Ill.2d 352, 369 (2010) ("this court has repeatedly held that the failure to argue a point in the appellant's opening brief results in forfeiture of the issue"). Forfeiture applies with particular force to an appellant because, while we may affirm a judgment on any basis in the record, even if not argued on appeal, we may not *reverse* on any basis in the record; the issue must be raised and argued to us. *People ex rel. Department*

of Human Rights v. Oakridge Healthcare Center, LLC, 2020 IL 124753, ¶ 36.

¶ 55 We may affirm a judgment on any basis in the record for purposes of economy to the parties and the judiciary; if the same result will ultimately obtain in the trial court for a reason not currently articulated by the lower court or the parties, it helps no one to delay the inevitable. But it is long and firmly settled that we do *not* search for reasons to *overturn* a circuit court's judgment. *People v. Givens*, 237 Ill.2d 311, 323 (2010) (reviewing court" 'should not normally search the record for unargued and unbriefed reasons to *reverse* a trial court judgment'" (emphasis in original) (quoting *Saldana v. Wirtz Cartage Co.*, 74 Ill.2d 379, 386 (1978))); see *People ex rel. Akin v. Southern Gem Co.*, 332 Ill. 370, 372 (1928) (while reviewing court "will

examine the record for the purpose of affirming a judgment it will not do so for the purpose of reversing it").

¶ 56 Among the many reasons for this principle is that searching the record for unargued errors "transform[s] the court's role from that of jurist to advocate" and forces the court "to speculate about the arguments the parties might have presented had the issues been raised." *Givens*, 237 Ill.2d at 328, 329.

¶ 57 Thus, the only question before us is whether the court correctly found that a conflict existed between the substantive laws of Illinois and New Zealand, such that the application of one versus the other would make a difference in the outcome of this case.

¶ 58 Plaintiff argues that there is no conflict. His argument relies on a textual interpretation of section 317 of the Accident Compensation Act, which we provide here in pertinent part once more:

> "(1) No person may bring proceedings independently of this Act, whether under any rule of law or any enactment, *in any court in New Zealand*, for damages arising directly or indirectly out of-
>
> (a) personal injury covered by this Act[.]" (Emphasis added.) Accident Compensation Act 2001, s 317(1) (N.Z.).

¶ 59 Plaintiff points to the italicized language above and argues that section 317 only bars lawsuits filed in a New Zealand court, not an Illinois court. The problem is that plaintiff is treating section 317 as if it is being raised as a jurisdictional bar. And thus the question he tries to answer: does section 317, or does it not, prohibit an Illinois court from exercising

jurisdiction over the *Airbus* suit? He says it does not, because the language only prohibits such suits in a *New Zealand* court. He is almost surely right about that-but that is not the question before us.

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¶ 60 From the perspective of a jurisdictional bar, we agree that section 317 does not bar this suit in an Illinois court. Illinois courts are bound to follow the Illinois and U.S. Constitutions, Illinois and federal laws, and binding common-law precedent. No foreign law could dictate matters of jurisdiction, substance, or procedure to Illinois-not a law in New Zealand or Panama or France or North Korea. See *Bennett*, 679 F.2d at 631 (in responding to same textual argument made here by plaintiff regarding section 317: "We agree, of course, with [plaintiff's] implicit premise that the New Zealand legislature cannot restrict the jurisdiction of the courts of other sovereign states."). And that is surely why the language of section 317 reads as it does-New Zealand recognizes the elementary fact that it has no authority to restrict the jurisdiction of other courts around the world, to dictate to other sovereigns what suits they may or may not entertain.

¶ 61 But the question before us is not one of jurisdiction. It is a choice-of-law analysis, which is fundamentally different. Our choice-of-law doctrine recognizes that, because Illinois has such liberal personal and subject-matter jurisdictional rules, sometimes cases will be brought (properly) in Illinois but might be governed by the substantive law of another jurisdiction-be it a sister state or a foreign country. If we determine that another jurisdiction's substantive law should apply, we choose to follow that law because it is the most appropriate under the circumstances of this case-not because that jurisdiction gives or does not give us permission to entertain the suit. (And as noted earlier, even when we find another jurisdiction's substantive law applicable, we reserve the right to choose *not* to enforce it if it violates Illinois public policy.)

¶ 62 So when we determine, in step one of the choice-of-law analysis, whether a conflict exists between the two jurisdictions, we do not ask whether New Zealand would permit Illinois to entertain the suit in the first instance. We do not require New Zealand's permission. We ask this question: if New Zealand law were the governing substantive law in this case, would the

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outcome of this lawsuit be different than if Illinois law were the governing substantive law? See *Bridgeview Health Care Center, Ltd. v. State Farm Fire & Casualty Co.*, 2014 IL 116389, ¶ 14; *Townsend*, 227 Ill.2d at 156.

¶ 63 And the answer to that question is a clear and unequivocal "yes." The substantive law of New Zealand and that of Illinois could not be more different on the question before us-not because of the language plaintiff isolates in section 317 but because, generally, one jurisdiction's substantive law recognizes a common-law tort action for compensatory damages based on personal injuries, and the other's does not.

¶ 64 Illinois, obviously, allows a plaintiff to sue in tort for compensatory damages arising from personal injuries. See, *e.g.*, *Townsend*, 227 Ill.2d at 156; *Best v. Taylor Machine Works*, 179 Ill.2d 367, 406 (1997) ("There is universal agreement that the compensatory goal of tort law requires that an injured plaintiff be made whole."); *Prouty v. City of Chicago*, 250 Ill. 222, 226 (1911) ("One who suffers an injury to his person as a consequence of the wrongful or negligent act of another has a right of action for the damages resulting from such injury without the aid of any statute but by a right which existed at common law.").

¶ 65 In stark contrast, New Zealand has altogether supplanted common-law tort actions for compensatory damages for personal injury and replaced it with a comprehensive scheme of taxpayer-funded compensation to victims of personal injury without requiring that the person prove fault of any kind. Simply put, a common-law action for compensatory damages arising from personal injuries is barred under New Zealand law. *Bennett*, 679 F.2d at 631-32.

¶ 66 The laws of New Zealand and Illinois conflict every bit as much as the laws of Michigan and Illinois conflicted in *Townsend*, 227 Ill.2d at 156. In that product liability action, Illinois allowed claims of strict liability in tort, whereas Michigan did not. *Id.* Michigan capped

compensatory damages for personal injury, while Illinois contained no such cap. *Id.* Michigan barred the recovery of punitive damages in product liability claims, whereas Illinois did not. *Id.*; see also *Kleronomos*,_ 2021 WL 1546428, at *2 (applying Illinois law; conflict of laws existed between Illinois and Wisconsin, as Wisconsin capped punitive damages and Illinois did not).

¶ 67 So if the *Townsend* plaintiff's lawsuit were governed by Michigan law, his claim for strict liability would have been subject to immediate dismissal, because Michigan law did not recognize that doctrine. The same would be true of his claim for punitive damages-stricken at the outset because they were disallowed by Michigan law. And of course, his compensatory damages would have been capped. Each of those outcomes

would have been different had Illinois law been the substantive governing law.

¶ 68 Likewise here. If the *Airbus* suit proceeded under Illinois law, plaintiff could have recovered compensatory damages for his personal injuries, provided he proved the elements of his tort claims. But if *Airbus* proceeded under the substantive law of New Zealand, his tort claim for compensatory damages would be barred, and thus the suit would be subject to immediate dismissal. See *Bennett*, 679 F.2d at 631-32.

¶ 69 The circuit court did not err in finding that a conflict of laws existed. As the question of the existence of a conflict is the only error plaintiff assigns, and we find no error in that determination, we have no basis to disturb the circuit court's judgment.

¶ 70 CONCLUSION

¶ 71 The judgment of the circuit court is affirmed.

¶ 72 Affirmed.

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2023 IL App (4th) 230094-U

ALVIN F. MARSH, BEVERLY MARSH, HENRY LIKES, MAXINE LIKES, GARY WESTERMEYER, TERESA WESTERMEYER, FRED BARNETT, and ROBERTA BARNETT, Plaintiffs-Appellants,
v.
RICHARD MIDDLETON, THE MIDDLETON LAW FIRM, LLC, THE ESTATE OF CHARLES SPEER, PETER BRITTON BIERI, SPEER LAW FIRM, P.A., RALPH DAVIS, and RALPH DAVIS LAW, Defendants-Appellees.

No. 4-23-0094

Court of Appeals of Illinois, Fourth District

October 23, 2023

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

Appeal from the Circuit Court of Peoria County No. 22LA15 Honorable Paul E. Bauer, Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court. Presiding Justice DeArmond and Justice Zenoff concurred in the judgment.

ORDER

KNECHT JUSTICE.

¶ 1 *Held*: (1) Plaintiffs' complaint alleging legal malpractice is not time-barred; the injury for which plaintiffs sought compensation occurred within two years of the complaint's filing.

(2) The determination plaintiffs' complaint was timely filed renders moot plaintiffs' argument the circuit court erred by denying their motion for leave to file an amended complaint.

¶ 2 In January 2022, plaintiffs, Alvin F. Marsh, Beverly Marsh, Henry Likes, Maxine Likes, Gary Westermeyer, Teresa Westermeyer, Fred Barnett, and Roberta Barnett, filed a malpractice action against defendants, Richard Middleton, the Middleton Law Firm, LLC, the estate of Charles Speer, Peter Britton Bieri, Speer Law Firm, P.A., Ralph Davis, and Ralph Davis

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Law, attorneys who represented plaintiffs in proceedings against individuals and entities engaged in hog farming (hog farmers) on nearby property. Plaintiffs alleged defendants were negligent in failing to warn them of their potential liability for their adversary's attorney fees, which resulted in plaintiffs incurring a liability of $2.5 million for those fees. Defendants moved to dismiss plaintiffs' complaint, asserting plaintiffs' claims were time-barred as plaintiffs were aware of their potential liability at the end of the May 2016 underlying trial. The circuit court agreed with defendants regarding the start of the statute-of-limitations period and dismissed plaintiffs' complaint with prejudice.

¶ 3 Plaintiffs appeal, arguing, in part, the statute of limitations for their claim did not begin to run until September 9, 2020, the date a court first ruled plaintiffs were liable for the hog farmers' attorney fees. We agree with plaintiffs and reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 On January 10, 2022, plaintiffs filed their complaint for legal malpractice and breach of fiduciary duty. According to the complaint, defendants agreed to represent plaintiffs in legal proceedings to remedy the environmental pollution caused by the nearby hog-farming operation. In the opening paragraph of the complaint, plaintiffs alleged defendants breached the standard of care by failing to warn of the risks of liability for attorney fees under the Illinois Farm Nuisance Suit Act (Farm Act) (740 ILCS 70/0.01 *et seq*. (West 2014)), encouraging plaintiffs to litigate without exercising due diligence or informing plaintiffs of the case's weaknesses, and placing their interests in a contingent fee over the plaintiffs' interests in abating the nuisance. Plaintiffs asserted they suffered damages in excess of $2.5 million, the amount of attorney fees awarded in the underlying litigation.

¶ 6 Plaintiffs' complaint alleges the following facts: Plaintiffs Alvin and Beverly

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Marsh had lived on their family farm for decades. In August 2007, a new entity acquired a neighboring small family hog farm and expanded it to a larger one, raising at least 7000 hogs. The "feeding and hog[-]waste practices" forced the Marshes to move from their family home. The Marshes contacted defendant Charles Speer, who "touted" his experience in battling the swine industry. Speer offered to represent the Marshes on a contingent[-]fee basis: "[t]hey would have 'nothing to lose.'" Speer asked the Marshes to help him get their neighbors involved in the suit. The Marshes did so.

¶ 7 Defendants recommended plaintiffs sue the hog farmers. Defendants prepared and filed a private nuisance action against them. Plaintiffs asserted, in their complaint, "[a]s self-proclaimed national confined animal feeding operation attorneys," defendants Speer and Peter Bieri knew or should have known about the Farm Act and its fee-shifting provisions. Under the Farm Act, according to plaintiffs, prevailing plaintiffs are not awarded attorney fees, but prevailing defendants in a nuisance suit are entitled to reimbursement of attorney fees. Before the first trial in 2014, which resulted in a mistrial, defendants "advised Plaintiffs that they would win the case, an unqualified guaranty, and they repeated this advice in 2015 and 2016." Specifically, defendants Speer, Richard Middleton, and Ralph Davis repeatedly told plaintiffs Gary and Theresa Westermeyer and the Marshes they would win the case, "they had nothing to lose," and the hog farmers' counsel "would be disbarred when the case concluded."

¶ 8 On April 7, 2016, the hog farmers provided defendants with a letter offering $25,000 for two families and a warning about the fee-shifting provisions of the Farm Act. Plaintiffs were not forwarded this letter. In response, defendants asked for $2.5 million to settle the case. The hog farmers responded with an offer of $30,000 each to two families and $20,000 to the remaining families and an offer "to waive their right to petition for attorney fees." This

letter was not shared with plaintiffs. It was rejected by plaintiffs' counsel as a "self-serving epistle" and a waste of time.

¶ 9 Plaintiffs, in their complaint, outlined multiple weaknesses in their case that defendants knew or should have known about. Despite these weaknesses, defendants advised plaintiffs to reject the offer, "that they had nothing to lose, that they should go forward to the trial, and that they would win." Plaintiff Likes was told "there was nothing to lose, no cost to you at all." Defendants did not advise plaintiffs of the fee-shifting provision. Plaintiffs alleged the breaches of the standard of care caused plaintiffs to decline the settlement offer, as they trusted the legal advice "they had nothing to lose by proceeding."

¶ 10 On May 24, 2016, a jury ruled in favor of the hog farmers. On June 16, 2016, the hog farmers filed a motion for an unspecified amount of attorney fees. By letter, defendants told plaintiffs "the likelihood of this motion being granted was," as plaintiffs stated, "slim to none:"

> "It is our opinion that the basis of their motion for the attorneys' fee provision in the [Farm Act] is unconstitutional under the

> Illinois State Constitution and the United States Constitution; in addition, Judge Cherry has already ruled that the [Farm Act] does not even apply to your case. *** We believe there is a substantial basis for Judge Cherry to deny Defendants' motion for attorneys' fees. Moreover, if Judge Cherry does not rule in our favor, we believe that it is highly unlikely that on appeal the higher courts will affirm his decision. As with any judicial decision, however, there is always the risk of an adverse outcome though it is our belief that the risk is low."

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On May 5, 2019, the circuit court denied the hog farmers' motion for attorney fees.

¶ 11 According to the complaint, defendants represented to plaintiffs there were "solid grounds for appeal," exaggerating the odds of prevailing. In that same letter, defendants failed to warn of the substantial risk of fee liability and of the fact their opponents' fees would continue to increase. The letter states, however, "We cannot guarantee we will succeed or that the appellate courts may not reverse Judge Cherry on his denial" of the hog farmers' motion for attorney fees.

¶ 12 On May 19, 2019, notice of appeal was filed. The hog farmers filed a cross-appeal, seeking attorney fees. On September 9, 2020, the jury verdict in favor of the hog farmers was upheld, and this court found plaintiffs liable for the hog farmers' attorney fees, reversing the circuit court's denial of those fees. *Marsh v. Sandstone North, LLC*, 2020 IL App (4th) 190314, ¶ 1, 179 N.E.3d 402.

¶ 13 On March 4, 2021, defendants informed plaintiffs leave to appeal to the Illinois Supreme Court had been denied. At this point, defendants encouraged plaintiffs to speak to tax and estate attorneys and advised "[i]f you have any insurance coverage for this liability, we advise you to contact your insurance company immediately." Defendants wrote they would "continue to represent you and work to try to keep the fee and expense demands as reasonable as possible." However, before the circuit court ruled on the motion for fees, defendants moved to withdraw as counsel.

¶ 14 In October 2021, the circuit court found plaintiffs jointly and severally liable for $2,530,227.73 in attorney fees. This was a final judgment on November 16, 2021. Plaintiffs maintained they received no warning an adverse judgment of attorney fees could be made against them until "on or about April 17, 2020."

¶ 15 In March 2022, defendant Davis moved to dismiss the complaint under section

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2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2022)), arguing plaintiffs' claims were time-barred. The remaining defendants adopted Davis's motion. According to the motion, section 13-214.3(b) of the Code requires actions against an attorney for "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." *Id.* § 13-214.3(b). Defendants asserted plaintiffs alleged "all defendants were negligent in eight ways prior to the May 2016 trial" and, therefore, the conduct from 2016 cannot be the basis for claims filed in January 2022. Defendants maintained the adverse jury verdict on May 24, 2016, triggered the running of the limitations period, rendering plaintiffs' suit too late. Defendants further alleged multiple errors in the pleadings, errors not relevant to this appeal.

¶ 16 After a hearing, the circuit court granted defendants' motion, finding the following:

> "The Court finds that this cause of action accrued on May 24, 2016[,] after a jury in the underlying action, Scott County Illinois Case No. 2010 L 3, reached a verdict and a judgment was entered. On June 16, 2016[,] the prevailing party, the 'hog farm,' filed a motion to collect their attorneys' fees, again creating a time when the Plaintiffs knew or reasonably should have known of the injury for which damages are sought. Each date accrued at least two years prior to the date this complaint was filed, January 10, 2022."

¶ 17 Plaintiffs filed a motion to reconsider and for leave to file an amended complaint, which included allegations defendants fraudulently concealed their malpractice. After a hearing,

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the circuit court denied plaintiffs' motion and reaffirmed its ruling after finding the matter time-barred:

> "[T]his cause of action accrued on May 24, 2016, when the jury in the underlying [case] reached a verdict upon which judgment was entered against the present Plaintiffs. The Court further finds the parties knew or reasonably should have known of the

> Motion to Collect Attorney Fees by the prevailing Defendants in the underlying case on or about June 23, 2016, when advised by letter from Defendant Charles Speer."

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, plaintiffs first argue the circuit court erroneously found the limitations period began in 2016. Specifically, they argue the May 24, 2016, date is inappropriate as there had been no determination plaintiffs were liable for the hog farmers' attorney fees, and June 2016 is also not a proper date as the hog farmers simply requested attorney fees and there had been no determination plaintiffs were liable. Plaintiffs maintain the statute of limitations did not begin to run until they were injured, and no injury occurred until a court found they were liable for attorney fees, which did not occur until, at the earliest, this court's September 2020 ruling remanding for an award of attorney fees. *Marsh*, 2020 IL App (4th) 190314, ¶ 106.

¶ 21 Defendants counter plaintiffs' injury accrued and the statute of limitations began to run when judgment was entered in favor of the hog farmers in the underlying case. Defendants argue in 2016, plaintiffs were on notice they had lost the underlying action and the defendants wanted their attorney fees and, therefore, were obligated to inquire further. Defendants

emphasize section 4.5 of the Farm Act, which provides the following regarding attorney fees:

> "In any nuisance action in which a farming operation is alleged to be a nuisance, a prevailing defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, together with a reasonable amount for attorney fees." 740 ILCS 70/4.5 (West 2016).

¶ 22 The motion to dismiss in this case was filed under section 2-619.1 of the Code (735 ILCS 5/2-619.1 (West 2020)). A section 2-619.1 motion combines a motion to dismiss under section 2-615 (*id.* § 2-615) based on alleged insufficient pleadings with a section 2-619 motion to dismiss (*id.* § 2-619) based on defenses or defects. *Madison County v. Illinois State Board of Elections*, 2022 IL App (4th) 220169, ¶ 42, 214 N.E.3d 931. In this case, defendants sought dismissal under both sections, but dismissal was obtained under the section 2-619 challenge to the lack of timeliness of

plaintiffs' claims (see 735 ILCS 5/2-619(a)(5) (West 2020)). The only section applicable to this appeal is section 2-619.

¶ 23 A motion to dismiss under section 2-619 "admits the legal sufficiency of the complaint and all well-pleaded facts and reasonable inferences therefrom and asserts affirmative matter outside the complaint that bars or defeats the cause of action." *Village of Orion v. Hardi*, 2022 IL App (4th) 220186, ¶ 23. A court, when ruling on the motion, must construe the complaint in the light most favorable to the nonmovant and "grant the motion only if the plaintiff can prove no set of facts entitling him or her to recover." *Id.* When a movant raises a statute-of-limitations issue in a motion to dismiss, the nonmovant "must provide enough facts to avoid application of the statute of limitations." *Hermitage Corp. v. Contractors Adjustment Co.*,

166 Ill.2d 72, 84, 651 N.E.2d 1132, 1138 (1995). Our review of a section 2-619 dismissal is *de novo*. *Van Meter v. Darien Park District*, 207 Ill.2d 359, 367, 799 N.E.2d 273, 277 (2003).

¶ 24 Legal-malpractice actions "based on tort, contract, or otherwise *** must be commenced within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2016). In deciding when a claim accrues, we first identify the injury and then decide when the injury was discovered or should have been discovered. *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 16, 193 N.E.3d 1187. In a legal-malpractice claim, the "injury" is "a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission." *Id.* ¶ 17 (quoting *Northern Illinois Emergency Physicians v. Landau, Omahana &Kopka, Ltd.*, 216 Ill.2d 294, 306, 837 N.E.2d 99 (2005)). A client is not" 'injured' unless and until he has suffered a loss for which monetary damages may be sought." *Id.* In legal-malpractice claims, as the injury is pecuniary, injury and damages are coextensive: "The existence of actual damages is therefore essential to a viable cause of action for legal malpractice." *Id.* ¶ 18 (quoting *Northern Illinois Emergency Physicians*, 216 Ill.2d at 307). No cause of action exists when damages are speculative. *Id.*

¶ 25 Thus, when considering a challenge to a legal-malpractice claim based on the alleged expiration of the statute of limitations, the initial task is to identify the plaintiff's injury. Here, the injury pled by plaintiffs is their liability for attorney fees.

¶ 26 The parties disagree as to the date their injury occurred. Plaintiffs maintain the injury did not occur until this court concluded they were liable for the hog farmers' attorney fees. In support, plaintiffs rely, in part, on the First District's decision in *Hermansen v. Riebandt*, 2020 IL App (1st) 191735, ¶¶ 16, 26, 85, 195 N.E.3d 615, in which the court found the injury occurred

not when the plaintiffs learned in 2012 of a lien that had been placed on their home as a result of their attorneys' alleged negligence, but when a 2015 legal judgment, in a declaratory-judgment action, found the lien enforceable. The existence of the mortgage lien did not, the *Hermansen* court found, establish an injury as the "plaintiffs still had at least the possibility of having the mortgage lien released, either by [the opposing party] voluntarily or through court action." *Id.* ¶ 85. The court concluded only "when there was an adverse judgment entered against them[ ] that [the] plaintiffs actually incurred any injury based on the existence of the mortgage lien." *Id.*

¶ 27 Defendants, quoting, *Carlson*, 2022 IL 126935, ¶ 19, contend the injury occurred when the judgment was entered against plaintiffs in the underlying action: "[T]he injury does not accrue, and the statute of limitations does not begin to run, until a judgment or settlement or dismissal of the underlying action." Following this, defendants argue, in May 2016, when the judgment was entered against plaintiffs, the statute of limitations began to run even though the amount of damages had yet to be determined.

¶ 28 We first find defendants' reliance on *Carlson* for this assertion is misplaced, as *Carlson* does not create a bright-line rule the time for bringing a malpractice suit begins when judgment in the underlying action is entered. The quoted language relied upon by defendants follows the Illinois Supreme Court's definition of a *typical* legal malpractice case, in which "an attorney's negligence allegedly occurred during the attorney's representation of a client in underlying litigation" and "the client suffered a monetary loss and but for the attorney's negligence the client would have recovered in the underlying litigation." *Id.* This is not one of those typical legal-malpractice cases. In this case, the allegations in the complaint reveal plaintiffs are not seeking damages based on a claim defendants' negligence prevented them from winning the underlying case. Plaintiffs seek damages for the attorney-fee liability.

¶ 29 Defendants argue, however, under the express terms of the Farm Act, plaintiffs became liable for attorney fees, and thus were injured, at the time judgment was entered in the underlying action. Defendants emphasize section 4.5 of the Farm Act, which provides "a prevailing defendant *shall* recover the aggregate amount of costs and expenses *** together with a reasonable amount for attorney fees." (Emphasis added.) 740 ILCS 70/4.5 (West 2016). At the time of the judgment, defendants conclude, the injury occurred even though the amount of damages had not yet been determined.

¶ 30 We are not convinced by defendants' argument, as the allegations and record show liability for attorney fees remained contested and, therefore, speculative at the time judgment in the underlying action occurred. This makes this case more like *Hermansen*, where the parties were aware of a potential financial liability but had not yet incurred that liability. In the underlying action here, defendants, as counsel for plaintiffs, asserted multiple challenges to the applicability of the Farm Act's attorney-fee provision. Defendants argued the Farm Act did not apply to plaintiffs' suit against the hog farmers as that act only applied to lawsuits brought by nonfarmers against farmers and the attorney-fee provision was unconstitutional. See *Marsh*, 2020 IL App (4th) 190314, ¶¶ 6, 61. The circuit court agreed with defendants' assessment, finding the Farm Act did not apply to plaintiffs' claims and plaintiffs, therefore, were not liable for the hog farmers' attorney fees. No pecuniary injury had yet occurred.

¶ 31 Instead, defendants' arguments in the underlying action show the liability for attorney fees remained undetermined and unresolved until our September 2020 decision in *Marsh*. Until *Marsh*, no court previously found plaintiffs liable for the hog farmers' attorney fees. The circuit court had, in fact, denied the hog farmers' request for those fees. Any lawsuit filed by plaintiffs for damages based on liability for attorney fees within two years of the 2016

judgment would have been premature. This conclusion finds support in the Illinois Supreme Court's analysis in *Carlson*, a case cited by both parties. In its analysis of a statute-of-limitations claim, the *Carlson* court highlighted the decision of *Lucey v. Law Offices of Pretzel &Stouffer, Chartered,* 301 Ill.App.3d 349, 703 N.E.2d 743 (1998). See *Carlson*, 2022 IL 126935, ¶ 22. The plaintiff in *Lucey* sought legal advice regarding whether he could solicit clients from his employer before he resigned to start his new company. *Id.* (citing *Lucey*, 301 Ill.App.3d at 351). Later, the *Lucey* plaintiff was sued by his former employer. *Id.* (citing *Lucey*, 301 Ill.App.3d at 352). The plaintiff hired new counsel to represent him in the suit with his former employer. While that suit was pending, the plaintiff brought a legal-malpractice claim

against prior counsel. *Id.* (citing *Lucey*, 301 Ill.App.3d at 352). On appeal, the First District found the suit against prior counsel premature:

> "Since it was possible that the plaintiff could prevail against the former employer, the damages were 'entirely speculative until a judgment is entered against the former client or he is forced to settle.' [Citation.] Thus, the plaintiff would not sustain any 'actual' damages unless and until the former employer's lawsuit was resolved adversely to him. [Citation.] The court also reasoned that requiring a client to bring a provisional malpractice suit would undermine judicial economy and the attorney-client relationship. [Citation.]" *Id.* ¶ 23.

¶ 32 As established in *Carlson* and *Lucey*, a cause of action for legal malpractice cannot succeed "[u]nless the client can demonstrate that he has sustained a monetary loss as the result of some negligent act on the lawyer's part." *Id.* (quoting *Northern Illinois Emergency Physicians,*

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216 Ill.2d at 307). Plaintiffs' monetary loss did not occur until this court determined their liability for the hog farmers' attorney fees. The hog farmers' June 2016 motion for attorney fees does not change this analysis, as no damages or pecuniary injury had occurred.

¶33 Defendants' case law does not support a different result. For example, in *Butler v. Mayer, Brown &Platt*, 301 Ill.App.3d 919, 921, 922-23, 740 N.E.2d 740, 742-43 (1998), the statute of limitations began to run when the circuit court entered judgment in the underlying action against the client *and* ordered the client to pay attorney fees. In *Belden v. Emmerman*, 203 Ill.App.3d 265, 267, 560 N.E.2d 1180, 1181 (1990), the attorneys entered a settlement agreement over a landlord-tenant dispute allegedly without the clients' consent and the circuit court entered orders pursuant to that settlement. Rejecting the argument the plaintiffs did not know they were damaged as the circuit court's orders could have been reversed on appeal, the reviewing court found the statute of limitations began to run when the circuit court entered the orders directing the tenant to leave the premises and setting the financial terms. *Id.* at 267, 269. Instead, the defendants' cases show the clients' injuries for which they were seeking relief occurred when the circuit courts entered judgments establishing the clients' liability due to their attorneys' alleged misconduct.

¶ 34 Moreover, the fact plaintiffs learned the hog farmers were seeking attorney fees did not create a pecuniary injury. At that time, despite the language in the Farm Act, there remained the possibility through court

action plaintiffs would not be liable for the hog farmers' attorney fees. According to the allegations in the complaint, the circuit court had, before the end of the trial in the underlying litigation, already determined the Farm Act did not apply to plaintiffs' claims against the hog farmers. Only in September 2020, when this court entered the adverse judgment against plaintiffs, did plaintiffs incur an injury. Plaintiffs' complaint filed less

than two years later was therefore timely, and the motion to dismiss was improperly granted.

¶ 35 Plaintiffs last argue the circuit court erred in denying their request for leave to file an amended complaint. Plaintiffs' appellate brief indicates they sought to amend their complaint by highlighting allegations of fraudulent concealment in order to extend the statute of limitations to five years after they discovered they had a cause of action. See 735 ILCS 5/13-215 (West 2016) ("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.").

¶ 36 Our decision finding plaintiffs' complaint timely under section 13-214.3(b) of the Code (*id.* § 13-214.3(b)), which affords plaintiffs the result they seek, renders consideration of this issue moot. See *In re Marriage of Peters-Farrell*, 216 Ill.2d 287, 291, 835 N.E.2d 797, 799 (2005) ("An appeal is moot if no actual controversy exists or if events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief."). We will not consider it.

¶ 37 III. CONCLUSION

¶ 38 We reverse the circuit court's dismissal of plaintiffs' complaint and remand for further proceedings.

¶ 39 Reversed and remanded.

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2022 IL App 220108-U

KYLE PRICE, as Independent Administrator of the Estate of Samuel Price, Deceased, Plaintiff-Appellant,
v.
CK BRUSH PLUMBING, LLC, Defendant-Appellee.

No. 4-22-0108

Court of Appeals of Illinois, Fourth District

September 26, 2022

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

Appeal from the Circuit Court of McLean County No. 21L4 Honorable Rebecca S. Foley, Judge Presiding.

DOHERTY, JUSTICE delivered the judgment of the court. Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

DOHERTY, JUSTICE

¶ 1 *Held*: (1) The appellate court affirmed, concluding the trial court committed no error in granting defendant's motion for summary judgment based on the open and obvious doctrine. The distraction and deliberate encounter exceptions did not apply.

(2) The trial court did not abuse its discretion in denying plaintiff's motion for leave to amend.

¶ 2 Samuel Price (decedent) was experiencing a sewage problem at his home and contacted defendant CK Brush Plumbing, LLC, for assistance. In the course of its work for Price, defendant's employees dug a large hole on the property. Several months later, decedent was found lying dead at the bottom of the hole. The cause of death was identified as "cervical spinal injuries due to a fall into a sewage sump pit."

¶ 3 Plaintiff Kyle Price, as independent administrator of the estate of his late father, filed a wrongful death action against defendant, alleging decedent died after falling into a hole on

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his property that defendant negligently created. The trial court granted summary judgment in defendant's favor, finding defendant owed no duty because the condition at issue was open and obvious. Plaintiff subsequently filed an emergency motion for leave to file a first amended complaint, which the court denied. Plaintiff appeals both rulings, arguing (1) the court's grant of summary judgment was improper because there are issues of material fact regarding application of the open and obvious doctrine and (2) the court abused its discretion by denying his motion for leave to amend. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff filed his complaint against defendant alleging that defendant was hired to perform work on decedent's property and as part of that work "created a hole on the premises, approximately seven by eight feet wide and five feet deep." Plaintiff asserted defendant "had a duty to use ordinary care for the safety" of decedent but breached its duty in several respects, including: (1) improperly operating, managing, maintaining, and controlling the property; (2) failing to provide a safe "route of access" on the property; (3) failing to warn of the dangerous condition existing on the property; (4) failing to provide adequate safeguards to prevent injury; (5) allowing the hole "to remain out of condition and in disrepair"; (6) failing "to adhere to appropriate requirements and codes"; (7) failing to ensure a safe and suitable walkway; and (8) negligently creating a dangerous condition on the property.

¶ 6 Defendant filed a motion for summary judgment, arguing the hole was an open and obvious condition of which decedent was well aware and, as a result, it owed him no duty of care. Defendant also maintained that no exception to the open and obvious doctrine applied. Plaintiff responded that both the distraction exception and deliberate encounter exception to the open and obvious doctrine were applicable. He asserted that, pursuant to those exceptions, defendant had a

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duty to protect decedent against the dangerous condition it created on his property.

¶ 7 The evidence presented with the motion and response showed that decedent resided at 1806 South Morris Avenue in Bloomington, Illinois, with plaintiff, his youngest adult son. At some point in 2018, decedent began experiencing a "sewage blockage problem" on his property that resulted in sewage "backing up" into the basement of his residence. Decedent initially

contacted A-1 Haney Plumbing, Inc. (A-1 Haney) about the problem, and in March and April 2018, A-1 Haney employees visited decedent's property to explore the issues. During the visits, they used both a camera and "high-pressured jetting" to investigate and unclog decedent's sewer line. Ultimately, their efforts were unsuccessful and, despite contacting both the City of Bloomington and the McLean County Health Department, A-1 Haney was unable to determine whether decedent's property was "on city sewer or on a septic system."

¶ 8 Decedent continued to experience sewer problems into early 2019 and eventually sought help from defendant. In early May, defendant's employees, Nicholas Beall and Tony Cottone, visited decedent's property and inserted a camera into his sewer line to attempt to diagnose the problem. However, at some point, the camera "got stuck," and the employees "couldn't figure out where the sewer was headed to." One week later, Beall and Paul Brush, defendant's vice president, returned to decedent's property and Brush used a mini excavator to dig a hole in the location where the camera had stopped the week before. Beall and Brush placed a "trash pump" in the hole "to get water out so that [they] could visibly see what was going on." According to Beall, they found a collapsed sewer pipe, but could not determine where decedent's sewer was going or whether it was hooked into the city sewer line.

¶ 9 Brush testified he dug the hole on decedent's property to locate a septic tank. Instead of a septic tank, there was a pipe leading to the adjacent property. Brush described the pipe

as "butt tile" that consisted of "two pieces of pipe put together with no connector." Once the pipe was uncovered, "sewage would just run out [of] the tile." Brush and Beall pumped the sewage out of the hole so they could see the pipe and then they "probed around" with a camera to look for a septic tank.

¶ 10 Plaintiff estimated that the hole was six feet deep and six feet by six feet wide. After the hole was dug, Beall put up an orange construction fence with caution tape because he felt the hole posed a potential safety hazard. The construction fencing was three and a half feet tall and placed around three sides of the hole. The fourth side of the hole was protected by a taller, existing boundary fence. Beall testified the construction fence was compliant with Occupational Safety and Health Administration (OSHA) standards. Eric Haney, the owner of A-1 Haney, who was familiar with the hole, agreed that the hole was obvious and acknowledged that the fencing around the hole was acceptable "by OSHA rules." Haney said that, in his professional

experience, he had never left an open hole of that size on someone's property. He stated that, at a minimum, he would have "covered the hole with 4-by-4s, screwed plywood down to it, and put in a hatch for inspection."

¶ 11 Eric Leman, a plumbing inspector for the City of Bloomington, testified he was not aware of defendant violating any portion of the plumbing code with respect to its work on decedent's property. Leman explained that in his experience as a plumber, the use of "caution tape and then some kind of fence barrier" was used more commonly as a safety measure for an open hole than "plywood and two-by-fours."

¶ 12 The hole dug by defendant remained on decedent's property for several months. Plaintiff testified that decedent had told him defendant recommended rerouting the sewer line to the north to "hook into the city sewer" and that doing so would cost $35,000 to $40,000. But, plaintiff added, decedent did not want to reroute his line. Brush investigated both the option of

rerouting decedent's sewer to the city's sewer system and putting in a new septic system on decedent's property. He then gave decedent an oral estimate of $17,000 or $18,000 to reroute his sewer. Although decedent initially agreed to that plan, he later decided he wanted to see if there was an existing septic tank on his property. Brush believed any septic tank was likely on an adjacent property and advised decedent "to get permission to dig on the adjacent property or contact a lawyer and see if the City of Bloomington would help him out with pricing and getting a new sewer to his house." Brush believed defendant's employees returned to decedent's property once or twice after the hole was dug to probe and shovel various spots on the property looking to find a septic tank. He asserted decedent never asked defendant to return to his property to refill the hole, but he acknowledged that if the hole had been filled in decedent's "basement would have been backing up all the time."

¶ 13 The record contains conflicting evidence regarding whether defendant's employees left a pump in the hole on decedent's property after the hole was dug. Beall recalled that only a trash pump was used in the hole, and defendant did not typically leave a trash pump behind after leaving a work site. He maintained he removed the trash pump from the hole on decedent's property the same day the hole was dug. To his knowledge, defendant did not leave another pump in the hole, and he stated, "[T]hat's not something that we would have done." Beall acknowledged that if there

was no pump in the hole, the hole would eventually fill up with sewage water.

¶ 14 Beall testified the trash pump defendant used could "occasionally clog or get backed up." He stated that "[n]ormally it would just get mud on the bottom of it, and you would just have to clean it off." He also agreed that sump pumps would not "run forever" and, [d]epending on the application," a pump would need to be maintained or cleaned.

¶ 15 Brush agreed that a sump pump needed to stay in the hole if it was not going to be

filled in. He stated defendant's employees left a trash pump in the hole after it was dug to remove sewage from the hole. However, defendant removed the pump about a week later after decedent received a violation notice from the city and because defendant "didn't have an answer from [decedent] on what he wanted to do." Brush also acknowledged that the pump would have to be monitored "on a day-to-day basis" by the landowner. He disagreed that someone would have to walk up to the construction fence by the hole to see if the pump was working. He testified as follows: "You can see if the pump was running by wherever the hose was going. If water wasn't coming outside of that hose, then you would know that the pump wasn't running."

¶ 16 Plaintiff, on the other hand, testified defendant placed and left a sump pump in the hole after it was dug. Initially, a hose attached to the pump drained sewage out to the alleyway that was next to decedent's property. Plaintiff stated decedent received a complaint from the City of Bloomington regarding where the sewage was draining. Decedent contacted defendant, who then moved the hose to a different location. It was plaintiff's understanding that the sump pump was placed in the hole to help prevent decedent's basement from flooding with human excrement. Plaintiff further testified that the sump pump placed by defendant remained in the hole until January 2020, when it "died out" or "went out." He and decedent went to Menards to purchase another sump pump, which plaintiff then installed inside the hole.

¶ 17 According to plaintiff, he and decedent checked on the sump pump daily. He stated they "just checked to make sure it was running" to prevent sewage from backing up into decedent's basement or from overflowing from the hole onto the land. Plaintiff described how he and decedent would check the pump, stating as follows: "You can just walk up to the side, you know and look at it. You could hear it running. You wouldn't even have to get close

to it to see that." Plaintiff agreed that the pump had not been removed from the hole for cleaning. He stated that other than

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replacing the pump in January 2020, he had never been in the hole, nor had he seen anybody else in the hole.

¶ 18 Decedent's eldest son, Cory Price, who resided in California, testified that he had visited decedent's home over Christmas 2019. He was aware decedent's property had sewage problems and during his visit he had observed the hole dug by defendant. Cory also saw decedent checking on a sump pump inside the hole "to make sure it was working." He stated decedent would "look over" and ensure water was not "over that pump." It was his understanding that decedent and plaintiff would check to make sure the pump was working every day.

¶ 19 On February 2, 2020, plaintiff found his father dead in the hole. Plaintiff testified he had no knowledge of how decedent "ended up in the hole before he died" and that he knew of no evidence that decedent had been distracted. He agreed that decedent "knew that the hole was there" from the time it was dug until the time he passed away. Decedent had told plaintiff that he was worried about the hole and did not want anyone around it. To plaintiff's knowledge, decedent had never been in the hole prior to February 2020. He even recalled decedent remarking that he "would never get close to that hole" and that he stated," 'There's no way in hell I could get out of that.'" Decedent had been in a car accident as a young man and lost his right arm. However, plaintiff described decedent as being in "good shape" and stated decedent had no medical issues and no problems with balance or dizziness.

¶ 20 Plaintiff stated that the work defendant performed on decedent's property in May 2019 corrected decedent's sewage backup problem, and that there were no subsequent sewage backups in decedent's basement. He asserted the sump pump was still working on the day decedent died. Plaintiff further testified as follows:

> "Q. And then after [decedent] was found, did you determine that there was

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> a problem at that point that he would have been working on?
>
> A. No. And I don't even know what he would have been doing anyway. He never would have been working on that pump.

Q. You continued to live at the house for a few months after February 2, right?

A. Yes.

Q. And no problems with the sewage system during that time?

A. No.

Q. Do you have any idea why [decedent] was in the hole?

A. No. I have no clue, no clue at all."

¶ 21 After decedent's death, his son Cory hired A-1 Haney to fix the sewage problems on the property and fill in the hole. He paid $18,200 for the work, which entailed rerouting the sewer on decedent's property to "tie into" the City of Bloomington's sewer system through a manhole on an adjacent property.

¶ 22 At the conclusion of the January 12, 2022, hearing on defendant's motion for summary judgment, the trial court orally granted the motion for summary judgment on the basis that defendant owed no duty of care to decedent. The court found the hole on decedent's property was an open and obvious condition and neither the distraction exception nor the deliberate encounter exception to the open and obvious doctrine applied. A written order consistent with the court's oral ruling was filed the next day. On January 14, plaintiff filed an emergency motion for leave to file a first amended complaint. He sought to add a claim against defendant based on a voluntary undertaking theory of liability prior to the expiration of the statute of limitations on February 2, 2022. On January 31, 2022, the court conducted a hearing and denied plaintiff's motion

to amend in an order dated February 1, 2022.

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Standard of Review

¶ 26 Under Section 2-1005 of the Illinois Code of Civil Procedure, summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). Summary judgment is a drastic measure that should only be allowed when the right of the moving party is clear and free from doubt. *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15. However, the use of summary judgment in a proper case is to be encouraged. *Jones v. Pneumo Abex LLC*, 2019 IL 123895, ¶ 31. Appellate review of a trial court's grant of summary judgment is under the *de novo* standard. *Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 17.

¶ 27 The issue presented below is one of duty. Whether a duty exists is a question of law for the court, and it may be determined on a motion for summary judgment. *Wojdyla v. City of Park Ridge*, 148 Ill.2d 417, 421 (1992). "Whether a dangerous condition is open and obvious may present a question of fact," but "where no dispute exists as to the physical nature of the condition, whether the dangerous condition is open and obvious is a question of law." *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 18.

¶ 28 B. Duty-Open and Obvious Conditions

¶ 29 Both parties here begin their analysis by reference to the general rule that a possessor of land is subject to liability for physical harm caused to others as a result of a dangerous condition on the premises. *Genaust v. Illinois Power Co.*, 62 Ill.2d 456, 468 (1976); see also

Restatement (Second) of Torts § 343. The open and obvious rule can apply even where the defendant is neither an owner nor possessor of the land. It is "firmly established in Illinois that a party that creates a dangerous condition will not be relieved of liability because that party does not own or possess the premises upon which the dangerous condition exists." *Corcoran v. Village of Libertyville*, 73 Ill.2d 316, 324 (1978); see also *Hutson v. Pate*, 2022 IL App (4th) 210696, ¶¶ 53-60. The party creating the dangerous condition is liable "to the same extent as would be the owner or possessor." *Corcoran*, 73 Ill.2d at 324. The evidence here is that defendant created the hole plaintiff contends was dangerous.

¶ 30 As the general rule applies here, so too does the "open and obvious" exception to that rule: a defendant is "not ordinarily required to foresee and protect against injuries from potentially dangerous conditions that are open and obvious." *Bucheleres v. Chicago Park District,* 171 Ill.2d 435, 447-48 (1996). "Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them." Restatement (Second) of Torts § 343A cmt. e (1965).

¶ 31 Whether the excavated ground here is considered a "hole" (see *Peters v. R. Carlson & Sons, Inc.*, 2016 IL App (1st) 153539, ¶¶ 2, 19), or whether its depth is the functional equivalent of a "height" (see *Bruns*, 2014 IL 116998, ¶ 17), both the condition and the danger presented by it meet every definition of open and obvious. The condition was created as a result of work that decedent requested; once completed, it was a conspicuous feature on his property; it was well known to decedent; and he encountered it daily for a period of months. Plaintiff conceded at oral argument that the hole constituted an open and obvious condition; in other words, a defendant could normally expect a person lawfully on the premises to guard against the danger presented and

owes no duty.

¶ 32 The real issue here is whether either the "distraction" or "deliberate encounter" exception to the rule of non-liability for open and obvious conditions apply here. If either exception applies, then defendant owed a duty to protect decedent against the danger posed by the excavated hole.

¶ 33 C. The Distraction Exception

¶ 34 An exception to the general rule of non-liability for open and obvious conditions is what has come to be known as the "distraction exception." Although a condition may be open and obvious, the owner or possessor may still owe a duty where there is "reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it." *Ward v. K Mart Corp.*, 136 Ill.2d 132, 149-50 (1990) (quoting Restatement (Second) of Torts § 343A cmt. f (1965)).

¶ 35 The distraction exception will apply only "where evidence exists from which a court can infer that plaintiff was actually distracted." *Bruns*, 2014 IL 116998, ¶ 22; *Sollami v. Eaton*, 201 Ill.2d 1, 16-17 (2002). Plaintiff here argues that the evidence of distraction is that decedent was required to check on the pump daily to ensure that it was working; thus, plaintiff argues, it is reasonable to anticipate that decedent "would momentarily fail to avoid the risk of the hole" as he checked on the operation of the pump. This argument is entirely a matter of speculation, as there is no evidence in the record to suggest that decedent was distracted or that distraction is why he fell into the hole. In addition, plaintiff is construing the hole and the pump as though they were separate and unrelated, essentially suggesting that decedent's attention could be diverted from the hole because he was

distracted by the pump *in the hole*. This is an insufficient basis to find, as required, that decedent was "actually distracted."

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¶ 36 Plaintiff argues that the fact that decedent was missing one arm due to a prior amputation brings this case within the holding in *Erne v. Peace*, 164 Ill.App.3d 420, 421-22 (1987). However, the physical limitation at issue in *Erne* was a visual impairment that affected the plaintiff's ability to perceive the dangerous condition at issue. Plaintiff fails to articulate any nexus between decedent's missing arm and his ability to appreciate the danger presented by the excavated hole.

¶ 37 D. The Deliberate Encounter Exception

¶ 38 Another exception to the general rule of non-liability for open and obvious conditions is the "deliberate encounter" exception. Even where a dangerous condition is open and obvious, "harm may be reasonably anticipated when the possessor 'has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk.'" *LaFever v. Kemlite Co.*, 185 Ill.2d 380, 391 (1998) (quoting Restatement (Second) of Torts § 343A cmt. f (1965)). In examining the deliberate encounter exception, the focus is on what the defendant anticipates, or should anticipate, the entrant on the land will do. *Lucasey v. Plattner*, 2015 IL App (4th) 140512, ¶ 41. It has been said that the deliberate encounter exception requires that "the injured party's only 'real' solution" is to choose to encounter the dangerous condition. *Hastings v. Exline*, 326 Ill.App.3d 172, 176 (2001).

¶ 39 The obvious issue with invocation of the deliberate encounter exception here is that there is no evidence to show that decedent deliberately encountered the hole. We lack any information about how or why he encountered the hole on the fateful day, and it would be complete speculation to suggest that he ended up in the hole as a result of a deliberate decision. At best, the evidence would support the inference that decedent routinely approached the hole to listen for the

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operation of the pump. There is no evidence that he deliberately encountered the hole itself.

¶ 40 Even if decedent had deliberately encountered the hole, the exception bearing that name would be inapplicable here. There is no reason

for defendant to have anticipated that someone in decedent's position would have chosen to deliberately encounter the hole when there were other avenues available to him to satisfy his foreseeable objective of checking to see if the pump was still working.

¶ 41 Although the supreme court has more often applied the deliberate encounter exception in the context of economic compulsion, such as when employees are compelled to encounter dangerous conditions as part of their job, it has cautioned that the exception is not limited to such situations. *Sollami*, 201 Ill.2d at 17; *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill.App.3d 711, 725-26 (2010). Even so, there must nonetheless be some sort of driving force that will cause a person to encounter the obvious danger in pursuit of an advantage. *Frieden v. Bott*, 2020 IL App (4th) 190232, ¶ 53; see also *Smith v. Purple Frog, Inc.*, 2019 IL App (3d) 180132, ¶ 17.

¶ 42 We reject plaintiff's assertion that decedent was somehow compelled to encounter the hole to avoid his home filling with sewage. There is no evidence that decedent's home was threatened by sewage on February 2. Similarly, Beall's testimony that the pump might need maintenance or cleaning at some point in the future is irrelevant when, as plaintiff concedes, the pump was operational on the day in question. Simply put, there is no evidence decedent made, or was required to make, a deliberate choice to proceed in the face of a danger presented by the hole. Thus, the requisite driving force as required by *Frieden* is missing.

¶ 43 We further recognize that, in cases which do not involve an employment-based economic compulsion, the availability of reasonable alternatives may render the deliberate

encounter exception inapplicable. In *Hastings*, 326 Ill.App.3d at 173, and *Winters v. MIMG LII Arbors at Eastland, LLC*, 2018 IL App (4th) 170669, ¶¶ 74-76, we found that the deliberate encounter exception did not apply where the plaintiff chose to traverse the dangerous condition when alternative routes were available. More recently in *Frieden*, 2020 IL App (4th) 190232, ¶ 6, we rejected application of the deliberate encounter exception where the plaintiff was injured while helping his brother-in-law work on the roof of his house. The plaintiff in *Frieden* was under no compulsion, economic or otherwise, to encounter the obvious danger of being on a roof with no safety equipment. *Id.* ¶ 52.

¶ 44 This case is like *Hastings*, *Winters*, and *Frieden*, each of which involved a person who was not facing any compulsion but who may have chosen a less safe path despite reasonable alternatives. Even if decedent had

good reason to check on the operation of the pump, he could have done so by listening at a safe distance or by checking the discharge end of the hose running from the hole. Plaintiff made it clear that "you can just walk up to the side, you know, and look at it. You could hear it running. You wouldn't even have to get close to it to see that." Thus, as in *Hastings*, it cannot be said that decedent's "only 'real' solution" was to choose to encounter the dangerous condition. There was no reason for defendant to anticipate that decedent would "encounter" the hole itself.

¶ 45 E. Traditional Tort Analysis

¶ 46 The supreme court has cautioned that the "existence of an open and obvious danger is not an automatic or *per se* bar to the finding of a legal duty," and the court must still apply traditional duty analysis to the facts of the case. *Bruns*, 2014 IL 116998, ¶ 19. In determining whether a duty exists, a court should consider (1) the reasonable foreseeability of injury, (2) the reasonable likelihood of injury, (3) the magnitude of the burden that guarding against injury places

on the defendant, and (4) the consequences of placing that burden on the defendant. *LaFever*, 185 Ill.2d at 389; *Bucheleres*, 171 Ill.2d at 456.

¶ 47 Where the danger is open and obvious, the first two factors of the duty analysis- the foreseeability and likelihood of injury-weigh against the imposition of a duty. *Bruns*, 2014 IL 116998, ¶ 19. We must still consider the third and fourth factors: the magnitude of guarding against the injury and the consequences of placing that burden on defendant. *Id.* ¶ 14.

¶ 48 Assessing the magnitude of the burden of the duty on defendant requires some understanding of what meeting that duty might entail. Plaintiff's complaint and his brief suggest that that either the hole should have been "repaired," *i.e.*, filled in, or defendant should have installed a more robust seal around or over it. The magnitude of guarding against the injury is not great, as the steps suggested by plaintiff are not dramatic or complicated.

¶ 49 The consequence of putting the burden on defendant in this highly unique circumstance, however, is fraught with complexity. Should defendant have filled the hole-the hole that plaintiff says was temporarily solving the sewage backup problem, and which needed to be continually drained to be effective-before decedent settled on an alternate way to prevent the sewage from backing up? Should defendant have made the hole more inaccessible, when plaintiff himself testified he needed access to the hole to replace a

pump that had stopped working? The point is simply that these two parties were not strangers to the creation of the hole; they were, in a sense, collaborators in its creation. Imposing a duty on one of them does not fit neatly within the normal parameters of tort duties, and for this reason it is difficult to say that the fourth factor-the consequences of placing a duty on defendant-weighs in favor of imposing a duty.

¶ 50 Considering all four factors, the first two weigh against imposition of a duty; the third weighs in favor of imposition of a duty; and the fourth is neutral at best. Considering all four

factors together, we find that, on balance, they do not favor the imposition of a duty under these circumstances.

¶ 51 F. Motion for Leave to Amend-Voluntary Undertaking

¶ 52 Plaintiff sought leave to amend to state a claim against defendant for a voluntary undertaking. In ruling on the motion, the trial court properly considered the factors specified in *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill.2d 263, 273 (1992): (1) whether the proposed amendment would cure the defective pleading, (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment, (3) whether the proposed amendment is timely, and (4) whether previous opportunities to amend the pleading could be identified. A trial court has broad discretion when ruling on a motion for leave to amend pleadings, and its denial of a motion to amend will not be reversed absent a manifest abuse of that discretion. *Loyola Academy*, 146 Ill.2d at 273-74.

¶ 53 The trial court disagreed with plaintiff's characterization of the proposed amendment as a "clarification" of his pleadings, and instead viewed it as the addition of a "new theory." Consequently, in assessing whether the proposed amendment would "cure" plaintiff's pleadings, the court essentially examined whether the new theory-that of a voluntary undertaking-might survive when plaintiff's negligence theories had not. The trial court felt *Buerkett v. Illinois Power Co.*, 384 Ill.App.3d 418 (2008), demonstrated that a voluntary undertaking theory would not be applicable to a case such as this one. *Buerkett* states that a voluntary undertaking may be found where a party who undertakes to render services to another, gratuitously or for consideration, and fails to exercise reasonable care if either (1) such failure increased the risk of harm or (2) the injured party relied on the undertaking. *Buerkett*, 384 Ill.App.3d at 427.

¶ 54 The trial court's view of the viability of a voluntary undertaking theory here is correct. Any duty imposed by virtue of a voluntary undertaking is construed narrowly, and it is limited to the extent of the undertaking. *Bell v. Hutsell*, 2011 IL 110724, ¶ 12. The undertaking here cannot be the creation of the hole; there is nothing about the hole's creation alleged to have been negligently undertaken. The erection of a fence around the hole could constitute the undertaking, but one cannot plausibly argue that the erection of a fence made the hole *more* dangerous, *i.e.*, that it increased the risk of harm. What plaintiff appears to focus on are actions which defendant did not undertake but which plaintiff feels it should have, such as filling or covering the hole. Such an approach is contrary to the required narrow construction of a voluntary undertaking, which is limited to the extent of the undertaking. We agree with the trial court that the proposed amendment would not cure a defect in the pleadings, and therefore this factor does not weigh in favor of amendment.

¶ 55 The trial court also considered the other three factors specified in *Loyola Academy*, noting with respect to several of them that discovery was essentially complete, and the case appeared to be ready for trial. It was clear, however, that the trial court was most concerned with allowing an amendment on a voluntary undertaking theory which appeared to lack viability in this case. Given the significant discretion vested in the trial court on decisions pertaining to amendment of pleadings, we cannot find that the trial court abused its discretion in denying leave to amend.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm the trial court's judgment.

¶ 58 Affirmed.

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2023 IL App (1st) 221381-U

MARIA OCAMPO, Plaintiff-Appellant,
v.
GROSSINGER CITY AUTOCORP, INC., Defendant-Appellee.

No. 1-22-1381

Court of Appeals of Illinois, First District, Second Division

September 19, 2023

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

Appeal from the Circuit Court of Cook County. No. 19 L 7045 Honorable Catherine A. Schneider Judge, Presiding.

JUSTICE COBBS delivered the judgment of the court. Justices McBride and Ellis concurred in the judgment.

ORDER

COBBS JUSTICE.

¶ 1 *Held*: The circuit court did not err in granting summary judgment in favor of defendant; neither did the court abuse its discretion in denying plaintiff's motion for reconsideration nor her motion for leave to file an amended complaint to include a theory of *res ipsa loquitor*.

¶ 2 Plaintiff-appellant Maria Ocampo filed a complaint against defendant-appellee Grossinger City Autocorp, Inc., alleging a single claim of negligence, following an injury she sustained on Grossinger's premises. The circuit court granted Grossinger's motion for summary judgment. On

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appeal, Ocampo argues that the circuit court erred in granting summary judgment in favor of Grossinger based on premises liability and in denying Ocampo's motions for reconsideration and leave to file an amended complaint to add a claim of *res ipsa loquitor*. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 26, 2019, Ocampo instituted an action against Grossinger, alleging negligence based on injuries she sustained on its property on July 1, 2017.

¶ 5 The undisputed facts of the case reveal the following. Grossinger operated Grossinger City Toyota, a Toyota dealership, which was located at 1561 North Fremont Street in Chicago, Illinois. The business also offered maintenance and service for those vehicles. On July 1, 2017, Ocampo brought her car to Grossinger for servicing. While her car was being serviced, Ocampo waited in the waiting room. When her car was ready, she paid for the service and walked towards the area where she was to pick up her car. The sliding glass doors opened when Ocampo approached them. As she crossed through the open sliding glass doors, the doors closed on her and she fell to the floor and was injured. An ambulance was called, and Ocampo was taken to the hospital.

¶ 6 In her complaint, Ocampo alleged that at all times, Grossinger owed "a duty to exercise ordinary care for the safety" of Ocampo and Grossinger "was negligent one or more of the following ways:"

> "(a) Chose to install a defective sliding glass door;
>
> (b) Chose to keep a defective sliding glass door after it became apparent that it malfunctioned;
>
> (c) Chose to install a sliding glass door with defective sensors;

> (d) Chose not to adjust the sliding glass door sensors so that the sliding glass door would remain open while patrons were under or near the frame of the door;
>
> (e) Chose to install a sliding glass door that lacked sensors on the closing edges of the door;
>
> (f) Was otherwise careless and negligent in the premises."

Finally, she alleged that "[a]s a direct and proximate result of one or more of the foregoing careless and negligent acts or omissions" of Grossinger, Ocampo "sustained injuries of a personal and pecuniary nature."

¶ 7 On August 7, 2019, Grossinger filed an answer to the complaint, denying that Ocampo was injured and denying all allegations of negligence.

¶ 8 During discovery, only Gary Grossinger (Gary) was deposed.

¶ 9 In his deposition, which took place on September 3, 2020, Gary, the president of Grossinger, testified as to the following. Grossinger operated at 1561 N. Fremont from September 2009 to April 2018, at which time the business was sold to AutoCanada. Grossinger "put in" the sliding glass doors within a year of September 2009 during the renovation of the building. Gary testified that he knew Ocampo had been injured but he did not know any more about her injuries and he learned about the injury from an employee. He testified that he did not know how Ocampo was injured and he did not know what Ocampo had been doing prior to the injury. He stated he did not know if there were any witnesses to the incident. He testified that if there was any surveillance footage of the sliding glass doors, he would not have access to it. He admitted that, in July 2017, Grossinger was responsible for the maintenance of the sliding glass doors. The doors were never replaced or upgraded after they were installed, and to his knowledge, there were never any repairs on the doors, including after this incident. He testified that he did not know how the

sliding glass doors functioned. At one time, there was a maintenance contract for the doors with Stanley Doors and that contract automatically renewed each year. Gary testified that the contract provided that Stanley would send service technicians to inspect the door, but Gary was unaware of what those inspections entailed and he was unaware of any repairs that Stanley deemed necessary. Gary was asked, "To your knowledge, sir, if the sliding glass doors are operating properly, they should not close on a person. Is that correct?" He responded, "I would assume they wouldn't close on somebody, no." Gary identified Rodrigo Delgado as the service advisor for Grossinger.

¶ 10 On March 2, 2021, Grossinger filed a motion for summary judgment. Therein, Grossinger argued that Ocampo has no evidence of negligence and no evidence of a dangerous condition. Grossinger set forth the elements of a premises liability claim and asserted that Ocampo had no evidence to establish proximate cause. Grossinger pointed to Ocampo's use of the word "chose" in her list of Grossinger's negligent acts and stated that she "does not have a single piece of evidence that even suggests that the door in question was 'defective' in any respect in the first place" and "zero evidence that Grossinger 'chose' to 'install' or 'keep' such a 'defective' door at its place of business." It further stated that Ocampo's complaint was completely based on conjecture and speculation. Finally, Grossinger noted that Ocampo "does not currently plead a premises liability claim" but it would be entitled to summary judgment under that theory of liability as well because there was no constructive or actual notice of the defective condition.

¶ 11 On March 23, 2021, the circuit court entered an order administratively dismissing the matter for want of prosecution. Ocampo subsequently filed a motion to vacate that order, which the court granted on March 31, 2021. The matter was then reinstated in the court's docket. This

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led to an administrative delay in the action until Grossinger filed a motion to amend the case management order. On December 30, 2021, the circuit court granted Grossinger leave to file a motion for summary judgment *instanter* and set a briefing schedule.

¶ 12 On January 19, 2022, Ocampo filed a response, pointing out that Grossinger failed to attach to its motion the transcripts from Gary Grossinger's deposition. Ocampo argued that Grossinger failed to satisfy its initial burden because it presented no evidence showing that Ocampo could not establish proximate cause. In regards to Grossinger's issue with the word "chose," Ocampo stated that that word "simply indicates that decisions regarding the installation, maintenance and upkeep of the sliding glass door in which Ocampo was injured was part of [Grossinger's] responsibility in its management of Grossinger." Lastly, she argued that Grossinger's reference to premises liability was incorrect where no such claim is before the court.

¶ 13 On February 7, 2022, Grossinger filed its reply, stating that discovery in the action was closed and the only deposition was that of Gary, who testified that he did not know how the doors operated, he did not personally maintain them, and he cannot testify that the doors were "defective." As such, "all of the evidence in this case, even when viewed most favorably to [Ocampo], utterly fails to establish a "defective" door (and how such a "defective" door caused the alleged incident to occur)[.]" Additionally, Grossinger cited to *Jones v. Pneumo Abex LLC*, 2019 IL 123895, for the proposition that, because all of relevant evidence is already before the court, the motion for summary judgment is not practically different than a motion for a directed verdict at trial.

¶ 14 On March 16, 2022, the circuit court granted Grossinger's motion for summary judgment, finding that there was no evidence in the record to support Grossinger's breach of duty and

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Ocampo failed to create a triable issue of fact as to whether Grossinger "breached its duty in causing her injury." In so finding, the court set forth the elements for an ordinary negligence claim and cited to Ocampo's complaint which alleged that Grossinger knowingly installed defective doors

and/or sensors or kept defective doors despite knowing they were defective. The court then stated that there was nothing in the record to show that Grossinger knew the doors were defective prior to the incident or that the doors were even defective.

¶ 15 On April 14, 2022, Ocampo filed a motion for reconsideration, and in the alternative, she filed a motion to amend the complaint to add a claim of *res ipsa loquitor*.[1] In her motion for reconsideration, she argued that Grossinger failed to support its summary judgment motion with evidentiary facts and therefore Grossinger "failed to satisfy its initial burden of production[.]" She also argued that the circuit court incorrectly applied the notice requirement for premises liability claims to Ocampo's complaint. In her motion to amend her complaint, Ocampo sought to add allegations of *res ipsa loquitor* and specifically that Grossinger "knew or should have known that its sliding glass doors would close on persons standing in the middle of the doors" and Grossinger "chose not to have a system of inspection[.]" She argued that the proposed amendment was timely, would cure her defective negligence pleading, and would not prejudice Grossinger.

¶ 16 On August 22, 2022, the circuit court denied both motions. As to the motion for reconsideration, the court cited to Ocampo's complaint and stated that it granted Grossinger's summary judgment motion because Ocampo "did not present any evidence to support her own

allegations" where she "expressly alleged" that Grossinger "acted negligently by way of knowingly installing (or knowingly allowing its patrons to use) defective doors." As to her motion to amend her complaint, the court found that all four of the factors set forth in *Loyola Academy v. S &SRoof Maintenance, Inc.*, 146 Ill.2d 263, 273-74 (1992), weighed against Ocampo.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Ocampo challenges the circuit court's grant of summary judgment in favor of Grossinger, as well as the denial of her motion for reconsideration. She also challenges the circuit court's denial of her motion to amend her complaint to include a theory of *res ipsa loquitor*.

¶ 20 A. Summary Judgment

¶ 21 Summary judgment is appropriate where" 'where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law.'" *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2020))." 'Genuine' means there is evidence to support the position of the nonmoving party." *Pekin Ins. Co. v. Adams*, 343 Ill.App.3d 272, 275 (2003). The court construes the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 43 (2004). The party moving for summary judgment is not required to prove its case or disprove the nonmovant's case, but instead may be "entitled to summary judgment by demonstrating the absence of a genuine issue of material fact." *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 31. The nonmovant may defeat a summary judgment motion by demonstrating that a question of fact does exist. *Id.* To do so, the nonmovant "must

come forth with some evidence that arguably would entitle [them to] recovery at trial." *Id.* "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102 (1992). "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 328 (1999).

¶ 22 Our review of the court's decision is *de novo*. *Adams*, 211 Ill.2d at 43. We may affirm the court's grant of summary judgment for any basis supported by the record, regardless of whether the trial court relied on that basis or its reasoning was correct. *Cole v. Paper Street Group, LLC*, 2016 IL App (1st) 180474, ¶ 41.

¶ 23 As both parties acknowledge, Grossinger's motion for summary judgment is a *Celotex* -type motion. This term is derived from *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and is a motion in which a defendant seeks summary judgment based on the plaintiff's lack of proof regarding matters outside the plaintiff's control and knowledge. *Jiotis v. Burr Ridge Park District*, 2014 IL App (2d) 121293, ¶¶ 23, 25-28. Whether a summary judgment motion is characterized as traditional or as *Celotex*-type is significant because strict compliance with the affidavit requirement in Supreme Court Rule 191(b) (eff. Jan. 4, 2013) is applicable to traditional motions.[2] *Jiotis*, 2014 IL App (2d) 121293, ¶ 26. Because *Celotex*-type motions assert that the nonmovant's evidence is simply insufficient, compliance with the affidavit requirement is not automatically necessary. *Id.* ¶ 25; see *Celotex*, 477 U.S. at 325. *Celotex*-type motions only require that the

nonmovant had an adequate opportunity to conduct discovery prior to summary judgment. *Id.* ¶ 26.[3]

¶ 24 We first reject Ocampo's circular argument that Grossinger must affirmatively present evidence showing that she has no evidence to support her claim. Specifically, she argues that Grossinger was required to specify how Ocampo could not prove her case based on the theory of negligence and Grossinger only presented "conjecture" in its motion and law relevant to premises liability, which Grossinger acknowledged had not been alleged in the complaint. However, on a *Celotex*-type motion, the defendant satisfies its initial burden of production when it" 'points out' the absence of evidence supporting the plaintiff's position." *Celotex*, 477 U.S. at 325; see also *Selby v. O'Dea*, 2020 IL App (1st) 181951, ¶ 218 ("[I]n a *Celotex* motion, the defendant puts forth no affirmative evidence; it merely argues that plaintiff has no evidence to prove its case."). As such, it is unclear to this court what evidence Grossinger could obtain to prove Ocampo's lack of evidence, and we are unaware of any requirement of Grossinger to do so.

¶ 25 Rather, as we have stated, Ocampo is required as the nonmovant to come forward "with some evidence that arguably would entitle recovery at trial." *Berke*, 2016 IL App (1st) 150397, ¶

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31. Although a plaintiff is not required to prove her entire case at this stage of litigation, she is nonetheless required, as the nonmoving party, to present some factual basis and evidentiary facts to support the elements of her cause of action. *Aalbers v. LaSalle Hotel Properties*, 2022 IL App (1st) 210494, ¶ 15. "[A] plaintiff cannot rely solely on the allegations in her complaint in order to raise a genuine issue of material fact." *Id.*

¶ 26 Before turning to the merits of Ocampo's claim of negligence, we address her arguments targeted at the circuit court's ruling.

¶ 27 Ocampo devotes a large part of her brief to her argument that the circuit court improperly relied on the law for a premises liability claim rather than ordinary negligence and improperly imputed a requirement of notice for her claim of negligence. In particular, she states that the trial court concluded that Grossinger owed her "no duty on the basis of lack of notice using a premises liability analysis." She also argues the trial court "failed to conduct a duty analysis in a negligence case."

¶ 28 However, as we have stated, we review the grant of summary judgment *de novo*, meaning that "we examine the evidence unconstrained by the reasoning of the trial court." *Zameer v. City of Chicago*, 2013 IL App

(1st) 120198, ¶ 12. As such, we need not dissect the reasoning for its decision on *de novo* review.

¶ 29 In any case, the court's written order clearly demonstrates that the court analyzed Ocampo's claim under the appropriate elements for ordinary negligence. Contrary to Ocampo's assertion that the court applied a requirement of "knowledge" or "notice" to her claim of negligence, the court's use of the word "knowingly" in its analysis was in reference to Ocampo's own allegations that Grossinger "[c]hose" to install or keep defective doors or sensors.

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Specifically, the court stated that her complaint alleged Grossinger "acted negligently by, *inter alia*, choosing to install sliding glass doors with defective sensors and/or defective sliding doors, and choosing 'to keep a defective sliding glass door after it became apparent that it malfunctioned[.]'" The court went on to find that there was no evidence in the record that Grossinger "knew the doors were defective" and no evidence that the doors were even defective. The word "chose" is the past tense of "choose," which is defined as "to select freely after consideration." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/chose (last visited August 31, 2023). As such, Ocampo's word choice suggests intentional conduct. It appears that the court reasonably construed her word choice as alleging that Grossinger intentionally decided with knowledge to install or keep defective doors and sensors.

¶ 30 Ocampo contends that her use of the word "chose" as opposed to "fail" is "no reason to enter summary judgment" for Grossinger. We agree. "When analyzing a party's request for relief, courts should look to what the pleading contains, not what it is called." *In re Haley D.*, 2011 IL 110886, ¶ 64. Here, the court appropriately analyzed Ocampo's claim of negligence precisely as it was alleged in her complaint. Additionally, we point out that the court also found that there was no evidence in the record that the doors or sensors were even defective. As such, summary judgment was not solely based on Ocampo's use of the word "chose."

¶ 31 Similarly, there is no basis for Ocampo's argument that the circuit court did not conduct a proper duty analysis where the circuit court specifically stated that it was granting summary judgment because it could not find any evidence in the record to support Grossinger's "alleged

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breach of duty" and Ocampo "failed to create a triable issue of fact as to whether [Grossinger] *breached* its duty in causing her injury." (Emphasis added.)

¶ 32 We now turn to the merits of Ocampo's claim of negligence.

¶ 33 To prevail in an action for negligence, the plaintiff must prove that the defendant owed a duty, the defendant breached that duty, and defendant's breach was the proximate cause of injury to the plaintiff. *Bell v. Hutsell*, 2011 IL 110724, ¶ 11. "A defendant in a negligence suit is entitled to summary judgment if he can demonstrate that the plaintiff has failed to establish a factual basis for one of the required elements of a cause of action for negligence." *Smith v. Tri-R Vending*, 249 Ill.App.3d 654, 658 (1993). "If the plaintiff cannot establish any element of his cause of action, summary judgment is proper." *Milevski v. Ingalls Memorial Hospital*, 2018 IL App (1st) 172898, ¶ 28.

¶ 34 For the following reasons, we conclude that summary judgment in favor of Grossinger was proper.

¶ 35 First, based on the record before us, Ocampo has not shown that Grossinger "chose" to install or keep defective doors or sensors. There is clearly no evidence in the record that Grossinger was aware of any issues or defects with the doors or their sensors. Gary testified that he did not know how the injury occurred or how the doors or sensors functioned. He further testified that Grossinger had a service agreement with a maintenance company to inspect the sliding glass doors, but he had no knowledge as to what the maintenance company's inspections entailed. He also testified that he was never informed of any problems or repairs with the doors by the maintenance company. From this evidence, which is the only evidence before us, there is no factual basis to support Ocampo's allegations as stated in her complaint.

¶ 36 Second, even if we do not strictly apply Ocampo's language to require evidence that Grossinger expressly "chose" to act negligently, she also has not presented any evidence to create a genuine issue of material fact regarding proximate cause, *i.e.* whether Grossinger's alleged negligence caused her injuries. See *National Tractor Parts, Inc. v. Caterpillar Logistics, Inc.*, 2020 IL App (2d) 181056, ¶ 38 ("If a plaintiff fails to establish one element of the cause of action, summary judgment in favor of the defendant is appropriate.").

¶ 37 "[P]roximate cause can only be established when there is a reasonable certainty that the defendant's act caused the injury." *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill.App.3d 789, 795 (1999). Although "proximate cause is generally a question of fact, it becomes a question of law when the facts alleged indicate that a party would never be entitled to recover." *Aalbers*, 2022 IL App (1st) 210494, ¶ 16. Proximate cause may be established through direct or circumstantial evidence. *Keating v. 68th &Paxton, L.L.C.*, 401 Ill.App.3d 456, 473 (2010).

¶ 38 Here, Ocampo asserts that her negligence claim is based on circumstantial evidence. "Circumstantial evidence is the proof of certain facts and circumstances from which the fact finder may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *Eskridge v. Farmers New World Life Insurance Co.*, 250 Ill.App. 3 603, 610 (1993). A fact can be established using circumstantial evidence as long as "the circumstances are so related to each other that it is the only probable, and not merely possible, conclusion that may be drawn." *Keating v. 68th &Paxton, L.L.C.*, 401 Ill.App.3d 456, 473 (2010). "If a plaintiff cannot identify the cause of his injury or can only guess as to the cause, a court cannot find the defendant liable for negligence." *Barclay v. Yoakum*, 2019 IL App (2d) 170962, ¶ 9 (citing *Kimbrough v. Jewel Cos.*, 92 Ill.App.3d 813, 817 (1981)).

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¶ 39 We recognize that an inference could be drawn that the doors must have in some way been defective based solely on Ocampo's injury. That inference, however, does nothing to prove that Grossinger's conduct was the proximate cause of her injury. See *Kellman v. Twin Orchard Country Club*, 202 Ill.App.3d 968, 974 (1990) ("The occurrence of an accident does not support an inference of negligence, and, absent positive and affirmative proof of causation, [a] plaintiff cannot sustain the burden of establishing the existence of a genuine issue of material fact."). As we have already made clear, Gary's testimony does not provide any additional evidence showing that Grossinger's alleged negligence was the cause of Ocampo's injury. Gary testified that Grossinger had an agreement with a maintenance company to service the sliding glass doors. He did not know how the injury occurred, how the doors functioned, or what the maintenance company's inspection entailed. He further testified that he was unaware of any repairs ever needed or conducted on the sliding glass doors.

¶ 40 In fact, Gary's testimony underscores how little evidence is in the record. There are no witnesses to the incident, there is no surveillance footage of the incident, there is no evidence regarding the function of the doors and the sensors, and there is no testimony from anyone who serviced

the sliding glass doors. Moreover, Grossinger also pointed out in its motion that Ocampo would not be able to acquire sufficient evidence to support her claim where discovery was closed and the only other testimony would be provided by Ocampo herself, and she had failed to demonstrate how her own testimony would prove that Grossinger "chose" to install or keep defective doors or sensors. See *Kleiss v. Bozdech*, 349 Ill.App.3d 336, 350 (2004) ("[T]he defendant must show that the plaintiff cannot acquire sufficient evidence to make its case.").

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¶ 41 Ocampo asserts that her claim was entirely proved by circumstantial evidence and, for that reason, it is not necessary to present witnesses knowledgeable as to the workings, operation, or maintenance of the doors or evidence that the doors were actually defective. However, the inference that Grossinger caused any alleged defective condition of the sliding glass doors is purely speculative, particularly where there is evidence that Grossinger contracted with a maintenance company to inspect and service the sliding glass doors. See *Majetich v. P. T. Ferro Construction Co.*, 389 Ill.App.3d 220, 224-25 (2009) (stating that facts will not be established where more than one conclusion can be drawn); *Keating*, 401 Ill.App.3d at 474 (finding that "the existence of multiple inferences regarding causation [did] not create a triable issue of fact"). There is no reasonable certainty that Grossinger's acts or omissions, as opposed to, for instance, the maintenance company or Grossinger's maintenance staff for that matter, caused the injury. See *Britton v. University of Chicago Hospitals*, 382 Ill.App.3d 1009, 1012 (2008) (finding that the plaintiff could not show that the defendant's alleged negligence proximately caused the revolving glass door to shatter where it was just as logical to infer that the plaintiff caused the glass to shatter); *Watts v. Bacon &Van Buskirk Glass Co.*, 18 Ill.2d 226, 232 (1959) (finding that there was no evidence that the glass company was negligent in supplying or installing the glass door and the mere fact of the plaintiff's injury "does not authorize a presumption or inference that the defendant glass company was negligent"). As such, based on our review of the record, we conclude that Ocampo has failed to establish an element of her negligence claim. See *Kimbrough v. Jewel Cos., Inc.*, 92 Ill.App.3d 813, 818-19 (1981) (finding that the plaintiff's failure to prove one element of negligence, *i. e.*, causal connection between condition and fall, entitles the defendant to summary judgment on the entire negligence claim).

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¶ 42 In one final attempt to save her complaint, Ocampo argues that Grossinger's contract with the maintenance company does not relieve it from liability for the doors' malfunction. Although that may be true, Ocampo

has, at no point, asserted any claims or allegations of an agency relationship or vicarious liability. See *In re Estate of Chaney*, 2013 IL App (3d) 120565, ¶ 8 ("It is well-settled law in Illinois that issues, theories, or arguments not raised in the trial court are forfeited and may not be raised for the first time on appeal."). In fact, she refers to her own lack of evidence on this point, stating "there is no evidence indicating that the entity that serviced those doors was qualified to service those doors; how often they were serviced; how they were serviced; and, what repairs were made, to those doors." It is clear that Ocampo is attempting to place the onus of obtaining evidence on Grossinger, despite the fact that it is her burden to present a factual basis to support her allegations. See *Aalbers v. LaSalle Hotel Properties*, 2022 IL App (1st) 210494, ¶ 15.

¶ 43 Accordingly, we hold that there were no genuine issues of material fact with respect to Ocampo's negligence claim and the circuit court's grant of summary judgment in favor of Grossinger was proper.

¶ 44 Ocampo also challenges the circuit court's denial of her motion for reconsideration. The purpose of a motion to reconsider is to bring to the court's attention "(1) newly discovered evidence which was not available at the time of the first hearing, (2) changes in the law, or (3) error in the court's previous application of existing law." *Gardner v. Navistar International Transportation Corp.*, 213 Ill.App.3d 242, 248 (1991). "A ruling on a motion to reconsider is within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion." *Aalbers*, 2022 IL App (1st) 210494, ¶ 39. Because we have found that the circuit court's grant of

Grossinger's motion for summary judgment was proper and there was no misapplication of the law for ordinary negligence, we find no basis to overturn its denial of Ocampo's motion to reconsider.

¶ 45 B. Motion to Amend Complaint

¶ 46 Finally, Ocampo challenges the circuit court's denial of her motion to file an amended complaint to add a claim of *res ipsa loquitor*.

¶ 47 Preliminarily, we note that Ocampo failed to provide the standard for review for a circuit court's denial of a motion to amend the complaint. See Ill. S.Ct. R. 341(h)(3) ("The appellant must include a concise statement of the applicable standard of review for each issue."). She also failed to set forth the *Loyola* factors (discussed below) and her arguments in regards to them until her reply brief, after Grossinger pointed out her omission. See Ill. S.Ct. R 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited and

shall not be raised in the reply brief[.]"). Nonetheless, it is within our discretion to address points made in the reply brief. See *Joyce v. Explosive Technologies Intern., Inc.*, 253 Ill.App.3d 613, 616 (1993).

¶ 48 Section 2-616(a) of the Code of Civil Procedure provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms[.]" 735 ILCS 5/2-616(a) (West 2020). Additionally, section 2-1005(g) states that "[b]efore or after entry of a summary judgment, the court shall permit pleadings upon just and reasonable terms." 735 ILCS 5/2-1005(g) (West 2020); but see *Hartzog v. Martinez*, 372 Ill.App.3d 515, 521-22 (2007) (recognizing that there was "a strong argument to be made for the proposition that the right to amend following a final summary judgment should be more restricted than the right to amend prior to summary judgment or where the summary judgment is interlocutory"). The right to amend, however, is not

absolute or unlimited. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill.App.3d 211, 219 (2010). A court must consider the following factors in determining whether to grant leave to amend a pleading: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S &S Roof Maintenance, Inc.*, 146 Ill.2d 263, 273 (1992). "The party seeking leave to amend bears the burden of demonstrating that all four factors favor the relief requested." *United Conveyor Corp. v. Allstate Insurance Co.*, 2017 IL App (1st) 162314, ¶ 36. The decision of whether to grant leave to amend a complaint rests within the sound discretion of the trial court, and we will affirm absent an abuse of that discretion. *I.C.S. Illinois*, 403 Ill.App.3d at 219. "An abuse of discretion occurs only where no reasonable person would take the view adopted by the trial court." *United Conveyor Corporation*, 2017 IL App (1st) 162314, ¶ 35.

¶ 49 As to the first factor, "[w]here it is apparent even after amendment that no cause of action can be stated, leave to amend should be denied." *Regas v. Associated Radiologists, Inc.*, 230 Ill.App.3d 959, 968 (1992). For this reason, the court may consider the merits of the claim in the proposed amended pleading. *I.C.S. Illinois*, 403 Ill.App.3d at 220.

¶ 50 The doctrine of *res ipsa loquitor* "permits the trier of fact to infer negligence based on circumstantial evidence[.]" *Dyback v. Weber*, 114 Ill.2d 232, 238 (1986). The determination of whether *res ipsa loquitor* applies is a question of law[.]" *Darrough v. Glendale Heights Community Hospital*, 234

Ill.App.3d 1055, 1060 (1992). The plaintiff must prove that "he was injured (1) in an occurrence that ordinarily does not happen in the absence of negligence (the

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probability element) (2) by an agency or instrumentality within the defendant's exclusive control (the control element)." *Johnson v. Armstrong*, 2022 IL 127942, ¶ 35. Stated another way, "the court in the first instance must decide based on whether the plaintiff has pleaded facts that would ever establish that the defendant had exclusive control over the instrumentality of the plaintiff's injury and that the injury is otherwise unexplainable absent the defendant's negligence." *Darrough*, 234 Ill.App.3d at 1060.

¶ 51 Here, the circuit court concluded that the inclusion of *res ipsa loquitor* would not cure Ocampo's pleadings because "the proposed *res ipsa* claim-like her negligence claim-would still require [Ocampo] to establish [Grossinger's] knowledge of the defective doors." In her motion, Ocampo specifically averred that her amended pleading would add that Grossinger "knew or should have known that its sliding glass doors would close on persons standing in the middle of the doors and that the defendant chose not to have a system of inspection that would have discovered the defective condition of the sliding glass door." The circuit court then was correct in concluding that Ocampo would need to prove, pursuant to her own proposed allegations, that Grossinger knew or should have known about the defective doors and there was no evidence in the record to support that allegation.

¶ 52 Moreover, "[w]here there are differing possible causes of an accident and a plaintiff cannot establish that it was defendant's actions which caused the accident, *res ipsa loquitor* will not be applicable." *Napoli v. Hinsdale Hospital*, 213 Ill.App.3d 382, 388 (1991). In this case, there was evidence that Grossinger contracted with a maintenance company to maintain, inspect, and service its sliding glass doors. Because the record before us suggests at least two possible entities responsible for any alleged defect, *res ipsa loquitor* is not applicable. *Nichols v. City of Chicago Heights,*

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2015 IL App (1st) 122994, ¶ 46 ("[T]he defendant's responsibility for a specific cause of an event is proven by eliminating the responsibility of any other person for that cause." (citing *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill.2d 266, 273 (1982)). As such, Ocampo cannot prevail on the first factor.

¶ 53 Although reviewing courts need not proceed any further in its *Loyola* analysis if the proposed amendment fails the first factor, we nonetheless address the other three factors. See *Hayes Mechanical, Inc. v. First Indus, L.P.*, 351 Ill.App.3d 1, 7 (2004).

¶ 54 "Prejudice to the party opposing an amendment is the most important of the *Loyola* factors, and 'substantial latitude to amend will be granted when there is no prejudice or surprise to the nonmovant.'" *Hartzog v. Martinez*, 372 Ill.App.3d 515, 525 (2007) (quoting *Paschen Contractors, Inc. v. City of Kankakee*, 353 Ill.App.3d 628, 638 (2004)). Prejudice is shown where delaying the amendment" 'leaves a party unprepared to respond to a new theory at trial.'" *Id.* (quoting *Miller v. Pinnacle Door Co.*, 301 Ill.App.3d 257, 261 (1998)).

¶ 55 Grossinger argues that because this case was filed in 2019, it was set for trial certification on May 3, 2021, and discovery had been closed for nearly a year, Grossinger would have been prejudiced by its inability to disclose or depose any additional witnesses to rebut the new theory. Ocampo argues in opposition that Grossinger would not have been prejudiced because if it needed additional discovery, it could have moved to amend the case management order, as it had done previously. Although we do not believe that Grossinger would have been hindered in responding to that theory based on the current record, we find that Grossinger would nonetheless have suffered prejudice due to additional needless litigation, especially where Ocampo was seeking to add a new theory of negligence *after* summary judgment had been granted. See *Geisler v. Everest National Insurance Co.,*

2012 IL App (1st) 103834, ¶ 102 (finding prejudice to the defendant where the amendment "would allow [the] plaintiff a 'second bite at the apple' "); *Tires 'N Tracks, Inc. v. Dominic Fiordirosa Construction Co.*, 331 Ill.App.3d 87, 95 (2002) ("It is improper practice to engage in piecemeal litigation, seeing one theory of the case to conclusion before proposing another.").

¶ 56 The third factor, which is timeliness, and the fourth factor, *i.e.* whether there were previous opportunities to amend, also weigh in favor of Grossinger. A court may deny a motion to amend if it was made "after an unreasonable length of time." *Loyola*, 146 Ill.2d at 275. "The stage of litigation at which a proposed amendment is brought is certainly a relevant consideration." *Hartzog*, 372 Ill.App.3d at 525-26. Here, we cannot say that Ocampo's request to add a claim of *res ipsa loquitor* was timely where it was made five years after the injury occurred and three years after her complaint was filed. See *United Conveyor Corporation*, 2017 IL App (1st) 162314, ¶ 37

(finding the motion to amend was not timely where it was filed 22 days after the trial court entered summary judgment and more than three years after it filed its complaint). Moreover, prior to the filing of Grossinger's motion for summary judgment, Ocampo was in possession of all the facts necessary she claims support her theory of *res ipsa loquitor* as Gary's deposition was taken in 2020 and discovery had been closed for 11 months. There was also nothing preventing Ocampo from amending her complaint in the multiple years the case was pending, prior to the closure of discovery and prior to the court's summary judgment ruling. See *Hartzog*, 372 Ill.App.3d at 526 (pointing out that the plaintiffs never explained their failure to raise the issue at an earlier time). We would also point out that Grossinger originally filed its motion for summary judgment in March 2021 but due to administrative delay, a briefing schedule was not set until December 2021.

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Again, this suggests that Ocampo had sufficient opportunity to amend her complaint prior to the court's grant of summary judgment. See *Saieva v. Budget Rent-A-Car of Rockford*, 227 Ill.App.3d 519, 531 (1992) (trial court did not abuse its discretion in denying plaintiff leave to amend his complaint to include a theory of *res ipsa loquitor* after the court granted summary judgment in favor of the defendant where the plaintiff had opportunity to include the claim earlier and the plaintiff waited 29 months to add the claim).

¶ 57 Nonetheless, Ocampo contends that, because Grossinger never challenged her pleadings previously, "[t]here was no reason for [her] to seek to amend her complaint." This contention is not well taken. First, it is hardly the defendant's responsibility to bring to the plaintiff's attention flaws in the complaint so that the plaintiff may cure those defects. Second, as we have stated, the theory of *res ipsa loquitor* was available to Ocampo at all stages of litigation in this action. See *Martin v. Yellow Cab Co.*, 208 Ill.App.3d 572, 577 (1990) (affirming the denial of the motion to amend where the same facts were available when the plaintiff filed the motion that were available when the plaintiff filed the complaint 20 months earlier).

¶ 58 As such, where all four *Loyola* factors weigh in favor of Grossinger, it was not an abuse of discretion for the circuit court to deny Ocampo's motion for leave to amend her complaint.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the circuit court.

¶ 61 Affirmed.

Notes:

[1] Ocampo did not attach her proposed amended complaint to the motion. She asserts on appeal that this was in conformity with the Circuit Court of Cook County General Administrative Order 20-9 § 3.4(F) (Dec. 17, 2020), which provides that proposed pleadings may not be attached to any motion as an exhibit or e-filed until leave of court is granted.

[2] Rule 191 sets forth the requirements for affidavits filed with motions for summary judgment. An affidavit submitted under this rule is a substitute for testimony at trial and strict compliance is necessary to insure that the trial judge is presented with valid evidentiary facts. *Solon v. Godbole*, 163 Ill.App.3d 845, 851 (1987).

[3] We note Grossinger's entreaty to this court to treat his motion for summary judgment like a motion for a directed verdict and cites to *Jones v. Pneumo Abex LLC*, 2019 IL 123895, for support. In that case, the question at issue was whether the defendants "engaged in a civil conspiracy to conceal the dangers of asbestos"; however, those claims had already been frequently litigated in Illinoi courts. *Id.* ¶ 22. Where those cases had proceeded to trial, reviewing courts had consistently concluded that the defendants could not be liable for civil conspiracy. *Id.* In the case before it, the appellate court "summarily distinguished" those nearly identical cases because the appeals were from motions for judgment notwithstanding the verdict rather than summary judgment. *Id.* ¶ 23. On appeal, our supreme court stated that in cases where there is a "long and well-documented historical record" that has been thoroughly tested over several lawsuits and the parties' pleadings and other materials are "exhaustive[,]" "there is no practical difference between the standard for summary judgment and that governing directed verdicts." *Id.* ¶¶ 24-25. It is clear to this court that the context for that comparison is specific to that case. As such, we believe that our analysis in which we apply the well-established principles for summary judgment motions is appropriate here.

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2023 IL App (1st) 220525-U

DARRIN VAN BUREN, Plaintiff-Appellant,
v.
THE CITY OF CHICAGO; NATHAN POOLE, Star # 20545; LAVARR KING, Star # 20297; and PATRICK LOFTUS, Star # 20327, Defendant-Appellant.

No. 1-22-0525

Court of Appeals of Illinois, First District, Third Division

September 6, 2023

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

Appeal from the Circuit Court of Cook County No. 18 L 12889 Honorable Toya T. Harvey, Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court. Justices McBride and D.B. Walker concurred in the judgment.

ORDER

REYES PRESIDING JUSTICE

¶ 1 *Held*: The judgment of the circuit court of Cook County granting summary judgment to a municipality and police officers on a malicious prosecution claim is affirmed.

¶ 2 Plaintiff Darrin Van Buren (Van Buren) filed a complaint for malicious prosecution in the circuit court of Cook County against the City of Chicago (City) and three police officers employed by the City - Nathan Poole (Poole), Lavarr King (King), and Patrick Loftus (Loftus). On appeal, Van Buren contends that the circuit court erred in granting summary judgment in favor of defendants. For the reasons discussed below, we affirm.

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¶ 3 BACKGROUND

¶ 4 *The Shooting*

¶ 5 On October 29, 2016, a shooting occurred at the Jamaican Jerk Villa restaurant in the 700 block of West 79th Street in Chicago. The shooting was captured on a security camera inside the restaurant. At approximately 8:30 p.m., an individual wearing a face mask entered the restaurant, walked to the front of a line of customers, and peered into the kitchen area. He then pulled out a handgun and fired shots into the kitchen door and the dining room. After exiting the restaurant, he fired once more through the front window. Two individuals were shot: customer Brenda Wilson and employee Olive Edwards (Edwards), who was working in the kitchen.

¶ 6 Within minutes of the shooting, Chicago police officers arrived at the restaurant. The record on appeal includes footage from the officers' body cameras. As discussed further below, Michael Webster (Webster) - who worked as security at the restaurant - informed officers at the scene that the shooter was Edwards' former boyfriend, who was quickly identified as Van Buren. On November 9, 2016, Van Buren was arrested; he was charged and subsequently indicted for the shooting. Van Buren maintains that the shooter had a visible scar on his head, whereas he does not; the circuit court entered an order on May 17, 2018, directing the sheriff's office to shave his head. Van Buren continued to be detained without bail until June 4, 2018, when the State ultimately nol-prossed the charges.

¶ 7 *The Malicious Prosecution Complaint*

¶ 8 Van Buren filed a two-count complaint for malicious prosecution and intentional infliction of emotional distress (IIED) against defendants in the circuit court of Cook County in November 2018. He alleged that the defendant officers reviewed the security footage of the shooting and knew that the shooter had a "plainly visible scar on the top of his head." According

to Van Buren, the officers had observed him - both in person and through video monitoring -while he was in custody prior to being charged, and they knew that he did not have a scar.

¶ 9 In count I, Van Buren alleged that the defendant officers maliciously prosecuted him on false charges without probable cause. As the officers performed the challenged actions within the scope of their employment, Van Buren also sued the City under the doctrine of *respondeat superior*. In count II, Van Buren alleged that the officers - and the City by extension - engaged in "extreme and outrageous" conduct with the intent to inflict severe emotional distress or with knowledge of the high probability that the conduct would cause such distress.

¶ 10 In their answer to the complaint, defendants admitted that Officers Poole and King reviewed security footage prior to Van Buren's arrest but denied that they knew that the shooter had a "plainly visible scar on the top of his head." Defendants also filed affirmative defenses based on the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-101 *et seq*. (West 2020)), a statutory scheme intended to protect local public entities and public employees from liability arising from the operation of government (745 ILCS 10/1-101.1 (West 2020)).

¶ 11 Defendants also filed a motion to dismiss count II of the complaint - the IIED claim - as time-barred pursuant to section 2-619(a)(5) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(5) (West 2020)). According to defendants, an IIED claim premised on an arrest and prosecution accrues at the time of the arrest. As the applicable limitations period was one year (745 ILCS 10/8-101(a) (West 2020)), defendants asserted that the action filed in November 2018 based on Van Buren's arrest in November 2016 was untimely. After briefing, the circuit court granted the motion to dismiss the IIED count.

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¶ 12 *The Motion for Summary Judgment*

¶ 13 Defendants filed a motion for summary judgment, arguing that Van Buren could not establish the first four of the five required elements of a malicious prosecution claim: (1) the commencement of criminal proceedings by defendants; (2) termination of the matter in favor of Van Buren; (3) the absence of probable cause for the proceedings; (4) the presence of malice; and (5) resulting damages. The exhibits to the motion included the following.

¶ 14 Nathan Poole Affidavit

¶ 15 In an affidavit, Officer Poole averred that he was assigned as the lead investigator at approximately 9:45 p.m. on the night of the shooting, October 29, 2016. When he arrived at the restaurant, the two victims had already been transported to area hospitals. Poole interviewed Webster, who stated that he "work[ed] security" at the restaurant. Webster informed Poole that he was sitting near the front of the restaurant when an individual in a blue mask and coveralls walked past him to the front counter. Webster indicated that he was not alarmed by the mask, as it was shortly before Halloween. Although Webster did not know the shooter's name, he immediately recognized him as the ex-boyfriend of a restaurant employee, Olive Edwards. Poole averred that Webster recognized Van Buren from his

"body features" and the fact that Van Buren had repeatedly visited the restaurant to pick up Edwards.

¶ 16 According to Poole, Webster stated that he observed the masked individual remove a silver handgun from his waistband and fire approximately three shots into the door used by employees. The shooter then walked to the front door of the restaurant and continued shooting. Webster believed that the shooter fired at him since Webster recognized him. The shooter exited the restaurant and fired the handgun through the front window, narrowly missing Webster. Poole averred that Webster described Van Buren as approximately 5'7" or 5'8" and 165 or 175 pounds,

with a dark complexion. Webster relayed that Van Buren drove a white Cadillac.

¶ 17 Poole averred that he spoke with Edwards at the hospital at approximately 11:30 p.m. that evening. Edwards informed Poole that she was working in the kitchen at the time of the shooting. She did not view the shooting, but she took cover in the kitchen when she heard gunshots. She then felt a burning sensation in her left foot and realized she had been shot.

¶ 18 Edwards described her relationship with Van Buren to Poole. Edwards and Van Buren dated for one year; he was physically abusive when he drank. They broke up approximately three weeks prior to the shooting. She told Poole that Van Buren threatened to kill her if she left him. Edwards' last encounter with Van Buren was at 10:35 a.m. on the morning of the shooting. He drove up to the bus stop where Edwards was waiting and harassed her regarding "marriage, love, and sex." After Edwards rejected his request to reunite, Van Buren departed. According to Edwards, Van Buren drove a four-door white Cadillac and owned a silver revolver.

¶ 19 Poole averred that, on the day after the shooting, he interviewed the other victim, Brenda Wilson, and he recovered and reviewed the footage from the restaurant's security camera. He subsequently reviewed the body camera footage from officers who initially arrived at the scene, which confirmed that Webster identified Edwards' "ex" as the shooter.

¶ 20 On November 3, 2016, Webster was interviewed again at the police station, where he reported that he had recognized the shooter as Edwards' boyfriend. When presented with a photo array, Webster identified Van Buren as the shooter. On November 4, 2016, Poole reviewed the security footage with Edwards. She informed Poole that she recognized the shooter as her former boyfriend, Van Buren. According to Poole's affidavit, Edwards

stated that she recognized Van Buren "from his small head, height, body build, broad ugly fingers, hair-cut with design, old scar on top of his head discovered while playing with his head when they were

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together, and a limp in his left leg from an earlier skating accident."

¶ 21 Van Buren was arrested on November 9, 2016. During separate recorded interviews with an assistant state's attorney on November 9 and 10, 2016, Webster and Edwards each identified Van Buren as the shooter depicted in the security video. On November 10, 2016, a search warrant was executed on Van Buren's Cadillac; police recovered a gun lock and six live rounds of .357 ammunition.[1]

¶ 22 The recorded interviews, as well as the body camera footage and restaurant security footage, were attached as exhibits to Poole's affidavit and are included in the record on appeal. ¶ 23 Preliminary Hearing Transcript

¶ 24 A transcript of a preliminary hearing held on November 22, 2016, was appended to the State's motion for summary judgment. Brenda Wilson testified, in part, that the shooter was an African American man who fired a large silver handgun. She was struck twice, and one of the bullets was permanently lodged in her back.

¶ 25 Edwards testified, in part, that Van Buren had previously tried to kick down her door and had threatened to hurt her if she left him. She also testified regarding their conversation on the morning of the shooting, wherein she indicated that she would not marry him. Immediately after the shooting, Webster told Edwards, "That's your dude," *i.e.*, the shooter was her boyfriend. According to Edwards, Van Buren visited her at the restaurant on approximately six occasions. When questioned regarding her identification of Van Buren as the shooter from the security video, Edwards testified that she recognized his limp and a scar on the side of his head. She also recognized his silver revolver, which she had viewed previously on two occasions.

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¶ 26 At the conclusion of the preliminary hearing, the circuit court entered a finding of probable cause and denied bail.

¶ 27 Nathan Poole Deposition

¶ 28 A transcript of Poole's videotaped deposition from February 2021 was also appended to the motion for summary judgment. Poole testified that

when he arrived at the Jamaican Jerk Villa restaurant after the shooting, he spoke with the responding officers and with Webster. Although another police officer had written in a report that Webster provided no details regarding the shooter, Webster provided details when interviewed by Poole. According to Poole, witnesses generally are more forthcoming with detectives than uniformed officers.

¶ 29 After conducting various interviews and otherwise investigating the shooting, Poole and his partner (King) signed a felony complaint form initiating the criminal proceedings against Van Buren on November 10, 2016. Poole testified before a grand jury on January 9, 2017.

¶ 30 During the deposition, Poole testified that Edwards told him that she discovered that Van Buren had a scar on his head when she was "playing" with his head. Although Poole testified that she never expressly stated that the scar was visible, she apparently recognized a scar on the shooter's head in the security video. Poole did not personally notice any scars on the shooter's head while viewing the video. Poole further testified that he did not specifically investigate whether Van Buren had a scar, as Edwards had otherwise identified Van Buren. As noted above, she informed Poole that she recognized Van Buren as the shooter based on his limp, his small head, his "ugly" fingers, and other physical characteristics.

¶ 31 Poole also testified that an evidence technician had recovered the mask on the night of the shooting, but forensic testing did not link the mask to Van Buren.

¶ 32 Defense counsel questioned Poole regarding the dismissal of charges against Van Buren

after the circuit court had granted the State's request for an order to shave Van Buren's head. When presented with a photograph of Van Buren's shaved head, Poole noted that the top of his head, but not the sides, had been shaven.

¶ 33 Lavarr King Deposition

¶ 34 The transcript of the deposition of Lavarr King from February 2021 was also appended to the defendants' motion for summary judgment. King, who was Poole's partner, had been a detective for 7 years and a Chicago police officer for 23 years at the time of the deposition.

¶ 35 King testified that he viewed the security video of the shooting on November 3, 2016, when he first became involved in the investigation.

When questioned regarding any "identifying characteristics" of the shooter, King responded that the shooter was an African American male who had short hair, wore a blue mask and an overcoat, and used a silver revolver. King did not observe any scars on the shooter in the video footage, but he did notice "something on his head" which "appeared to kind of leave as he changed his direction."

¶ 36 Although King was aware that Edwards stated that Van Buren had a scar on his head, he did not check for a scar when Van Buren was arrested. King testified he "wasn't looking for anything," as Van Buren had already been identified by Webster and Edwards. King recalled that Edwards "knew that that was him" based on the shooter's head, hands, and distinctive gait. When King inquired regarding his limp, Van Buren responded that he had arthritis.

¶ 37 Van Buren's counsel asked why Edwards did not sign the complaint. King explained that Edwards was not present when the charges were approved and that it was not the practice of the Chicago police department to call in a victim to sign a complaint. King expressed frustration regarding the "Bozo" head shave performed on Van Buren, *i.e.*, the shave of the top of his head but not the sides. King testified that all of the investigatory materials were provided to the State,

and he appeared to opine that the State should not have dropped the charges against Van Buren.

¶ 38 Patrick Loftus Affidavit

¶ 39 In an affidavit, Officer Patrick Loftus averred that he was *not* assigned to investigate the shooting on October 29, 2016. On November 9, 2016, when Van Buren was brought to the police station pursuant to an investigative alert, Loftus was notified by one of the arresting officers. Loftus then either contacted or attempted to contact the detective who issued the alert to notify the detective that Van Buren was in custody. Loftus also compiled the investigative file pursuant to a subpoena and forwarded it to the State's Attorney's Office on November 21, 2016. ¶ 40 Loftus averred that he did not have other involvement in the case, *e.g.*, he did not speak with Van Buren, perform any investigation, prepare any reports, or sign any criminal complaint.

¶ 41 Darrin Van Buren Deposition

¶ 42 Van Buren testified he met Edwards in 2015 and they dated "on and off' for one or two years; he was also dating another woman during that time. He had been to the Jamaican Jerk Villa restaurant on more than 10 but less than 50 occasions. When questioned regarding certain incidents with Edwards, Van Buren denied ever stalking, threatening, or otherwise abusing her. He acknowledged that he owned a gray handgun which he had shown to Edwards but denied ever pointing the weapon at her. Van Buren also indicated that he owned a white Cadillac. He denied having a scar on his head.

¶ 43 Van Buren testified that he drove Edwards to work on the morning of the shooting. According to Van Buren, Edwards telephoned him from the emergency room after the shooting and stated "baby, they shot me." He testified that Edwards never told him that she thought he shot her. When questioned regarding his whereabouts on the night of the shooting, Van Buren testified that he was drunk in a park with "buddies," none of whom he could name.

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¶ 44 *Briefing and Ruling on Summary Judgment Motion*

¶ 45 In his response to the motion for summary judgment, Van Buren argued that Poole and King[2] maliciously caused him to be arrested and jailed for 19 months for a crime which he did not commit. Van Buren noted that one of the responding officers prepared an incident report wherein the officer stated that Webster - the security person at the restaurant - offered no details regarding the shooter other than that he was wearing a blue mask and coveralls. Van Buren also maintained that Officers Poole and King failed to verify whether he had a scar on his head, despite their review of the restaurant's security footage, where the shooter's scar was "visible." Van Buren further asserted that the incident report listed the shooter's height as between 6' and 6'2", whereas Poole was aware that Van Buren's height was 5'7".

¶ 46 According to Van Buren, Poole provided "false, inaccurate and/or deliberately misleading testimony" to the grand jury; his grand jury testimony was an attachment to the response. Van Buren noted that Poole and King - and not Olive Edwards - signed the felony complaints. Van Buren also observed that one of the complaints "falsely stated" that Van Buren lacked a valid Firearm Owner's Identification (FOID) card; this count was later dropped.

¶ 47 In their reply, defendants characterized any purported discrepancy relating to the incident report as "immaterial," given that police bodycam

footage revealed that Webster had informed the responding officers that the shooter was Edwards' boyfriend. Defendants further noted that neither Poole nor King "knew" that the shooter had a scar - let alone a "huge" and "visible" scar - contrary to Van Buren's contention. According to defendants, any malicious prosecution claim based on the dropped FOID-related charge was time-barred. Finally, defendants contended that Poole's grand jury testimony was truthful, that he was not required to volunteer "exculpatory"

information, and that, in any event, "grand jury witnesses enjoy absolute immunity" from malicious prosecution claims.

¶ 48 Following arguments, the circuit court entered an order on November 2, 2021, granting defendants' motion for summary judgment. The circuit court found no material issue of fact regarding the absence of two of the required elements of a malicious prosecution claim: malice and probable cause.

¶ 49 Van Buren filed a motion for reconsideration, contending, in part, that the court did not consider the "grossly negligent conduct" of the defendant officers when finding that no issue of material fact existed as to the absence of probable cause for the proceedings. According to Van Buren, the officers "readily admit that they did not verify any of the facts that supported their supposed honest belief for probable cause." Defendants responded, in part, that the evidence established probable cause as a matter of law, *e.g.*, the separate and consistent identification of Van Buren as the shooter by both Edwards and Webster. The circuit court denied the motion to reconsider, and Van Buren filed this timely appeal.

¶ 50 ANALYSIS

¶ 51 Van Buren contends on appeal that the circuit court erred in granting summary judgment in favor of defendants. Prior to addressing his arguments, we note that the issues have been narrowed in two respects. First, our review is limited to the malicious prosecution claim, as Van Buren's IIED claim was dismissed as time-barred and his briefs solely address the malicious prosecution claim. See Ill. S.Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (noting that "[p]oints not argued are forfeited"). Second, although the malicious prosecution claim was filed against three officers - Poole, King, and Loftus - neither Van Buren's response to the summary judgment motion nor his briefs on appeal address any claims specifically against Loftus. Such arguments

are thus forfeited. *Id*. We begin our analysis with a discussion of summary judgment principles.

¶ 52 *Summary Judgment*

¶ 53 The purpose of summary judgment is not to try an issue of fact but to determine whether an issue of fact exists. *Monson v. City of Danville*, 2018 IL 122486, ¶ 12. Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2020)." 'A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.'" *Monson*, 2018 IL 122486, ¶ 12 (quoting *Adames v. Sheahan*, 233 Ill.2d 276, 296 (2009)). The court must construe the evidence in the record strictly against the movant (*id*.), and "unsupported conclusions, opinions, or speculation are insufficient to raise a genuine issue of material fact" (*Valfer v. Evanston Northwestern Healthcare*, 2016 IL 119220, ¶ 20). Although summary judgment has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit where the right of the movant is clear and free from doubt. *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15; *Aalbers v. LaSalle Hotel Properties*, 2022 IL App (1st) 210494, ¶ 15.

¶ 54 On appeal from an order granting summary judgment, the reviewing court must consider whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether summary judgment is proper as a matter of law. *Monson*, 2018 IL 122486, ¶ 12. Our review of the trial court's grant of summary judgment is *de novo*. *Suburban Real Estate Services*, 2022 IL 126935, ¶ 15. We may affirm the grant of summary judgment on any basis in the record, regardless of whether the circuit court's reasoning was

correct. *Sang Ken Kim v. City of Chicago*, 368 Ill.App.3d 648, 653 (2006).

¶ 55 *Malicious Prosecution Claim*

¶ 56 Van Buren argues that the circuit court erred in granting summary judgment in favor of defendants on his malicious prosecution claim. A malicious prosecution action is a civil tort initiated by a plaintiff for the recovery of damages which have proximately resulted to a" 'person, property or reputation'" from a previously unsuccessful criminal or civil proceeding,

which was prosecuted with malice and without probable cause. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 23 (quoting *Freides v. Sani-Mode Manufacturing Co.*, 33 Ill.2d 291, 295 (1965)).

¶ 57 To state a cause of action for malicious prosecution, the plaintiff must prove five elements: (1) the commencement or continuation of an original civil or criminal judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages to the plaintiff. *Id.* ¶ 26. Accord *Swick v. Liautaud*, 169 Ill.2d 504, 512 (1996).

¶ 58 Our supreme court has long recognized that actions for malicious prosecution are disfavored. *Beaman*, 2019 IL 122654, ¶ 24. See also *Holt v. City of Chicago*, 2022 IL App (1st) 220400, ¶ 67 (noting that "[p]ublic policy encourages the exposure of crime and disfavors malicious prosecution suits"). An action for malicious prosecution is subject to more stringent limitations than other tort actions and will be permitted only when all the requirements for maintaining an action have been satisfied. *Beaman*, 2019 IL 122654, ¶ 25. The absence of any of the five elements bars a plaintiff's malicious prosecution claim. *Beaman v. Freesmeyer*, 2021 IL 125617, ¶ 74; *Beaman*, 2019 IL 122654, ¶ 26; *Swick*, 169 Ill.2d at 512.

¶ 59 *Absence of Probable Cause*

¶ 60 "Lack of probable cause for instituting the original proceedings is an indispensable

element of an action for malicious prosecution." *Beaman*, 2021 IL 125617, ¶ 116. Accord *Turner v. City of Chicago*, 91 Ill.App.3d 931, 934 (1980) (noting that the presence of probable cause "constitutes an absolute bar to an action for malicious prosecution"). Probable cause is defined as a state of facts that would lead a reasonably cautious individual to believe, or to entertain a strong and honest suspicion, that the arrested person committed the charged offense. *Beaman*, 2021 IL 125617, ¶ 116. "In the context of an action for malicious prosecution, the assessment of probable cause depends on the totality of the circumstances existing when defendants commenced the prosecution." *Id.* ¶ 117.

¶ 61 "A reasonable ground for belief of an accused's guilt may be based on information from other persons as well as on personal knowledge." *Holt*, 2022 IL App (1st) 220400, ¶ 68. In this case, Poole was informed by both Edwards and Webster that Van Buren was the shooter. Webster was familiar

with Van Buren's appearance, as he was a regular visitor to the restaurant where Webster and Edwards were employed. After dating for one year, Edwards was knowledgeable regarding Van Buren's appearance and demeanor. Upon reviewing the security footage of the shooting, she readily recognized his physical features, including his small head, his body build, his "ugly fingers," a scar on his head, and his limp. Edwards also indicated that the handgun used in the shooting appeared similar to a handgun owned by Van Buren.

¶ 62 When the victim of the crime supplies the police with the information forming probable cause, there is a presumption that the information provided is inherently reliable. *Holt*, 2022 IL App (1st) 220400, ¶ 68; *Sang Ken Kim*, 368 Ill.App.3d at 655. The reports of Webster and Edwards alone supported the officers' reasonable belief to arrest Van Buren, as the information from an eyewitness or a victim of a crime is entitled to particularly great weight in evaluating its reliability. *Holt*, 2022 IL App (1st) 220400, ¶ 69. A police officer is entitled to accept a report if

it is not so incredible as to make the officer's belief that the plaintiff committed the crime to be unreasonable. *Id.* ¶ 80.[3] In this case, the officers' belief that Van Buren committed the shooting was not incredible or unreasonable in any respect. Not only did Webster and Edwards identify Van Buren as the shooter, but Edwards also described past physical abuse in their relationship and their contentious exchange on the morning of the shooting. These facts - coupled with the security footage revealing that the shooter aimed and shot through the door into the kitchen where Edwards was working - support the presence of probable cause.

¶ 63 Van Buren contends that the shooter bore a scar on his head, but that Van Buren did not. According to Van Buren, the officers failed to "conduct a minimal investigation" by not verifying whether he had a scar. We reject this contention. Given the detailed and consistent identifications of Van Buren as the shooter by both Webster and Edwards, the arrest and initiation of charges against defendant by the officers was justified. Illinois courts have consistently found that it is not necessary to verify the correctness of each item of information; it is sufficient to act with reasonable caution and prudence. *Sang Ken Kim*, 368 Ill.App.3d at 655; *Turner*, 91 Ill.App.3d at 935. Even if we assume that the officers erred in not taking such a step (which we do not), a "mistake or error that is not grossly negligent will not affect the question of probable cause in an action for malicious prosecution when there is an honest belief by the complainant that the accused is probably guilty of the offense." *Beaman*, 2021 IL 125617, ¶ 116. Accord *Holt*, 2022 IL App (1st) 220400, ¶ 68.

¶ 64 We are also unpersuaded by Van Buren's arguments regarding other purported deficiencies in the investigative process. For example, Van Buren contends that there were

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inconsistencies in the descriptions of the shooter's height and Van Buren's height. We observe, however, that Van Buren has inconsistently described his own height, *e.g.*, he testified during his deposition that he is 5'101/2" but now maintains that he is 5'7". Van Buren also claims that the officers should have conducted a live lineup. We note, however, that both Webster and Edwards knew Van Buren prior to the shooting, and thus it was not necessary to check whether they could recognize him. In any event, both Webster and Edwards identified defendant in a photo array. Van Buren further contends that the detective "falsely stated in the felony complaint" that he did not have a valid FOID card. This charge was a misdemeanor charge (see 430 ILCS 65/14(e) (West 2016)) which was nol-prossed by the State at the beginning of Van Buren's preliminary hearing. As such, it was not "instrumental in the commencement or continuation of his criminal prosecution." *Beaman*, 2021 IL 125617, ¶ 88.

¶ 65 Based on the information they knew at the time of Van Buren's arrest, defendants held an objectively reasonable belief that Van Buren had committed the shooting. We find that there is no genuine issue of material fact regarding the existence of probable cause in this case, and therefore, we also find that the circuit court acted properly in granting defendants' motion for summary judgment on the allegations of malicious prosecution. See *Williams v. Manchester*, 228 Ill.2d 404, 417 (2008) (noting that summary judgment for the defendant is proper if the plaintiff fails to establish any elements of the cause of action); *Holt*, 2022 IL App (1st) 220400, ¶ 68 (providing that "[i]f it appears that there was probable cause to institute the proceedings, the action for malicious prosecution fails").

¶ 66 CONCLUSION

¶ 67 The judgment of the circuit court of Cook County is affirmed in its entirety.

¶ 68 Affirmed.

Notes:

[1] While the record suggests that a revolver owned by Van Buren could fire the recovered ammunition, there does not appear to be any forensic evidence linking the firearm or the ammunition to the shooting at issue.

[2] Van Buren's response did not reference Officer Loftus.

[3] We further note that Van Buren's grand jury indictment is *prima facie* evidence of probable cause for purposes of a malicious prosecution claim. See *Beaman*, 2021 IL 125617, ¶ 117; *Holt*, 2022 IL App (1st) 220400, ¶ 77 (same).

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2023 IL App (1st) 191973

SUBURBAN REAL ESTATE SERVICES, INC. and BRYAN BARUS, Plaintiffs
v.
WILLIAM ROGER CARLSON JR. and CARLSON PARTNERS, LTD., Defendants and Third-Party Plaintiffs-Appellants

(Carmen A. Gaspero Jr.; Lisa M. Gaspero; and Lisa M. Gaspero, Attorney At Law, P.C., d/b/a Gaspero & Gaspero, Attorneys at Law, P.C., Third-Party Defendants-Appellees).

No. 1-19-1973

Court of Appeals of Illinois, First District, Sixth Division

October 27, 2023

Appeal from the Circuit Court of Cook County. No. 16 L 5295 Honorable Diane M. Shelley, Judge, presiding.

Attorneys for Appellant: John J. D'Attomo, of Nisen & Elliott, LLC, of Chicago, for appellants.

Attorneys for Appellee: Rebecca M. Rothmann and Marc Pawlus, of Wilson Elser Moskowitz Edelman & Dicker LLP, of Chicago, for appellees.

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

OPINION

HYMAN JUSTICE.

¶ 1 Suburban Real Estate Services, Inc. (Suburban), and Bryan Barus needed legal advice in dissolving ROC/Suburban, LLC, a company they co-owned with ROC, Inc. Suburban and Barus retained defendants William Roger Carlson and his law firm, Carlson Partners, Ltd. After Barus

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followed Carlson's advice, ROC, Inc., sued Suburban, alleging Barus breached his fiduciary duties to ROC/Suburban. Barus then retained the law

firm of Gaspero &Gaspero (Gaspero), and both firms represented Suburban until Carlson withdrew several months later.

¶ 2 After a bench trial resulted in a judgment against Suburban for $336,652.26, Barus brought a legal malpractice complaint against Carlson, alleging Carlson's negligent advice led to the judgment. Carlson filed a third-party complaint for contribution against Gaspero under the Illinois Joint Tortfeasors Contribution Act (Contribution Act) (740 ILCS 100/0.01 (West 2016)).

¶ 3 Carlson moved for summary judgment, arguing the two-year statute of limitations barred the malpractice claim. Gaspero also moved for summary judgment on Carlson's contribution claim. The trial court granted summary judgment to Carlson. The trial court also granted Gaspero summary judgment on its third-party complaint for contribution.

¶ 4 Barus appealed the summary judgment order in Carlson's favor on his legal malpractice claim, and Carlson appealed the summary judgment order on its third-party complaint for contribution. This court stayed Carlson's appeal until resolution of Barus's appeal, which we reversed in Carlson's favor and remanded. *Suburban Real Estate Services, Inc. v. Carlson*, 2020 IL App (1st) 191953. The Illinois Supreme Court affirmed. *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935.

¶ 5 We now address whether the trial court erred in granting summary judgment to Gaspero on the contribution claim. Carlson contends the trial court (i) applied the wrong standard under section 2 of the Contribution Act and (ii) erred in finding no questions of fact on whether Gaspero caused or contributed to Barus's injury.

¶ 6 We affirm. Barus's monetary injuries for breaching his fiduciary duties to ROC/Suburban resulted from following Carlson's legal advice, and no genuine issues of material fact exist as to

whether Gaspero's representation of Barus in the underlying litigation caused or contributed to those injuries.

¶ 7 Background

¶ 8 Bryan Barus is the principal and sole owner of Suburban, a commercial real estate management company. In February 2006, Suburban and another company, ROC, Inc., formed ROC/Suburban LLC. (Michael Siurek, the sole shareholder of ROC, Inc., is not a party to the appeal.) The new company acted as a vendor to Suburban, supplying commercial

property management services. In 2010, Barus decided to end Suburban's involvement in ROC/Suburban and retained Carlson and his law firm to represent his company in unwinding the business relationship. On June 1, 2010, on the advice of Carlson, Barus sent a "break-up" letter to Siurek, notifying him of the steps he planned to take to terminate his company's relationship with ROC/Suburban, including no longer using ROC/Suburban as a vendor and taking most of ROC/Suburban's employees.

¶ 9 On the advice of Carlson, Barus implemented the steps outlined in the letter. About a month later, in August 2010, ROC, Inc., sued Suburban in Du Page County, alleging that Suburban's actions, through Barus, breached fiduciary duties owed to ROC/Suburban (underlying litigation). Barus also retained Gaspero to represent him in the underlying litigation because, according to Gaspero, Barus was troubled by the legal advice Carlson gave him. E-mail messages from Barus indicate he wanted the firms to work simultaneously and "in concert" and function as "a team" in the underlying litigation. The firms' joint representation lasted until December 2010, when Carlson terminated his relationship with Barus.

¶ 10 At a pretrial conference in April 2013, the trial judge told Gaspero that if the case proceeded to trial, it would likely find that Barus's conduct in disassociating from ROC, Inc., constituted a

breach of fiduciary duty. The judge further said that, to the extent Barus's conduct was recommended by Carlson, the advice constituted legal malpractice and a malpractice claim was "a hundred percent" certainty. Gaspero told Barus about the trial judge's comments and discussed the possibility of a legal malpractice claim against Carlson.

¶ 11 The underlying litigation continued for nearly five years. On the recommendation of Gaspero, Suburban filed a counterclaim, alleging that Siurek breached his fiduciary duties to ROC/Suburban. After a bench trial, the court entered judgment for ROC, Inc., and against Suburban on its counterclaim. The court found that Suburban, through Barus, breached its fiduciary duties and ordered Suburban to pay ROC, Inc., 50% of the fair value of the assets Barus improperly transferred from ROC/Suburban. In a written opinion, the trial court stated that Barus "had no creditability and his testimony was designed to hide facts from the court and cannot be believed." The court awarded damages of $336,652.26 against Suburban.

¶ 12 Malpractice Litigation

¶ 13 Barus, through new attorneys, filed a legal malpractice case in 2016, alleging that, as a result of Carlson's legal advice, he had to pay more than $500,000 in claims and attorney's fees to ROC, Inc. Barus alleged that Carlson improperly advised him on dissolving ROC/Suburban by (i) failing to advise on the appropriate steps to obtain a judicial dissolution, (ii) recommending Barus take self-help action, which resulted in a finding he breached his fiduciary duties to ROC/Suburban, (iii) recommending and approving the content of the breakup letter and the actions Barus took, or failing to advise him of the consequences of those actions, and (iv) failing to advise Barus of an alternate course of action after ROC, Inc., and its lawyers threatened to take legal action for breach of fiduciary duties.

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¶ 14 In April 2017, Carlson filed a third-party complaint for contribution against Gaspero under the Contribution Act. Carlson alleged Gaspero breached its fiduciary duties to Barus and caused or contributed to Barus's injury by (i) failing to prepare Barus for his deposition testimony properly, (ii) failing to apprise themselves of the facts to represent Barus in the underlying case competently, (iii) filing a counterclaim against ROC, Inc., and (iv) failing to settle ROC, Inc.'s, lawsuit against Barus after the trial judge informed Gaspero of the likelihood of an adverse ruling.

¶ 15 Carlson moved for summary judgment on the malpractice claim, arguing Barus knew or should have known about his alleged negligence in 2011 when Barus retained and started paying attorney's fees to Gaspero or by 2013, at the latest, when the trial judge told Gaspero that a malpractice claim was a certainty. Carlson argued that the applicable two-year statute of limitations barred Barus's malpractice complaint.

¶ 16 Meanwhile, Gaspero moved for summary judgment on Carlson's third-party complaint for contribution, arguing the record directly rebutted the conclusion that Carlson and Gaspero were both subject to liability in tort to Barus arising from the same injury, as required by section 2 of the Contribution Act. Gaspero asserted Carlson alone advised Barus on terminating his relationship with ROC/Suburban. Gaspero also argued Carlson could not proceed to trial on the claim without pointing to evidence showing what Gaspero could have done to change the outcome.

¶ 17 After a hearing, the trial court granted both motions for summary judgment. As to Carlson's contribution claim, the trial court found Carlson does not "point to any material in the record that reveals the Gaspero firm could or should have advised Barus against taking the actions that he took that gave rise to the [underlying] case." Further, "[a]s to failing to advise Barus to remediate his conduct against ROC/Suburban, there is nothing in

the record to show that this did not occur or that this would have prevented the existing damages. Indeed, by the time the Gaspero firm knew

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of Barus's conduct, the damage had been done to ROC/Suburban." The court found no evidence the Gaspero attorneys failed to apprise themselves of the facts of the case, stating that the only support was an unverified response to a motion for Illinois Supreme Court Rule 137 (eff. July 1, 2013) sanctions filed by the attorney representing Barus in the malpractice litigation. That motion stated, "in a conclusory manner that the 'record demonstrates that at least some of the issues identified by [the trial judge] with [Barus and his wife's] testimony may have resulted from issues [Gaspero] failed to completely understand, thus leading to the appearance that the Ba[r]us's were being deliberately obtuse.'" But the court found "no indication in the record that this motion is supported by any evidentiary foundation such as an affidavit, deposition testimony, or other foundational evidence."

¶ 18 As to Carlson's contention that Gaspero should have settled the case, the court stated that while an attorney could be liable in malpractice for failing to settle a case against a client's express instruction, "no evidence in the record show[ed] that Gaspero had such authority, or that Gaspero had not urged Barus to settle." Thus, the court determined no genuine issue of material fact existed on the question of proximate cause and granted summary judgment for Gaspero.

¶ 19 Barus appealed the trial court's order granting Carlson summary judgment on the malpractice claim, and Carlson appealed the summary judgment order on the claim for contribution. This court consolidated the appeals and stayed Carlson's appeal of his contribution claim pending Barus's appeal. We then reversed the trial court, finding the statute of limitations on Barus's malpractice claim did not accrue until the trial court entered judgment against Suburban for breaching its fiduciary duties. We remanded Barus's timely filed complaint for further proceedings. *Carlson*, 2020 IL App (1st) 191953. The Illinois Supreme Court affirmed. *Carlson*,

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2022 IL 126935. Now we turn to Carlson's appeal of the trial court's order granting summary judgment to Gaspero on Carlson's claim for contribution.

¶ 20 Analysis

¶ 21 Standard of Review

¶ 22 Summary judgment applies where no genuine issues of material fact remains, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2022). The trial court considers "the pleadings, depositions, admissions, exhibits, and affidavits on file in the case" and construes that evidence in favor of the nonmoving party. *Purtill v. Hess*, 111 Ill.2d 229, 240 (1986). But the inferences drawn in favor of the nonmovant must be supported by evidence; speculation and conjecture are insufficient. *Benson v. Stafford*, 407 Ill.App.3d 902, 912 (2010). We review the trial court's grant of summary judgment *de novo*. *Williams v. Manchester*, 228 Ill.2d 404, 417 (2008).

¶ 23 Section 2 of the Contribution Act

¶ 24 The Contribution Act permits a defendant to assert a third-party claim for contribution "where 2 or more persons are subject to liability in tort arising out of the same injury *** there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a) (West 2016). To properly allege a right of contribution, a defendant must demonstrate that (i) the defendant and the third party are both subject to liability in tort to the plaintiff and (ii) their liability must arise from the same injury. *People v. Brockman*, 148 Ill.2d 260, 268 (1992).

¶ 25 In assessing liability under section 2, we look at when the injury occurred and not when the contribution claim was brought. *Doyle v. Rhodes*, 101 Ill.2d 1, 11 (1984). Here, that would be when the judgment was entered against Barus. See *Carlson*, 2022 IL 126935, ¶¶ 37-39.

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¶ 26 Carlson asserts Gaspero's concurrent representation of Suburban in the underlying litigation alone is sufficient to make Gaspero "subject to liability in tort" under the Contribution Act. For support, Carlson relies on *Andreasen v. Suburban Bank of Bartlett*, 173 Ill.App.3d 333, 343-44 (1988). In *Andreasen*, minority shareholders of a bank filed a stock appraisal action against the bank and retained two law firms, one to try the case and the other to act as a liaison with the minority shareholders. *Id.* at 334. The bank filed a counterclaim, and when neither law firm representing the shareholders filed an answer, the trial court entered a default judgment. *Id.* The trial court granted the shareholders' motion to vacate the default judgment but ordered that they or their attorneys pay the bank. *Id.* One of the firms representing the shareholders appealed the order, arguing that the other firm was the shareholder's sole agent on the counterclaim issue and solely responsible for the failure to file an answer. *Id.* at 343. The appellate court disagreed, holding "[r]egardless of his understanding with cocounsel,

[the appellant attorney] retained responsibility to the clients and cannot excuse his failure to secure a timely answer to the counterclaim on the basis that he was not the attorney who was to respond to it." *Id.*

¶ 27 Carlson contends that, as in *Andreasen*, Gaspero's concurrent representation of Barus creates a question of fact on liability for Barus's injuries. *Andreasen* is distinguishable, however. In *Andreasen*, both firms represented the minority shareholders when the bank filed its counterclaim, so both had a responsibility to their clients for failing to answer. Conversely, only Carlson represented Suburban when the conduct giving rise to the underlying litigation occurred, namely, Carlson's advice to Barus about dissolving ROC/Suburban, which Barus eventually took. Gaspero's later representation alone is not, without more, sufficient to make Gaspero "subject to liability in tort," a requirement under the Contribution Act.

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¶ 28 Proximate Cause

¶ 29 Carlson also contends the trial court erred in granting summary judgment because questions of fact remain on whether Gaspero caused or contributed to Barus's injuries. We agree with Carlson that Gaspero could be liable for contribution under the Contribution Act even if Gaspero's conduct was not concurrent with Carlson's conduct, so long as the same injury is involved. See *Brockman*, 148 Ill.2d at 269 (holding, "the proper focus of the 'same injury' requirement is not the timing of the parties' conduct which created the injury, but the injury itself"); *Alper v. Altheimer &Gray*, 257 F.3d 680, 685 (7th Cir. 2000) (applying Illinois law, "if a trier of fact could find that [two law firms'] conduct combined to produce the same injury, [the law firm sued for malpractice] has properly pleaded a third party action for contribution, even though the conduct of the two parties occurred at different times").

¶ 30 But in determining whether Gaspero can be "subject to liability in tort," we must decide if they engaged in conduct while representing Barus that caused or contributed to the injuries. In short, we must assess whether Carlson has alleged facts showing Gaspero is liable for legal malpractice in representing Barus.

¶ 31 To prevail on a legal malpractice claim, a plaintiff client must plead and prove (i) the defendant attorney owed the plaintiff a duty of due care arising from the attorney-client relationship, (ii) the defendant breached that duty by committing a negligent act or omission, (iii) which proximately caused the plaintiff's injury, and (iv) the plaintiff suffered actual damages. *Laurent v. Johnson*, 2017 IL App (3d) 160627, ¶ 18. The failure to establish

an element of the cause of action will result in summary judgment. *Williams*, 228 Ill.2d at 417.

¶ 32 Carlson contends the record reflects that Gaspero's negligent representation caused or contributed to Barus's alleged injuries. Specifically, Gaspero failed to properly prepare Barus for

his trial testimony or to properly apprise themselves of the relevant facts necessary to examine trial witnesses competently. For support, Carlson relies on a response to a motion for Rule 137 sanctions filed by Barus's malpractice attorneys, that "at least some of the issues identified by [the trial judge] with the Barus'[s] testimony may have resulted from issues [Gaspero] failed to completely understand, thus leading to the appearance that the Barns's [*sic*] were being deliberately obtuse." Carlson contends the trial court erred in declining to consider this document on the grounds it was "an unverified motion for Rule 137 sanctions," because "[a]n admission in an unverified pleading signed by an attorney is binding on the party as a judicial admission." *Bank of New York Mellon v. Wojcik*, 2019 IL App (1st) 180845, ¶ 23. Alternatively, the statements constitute "evidentiary admissions" precluding summary judgment. See *Renshaw v. Black*, 299 Ill.App.3d 412, 418-19 (1998) (reversing summary judgment in legal malpractice case, attorney's statements were "evidentiary admissions" creating issue of fact on causation and damages).

¶ 33 Judicial admissions are formal admissions in the pleadings that have the effect of withdrawing a fact from issue and dispensing wholly with the need for its proof. *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill.App.3d 83, 86 (2010). A statement must be clear, unequivocal, and uniquely within the party's personal knowledge to constitute a judicial admission. *Williams Nationalease, Ltd. v. Motter*, 271 Ill.App.3d 594, 597 (1995). The statement must also be intentional, relating "to concrete facts and not an inference or unclear summary." *Serrano v. Rotman*, 406 Ill.App.3d 900, 907 (2011). Evidentiary admissions can be controverted or explained by the party, while judicial admissions cannot be controverted or explained. *Pryor v. American Central Transport, Inc.*, 260 Ill.App.3d 76, 85 (1994).

¶ 34 As a matter of law, the statements in the response to a motion for sanctions were neither judicial nor evidentiary admissions. Made by Barus's malpractice attorney, the statements are

being offered by Carlson, not against Barus but against Gaspero, who is not the party who made them. Moreover, the statements are not unequivocal, asserting some of the issues the trial judge raised about Barus's testimony *may* have resulted from Gaspero's failure to understand the issues thoroughly. This equivocal statement, not made by Gaspero, cannot constitute an admission. Thus, the trial court did not err in declining to consider it.

¶ 35 The other evidence that Gaspero caused or contributed to Barus's injury involves (i) the trial court's assertion in its written opinion that Barus was "not truthful" and "not credible" when he testified at trial, (ii) failing to settle the underlying lawsuit after the trial judge told Gaspero that Barus had breached his fiduciary duties, and (iii) filing a counterclaim against Siurek without naming Siurek as a defendant in his individual capacity or presenting evidence of damages. Carlson asserts that this "evidence," at minimum, presents a question of fact on whether Gaspero caused or contributed to Barus's injuries. We disagree.

¶ 36 The trial judge's assessment that Barus was not a truthful or credible witness, without more, does not constitute evidence of legal malpractice. Carlson does not contend, and nothing in the record suggests, Gaspero encouraged Barus to lie or failed to advise him to testify truthfully.

¶ 37 As to failing to settle, Carlson presents no evidence Gaspero did not try to settle. At her deposition, Lisa Gaspero stated she was "always advising Barus *** it would be in his best interests to settle to avoid graver repercussions" and "[Barus] wanted to settle the case under terms that he would consider fair, and we had not yet been able to arrive at an agreement that [he] considered fair." An attorney has no authority to settle a client's claim, absent the client's express authorization. *Kulchawik v. Durabla Manufacturing Co.*, 371 Ill.App.3d 964, 969 (2007). The record suggests Gaspero encouraged Barus to settle and attempted to settle, but the parties never reached terms to which Barus would agree. Again, not evidence of legal malpractice.

¶ 38 Lastly, Carlson contends Gaspero was negligent in advising Barus to file a counterclaim against Siurek, which contributed to extending the case for several years and resulted in an adverse judgment against Suburban. First, as noted, nothing in the record suggests that anything other than Carlson's advice to Barus resulted in the trial court's finding Barus breached his fiduciary duties to ROC/Suburban. As to whether Gaspero acted negligently by filing a counterclaim prolonging the litigation," 'the question of whether a lawyer has exercised a reasonable degree of care and

skill in representing and advising his [or her] client has always been one of fact.'" *Nelson v. Quarles & Brady, LLP*, 2013 IL App (1st) 123122, ¶ 30 (quoting Brown *v. Gitlin*, 19 Ill.App.3d 1018, 1020 (1974)). Despite a lawyer's breach of a duty to a client presenting a factual question, "the issue may be decided as a matter of law under the doctrine of judgmental immunity which provides that 'an attorney will generally be immune from liability, as a matter of law, for acts or omissions during the conduct of litigation, which are the result of an honest exercise of professional judgment.'" *Id.* ¶ 31 (quoting *McIntire v. Lee*, 816 A.2d 993, 1000 (N.H. 2003)).

¶ 39 Carlson presented no evidence that the Gaspero firm failed to exercise professional judgment in representing Barus or caused or contributed to the monetary injuries Barus incurred when he breached his fiduciary duties by taking the actions Carlson recommended. Absent that evidence, the trial court correctly granted summary judgment to Gaspero on Carlson's claim for contribution.

¶ 40 Affirmed.

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2023 IL App (1st) 221467-U

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a Christiana Trust, not in its individual capacity but solely as Trustee of the Brougham Fund I Trust [successor in interest to WELLS FARGO BANK, N.A.], Plaintiff-Appellee,
v.
MALCOLM D. HERZOG, Defendant-Appellant.

No. 1-22-1467

Court of Appeals of Illinois, First District, Second Division

December 5, 2023

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

Appeal from the Circuit Court of Cook County. No. 11 CH 25112 Honorable William B. Sullivan Judge, Presiding.

JUSTICE COBBS delivered the judgment of the court. Justices McBride and Ellis concurred in the judgment.

ORDER

COBBS JUSTICE.

¶ 1 *Held*: Appeal is not moot despite appellant's failure to obtain a stay because appellant has requested relief other than the sold property. The circuit court properly granted summary judgment in favor of Wilmington Savings where the release of the mortgage was not supported by consideration and foreclosure of the valid mortgage on Herzog's property was warranted. The circuit court's confirmation of sale and

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entry of deficiency judgment was not an abuse of discretion. The circuit court is directed to enter an order expunging the invalid release from the public record.

¶ 2 In this mortgage foreclosure action, defendant-appellant Malcolm D. Herzog appeals from orders of the circuit court of Cook County entering summary judgment in favor of plaintiffappellee Wilmington Savings Fund Society, doing business as Christiana Trust, not in its individual capacity but

solely as Trustee of the Brougham Fund I Trust [successor in interest to Wells Fargo Bank, N.A.] (Wilmington Savings), confirming the sale of the property, and entering a deficiency judgment against Herzog in the amount of $1,574,091. On appeal, Herzog argues that the circuit court erred in granting summary judgment in favor of Wilmington Savings because the release of the mortgage barred its foreclosure and Wilmington Savings did not provide evidence of fraud, duress, illegality, or mutual mistake. He also argues that the court erred in confirming the foreclosure sale and entering a deficiency judgment without an evidentiary hearing where the amount was patently inequitable. For the reasons that follow, we affirm and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 Preliminarily, we note that, despite the more than a thousand pages of record, Herzog's statement of facts is comprised of less than three pages. See Ill. S.Ct. R. 341(h)(6) (eff. Oct. 1, 2020) (Statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment[.]"). Those three pages provide almost none of the procedural history of the case and contains improper argument throughout. Unfortunately, Wilmington Savings did not provide its own statement of facts, despite the deficiency in Herzog's brief. See Ill. S.Ct. R. 341(i) (eff. Oct. 1, 2020) (Statement of facts need not be included in appellee's brief "except to the extent that the presentation by the appellant is deemed

unsatisfactory."). Nonetheless, we choose neither to strike the statement of facts nor dismiss the appeal. We will, however, disregard the noncompliant portions of Herzog's statement of facts. See *Szczesniak v. CJC Auto Parts, Inc.*, 2014 IL App (2d) 130636, ¶ 8. The following statement of facts, therefore, is based on the record filed on appeal.

¶ 5 The property that is the subject of these foreclosure proceedings is located at 9111 West 126th Street in Palos Park, Cook County, Illinois. On September 8, 2006, Herzog executed a mortgage in the amount of $1,499,999. The original mortgagor, Wells Fargo Bank, N.A. (Wells Fargo), recorded the mortgage with the Cook County Recorder of Deeds on October 12, 2006.

¶ 6 The loan was twice modified, first on March 31, 2008, and a second time on April 3, 2008. After the second modification, the amount of indebtedness was $1,728,798.05. Significantly, the release of the original mortgage was recorded, five days later, on April 8, 2008.

¶ 7 In late 2010, Herzog failed to make the necessary mortgage payments and the note and mortgage went into default.

¶ 8 Subsequently, on July 18, 2011, Wells Fargo filed its initial complaint in this action.

¶ 9 Between 2011 and 2017, Wells Fargo continued to pursue its foreclosure action against Herzog. In 2016, Wells Fargo assigned Herzog's mortgage to Wilmington Savings. On Wells Fargo's motion, Wilmington Savings was substituted as plaintiff. Attached to the motion was an exhibit showing the corporate assignment of Herzog's mortgage which reflected the mortgage as "ReRecorded" on February 22, 2016. The court granted the motion on August 15, 2017.

¶ 10 On October 16, 2017, Wilmington Savings filed several non-dispositive motions, including a motion for summary judgment.

¶ 11 Following briefing on Wilmington Savings's motion for summary judgment on January 18, 2018, Herzog filed a motion and was subsequently granted leave to file an affirmative defense,

namely release of the mortgage. Attached to the motion was an exhibit showing that, on April 18, 2008, Wells Fargo executed a "Release of Mortgage or Trust Deed," recorded on May 8, 2008, with the Cook County Recorder of Deeds. The release stated that Wells Fargo "for and in consideration of the payment of indebtedness" secured by Herzog and "the cancellation of all the notes thereby secured, and the sum of one dollar, "do hereby REMISE, RELEASE, CONVEY, AND QUITCLAIM unto [Herzog] *** all the right, title, interest, claim, or demand *** acquired in, through or by a certain Mortgage/Trust Deed, dated September 8, 2006[.]" The document was signed by Milly A. Thompson, as assistant vice president of Wells Fargo.

¶ 12 On March 2, 2018, Wilmington Savings moved to amend its complaint, the version of which is the subject of this appeal. Count I requested, *inter alia*, foreclosure on the mortgage. Count II requested a judgment declaring the validity of the mortgage and expungement of the release from the public record. The complaint stated that Wilmington Savings's predecessor "executed an erroneous 'Release of Mortgage or Trust Deed' dated April 18, 2008 and recorded April 8, 2008[.]" The subject mortgage "was re-recorded February 22, 2016 *** to reflect that the subject mortgage is a valid and subsisting lien [against] the subject property" and Herzog continued to make payments on the note and mortgage "after the date of the erroneous Release of Mortgage[.]" Wilmington Savings requested

that the circuit court declare the mortgage as valid, expunge the release of mortgage, and award such other relief as "fit and proper" under the circumstances.

¶ 13 Attached to the complaint was an affidavit of rescission dated May 4, 2015, and signed by Elizabeth Ripka, vice president of loan documentation of Wells Fargo. Ripka averred that the release should be expunged as "null and void" because there is still a "valid and existing lien against the subject property."

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¶ 14 In his answer to the amended complaint, Herzog stated "affirmatively that [Wilmington Savings] lacks any valid and subsisting instrument that is subject to foreclosure," "all indebtedness secured thereby was released" by the release of mortgage, and the re-recording of the mortgage was not authorized or effective. He denied that the affidavit of rescission was genuine but "admit[ted] that he made payments to Wells Fargo" after the recording of the release. Finally, he requested that both counts be dismissed with prejudice.

¶ 15 Between 2018 and 2021, Herzog filed two motions to dismiss, as well as a motion for summary judgment, all of which were denied. During that time, the depositions of John Gresham, a corporate representative of BSI Financial Services (BSI), and Herzog were taken.

¶ 16 Gresham testified that BSI is the servicer for Wilmington Savings. BSI accepts payments from borrowers, sends out mortgage statements, takes inquiries, and assists with loss mitigation. Gresham was responsible for reviewing loans that fall into default and attending trials, mediations, and depositions in foreclosure cases. He testified that he had not seen the agreement between Wells Fargo and Wilmington Savings assigning the subject mortgage. He did not personally contact Wells Fargo to see if there were any additional documents related to this mortgage. He also did not contact any persons identified in the release document or the affidavit of rescission and he had no knowledge as to the error made in the release of the mortgage. As far as he knew, no one at BSI ever investigated who was involved in the execution of those documents. He further testified that there was nothing on the face of the release that would suggest that it was made in error.

¶ 17 Herzog testified that he had other "obligations" with Wells Fargo, in addition to the one at issue, and he did not recall making mortgage payments to Wells Fargo for the property at issue. He testified that he believed that he did not have a mortgage on the property at issue because "it

was released as well as the debt." He further testified that he did not recall any of the specifics

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surrounding the execution of the release. As to the continued payments to Wells Fargo after the release, Herzog stated that he did not recall making any payments after March 26, 2008, but he had other obligations with Wells Fargo and any payments made should have been applied to his other mortgage.

¶ 18 During his deposition, the following colloquy occurred:

> "Q. Did you receive a form 1099-C for this property after the release of mortgage was recorded in May of 2008 from Wells Fargo Bank?
>
> A. I do not remember.
>
> * * *
>
> Q. When people have loan forgiveness against them, it gets taxed a certain way. When people make monthly payments or pay off a debt, it gets taxed in an entirely different way. Do you know how that -- do you know what actions or steps you reported to the IRS relating to the forgiveness of the $1.5 million?
>
> A. No recollection.
>
> Q. Do you know if it was treated as personal income?
>
> A. No recollection.
>
> Q. Do you recognize if you took $1.5 million of loan forgiveness and didn't treat it as earned income it could have tax consequences?
>
> A. No recollection."

¶ 19 On June 1, 2021, Wilmington Savings filed a motion for summary judgment. Therein, Wilmington Savings asserted that Herzog admitted that the mortgage was a valid lien by failing to deny the allegation in his answer. Further, Herzog's admission that he continued to make payments

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on the mortgage after the release was executed is evidence that the release was in error. It also contended that those continued payments evidenced that Herzog had not paid the entire indebtedness at the time the release was executed. Additionally, it maintained, Herzog's deposition showed that he had no evidence of valid consideration for the release because he could not recall any of the details of the release. It further pointed to Wells Fargo's re-recording of the mortgage as evidence of the invalidity of the release. Finally, Wilmington Savings asserted that Herzog's indebtedness still existed and had Herzog paid off the loan to secure the release, no amount would be owed. Attached to the motion was an affidavit from Cheryl Mallory, an assistant vice president of BSI, attesting that, as of January 8, 2021, the amount due under the mortgage was $2,481,266.62.

¶ 20 Simultaneously, Wilmington Savings filed a motion to appoint a selling officer and a motion for judgment of foreclosure.

¶ 21 On July 15, 2021, Herzog filed his response to Wilmington Savings's motion for summary judgment. He argued that an issue of fact existed as to whether the mortgage in this action remains in existence and is subject to foreclosure. He further asserted that Wilmington Savings lacks any proof that the release was mistakenly prepared, executed, and recorded by Wells Fargo. Additionally, he claimed that evidence of unilateral mistake would be insufficient. Finally, Herzog asserted that there is no evidence of lack of consideration and that issue was never included in plaintiff's amended complaint.

¶ 22 On August 5, 2021, Wilmington Savings filed its reply, arguing that there would only be an issue of material fact if Herzog claimed that there was consideration for the release and he had evidence to support that claim.

¶ 23 The circuit court scheduled a hearing on the motion for September 28, 2021. There is no transcript of this hearing, or an acceptable substitute, in the record, in contravention of Illinois Supreme Court Rule 323(a), (c), (d) (eff July 1, 2017). Following the hearing, the circuit court granted summary judgment in favor of Wilmington Savings and entered a judgment of foreclosure and sale. The court also appointed a selling officer.

¶ 24 On November 29, 2021, Herzog filed a motion for a stay pending appeal pursuant to Illinois Supreme Court Rule 305(b) and a motion for a finding pursuant to Illinois Supreme Court Rule 304(a), which were both denied.

¶ 25 On that same day, Herzog also filed a motion for reconsideration, containing largely the same arguments as in his response to the motion for summary judgment. On April 12, 2022, the circuit court denied Herzog's motion for reconsideration.

¶ 26 On April 19, 2022, the subject property was sold at auction for $1,088,000.

¶ 27 After the sale, Wilmington Savings filed a motion for approval of the sale and for an eviction order. Herzog objected, arguing that Wilmington Savings failed to show that the value of the collateral was less than the indebtedness and the sale was not commercially reasonable.

¶ 28 On August 30, 2022, the court approved the sale and entered a deficiency judgment of $1,574,091.18 against Herzog. The court's written order stated that all required notices were given, the sale was fairly and properly made, and justice was otherwise done.

¶ 29 This timely appeal followed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, Herzog argues that the circuit court erred in granting summary judgment in favor of Wilmington Savings because the release of the mortgage barred its foreclosure and

Wilmington Savings did not provide evidence of fraud, duress, illegality, or mutual mistake. He also argues that the court erred in confirming the sale and entering a deficiency judgment without an evidentiary hearing where the amount was patently inequitable.

¶ 32 A. Mootness

¶ 33 Initially, we must address Wilmington Savings's contention that this appeal should be dismissed. Wilmington Savings asserts that Herzog's appeal of the circuit court's judgment is moot because he failed to obtain a stay of the judgment as required under Illinois Supreme Court Rule 305(k) (eff July 1, 2017).

¶ 34 Herzog, in his reply, contends that, if this court reverses the foreclosure judgment or, in the alternative, vacates the deficiency judgment, it will have "provided highly substantial relief regardless of the inability of [Herzog] to recover the foreclosed property." He further asserts that "he will also get restitution for the value he lost by reason of the improper

foreclosure and sale." Finally, he argues that there is no precedent for declaring an appeal moot that involves a deficiency judgment, or "where money was at stake."

¶ 35 Before proceeding, we note that while this appeal was pending, Wilmington Savings filed a motion to dismiss the appeal as moot pursuant to Illinois Supreme Court Rule 305(k). Herzog filed an objection. A different panel of this court denied the motion.

¶ 36 "The denial of a motion to dismiss an appeal is not final and '[t]he panel that hears the appeal has an independent duty to determine whether it has jurisdiction and to dismiss the appeal if it does not. '" *Rocha v. FedEx Corporation*, 2020 IL App (1st) 190041, ¶ 54 (quoting *In re Estate of Gagliardo*, 391 Ill.App.3d 343, 348-49 (2009)). Therefore, despite the prior order denying the motion to dismiss, we reconsider whether this appeal is moot, pursuant to our inherent authority

to reconsider our prior rulings. See *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 37 ("A court has inherent authority to reconsider and correct its rulings[.]").

¶ 37 Whether an appeal is moot is a threshold question. *Lakewood Nursing &Rehabilitation Center v. Department of Public Health*, 2015 IL App (3d) 140899, ¶ 17. "An appeal is moot if no actual controversy exists or if events have occurred that make it impossible for the reviewing court to grant the complaining party effectual relief." *In re Marriage of Peters-Farrell*, 216 Ill.2d 287, 291 (2005). "The existence of a real dispute is not a mere technicality but, rather, is a prerequisite to the exercise of this court's jurisdiction." *Id.* However, the failure to obtain a stay pending appeal, by itself, does not render an appeal moot. *In re Tekela*, 202 Ill.2d 282, 292 (2002). Rather, where a reviewing court is not capable of granting any effectual relief to a party, the case is rendered moot. *Id.* at 292-93.

¶ 38 In cases involving property, an appeal is moot when the subject property "has already been conveyed to a third party and the party seeking possession failed to obtain a stay." *Northbrook Bank &Trust, Co. v. 2120 Division LLC*, 2015 IL App (1st) 133426, ¶ 14. Where there is no stay of judgment pending appeal, Illinois Supreme Court Rule 305(k) (eff. July 1, 2017) protects a third-party buyer from reversal or modification of a judgment regarding the subject property. *Steinbrecher v. Steinbrecher*, 197 Ill.2d 514, 523 (2001). As such, the protections afforded to the non-party purchaser of the subject property under Rule 305(k) prevent this court from providing any relief that would affect the disposition of the property.

¶ 39 In his notice of appeal, as well as in his opening brief, Herzog requests merely that the trial court's orders be reversed. In reply to Wilmington Savings's mootness argument, however, he asserts that because there is a deficiency judgment at issue and there is a possibility for restitution for the value he lost if the foreclosure is held to be improper, his appeal cannot be considered moot.

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¶ 40 We first note that the case to which Wilmington Savings cites for support, *Deutsche Bank National Trust Co. as Trustee for Indymax Indx Mortgage Loan Trust 2006-AR25 v. Roman*, 2019 IL App (1st) 171296, is inapposite. There, although a deficiency judgment was entered against the defendant, the defendant did not on appeal request any monetary relief and this court's mootness analysis lacked any reference to that deficiency judgment. *Id.* ¶¶ 19-27. That said, it is debatable whether, but for Wilmington Savings's mootness argument, Herzog would have made a specific request for restitution. However, in the face of Rule 305(k), reversal in this case could only yield monetary relief.

¶ 41 Although not often sought in cases such as the one now before us, restitution remains a viable form of equitable relief following a foreclosure. See, e.g., *RCB Equities #3, LLC v. Jakubow*, 2021 IL App (1st) 200256-U (mootness argument rejected where defendant had no interest in return of the foreclosed property, but instead sought reversal of the deficiency judgment or an award of the sale proceeds); *Wilmington Savings Fund v. Lockhart*, 2019 IL App (1st) 181180-U (where the appellant's claim requesting the court reverse the trial court's dismissal of her quiet title claim was moot because this court could not grant any meaningful relief but her claims seeking money damages were not moot because they did not depend on the title to the property); but see *First Horizon Home Loans v. Garcia*, 2019 IL App (1st) 180092-U (where there was no evidence in the record to support defendant's claim on appeal that it was seeking money damages as opposed to reversal of the judgment of foreclosure and confirmation of the sale, defendant's appeal was deemed moot pursuant to Rule 305(k)).[1] Indeed, case law dating back over a century has

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established that, on the reversal of a foreclosure judgment, when the post judgment sale of a property prevents a court from restoring the foreclosure defendant to the *status quo ante*, the proper remedy is to award the defendant the sale proceeds in place of the property. See *Thompson v. Davis*, 297 Ill. 11, 15-19 (1921) (where "[t]he decree of foreclosure was reversed and set aside, and the parties became entitled to be restored to

their former rights as nearly as possible"); see also *Williamsburg Village Owners' Ass'n, Inc v. Lauder Associates*, 200 Ill.App.3d 474, 483 (1990) ("[U]pon the reversal of a judgment, under which one of the parties has received benefits, he is under an obligation to make restitution.").

¶ 42 Here, Herzog has requested that we vacate the summary judgment entered and, if he is ultimately successful in the circuit court, he could seek restitution in lieu of possession of the transferred property and he would be relieved of the deficiency judgment. Because Herzog has requested relief other than possession of the property, we find that the appeal is not moot and proceed to the merits.

¶ 43 B. Summary Judgment

¶ 44 On appeal, Herzog argues that the release issued by Wells Fargo should have barred the foreclosure and "cannot be avoided by parol evidence of lack of consideration for its issuance[.]" Herzog further contends that Wilmington Savings was required to present evidence of fraud, duress, illegality, or mutual mistake to set aside the release and it failed to present such proof.

¶ 45 Wilmington Savings responds that Herzog failed to demonstrate that the purported release created a genuine issue of material fact. It further asserts Herzog presented no evidence that he provided consideration for a release on the mortgage. Instead, it maintains, during his deposition, he repeatedly asserted that he could not recall anything about the release and he admitted to

continuing to make payments towards the outstanding indebtedness following the purported release.

¶ 46 Summary judgment is appropriate" 'where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2020))." 'Genuine' means there is evidence to support the position of the nonmoving party." *Pekin Ins. Co. v. Adams*, 343 Ill.App.3d 272, 275 (2003). The court construes the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent. *Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 43 (2004). The party moving for summary judgment is not required to prove its case or disprove the nonmovant's case, but instead may be "entitled to summary

judgment by demonstrating the absence of a genuine issue of material fact." *Berke v. Manilow*, 2016 IL App (1st) 150397, ¶ 31. The nonmovant may defeat a summary judgment motion by demonstrating that a question of fact does exist. *Id.* To do so, the nonmovant "must come forth with some evidence that arguably would entitle [them to] recovery at trial." *Id.* "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 102 (1992). "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill.App.3d 313, 328 (1999). Our review of the court's decision is *de novo* (*Adams*, 211 Ill.2d at 43), meaning we perform the same analysis a trial court would perform and we afford no deference to the reasoning or the disposition of the trial court (*Johnson v. Fuller Family Holdings, LLC*, 2017 IL App (1st) 162130, ¶ 37).

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¶ 47 Count I of Wilmington Savings's amended complaint alleges that the mortgage is a valid, existing lien and requests that the circuit court enter a judgment of foreclosure against Herzog. Count II, though oddly worded, seeks a declaratory judgment that the release was recorded in error and requests that the court "expunge" it from the public record. We first note that the order entered in this case states simply that the circuit court granted Wilmington Savings's motion for summary judgment. No mention is made of the release, the later filed purported recission, or expungement.[2]That notwithstanding, the inference to be drawn from the court's judgement is that the release was recorded in error and that there was, therefore, a valid lien on the property supporting summary judgment in favor of Wilmington Savings. See *Illinois Bar Association Mutual Insurance Co. v. Canulli*, 2020 IL App (1st) 190142, ¶ 19 (an order granting summary judgment that fails to expressly dispose of all issues may be appealed from where the order necessarily entailed the disposition of the remaining issues). Accordingly, we first address the validity of the release, a necessary predicate to determining whether there was a valid, existing mortgage under which Herzog defaulted and which supported the court's judgment. We reserve for later discussion Wilmington Savings's request that the release be expunged from the public record.

¶ 48 The salient facts surrounding the release are as follows. A release was executed by Wells Fargo on April 18, 2008, and recorded on May 6, 2008. The release identified Herzog as the mortgagor and identified the mortgage at issue in this case. Signed by the Assistant Vice President of Wells Fargo, the release stated that Herzog was released from the mortgage. Seven years later, Wells Fargo, just prior to assigning this mortgage to Wilmington Savings, filed an affidavit of

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rescission with the Cook County Recorder of Deeds, which stated generally that the release was recorded in error. The mortgage was then "re-recorded" in 2016.

¶ 49 "A release is the abandonment of a claim to the person against whom the claim exists." (Internal quotation marks omitted.) *Borsellino v. Putnam*, 2011 IL App (1st) 102242, ¶ 103. Because it is a contract, a release is governed by the rules of law pertinent to contracts. *Bruner v. Illinois Cent. R. Co.*, 219 Ill.App.3d 177, 180 (1991). Where the release in question is valid on its face, the burden of proof is on the party seeking to rescind or invalidate the release. *Meyer v. Murray*, 70 Ill.App.3d 106, 111 (1979).

¶ 50 Herzog asserts that, for Wilmington Savings to avoid enforcement of the release, it must provide clear and convincing evidence that the release was obtained through fraud, duress, illegality, or mutual mistake. See *Vandenburg v. Brunswick Corporation*, 2017 IL App (1st) 170181, ¶ 29; *Simmons v. Blauw*, 263 Ill.App.3d 829, 832 (1994) (citing *Frank Rosenberg, Inc. v. Carson Pirie Scott &Co.*, 28 Ill.2d 573, 579 (1963)). However, this argument assumes that the release was, in fact, a valid contract. Wilmington Savings takes the position that the release was not a valid contract because no consideration for releasing Herzog from the mortgage was given in exchange.

¶ 51 A valid contract is one that is supported by an offer, acceptance, and consideration. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 329 (1977); see also *Moehling v. W.E. O Neil Construction Co.*, 20 Ill.2d 255, 265 (1960) (stating that consideration is an essential element of a valid contract). "Consideration for a contract consists of either some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss of responsibility given, suffered, or undertaken by the other." *Johnson v. Maki and Associates, Inc.*, 289 Ill.App.3d 1023, 1028 (1997). "There must be a consideration for every valid contract and, if there is no consideration,

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the contract is invalid." *Beyer v. Wolfe*, 228 Ill.App. 429, 435 (1923). Further, Illinois courts have expressly held that a release is invalid unless it is supported by consideration. See *Rohr Burg Motors, Inc. v. Kulbarsh*, 2014 IL App (1st) 131664, ¶ 48; *Koules v. Euro-American Arbitrage, Inc.*, 293 Ill.App.3d 823, 832 (1998). Nonetheless, "the mere pleading of lack of consideration [does] not overcome the presumption of a valid consideration, for that can only be done by offering evidence in support of that allegation."

Stolzenbach v. Pagoria, 71 Ill.App.3d 863, 866 (1979). Such evidence must be of a "very clear and cogent nature." *Pedott v. Dorman*, 192 Ill.App.3d 85, 93 (1989).

¶ 52 Initially, we point out that, despite Wilmington Savings's repeated assertions that Herzog has failed to demonstrate the validity of the release, for example, by proving consideration was given for the release, the burden is on Wilmington Savings, not Herzog, to first provide *clear and cogent* evidence that the facially valid release was invalid. See *Blaylock v. Toledo, P. &W. R. Co.*, 43 Ill.App.3d 35, 38 (rejecting the plaintiff's position that "it was the burden of the defendant to prove the absence of those grounds which might vitiate the release" and finding fatal "the plaintiff's failure to support his charge of fraud"). If Wilmington Savings first demonstrates that the release was invalid for lack of consideration, it will have proven that it is entitled to summary judgment as a matter of law, unless Herzog comes forth with some evidence to create a genuine issue regarding consideration.

¶ 53 In his attempts to defeat Wilmington Savings's argument, Herzog cites to the principle of law that courts will typically not inquire into the sufficiency or adequacy of consideration. Sufficiency of consideration is not, however, the issue now before us. Wilmington Savings's argument is that there is a total lack of consideration in exchange for the release of the mortgage. See *White v. Village of Homewood*, 256 Ill.App.3d 354, 358 (1993) (rejecting the defendants'

cited authority because the issue before the court was not adequacy of consideration but absolutely no consideration flowed between the parties). Thus, where the issue before the court, as it is here, is whether a valid contract was formed, a court may inquire into the actual consideration given. *Agnew v. Brown*, 96 Ill.App.3d 904, 908 (1981) ("[L]ack or failure of consideration goes to the actual validity of contract formation [citation omitted] and cannot be swept aside by [a party's] argument that a court typically does not review adequacy of consideration."). Thus, Herzog's argument fails.

¶ 54 Herzog fares no better with his repeated assertions regarding the inadmissibility of "parol evidence" to validate the release. "The parol evidence rule, in general, operates to exclude evidence which would change or alter the expressed meaning of a written document, when such evidence concerns dealings between the parties before or at the time of making the written contract." *Davis v. Buchholz*, 101 Ill.App.3d 388, 391 (1981). Where a contract recites consideration, "that recital is prima facie evidence that the grantor received the amount named." *Walton v. Malcolm*, 264 Ill. 389, 397

(1914). Although there is a presumption that consideration was given for a contract, the presumption is rebuttable, although "evidence to rebut must be of a very clear and cogent nature." *Davis*, 101 Ill.App.3d at 392. "[F]ailure of consideration may be shown by parol evidence" where that issue is properly in dispute. *Id.* In the case before us, Wilmington Savings has explicitly challenged whether *any* consideration was given in exchange for the release of Herzog's mortgage. As such, any evidence submitted on that issue was admissible and appropriately considered by the circuit court and now this court. *In re Marriage of Tabassum and Younis*, 377 Ill.App.3d 761, 770 (2007) (stating that whether a contract contains consideration is a question of law that we review *de novo*).

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¶ 55 To support its claim that the release was recorded in error, Wilmington Savings points to Wells Fargo's 2015 affidavit of rescission, Herzog's admission that he continued to make mortgage payments after the release was recorded, and the amount of Herzog's outstanding indebtedness. Herzog contends that this evidence is insufficient to support recission of the release and Wilmington Savings's allegations are based on pure speculation.

¶ 56 Based on the evidence before us, we are not persuaded that either Wells Fargo's affidavit of rescission, which offers little, or Herzog's admission of continued payments to Wells Fargo post-release are sufficient to support Wilmington Savings's claim of no consideration. First, the affidavit, issued seven years after the release was recorded, generally states that the release was recorded "in error" and is rendered "null and void." This is hardly evidence of a lack of consideration. Second, we do not dispute that Herzog admitted to continuing to make payments to Wells Fargo. However, in his deposition, he testified that he had multiple obligations with Wells Fargo and any of his payments could have been made for the purpose of a mortgage other than one at issue here. As such, neither of these facts constitute clear and cogent evidence of the release's invalidity.

¶ 57 That said, we are persuaded that Wilmington Savings has presented evidence that Herzog's mortgage has simply not been paid off. Further, the amount of his indebtedness at the time the motion for summary judgment was filed was $2,481,266.62, according to an affidavit from BSI on behalf of Wilmington Savings. As Herzog himself states in his brief, "[t]he Release unambiguously states that it was issued 'for and in consideration of the payment of the indebtedness secured by the borrower[.]" Although he contends that this recital defeats Wilmington Savings's contention that consideration was not given, we construe that recital differently in light of the evidence of Herzog's continuing indebtedness. In our view, the release

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contains a specific recital of consideration, namely the payment of Herzog's indebtedness, which at that time was more than $1.7 million. Although he asserts that consideration could have taken another form, the specificity of the release leaves no room for such an inference.

¶ 58 Further, and although neither party appears to press the point here, during his deposition, Herzog was asked a series of questions regarding tax consequences resulting from the release. He was specifically asked whether he had received a 1099-C for the property after release of the mortgage was recorded. In response to every question regarding tax consequences, Herzog repeatedly stated that he had "no recollection."

¶ 59 We need not delve too deeply into the taxation issue here. Suffice it to say that if Wells Fargo had discharged $1.7 million of debt to Herzog, it would have been required, not only to notify the IRS of the same, but also Herzog. See *In re Estate of Hofer*, 2015 IL App (3d) 140542, ¶ 22 (Form 1099-C "was created for the mandatory reporting by applicable entities to the IRS of discharges, cancellations, or extinguishments rendering a debt unenforceable or uncollectible y the creditor."); see also 26 CFR § 1.6050P-1(a) (2016). And, notice would not have been the end of the story, for forgiveness of the debt would have resulted in personal income to Herzog, also reportable to the IRS (26 U.S.C. § 61(a)(11) (2017) (income for discharge of indebtedness is included within gross income)) and, not likely an event that one would have forgotten.

¶ 60 Given that, we are simply hard pressed to believe, number one, that Herzog had no recollection of not having received a 1099-C, if as he maintains, the debt had actually been released. Number two, given that lenders are not in the habit of giving away money, it strains the bounds of credulity that, on April 3, 2008, Wells Fargo granted a loan modification, increasing Herzog's mortgage to $1,728,798 and then, a few short days later, on April 18, 2008, that same mortgage was released. Other than his protestations regarding Wilmington Savings's lack of proof

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of consideration, Herzog has presented no evidence to defeat summary judgment. The simplest proof would have been cancelled checks or some other documents bearing the account number for payment on the mortgage identified in the release, materials clearly under Herzog's control. Clearly, the purported release was filed in error.

¶ 61 In sum, Herzog has presented no evidence that contradicts Wilmington Savings's proof of lack of consideration, and thus, there is no genuine issue of material fact before the court regarding consideration. Because Wilmington Savings presented "clear and cogent" evidence that consideration was not paid in exchange for the release, we conclude that the release was not a valid contract and Wilmington Savings had a valid, existing mortgage against Herzog. Therefore, Wilmington Savings was entitled to summary judgment as a matter of law.

¶ 62 As a final aside, it is not lost on this court that Wilmington Savings's predecessor in interest, Wells Fargo, was in no way prompt in seeking to rescind the invalid release. The affidavit of rescission was not filed until seven years after the release was recorded. Considering there was no consideration for the release, and because we have no reason to believe that Wells Fargo, having entered into a loan modification with Herzog, intended to then effectively gift Herzog with millions of dollars, it is obvious that Wells Fargo made a serious error. Additionally, the complete lack of evidence presented regarding the circumstances which led to the execution and recording of the release is disconcerting, albeit not surprising considering fifteen years have passed since then. Nonetheless, under the circumstances before us, we cannot contemplate any better evidence available to Wilmington Savings to prove Herzog's failure to give consideration than proof of his multimillion dollar outstanding indebtedness to Wilmington Savings.

¶ 63 For that reason, we conclude that the circuit court properly granted summary judgment in favor of Wilmington Savings.

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¶ 64 C. Confirmation of Sale and Deficiency Judgment

¶ 65 We next address Herzog's challenges to the confirmation of sale and deficiency judgment. Herzog requests that this court "reject the sale" or "require an evidentiary hearing to determine whether it should be approved[.]" Herzog contends that the deficiency judgment was unfair and Wilmington Savings "made no effort to overcome the presumption that the value of the collateral is equal to the indebtedness."

¶ 66 In response, Wilmington argues that Herzog "makes no showing as to any of the factors set forth in section 1508 of the Foreclosure Law," his sole objection to the confirmation of the sale "is based upon conjecture regarding the fair market value of the property," and he provided no proof that the sale price obtained at the foreclosure sale was unconscionable. For the following reasons, we agree with Wilmington Savings.

¶ 67 A judicial foreclosure sale must be approved by the circuit court. *Citicorp Savings v. First Chicago Trust Co.*, 269 Ill.App.3d 293, 300 (1995). Confirmation of a judicial sale is governed by section 15-1508(b) of the Illinois Mortgage Foreclosure Law (Foreclosure Law) (735 ILCS 5/15/-1501 *et seq*. (West 2022)), which provides, in pertinent part:

> (b) Hearing. Upon motion and notice in accordance with court rules applicable to motions generally, which motion shall not be made prior to sale, the court shall conduct a hearing to confirm the sale. Unless the court finds that (i) a notice required in accordance with subsection (c) of Section 15-1507 was not given, (ii) the terms of sale were unconscionable, (iii) the sale was conducted fraudulently, or (iv) justice was not otherwise done, the court shall then enter an order confirming the sale.
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> (e) Deficiency Judgment. In any order confirming a sale pursuant to the judgment of foreclosure, the court shall also enter a personal judgment of deficiency against any party (i) if otherwise authorized and (ii) to the extent requested in the complaint and proven upon presentation of the report of sale in accordance with Section 15-1508. Except as otherwise provided in this Article, a judgment may be entered for any balance of money that may be found due to the plaintiff, over and above the proceeds of the sale[.] *** Such judgment may be entered, or enforcement had, only in cases where personal service has been had upon the persons personally liable for the mortgage indebtedness, unless they have entered their appearance in the foreclosure action." 735 ILCS 5/15-1508(b), (e) (West 2022).

¶ 68 It is well settled that a reviewing court reviews an order confirming a judicial sale for abuse of discretion. *CitiMortgage, Inc. v. Lewis*, 2014 IL App (1st) 131272, ¶ 31. This court also reviews the denial of an evidentiary hearing under section 15-1508 for an abuse of discretion. *Deutsch Bank National Trust Co. v. Cortez*, 2020 IL App (1st) 192234, ¶ 17. A circuit court abuses its discretion when its ruling rests on an error of law or where no reasonable person would take the view adopted by the circuit court. *CitiMortgage, Inc. v. Bermudez*, 2014 IL App (1st) 122824, ¶ 57.

¶ 69 It is not unusual for property to bring less than its full, fair market value at a forced sale. *NAB Bank v. LaSalle Bank*, 2013 IL App (1st) 121147, ¶ 20. "[M]ere inadequacy of price alone is not sufficient cause for setting

aside a judicial sale." *Illini Federal Savings &Loan Association v. Doering*, 162 Ill.App.3d 768, 771 (1987). "This rule is premised on the policy which provides stability and permanency to judicial sales and on the well-established acknowledgment that property does not bring its full value at forced sales and that the price depends on many circumstances for which the debtor must expect to suffer a loss." *World Savings &Loans Ass n v.Amerus Bank,*

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317 Ill.App.3d 772, 780-81 (2000). The party objecting to the sale bears the burden of proving that sufficient grounds exist to disapprove the sale. *Lewis*, 2014 IL App (1st) 131272, ¶ 31. Finally, regarding evidentiary hearings on foreclosure sales, one is only warranted where the debtor has presented a "current appraisal or other current indicia of value which is so measurably different than the sale price as to be unconscionable." *Resolution Trust Corp. v. Holtzman*, 248 Ill.App.3d 105, 115 (1993).

¶ 70 Here, the record shows that Herzog's original mortgage on the property was for $1,499,799 and after the second modification, the amount of indebtedness was $1,728,798.05. In its motion for confirmation of sale and deficiency judgment, Wilmington Savings attached exhibits showing that the total amount due to Wilmington Savings at the time of the foreclosure sale was $2,661,691.18. On April 19, 2022, the property sold for $1,088,000, which is a portion, but not all, of Herzog's total indebtedness. According to Wilmington Savings's exhibits, the amount of indebtedness remaining after the sale was $1,574,091.18. The property was then sold again in 2023 for $1,000,000, which Wilmington Savings contends is evidence that the property was sold at the foreclosure sale for near fair market value.[3]

¶ 71 "When there is no fraud or other irregularity in the foreclosure proceeding, the price at which the property is sold is the conclusive measure of its value." *Nationwide Advantage Mortg. Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶ 35. Such is the case here where Herzog's only challenge to the sale is based on conjecture alone regarding the fair market value of the property. He does not present any evidence that the sale price was unconscionably low or that there was any other flaw in the sale. He only cites to an online real estate website, stating that the property's value is

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estimated between $1.73 and $1.91 million. This is insufficient evidence to place unconscionability of the sale price into issue. In any case, "[r]ecent case law suggests that a sale price below 50% of fair market value is a

reasonable threshold for unconscionability." *T2 Expressway, LLC v. Tollway LLC*, 2021 IL App (1st) 192616, ¶ 29. Even if we were to find that $1.91 million is the fair market value of the property, the sale price of $1,088,000 would still not be less than 50% of the fair market value. As such, an evidentiary hearing was not warranted on unconscionability. Rather, the circuit court's order expressly stated that all required notices were given, the sale was "fairly and properly made," and justice was otherwise done. Thus, all of the statutory criteria were met in this case, and the court properly confirmed the sale in accordance with section 15-1508(b) of the Foreclosure Law.

¶ 72 The deficiency judgment was also correctly entered against Herzog. The court was required under section 15-1508(e) to enter a deficiency judgment against Herzog where a balance remained due to Wilmington Savings after the sale of the property, the complaint properly requested a deficiency judgment, and Herzog voluntarily entered his appearance in the foreclosure action. See *U.S. Bank Trust, N.A. v. Atchley*, 2015 IL App (3d) 150144, ¶ 11 (stating that section 15-1508(e) is mandatory, not permissive, and a trial court must grant a deficiency judgment when the requirements of that section are met). Thus, the court did not err by granting the deficiency judgment where all of the statutory criteria were met.

¶ 73 Finally, Herzog cites *First Galesburg National Bank and Trust Co. v. Joannides*, 103 Ill.2d 294 (1984), which is inapposite. In that case, our supreme court ruled that the failure of the creditor to give notice of the sale of the collateral to the debtor resulted in a rebuttable presumption that the value of the collateral is equal to the indebtedness. *Id.* at 300. In contrast, this case does not involve a failure of Wilmington Savings to give notice to Herzog of the property sale.

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Moreover, *First Galesburg* involved the sale of cars and the Uniform Commercial Code. *Id.* at 296-99. Similarly, *Munao v. Lagattuta*, 294 Ill.App.3d 976, 979-83 (1998), involved the Uniform Commercial Code and the sale of restaurant equipment and, thus, is not applicable to the case before us which involves a foreclosure. Herzog also cites to *Munao* for the proposition that a sale must have been "commercially reasonable" to support a deficiency judgment. Again, *Munao* applied the law under the Uniform Commercial Code and, thus, it has no relevancy to the proceedings in this case. Our own research has revealed that any reference to whether a sale was "commercially reasonable" is only found in cases involving the Uniform Commercial Code. As such, we do not find this contention or any of Herzog's cited authority persuasive here.

¶ 74 Accordingly, the circuit court did not abuse its discretion in confirming the sale and entering the deficiency judgment against Herzog without an evidentiary hearing.

¶ 75 D. Expungement of the Recorded Release

¶ 76 Count II of Wilmington Savings's complaint requested a declaratory judgment expunging the recorded release from the public record. The circuit court granted summary judgment in favor of Wilmington Savings but its written order failed to expressly grant the requested relief under count II. The evidence necessary to address Wilmington Savings's request is before this court.

¶ 77 As we discussed above, Wilmington Savings demonstrated that, despite the recorded release of mortgage, Herzog remained indebted to Wilmington Savings under the mortgage for more than $2 million. The remaining debt was clear and cogent evidence of a lack of consideration in exchange for the release of indebtedness. Herzog failed to provide any evidence to the contrary. Thus, based on the record before us, we find that Wilmington Savings's predecessor, Wells Fargo, recorded the release in error and a declaratory judgment expunging the release was warranted in this case.

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¶ 78 Pursuant to Illinois Supreme Court Rule 366 (eff. Feb. 1, 1994), a reviewing court, in any appeal, may, in its discretion, "enter any judgment and make any order that ought to have been given or made *** that the case may require." As such, we exercise our supervisory power to direct the circuit court to enter an order expunging the erroneously recorded release from the public record.

¶ 79 III. CONCLUSION

¶ 80 For the reasons stated, the judgment of the circuit court of Cook County is affirmed, and we remand for the circuit court to comply with the directions set forth above.

¶ 81 Affirmed and remanded with directions.

Notes:

[1] Although *Wilmington Savings Fund v. Lockhart* and *First Horizon Home Loans v. Garcia* are unpublished and were issued prior to January 1, 2021,

and therefore, not precedential, we find them persuasive. See *Osman v. Ford Motor Co.*, 359 Ill.App.3d 367, 374 ("The fact one court has used certain reasoning in an unpublished opinion does not bar courts in this state from using the same reasoning in their decisions.").

[2] Despite Herzog's failure to include a report of proceedings or acceptable substitute for the hearing on Wilmington Savings's motion for summary judgment, the lack thereof does not hinder our review of the circuit court's judgment because our review is *de novo*.

[3] This court may take judicial notice of the public records of the Cook County Clerk's Office. *Bayview Loan Servicing, LLC v. Szpara*, 2015 IL App (2d) 140331, ¶ 31.

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2023 IL App (1st) 211567-U

TAMMY SOPPER SEGOVIA, Plaintiff-Appellant,
v.
GEORGE SPELLMIRE and SPELLMIRE LAW FIRM, LLC, an Illinois limited liability company, Defendants-Appellees.

No. 1-21-1567

Court of Appeals of Illinois, First District, Second Division

August 8, 2023

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

Appeal from the Circuit Court of Cook County No. 18-L-12007 Honorable Thomas Mulroy Judge Presiding

JUSTICE ELLIS delivered the judgment of the court. Justices Howse and Cobbs concurred in the judgment.

ORDER

ELLIS, JUSTICE

¶ 1 *Held*: Reversed. Court erred in granting summary judgment in malpractice claim. Record showed that underlying lawsuit was not time-barred.

¶ 2 In 2018, Plaintiff Tammy Segovia filed a legal malpractice claim against George Spellmire and his law firm (the Spellmire defendants) after they failed to file an action (itself a legal malpractice claim) against plaintiff's former attorney. The Spellmire defendants moved for summary judgment, arguing that plaintiff's claim against her former lawyers would have been time-barred, and thus even if defendants were negligent in failing to file that action, their negligence did not proximately cause plaintiff any injury. The circuit court agreed and ruled that

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plaintiff knew or should have known of her underlying claim no later than 2011, meaning it was time-barred before she ever contacted the Spellmire defendants.

¶ 3 We reverse. The record at this stage reveals that, while plaintiff may have known she was "injured" in 2011, she did not know of her injury's "wrongful cause" until far later-far enough later that a lawsuit against plaintiff's former attorney would not have been time-barred when the Spellmire defendants represented her. We remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 There is very little dispute about the facts relevant to our review of this case. Any complexity in the facts is merely a reflection that this is a legal malpractice action against a law firm for not filing a legal malpractice against a second law firm for alleged negligent representation. In a nutshell, this case concerns the performance of three lawyers or firms who represented plaintiff Tammy Segovia:

- Attorney Yvonne Del Principie, who drafted a trust for her in 2004;

- The law firm of Much Shelist, on whose (allegedly negligent) advice plaintiff revoked the 2004 trust in 2011; and

- The Spellmire defendants, who in 2015 investigated a potential malpractice claim against Much Shelist but (allegedly negligently) did not file one.

Plaintiff's theory is that Much Shelist provided negligent representation when it revoked the 2004 trust, and the Spellmire defendants should have helped plaintiff sue Much Shelist for malpractice. Instead, the Spellmire defendants themselves committed malpractice by not doing so and allowing the limitations period against Much Shelist to expire.

¶ 6 Now to the detail. In 2004, plaintiff bought a house with her then-boyfriend Andrew Kulik (the Deming Property). About a month later, plaintiff hired attorney Yvonne Del Principie

to draft a trust. This trust was intended to memorialize the couple's agreement that, if plaintiff and Kulik were to marry and later divorce, plaintiff would have sole ownership of the Deming Property in return for reimbursing him for his contribution to the mortgage (the 2004 Trust). Less than a year after purchasing the Deming Property, the two married.

¶ 7 Fast forward to 2011: after plaintiff and Kulik had a child, the couple retained Much Shelist to prepare an estate plan. One of the principal purposes was to protect their assets in the event of liability for medical

malpractice claims against Kulik, a physician. As part of that process, plaintiff gave Much Shelist a copy of the 2004 Trust. As plaintiff and Kulik were preparing to finalize the estate documents, their Much Shelist attorney told plaintiff there was a problem with the 2004 Trust. According to plaintiff, her lawyer said: "By the way, this trust will not hold up in court. And this trust is not wor[th] anything. And I've even talked to the partners here at Much[] Shelist about this, and they suggest that we just revoke the trust."

¶ 8 In that moment, plaintiff "just was kind of dumbfounded, probably broke out into a sweat, thinking I'm a total idiot, that whoever-whichever attorney, which I know which attorney I used, um, to do the trust, I must of used a ridiculous attorney, and how did I do this." But despite this feeling, the couple revoked the 2004 Trust on advice of counsel. In its place, they executed an estate plan which no longer protected plaintiff's sole ownership of the Deming Property (the 2011 Trust).

¶ 9 As plaintiff later explained in her deposition, "I knew that the 2004 Trust was being revoked" in 2011. She "kn[e]w revoking a trust, what that meant. And that I was screwed, basically." She "didn't know exactly what was happening, but I know that it was revoked, and whatever I had planned for the Deming house was not going to happen."

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¶ 10 By 2015, plaintiff and Kulik's marriage had broken down. Around March 2015, plaintiff retained attorney Howard London to represent her in the divorce proceeding. Plaintiff gave London all her estate documents, including both the 2004 and 2011 Trusts. According to plaintiff, she recalled London "being very clear," when he reviewed the 2004 Trust, that, "Well, Tammy, this that [sic] would have held up in court somehow but you revoked it."

¶ 11 Plaintiff testified that this was the first inkling she ever had that Much Shelist had a made a mistake during its representation of her. London advised plaintiff to speak with a legal malpractice attorney.

¶ 12 So in May 2015, she contacted defendants to investigate whether she had a viable claim against Much Shelist. Plaintiff and defendants entered into an hourly retainer agreement in which defendants would "provide arbitration services concerning Much Shelist's conduct in your trust and estate planning matters. We will investigate any potential claim(s) against Much Shelist with the purpose of initiating and participating in ADR proceedings related to said claims."

¶ 13 During the initial investigation, the Spellmire defendants developed their preliminary opinion that plaintiff may have a claim. However, there was some question about when the limitations and repose periods would expire. Given that the legal work under review (Much Shelist's work) took place in 2011, the Spellmire defendants recognized that they would almost certainly draw a motion to dismiss based on the two-year statute of limitations for legal malpractice. See 735 ILCS 5/2-13-214.3(b) (West 2022).

¶ 14 According to plaintiff, in June 2015, she met with defendants about her case. At the meeting, they allegedly told her that she had a viable arbitration claim against Much Shelist and "would wait to file the arbitration case until after my divorce was final because according to Spellmire, I had not suffered damages yet." In late July, plaintiff informed the firm that

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"[b]etween the legal fees for my divorce and now with Spellmire law re Much Shelist, I'm becoming financially overwhelmed and this is still very early in both cases." Tim McInerney, an associate assigned to plaintiff's case, responded as follows:

> "As George suggested yesterday, we think it's best to see how the property is treated in the divorce, then evaluate whether you want to proceed against Julia/Much for the possible loss of the house and your attorney fees trying to correct the problem. The statute of limitations for such an action would likely expire in March of 2017 (two years after you hired Howard and six years after the meeting where the revocation took place).
>
> Regarding legal fees, now that we have reviewed the documents, formed an opinion about possible time limitations, and received an opinion from Katarinna as to whether there was negligence, we can basically settle into a holding pattern while we await the outcome of the divorce. This will greatly reduce or eliminate our attorney fees until there is a development in the divorce or if you ask us to assist with anything else."

¶ 15 Kulik finally filed for divorce in December 2015.

¶ 16 In July 2016, plaintiff updated defendants: "It's been about a year since I worked with you and George regarding my potential case against Much Shelist. My divorce will hopefully be finalizing shortly and therefore I want to review the written basis and strength for my claim to see where to go from here." McInerney responded:

> "It's nice to hear from you. I can certainly put our assessment into a memo for you. I believe where we left off, the big question was how the Deming house would be treated in the divorce because if you managed to keep the house, even though it was looking unlikely, that would reduce or eliminate your damages. Is there an update on the disposition of the house or is it still too soon to say?"

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Plaintiff could only tell McInerney that "the effort to settle the divorce case is ongoing." While she was interested in seeing the memorandum, she ended the email by reiterating that "I am not asking you to do any additional work at this time."

¶ 17 In early November 2016, the court approved plaintiff and Kulik's marital settlement agreement. While she maintained ownership of the Deming Property, she only did so after having to pay Kulik half its appraised value (approximately $750,000)-well over the amount agreed to by the couple when they first purchased it.

¶ 18 The next time plaintiff spoke with the Spellmire defendants was in April 2017. At this point, she wanted them to accept the case on a contingency fee in lieu of their prior hourly agreement. They declined, and plaintiff sought other representation in May 2017. After an unsuccessful mediation, plaintiff filed the present malpractice claim against the Spellmire defendants. In her complaint, plaintiff alleged that defendants breached the duty of care by failing to timely file a claim against Much Shelist and failing to adequately advise her on the limitations period of said claim. She also alleged excessive billing.

¶ 19 Defendants moved to dismiss. Curiously, in seeking dismissal, their position was that plaintiff had until June 2018 to bring her claim against Much Shelist. But because she had fired them while she still had a viable claim, they contended that they could not be the proximate cause for any harm stemming from the failure to bring the claim; she still could have hired another lawyer. The court denied the motion to dismiss and set a discovery schedule.

¶ 20 As part of discovery, defendants deposed plaintiff. During her deposition, as we quoted above, plaintiff explained that she clearly understood the effect of revoking the 2004 Trust at the time. Based on this "admission," the Spellmire defendants moved for summary judgment. Unlike their position in the motion to dismiss, they now argued that they could not have proximately

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caused plaintiff's injury because the limitations period for the Much Shelist claim expired *before she contacted them* in 2015. Specifically, they now contended that plaintiff was aware of her injury-the fact that she did not have sole ownership of the Deming Property-the instant she revoked the trust on March 8, 2011. Thus, the limitations period against Much Shelist began running that day and expired in March 2013.

¶ 21 The circuit court entered summary judgment for the Spellmire defendants, finding that:

> "Plaintiff's own testimony under oath establishes that the statute of limitations for any claim she had against Much Shelist's legal representation was triggered on March 8, 2011, when Plaintiff revoked the trust. Plaintiff admits that when she revoked the trust, she knew that the Deming Property would not be distributed as she wished in the event of divorce because she knew' [what] revoking a trust meant. And that I was screwed, basically', stated that she 'felt like I was going to vomit' when signing the revocation, admitted signing the document caused her to break 'out in a sweat', and she stated that she knew 'whatever I had planned for the Deming house was not going to happen.' "

¶ 22 Based on this finding, the court held that the limitations period for plaintiff's claim against Much Shelist ran almost two years before she retained defendants. "Thus, the retention of Defendants was too late and Plaintiff could not have prevailed [on] her claim against Much Shelist no matter what Defendants did. As such, Plaintiff cannot establish that 'but for' Defendants' conduct, she would have been successful." The court then granted summary judgment on plaintiff's malpractice claim-leaving only her excessive billing count.

¶ 23 With the majority of her claim terminated, plaintiff voluntarily dismissed the excessive-billing claim, leaving the order of summary judgment as a final and appealable judgment. Plaintiff timely appealed.

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¶ 24 ANALYSIS

¶ 25 Summary judgment is appropriate where the pleadings, depositions, affidavits, and admissions on file show that there is no genuine issue as to any material fact, and the moving party is entitled to a judgment

as a matter of law. *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15. We review the evidence liberally in favor of the non-movant-here, plaintiff. *Chatham Foot Specialists, P.C. v. Health Care Services Corp.*, 216 Ill.2d 366, 376 (2005). Our review is *de novo*. *Carlson*, 2022 IL 126935, ¶ 15.

¶ 26 To succeed in a legal malpractice claim, the plaintiff must show not only a duty of representation and a breach of that duty; she must also prove that the breach of duty proximately caused her damages. *Id.* ¶ 17. Legal malpractice actions are unique in that they usually require an inquiry into the actions of the defendant law firm in the underlying litigation or transaction at issue-what we often call a "case within a case." *Id.* ¶ 19. Here, what the defendant law firm is alleged to have done negligently is to not sue yet another law firm for legal malpractice. It is not just a "case within a case" but a legal malpractice action within a legal malpractice action. So here, the question is whether the Spellmire defendants were negligent in failing to sue Much Shelist for its alleged malpractice in revoking the 2004 trust. More specifically, our question is whether any potential suit against Much Shelist was time-barred by the time plaintiff walked in the door of the Spellmire law firm for the first time in 2015.

¶ 27 The Spellmire defendants' position, which carried the day in the circuit court, is this: they could not have timely sued Much Shelist, because plaintiff knew of her injury (the loss of sole ownership interest in the Deming property) and that it was the result of negligent legal advice back in March 2011; the limitations period thus expired two years later in March 2013; and plaintiff did not even meet with the Spellmire defendants until 2015. Thus, even if they were

negligent in not filing suit, plaintiff suffered no damages-because that lawsuit against Much Shelist would have been immediately dismissed as time-barred. See *Carlson v. Michael Best &Friedrich LLP*, 2021 IL App (1st) 191961, ¶ 82 (no legal malpractice claim when client engaged defendants after limitations period of underlying claim had expired).

¶ 28 There is no debate here that an aggrieved client must bring an action for legal malpractice "within 2 years from the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2022). This limitations period incorporates the discovery rule, "which delays the commencement of the statutory period until the injured party knows or reasonably should know facts that would cause him or her to believe that

their injury was wrongfully caused." *Michael Best &Friedrich LLP*, 2021 IL App (1st) 191961, ¶ 81.

¶ 29 Injury and wrongful cause are different elements; one must know not only of an injury but that the injury was wrongfully caused. *Carlson v. Fish*, 2015 IL App (1st) 140526, ¶ 23; *LaManna v. G.D. Searle and Co.*, 204 Ill.App.3d 211, 217-18 (1990)." 'A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury *and its cause* to put a reasonable person on inquiry to determine whether actionable conduct is involved.'" (Emphasis added.) *Zweig v. Miller*, 2020 IL App (1st) 191409, ¶ 26 (quoting *Fish*, 2015 IL App (1st) 140526, ¶ 23).

¶ 30 The Spellmire defendants insist that these conditions were met in March 2011, when plaintiff revoked her 2004 trust after being told by her lawyer at Much Shelist that the 2004 trust was invalidly drafted and unenforceable in court. At that point, they say, she knew of her injury-that she would not have full and exclusive ownership of the Deming property-and that her injury was wrongfully caused.

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¶ 31 We agree with the first part but not the second. That is, we agree that plaintiff knew she was injured as of March 2011. An "injury" for these purposes is" 'a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission.'" *Carlson*, 2022 IL 126935, ¶ 17 (quoting *Northern Illinois Emergency Physicians v. Landau, Omahana &Kopka, Ltd.*, 216 Ill.2d 294, 306 (2005). To be sure, plaintiff knew that she did not have full ownership of the Deming property in March 2011. But did she know of her injury's wrongful cause at that time? Based on this record at this stage, our answer is a clear no.

¶ 32 Again, the limitations period begins not only when a plaintiff knows of her injury but when she also knows that her injury was" 'caused by the lawyer's negligent act or omission.'" *Id.* (quoting *Northern Illinois Emergency Physicians*, 216 Ill.2d at 306). Plaintiff's theory is that the "negligent act or omission" that "caused" her to lose full ownership of the Deming property was the revocation of the 2004 trust in March 2011.

¶ 33 But plaintiff did not know that this was the cause in March 2011. She knew she was revoking the 2004 trust, obviously-but she did *not* know that the effect of that revocation was to defeat her claim to exclusive ownership of the Deming property. She was told something very different by her Much Shelist lawyer. She was told that she never *had* exclusive possession of the Deming property, because the 2004 trust was

unenforceable from the start. She was told, in other words, that the negligent act or omission that "caused" her to lack exclusive ownership of the Deming property was poor legal work performed in 2004 in drafting the 2004 trust. When plaintiff signed that revocation seven years later, she did not think she was causing her claim to exclusive ownership to disappear; she was told it was already gone.

¶ 34 So while it is true, as the Spellmire defendants insist, that plaintiff knew in March 2011 that she did not have exclusive ownership of the Deming property, she did not know *why* yet.

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She did not know what *caused* that injury. She thought she did; based on the Much Shelist's lawyer's advice, plaintiff thought the cause was a negligently drafted 2004 trust. But she did not know what she now alleges is the *real* reason-the *revocation* of the 2004 trust in March 2011. She did not know that this particular act was the cause of her losing full ownership.

¶ 35 Nor did she know in March 2011 that this cause was "wrongful." She trusted her Much Shelist lawyer, as she had every right and reason to do; it would stand the law on its head to suggest otherwise. She had no reason to suspect that her Much Shelist lawyer was giving her (allegedly) negligent advice. She obviously placed her faith in that lawyer when she revoked the 2004 trust, believing that she was simply revoking a document that had no legal effect, anyway.

¶ 36 Things came to a head in 2015, when she conferred with her divorce lawyer, London. He told her that the 2004 trust would have aided her claim to exclusive ownership of the Deming property in the divorce-that it *would* have held up in court-simply put, that she never should have revoked that 2004 trust. Until that moment, plaintiff testified, she had no inkling or reason to believe that the Much Shelist lawyer actually gave her the (allegedly) wrong advice. It was at that moment that plaintiff knew the true "cause" of her injury, and that it was "wrongful."

¶ 37 The Spellmire defendants cite decisions and go to great lengths to emphasize that it does not matter that the plaintiff knows *who* wrongfully caused the injury, only that the injury was wrongfully caused. True, but that does not change anything we have said. The "who" aside, plaintiff did know *what* caused her injury-which negligent act or omission-until her meeting with London in 2015. At that point, after conferring with London, plaintiff first realized that the cause of her problem was not (allegedly) negligent legal work in 2004-it was (allegedly) negligent legal advice in 2011, which caused her to revoke her claim to full ownership of the

Deming property. It was then and only then that she discovered the true "wrongful cause" of her "injury," at least under plaintiff's theory of case.

¶ 38 Based on the discovery rule embodied in the statute of limitations for legal malpractice claims, the two-year limitations period for a claim against Much Shelist thus did not begin running until that day in 2015 when plaintiff received this information from London. At the time in 2015 that plaintiff first approached the Spellmire defendants about a possible claim against Much Shelist, a potential lawsuit was not time-barred. It was thus error to hold, as a matter of law, that plaintiff could not prove a proximate causal relationship between the Spellmire defendants' alleged breach of duty and her damages.

¶ 39 Though we have liberally sprinkled in the word "allegedly" to make this point, we emphasize that we are at the stage of summary judgment, where we draw all reasonable inferences in the record in plaintiff's favor. We express no opinion on the merits. We do not mean to suggest that any law firm or lawyer herein did or did not commit malpractice; we make no comment on the various legal interpretations of the 2004 trust and its enforceability in court. None of those questions are before us. And we understand there is much more to be said about the interactions between plaintiff and Much Shelist, as well the interactions between plaintiff and the Spellmire defendants. We are taking plaintiff's theory as we find it without comment on the merits. We only hold here that summary judgment on the stated ground was inappropriate.

¶ 40 CONCLUSION

¶ 41 The judgment of the circuit court is reversed. The cause is remanded for further proceedings.

¶ 42 Reversed and remanded.

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2023 IL App (4th) 230143-U

RMS INSURANCE SERVICES, INC., d/b/a FLANDERS INSURANCE AGENCY, and OWEN G. COSTANZA, an Individual, Plaintiffs-Appellants,
v.
DONALD G. SATTLER, an Individual, MARION L. THORNBERRY, an Individual, ELISABETH M. RODGERS, an Individual, Defendants-Appellees,

and CHERYL RUSSELL-SMITH, an Individual, Defendant.

No. 4-23-0143

Court of Appeals of Illinois, Fourth District

October 17, 2023

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

Appeal from the Circuit Court of Boone County No. 21L30 Honorable Stephen Balogh, Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court. Justices Harris and Knecht concurred in the judgment.

ORDER

CAVANAGH JUSTICE

¶ 1 *Held*: The trial court's judgment is affirmed because plaintiffs failed to establish the court erred in granting defendants' motion for summary judgment.

¶ 2 On October 18, 2021, plaintiffs RMS Insurance Services, Inc., d/b/a Flanders Insurance Agency (Flanders), and Owen G. Costanza, in his individual capacity, filed a 17-count complaint against defendants Donald G. Sattler, Marion L. Thornberry, Elisabeth M. Rodgers, and Cheryl Russell-Smith. On July 8, 2022, the trial court allowed plaintiffs leave to file a 13-count first amended complaint. The amended complaint no longer included counts directed at Cheryl Russell-Smith. Thereafter, on August 22, 2022, defendants Sattler, Thornberry, and Rodgers filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure

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(Procedure Code) (735 ILCS 5/2-1005 (West 2022)), asking the court to dismiss plaintiffs' first amended complaint with prejudice, along with a separate motion to dismiss counts I, II, and III of plaintiffs' first amended complaint pursuant to section 2-615 of the Procedure Code (*id.* § 2-615). On January 18, 2023, the court granted both of defendants' motions and dismissed plaintiffs' entire amended complaint with prejudice. Plaintiffs appeal, arguing the court erred in granting defendants' motions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 According to plaintiffs' complaint, Costanza was the former president of the Village of Poplar Grove. During the 2020 election, Sattler ran against Costanza for the office of village president. Costanza was the incumbent village president at that time. The complaint outlined animosity that existed between Costanza and defendants prior to and after the election.

¶ 5 Plaintiffs alleged defendants made defamatory statements about Costanza through a flyer, verbally, and through other means, including social media. According to plaintiffs' complaint, the alleged defamatory statements included accusations Costanza committed criminal acts, including insurance fraud. Plaintiffs attached the flyer to their complaint. Sattler defeated Costanza in the election. However, plaintiffs alleged defendants continued to post the allegations against Costanza after the election was over.

¶ 6 Plaintiffs' complaint made individual claims of tortious interference with prospective business advantage, tortious interference with contract, defamation, and common law business defamation against Sattler, Thornberry, Rodgers, and Smith, respectively. Plaintiffs also alleged a civil conspiracy between Sattler, Thornberry, Rodgers, and Smith to tortiously interfere with plaintiffs' contracts with existing customers and damage plaintiffs' business and reputation in the community.

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¶ 7 We have attached the flyer at issue to this order. At the top of the flyer, in underlined red ink is the headline "My Opponent[']s Criminal Record Is," followed by a colon. Then, under that headline, the flyer contains the following 13 bullet points: (1) "1995 Pleads Guilty to Filing a False Report in Boone County"; (2) "1999 Terminated from Liberty Insurance for Fraud Misrepresentation"; (3) "1999 Pleads Guilty Writing Bad Check in Boone County"; (4) "2000 Home Foreclosure in Boone County"; (5) "2000 Completes Chapter 7 Bankruptcy Filed in 1996 as Chapter 13"; (6) "2007

Pleads Guilty for Drunk Driving Winnebago County"; (7) "2008 Wisconsin DOI Denies Insurance License for False Application"; (8) "2010 Indiana DOI Fines Him $1500 False Application &Revokes Insurance License"; (9) "2011 Terminated from RMS Service Group for Misappropriating Company Funds"; (10) "2012 Answers Fraudulently Again on Illinois DOI License Renewal Application"; (11) "2014 Illinois DOI Investigates Numerous Complaints by Insurance Customers, Past Terminations, Criminal History, Unlawful Fund Withdrawals, and Fines &Discipline from Wisconsin and Indiana (IL-14-HR-0482 &IN-934-AG10-8031-135)"; (12) "2014 Illinois DOI Revokes Insurance Business License for Major Agency Violations"; and (13) "2015 Illinois DOI Disciplines and Fines Him $30,000.00 for Multiple Repeat Violations." Under the bullet points, the flyer states, "We cannot allow a repeat criminal like Mr. Costanza to Defraud our village like he has defrauded his creditors, customers, past employers[,] and the Wisconsin, Indiana, and Illinois Departments of Insurance. What else has he done to us?" Located on the right side of the flyer are two red, solid circles. Over each circle is a solid black "X." Over each black "X" and red circle are the words "INSURANCE FRAUD" in a red font. At the bottom of the flyer in a red font is the phrase "Restore Integrity to Poplar Grove," which is followed by "Paid for by friends of Sattler for Village President" in a smaller, black, italicized font.

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¶ 8 On January 12, 2022, defendants Sattler, Thornberry, and Rodgers filed a motion to dismiss pursuant to section 2-619(a)(1) of the Procedure Code (*id.* § 2-619(a)(9)), asking the trial court to dismiss plaintiffs' complaint pursuant to the Citizen Participation Act (Act) (735 ILCS 110/1 *et seq.* (West 2022)). Defendants argued plaintiffs' complaint was a strategic lawsuit against public participation (SLAPP) claim and requested the complaint be dismissed with prejudice. That same day, defendants Sattler, Thornberry, and Rodgers also filed motions to dismiss plaintiffs' complaint pursuant to section 2-615 of the Procedure Code (735 ILCS 5/2-615 (West 2022)).

¶ 9 On March 25, 2022, the trial court granted plaintiffs' oral motion to voluntarily dismiss Smith and the counts directed at her without prejudice.

¶ 10 On April 14, 2022, the trial court entered an order which took the defendants' motion to dismiss plaintiffs' complaint pursuant to the Act under advisement.

¶ 11 On May 11, 2022, the trial court (Judge Ronald A. Barch presiding) issued a written order denying defendants' section 2-619(a)(9) (*id.* § 2-619(a)(9)) motion to dismiss plaintiffs' complaint as a SLAPP claim under

the Act. Defendants' other motions to dismiss were not addressed by the court.

¶ 12 Judge Barch stated the Act was designed to protect citizens from SLAPP claims. Citing *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 15, and *Prakash v. Parulekar*, 2020 IL App (1st) 191819, ¶ 33, Judge Barch indicated SLAPP lawsuits are meritless claims used to retaliate against a citizen for attempting to participate in government through the exercise of his constitutional rights of freedom of speech and/or the right to petition. According to Judge Barch's order:

> "When determining whether a SLAPP should be dismissed under Section

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> 2-619, courts are required to engage in a three-step analysis: (1) whether the movant's acts were in furtherance of his right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) whether the nonmovant's claims are solely based on, related to, or in response to the movant's acts in furtherance of his constitutional rights; and (3) whether the nonmovant failed to prove that the movant's acts were not genuinely aimed at solely procuring favorable government action. [Citation.] The movant bears the burden of proof under the first two prongs of the analysis, after which the burden shifts to the nonmovant."

Judge Barch found that it was clear Sattler, Thornberry, and Rodgers's individual actions were in furtherance of their respective rights to petition, speak, associate, or otherwise participate in government action.

¶ 13 Turning to the second prong of the analysis and citing *Prakash*, 2020 IL App (1st) 191819, ¶ 34, and *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 45, Judge Barch stated the Act was not "intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the Act." Again, relying on *Sandholm*, 2012 IL 111443, ¶ 50, Judge Barch indicated "[t]he legislative history of the Act supports the conclusion that the legislature intended to target only *meritless*, retaliatory SLAPPs and did not intend to establish a new absolute privilege or qualified privilege for defamation and other torts." (Emphasis in original.) Judge Barch indicated that when a plaintiff's complaint does not constitute a SLAPP because it "genuinely seeks redress for damages from defamation or other intentional torts ***, it is irrelevant whether the defendants' actions were genuinely

aimed at procuring favorable government action, result, or outcome." Further, the order stated:

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> "How to prove a claim is 'meritorious' or 'retaliatory' is a central question to the second prong of the SLAPP analysis. [Citation.] A claim is 'meritless' if the moving party disproves some essential element of the nonmovant's claim. [Citation.] In the end, the Act is expressly designed to bar only those lawsuits that try to abuse the justice system by bringing unfounded claims in retaliation against defendants who legitimately exercise their First Amendment rights, while simultaneously preserving the right of individuals to file lawsuits for real injuries. [Citation.]"

Citing *Garrido*, 2013 IL App (1st) 120466, ¶ 27, Judge Barch noted the fact a defendant may prevail on an affirmative defense in a defamation action does not mean the defamation action is meritless. The trial court explained, "Stated differently, in the case of statements that constitute defamation, even if defendants can prove the allegedly defamatory statements at issue are substantially true or constitutionally privileged, they cannot carry their burden of showing that plaintiff's claim is meritless."

¶ 14 The trial court concluded defendants had established some of the statements in the Flyer were in fact true, which made tort claims based solely on those assertions meritless as a matter of law. However, as for the rest of the assertions attributed to defendants, the court determined those statements were not clearly truthful. According to Judge Barch's order:

> "In summary, the court finds that the Defendants have proven that some of the statements attributed to them are truthful, making tort claims based upon those statements separately and individually meritless as a matter of law. As to the balance of statements attributed to the Defendants, however, whether the statements are blatantly false, partially false[,] or substantially true[,] and whether the statements were intended and understood to be false, misleading, defamatory, and

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> injurious to Plaintiffs are questions of fact for the jury. It will be up to a jury to determine whether Plaintiffs suffered tortious injury from statements and materials that comingled arguably true statements with statements that are facially untrue, arguably false[,] or substantially true. Whether allegedly

> defamatory materials are substantially true is normally a jury question. [Citation.] Here, the pleadings, exhibits[,] and attachments give rise to a genuine question of fact as to whether the gist or sting of the allegedly false, misleading *** statements and materials is substantially true. Because the Defendants have failed to demonstrate that all of Plaintiffs' claims are meritless, the Defendants have failed to carry their burden of proving that Plaintiffs' lawsuit is a SLAPP. Defendants' Section 2-619 motion to dismiss is therefore denied."

¶ 15 On May 27, 2022, the trial court entered a stipulated order continuing defendants' remaining motions to dismiss and indicating plaintiffs could file their motion for leave to file an amended complaint within 30 days.

¶ 16 On June 21, 2022, plaintiffs filed a motion for leave to file their first amended complaint. The amended complaint was directed at Sattler, Thornberry, and Rodgers and included individual claims against each defendant for tortious interference with prospective business advantage, tortious interference with contract, defamation *per se*, and common law business defamation *per se*. The amended complaint also included a count alleging a civil conspiracy between Sattler, Thornberry, and Rodgers to tortiously interfere with plaintiffs' contracts with existing customers, tortiously interfere with plaintiffs' prospective business advantage, and damage plaintiffs' business and reputations in the community.

¶ 17 On July 8, 2022, the trial court granted plaintiffs' motion for leave to file their first

amended complaint.

¶ 18 On August 22, 2022, defendants Sattler, Thornberry, and Rodgers filed a motion for summary judgment pursuant to section 2-1005 of the Procedure Code (735 ILCS 5/2-1005 (West 2022)). Defendants argued plaintiffs' amended complaint should be dismissed in its entirety. In addition, these same defendants filed a separate motion to dismiss plaintiffs' tortious interference with business counts (count I, II, and III) pursuant to section 2-615 of the Procedure Code (*id.* § 2-615).

¶ 19 On January 18, 2023, the trial court (Judge Stephen E. Balogh presiding) issued a written order granting defendants' motion for summary judgment, dismissing all of plaintiffs' first amended complaint with prejudice and granting defendants' motion to dismiss counts I, II, and III of

plaintiffs' first amended complaint. Judge Balogh's order indicated plaintiffs' amended complaint included a few additional allegations regarding damages but was substantially similar to plaintiffs' original complaint. The court also indicated defendants had "provided affidavits, documents from the public record, as well as documents obtained from the Departments of Insurance for Illinois, Indiana[,] and Wisconsin. In response, Costanza ha[d] supplied his own affidavit."

¶ 20 According to Judge Balogh's order, plaintiffs alleged the three defendants wanted to ruin Costanza's career in local politics and collaterally damaged Costanza's insurance business. Judge Balogh noted that defendants conceded they had publicly disseminated the allegations in the flyer and continued doing so after the election because Costanza was still active in local politics, pursuing positions in local government and the local Republican party. Judge Balogh recognized Costanza and the three defendants were all Republicans. According to the trial court's order:

> "In the instant matter, Costanza has pled that none of the defendant's [*sic*] behavior

> was privileged because they knew the allegations of the flyer to be false. The crux of the defendants' motion for summary judgment is that their statements are all privileged because those statements are indisputably, materially and substantially true.
>
> It is undisputed that at the time *** the flyer was publicly disseminated, Costanza was an elected official and running for another public office. The gravamen of his amended complaint is that the statements made in the flyer and repeated on social media and literally, in the public square, all concerned his fitness for public office. Therefore, as the court has previously held, the allegations involve a public person and matters of public concern. Thus, in determining whether there is a genuine issue of material fact giving rise to a question of whether Costanza or his business were defamed, the court must consider not only privilege associated with truth, but the heightened protections of privilege arising out of the First Amendment to the U.S. Constitution.
>
> Protections afforded to speech (expression) by the First Amendment are designed to assure, 'unfettered interchange of ideas for the bringing about of political and social changes

> desired by the people.' *Miller v. California*, 413 U.S. 15, 24-35 (1973). These protections have been interpreted as limiting the reach of state defamation laws. See *Dun &Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 755 (1985). To what extent state defamation laws are constrained by the Constitution requires consideration of the status of the plaintiff, whether he is a public figure and whether the speech at issue is of public concern. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986). Additionally, if speech

> addresses a matter of public concern, the burden is on the plaintiff to prove that the defendant actually knew the statement was false at the time it was published. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381, 395-96 (2008).
>
> Thus, under Illinois law, recovery for a defamatory statement in this case will only be allowed if there is a showing of actual malice. This requires proof by the plaintiff that has, 'established both that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.' *Catalano v. Pechous*, 83 Ill.2d 146, 155 (1980); *Jacobson v. CBS Broadcasting, Inc.*, 2014 IL App (1st) 132480, ¶ 36[ ] (citations omitted). Reckless disregard means that the defendant had a 'high degree of awareness' that the statement was probably false or 'entertain[ed] serious doubts as to its truth.' *Jacobson*, quoting *Kuwik v. Starmark Star Marketing &Administration, Inc.*, 156 Ill.2d 16, 24-25 (1993)."

Judge Balogh then went through the flyer's bullet points, stating the truth of the statements was either undisputed or objectively verified by administrative records.

¶ 21 Judge Balogh then turned his attention to the following statement at the bottom of the flyer, "We cannot allow a repeat criminal like Mr. Costanza to defraud our village like he has defrauded his creditors, customers, past employers[,] and the Wisconsin, Indiana, and Illinois Departments of Insurance. What else has he done to us?" According to the trial court's order:

> "It is here that the message intended to be conveyed by the previous statements is encapsulated. The defendants wanted the voters of the Village to believe that Costanza was not deserving of their trust or their votes. Nothing could

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> be more representative of the, 'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Miller*, 413 U.S. at 2435. The social context of this message is inarguably to paint Costanza as unworthy of holding elected office.
>
> Nonetheless, Costanza argues that the statements made in the flyer should not be protected because the defendants knew that he had never been criminally convicted of insurance fraud and that criminality will be inferred from the overall context of the flyer. The question of law for the court is whether the statements made in the flyer, including both express assertions as well as implications drawn from the whole, are factual in nature, and whether they were made with a high degree of knowledge of their falsity. *Jacobson*, 2014 IL App (1st) 132480, ¶ 36."

Judge Balogh indicated Costanza argued he had never been convicted of insurance fraud but did not dispute he was accused of insurance fraud by a prior employer and was administratively disciplined and fined for making misrepresentations to insurance officials in Illinois, Indiana, and Wisconsin. In addition, the court stated plaintiffs did not dispute Costanza's Illinois "producer's license for one of his operating entities has been permanently revoked and that entity was civilly fined $30,000.00 for repeated misrepresentations." Judge Balogh also noted Costanza had two criminal convictions for misdemeanor offenses, one involving dishonesty, and had also received supervision after pleading guilty to a third misdemeanor offense.

¶ 22 Continuing the trial court's analysis, Judge Balogh stated: "Whether the statements have precise meaning or are well understood is clouded by the headers regarding Costanza's criminal record and insurance fraud. It must be remembered that there is no direct allegation that Costanza has ever been criminally convicted of the crime of insurance fraud." Further, Judge

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Balogh noted the term "insurance fraud" can have different meanings.

¶ 23 The trial court indicated it was undisputed that Costanza had been accused of, administratively disciplined for, and fired for committing fraud in the general sense of the word while working in the insurance industry.

The court also noted defendants argued the flyer and related statements were materially and substantially true or, in other words, that the gist or sting of the flyer was true. According to Judge Balogh's analysis, "[t]he sting of the flyer is that Costanza has engaged in professional misrepresentation and fraud, within the ordinary meaning of the word, in his capacity as an insurance producer." Further, "[g]iven Costanza's record of misfeasance, malfeasance[,] and nonfeasance in both his professional and personal lives, the court finds that no reasonable jury could find that characterizations of that record as criminal or as involving insurance fraud exaggerate the substantial truth of defendants' statements." In finalizing the court's analysis, Judge Balogh stated:

> "As discussed above, the defendants have provided documentation from the public record as well as documentation received in response to [Freedom of Information Act] requests which objectively verify the substantive truth of each of [the] allegations made in the flyer. However, the statements regarding 'my opponent's criminal record' and 'insurance fraud', which both appear in larger type and red ink, are amorphous and not so easily verifiable.
>
> Both are technically true. Costanza does have a misdemeanor criminal record and has engaged in fraud, as that term is generally understood, in his work as an insurance professional. To the extent that the meaning of the headings on the flyer are open to differing subjective interpretations, they are no more than assertions of opinion, not defamatory facts applicable to the plaintiff. See *Imperial*

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Apparel, 227 Ill.2d at 398.

> Finally, the court must examine whether there is anything about the social context of the statements that renders them more likely to be construed as factual rather than opinion. *Id.* The social context of those remarks is that they were made in the effort to keep Costanza from [being] elected to a position of trust in their community, and, on a continuing basis, to keep him from holding any position of trust within the Village or the local Republican Party.
>
> *Therefore, the court finds that the statements made by the defendants in regard to Costanza were and are privileged because they concern a matter of public interest and involve a*

public person. The statements are, as discussed above, factual in nature and substantially true." (Emphasis added.)

¶ 24 This appeal followed.

¶ 25 II. ANALYSIS

¶ 26 We first note this is a complicated case. Further, plaintiffs' arguments in their appellants' brief are difficult to comprehend and are incomplete. Illinois Supreme Court Rule 341(h)(7) (eff. Oct. 1, 2020) requires an appellant's brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." A reviewing court is not a depository into which the appellant may dump his burden of argument and research. *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88. "Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S.Ct. R. 341(h)(7) (eff. Oct. 1, 2020).

¶ 27 The primary basis for plaintiffs' appeal is their contention the trial court erred in granting defendants' motion for summary judgment. Summary judgment is proper when" 'the

pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Suburban Real Estate Services, Inc. v. Carlson*, 2022 IL 126935, ¶ 15 (quoting 735 ILCS 5/2-1005(c) (West 2018)). Plaintiffs are correct that summary judgment is a drastic way to resolve a case and should only be allowed when the moving party's right to such a judgment is clear and free from doubt. *Id.* (citing *Purtill v. Hess*, 111 Ill.2d 229, 240 (1986)). However, when a party moving for summary judgment supplies facts which, if not contradicted, would entitle the moving party to a judgment as a matter of law, the nonmoving party may not rely on his pleadings alone to raise issues of material fact. *Purtill*, 111 Ill.2d at 240.

¶ 28 "A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part of the relief sought against him or her." 735 ILCS 5/2-1005(b) (West 2022). When moving for summary judgment, a defendant may satisfy his initial burden of proof "either by affirmatively showing that some element of the case must be resolved in its favor or by establishing that there is an absence

of evidence to support the plaintiff's case." *Ross Advertising, Inc. v. Heartland Bank &Trust Co.*, 2012 IL App (3d) 110200, ¶ 28.

¶ 29 A plaintiff does not have to prove his case to survive a defendant's motion for summary judgment. *Id.* However, a plaintiff "must present a factual basis that would arguably entitle the plaintiff to a judgment." *Id.* "If a plaintiff cannot establish an element of her cause of action, summary judgment for the defendant is proper." *Id.* We apply a *de novo* standard when reviewing an order granting a motion for summary judgment. *Id.*

¶ 30 A. Judge Barch's Order

¶ 31 We first address plaintiffs' argument that Judge Barch's order denying defendants' motion to dismiss pursuant to section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West

2022)) precluded Judge Balogh from granting defendants' motion for summary judgment. As previously stated, defendants' motion to dismiss argued plaintiffs' complaint was a SLAPP action under the Act (735 ILCS 110/1 *et seq*. (West 2022)).

¶ 32 According to plaintiffs, the fact Judge Barch and Judge Balogh could look at the facts in this case and draw different inferences precludes summary judgment. Plaintiffs assert "[a] triable issue of fact exists where there is a dispute as to a material fact or where, although the facts are not in dispute, reasonable minds might differ in drawing inferences from those facts." *Petrovich v. Share Health Plan of Illinois, Inc.*, 188 Ill.2d 17, 31 (1999).

¶ 33 Plaintiffs contend "[t]here can probably be no better example of a 'reasonable mind' than that of a Circuit Court Judge." According to plaintiffs' brief:

> "Here, two very experienced judges came to opposite conclusions based on the same facts. Not only were these two judges examining the same facts but they were sitting in the same courtroom in the same circuit on the same case. All that is required to find a triable issue and preclude summary judgment is the possibility that reasonable minds might differ in drawing inferences. The mere possibility is enough to preclude summary judgment. Here[,] the two reasonable minds actually drew different inferences from the same facts. This alone merits reversal under *Petrovich*."

On the surface, this argument has some persuasive appeal.

¶ 34 However, Judge Barch and Judge Balogh were ruling on different matters. Judge Barch denied defendants' motion to dismiss plaintiffs' complaint as a SLAPP claim, and Judge Balogh granted defendants' motion for summary judgment. As a result, this is not a situation where Judge Balogh was simply asked to reconsider an earlier denial of a motion for summary judgment.

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¶ 35 Regardless, even if we treated Judge Barch's ruling as the denial of a motion for summary judgment, the Second District has stated:

> "[A] long line of cases has condoned the authority of a successor judge to change the interlocutory rulings of a predecessor judge. [Citations.] A successor court has the power to modify or revise an interlocutory order at any time prior to final judgment. [Citations.] When the interlocutory order involved the exercise of a prior judge's discretion, the successor judge may overturn the order only where new facts or circumstances warrant such action and there is no evidence of judge shopping. [Citation.] On the other hand, where the successor judge finds that the previous interlocutory order is erroneous as a matter of law, the successor judge, absent evidence of judge shopping, may correct the previous order regardless of the existence of a new matter." *Brandon v. Bonell*, 368 Ill.App.3d 492, 502 (2006).

Both the denial of a motion for summary judgment and the denial of a motion to dismiss are interlocutory orders that may be revised prior to a final judgment. *Id.*

¶ 36 Plaintiffs do not argue Judge Barch made a discretionary decision when denying defendants' SLAPP motion to dismiss or that defendants engaged in judge shopping. As a result, plaintiffs have failed to establish Judge Balogh's summary judgment ruling was precluded by Judge Barch's denial of the motion to dismiss. Therefore, plaintiffs must establish other reasons why Judge Balogh erred in granting defendants' motion for summary judgment.

¶ 37 B. Judge Balogh's Order

¶ 38 We first note the foundation for all of plaintiffs' claims is the defendants' publication of the alleged defamatory statements about

Costanza. This requires a brief overview of the law regarding defamation claims.

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¶ 39 1. Applicable Law

¶ 40 "To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Green v. Rogers*, 234 Ill.2d 478, 491 (2009). A statement is defamatory if it "harms a person's reputation to the extent it lowers the person in the eyes of the community or deters the community from associating with her or him." *Id.*

¶ 41 If a statement's harm is obvious and facially apparent, the statement is defamatory *per se*. Our supreme court has stated:

> "In Illinois, there are five categories of statements that are considered defamatory *per se*: (1) words that impute a person has committed a crime; (2) words that impute a person is infected with a loathsome communicable disease; (3) words that impute a person is unable to perform or lacks integrity in performing her or his employment duties; (4) words that impute a person lacks ability or otherwise prejudices that person in her or his profession; and (5) words that impute a person has engaged in adultery or fornication.
>
> * * *
>
> It is well settled that, even if an alleged statement falls into one of the categories of words that are defamatory *per se*, it will not be actionable *per se* if it is reasonably capable of an innocent construction. [Citation.] Under the 'innocentconstruction rule,' a court must consider the statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning. [Citation.] Indeed, this court has emphasized that the context of the

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> statement is critical in determining its meaning, as a given statement may convey entirely different meanings when presented in different contexts. [Citation.] If the statement may reasonably be innocently interpreted, it cannot be actionable *per se*. [Citation.] *** At the same time, when the defendant

> clearly intended and unmistakably conveyed a defamatory meaning, a court should not strain to see an inoffensive gloss on the statement." (Emphasis in original.) *Id.* at 491-92, 499-500.

¶ 42 Further, even if a statement is defamatory, the statement cannot support a defamation claim if it is true. *Harrison v. Addington*, 2011 IL App (3d) 100810, ¶ 39. A defendant does not have to establish the defamatory statement was "technically accurate in every detail." *Gist v. Macon County Sheriff's Department*, 284 Ill.App.3d 367, 371 (1996). Instead, the defendant only needs to establish the defamatory assertions are substantially true, which the defendant "can demonstrate by showing that the 'gist' or 'sting' of the defamatory material is true." *Id.*

¶ 43 According to this court in *Gist*, "When determining the 'gist' or 'sting' of allegedly defamatory material, a trial court must 'look at the highlight of the article, the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement.'" *Id.* (quoting *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313, 316 (7th Cir. 1987)). Normally, whether defamatory assertions are substantially true is a question for the jury. *Id.* However, a court can decide this question as a matter of law if no reasonable jury could find the defamatory assertions were not substantially true. *Id.*

¶ 44 Regardless, even if a defamatory statement is not substantially true, the statement is not actionable if protected by a qualified privilege. *Turner v. Fletcher*, 302 Ill.App.3d 1051, 1055 (1999). Whether a qualified privilege exists is a question of law. *Id.* According to our

supreme court:

> "Qualified privilege in Illinois defamation law is based on a policy of protecting honest communications of misinformation in certain favored circumstances in order to facilitate the availability of correct information. [Citation.] A privileged communication is one that might be defamatory and actionable except for the occasion on which, or the circumstances under which, it is made. [Citation.] Qualified privilege enhances a defamation plaintiff's burden of proof. [Citation.] In the absence of qualified privilege, a plaintiff need only show that the defendant acted with negligence in making the defamatory statements in order to prevail." *Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795, ¶ 30.

Once a defendant demonstrates a qualified privilege exists, the plaintiff bears the burden of demonstrating the defendant abused the privilege. *Gist*, 284 Ill.App.3d at 374.

¶ 45" '[A]n abuse of a qualified privilege may consist of any reckless act which shows a disregard for the defamed party's rights, including the failure to properly investigate the truth of the matter, limit the scope of the material, or send the material to only the proper parties.'" *Dent*, 2022 IL 126795, ¶ 30 (quoting *Kuwik v. Star Marketing &Administration, Inc.*, 156 Ill.2d 16, 30 (1993)). Generally, whether a defendant abused the privilege is a question of fact for a jury to decide. *Turner*, 302 Ill.App.3d at 1057. However, the defendant is entitled to a judgment as a matter of law if the pleadings and exhibits present no genuine issue of material fact regarding the applicability of the privilege. *Id.*

¶ 46 2. *Judge Balogh's Reasoning and Plaintiffs' Burden*

¶ 47 As previously stated, Judge Barch was ruling on a motion to dismiss plaintiffs' claim as a SLAPP action, and Judge Balogh was determining whether defendants were entitled to

summary judgment. Judge Barch, citing *Garrido*, 2013 IL App (1st) 120466, ¶ 27, stated the fact defendants hypothetically could prevail on an affirmative defense such as substantial truth or constitutional privilege did not establish plaintiffs' claim was a meritless SLAPP justifying dismissal at that time. In granting defendants' motion for summary judgment, Judge Balogh ruled both (1) "the statements made by the defendants in regard to Costanza were and are privileged because they concern a matter of public interest and involve a public person" and (2) the statements in the flyer were "factual in nature and substantially true." For this court to reverse the trial court's summary judgment ruling, plaintiffs need to establish the trial court was wrong on both points. Even if this court were to agree with plaintiffs that the trial court erred by ruling the statements in the flyer were substantially true, this court could affirm the trial court's ruling if plaintiffs did not also establish the trial court erred in determining the statements were not actionable pursuant to a qualified privilege.

¶ 48 3. *Plaintiffs' Specific Arguments*

¶ 49 Plaintiffs argue Judge Balogh erred in granting defendants' motion for summary judgment because the trial court did not ignore certain allegations in the flyer, including defendants' allegations regarding Costanza's (1) criminal convictions and guilty pleas, (2) administrative and

regulatory issues, and (3) personal financial issues. According to plaintiffs, Judge Balogh should have only considered the following information from the flyer in deciding the motion for summary judgment: (1) "*My Opponents [sic] Criminal Record Is:*"; (2) "INSURANCE FRAUD"; (3) "We cannot allow a repeat criminal like Mr. Costanza to Defraud our village like he has defrauded his creditors, customers, past employers[,] and the Wisconsin, Indiana, and Illinois Departments of Insurance"; (4) "What else has he done to us?"; (5) "INSURANCE FRAUD"; (6) "Restore Integrity to Poplar Grove"; and (7) "Paid for by friends

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of Sattler for Village President." We find no merit in the points defendant argues.

¶ 50 As for plaintiffs' argument the statements in the flyer regarding Costanza's prior criminal convictions and guilty pleas should not have been considered by the trial court because they were inadmissible pursuant to Illinois Rule of Evidence 609(b) (eff. Jan. 6, 2015) because more than 10 years had passed since he entered those guilty pleas, we note plaintiffs provided this court with no analysis explaining why Rule 609(b) has any relevance here, and we see none. Rule 609 governs when prior convictions may be used to impeach a witness. In this case, the evidence concerning Costanza's prior convictions and guilty pleas was not being used to impeach him. Instead, Judge Balogh was considering the truth of defendants' statements regarding Costanza's prior guilty pleas.

¶ 51 Turning to their next argument, plaintiffs argue Judge Balogh erred by considering the statements in the flyer regarding Costanza's administrative issues, regulatory issues, and personal financial issues because those statements by defendants "are immaterial to the determination of the defamatory nature of the Flyer." We disagree. As noted earlier, courts must look at the alleged defamatory statements in context, giving "the words of the statement, and any implications arising from them, their natural and obvious meaning." *Green*, 234 Ill.2d at 499-500. According to our supreme court, "the context of the statement is critical in determining its meaning, as a given statement may convey entirely different meanings when presented in different contexts." *Id.* Plaintiffs have failed to establish the trial court erred in examining all of the statements made in the flyer.

¶ 52 4. *Qualified Privilege*

¶ 53 We note plaintiffs' arguments on appeal challenging the merits of Judge Balogh's ruling granting defendants' motion for summary judgment appear to be directed only at the trial

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court's ruling the allegations in the flyer were substantially true. Even if a defamatory statement is not substantially true, the statement is not actionable if protected by a qualified privilege. *Turner*, 302 Ill.App.3d at 1055. As a result, even if this court agreed with plaintiffs that the trial court erred by determining the statements were substantially true, plaintiffs must still establish why the trial court erred in determining the statements are not actionable because of a qualified privilege. ¶ 54 Plaintiffs present no arguments on this point. As a result, pursuant to Rule 341(h)(7), plaintiffs forfeited any argument they may have had that Judge Balogh erred in granting defendants' motion for summary judgment because the statements are not actionable because of a qualified privilege. In their reply brief, plaintiffs argued defendants' actions were not privileged. However, plaintiffs' argument is not timely. Rule 341(h)(7) makes clear "[p]oints not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S.Ct. R. 341(h)(7) (eff Oct. 1, 2020).

¶ 55 Because plaintiffs' arguments failed to establish the trial court erred in ruling the alleged defamatory statements were substantially true, and because plaintiffs forfeited any argument the court erred in finding the statements were not actionable because of a qualified privilege, we affirm the court's summary judgment order.

¶ 56 C. Tortious Interference and Civil Conspiracy Claims

¶ 57 Moving on, plaintiffs stated in their appellants' brief that defendants conceded plaintiffs' tortious interference and civil conspiracy claims because they were not addressed in defendants' motion for summary judgment. According to plaintiffs' brief, "Defendants have made no arguments regarding either Plaintiffs' (i) tortious interference with contract counts, (ii) tortious interference with prospective business advantage counts, or (iii) the civil conspiracy count." We disagree. The foundation for all of plaintiffs' claims in their amended complaint was defendants'

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alleged defamation. As a result, defendants' motion for summary judgment challenged all of plaintiffs' claims.

¶ 58 D. Motion to Dismiss

¶ 59 We need not address plaintiffs' argument regarding defendants' motion to dismiss the first three counts of plaintiffs' amended complaint because plaintiffs have failed to establish the trial court erred in granting defendants' motion for summary judgment as to the entire amended complaint.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm the trial court's judgment.

¶ 62 Affirmed.

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(Exhibit 1 Omitted)