To: JCW
From: Jared M. Stromer
Re: Research Assignment 1 - Personal Injury - Estoppel and Homeowner Liability

Question 1:
Is client estopped from suing prior attorney for low damages settlement amount?

Yes and No. Under the law suing for the fake of low settlement amounts is generally barred. Public policy dictates that allowing such claims to go through without a trial opens the door to unlimited liability to attorneys who may not get settlements in the amounts that plaintiffs expect. Generally speaking, for this reason trials based off new claims or issues of fact that occur after settlement usually warrant these types of suites. However, if the settlement was made fraudulently or without the knowledge of the plaintiff or very directed facts omitted or kept from the plaintiff which further damages plaintiffs claim, then there is obvious recourse for a malpractice claim.

Current case law dictates that "To properly state a cause of action for legal malpractice, plaintiffs must allege in their complaint: (1) the existence of an attorney-client relationship that establishes a duty on the party 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 plaintiffs would have prevailed in the underlying action; and (4) damages. Webb v. Damisch, 362 Ill. App. 3d 1032, 1037–38 (Ill. App. 1st Dist. 2005). The proximate cause element of a legal malpractice claim requires that the plaintiffs must plead facts sufficient to show that, but for the attorneys' malpractice, the clients would have been successful in the undertaking the attorneys were retained to perform. Id. This is provided that there is very direct evidence showing the fraud or misguided/damaging circumstances which lead to malpractice which in this case is a low settlement figure. Generally, without this direct evidence a plaintiff is barred from recovery in a malpractice claim for low settlement. The only exception to evidence is if the case shows that the malpractice was so egregious that a lay person would find malpractice. This does not seem like the case here given the facts presented.

The case law which backs this up is attached and states that if there is reason for a low settlement amount and the claim does get settled with the knowledge of the plaintiff who ends the case through settlement then there is no claim for further damages unless further damages can be shown without speculation on actual damages lost in the low settlement. Further, a trial on the merits is almost always recommended in these situations as the merits of the case weigh heavily towards damages and causation of those damages by counsel.

"Only a trial on the merits can fully and fairly resolve the issue of whether an attorney is liable for malpractice despite the fact that the underlying case was settled." *McCarthy,* 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97. The *McCarthy* court pointed out that "[t]o hold otherwise could create ethical problems where an attorney, knowing that he mishandled a case, encourages his client to settle in order to shelter himself from a malpractice claim. Id.

Settlement by successor counsel does not necessarily bar a malpractice action against prior counsel. *McCarthy,* 250 Ill.App.3d at 172, 190 Ill.Dec. 228, 621 N.E.2d 97. Further, an attorney malpractice action should be allowed where the plaintiff can show that he settled for a lesser amount than he could reasonable expect without the malpractice. *Brooks v. Brennan,* 255 Ill.App.3d 260, 270, 193 Ill.Dec. 67, 625 N.E.2d 1188 (1994). Id.

Question 2:
What is homeowners' liability if sued?

Little to none. Since the son is akin to an independent contractor and therefore was not under the control Homeowners, the liability assessed would fall with the Son who directed and instructed Neighbor to hold, pickup and work with the branches as he saw fit. Principals generally are not liable for the negligence of independent contractors. Restatement (Second) of Torts § 409 (1965). Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *4 (Ill. App. 4th Dist. Jan. 21, 2020). Independent contractors are people who render services for a principal but are only controlled as to the result of their work and not the means by which that result is accomplished. *Carney*, 2016 IL 118984, ¶ 31, 412 Ill.Dec. 833, 77 N.E.3d 1. Id.

Homeowners who did asses the progress and safety to their own property, did not make attempts to dictate the process or work by which the Son performed. Nor did Homeowners make it a point

to give permission or interfere with the volunteer Neighbor who was injured. Whether the law imposes a duty of reasonable care upon a defendant for the benefit of the plaintiff depends upon the nature of their relationship. *Simpkins v. CSX Transportation, Inc.*, 2012 IL 110662, ¶ 18, 358 Ill.Dec. 613, 965 N.E.2d 1092. When determining whether a duty exists, courts primarily consider the four traditional duty factors, which are (1) the likelihood of injury, (2) the reasonable foreseeability of injury, (3) the magnitude of the burden of guarding against the injury, and (4) the consequences of placing that burden on the defendant. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *3 (Ill. App. 4th Dist. Jan. 21, 2020).

Because the hiring entity has no control over the details and methods of the independent contractor's work, it is not in a good position to prevent negligent performance, and liability therefor should not attach. Rather, the party in control—the independent contractor—is the proper party to be charged with that responsibility and to bear the risk." *Carney*, 2016 IL 118984, ¶ 32, 412 Ill.Dec. 833, 77 N.E.3d 1. Id. 'In order for the rule stated in this Section to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way.' " *Carney*, 2016 IL 118984, ¶ 46, 412 Ill.Dec. 833, 77 N.E.3d 1 (quoting Restatement (Second) of Torts § 414, cmt. c, at 388 (1965)). Id. One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care. *Restatement of Torts § 414*.

Because Son is an independent contractor and he allowed Neighbor to assist, the Neighbor was an employee and also directly under the control of Son, the independent contractor. For section 414 to apply to this case, plaintiff must still establish that (1) defendant had control over the work, (2) defendant caused harm to another, and (3) it was his negligent use of his control that

caused the harm. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *4 (Ill. App. 4th Dist. Jan. 21, 2020)

The level of control that could be exercised over him was less than that which could be exercised over a paid worker. A direction given to a volunteer does not control a volunteer to the same degree as it would a paid worker because nothing prevents the volunteer from simply walking off the job. In this regard, we know of no case in which section 414 has been applied to a case involving a volunteer. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *5 (Ill. App. 4th Dist. Jan. 21, 2020). This makes Neighbor akin to an employee of the independent contractor and therefore Homeowners would not be liable.

Further, even if Neighbor was not an employee he functions as a volunteer and thus would not be a guest by which a duty of ordinary care is required. Generally, a landowner is under no duty to protect invitees from open and obvious perils. Frieden v. Bott, 4-19-0232, 2020 WL 290455, at *5 (Ill. App. 4th Dist. Jan. 21, 2020). The deliberate encounter exception applies when the possessor of land has reason to expect that an invitee or licensee will proceed to encounter a known or obvious danger because a reasonable person in plaintiff's position would do so. Id. Here, that is not the case. This person as on the land deliberately and as such would have assumed the dangers and the liability having either signed up as a n employee of the independent contractor or as a volunteer to do hazardous work.

The Homeowners would not be liable for the injuries sustained in either case and means that the employee/volunteer assumed the risks with the open and obvious dangers associated with branch removal and the use of heavy machinery to assist in branch removal.