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

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

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

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

INTRODUCTION

Defendants brought their Motion to Dismiss First Amended Complaint at Law, pursuant to Section 2-615. (See Defendants' Memorandum in Support of Defendants' Motion to Dismiss attached hereto without exhibits as **Exhibit A**.) In their Motion, Defendants argue that DULBERG failed to state a claim for legal malpractice. However, after review of the facts in the Complaint, this Honorable Court will determine that DULBERG's First Amended Complaint is sufficient to survive this Motion to Dismiss.

STANDARD OF REVIEW FOR SECTION 2-615

1. A Motion to Dismiss pursuant to section 2-615 attacks the legal sufficiency of the Complaint by alleging defects on its face. *Weisblatt v. Colky*, 265 Ill.App.3d 622, 625 (1st Dist. 1994). Section 2–615 motions "raise but a single issue: whether, when taken as true, the facts

alleged in the Complaint set forth a good and sufficient cause of action." *Visvardis v. Ferleger* 375 Ill.App.3d 719, 723 (1st Dist. 2007), quoting *Scott Wetzel Services v. Regard*, 271 Ill.App.3d 478, 480, 208 Ill. Dec. 98, 648 N.E.2d 1020 (1995).

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

ARGUMENT
(under 2-615)

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

1. In his First Amended Complaint, DULBERG sufficiently set forth the necessary elements of legal malpractice. "To prevail on a legal malpractice claim, the plaintiff client must plead and prove that the defendant attorneys owed the client a duty of due care arising from the attorney-client relationship, that the defendants breached that duty, and that as a proximate result, the client suffered injury." *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306-307 (Ill., 2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. Last Defendants raise the issue of proximate cause as to MAST's improper determination of Gagnon's insurance coverage limit being $300,000.00 and not $100,000.00. (See Motion to Dismiss attached as **Exhibit A**, pg. 7.) As argued above, this allegation supports

DULBERG's argument that MAST did not conduct the proper discovery, as evidenced by the incorrect policy limit. Had MAST not breached the standard of care and had he conducted discovery, DULBERG would have had the correct policy amount for Gagnon, and would have the insurance policy for the McGuires in order to make an informed decision as to settlement.

30. In DULBERG's case, he was forced to settle for an amount less than he would have reasonably received. After mediation, DULBERG was allowed only to recover to the extent of Gagnon's policy limits. (See First Amended Complaint, **Exhibit B**, ¶24, 27, 29.) Had MAST not allowed the release of the McGuires, DULBERG could have reasonably been able to collect the remainder of the mediation award against the McGuires. "Attorney malpractice action should be allowed where it can be shown that the plaintiff had to settle for a lesser amount than she could reasonably expect without the malpractice." *Brooks v. Brennan*, 255 Ill.App. 3d 260, 270 (5th Dist., 1994). Thus, DULBERG properly brought a malpractice against the Defendants.

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

32. DULBERG has proved that the actions and inactions of the Defendants have caused DULBERG damages. (See First Amended Complaint, **Exhibit B**, ¶31, 32.) Any dispute as to the proximate cause and damages must be left to the jury as it is a factual question. The issues of proximate cause and damages must be determined by a jury or trier of fact after all proper evidence and testimony is presented at trial. Proximate cause is a **question of fact** to be decided by a jury. (internal citation omitted) (Emphasis added) *Hooper v. County of Cook*, 366 Ill.App.3d 1, 7 (1st Dist., 2006). "The determination of damages is a **question of fact** that is

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

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

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

CONCLUSION

After review of the allegations in the First Amended Complaint and taking the allegations as true, this Honorable Court must find that DULBERG has properly stated and pled a claim for legal malpractice. More importantly, due to the factual questions in this case, granting the Motion to Dismiss would be inappropriate. However, in the event this Court grants the Motion, DULBERG requests a reasonable time to file a Second Amended Complaint to include any other facts this Court deems appropriate.

WHEREFORE your Plaintiff PAUL DULBERG prays this Honorable Court denies Defendants' Motion to Dismiss and for all other relief this Honorable Court deems equitable and just. If this Court grants Defendants' Motion to Dismiss, PAUL DULBERG prays for a reasonable amount of time to file a Second Amended Complaint.

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

_____
Thomas W. Gooch, III

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