## MCHENRY COUNTY, ILLINOIS Ratherine M. Keefe Clerk of the Circuit Court \*\*\*\*Electronically Filed\*\*\*\* Transaction ID: 17111133930 17LA000377 02/07/2018 Plaintiff, Plaintiff, No. 17LA000377 No. 17LA000377 THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, Defendants.

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT

## **DEFENDANTS' COMBINED MOTION TO DISMISS**

Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, by and through their attorneys, GEORGE K. FLYNN, and CLAUSEN MILLER P.C., pursuant to 735 ILCS 5/2-615, 735 ILCS 5/2-619(a)(5) and 735 ILCS 5/2-619.1, move to dismiss Plaintiff's Complaint, and state as follows:

- 1. The Plaintiff Paul Dulberg ("Dulberg") retained defendants The Law Offices of Thomas J. Popovich P.C. ("Popovich") to prosecute a personal injury claim on his behalf against his next door neighbors, Carolyn and Bill McGuire and their adult son (Dulberg's lifelong friend), David Gagnon ("Gagnon")). Hans Mast ("Mast") handled the case for the firm. This legal malpractice case arises out of that underlying personal injury case.
- 2. In Illinois, to establish a legal malpractice claim, a plaintiff must plead and prove the existence of an attorney client relationship; a duty arising from that relationship; a breach of that duty, the proximate causal relationship between the breach of duty and the damage sustained; and actual damages. *Glass v. Pitler*, 276 Ill. App. 3d 344, 349 (1st Dist. 1995).
- 3. The plaintiff in a legal malpractice claim must plead a case within the case. *Ignarski v. Norbut*, 271 Ill. App. 3d 522 (1995).

- 4. Dulberg fails to allege requisite facts in support of each and every element of the "underlying" case or "case within the case" against the McGuires.
  - 5. Dulberg's complaint must be dismissed pursuant to 735 ILCS 5/2-615.
- 6. Dulberg admits in ¶13 of his Complaint, that he agreed to a \$5,000.00 settlement with the McGuires.
- 7. The doctrine of judicial estoppel provides that a party who assumes a particular position in a proceeding is estopped from assuming a contrary position in a subsequent proceeding. *Larson vs. O'Donnell*, 361 Ill. App. 3d 388, 398 (1st Dist. 2005), *rev'd on other grounds*. Dulberg is estopped from bringing this legal malpractice case because he expressly agreed to settle his case against the McGuires, and then continued to pursue his case against Gagnon. Dismissal is mandated under 735 ILCS 5/2-619(a)(9).
- 8. Dulberg has failed to file his legal malpractice complaint against Popovich and Mast within the two year statute of limitations for claims against attorneys. 735 ILCS 5/13-214.3 provides for a two year statute of limitations period which shall begin to run at "the time the person bringing the action knew or reasonably should have known of the injury for which damages are sought.
- 9. Here, the Plaintiff did not file his Legal Malpractice Complaint against Defendants until November 28, 2017, at least seven (7) months too late.
- 10. His claim must be dismissed with prejudice pursuant to 735 ILCS 5/2-619(a)(5). WHEREFORE, Defendants, LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST, pursuant to 735 ILCS 5/2-615 and 735 ILCS 5/2-619(a)(5), and 735 ILCS 5/2-

619.1, respectfully request this Honorable Court dismiss Plaintiff's Complaint with prejudice, and for any further relief this Court deems fair and proper.

/s/ George K. Flynn

GEORGE K. FLYNN CLAUSEN MILLER P.C.

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

## **CERTIFICATE OF SERVICE**

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

Mr. Thomas W. Gooch, III The Gooch Firm 209 S. Main Street Wauconda, IL 60084 gooch@goochfirm.com

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

Camblillacke