NO. 126935

IN THE SUPREME COURT OF ILLINOIS

SUBURBAN REAL ESTATE SERVICES, INC. and BRYAN E. BARUS
Plaintiffs-Appellees
vs.
WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD. f/k/a as Toussaint & Carlson, Ltd.
Defendants-Appellants
and
WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD. f/k/a as Toussaint & Carlson, Ltd.
Third-Party Plaintiffs
vs.
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

On Appeal from
Appellate Court, First District
Nos.1-19-1953 & 1-19-1973
(consol.)

Original Appeal
From the Circuit Court
Of Cook County, Illinois
No. 2016 L 5295

Hon. Diane M. Shelly,
Judge Presiding

BRIEF OF PLAINTIFFS-APPELLEES

Respectfully submitted by:
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POINTS AND AUTHORITY

ISSUES PRESENTED

Whether the Appellate Court erred by holding that Barus had not suffered a realized injury actionable for a legal malpractice claim before the June 17, 2015 judgment in *Siurek v. Suburban Real Estate Services, Inc.* 2010 CH 4291.

Whether the Appellate Court erred by holding that attorney fees do not constitute a realized injury prior to judgment or settlement in the underlying case or prior to a judicial finding that the fees are attributable to attorney neglect.

Whether the Appellate Court should be affirmed because its holding that the attorney fees incurred by Bryan Barus and Suburban Real Estate Services, Inc. in the underlying case and related to the investigation of a possible malpractice action were not a realized injury and could not support a legal malpractice action before the June 17, 2015 judgment in *Siurek v. Suburban Real Estate Services, Inc.* 2010 CH 4291 precludes a finding of an uncontested fact that Bryan Barus and Suburban Real Estate Services, Inc. knew or should have known of an injury starting the statute of limitations.

Whether a reversal of the Appellate Court decision should only be applied prospectively because it would be inequitable to retroactively apply the decision to Bryan Barus and Suburban Real Estate Services, Inc. given the Appellate Court's holding that the attorney fees incurred by Bryan Barus and Suburban Real Estate Services, Inc. in the underlying case and related to the investigation of a possible malpractice action were not a realized injury and could not support a legal malpractice action before the June 17, 2015 judgment in *Siurek v. Suburban Real Estate Services, Inc.* 2010 CH 4291.

STATUTES INVOLVED

735 ILCS 5/13-214.3(b)

ARGUMENT

The Appellate Court's reversal of the Circuit Court's summary judgment effectively precludes summary judgment against Bryan Barus and Suburban Real Estate Services, Inc. (collectively "Barus") on statute of limitations grounds. Defendants relied on evidence that Barus, through his lawyers, retained a lawyer expert in the field of legal malpractice actions to investigate his pursuit of a legal malpractice claim against Defendants in April 2013, thus arguing it was an uncontested fact that Barus knew or should have known his legal fees constituted an injury caused by Defendants' neglect by that time. The malpractice expert's legal advice was that a legal malpractice claim would be premature, and would have to wait, until after a judgment or settlement, and Barus relied on that advice. The Appellate Court's reversal of summary judgment confirmed the accuracy of the malpractice expert's advice that Barus had not yet suffered a realized injury to enable a legal malpractice case to begin. Given the Appellate Court's decision, it cannot be an uncontested fact that Barus knew or should have known of a realized injury for legal malpractice before the June 17, 2015 judgment (the "Judgment") in the underlying case, *Siurek v. Suburban Real Estate Services, Inc.* 2010 CH 4291 (the "Underlying Case"); the Appellate Court just confirmed there was no such an injury until Judgment. Given the Appellate Court's decision, the relevant question, instead, is whether it is an uncontested fact that Barus could not have known or reasonably known of a realized injury recoverable through a legal malpractice claim at any point before the Judgment.

The Appellate Court decision should preclude summary judgment on statute of limitations grounds for another reason. The Appellate Court held that this case was controlled by its *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill.App.3d 349,

354 (1st Dist. 1998) and *Warnock v. Karm Winand & Patterson*, 376 Ill.App.3d 364, 370, 371 (1st Dist. 2007) holdings that a realized injury actionable under legal malpractice would not occur before judgment and, specifically, that the attorney fees related to the underlying litigation did not constitute a realized injury absent an order finding the fees were caused by attorney negligence. The evidence demonstrates that Barus relied on that analysis and did not pursue the legal malpractice claim until after the Judgment. If this Court reverses the Appellate Court's decision because those cases incorrectly resolved this legal issue, this Court's decision should not be applied retrospectively to Barus to avert the injustice or hardship on Barus for relying on the overturned decision. *See, e.g., Molitor v. Kaneland Community Unit Dist.*, 18 Ill.2d 11, 26-7 (1959).

Finally, Defendants' argument ignores that speculative damages cannot satisfy the requirement for a realized injury for legal malpractice. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306 (2005). Defendants' argument that the attorney fees constitute the realized injury to start the statute of limitations effectively admits that the non-legal fee damages caused by Barus' conduct were still speculative and did not constitute a realized injury before the Judgment. The best explanation for that reality is provided in the *Lucey* decision: "Since it is also possible the former client will prevail when sued by a third party, damages are entirely speculative until a judgment is entered against the former client or he is forced to settle." *Lucey*, 301 Ill.App.3d at 355.

Defendants' argument seeks to end run that analysis by arguing the attorney fees incurred before judgment are a realized injury that occurs before a judgment. But that exact

position was pursued in *Lucey*, and the appellate court agreed with the circuit court's rejection of that argument:

> But if he wins the litigation -- I thought about that too. If he wins the litigation, the attorney fees are not as a result of any malpractice. They are the result of being sued by someone. Pretzel & Stouffer never guaranteed he would not be sued.

Id. at 356.

Complicating Defendants' argument is the reality that here, Defendants assert that Barus knew or should have known that the attorney fees Barus paid to defend his conduct were caused by Defendants' negligent advice while Defendants, to this day in the malpractice case, deny that their advice was negligent. It is impossible to square Defendants' denial that their advice was negligent with Defendants' assertion that it is an uncontested fact that Barus should have known Defendants' advice was negligent. And that conflict will be present in many malpractice actions, such that if Defendants' proposition is accepted, lawyers will regularly defeat malpractice claims because attorney fees constitute an injury a client should have known were caused by their lawyer's negligent advice despite their lawyer's continuing denial that their advice was negligent.

The natural consequence of that situation is also problematic. When a third-party raises a question about a client's conduct that relates to advice from a lawyer, the natural response will be to address the challenge with a lawyer, whether the lawyer who gave the advice or another. If the client pays for fees related to that advice, there would, under Defendants' proposition, be a very real risk that such fees started the statute of limitations for a claim related to the advice related to the challenged conduct. If the lawyer contacted is the lawyer who gave the challenged advice, the lawyer should inform the client of the potential that the payment of fees triggered the statute of limitations on a claim based on

the challenged advice. Successor counsel would have to provide the same advice or risk malpractice for failing to do so if the statute runs out before the client files the suit.

Frequently, any litigation related to the challenge of the client's conduct will continue beyond the two-year anniversary of the issue being raised, and, thus, a client will likely have to file a legal malpractice claim related to the advice before the underlying claim is resolved to avoid losing the malpractice claim on statute of limitation grounds. The filing of these provisional cases before a determination that the advice was negligent is the exact situation this Court has warned against. Further, while the Defendants' proposition imposes that cost on the courts, it imposes an even more significant cost on clients.

Filing the malpractice action will waive the attorney-client privilege and work product privilege as to the original advice, as well as any advice the original lawyer provided while that lawyer represented the client related to the challenged conduct. *Fischel & Kahn v. van Straaten Gallery,* 189 Ill.2d 579, 585 (2000). By being forced to file a malpractice claim to avoid a statute of limitations bar, the client has to give the opponent in the underlying case ammunition that may make the difference between the client winning or losing the underlying case. Defendants' proposition would place clients between Scylla and Charybdis.

Conversely, this Court can eliminate the issue by holding that attorney fees incurred to defend action taken on an attorney's advice remain a speculative injury until the underlying litigation is resolved by judgment or settlement. The Court could adopt the limitation addressed in *Lucey* and in *Warnock* that attorney fees can trigger the statute of limitations if there is an order indicating that fees are necessitated to correct attorney neglect. Defendants' proposition would render fees paid to investigate any conduct engaged

in related to an attorney's advice as starting the attorney malpractice statute of limitations, and the proposition should be rejected.

I. THE APPELLATE COURT'S HOLDING THAT BARUS DID NOT SUFFER A REALIZED INJURY UNTIL JUDGMENT IN THE UNDERLYING CASE PRECLUDES A FINDING OF AN UNCONTESTED FACT THAT BARUS KNEW OR SHOULD HAVE KNOW OF THE INJURY BEFORE THEN

Defendants obtained summary judgment by arguing that it was an uncontested fact that Barus knew or should have known that legal fees paid to lawyers to evaluate a potential legal malpractice claim against Defendants constituted a realized injury caused by Defendants' negligent advice. Defendants' argument then, and continuing through its brief here, improperly merges the discovery rule into the question of whether there is a realized injury. Petition at 8 ("On appeal, Plaintiffs did not dispute that they knew, or reasonably should have known, that they suffered injury more than two years before filing their malpractice claim."). That assertion demonstrates Defendants' failure to understand the distinct issue of whether there is a realized injury pursuant to which the discovery rule is to be analyzed. Barus' position has been consistently that he could not have known or reasonably should have known of a realized injury more than two years before filing suit on May 26, 2016 because no realized injury existed until the Judgment was entered June 17, 2015.

The Appellate Court reversed the Trial Court, holding that the *Lucey,* 301 Ill.App.3d 349 and *Warnock,* 376 Ill.App.3d 364 decisions were "directly on point" and controlled the analysis that "Barus did not suffer a realized injury until the trial court entered the judgment against him on June 17, 2015." *Suburban Real Estates Services, Inc. v. Carlson*, 2020 IL App (1st) 191953 at ¶26.

In *Lucey*, the defendant had advised its client that Illinois law permitted the client to solicit his employer's customers while still employed. *Lucey*, 301 Ill.App.3d at 351-52. Not surprisingly, the employer sued the client when he did so. *Id.* While that suit was pending, the client filed a malpractice case against the defendant. *Id.* The court affirmed the dismissal of the complaint, holding that the malpractice suit was premature because the "damages are entirely speculative" until the resolution of the underlying suit against the client. *Id.* at 355. The court expressly rejected the argument that legal fees related to the challenge to the conduct taken on the attorney's advice could constitute a realized injury absent effectively an order identifying the attorney neglect, relying on the decision in *Goran v. Glieberman*, 276 Ill.App.3d 590, 595-96 (1st Dist. 1995). *Id.*

In *Warnock*, the client retained counsel to represent it in a real estate sale, and counsel drafted numerous agreements that contained both a liquidated damages provision as well as a term retaining all other legal or equitable remedies for the client. *Warnock*, 376 Ill.App.3d at 365-66. When the buyer failed to complete the transaction, client received the liquidated damages from escrow. *Id.* The client was sued in the underlying case to recover the liquidated damages it had received, and it hired new counsel "to evaluate the merits of the demand letter" for the return of the liquidated damages given the reservation of all other legal remedies. *Id.* at 366-67. Under Illinois law, liquidated damages are unenforceable in a contract that also preserved other legal or equitable rights, such as the terms in the contract drafted by the defendant counsel. *Id.* Given that clear Illinois law, the client lost the underlying case on a motion for judgment on the pleadings. *Id.* The client sued the original counsel for legal malpractice, and the trial court granted summary judgment for the defendant counsel, holding that the statute of limitations began when client retained the new

lawyers to evaluate the merits of the underlying claim that the liquidated damages term was unenforceable. *Id.* at 367. The court reversed, holding that no realized damages were incurred before judgment, expressly rejecting that attorney fees incurred related to the challenge to the liquidated damage provision were realized damages before judgment. *Id.*

When a client knew or should have known an injury was caused by attorney neglect "under the discovery rule to maintain a cause of action" is a question of fact. *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240, 250 (1994). In 2013, Barus' counsel dropped the consideration of filing a legal malpractice claim against Defendants at that time because the legal malpractice expert they consulted indicated that the claim did not accrue prior to judgment or settlement, and, thus, such a claim would be premature if filed before then. C1051 V2 at19:2-20:7. With the Appellate Court confirming that Barus did not have a realized injury before the Judgment, Defendants cannot meet the requirement of summary judgment that the uncontested facts require dismissal.

Defendants cannot demonstrate that it is an uncontested fact that Barus should have known he suffered an injury caused by Defendants' negligence where the legal advice was that he had not yet suffered such an injury, particularly now after the Appellate Court has confirmed that legal advice was correct. At the minimum, a jury could decide that Barus did not know, and should not have known, enough to start the statute of limitations. This result applies even if this Court reverses the Appellate Court. To hold otherwise would be to find an uncontested fact that Barus should have known in 2013 that this Court would reverse the Appellate Court's decisions. Clearly that would be an inappropriate result.

Further, in reality, the outcome should be a resolved fact that Barus did not and could not have known of an injury caused by Defendants' neglect to start the statute of

limitations before the Judgment. The legal expert informed him that any malpractice claim was premature before judgment or settlement, and the Appellate Court has confirmed that advice was correct because he suffered no realized injury before the Judgment. How can it be found that a client should have known of an injury starting the statute of limitations when the legal advice confirmed by the Appellate Court was no such injury existed under Illinois law at that time? The simple answer is it cannot be supported, and, thus, the issue should be resolved as a matter of law that Barus did not know and could not have known of an injury starting the statute of limitations for legal malpractice before the June 17, 2015 Judgment.

II. IF THIS COURT REVERSES THE APPELLATE COURT'S DECISION, THE COURT'S DECISION SHOULD NOT BE APPLIED RETROACTIVELY TO BARUS' CLAIM

The Appellate Court reversed the Trial Court because the *Lucey* and *Warnock* decisions were "directly on point" and required the conclusion that Barus did not suffer a realized injury before the June 17, 2015 Judgment. *Suburban Real Estate Services, Inc.*, 2020 IL App(1st) 191953 at ¶26. The evidence demonstrates that a legal malpractice claim was not filed before the Judgment because Barus' lawyers concluded, as held in *Lucey*, "if there's no judgment or settlement yet, it would be premature" to bring a legal malpractice claim. C1051 V2 at 19:21-20:7.

Under Illinois law, this Court "may decide to give a decision prospective application when retroactive application would be inequitable." *Deichmueller Constr. Co. v. Industrial Com.*, 151 Ill.2d 413, 416 (1992). This Court applies the three-factor analysis identified in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971). *Aleckson v. Round Lake Park*, 176 Ill.2d 82, 87 (1997). The threshold factor is whether the decision is "'overruling clear past precedent on which litigants may have relied [citation] or by

deciding an issue of first impression whose resolution was not clearly foreshadowed.'" *Id.* (*citing Chevron*, 404 U.S. at 106-07, 30 L. Ed. 2d at 306, 92 S. Ct. at 355). This Court explained that if the decision met that threshold question, the Court weighs two remaining factors: "(i) whether, given the purpose and prior history of the new rule, its operation will be retarded or promoted by prospective application, and (ii) whether prospective application is mandated by the balance of equities." *Id*. at 88

The Appellate Court has confirmed that the *Lucey* and *Warnock* decisions are good law, apply to the circumstances in this case, and required reversal of the Trial Court decision. It cannot be reasonably argued that this Court's reversal would not be reversing clear precedent. Further, this Court cited to the *Lucey* decision favorably related to the appellate court's analysis that the damages alleged in *Lucey* were speculative and could not support a legal malpractice claim. *Northern Illinois Emergency Physicians*, 216 Ill.2d at 307.

To the extent that Defendants assert the precedent was not clear, and argue that *Nelson v. Padgitt*, 2016 IL App (1st) 160571 and *Construction Systems, Inc. v. FagelHaber, LLC*, 2019 IL App (1st) 172430 constitute the applicable law, there are a several problems with that argument. First, the Appellate Court has already explicitly rejected that argument, holding that *Lucey* and *Warnock* apply. Second, the *Suburban Real Estate Services* decision did not create the differentiation between cases where the client is a plaintiff or defendant in the underlying case; the decision in *Nelson* used that distinction to justify that the *Nelson* outcome not follow the *Lucey* decision. *Nelson*, 2016 IL App (1st) 160571 at *P22. The *Construction Systems* decision relied upon the *Nelson* decision. *Construction Systems*, 2019 IL App (1st) 172430 at *P29. Defendants cannot rely on *Nelson* and *Construction Systems*

as support for the argument that *Lucey* does not constitute clear precedent when those decisions rely on the explicit differentiation relied on here for the reason *Lucey* did not control the facts underlying those decisions. As explained in the decision in *Suburban Real Estate Services, Lucey* and *Warnock* are clear precedent controlling the outcome in this case.

In the event this Court were to reverse the Appellate Court here, the facts demonstrate that decision would meet the first threshold of reversing clear precedent, and the facts clearly warrant prospective application only. This Court emphasized and agreed with the holding in *Chevron* that a decision changing the statute of limitations weighs in favor of prospective application only. *Aleckson*, 176 Ill.2d at 93-4. The purpose of a statute of limitations is to make sure a plaintiff does not sleep on their rights. *Id*. at 94. This Court cited the analysis of the United States Supreme Court weighing the two facts, concluding that "it would 'be substantially inequitable *** to hold that the [plaintiff] slept on his rights at a time when he could not have known the time limitations that the law imposed on him.'" *Id.* (*quoting Chevron*, 404 U.S. at 108, 30 L. Ed.2d at 306-7; S.Ct. at 356).

The *Chevron* analysis discussed in *Aleckson* should apply equally here. As the Appellate Court has held, under *Lucey* and *Warnock*, the statute of limitations on Barus' legal malpractice claim did not begin until the Judgment. More significantly, unlike in *Chevron*, the law was that not only had the statute of limitations not started to run before the Judgment, but under *Lucey*, Barus' legal malpractice claim against Defendants would have been dismissed as premature if filed before the Judgment as no realized injury had occurred before then.

Further, it cannot be argued that Barus failed to follow the decisions in *Nelson* and *Construction Systems* because Barus filed his lawsuit in May 2016, before those decisions were made in November 2016 and in 2019 respectively. Further, Barus' counsel decided not to file a malpractice claim before the Judgment because the cases held that the law rendered such a filing as premature. The facts in this case would render a retroactive application to Barus or other similarly situated clients even more inequitable than the facts in the seminal *Chevron* case addressed by this Court in *Aleckson.*

If this Court reverses the Appellate Court's decision, this Court should apply that decision prospectively only, and not apply the decision to allow summary judgment against Barus.

III. THIS COURT SHOULD AFFIRM THE APPELLATE COURT'S HOLDING THAT THE STATUTE OF LIMITATIONS UNDER 735 ILCS 5/13-214.3(b) DID NOT BEGIN TO RUN UNTIL THE JUDGMENT IN THE UNDERLYING CASE

a. Defendants and the Trial Court Ignore the Applicable Precedent that Attorney Fees are Speculative Damages Insufficient for the Initiation of a Legal Malpractice Claim Prior to Judgment or Settlement in the Underlying Case or an Order Finding that the Fees are Incurred due to Attorney Neglect

The statute of limitation for claims arising out of the legal services is provided in 735 ILCS 5/13-214.3(b), which provides that a claim "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." Defendants argued, and the Trial Court agreed, that Barus suffered an injury by paying legal fees in the Underlying Case and that Barus knew or should have known that those legal fee injuries were caused by Defendants' conduct that Barus claims, in the legal malpractice action, was negligent. Barus asserts that the legal fees cannot be a realized injury for legal malpractice until after the Judgment because there has

been no other order indicating that Defendants engaged in negligent conduct which the fees were necessary to correct, relying on the courts' decisions in *Goran v. Glieberman*, 276 Ill.App.3d at 596, *Lucey*, 301 Ill.App.3d at 355 and *Warnock*, 376 Ill.App.3d at 371.

The Trial Court accepted Defendants' argument and held that summary judgment was appropriate because the statute of limitations

> was triggered when plaintiffs had – or should have had – a reasonable belief that the attorney fees were incurred because of defendants' negligence. See *Nelson*, 2016 IL App. (1st) 160571, ¶12. Indeed, the relevant inquiry isn't when plaintiffs knew or should have known about the possibility that they would not prevail in the DuPage County case, but when plaintiffs should have discovered defendants' advice proximately caused and instigated the underlying litigation and their attorney fees.

C3715 V4. The court reached that conclusion by following an offshoot of the *Lucey* line of case, first established in *Nelson v. Padgitt*, 2016 IL App (1st) 160571 and followed in *Construction Systems, Inc. v. FagelHaber, LLC*, 2019 IL App (1st) 172430 at *P28. As made clear in *Nelson*, the court created that offshoot from the *Lucey* decision by differentiating the client in *Nelson*, a plaintiff in the underlying litigation, from the precedent in *Lucey* "where 'actionable damages were a mere potentiality' until there was an adverse judgment." *Nelson*, 2016 IL App (1st) 160571 at *P21.

Additionally, the court failed to address the express limitation on attorney fees constituting actionable damages in an attorney malpractice case that had been established in *Goran* and followed in *Lucey* and *Warnock.* In *Nelson*, the court ignored the analysis underlying the holdings in *Goran* and *Lucey*, and differentiated the holding that attorney fees in *Warnock*, which were held not to be actionable damages, from the fees in *Nelson*, which were held to be actionable damages, because in *Warnock* "plaintiffs could not have known that letter agreements for real estate sale drafted by attorney were faulty until trial

court granted defendants' motion for summary judgment, limitations period did not begin to run until adverse judgment entered." *Nelson*, 2016 IL App (1st) 160571 at *P23.

In *Nelson,* the client hired counsel to prepare an employment contract between the client and his new employer, which the new employer terminated pursuant to the term permitting termination for cause if client did not generate a specific amount of sales from his existing customers within the first six months of the employment agreement. *Nelson*, 2016 IL App (1st) 160571 at *P3-P4. Conversely, in *Warnock*, the client retained counsel to represent it in a real estate sale, and counsel drafted numerous agreements that contained both a liquidated damages provision as well as a term retaining all other legal or equitable remedies for the client. *Warnock*, 376 Ill.App.3d at 365-66. When the buyer failed to complete the transaction, client received the liquidated damages from escrow. *Id.* The client was sued in the underlying case to recover the liquidated damages it had received, and it hired new counsel "to evaluate the merits of the demand letter" for the return of the liquidated damages. *Id*. at 366-67. Under Illinois law, liquidated damages are unenforceable in a contract that also preserved other legal or equitable rights, such as the contract drafted by the defendant counsel. *Id.* Given that clear Illinois law, the client lost the underlying case on a motion for judgment on the pleadings. *Id.*

Bluntly, the court's explanation that legal fees were not a realized injury in *Warnock* because the client could not reasonably have known the attorney's inclusion of a void term in the contract was malpractice until judgment cannot be squared with the explanation that the attorney fees in *Nelson* were recoverable because that was not a case where "the financial loss and the attorney's negligence is faint or too complex for a layman to grasp." *Nelson,* 2016 IL App (1st) 160571 at *P23. The facts in *Warnock* demonstrate attorney

negligence much more clearly than the facts in *Nelson.* In *Warnock*, the court held the attorney fees did not constitute a realized injury before judgment in the underlying case because there was nothing akin to the appellate court order in *Goran* indicating that the fees were necessary to correct the attorney's improper advice. *Warnock*, 376 Ill.App.3d at 371. The court in *Nelson* failed to address that requirement.

Similarly, the court in *Construction Systems* failed to address the requirement that something akin to the order in *Goran* is necessary for attorney fees to be a realized injury before the judgment. And, as in *Nelson*, the court sought to differentiate the outcome regarding attorney fees in *Warnock* with the assertion that the *Warnock* "plaintiff did not actually discover and reasonably could not have discovered counsel's negligence until the trial court entered judgment on the pleadings in the underlying case in favor of that plaintiff." *Construction Systems*, 2019 IL App (1st) 172430 at *P27. While the attorney error in *Construction Systems*, failure to provide statutory notice required to enforce an attorney lien, is more obvious than the failure in *Nelson*, the assertion that it is more obvious than an attorney including a term void as a matter of Illinois law in a contract lacks merit. Instead, again, the attorney fees in *Warnock* did not start the statute of limitations because there was nothing akin to the appellate court order in *Goran* indicating that the fees were necessary to correct the attorney's improper advice, and the court in *Construction Systems* ignored that requirement. *Warnock*, 376 Ill.App.3d at 371.

Finally, Defendants' proposition that the court's decision in *Zweig v. Miller*, 2020 IL App (1st) 191409 conflicts with the decision here is perplexing. In that case, the court expressly held that "[t]he holding in *Lucey* is inapposite to this case." *Id.* at ¶35. The

decision here is not in conflict with the decision in *Zweig*; the Appellate Court expressly identified the different caselaw applicable to two cases based on different controlling facts.

b. The Ruling that Attorney Fees are Speculative Damages Insufficient for the Initiation of a Legal Malpractice Claim Prior to Judgment or Settlement in the Underlying Case or an Order Finding that the Fees are Incurred due to Attorney Neglect Do Not Conflict with 735 ILCS 5/13-214.3(b), this Court's Decisions Interpreting that Statute or with Other Appellate Courts' Decisions

The holding that attorney fees do not constitute a realized injury prior to an adverse judgment in the underlying suit or effectively a court order that there was attorney neglect which the fees are necessary to correct is not inconsistent with the statute or caselaw. Speculative damages do not constitute an injury to start the statute of limitations. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill.2d 294, 306 (2005) *(citing Lucey*, 301 Ill. App.3d at 353); *see also Lucey*, 301 Ill. App.3d at 355 (attorney fees are speculative damages until judgment or settlement in the underlying case or an order finding fees are incurred due to attorney neglect). The discussion in the *Lucey* case provides the best explanation for why attorney fees cannot be actionable damages, absent an order as in *Goran*. The simple reason is that if the client wins the underlying litigation based on following the attorney's allegedly negligent advice, the client did not suffer an injury that could or should be recovered from the attorney. By providing legal representation, an attorney is not assuring the client that they will never be sued or agreeing to indemnify them if they do. If attorney fees cease to be "damages" if the client prevails in the underlying suit, the fees are only speculative damages before that and cannot be a realized injury sufficient to initiate an attorney malpractice action.

That interpretation does not conflict with this Court's prior decisions, or the decisions of other appellate courts. Defendants' citation to *Golla v. General Motors Corp.*,

167 Ill.2d 353 (1995) is inapposite. The case in *Golla* did not involve 735 ILCS 5/13-214.3(b); the citation is simply to the general rule for commencement of actions, not legal malpractice and not specifically to whether attorney fees prior to a judgment or order constitute a realized injury for an attorney malpractice claim.

In *Northern Illinois Emergency Physicians*, 216 Ill.2d at 306, this Court simply explained that where the existence of damages is uncertain, the damages are speculative and not actionable. The case did not include issues regarding when the statute of limitations begins for an attorney malpractice case or when attorney fees incurred by a client due to attorney negligence become a realized injury. The Appellate Court's decision here does not conflict with *Northern Illinois Emergency Physicians*.

Defendants' citation to this Court's decision in *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill.2d 72 (1995) as conflicting with the Appellate Court's decision here also lacks merit. As an initial matter, the analysis does not involve 735 ILCS 5/13-214.3(b) or the question of when attorney fees constitute a realized injury for a legal malpractice claim. In *Hermitage*, the issue was whether a client's motion to reconsider the summary judgment granted against the client's lien claim extended the discovery notice of the client's claim until that motion was resolved. Summary judgment in the underlying litigation reducing the client's lien was entered on July 16, 1987, and the client's motion for reconsideration was rejected on March 16, 1989. *Hermitage*, 166 Ill.2d at 75. This Court held that the statute of limitations began to run on July 16, 1987, when the order was entered reducing the mechanics lien, rejecting the argument that the statute would not begin to run until when the motion to reconsider had been resolved. *Id.* at 86-7 ("Accordingly, the statutes of limitation on the four counts in the complaint commenced on July 16, 1987,

when the circuit court granted partial summary judgment and reduced the mechanics lien.") To the extent the case has any application here, it supports the Appellate Court holding that the statute of limitations did not commence until the existence of an injury was resolved by the Judgment in the Underlying Case.

Defendants' citation to *Palmros v. Barcelona*, 284 Ill. App. 3d 642 (2nd Dist. 1996) is inapposite as well. Initially, the plaintiff in the malpractice claim was not the attorney's client and the applicable time period under 735 ILCS 5/13-214.3(d), not 214.3(b), was addressed in the case. *Id.* at 644. The client had his lawyer prepare a will, and subsequently passed away on August 8, 1992. *Id*. Section 214.3(d) provides the statute of limitations for attorney malpractice claims where the client died, and the first question is whether the injury occurred before or after the client's death. 735 ILCS 5/13-214.3(d). The court concluded that the alleged injury, whether distributions to beneficiaries inconsistent with the client's intent or attorney fees related to the will contest, would have had to occur after the death of the client. *Palmros*, 284 Ill. App. 3d at 646-47. Under 214.3(d), where the will is submitted to probate, the legal malpractice claim for a post-death injury must be commenced within six months of the later of 1) date to file claims against the estate or 2) the date to file a will contest. 735 ILCS 5/13-214.3(d). Proper notice of estate filing was given, and estate claims had to be filed by December 10, 1992. *Palmros*, 284 Ill. App. 3d at 645. The will was admitted to probate on June 16, 1993, and thus will contests had to be filed by December 16, 1993. *Id*. Based on those facts, the court found that a claim against the attorney for his work for the deceased client had to be filed by December 16, 1993, and since it was not, the claim was barred by application of 214.3(d). *Id.* The timing analysis under 214.3(d) has no

application to the issue here of when attorney fees become a realized injury sufficient for the 214.3(b) statute of limitations.

Defendants' citation to *Union Planters Bank, N.A. v. Thompson Coburn LLP*¸402 Ill. App.3d 317 (5th Dist. 2010) is also inapposite. The case addressed proximate cause, not the initiation of the statute of limitations under 735 ILCS 5/13-214.3(b). In *Union Planters Bank*, the plaintiff, Union Planters Bank, prevailed, on a jury verdict, in a lawsuit to recover damages for settlements it entered into and for legal fees related to conduct it engaged in at the direction of its lawyers. *Id.* at 318. The attorney defendant argued for reversal, claiming that the plaintiff failed to prove proximate cause because it did not prove a "case-within-a-case." *Id.* at 343-44. The court affirmed, holding that a lawyer's negligent advice can proximately cause damages by forcing the client to settle and to incur fees, but that decision does not address, much less conflict, with the Appellate Court's decision here regarding when legal fees become a realized injury.

Finally, Defendants' citation to *In re Estate of Bass*, 375 Ill. App. 3d 62, 68 (1st Dist. 2007), also fails to identify any conflict regarding when attorney fees are a realized injury that can start the statute of limitations. In *Estate of Bass,* the court simply held that a trial court had discretion to stay a malpractice claim "pending the outcome of the underlying case." 375 Ill. App. 3d at 68. Having reached that conclusion, the court expressly did not decide whether the case was premature or whether the attorney fees started the statute of limitations. *Id.* at 72.

c. Application of the Standard Pursued by Defendants Would Have Rendered Different Results than those in Numerous Cases

Defendants and the Trial Court's analysis relied on an assertion that legal fees could be a realized injury if it was "plainly obvious" that the fees related to bad advice by the

attorney. C3714 V4; Appeal Response Brief at p. 8-9. While the Trial Court quoted the *Lucey* decision, the Trial Court ignored the express limitation cited in that case that attorney fees only constitute actionable damages for a legal malpractice claim where there is something akin to the appellate court order in *Goran* finding that the attorney's work was negligent. *Lucey*, 301 Ill. App.3d at 355. The appellate court in *Lucey* explained that only the legal fees in *Goran* to correct the deficient legal work related to the appeal brief and the appellate record, and expressly not the legal fees working on the case generally, were a realized injury and, therefore, actionable. *Id.* The court explained that "the only reason these [legal fee] damages were actionable was that a clear finding of attorney neglect had already been made in that case." *Id.* The court explained that while attorney fees "may trigger the running of the statute of limitations for legal malpractice purposes, but only where it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel's neglect ***(such as through a ruling adverse to the client to that effect)***." *Id.* (emphasis added). The court held that the *Lucey* case was "not a case where it is plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence." *Id.* The facts in the *Lucey* case are almost identical to the facts here, with the only exceptions being that the client in *Lucey* took a client, not employees, and the client in *Lucey* filed an attorney malpractice action before judgment in the underlying suit.

Defendants, the Trial Court, and the appellate courts in *Nelson* and *Construction Services* ignore that explicit limitation to expand the *Lucey* holding to all legal fees in the type of cases in *Nelson* and *Construction Systems*, which the court differentiated from the decision in *Lucey* as clients who were plaintiffs in the underlying case, where it was "plainly

obvious" that the legal fees related to negligent advice. Defendants argue that the decision in *Zweig* expands legal fees as realized damages sufficient to start the statute of limitations for a legal malpractice claim to any fees incurred to address a claim challenging conduct taken at the advice of counsel regardless of whether the client prevailed in the underlying litigation. Petition at p. 9-10. That expansion is consistent with the Trial Court's analysis that "the relevant inquiry isn't when plaintiffs knew or should have known about the possibility that they would not prevail in the DuPage County case, but when plaintiffs should have discovered defendants' advice proximately caused and instigated the underlying litigation and their attorney fees." C3715 V4. Numerous decisions would have required different results if either standard was the law.

The court in *Lucey*, absent the differentiation addressed in the decisions in *Nelson* and in this case, would require a different result under either standard. In *Lucey*, the client took his employer's client based on his attorney's advice, and the employer filed suit against the client. 301 Ill. App.3d at 351-52. The client retained new counsel to defend the action, ***and to file a malpractice claim against his attorney asserting the attorney fees being incurred where actual damages***. *Id.* If the simplified "plainly obvious" or the Defendants' *Zweig* standard was the applicable law, the outcome in *Lucey* would have had to have been different. The client actually plead the attorney fees paid to defend the employer's action were a realized injury. Critically, none of the appellate courts even attempted to differentiate the facts in *Lucey* from the facts relevant in the other cases, except for the explicit differentiation in *Nelson* related to the client's posture as the defendant in the underlying litigation.

While none of the decisions address *Lucey,* other than the posture in the underlying litigation, each of the three cases attempt to distinguish the outcome in those cases from the outcomes in both *Warnock*, 376 Ill.App.3d 364 and in *York Woods Community Ass'n v. O'Brien*, 353 Ill. App. 3d 293 (2nd Dist. 2004). As discussed above, absent the posture differentiation, the legal fees in *Warnock* cannot rationally be less "plainly obvious" incurred due to attorney negligence than the legal fees in *Nelson* and in *Construction Services*. The client was sued to recover liquidated damages that were paid pursuant to an unenforceable term of a contract drafted by the client's lawyer. *Warnock*, 376 Ill.App.3d at 365-66. The client lost the underlying case on a motion on the pleadings because Illinois law voided the liquidated damages term. *Id.* at 366-67. If the attorney fees in *Nelson* or in *Construction Services* are plainly obvious the result of attorney negligence and the fees in *Warnock* are not, the standard is unworkable. Similarly, under Defendants' *Zweig* analysis, the outcome in *Warnock* would have had to have been the opposite result because a realized injury would have occurred as soon as the client was sued to recover the liquidated damages based on the assertion that the liquidated damages provision was void because the contract included a reservation of all other equitable and legal rights. *Id.*

Applying the same analysis to the facts in *York Woods* renders the same outcome. In *York Woods*, an unincorporated homeowners' association retained defendant attorneys to incorporate the association as a not-for-profit corporation, which defendants did. *York Woods*, 353 Ill. App.3d at 294. In January 1998, homeowner members of the association challenged the validity of the incorporation of the association, and while the association prevailed at the trial court, the appellate court reversed, holding that the association had not been validly incorporated because it failed to comply with two statutory requirements

regarding voting. *Id.* at 294-95. The specific requirements were that 2/3 of the associations' members had to approve of the change and the association had to file articles of incorporation reflecting the required vote. *Id*. at 296. The uncontested facts demonstrated that there was not a 2/3 approval vote and the articles were filed before any vote was taken, and, thus, the court reversed the judgment for the corporation, holding the incorporation was invalid. *Id.* In July 2002, shortly after that reversal, the homeowners filed the legal malpractice claim against the defendants related to the deficient incorporation. *Id.*

In the legal malpractice action, the appellate court rejected defendants' argument that summary judgment was proper on statute of limitation grounds because the plaintiffs began incurring attorney fees when they filed the action challenging the incorporation of the entity in January 1998 and the malpractice claim was not filed until July 2002. The court held that attorney fees as "damages remained speculative, and no cause of action had accrued" until the appellate court held that the incorporation was invalid. *Id.* at 299.

Again, the effort to distinguish the *York Woods* holding that uncontested facts demonstrated an attorney failure to comply with statutory incorporation requirements was not "plainly obvious" attorney negligence while the failure to follow statutory lien notice requirements in *Construction Systems* or drafting an employment contract allowing a client to be terminated for failure to meet a sales quota in *Nelson* are "plainly obvious" demonstrates such a rule is unworkable. Defendants' *Zweig* interpretation would also require a different result in the *York Woods* case as the homeowner's knew the legal fees they incurred to resolve that the incorporation was invalid were necessitated because of the attorney defendants' failure to comply with the statute. That fact was the basis for the homeowners' suit to have the incorporation held to be invalid.

In the *Zweig* decision, the court addresses the *Goran* decision, but fails to address the type of legal fees that did not constitute realized damages sufficient to support a legal malpractice claim or start the statute of limitations, and the decision failed to address that "the attorney fees of $1297 to fix the defendant attorney's errors" constituted a realized injury and started the statute of limitations because the appellate court entered an order that the attorney's work causing those fees was deficient and needed to be redone. *Zweig*, 2020 IL App (1st) 191409 at *P33; *Goran*, 276 Ill.App.3d 590, 595-96; *Lucey*, 301 Ill.App.3d at 354-55.

The final case addressed in the *Nelson*, *Construction Systems* and *Zweig* trilogy in an effort to avoid a conclusion that those decisions conflict with prior cases is the discussion in *Construction Systems* of this Court's decision in *Jackson Jordan, Inc. v. Leydig, Voit & Mayer,* 158 Ill.2d 240, 250 (1994). As with the other cases, application of the "plainly obvious" standard or Defendants' *Zweig* analysis would have resulted in the opposite conclusion in the *Jackson Jordan* case.

In *Jackson Jordan*, the client retained defendant attorneys in 1973 to conduct a patent review. *Jackson Jordan*, 158 Ill.2d at 243. Defendants concluded that the client's design did not infringe on any patents, but defendants failed to include one competitor's patent received from the client in their review. *Id.* at 243-44. In 1975, the competitor sued another competitor alleging that a machine, with a similar design to the client's machine relative to the ignored patent, infringed on the ignored patent. *Id.* at 244. In 1980, the patent was held to be valid and that the machine infringed on the patent. *Id.* The client was concerned about a challenge to its machine given the similarities. *Id.* On August 26, 1980, defendants opined that, despite the results in the other case, the patent would be held to be

invalid and the client would prevail in any litigation related to the patent. *Id.* at 245. On June 28, 1982, the competitor contacted the client asserting client's machine violated the ignored patent, indicating it was going to initiate a patent infringement claim. *Id.* On July 19, 1982, client had defendant initiate a declaratory judgment action to find the ignored patent to be invalid, with the competitor filing a counterclaim that client had infringed the patent. *Id.* On August 8, 1983, client prevailed in the underlying case as to the validity of the lien and other issues. *Id.* at 246. On November 9, 1984, the appellate court reversed, vacating the order that the patent was invalid. *Id.* On February 27, 1986, the trial court held that the patent was valid and client infringed on the patent. *Id.* at 247. The issue of damages remained, and client invited defendant lawyers to a settlement conference, explaining that client would be suing defendants for legal malpractice. *Id.* Defendants withdrew their representation, and client settled with its competitor. *Id.*

Client filed the legal malpractice claim on February 1, 1988.[1] *Id.* In the lawsuit, the client identified its injury as the settlement amount as well as the attorney fees incurred in the patent litigation. *Id.* The trial court granted defendant attorney's motion for summary judgment, holding that the statute of limitations began on June 18, 1982 when the competitor sent the letter claiming infringement and indicating it was going to initiate suit because client "knew or should have known of its injury and should have inquired whether the injury was wrongfully caused" at that time. *Id.* at 248. The court affirmed, holding client incurred an injury when it paid legal fees after the competitor's letter and client "knew or

[1] Given the relevant dates, 735 ILCS 5/13-214.3 did not apply, but this Court was applying the discovery rule consistent with the terms of 214.3(b).

should have known of its injury, and of the injury's wrongful cause, once it received" the competitor's letter announcing the patent holder's intention to sue. *Id.*

This Court reversed, rejecting the conclusion that it was an uncontested fact that client knew or should have known the legal fees paid in the patent litigation was an injury and that the injury had been caused by defendant's negligence. *Id.* 249-51. That outcome is inconsistent with both the "plainly obvious" standard and Defendants' *Zweig* interpretation.

Client began incurring fees in 1980 when it paid defendants to perform a review of the decision against the other competitor for infringement related to the ignored patent. The fees were incurred because defendants failed to include the ignored patent, provided to defendants in 1970, in defendants' patent review for client. Additional fees started being incurred in 1982 when defendants filed the declaratory judgment action regarding the ignored patent. Under the "plainly obvious" standard asserted by Defendants and the Trial Court, the fees to pursue the declaratory judgment action related to defendant's failure to review the ignored patent would be an injury that started the statute of limitations as a matter of law, the exact outcome rejected by this Court in the *Jackson Jordan* case.

The conflict is even more apparent when the facts are applied to Defendants' *Zweig* interpretation and the Trial Court's conclusion. Under that interpretation, legal fees constitute a realized injury when they are incurred to obtain "a result in the underlying case that was not achieved during defendants' representation." Petition at p. 9. Client began incurring fees in 1980 to address the patent the defendant attorneys ignored in 1973. Under the Trial Court's and Defendants' interpretation, the client would have suffered an injury starting the statute of limitations in 1980. The declaratory judgment action fees beginning

in 1982 would have also constituted discovery notice under this interpretation. Again, this Court rejected that outcome.

Defendants' interpretations regarding when attorney fees constitute a realized injury starting the statute of limitations would lead to results that are clearly inconsistent with the decisions of appellate courts and, most significantly, of this Court. Those interpretations should be rejected.

d. Application of the Standard Pursued by Defendants Would Cause Material Damage to Clients, Lawyers, and the Courts

Defendants' interpretation will cause significant risks, and result in conduct that will injure client, lawyers and cause great inefficiency for the Courts. Given the uncertainty inherent in Defendants' interpretation, even if the "plainly obvious" standard is applied, attorneys and clients will have to consider every challenge to conduct taken on an attorney's advice as starting the statute of limitations. The inconsistency of the application to the facts in *Warnock, York Woods, Nelson* and *Construction Systems* decisions discussed above demonstrate that an attorney should never be comfortable that the outcome of the interpretation is foreseeable.

Defendants' argument in this case presents a glaring example of the risk. Defendants here argue that their advice to Barus to take his principal's employees is not malpractice while also arguing Barus should have known the advice was malpractice. Further, their argument is that Barus' conduct is so clearly a breach of fiduciary duty as to start the statute of limitations. However, courts have differentiated cases where a lawyer drafted a contract void as a matter of Illinois law or failed to comply with statutory requirements to incorporate an association to argue that those errors are not so plainly obvious as to start the statute of

limitations. That dichotomy demonstrates why attorneys cannot be comfortable with what they believe will appear plainly obvious to a court.

The natural result of that uncertainty will be the need for an attorney to inform a client of the start of the statute of limitations for an attorney malpractice claim as soon as the client receives a challenge to conduct taken in reliance on the attorney's advice. The attorney should do so even if they do not believe the client's conduct was wrongful, otherwise the client is left in the impossible situation of the attorney saying their advice was not malpractice while later arguing the client should have known it was malpractice. Either way, the attorney likely has to at least consider withdrawing due to the potential conflict.

If the client goes to a new lawyer for a second opinion, Defendants' interpretation effectively will require the new lawyer to advise the client to file a provisional attorney malpractice claim before the underlying case is finished. Even assuming the lawsuit is filed contemporaneously with the challenge to the client's conduct, a review of circuit court dockets reveals that many claims will extend beyond the two-year anniversary of the initiation of the suit. Assuming the client spends some time attempting to negotiate a resolution before suit is filed, Defendants' interpretation is even more likely to require a provisional suit to preserve the claim before a resolution in the underlying case.

While the problems of inefficiencies imposed on the courts from provisional suits and on attorney-client relationships where a client has to seek a second legal opinion every time it is threatened with a suit are obvious, a more critical injury to the client would be created by Defendants' interpretation.

Whenever a client files an attorney malpractice claim, the client waives the attorney-client privilege as to their communications with the attorney/firm being sued regarding the

challenged conduct. *Fischel & Kahn v. van Straaten Gallery*, 189 Ill.2d 579, 585 (2000). Either of Defendants' interpretations will result in countless situations where a client is forced to choose between losing its attorney-client privilege regarding the challenged conduct upon which the underlying case is based and losing its ability to recover from its attorneys if their advice resulted in the client engaging in wrongful conduct subjecting the client to a loss in the underlying case. As this Court indicated, "[i]t would be a strange rule if every client were required to seek a second legal opinion whenever it found itself threatened with a lawsuit" due to a statute of limitations beginning when the threat is received. *Jackson Jordan*, 158 Ill.2d at 253. It would be an incredibly inequitable rule if clients had to surrender their attorney-client privilege in a case to preserve their attorney malpractice claim related to the conduct underlying that case that was taken at the direction of counsel. Defendants' interpretations are both inconsistent with the law and would result in an absurd reality, and, therefore, those interpretations should be rejected.

e. Attorney Fees Should Constitute Realized Damages Consistent with the Analysis in *Goran*, *Lucey*, and *Warnock*.

The Appellate Court's analysis that attorney fees constitute realized damages only when "it is clear, at the time the additional fees are incurred, that the fees are directly attributable to former counsel's neglect (such as through a ruling adverse to the client to that effect)" presents the proper outcome. *See Goran*, 276 Ill.App.3d at 591-92, 595; *Lucey*, 301 Ill.App.3d at 355; *Warnock*, 376 Ill.App.3d at 370-71. Obviously, an adverse judgment would trigger attorney fees as realized damages, but other circumstances, as the order in *Goran*, could accelerate the time before an adverse judgment on the claim. Following this approach will eliminate the inequitable choice imposed on the client because they have a court ruling putting them on notice. It will eliminate the risk to attorneys of clients sitting

on their rights. It will eliminate the risk to the attorney-client relationship by allowing a client's attorney to fight the challenge without either the attorney or the client being injured further. It will eliminate inefficiencies for the courts having to handle numerous provisional cases. And it will eliminate the uncertainty, and possibility, of what happens if a client wins a malpractice claim against their attorneys and later wins the underlying case that the client's conduct was not wrongful.

Finally, it will eliminate the incomprehensible situation present here where Defendants argue that Barus should have known that he was incurring fees because Defendants' committed malpractice while Defendants are denying that they committed malpractice. This Court could eliminate any confusion regarding what short of an order could start the statute of limitations as to attorney fees by holding that an attorney can establish notice for its client by informing the client that the attorney's advice was negligent. Requiring that notification to enable attorney fees to constitute a realized injury sufficient to start the statute of limitations before judgment or "a ruling adverse to the client to that effect" will also eliminate the burden on the client regarding the attorney-client privilege. Such notification will likely enable the client to settle the underlying claim, thus reducing attorney fees and damages to be recovered from its attorneys, as well as reducing the burden on the courts.

IV. THE AMICUS BRIEF IGNORES THAT ATTORNEY MALPRACTICE CLAIMS CANNOT BE INITIATED UNTIL A REALIZED INJURY HAS OCCURRED

The *amicus* brief largely retreads the arguments made by Defendants, and, unfortunately, ignores the cases and analysis inconsistent with its propositions.

The *amicus* argument starts with the same misstatement Defendants make that the Appellate Court's decision in this case is new law. That proposition can only be made by ignoring the *Lucey* and *Warnock* decisions that attorney fees are not a realized injury until there is something akin to an order that the attorney fees are necessary to correct some attorney negligent advice. *Lucey*, 301 Ill.App.3d at 355; *Warnock*, 376 Ill.App.3d at 367. The *amicus* brief makes the argument by failing to even mention, much less address, the *Lucey* and *Warnock* decisions ***cited by the Appellate Court as controlling Barus' claim in this case***. *Suburban Real Estates Services*, 2020 IL App (1st) 191953 at ¶26.

The Appellate Court was not making new law in this case; it was asserting that the *Nelson* and *Construction Systems* decisions diversion from the *Lucey* and *Warnock* line of cases were, unsurprisingly, limited to the distinction identified in the *Nelson* analysis followed by *Construction Systems*, i.e., that the *Lucey* analysis does not apply where the client was the plaintiff in the underlying case. While the distinction highlighted in the *amicus* brief may be a problematic issue to the Defendants and the *amicus*, the real problem is the creation of the distinction in *Nelson* and *Construction Systems* to avoid the requirement of effectively a court order to convert attorney fees into a realized injury.

The *amicus* brief compounds that error by ignoring this Court's holding that speculative damages do not constitute an injury to start the statute of limitations. *Northern Illinois Emergency Physicians*, 216 Ill.2d at 306 (2005) *(citing Lucey*, 301 Ill. App.3d at 353); *see also Lucey*, 301 Ill. App.3d at 355 (attorney fees are speculative damages until judgment or settlement in the underlying case or an order finding fees are incurred due to attorney neglect). Consistent with Defendants' error, the *amicus* brief fails to address that an attorney malpractice claim cannot proceed until an injury is realized, and that treating

attorney fees as a realized injury converts an attorney representation into a promise that the client will not be sued and an indemnification of the client's legal fees if they are.

Like Defendants, the *amicus* brief fails to address the central issue regarding treating attorney fees as a realized injury; what happens when a client wins against the attorney before winning the underlying action. The *amicus* does not assert they would be content with the client keeping the attorney's money, or more likely the insurance company's money, to pay the judgment against the attorneys when the final outcome of the underlying litigation was that the attorney did not provide bad advice. That central issue is what precludes the *amicus* brief argument that attorney fees will regularly constitute realized damages.

The string cite of discovery rule cases is inapplicable because those cases, with the exception of this Court's decisions in *Hermitage*, 166 Ill.2d 72 and *Jackson Jordan*, 158 Ill.2d 240, do not present that critical issue. As discussed above, this Court's decisions in *Hermitage* and in *Jackson Jordan*, if anything, support the Appellate Court's decision here, and that Defendants' and the *amicus* propositions would have led to different results.

That difference could not be better highlighted than the assertion in the *amicus* brief that "a client is often on inquiry notice prior to the entry of an adverse judgment." Brief at p. 7. That statement is directly at odds with the position purportedly followed in *Nelson* and *Construction Systems* because "[c]ontrary to defendant's arguments, we continue to believe that, in Illinois, 'a cause of action for legal malpractice 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 his attorney.'" *Warnock*, 376 Ill. App. 3d at 371 (*quoting Lucey*, 301 Ill. App.3d at 356). The *amicus* brief

can only make that assertion by ignoring the *Lucey* and *Warnock* decisions being followed here and differentiated in *Nelson* and *Construction Systems.*

The *amicus* brief also ignores that its assertions about the Judge's purported comments, ignoring issues of hearsay and advisory opinions, demonstrates that it cannot be an uncontested fact that Barus should have known the attorney fees were a realized injury. As the *amicus* brief acknowledges, Barus sought and obtained legal advice regarding whether he could pursue a legal malpractice claim at that time. The *amicus* brief ignores the fact that Barus was told that such a claim would be premature because he would not suffer a realized injury to support the claim until judgment or settlement. Again, the *amicus* brief to this point is simply a recast of the Defendants' argument.

The remaining points in the *amicus* brief largely relate to perceived injuries to clients and lawyers if legal fees do not constitute a realized injury immediately. Much of the professed injury is illusory. The proposition that there will be a loss of evidence, unequal access to evidence and a loss of insurance coverage all stems from an attorney's decision regarding what to keep after a representation is completed, and for how long to maintain the retention of such information and insurance. Any lawyer who elects to destroy such documentation or drop its insurance during the six-year repose period is electing to take that known risk.

The proposition that there will be a lost opportunity to address or settle claims is similarly flawed. Nothing prevents a client and attorney from entering a tolling agreement, and all the related benefits derived from a tolling agreement, before the client has suffered a realized injury.

That leaves the one area that is truly an issue and which was not addressed in Defendants' arguments: the impact of the statute of repose particularly given the length of cases in some dockets. Barus agrees that the interplay of an attorney malpractice claim not accruing until a realized injury is incurred and the six-year statute of repose presents real potential problems. Interestingly, the *amicus* brief failed to address the one case in which that issue would have been directly relevant, the *Lucey* case that dismissed the attorney malpractice claim as premature.

The proposition in the *amicus* brief is, however, a red herring. The problem is not driven by the requirement that a client suffer a realized injury to pursue a legal malpractice claim, or that attorney fees do not constitute a realized injury absent an order that the fees are incurred due to attorney negligence. The problem is driven by the nature of a statute of repose. By definition, the legislature imposed the statute of repose to preclude valid malpractice claims that a client did not have notice of before the six-year anniversary of an attorney's advice. That a client will lose the ability to pursue valid claims is part and parcel of the expected and anticipated application of the statute of repose.

The expected outcome of the statute of repose does not, and cannot, provide a basis to allow attorney malpractice claims for a speculative injury. Again, a legal representation is not a guarantee that a client will not be sued or an agreement to indemnify the client's legal fees opposing such a suit. Treating attorney fees to respond to a challenge that conduct taken based on an attorney's advice as a realized injury, as proposed by in the *amicus* brief, by the Trial Court and by the Defendants, converts the attorney retention into such a guarantee and indemnification. Based on the docket stats provided in the *amicus* brief, the provisional cases resulting from that proposition will occur much more frequently than the

problem with the interplay between the statute of limitations and the statute of repose. That proposition conflicts with the statute and caselaw, is deficient and should be rejected.

CONCLUSION

The Appellate Court's reversal of the Trial Court's summary judgment against Barus should be affirmed. The Appellate Court's reversal demonstrates that the Trial Court erred by ruling that it was an uncontested fact that Barus knew or should have known his legal fees were a realized injury triggering the statute of limitations; the reversal demonstrates the contrary, that Barus could not have known a realized injury had occurred prior to the Judgment because the Appellate Court held a realized injury had not occurred prior to the Judgment, just as Barus' counsel had opined.

Further, the Appellate Court's reversal demonstrates that it would be inequitable to re-impose summary judgment against Barus in the event that this Court reverses the Appellate Court. Barus relied on his attorney's analysis of the Appellate Court's decisions that a legal malpractice claim based on attorney fees was premature before the underlying judgment to delay filing a malpractice claim against Defendants before the Judgment was entered. This Court, following the United States Supreme Court, has resolved that it would be inequitable to bar a claim with a statute of limitation when the client did not know the statute was running based on a court's interpretation of the statute of limitations.

Finally, attorney fees are not a realized injury prior to a judgment, settlement, or judicial finding that the fees are the direct result of attorney neglect. The discovery rule inherent in 735 ILCS 214.3(b) is not relevant until a realized injury has occurred. The Appellate Court decision should be affirmed because the statute of limitation on Barus' legal malpractice claim did not commence until the Judgment was entered on June 17, 2015.

Respectfully submitted by:
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Bryan E. Barus

By: /s// John W. Moynihan
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NO. 126935

IN THE SUPREME COURT OF ILLINOIS

SUBURBAN REAL ESTATE SERVICES, INC. and BRYAN E. BARUS
Plaintiffs-Appellees
vs.
WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD. f/k/a as Toussaint & Carlson, Ltd.
Defendants-Appellants
and
WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD. f/k/a as Toussaint & Carlson, Ltd.
Third-Party Plaintiffs
vs.
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

On Appeal from
Appellate Court, First District
Nos.1-19-1953 & 1-19-1973
(consol.)

Original Appeal
From the Circuit Court
Of Cook County, Illinois
No. 2016 L 5295

Hon. Diane M. Shelly,
Judge Presiding

SUPREME COURT RULE 341(C) CERTIFICATION OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 36 pages or words.

Respectfully submitted by:
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Bryan E. Barus

By: /s// John W. Moynihan
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CERTIFICATE OF SERVICE

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 instrument are true and correct; that on July 14, 2021, the forgoing referred to documents were filed with the Supreme Court for the State of Illinois electronically and served via electronic means upon John d'Attomo, Brittany Kirk, Rebecca Rothman and Michael Shakman at

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