No. 126935

IN THE SUPREME COURT OF ILLINOIS

SUBURBAN REAL ESTATE SERVICES, INC. and BRYAN BARUS, Plaintiffs-Appellees, v. WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD., Defendants-Appellants.	)	On leave to appeal from the Appellate Court of Illinois, First District, Nos. 1-19-1953 & 1-19-1973 (consol.) There Heard on Appeal from the Circuit Court of Cook County, Illinois, Hon. Diane M. Shelly, Judge Presiding, No. 2016 L 5295

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Defendants-Appellants WILLIAM ROGER CARLSON, JR. and CARLSON PARTNERS, LTD. (collectively, "Defendants"), by and through their undersigned counsel, respectfully submit this Reply Brief.

I. THE "LAW OF THE CASE" DOCTRINE DOES NOT APPLY TO THIS COURT.

Plaintiffs first argue that the Appellate Court's conclusion that Plaintiffs did not suffer injury until the Judgment was entered in the Underlying Action conclusively resolves the question of whether the trial court properly granted summary judgment for Defendants. *See* Pls.' Br. at 2 ("[g]iven 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 . . ."); Pls.' Br. at 8 ("[w]ith the Appellate Court confirming that Barus did not have a realized injury before the Judgment, Defendants cannot meet the requirement of summary judgment . . ."). Plaintiffs are mistaken.

The "law of the case" doctrine generally bars relitigation of an issue previously decided in the same case. *People v. Coty*, 2020 IL 123972, ¶ 20 (citations omitted); *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006)(citations omitted). However, even where the "law of the case" doctrine bars relitigation of an issue in the appellate court, the "law of the case" doctrine does not apply when this Court reviews the decision of the appellate court. *Id.* Rather, this Court may review all matters which were properly raised and addressed in the litigation. *Id. See also Jones v. Pneumo Abex LLC*, 2019 IL 123895, ¶ 21 (*de novo* standard of review governs appeals arising from the appellate court's reversal of a circuit court order granting summary judgment). The Court should accordingly reject any suggestion that the Appellate Court decision conclusively resolves any issue in this case.

The argument advanced by Plaintiffs also misconstrues relevant summary judgment principles. The conclusion reached by the trial court when granting summary judgment need not be an "uncontested fact." Rather, only the facts relied upon by the trial court in reaching that conclusion must be uncontested. To accept Plaintiffs' argument would mean that summary judgment could never be granted because the conclusion reached by the trial court when granting summary judgment will always be "contested" by the party who suffers an adverse summary judgment ruling.

Plaintiffs also incorrectly assert that determining when a plaintiff suffers injury is always a question of fact. (Pls.' Br. at 8) The point at which a plaintiff should discover an injury is a legal question for the court where the facts are undisputed and only one conclusion is reasonable. *American Family Mutual Insurance Co. v. Krop*, 2018 IL 122556 ¶ 21 (citing *Jackson Jordan, Inc. v. Leydig, Voit & Meyer*, 158 Ill. 2d 240 (1994)). *See also Morris v. Margulis*, 197 Ill. 2d 28, 35-36 (2001); *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981).

Contrary to Plaintiffs' suggestion, the trial court's conclusion that Plaintiffs reasonably should have known of their injury no later than April 2013 need not be an "uncontested fact" to warrant summary judgment. Nor is that issue a factual question in this case. *See Krop*, 2018 IL 122556 ¶ 21; *Morris*, 197 Ill. 2d at 35-36; *Witherell*, 85 Ill. 2d at 156. The trial court followed the correct summary judgment principles when granting summary judgment in favor of Defendants in this case. *See* C 3715 ("All of these undisputed facts together show that plaintiffs reasonably should have known no later than in April 2013 that a legal malpractice action had accrued.").

II. A DECISION OF THIS COURT RESOLVING THIS APPEAL IS BINDING ON THE PARTIES TO THE INSTANT CASE.

Plaintiffs next argue that, assuming this Court reverses the Appellate Court decision, that ruling should not apply to the parties in this case. According to Plaintiffs, the Court must undertake a retroactivity analysis to assess whether its decision should govern the parties in the instant case. As an initial matter, Plaintiffs failed to raise any retroactivity argument below and have therefore waived such argument. Further, a retroactivity analysis is not required to determine whether the Court's decision resolving this appeal applies to the parties in this case. Even assuming the retroactivity argument was not waived, and further assuming that the Court must undertake a retroactivity analysis to determine whether a decision resolving this appeal applies to the parties in this case, Plaintiffs cannot satisfy the requirements for limiting a decision of this Court to only prospective application.

A. Plaintiffs Waived Any Retroactivity Argument.

Plaintiffs argue that it would be "inequitable" to retroactively apply the decisions in *FagelHaber* and *Nelson* to this case because *FagelHaber* and *Nelson* were both decided after Plaintiffs commenced their malpractice action. (Pls.' Br. at 12) Plaintiffs failed to raise this argument in the trial court. Nor did Plaintiffs raise this argument before the Appellate Court. Plaintiffs have therefore waived any such argument. *See Bruso v. Alexian Brothers Hospital*, 178 Ill. 2d 445, 461 (1997)(argument not raised in the trial court or the Appellate Court is waived)(citation omitted).

B. Even Assuming The Retroactivity Argument Is Not Waived, The Retroactivity Analysis Does Not Determine Whether A Decision Resolving This Appeal Governs The Parties To The Instant Case.

A judicial decision is binding on the parties before the Court even where the decision applies only prospectively. *John Carey Oil Co., Inc. v. W.C.P. Investments*, 126 Ill. 2d 139, 149

(1988)("On those occasions when prospective application is warranted, the holding of the court still controls the case at bar; to not apply the rule would render it *dictum* and deprive the challenger the fruits of his efforts in questioning the old, erroneous rule."); *Elg v. Whittington*, 119 Ill. 2d 344, 359 (1987)(applying decision prospectively and noting, "[h]owever, our decision remains in effect for the parties in the instant case").

The case cited by Plaintiffs, *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11 (1959), supports this conclusion. In *Molitor*, the Court overruled existing precedent which afforded school districts immunity from tort damages. In so ruling, the Court applied its decision prospectively except as to the parties before the Court. The Court reasoned that not applying its decision to the parties before the Court would render its decision mere *dictum* and, moreover, it would deprive the appellant of the benefit of pursuing an appeal. This Court noted:

> [T]here is substantial authority in support of our position that the new rule shall apply to the instant case. At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere dictum. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding of precedent since appellant could not in any event benefit from a reversal invalidating it.

Molitor, 18 Ill. 2d at 28 (citations omitted).

Therefore, a decision of this Court is binding on the parties to the instant case irrespective of any retroactivity analysis that might otherwise result in only prospective application as to non-parties.

C. Even Assuming The Retroactivity Argument Is Not Waived, And Further Assuming A Retroactivity Analysis Is Required To Determine Whether A Decision Resolving This Appeal Governs The Parties To The Instant Case, Plaintiffs Cannot Establish The Requirements For Limiting The Decision to Prospective Application.

Even assuming the Court was required to undertake a retroactivity analysis, Plaintiffs cannot establish the requirements for limiting a decision of this Court to only prospective application. A three-factor analysis applies when assessing whether a decision in a civil case should apply retroactively or only prospectively. *Harris v. Thompson*, 2012 IL 112525, ¶ 29 (citing *Chevron Oil Co. v Huson*, 404 U.S. 97 (1971)). "First, the decision *must* establish a new rule of law, either by overruling clear past precedent on which litigants have relied, or by deciding an issue of first impression where the resolution was not clearly foreshadowed. This initial factor is a threshold requirement for solely prospective application of a new decision." *Harris*, 2012 IL 112525, ¶ 30 (emphasis in original). Assuming the threshold requirement is satisfied, the Court must then assess (2) whether, given the purpose and history of the new rule, its operation will be advanced or hampered by prospective application, and (3) whether, after balancing the equities, injustice or hardship would result if the decision is applied retroactively. *Id.* Here, Plaintiffs cannot satisfy the threshold requirement because a decision overruling the Appellate Court in this case would not establish a new rule or overrule any clear past precedent.

1. A Decision Reversing The Appellate Court Would Not Create A New Rule.

In *Harris*, this Court resolved a conflict among the Districts of the Appellate Court concerning application of the Local Governmental and Governmental Employees Tort Immunity Act ("Tort Immunity Act") to negligent acts of public employees operating emergency vehicles. The case arose from the Fifth District of the Appellate Court, which held that the Tort Immunity Act did not immunize public employees operating emergency vehicles from claims of

negligence. The decision from the Fifth District conflicted with decisions from other Districts of the Appellate Court which afforded public employees operating emergency vehicles with immunity from negligence claims. This Court reversed the Fifth District, and ordered that its decision apply retroactively, even where the plaintiff had suffered serious injuries and had already obtained a substantial damages award following trial. In so ruling, the *Harris* court noted that its ruling did not create new law, but simply gave effect to the legislative intent of Section 5-106 of the Tort Immunity Act.

Similarly, in *Tosado v. Miller*, 188 Ill. 2d 186 (1999), this Court held that the one-year limitations period in the Local Governmental and Governmental Employees Tort Immunity Act governed the plaintiffs' claims for medical malpractice, and not the two-year limitations period governing medical malpractice claims contained in the Illinois Code of Civil Procedure. This ruling rendered plaintiffs' claims time barred, and plaintiffs therefore requested that the Court apply its ruling only prospectively, and not to the parties before the Court. The Court rejected this request finding that plaintiffs failed to satisfy the threshold requirement of demonstrating that the Court's decision established a new rule of law. 188 Ill. 2d at 196-97. Specifically, the Court found that its decision did not create new law but, rather, "was foreshadowed by the language of the statute." *Id.* at 197.

Under *Harris* and *Tosado*, a judicial decision interpreting the legislative intent expressed in a statutory provision does not create a new rule. Likewise here, a decision giving effect to the legislative intent of Section 13-214.3 would not create a new rule. Plaintiffs cannot satisfy the threshold requirement for limiting a new decision to only prospective application and, therefore, the Court need not consider the additional factors. *See Harris*, 2012 IL 112525, ¶¶ 32-33 ("Because establishing a new principle of law is a threshold requirement for limiting a new

decision to only prospective application, and because our decision today does not cross that threshold, we have no need to consider the additional two factors.")(citation omitted).

2. A Decision Reversing The Appellate Court Would Not Overrule Clear Precedent.

Plaintiffs next argue that a decision reversing the Appellate Court would be overruling clear precedent and therefore should not govern the parties to the instant case. This argument should be rejected because numerous Appellate Court decisions recognize that a claim for legal malpractice accrues when the client incurs attorney fees as a direct result of the alleged attorney neglect.

As a general rule, a client does not sustain an injury for purposes of a legal malpractice claim until she suffers an adverse judgment, settlement, or dismissal of the underlying action. *Lucey v. Law Offices of Pretzel & Stouffer*, 301 Ill. App. 3d 349, 356 (1st Dist. 1998). However, this general rule does not apply in all circumstances. Numerous decisions from the Appellate Court – including *Lucey* – recognize that a claim for legal malpractice may accrue before an adverse judgment or settlement. *See, e.g., Zweig v. Miller*, 2020 IL App (1st) 191409, ¶ 21 (malpractice claim may accrue before an adverse judgment where it is "plainly obvious" that plaintiff has been injured as a result of attorney negligence or where the attorney's neglect is a direct cause of the legal expense incurred by the client); *Construction Systems, Inc. v. FagelHaber, LLC*, 2019 IL App (1st) 172430, ¶ 20 (same); *Nelson v. Padgitt*, 2016 IL App (1st) 160571, ¶¶ 22-23 (same); *In re Estate of Bass*, 375 Ill. App. 3d 62, 70 (1st Dist. 2007)(same); *Palmros v. Barcelona*, 284 Ill. App. 3d 642, 647 (2nd Dist. 1996)(malpractice claim accrued – regardless of any adverse judgment or settlement in the underlying litigation – when the client paid attorney fees to successor counsel to defend claims filed against her as a result of alleged attorney neglect).

The existence of these Appellate Court decisions demonstrates that a decision reversing the Appellate Court in this case would not be overruling clear past precedent. *See Castaneda v. Illinois Human Rights Commission*, 132 Ill. 2d 304, 329-30 (1989)(existence of multiple cases supporting Appellate Court decision, even though factually distinguishable, indicated that Appellate Court decision did not overturn established precedent); *Harris*, 2012 IL 112525, ¶ 31 ("resolving a conflict among the districts of our appellate court by choosing one appellate court decision over another does not constitute overruling clear past precedent.").

The dissenting opinion authored by Justice Griffin in the instant case further illustrates that the Court need not establish a new rule or overrule past precedent in order to reverse the Appellate Court decision. Indeed, Justice Griffin concluded that the trial court decision should have been affirmed under existing law and without creating any new rule.

The courts in both *Lucey* and *Warnock v. Karm Winand & Patterson,* 376 Ill. App. 3d 364 (1st Dist. 2007) – the principal cases relied on by Plaintiffs – expressly noted that their holdings followed the "general rule," thus acknowledging that a different rule might apply in other circumstances. Indeed, neither case holds that the payment of attorney fees will trigger the statute of limitations only after an adverse judgment or settlement. *Lucey* was decided in 1998. The fact that *Lucey* acknowledged the existence of a different rule approximately 23 years ago demonstrates that invoking that rule in this case would not be creating a new rule. A decision by this Court reversing the Appellate Court decision and endorsing the rationale of *Zweig* and *FagelHaber* would represent a clarification of existing law, not "an abrupt and fundamental shift in doctrine" that might create an entirely new rule. *See Harris*, 2012 IL 112525, ¶ 32.

Nor would a decision reversing the Appellate Court result in "changing the statute of limitation" as alleged by Plaintiffs. (Pls.' Br. at 11) The decision in *Aleckson v. Village of*

Round Lake Park, 176 Ill. 2d 82 (1997), is therefore inapposite. In *Aleckson*, the plaintiffs filed suit challenging the results of a police promotion examination. The defendants argued that plaintiffs' complaint was subject to the 35-day time limit for administrative review proceedings and therefore time barred. Plaintiffs argued that existing precedent from the Second District, *Barrows v. City of North Chicago*, 32 Ill. App. 3d 960 (2nd Dist. 1975), held that actions challenging police promotion exams were outside the scope of the Administrative Review Law and therefore governed by a one-year statute of limitations. Notwithstanding *Barrows*, the trial court dismissed the complaint as untimely, and plaintiffs appealed. During the pendency of the appeal, the Second District issued a decision overruling *Barrows*, thus concluding that the applicable limitations period was 35 days. The Second District refused to apply the overruling decision to the parties before the court, and this Court affirmed that decision finding that such determination was within the authority of the Appellate Court.

Aleckson is inapposite for two reasons. First, in *Aleckson*, the intervening Appellate Court decision unambiguously overturned existing precedent. As noted above, a decision reversing the Appellate Court in this case would not overrule any clear past precedent. Second, the effect of the intervening Appellate Court decision in *Aleckson* was to affirmatively change the limitations period from a period of one year to a period of 35 days. By contrast, here, the parties agree that the statute of limitations is two years. A decision reversing the Appellate Court decision in this case would not change the applicable two-year limitations period. For all the foregoing reasons, a decision reversing the Appellate Court decision would not establish a new rule or overrule any clear precedent.

III. THIS COURT SHOULD ADOPT THE RATIONALE OF THE COURTS IN *ZWEIG, FAGELHABER, NELSON, ESTATE OF BASS,* AND *PALMROS*.

A. The Appellate Court Decision Ignores Established Principles of Statutory Construction and Is Inconsistent With Illinois Supreme Court Precedent.

The Appellate Court held that the payment of attorney fees directly attributable to attorney neglect is not an "injury" for purposes of Section 13-214.3(b) unless and until entry of an adverse judgment or settlement in the underlying case. In so ruling, the Appellate Court ignored established principles of statutory construction when interpreting Section 13-214.3(b).

The fundamental principle of statutory construction is to ascertain and give effect to the intent of the legislature. *Petersen v. Wallach*, 198 Ill. 2d 439, 444 (2002)(citations omitted). The best means of determining legislative intent is through the statutory language. *Id.* Each word of the statute should be given reasonable meaning and not rendered superfluous. *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007). In determining legislative intent, the Court may properly consider the purpose for the law, the evils sought to be remedied, and the goals to be achieved. *Id.*

Section 13-214.3(b) provides that a claim for legal malpractice accrues when the client "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b)(emphasis added). Thus, the legislature used two separate and distinct words – "injury" and "damages" – when enacting Section 13-214.3(b). The Court must give meaning to each of these words, and avoid rendering either word superfluous, when interpreting this statutory provision. *See Brucker*, 227 Ill. 2d at 514.

The words "injury" and "damages" are not synonymous. The word "injury" means "the invasion of any legally protected interest of another." Restatement (Second) of Torts § 7

(1965).[1] On the other hand, "damages" is a sum awarded to an injured person for the tort of another. Restatement (Second) of Torts § 12A (1965). The term "injury" therefore denotes a broader set of circumstances which may exist prior to any conclusive finding of liability or determination of damages. Stated differently, an "injury" may exist earlier than "damages." In this case, the Appellate Court overlooked these principles of statutory construction and failed to give meaning to the distinct words "injury" and "damages" when concluding that no cause of action accrued until judgment was entered in the Underlying Action. By contrast, the decisions in *Zweig, FagelHaber, Nelson, Estate of Bass,* and *Palmros* harmonize with the legislative intent expressed in Section 13-214.3(b) by recognizing that a claim for legal malpractice may accrue before a conclusive finding of liability or determination of damages.

In *Zweig*, the client argued that his malpractice action was timely filed within two years of the date he settled underlying litigation arising from a business investment where the defendant-lawyer represented him. Specifically, the client argued that he did not suffer pecuniary injury until the settlement occurred. The *Zweig* court rejected this argument finding that the statute of limitations was triggered when the client began paying legal fees to new counsel "to attempt to achieve a result in the underlying case that was not achieved during defendants' representation." 2020 IL App (1st) 191409, ¶ 3. The *Zweig* court held that the possibility that the client might prevail in the underlying litigation did not negate the fact that the client incurred and paid attorney fees to remedy the negligence of prior counsel. 2020 IL App (1st) 191409, ¶¶ 35, 38. Likewise, here, the fact that Plaintiffs might possibly have prevailed in

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[1] An action for legal malpractice is one sounding in tort arising from a contract for legal services. *Land v. Greenwood*, 133 Ill. App. 3d 537, 541 (4th Dist. 1985). "In a legal malpractice action, ordinary negligence principles apply." *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 975 (1st Dist. 2005)(citing *Pelham v. Griesheimer*, 92 Ill. 2d 13 (1982)).

the Underlying Action did not negate the fact that they incurred and paid attorney fees directly attributable to the alleged attorney negligent more than two years before filing their malpractice claim.

Similarly, in *FagelHaber*, the court held that the statute of limitations commenced when the client retained new counsel and paid legal fees to investigate the negligence of the client's former counsel. 2019 IL App (1st) 172430, ¶¶ 16-17. The *FagelHaber* court concluded that the client knew, or should have known, of the alleged negligence of its former counsel in 2005 when its new counsel researched issues related to the required lien notice. The *FagelHaber* court rejected the client's argument that the statute of limitations commenced only when the parties settled the underlying lien litigation in December 2007 and its financial losses were determined. The court held that the "payment of the additional legal fees constituted actual damages and, coupled with its knowledge of FagelHaber's negligence, commenced the running of the statute of limitations at that time." 2019 IL App (1st) 172430, ¶ 25.

The *Zweig* court acknowledged *Lucey*, but found *Lucey* distinguishable because the client in *Zweig* expressly alleged that he incurred attorney fees as a direct result of former counsel's neglect. 2020 IL App (1st) 191409, ¶ 35. Unlike the facts in *Zweig*, in *Lucey* it was "unclear" whether the injured client suffered any injury as a result of attorney neglect until the adverse judgment was entered against the client. 2020 IL App (1st) 191409, ¶ 35. Similarly, in *FagelHaber*, the court cited *Lucey* but found *Lucey* distinguishable because in *FagelFaber* it was "clear" that the client paid additional attorney fees to successor counsel directly attributable to the alleged neglect of former counsel. 2019 IL App (1st) 172430, ¶ 25. Further, the *FagelHaber* court found *Warnock v. Karm Winand & Patterson,* 376 Ill. App. 3d 364 (1st Dist. 2007),

distinguishable because in that case "the attorney's negligence could not have reasonably been discovered before the trial court entered an adverse judgment." 2019 IL App (1st) 172430, ¶ 27.

Here, similar to *Zweig* and *FagelHaber*, there is no dispute that Plaintiffs incurred and paid attorney fees to new counsel as a direct result of the alleged attorney neglect as early as 2010 and certainly no later than 2013 – more than two years before Plaintiffs commenced their malpractice claim. At that point, Plaintiffs suffered injury and damages were no longer speculative. *See FagelHaber*, 2019 IL App (1st) 172430, ¶ 25 ("Payment of attorney fees is a monetary loss sufficient to constitute damages if the additional fees are directly attributable to former counsel's neglect."). In fact, Plaintiffs claimed these attorney fees as one element of their damages in their interrogatory answers. *See* C 1053-64 at No. 12 (alleging damages including "the amount of attorneys' fees charged by all legal counsel other than the Carlson Law Firm in defending assertions made by ROC, Inc. that [Suburban] breached its fiduciary duty to ROC/Suburban, LLC"). Plaintiffs' interrogatory answers are binding admissions. *See Van's Material Company, Inc. v. Department of Revenue*, 131 Ill. 2d 196, 211-12 (1989)(answer to an interrogatory eliciting the party's contentions is a judicial admission). These clear admissions make the instant case distinguishable from *Lucey* and *Warnock*.

The First District similarly concluded that the payment of attorney fees triggered the statute of limitations for an attorney malpractice claim regardless of any adverse judgment in *Nelson v. Padgitt*, 2016 IL App (1st) 160571. In *Nelson*, the client hired an attorney to negotiate an employment agreement on his behalf. Approximately six months after the agreement was executed, the employer terminated the employee. Thereafter, the employee sued the employer for breach of contract and fraud. The trial court granted summary judgment for the employer finding that the employee's termination was attributable to his "failure to properly negotiate" the

employment agreement. 2016 IL App (1st) 160571, ¶ 6. Subsequently, the client retained new counsel and sued his prior counsel for legal malpractice. The trial court dismissed the malpractice claim based on the two-year statute of limitations. The trial court reasoned that the employee knew or reasonably should have known of his injury at the time the employer terminated his employment or, at a minimum, when he engaged new counsel to pursue claims against the employer for breach of contract and fraud. 2016 IL App (1st) 160571, ¶¶ 15-16. The *Nelson* court expressly held that the legal fees incurred by the employee as a result of the attorney's neglect in drafting the employment agreement was an actual injury sufficient to trigger the statute of limitations. 2016 IL App (1st) 160571, ¶ 23.

Still further, in *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 64 (1st Dist. 2007), the court found that the payment of attorney fees by estate beneficiaries to pursue a malpractice claim against the attorneys who prepared an estate plan for the decedent was an actual injury "regardless of the outcome" of the underlying probate litigation. 375 Ill. App. 3d at 70. The *Estate of Bass* court held: "A legal malpractice claim can accrue before the client suffers a final, adverse judgment in the underlying action where it is plainly obvious, prior to any adverse ruling against the plaintiff, that he has been injured as the result of professional negligence ***or*** where an attorney's neglect is a direct cause of the legal expense incurred by the plaintiff." 375 Ill. App. 3d at 70 (emphasis added)(quotations omitted). Thus, *Estate of Bass* acknowledges that (a) the payment of attorney fees by the estate beneficiaries was actual injury for purposes of a legal malpractice action "regardless of the outcome" of the underlying probate litigation, *i.e.*, even absent any adverse judgment or clear finding of attorney neglect, and (b) the client's status as a plaintiff or defendant in the underlying dispute is not relevant.

Finally, in *Palmros v. Barcelona*, 284 Ill. App. 3d 642 (2nd Dist. 1996), the court concluded that the plaintiff suffered injury when the plaintiff incurred and paid attorney fees to successor counsel to defend litigation filed against her as a result of alleged attorney neglect. As a result, the Second District affirmed the dismissal of the plaintiff's claim for legal malpractice finding it barred by Section 13-214.3(b). Relevant here, the client in *Palmros* was the defendant in the underlying litigation. Thus, contrary to the Plaintiffs' argument, a client's status as a defendant or plaintiff in the underlying litigation is not determinative concerning whether the payment of attorney fees to successor counsel triggers the statute of limitations.

As noted, Plaintiffs do not dispute they incurred and paid legal fees as a direct result of alleged attorney neglect more than two years before commencing their claim for legal malpractice. Even earlier, Plaintiffs suffered a legal detriment when they were sued in the Underlying Action for engaging in conduct allegedly recommended by the Defendants. Plaintiffs also suffered a legal detriment when the trial court entered a temporary restraining order against Plaintiffs after they engaged in conduct that was allegedly recommended by the Defendants. The damages awarded against Plaintiffs at the conclusion of the Underlying Action merely enhanced the injury that Plaintiffs had already suffered years earlier.

Plaintiffs do not dispute that they had knowledge of the alleged wrongful conduct more than two years before commencing their malpractice claim, or that they incurred and paid legal fees as a direct result of alleged attorney neglect more than two years before commencing their malpractice claim. Plaintiffs simply assert that the legal fees they paid as a direct result of the alleged attorney neglect was not an actionable until judgment was entered in the Underlying Action. But this Court has never required a conclusive finding of injury or determination of damages before a cause of action accrues under the discovery rule. Rather, a cause of action

accrues when a party is apprised of sufficient information from which the party should reasonably know of an injury and that it was wrongfully caused.

For example, in *Khan v. Deutsche Bank AG*, 2012 IL 112219, the plaintiffs alleged that the defendants induced them to undertake an illegal tax shelter strategy that resulted in the plaintiffs incurring back taxes, penalties, and interest. This Court held that the plaintiffs' claims accrued under the discovery rule when plaintiffs received a notice of deficiency from the IRS, not when the IRS issued its final deficiency assessment. 2012 IL 112219, ¶ 45. The Court held that "[r]eceipt of the notice of deficiency puts the taxpayer on notice that he has suffered an injury and that the injury was wrongfully caused." 2012 IL 112219, ¶ 45. The Court observed that "[a] cause of action 'accrues' when facts exist that authorize the bringing of a cause of action." *Id.* at ¶ 20 (emphasis added).

Similarly, this Court recognized that a claim accrues under the discovery rule prior to any final determination of liability or calculation of damages in *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72 (1995). In *Hermitage*, the plaintiffs hired the defendants to prepare and record a mechanic's lien. Plaintiffs later filed suit to foreclose the lien seeking an amount in excess of $93,000. In 1987, the trial court reduced the lien amount to $17,332. A motion to reconsider that order was denied in 1989. In 1991, plaintiffs filed suit asserting various claims. Defendants argued that plaintiffs' claims were barred by the statute of limitations. This Court concluded that the statute of limitations commenced in 1987 when the trial court reduced the lien amount because plaintiffs were then "on notice of the alleged defect" regardless of any final determination in the litigation. 166 Ill. 2d at 84. The Court reasoned that the statute of limitations commences once the injured party knows or reasonably should know that an injury has occurred and that it was wrongfully caused. 166 Ill. 2d at 85-86. *See also*

Sundance Homes, Inc. v. County of DuPage, 195 Ill. 2d 257, 266 (2001)(a claim accrues "when facts exist which authorize one party to maintain an action against another"; the accrual of claim is not deferred "until a plaintiff has *assurance* of the success of an action")(emphasis in original)(citations omitted); *Shrock v. Ungaretti & Harris Ltd.*, 2019 IL App (1st) 181698, ¶¶ 66-69 (claim accrues for purposes of Section 13-214.3(b) when the plaintiff acquires information that would warrant further inquiry, regardless of the conclusiveness or ultimate veracity of the information).

The foregoing decisions comport with the legislative intent expressed in Section 13-214.3(b) and are consistent with the reasoning in *Zweig, FagelHaber, Nelson, Estate of Bass,* and *Palmros*. The relevant question is not whether the client was a plaintiff or defendant in the underlying litigation, but whether and when the client was apprised of information from which to form a reasonable belief that it suffered injury attributable to attorney neglect.

Plaintiffs' contention that no claim accrues under Section 13-214.3(b) unless and until there is a conclusive finding of liability (*i.e.*, adverse judgment) or final determination of damages (*i.e.*, settlement) is inconsistent with the foregoing decisions. Plaintiffs' contention is also flawed as a practical matter. The settlement of an underlying action might occur for any number of reasons unrelated to the merits of the claims and, by extension, unrelated to any alleged attorney neglect. Further, an adverse judgment does not necessarily establish a conclusive finding of liability or determination of damages because that judgment could later be reversed on appeal and all malpractice claims dismissed.

This Court's decisions in *Khan, Hermitage,* and *Sundance Homes* are in accord with the decisions in *Zweig, FagelHaber, Nelson, Estate of Bass,* and *Palmros,* and each of these decisions more properly harmonize with the legislative intent expressed in Section 13-214.3(b).

Accordingly, this Court should adopt the rationale of those cases and reverse the Appellate Court decision.

B. The Appellate Court Decision Contravenes the Legislative Goals and Policy Objectives of Section 13-214.3(b).

The purpose of a statute of limitations is to encourage the prompt presentation of claims and thereby protect defendants from stale claims. *Golla v. General Motors Corp*., 167 Ill. 2d 353, 369-70 (1995). A defendant is "almost certainly" prejudiced when forced to defend against claims brought after "memories had faded and evidence has become unavailable . . ." *Id.* In addition to preventing stale claims, the statute of limitations promotes "the orderly administration of justice by promoting the interests of predictability and finality." *Sepmeyer v. Holman*, 162 Ill. 2d 249, 256 (1994). A decision adopting the rationale of *Zweig, FagelHaber, Nelson, Estate of Bass*, and *Palmros* would advance the purpose and policy objectives of Section 13-214.3(b).

Plaintiffs do not dispute that they were aware of the alleged attorney neglect no later than 2013. But Plaintiffs waited three more years – until 2016 – to file suit without providing Defendants any prior notice of their potential claim. According to Plaintiffs, they were required to delay filing their malpractice claim until an adverse judgment or settlement in the Underlying Action. This interpretation of Section 13-214.3(b) would allow a former client to unilaterally control the timing for any presentation of a malpractice claim, and thereby unfairly prejudice the defendant-lawyer. This interpretation of Section 13-214.3(b) would also allow a former client to control – or at least influence – the amount of damages suffered in the underlying action which the client would later seek to recover in a malpractice action. This unfair result occurred in this case: Plaintiffs rejected advice from their new counsel to settle the Underlying Action (C 2347 at 120-21), and instead proceeded to trial and lost, and thereby dramatically increased the

damages which Plaintiffs now seek to recover in the instant case. This result is inimical to the statutory goals of encouraging the prompt presentation of claims and protecting defendants from unfair prejudice. For sound policy reasons, the statute of limitations should commence when the client is apprised of information from which to form a reasonable belief that it was injured by attorney negligence. Under this rule, there is no inconsistency when Defendants deny liability for malpractice but also assert that Plaintiffs should be charged with knowledge sufficient to trigger the statute of limitations as early as 2010 and certainly no later than 2013.

According to Plaintiffs, a client will be forced to commence a malpractice action whenever any actions taken by the client based on their attorney's advice is challenged to avoid having a malpractice claim barred as untimely. Plaintiffs contend this would result in various cases being stayed or dismissed as premature. These same "judicial economy" concerns were addressed and rejected in *FagelHaber* and *Nelson*.

The *FagelHaber* court first noted that such concerns are only relevant in cases where the attorney negligence could not be reasonably discovered prior to an adverse judgment. 2019 IL App (1st) 172430, ¶ 27. That concern was not relevant in *FagelHaber*, nor is it relevant in the instant case. Next, the *FagelHaber* court noted that a malpractice action can be stayed pending resolution of underlying litigation to mitigate such "judicial economy" concerns. *Id.* ¶ 31. Still further, the *FagelHaber* court noted that "it is not uncommon" in the context of legal malpractice actions for the parties to enter into a tolling agreement pending resolution of the underlying litigation to mitigate any such judicial economy concerns. *Id.* ¶ 32.

Similarly, the *Nelson* court rebuffed the argument made by Plaintiffs here. In so doing, the court noted that its ruling was consistent with the legislature's intent as reflected in Section 13-214.3(b). *See* 2016 IL App (1st) 160571, ¶ 24 ("the legislature chose to write a statute of

limitations into the Code of Civil Procedure, and, while a balancing act, our ruling is consistent with the legislature's wishes.") The *Nelson* court then admonished that the two-year statute of limitations set forth in Section 13-214.3(b) is a statutory enactment, and changing a statute is for the legislature, not the courts. *Id.* ¶ 24. For these same reasons, the Court should reject the policy arguments raised by Plaintiffs in this case.

For all the foregoing reasons, Defendants respectfully request that the Court reverse the Appellate Court decision and affirm the judgment of the trial court.

Dated: August 11, 2021

Respectfully submitted,

WILLIAM ROGER CARLSON, JR.,
and CARLSON PARTNERS, LTD.

By: /s/ John J. D'Attomo
One of Their Attorneys

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CERTIFICATE 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 containing the Rule 341(d) cover, the Rule 341(h)(1) 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 20 pages.

/s/ John J. D'Attomo

No. 126935

IN THE SUPREME COURT OF ILLINOIS

SUBURBAN REAL ESTATE SERVICES, INC. and BRYAN BARUS, Plaintiffs-Appellees, v. WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD., Defendants-Appellants.	)	On leave to appeal from the Appellate Court of Illinois, First District, Nos. 1-19-1953 & 1-19-1973 (consol.) There Heard on Appeal from the Circuit Court of Cook County, Illinois, Hon. Diane M. Shelly, Judge Presiding, No. 2016 L 5295

NOTICE OF FILING

Defendants-Appellants WILLIAM ROGER CARLSON, JR. and CARLSON PARTNERS, LTD. hereby provide notice of filing of the attached Reply Brief of Defendants-Appellants.

Dated: August 11, 2021

Respectfully submitted,

WILLIAM ROGER CARLSON, JR.,
and CARLSON PARTNERS, LTD.

By: /s/ John J. D'Attomo
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on this 11th day of August 2021, he caused a copy of the forgoing REPLY BRIEF OF DEFENDANTS-APPELLANTS and NOTICE OF FILING to be filed electronically with the Clerk of the Illinois Supreme Court and served electronically on the following:

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

/s/ John J. D'Attomo