No. 126935

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

SUBURBAN REAL ESTATE SERVICES, INC. and BRIAN E. BARUS, Plaintiffs-Appellees, v. WILLIAM ROGER CARLSON, JR., and CARLSON PARTNERS, LTD., Defendants-Appellants _____ WILLIAM ROGER CARLSON JR., and CARLSON PARTNERS, LTD., Third-Party Plaintiffs-Appellants v. CARMEN A. GASPERO, JR., et al., Third-Party Defendant-Appellees.	)	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. 16 L 5295 Hon. Diane M. Shelley, Judge Presiding

BRIEF *AMICUS CURIAE* OF ATTORNEYS' LIABILITY ASSURANCE SOCIETY LTD. IN SUPPORT OF CARLSON PARTIES

Michael L. Shakman (ARDC No. 2558823)
Diane F. Klotnia (ARDC No.6202609)
Zachary J. Freeman (ARDC No. 6281413)
Alexandra K. Block (ARDC No. 6285766)
Miller Shakman Levine & Feldman LLP
180 N. LaSalle St., Suite 3600
Chicago, Illinois 60601
mlshak@aol.com
dklotnia@millershakman.com
zfreeman@millershakman.com
ablock@millershakman.com
Tel.: (312) 263-3700 / Fax: (312) 263-3270

TABLE OF POINTS AND AUTHORITIES

INTEREST OF AMICUS

Attorneys' Liability Assurance Society Ltd., a Risk Retention Group ("ALAS"), files this brief as *amicus* in support of Appellants William Roger Carlson, Jr. and Carlson Partners, Ltd. (collectively, "Carlson"). Carlson has been granted leave to appeal the ruling of the Appellate Court for the State of Illinois, First District, in *Suburban Real Estate Services, et al. v. William Roger Carlson, Jr., et al.,* 2020 IL App (1st) 191953 (the "Opinion").

ALAS is the nation's leading provider of professional liability insurance for larger law firms and is organized on a mutual basis with member law firms owning the company. It is not the insurer for any party in this lawsuit and has no financial interest in its outcome. ALAS's Illinois member firms have no direct interest in the outcome of this case. Neither Carlson nor their counsel solicited this brief. The fees for preparation of this brief have been paid solely by ALAS.

ALAS files this brief because of concerns about the adverse, and likely unintended, consequences of the Appellate Court's ruling on lawyers, their clients, professional liability insurers, and the public interest.

Founded in 1979, ALAS is a mutual insurance company that currently insures 220 member law firms, including over 68,600 lawyers – approximately one out of every thirteen lawyers in private practice in the United States. In Illinois, ALAS has 45 member firms with approximately 4,660 lawyers practicing in main or branch offices. ALAS has a great deal of experience

assisting its insureds in avoiding malpractice claims – and in responding properly when they arise. It is widely recognized as the national leader in these areas. It respectfully submits that its experience in dealing with many legal malpractice cases over many years may be of use to the Court in deciding this case.

SUMMARY OF ARGUMENT

ALAS has learned from many years working with lawyers in responding to legal malpractice claims that it is important to the lawyer and the client that claims be identified, investigated, and litigated or settled while memories are fresh and evidence still available. Lawyers, insurers, clients, and the public have a strong interest in the certainty and predictability of stable limitations rules that encourage identifying, addressing, and resolving claims promptly so crucial evidence is not lost, memories have not faded, and professional liability insurance coverage has not expired or become unavailable. Unnecessary delay in addressing known claims is bad for everyone.

In this case, the Appellate Court created a special rule applicable to only some legal malpractice claims that mandates unnecessary delay. This new rule is contrary to this Court's well-established precedent and disregards the concerns underpinning the discovery rule applicable to legal malpractice claims and many other types of claims.

The Appellate Court's new rule applies a different, inconsistent trigger for the statute of limitations applicable to malpractice claims depending on

whether the client in the legal malpractice action was a plaintiff or a defendant in an underlying lawsuit. When the client was a defendant in the underlying lawsuit, the new rule delays starting the statute of limitations until the client suffers an adverse judgment. But if the client was the plaintiff in the underlying lawsuit, the standard discovery rule applies: the statute of limitations begins to run when the client is on inquiry notice, *i.e.*, knows, or reasonably should know, that he/she has been injured and that the injury may have been wrongfully caused.

The Appellate Court's new rule is bad policy because it creates different rules for different types of malpractice claims, contrary to the plain language of the statute of limitations, 735 ILCS 5/13-214.3(b), and mandates delay in addressing a client's malpractice claim when the client was the defendant in the underlying case regardless of all other facts relevant to inquiry notice.

Worse, the new rule fails to consider the serious, unintended consequence to the client when the adverse ruling that triggers the statute of limitations does not occur until more than six years after the lawyer's last negligent act giving rise to the claim. In that situation, the six-year statute of repose would extinguish – and bar the client from pursuing – any malpractice claim. It is a true "Catch-22" in which the client's known claim may be barred by the statute of repose before it accrues. In that situation, the client has no claim and no remedy. The Appellate Court appears to have not considered this serious, unintended consequence when it adopted its new rule.

Even in cases where the adverse judgment occurs prior to the running of the six-year statute of repose, the Appellate Court's new rule runs afoul of the sensible reasoning supporting the discovery rule – that claims should be brought with reasonable promptness to ensure they can be resolved fairly and in a timely manner.

ARGUMENT

A. The Court's Long-Standing Discovery Rule Makes Sense.

This Court has long recognized that "the underlying purpose of statutes of limitations … is to 'require the prosecution of a right of action within a reasonable time to prevent the loss or impairment of available evidence and to discourage delay in the bringing of claims.'" *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). In *Nolan*, the Court adopted the discovery rule in tort actions and rejected delaying notification until "knowledge of negligent conduct." *Id.*

The Court has repeatedly applied the discovery rule in many contexts.[1] The Court has repeatedly rejected an accrual standard that would delay or toll

---

[1] *See Moon v. Rhode,* 2016 IL 119572, ¶40 (wrongful death); *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶36 (construction); *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶45 (accounting malpractice); *Snyder v. Heidelberger*, 2011 IL 111052, ¶10 (legal malpractice); *Clark v. Children's Mem'l Hosp.*, 2011 IL 108656, ¶123 (negligent infliction of emotional distress); *Orlak v. Loyola Univ. Health Sys.*, 228 Ill. 2d 1, 8 (2007) (medical malpractice); *Morris v. Margulis*, 197 Ill. 2d 28, 35-36 (2001) (breach of fiduciary duty); *Parks v. Kownacki*, 193 Ill. 2d 164, 176 (2000) (personal injury); *Clay v. Kuhl*, 189 Ill. 2d 603, 608-09 (2000) (personal injury); *Advincula v. United Blood Servs.*, 176 Ill. 2d 1, 43 (1996) (personal injury); *Golla v.*

…continued on next page

the start of the limitations period until the plaintiff knew he/she had a cause of action against a specific defendant and knew the exact extent of the injury. *See*, *e.g.*, *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶45 ("To permit plaintiffs to wait until the full extent of their injuries are known would read the discovery rule out of this case."); *Parks v. Kownacki*, 193 Ill. 2d 164, 176 (2000) ("The limitations period begins running even if the plaintiff does not know that the misconduct was actionable."). As the Court explained in *Nolan*: "[I]f knowledge of negligent conduct were the standard, a party could wait to bring an action far beyond a reasonable time when sufficient notice has been received of a possible invasion of one's legally protected interests." 85 Ill. 2d at 170-71. The well-established discovery rule encourages the client to do the sensible thing by starting the limitations period when the client knows or reasonably should know that he or she has been injured and that the injury has been wrongfully caused. The client then has the entire period provided by the applicable

---

General Motors Corp., 167 Ill. 2d 353, 359-60 (1995) (product liability); *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 84 (1995) (construction); *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 249 (1994) (legal malpractice); *Rio v. Edward Hosp.*, 104 Ill. 2d 354, 365 (1984) (claims subject to the Tort Immunity Act); *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 415 (1981) (construction); *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 169 (1981) (product liability); *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981) (product liability); *Williams v. Brown Mfg. Co.*, 45 Ill. 2d 418, 432 (1970) (products liability); *Lipsey v. Michael Reese Hosp.*, 46 Ill. 2d 32, 40 (1970) (medical malpractice); *Berry v. G. D. Searle & Co.*, 56 Ill. 2d 548, 558-59 (1974) (products liability); *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill. 2d 129, 136-37 (1975) (defamation); *Rozny v. Marnul*, 43 Ill. 2d 54, 72-73 (1969) (tortious misrepresentation).

statute of limitations to file any claims that arise out of the injury, subject to any applicable statute of repose.

The Legislature expressly incorporated the discovery rule into the statute of limitations applicable to lawsuits against lawyers:

> An action for damages based on tort, contract, or otherwise (i) against an attorney arising out of an act or omission in the performance of professional services or (ii) against a non-attorney employee arising out of an act or omission in the course of his or her employment by an attorney to assist the attorney in performing professional services 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.

735 ILCS 5/13-214.3(b); *Snyder v. Heidelberger*, 2011 IL 111052, ¶10 ("The statute of limitations set forth in section 13–214.[3](b) incorporates the 'discovery rule,' which serves to toll the limitations period to the time when the plaintiff knows or reasonably should know of his or her injury.").

Nothing about the scenario where the client was the defendant in the underlying lawsuit warrants a different rule. The Opinion is correct that a client would be on inquiry notice when he or she is the plaintiff in an underlying lawsuit. Opinion, ¶32, A068. But the Opinion's conclusion that the client who is a defendant could not have the requisite knowledge to be on inquiry notice until an adverse judgment is illogical.

When a client is the defendant in an underlying lawsuit, inquiry notice of any malpractice claims should turn on the specific facts of that case – not solely on the client's status as the defendant. A client sued as a result of his/her reliance on negligent legal advice who incurs attorneys' fees defending the

lawsuit can be on inquiry notice of a malpractice claim long before an adverse judgment is entered. The concerns that animate and justify the discovery rule – preserving evidence and encouraging the timely resolution of claims – are relevant to all malpractice claims, whether the client was plaintiff or defendant in the underlying lawsuit.

This Court has sensibly rejected an accrual rule that would have started the clock at a "reasonable time" after discovery of injury because such a ruling would lead to a lack of certainty and increased litigation. *Hermitage Corp. v. Contractors Adjustment Co.,* 169 Ill. 2d 72, 83-84 (1995). The Appellate Court's rule creates two separate classes of malpractice plaintiffs for purposes of determining inquiry notice, generating uncertainty and delay with regard to when the statute of limitations is triggered and when claims must be filed.

Without exception, courts addressing statutes of limitations treat when the plaintiff was on inquiry notice as a fact question. Although a client may not be on inquiry notice until the entry of an adverse judgment, a client is often on inquiry notice prior to the entry of an adverse judgment. *See Constr. Sys., Inc. v. FagelHaber, LLC*, 2019 IL App (1st) 172430, ¶20 ("[A] malpractice action may accrue before the trial court enters an adverse judgment if it is plainly obvious that the plaintiff 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.") (internal quotation marks omitted); *accord Zweig v. Miller*, 2020 IL App (1st) 191409, ¶30. Where the negligence is "plainly

obvious" or where the client has incurred expenses as a result of the lawyer's negligence, the client is on inquiry notice, even in the absence of an adverse judgment. *Constr. Sys.*, 2019 IL App (1st) 172430, ¶20.

The Appellate Court opted for a mechanical, bright line rule that delays the accrual of a claim until the entry of an adverse judgment in an underlying lawsuit, but only when the client was the defendant in that lawsuit. Opinion, ¶¶32-34, A068. It applied the new rule even though the trial judge in the underlying lawsuit told the client in no uncertain terms that he had a malpractice claim against his former lawyer. The client then paid fees to his attorneys to investigate and prepare for a malpractice claim; the attorneys even sought legal advice from another attorney about when that malpractice claim needed to be filed. Opinion, ¶12, A04; Dissent ¶48, A014. The discovery rule can and should be applied in the same manner to all types of legal malpractice claims.[2] As explained below, the Appellate Court's new rule is not only unnecessary, but leads to serious unintended consequences.

B. The Negative Consequences of this New Exception to the Discovery Rule Argue Strongly Against It.

The Appellate Court's ruling allows a client to delay notifying his or her lawyer of a potential claim until any underlying litigation has played out if the

---

[2] *Compare Terra Found. for Am. Art v. DLA Piper LLP*, 2016 IL App (1st) 153285, ¶38, where the court rejected an argument that the statute of repose operates differently for malpractice in transaction or litigation setting because "the plain language of section 13–214.3 makes no distinction in its application as to types of malpractice." The same is true of the language of the two-year statute of limitations, and the discovery rule it includes.

client is the defendant in the underlying litigation, even if the lawyer's negligence was plainly obvious to the client, and even if the client incurred damages as a result of that negligence. An adverse judgment may not be entered for many years after the underlying litigation is filed, long after the client knows or "reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b). The delay sanctioned by the Appellate Court's new rule is likely to have serious consequences for both the client and the lawyer.

Loss of evidence. The passage of time risks the loss or impairment of relevant evidence. The discovery rule was intended to ensure that a plaintiff does not sit on his/her claim after learning enough to know that he/she may have a claim to assert, thereby minimizing the negative effects from the passage of time.

Equal access to evidence. A client who has knowledge of a possible claim is in a superior position to gather and preserve evidence before giving notice to his/her former lawyer. Defendants in all tort claims, including lawyer-defendants, should be protected against unreasonable delay in learning of claims, lest they be prejudiced in mounting their defense. The imbalance is evident in the present case. Justice Griffin, dissenting from the original Opinion, noted that within a few days after a pretrial conference in the underlying case where the trial judge strongly indicated that there was a malpractice claim to be made by one of the defendants that the client, through

his new lawyer and with no indication of notice to his prior lawyer, "searched for and retrieved records of his correspondence with defendants for the purposes of evaluating a malpractice claim against defendants."[3] Dissent ¶48, A014-015; *see also* Opinion, ¶12, A061. The client in the underlying lawsuit did not file suit for malpractice against his former lawyer until more than three years later – depriving the lawyer of an equal opportunity to find and retrieve relevant documents and to develop and evaluate defenses.

Loss of insurance coverage. Delay in triggering the statute of limitations often will result in delay in notifying the client's former lawyer of a potential claim against the lawyer, resulting in the risk of loss of insurance coverage. Most legal malpractice insurance policies operate on the "claims-made" principle – coverage is provided only for claims made during the policy period. But law firms dissolve and lawyers relocate. A dissolved firm may not have purchased so-called "tail coverage" – coverage for claims made after dissolution based on services provided before dissolution. Or a lawyer may relocate to a new firm whose insurance covers only claims for work done at the new firm.[4]

---

[3] The panel that denied the motion for hearing was different than the panel that issued the initial opinion because Justice Griffin was replaced by Justice Coghlan. Following the denial of the motion for rehearing, Justice Coghlan concurred in the judgment and opinion, and Justice Griffin's dissenting opinion was removed from the Opinion.

[4] In the "modern era of lawyer mobility," lawyers facing long-tail liability may finally get notice of a claim only after they have already switched firms or retired. Robert W. Hillman, *Law Firm Risk Management in an Era of Breakups and Lawyer Mobility: Limitations and Opportunities*, 43 TEXAS TECH LAW REV. 449, 450 (2011) (describing modern law firm culture as "revolving doors").

The Appellate Court's new rule increases the risk that when the client finally asserts the claim there will be no insurance to cover it. The last thing a client should want is to have a claim against an allegedly negligent lawyer without insurance. That is bad for both client and lawyer.

Loss of opportunity to address and settle claims. As Justice Griffin noted, the negative impact of the Appellate Court's new rule is not limited to the defendant's inability to locate and preserve evidence. The defendant and his/her insurer are also deprived of an opportunity to evaluate the potential claim and "to plot a more efficient resolution of the disputes." Dissent, ¶60, A020. Tolling agreements are a common part of the legal malpractice landscape. The Appellate Court's rule delays their application.

An approach that enforces a limitations period but allows it to be extended by agreement or stayed by the court until the full extent of the injuries are ascertainable balances everyone's interests. It allows the defendant law firm and lawyer to preserve documents and evidence, it allows insurance carriers to reserve for exposure, and it allows an earlier evaluation that can often lead to earlier resolutions. Allowing the plaintiff to keep his/her former attorney in the dark about a possible malpractice claim because the limitations period has been extended indefinitely by the Appellate Court's new rule is unfair and counterproductive, particularly when there are easy alternatives, such as tolling agreements and abatements, to address concerns

relating to the filing of a malpractice suit prior to the entry of an adverse judgment.

Potential for loss of claims due to the statute of repose. While the sophisticated client may seek a tolling agreement by which the former lawyer agrees not to assert the six-year statute of repose, an unsophisticated client (or successor counsel) may not realize that the client's claim may be barred by the statute of repose before the client suffers an adverse judgment in the underlying case. Some underlying lawsuits reach judgment before six years have expired from the lawyer's last negligent actions. But some do not. They may be dismissed, appealed, and reversed, a process that can consume years. Then the case may take more time to reach the trial call, be tried, and go to judgment. Under the Appellate Court's new rule, clients may lose their right to bring malpractice claims because they could not assert them until the entry of an adverse judgment, by which time the statute of repose may bar the claim entirely.[5]

Although averages varied, circuit courts in several counties reported in 2019 average times to verdict in law jury cases well in excess of six years (DeWitt (75.5 months), Hardin (110.9 months), Knox (99.5 months), Mercer

[5] While the transactional malpractice at issue in this case occurred one month before the underlying litigation commenced, *see* Opinion ¶7, A060, transactional malpractice can occur years before any litigation is filed, which increases the likelihood that the claim would be barred by the statute of repose before the entry of an adverse judgment.

(257 months), Vermillion (100.8 months) and Whiteside (101.5 months)), albeit based on low case numbers. *See* Administrative Office of the Illinois Courts, *Illinois Courts 2019 Statistical Summary*, at 71-74, available at https://www.illinoiscourts.gov/Resources/9ce30c6e-f2c8-4990-b5b4-a1eae2db5739/2019_Statistical_Summary.pdf (last visited 6/25/2021).[6]

Under the Appellate Court's new rule, in cases in which no adverse judgment is entered for six years following the lawyer's negligence – even if the client reasonably believed it had a claim against the lawyer before entry of the adverse verdict and had expended time and money to investigate the claim – there would have been no injury permitting a suit to be filed, if the client was a defendant. The malpractice claim would not have accrued. The client could not file its malpractice action until after the entry of the adverse judgment. By that time, the client's claim would have been extinguished by the six-year statute of repose. [7]

---

[6] With few exceptions (2002, 2007, 2010, and 2013), in each year from 2001 through 2019, at least one county reported *average* time to verdict in law jury cases greater than six years. *See* Administrative Office of the Illinois Courts, Annual Statistical Summaries 2001-2019, available at https://www.illinoiscourts.gov/reports/annual-report-illinois-courts/ (last visited 6/25/2021). (Often the sample size was no more than one case.) And in the years 2007, 2010 and 2013, several counties reported time to verdict approaching six years. Because jury trials were effectively suspended from about March 2020 through at least June 2021 due to the pandemic, the time to verdict will likely increase in 2021 and for some time thereafter.

[7] Addressing this issue by staying claims that could be barred by the statute of repose before the claims have accrued is not a solution to the "Catch 22" problem. As noted in *Est. of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 70 (1st Dist. 2007), Illinois courts discourage the filing of provisional

…*continued on next page*

CONCLUSION

The long-established discovery rule makes sense. The Appellate Court's new rule does not. The discovery rule provides a uniform policy that encourages plaintiffs to investigate and advance their claims sooner rather than later. It thereby encourages fair access to evidence before memories fade and documents are lost. It maximizes the availability of insurance for malpractice claims. It encourages early recognition of potential malpractice claims and increases the likelihood of efforts to settle or to enter into tolling agreements that avoid statute of limitations and statute of repose disputes. All these benefits are undercut by the Appellate Court's new rule and the distinction it creates between clients who are defendants rather than plaintiffs in the underlying lawsuit. This Court should maintain the integrity of the discovery rule in legal malpractice cases by reversing.

Dated: June 25, 2021

Respectfully Submitted,

Attorneys' Liability Assurance Society Ltd.

/s/ *Michael L Shakman*
One of its attorneys

malpractice cases. *See also Romano v. Morrisroe*, 326 Ill. App. 3d 26, 32 (2d Dist. 2001); *York Woods Cmty. Ass'n v. O'Brien*, 353 Ill. App. 3d 293, 299 (2d Dist. 2004).

Rule 341(c) 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 contained in the Rule 341(d) cover, the Rule 341(h) 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 14 pages.

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 the foregoing Certificate of Compliance are true and correct, except as to matters therein stated to be upon information and belief and as to such matters the undersigned certifies that she verily believes the same to be true.

Date: June 25, 2021 /s/ *Michael L. Shakman*