2019 IL App (1st) 180852-U

SIXTH DIVISION
April 26, 2019

No. 1-18-0852



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| WILLIAM J. MOSER, JR., | ) | Appeal from the |
| | ) | Circuit Court of Cook County |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | 16 L 4395 |
| | ) | |
| JOSEPH G. PHELPS and RINELLA & RINELLA, LTD., | ) | |
| | ) | |
| | ) | Honorable William E. Gomolinski, |
| Defendants-Appellees. | ) | Judge Presiding. |

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly granted summary judgment where plaintiff's claims for legal malpractice were barred by the two-year statute of limitations and there was no evidence defendants engaged in fraudulent concealment; affirmed.

¶ 2 This appeal stems from a legal malpractice action filed by plaintiff, William J. Moser, Jr., against defendants, his former attorneys Joseph G. Phelps and Rinella & Rinella, Ltd. (collectively, defendants). Plaintiff originally retained defendants to represent him in dissolution of marriage proceedings against his now ex-wife. Defendants moved for summary judgment, arguing that plaintiff's claim was time-barred by the two-year statute of limitations applicable to legal malpractice actions and the circuit court granted their motion. On appeal, plaintiff asserts

that the court erred because under the discovery rule, plaintiff's claims were timely, and alternatively, that a five-year statute of limitations should have applied due to defendants' fraudulent concealment. We find the trial court's decision was proper and affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendants represented plaintiff in his divorce proceedings against his now ex-wife, Marianne Wickman, which culminated in the execution of a marital settlement agreement (MSA) on October 26, 2006, that was incorporated into a judgment for dissolution of marriage. Thereafter, post-dissolution litigation ensued.

¶ 5 On August 21, 2013, plaintiff sent Phelps an email that stated:

> "Your voicemail message to me today, in which you threatened to resign once again if I didn't pay my bill…IS ENOUGH!
>
> I do not believe that you have acted in my best interest.
>
> You have continued to ignore the issues that I asked you to address throughout the case.
>
> In view of this, and in not acting correctly on my behalf, you are instructed to DO NO FURTHER WORK.
>
> Have the files prepared, I will be seeking different counsel." (Emphasis in original.)

On a printout of that email, there was a handwritten notation stating, "I fired R&R on 8-21-13 for cause!"

¶ 6 On August 22, 2013, Phelps sent the following response: "I would also highly recommend that you or your new lawyer file a fee petition against the ex-wife for her scurrilous pleadings." Also on that date, defendants filed a motion to withdraw as plaintiff's counsel, which was granted on September 3, 2013.

¶ 7 On May 3, 2016, plaintiff filed a complaint for legal malpractice against defendants in circuit court. Plaintiff's complaint alleged that at the time the MSA was entered, defendants "urged [plaintiff] to accept the agreement, advising him repeatedly that this was the best agreement that he could obtain, that it was properly drafted, and he was protected in all ways and respects, and fared much better by entering into the agreement than risking a trial." Plaintiff's complaint alleged that these statements were intentionally false, that defendants knew or should have known that the MSA was not fair or equitable, and that they intentionally concealed this information from plaintiff to induce him to enter the MSA. The complaint also stated that defendants further concealed "the almost certain fact that the [p]arties would be forced into commencing post-decree litigation of numerous open-ended issues." Plaintiff alleged that during the post-decree litigation, defendants failed to recognize that certain of plaintiff's investment accounts had been frozen "due to the wrongful conduct of his then ex-spouse [Marianne Wickman] in notifying the holders of those accounts that she was entitled to a portion of them which resulted in the total freezing of those accounts" and that defendants did nothing to unfreeze the accounts, causing a $146,380.54 depletion in those accounts. Plaintiff's complaint also stated that defendants also failed to take action against a petition for contribution for attorney fees filed by Wickman, seeking over $100,000 from plaintiff.

¶ 8 Plaintiff's complaint alleged that defendants were negligent and failed to exercise a reasonable degree of skill and care in one or more of the following ways:

> "a. Failed to completely investigate and discover the extent and detail of the assets held by [Marianne Wickman] at the time the Petition for Contribution was filed;
>
> b. Repeatedly delayed the proceedings which resulted in the increase in fees charged by Jeffrey Leving, who sought contribution from [plaintiff];

c. Failed to take any action whatsoever to recover from [Marianne Wickman] the account depletion of $146,380.54 directly caused by [Marianne Wickman] and the wrongful freezing of [plaintiff's] investment accounts;

d. Failed to obtain from the Court sufficient time to conduct adequate and complete discovery into the fee claims of Jeffrey Leving, Ltd. on behalf of [Marianne Wickman], to discover the reasonableness of those charges and the necessity of the work done;

e. Abruptly withdrew from the representation of [plaintiff], which under the circumstances was done without good cause after threatening to withdraw for some period of time and delaying the actual withdrawal;

f. Otherwise breached the standard of care owed [plaintiff];"

¶ 9 On August 2, 2016, defendants filed their answer to plaintiff's complaint, asserting the statute of limitations and the statute of repose as affirmative defenses. During discovery, plaintiff raised another issue of defendants' negligence that was not raised in his complaint—defendants' failure to revive a judgment that Marianne Wickman obtained years earlier from her prior ex-husband, Wayne Wysoglad (the Wysoglad judgment).

¶ 10 On June 15, 2017, plaintiff testified at his deposition. During his deposition, plaintiff testified, in relevant part, as follows:

"Q. Okay. You've let's establish one thing. You fired Rinella & Rinella, correct?
A. Correct.
Q. And you did that in August of 2013?
A. That is correct.
* * *
Q. And you felt at the time you terminated them in August of 2013 that they had ignored issues in the case?
A. Yes. And that they basically misrepresented to me what was going on.
Q. And you knew that back in August of 2013?
A. Well, on an issue too in regards to the E*Trade issue. I knew that.
* * *

Q. Okay so you -- you fault Rinella & Rinella for not what? Acting quickly enough to unfreeze the account?

A. Ten months to unfreeze the account. ***

* * *

Q. Okay.

A. That's not what E*Trade was requesting but I put my faith continuously in the law firm of Rinella & Rinella.

Q. So you feel it was a mistake to go to the court to try to --

A. I feel that somewhere along the lines there would have been a way of expediting it a little bit more than ten months while the account was losing value.

Q. There was --

A. There was an emergency petition, I would have thought -- and I'm not a lawyer -- could have been filed at some point in time, much earlier than ten months.

Q. So that was something that you were aware of that Rinella delayed?

A. That is correct.

Q. And at that time you had already sustained the losses for the diminution in the account value, correct?

A. That is correct.

* * *

Q. So [the E*Trade issue] was something -- at the time you terminated Rinella & Rinella in August of 2013, that was something that you were aware of that Rinella delayed?

A. That is correct.

Q. Okay. And at that time you had already sustained the losses for the diminution in the account value, correct?

A. That is correct.

* * *

Q. Okay and this is the -- this document has an August 21, 2013, email from you to Mr. Phelps, correct?

A. That is correct, yes.

Q. And it's cc'd Stefanie Cooley. Do you know who that is?

A. Assistant to [Phelps].

Q. Okay. And this is the e-mail where you terminated Rinella & Rinella?

A. That is correct.

Q. And you state, [y]ou have continued to ignore the issues that I have asked -- that I asked you to address throughout the case, correct?

A. Correct.

Q. Okay. And we talked about the E*Trade issue, correct?

A. We have talked about that, but there were other issues, but yes.

Q. And you were aware of Mr. Phelps['s] alleged failure to address that issue at the time that you wrote this e-mail on August 21, 2013, correct?

A. Yes, yes.

Q. Okay. And you state -- by the way, that handwriting at the bottom, that's your handwriting?

A. It seems to be, yes, because I print.

Q. And it states there, I fired R&R on 8/21/13, and it says, for cause, correct?

A. Correct.

Q. Okay. What was the for cause? I mean --

A. The E*Trade issue.

Q. Correct. Anything else?

A. The other issue was the fact that I didn't -- I never saw my filings about the money that I had supported my son on; the fact that there was never a discovery done of my ex-wife Marianne.***

* * *

Q. The issue with the Wysoglad judgment--certainly when you signed this verification, you were aware of the issue with the Wysoglad judgment and the fact that it was dormant, correct?

A. I was told that it was dormant, yes.

Q. And you had not taken steps to revive it at the time that you signed this document, correct?

A. That is correct.

Q. And you signed this document on December 23, 2013, correct?

A. That is correct.

Q. And at the time that you signed this document on December 23, 2013, the court's order had been entered which assigned a zero value to the Wysoglad judgment, correct?

A. That is correct.

* * *

Q. So whatever damages you sustained as a result of the Wysoglad judgment had already happened on December 23, 2013, correct?

A. Yes.

* * *

Q. Okay if you turn to page 2 of [a February 18, 2014 court order], under paragraph 4, it states that, [b]y agreement, William Moser shall pay by March 4, 2014, the sum of $40,000 as a final and full resolution of all fees and costs sought by Marianne in her Amended Petition for Contribution to Fees and Costs. The payments shall be paid directly to the Law Offices of Jeffrey Leving, Limited. Do you see that, sir?

A. Yes.

Q. And at the time that you -- this order was entered, you were aware that Rinella & Rinella had not conducted discovery into the petition filed for Mr. Leving's fees, correct?

A. That's correct. They did not file -- they did not do any discovery whatsoever on that, correct.

Q. And you were aware of that on February 18, 2014, correct?

A. I would imagine that to be the case, yes.

* * *

Q. Do you have reason to believe that you did not comply with the court's order to make the payment?

A. No, I'm sure I paid the $40,000.

Q. And it would have been paid by March 4th of 2014, correct?

A. Or sooner, yes.

Q. So the damages you sustained related to having to pay Mr. Leving's fee was sustained as of March 4, 2014?
A. Correct.
* * *"

¶ 11 On January 22, 2018, defendants filed their motion for summary judgment, arguing that plaintiff's claims were time-barred by the two-year statute of limitations applicable to legal malpractice actions. Defendants contended that during his deposition, plaintiff admitted to knowing of defendants' negligence and his alleged damages more than two years prior to the filing of his lawsuit. In fact, defendants' motion cited to specific portions of plaintiff's testimony wherein he admitted to being fully aware of each of defendants' alleged acts of negligence and resulting damages more than two years' prior to the filing of his complaint. Defendants asserted that plaintiff's claim was untimely under the discovery rule, which provides that a statute of limitations begins to run when the allegedly injured party has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further. In addition to plaintiff's deposition testimony, defendants pointed to plaintiff's August 21, 2013, email to Phelps, which commanded that defendants do no further work, and upon which plaintiff had written that he had fired defendants "for cause." Defendant's motion also provided, "Although not referenced in [plaintiff's complaint], plaintiff alleged in discovery in this matter that [defendants] were negligent because they failed to revive a judgment that [p]laintiff's ex-wife had obtained years earlier from her ex-husband, Wayne Wysoglad (the 'Wysoglad [j]udgment')." Similar to the allegations of the complaint, defendants argued that plaintiff had also admitted in his deposition to being aware of defendants' alleged negligence and his resulting damages from the Wysoglad judgment over two years prior to filing his complaint.

¶ 12 On February 20, 2018, plaintiff filed his response to the motion for summary judgment, asserting that his claims are not time-barred under the discovery rule. Plaintiff argued that

simply stating the words "for cause" on the printout of the August 21, 2013, email does not mean that plaintiff was aware he had a legal malpractice claim against defendants or was aware of his injury. Plaintiff pointed to another portion of his deposition where he testified that that outside counsel informed him "sometime in 2014" that he may have a cause of action against defendants. Plaintiff emphasized his testimony that he was not in a position to determine whether defendants were negligent. Plaintiff further argued that his complaint set forth a cause of action for legal malpractice based on fraudulent concealment, which stops the running of the limitations period until the cause of action is discovered and carries a five-year statute of limitations.

¶ 13 On March 7, 2018, defendants filed their reply in support of their motion for summary judgment, arguing that plaintiff's response did not contradict any of the numerous admissions he made during his deposition. Defendants also pointed out that plaintiff's contention that the statute of limitations did not begin to run until plaintiff knew he had a claim for legal malpractice against his attorney was a misstatement of the law. Further, defendants asserted that no facts were adduced indicating there was any fraudulent concealment by defendants. Defendants note that plaintiff did not present an affidavit and failed to identify what was allegedly fraudulently concealed.

¶ 14 The court heard argument and issued its decision on March 26, 2018. Plaintiff's counsel argued that plaintiff's deposition testimony was based on "hindsight" and that when plaintiff stated that he was aware of defendant's negligence and his injury back in 2013 that was only because his deposition testimony occurred after he had spoken with a malpractice attorney and after his complaint was filed. In other words, plaintiff's counsel asserted that by being able to look back at the issue and after having discussions with a legal malpractice attorney, plaintiff

was able to determine when he was injured but this does not mean that at the time of the injury he was actually aware of the injury. The court responded as follows:

> "THE COURT: So then why doesn't he say that in his deposition, no, I didn't know it then. I didn't know it until I spoke to my attorney on this date? But he doesn't say that. He says, no, I knew that. And I fired him for cause. And I knew that. And I knew that they delayed ten months."

In response to plaintiff's counsel's argument that this entire issue was a factual question best left for a jury, the court stated, "It might be a factual question unless and until somebody makes admissions in the record as to when they knew and how they knew and that a wrongful act was committed." Ultimately, the court found, "[t]here is no question in my mind that you are beyond the statute of limitations" and granted defendants' motion for summary judgment.

¶ 15 Plaintiff did not file a motion to reconsider but filed his timely notice of appeal on April 20, 2018.

¶ 16 II. ANALYSIS

¶ 17 A. Rule 341 Deficiencies

¶ 18 Prior to addressing the substantive issues on appeal, it is necessary to point out a significant deficiency in plaintiff's brief. Illinois Supreme Court Rule 341(h)(6) states that the statement of facts in an appellant's brief "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and *with appropriate reference to the pages of the record on appeal* ***." (Emphasis added.) Ill. S. Ct. R. 341(h)(6) (eff. May 25, 2018). Rule 341(h)(7) similarly provides that the argument section of the appellant's brief "shall contain the contentions of the appellant and the reasons therefor, with

citation of the authorities and *the pages of the record relied on*." (Emphasis added.) Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 19 Plaintiff's record citations in both his statement of facts and argument section of his brief fail to comply with Rule 341(h). When citing to the record, plaintiff does not cite the specific page number on which the information appears. Instead, plaintiff cites a range of pages. For example, in plaintiff's statement of facts, when referring to a specific allegation in his complaint, plaintiff merely provides a citation to the eight pages of the record that contain his complaint, instead of the singular page of the complaint that contains the specific allegation he references. More problematic is plaintiff's consistent use of a range of pages as a record citation in his argument section. Throughout this section, plaintiff repeatedly refers to and relies on his deposition testimony. Each time plaintiff refers to a singular piece of testimony, he provides a record citation to 40 pages of the record, *i.e.*, "(C232-C272; A143-A183)." This makes it extremely difficult for this court to find the actual piece of testimony plaintiff references. Making matters worse is the fact that pages C232-C272 of the record and A143-A183 of plaintiff's brief's appendix actually consist of plaintiff's response to defendant's motion for summary judgment, which included excerpts from plaintiff's deposition. Thus, the range of 40 pages that plaintiff uses as a record citation does not even refer to a complete transcript of his deposition. Instead, the full transcript of plaintiff's deposition appears elsewhere in the record in a section never cited by plaintiff. Plaintiff's reply brief similarly suffers from the same errors.

¶ 20 We remind plaintiff that "this court may, in its discretion, strike a brief and dismiss an appeal based on the failure to comply with the applicable rules of appellate procedure." *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12. It is well-settled that "a reviewing court is entitled to have issues on appeal clearly defined with pertinent authority cited and a cohesive legal

argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.) *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 208 (2007). The failure to provide proper record citations renders this court's review more difficult and time-consuming than if the rules had been followed. Although plaintiff's brief is undoubtedly deficient, it is not so deficient that we cannot review this appeal. As a result, we exercise our discretion and reach the merits. We also caution plaintiff's counsel to comply fully with all applicable supreme court rules in the future.

¶ 21 B. Motion for Summary Judgment

¶ 22 Turning now to the merits of this appeal, plaintiff asserts that the trial court erred when it granted summary judgment in favor of defendants. We disagree. "[S]ummary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2-1005(c) (West 2014)). The court is required to strictly construe the pleadings, depositions, admissions, and affidavits against the movant and liberally in favor of the opposing party. *Id.* When examining an appeal from a summary judgment ruling, we conduct a *de novo* review. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 23 1. Discovery Rule

¶ 24 Section 13-214(b) of the Illinois Code of Civil Procedure (Code) provides that an action for legal malpractice must be filed within two 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) (West 2016). In *Carlson v. Fish*, this court summarized the pertinent law governing statute of limitations in legal malpractice cases as follows:

> "This statute of limitations incorporates the discovery rule, 'which delays commencement of the statute of limitations until the plaintiff knows or reasonably should have known of the injury and that it may have been wrongfully caused.' [Citation.] Significantly, actual knowledge of the alleged malpractice is not a necessary condition to trigger the running of the statute of limitations. [Citation.] A statute of limitations begins to run when the purportedly injured party 'has a reasonable belief that the injury was caused by wrongful conduct, thereby creating an obligation to inquire further on that issue.' [Citation.] Knowledge that an injury has been wrongfully caused 'does not mean knowledge of a specific defendant's negligent conduct or knowledge of the existence of a cause of action.' [Citation.] A person knows or reasonably should know an injury is 'wrongfully caused' when he or she possesses sufficient information concerning an injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved. [Citation.] The law is well settled that once a party knows or reasonably should know both of his injury and that it was wrongfully caused, 'the burden is on upon the injured person to inquire further as to the existence of a cause of action.' [Citation.] 'For purposes of a legal malpractice action, a client is not considered to be injured unless and until he has suffered a loss for which he may seek monetary damages. [Citation.]" 2015 IL App (1st) 140526, ¶ 23.

¶ 25 Plaintiff asserts that the trial court erroneously determined that his claims were time-barred due to the discovery rule. Defendants respond that based on plaintiff's own deposition testimony, he admitted that he was aware of each act of defendants' alleged negligence and his

injuries over two years prior to the filing of his complaint. We agree with defendants and find that summary judgment was proper.

¶ 26 Our supreme court "has never suggested that plaintiffs must know the full extent of their injuries before the statute of limitations is triggered." *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 364 (1995). Instead, "our cases adhere to the general rule that the limitations period commences when the plaintiff is injured, rather than when the plaintiff realizes the consequences of the injury or the full extent of her injuries." *Id.*

¶ 27 During his deposition, plaintiff confirmed that he fired defendants in August 2013, because he felt they had ignored issues in the case and due to their mishandling of the E*Trade issue. He testified that at the time he fired defendants he knew of the E*Trade issue and that he had already sustained losses for the diminution in value of his E*Trade account. Plaintiff also specifically testified that he meant "the E*Trade issue" when he wrote "for cause" on the August 21, 2013, email printout. Based on this testimony alone, summary judgment was proper because as of August 21, 2013, plaintiff knew of the diminution in his E*Trade account and knew or reasonably should have known that defendant's mishandling was the cause of the diminution. As a result, plaintiff was put on inquiry to determine whether actionable conduct was involved and the burden was on plaintiff to inquire further as to the existence of a cause of action. *Carlson*, 2015 IL App (1st) 140526, ¶ 23.

¶ 28 We further find summary judgment was proper because plaintiff admitted he knew or should have known of each of defendant's acts of negligence and their resulting injury at the time he fired defendants in August 2013. Plaintiffs' complaint alleged that defendants committed negligence in the following ways:

"a. Failed to completely investigate and discover the extent and detail of the assets held by [Marianne Wickman] at the time the Petition for Contribution was filed;

b. Repeatedly delayed the proceedings which resulted in the increase in fees charged by Jeffrey Leving, who sought contribution from [plaintiff];

c. Failed to take any action whatsoever to recover from [Marianne Wickman] the account depletion of $146,380.54 directly caused by [Marianne Wickman] and the wrongful freezing of [plaintiff's] investment accounts;

d. Failed to obtain from the Court sufficient time to conduct adequate and complete discovery into the fee claims of Jeffrey Leving, Ltd. on behalf of [Marianne Wickman], to discover the reasonableness of those charges and the necessity of the work done;

e. Abruptly withdrew from the representation of [plaintiff], which under the circumstances was done without good cause after threatening to withdraw for some period of time and delaying the actual withdrawal[.]"

¶ 29 During his deposition, defense counsel asked plaintiff when he knew about each allegation of negligence and when he knew of the injuries caused thereby. After review of that testimony, it is clear that plaintiff knew of each instance of alleged malpractice and resultant injury over two years prior to the filing of this case on May 3, 2016.

¶ 30 The allegations contained in paragraphs (a), (b), and (d) relate to defendants' alleged failure to adequately investigate Wickman's assets and her ability to pay her attorney, defendants' delay which caused an increase in Wickman's attorney fees, and the reasonableness of Wickman's attorney fees. Plaintiff testified that he was aware of defendants' negligence and his resulting injuries relating to paragraphs (a), (b), and (d) as of March 4, 2014, at the latest. Specifically, plaintiff testified that on February 18, 2014, he knew that defendants had not done

any discovery on Wickman's Petition for Contribution and failed to look into Wickman's assets. He also stated that he was ordered to pay $40,000 to Wickman's attorney by March 4, 2014, following her Petition for Contribution, and that he paid the entire amount by that date if not sooner. Plaintiff's testimony establishes that he knew or should have known of defendants' negligence in not conducting discovery into Wickman's assets and Leving's fee claims and the resulting injury by March 4, 2014, which is the latest date by which plaintiff testified he paid the $40,000. Therefore, in order to be timely, plaintiff's complaint was required to be filed by March 4, 2016. Because it was not filed until May 3, 2016, it is time-barred.

¶ 31 The allegations contained in paragraph (c) refer to the E*Trade issue. Earlier in this section, we determined that plaintiff's admissions that he knew both of the E*trade issue and the diminution in his account as of August 21, 2013, was enough to render summary judgment proper on its own. Thus, we need not address the allegations in paragraph (c) separately here.

¶ 32 The allegations of paragraph (e) state that defendants "[a]bruptly withdrew" from their representation of plaintiff. Such an allegation is perplexing where the record contains clear evidence that plaintiff fired defendants and that it was plaintiff who instructed defendants to cease work. There is simply no evidence that defendants "abruptly" withdrew and caused plaintiff an injury. Instead, it appears that defendants merely followed the instructions given to them by plaintiff in his August 21, 2013, email. Further, even if plaintiff had evidence to support his allegations, such a claim would be time-barred where defendants were granted leave to withdraw on September 3, 2013, and plaintiff's complaint was not filed until May 3, 2016. As such, summary judgment was proper on this allegation also.

¶ 33 Finally, we address the Wysoglad judgment, which was not even alleged in plaintiff's complaint but which defendants agree was raised in discovery. For the same reasons plaintiff's

other claims are time-barred so too is any claim regarding the Wysoglad judgment. Plaintiff testified he signed a verification in support of a motion filed by his now-current attorneys on December 23, 2013. He further testified that as of that date, the court's order assigning a $0 value to the Wysoglad judgment had already been entered, and thus whatever damages he sustained as a result of the Wysoglad judgment were already sustained as of that date. Therefore, any legal malpractice claim relating to the Wysoglad judgment was time barred as of December 23, 2015. Plaintiff did not file his complaint until six months later.

¶ 34 Plaintiff further argues that by the time he testified at his deposition on June 15, 2017, he had already had the benefit of speaking to his legal malpractice attorney and filing his malpractice case. Based on the communication with his attorney, it was determined when the malpractice arose and when plaintiff knew about it. Thus, when he testified on June 15, 2017, plaintiff could then point to when he believed the malpractice occurred.

¶ 35 We agree with the trial court's response to this contention—" So then why doesn't he say that in his deposition, no, I didn't know it then. I didn't know it until I spoke to my attorney on this date***." There is no indication in plaintiff's deposition that he was unaware of his potential claims against defendants or the injuries he suffered as a result thereof until after speaking with his legal malpractice attorney. Plaintiff has not presented an affidavit or other evidence that would support his argument that his deposition testimony was a product of hindsight. To support this contention, plaintiff asks this court to speculate that he actually intended an alternative meaning to his deposition testimony. We decline to do so because "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999).

¶ 36 2. Fraudulent Concealment

¶ 37 Plaintiff also argues that defendants fraudulently concealed their legal malpractice from him, triggering a five-year statute of limitations under section 13-215 of the Code. 735 ILCS 5/13-215 (West 2016). "Under the fraudulent concealment doctrine, the statute of limitations will be tolled if the plaintiff pleads and proves that fraud prevented discovery of a cause of action." *Carlson*, 2015 IL App (1st) 140526, ¶ 44. In general, a party alleging fraudulent concealment must show affirmative acts by the fiduciary designed to prevent discovery of the action. (Internal quotation marks omitted.) *Id.* "In other words, a claimant must show affirmative acts or representations [by a defendant] that are calculated to lull or induce a claimant into delaying filing his claim or to prevent a claimant from discovering his claim." (Internal quotation marks omitted.) *Id.* An exception to this rule exists where the existence of a fiduciary relationship, *i.e.*, an attorney-client relationship, is established. *Id.* "A fiduciary who is silent, and thus fails to fulfill his duty to disclose material facts concerning the existence of a cause of action has fraudulently concealed that action, even without affirmative acts or representations." (Internal quotation marks omitted.) *Id.*

¶ 38 Plaintiff asserts that his claims were not time-barred based on defendants' fraudulent concealment, specifically, because he and defendants were in an attorney-client relationship, and they had a fiduciary duty to disclose material facts concerning the existence of a cause of action. Defendants respond that plaintiff has failed to cite to anything in the record indicating that defendants concealed anything from plaintiff. We agree with defendants.

¶ 39 Plaintiff does not point to any material facts that defendants allegedly failed to disclose but contends that he was "constantly reassured" by defendants that they were doing everything correctly with plaintiff's file. Plaintiff argues that because of these reassurances, he did not have any reason to believe that defendants committed malpractice or that he needed a second opinion.

Plaintiff's complaint alleges that at the time he entered the MSA, defendants urged him to accept the agreement and told him that it was the best agreement he could obtain and was better than risking a trial.

¶ 40 In *Carlson*, the plaintiff also raised the issue of fraudulent concealment, and asserted "that instead of advising him that he might have a claim of legal malpractice against them for failing to protect him from his former partners' fraudulent conduct, defendants reassured [the plaintiff] that the settlement agreement was good under the circumstances and could have been much worse." 2015 IL App (1st) 140526, ¶ 45. The court in *Carlson* contrasted the case before it with *DeLuna v. Burciaga*, where "the plaintiffs alleged that their attorney misled them by telling them that their underlying medical malpractice case was going well when it had, in fact, been dismissed, and failed to disclose material facts bearing on the procedural status of the case." *Id*. (citing *DeLuna*, 223 Ill. 2d 49, 79-80 (2006)). The *Carlson* court found that the scenario before it was not like *DeLuna* and noted that the plaintiff failed to cite a single case that held that a lawyer has an affirmative obligation to advise a client to sue the attorney for legal malpractice. *Id.*

¶ 41 We find this case mirrors *Carlson*, and similarly reject plaintiff's arguments as the court did there. Here, the only alleged evidence of fraudulent concealment is plaintiff's testimony that defendants reassured him that they were doing everything correctly and that he did not know of his injury until the end of 2016. Plaintiff does not point to any evidence supporting his contention that defendants engaged in fraudulent concealment or failed to disclose material facts. Unlike *DeLuna*, where the defendant attorneys misled the plaintiffs by telling them their case was going well when it had actually been dismissed, plaintiff fails to indicate any material misrepresentations or omissions by defendants here. Plaintiff acknowledges that he must allege

that defendants failed to disclose a material fact, yet he does not point to any lack of disclosure. Essentially, plaintiff makes the same general argument as the plaintiff in *Carlson*, which was rejected by that court. Similarly, plaintiff has failed to cite a case holding that an attorney has an affirmative obligation to inform a client that he should sue the attorney for legal malpractice.

¶ 42 *Carlson* also rejected the plaintiff's argument that he was " 'lulled' by defendants into thinking that his only option was a fraud case against his former partners" because the plaintiff had consulted with three law firms, two mediation firms, and an accounting firm, and was not solely reliant on the defendants. *Id.* ¶ 46.

¶ 43 We also find this reasoning applicable to the case at bar. The record contains an email dated August 19, 2013, from plaintiff to Gauthier and Gooch, the law firm he hired following defendants' withdrawal from and his current attorney on appeal. This is significant because plaintiff sent defendants the email firing them for cause on August 21, 2013, which was two days after his communication with his now-current attorney. This means that plaintiff was already in contact with his now-current attorney at the time he fired defendants. Thus, similar to the plaintiff in *Carlson*, it is hard to imagine how plaintiff could have been lulled by defendants into not filing a claim against them when plaintiff was already in touch with another law firm when he fired defendants. Additionally, after plaintiff sent the August 21, 2013, email telling defendants to "DO NO FURTHER WORK," defendants filed a motion to withdraw as counsel the next day. Such action does not indicate that defendants tried to conceal, or failed to disclose, any material information.

¶ 44 Ultimately, plaintiff's argument that defendants engaged in fraudulent concealment is not supported by the record. Plaintiff points to his testimony that he "trusted" defendants and asks this court to speculate that such testimony establishes that he had no reason to believe that here

had been any malpractice. We fail to see how merely trusting one's attorney equates to that attorney having engaged in fraudulent concealment. Again, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce*, 309 Ill. App. 3d at 328. Based on plaintiff's complete lack of evidence of fraudulent concealment, his claim hinges on conjecture, and thus we decline to apply a five-year statute of limitations.

¶ 45 III. CONCLUSION

¶ 46 Based on the foregoing, we affirm the trial court's decision to grant defendants' motion for summary judgment.

¶ 47 Affirmed.