2018 IL App (1st) 162136-U

No. 1-16-2136

Order filed March 22, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ROBERT DAVIS, Plaintiff-Appellant, v. LECLAIR RYAN P.C., a State of Virginia Professional Corporation, f/k/a Wright, Robinson, Osthimer and Tatum, P.C., formerly a State of Virginia Professional Corporation; and DANIEL KRASNEGOR, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 11 L 972 Honorable Margaret A. Brennan, Judge presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the circuit court's order granting summary judgment in favor of defendants where plaintiff filed his breach of fiduciary duty action against them within the two-year statute of limitations.

¶ 2 In 1993, plaintiff, Robert Davis (Davis), a Vietnam veteran, applied for disability benefits for post-traumatic stress disorder caused by his military service. After being unsuccessful, Davis

hired defendants, Daniel Krasnegor and his law firm, Wright Robinson & Tatum, Inc. (Wright Robinson) (collectively, defendants), to represent him.[1] They agreed that defendants would be entitled to 20% of any retroactive disability benefits Davis obtained but reduced by the amount of attorney fees defendants obtained under the Equal Access to Justice Act (EAJ Act) (28 U.S.C. § 2412 (2006)) in connection with his case. In 2007, Davis fired defendants, who thereafter wrote to the Department of Veterans Affairs (VA), asserting that they had substantially performed under the agreement and requesting the department withhold as their attorney fees 20% of any retroactive benefits Davis might obtain. A year later, Davis successfully obtained a retroactive benefits award, and the VA withheld 20% of the award.

¶ 3 Davis eventually sued defendants in the circuit court of Cook County for allegedly breaching their fiduciary duty to him by causing the withholding of 20% of his retroactive benefits award despite them obtaining a larger amount of attorney fees under the EAJ Act. Defendants moved for summary judgment, in part, based on the cause of action being barred by the two-year statute of limitations. The circuit court agreed and granted defendants' motion. Davis now appeals, contending that the circuit court erred when it found that his claim was time-barred. For the reasons that follow, we reverse and remand the matter for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 A. Levels of Review for Service-Connected Disability Benefits

¶ 6 A veteran who seeks service-connected disability benefits must initiate his or her claim with the VA. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011). A regional office of the VA adjudicates the claim, and if the veteran is dissatisfied with the result, he or she may obtain review by the Board of Veterans' Appeals (BVA). *Id.* If the veteran obtains an adverse decision

[1] Wright Robinson & Tatum, Inc. was incorrectly sued as LeClair Ryan P.C.

by the BVA, he or she may obtain further review by the United States Court of Appeals for Veterans Claims (CAVC). *Id.* at 432.

¶ 7 B. Attorney Fees Dispute

¶ 8 Davis served in active duty in the United States Air Force from 1961 until 1965, including time in the Vietnam conflict. In 1993, Davis filed a claim with the VA seeking service-connected disability benefits for post-traumatic stress disorder. His claim went through several proceedings of the Chicago Regional Office of the VA (CRO), the BVA and the CAVC, in which it was denied, appealed and remanded multiple times. As a result, he did not obtain any disability benefits.

¶ 9 In September 2002, Davis retained defendants, in particular attorney Daniel Krasnegor, to represent him before the CAVC on his appeal from BVA, which had recently denied his claim. According to their agreement, defendants could petition the CAVC for attorney fees pursuant to the EAJ Act (28 U.S.C. § 2412 (2006)), which authorized the award of attorney fees to the prevailing party in civil litigation against the United States or one of its agencies. The CAVC eventually remanded Davis' case back to the BVA because of improper notice and the BVA had ignored evidence favorable to him. In December 2003, defendants petitioned the CAVC for $12,270.10 in attorney fees under the EAJ Act and ultimately received $11,642.52.

¶ 10 In April 2007, defendants and Davis entered into another agreement in connection with his disability benefits claim, which had recently been remanded from the CAVC to the BVA based again on improper notice and the BVA's failure to consider evidence favorable to him. Pursuant to the agreement, Davis agreed to pay defendants 20% of any retroactive disability benefits awarded to him but "reduced" by the amount of EAJ Act fees "and other costs paid, if any, to [defendants] on appeal of this matter to the [CAVC], if another appeal becomes

necessary."[2] Davis also agreed to authorize the VA to withhold the 20% payment from his award and disburse the payment directly to defendants. Shortly thereafter, defendants petitioned the CAVC for $16,841.80 in attorney fees under the EAJ Act for successfully obtaining the remand to the BVA and ultimately received approximately $6500.

¶ 11 On October 1, 2007, Davis fired defendants. The next day, defendants sent a letter to the VA with a copy to Davis and informed the agency that they no longer represented him in his disability benefits claim. They also stated that, because they had substantially performed under their agreement, they were entitled to 20% of any retroactive benefits Davis might obtain and requested that amount withheld from his potential recovery.

¶ 12 A week later, Krasnegor e-mailed Davis, asking him if he wanted a copy of his file. Krasnegor also requested to be informed if Davis' claim was successful because he was entitled to 20% of the potential award. Krasnegor asserted that the VA "should" withhold 20% of his award, but if it forgot to, it would "make things much more complex as [the VA] may decide to collect [the money] later from [him] as a debt." Krasnegor further stated that he and Wright Robinson had already been paid fees under the EAJ Act and were expecting additional fees under the EAJ Act. Based on this, Krasnegor indicated that, if Davis obtained a retroactive benefits award that was greater than the cumulative amount of EAJ Act fees defendants had collected, they would "refund" him the total amount of the EAJ Act fees. If, however, Davis obtained a retroactive benefits award that was smaller than the cumulative amount of EAJ Act fees defendants had collected, Davis would "not owe [them] anything."

[2] According to federal law, an attorney may collect no more than 20% of a veteran's retroactive benefits award pursuant to a fee agreement. 38 U.S.C. § 5904(d) (2006). An attorney's entitlement to fees under such an agreement does not prevent him or her from also obtaining attorney fees under the EAJ Act. Pub. L. No. 102-572, § 506(c), 106 Stat. 4506, 4513. However, the attorney must refund the smaller amount to the veteran. *Id.*; see also *Mason v. Nicholson*, 20 Vet. App. 279, 291 (2006).

¶ 13 Eventually, on August 7, 2008, the BVA determined that Davis' claim was justified and remanded his case to the CRO for an assignment of a disability rating and an effective date. Two weeks later, the CRO awarded Davis a 50% disability rating retroactive to either May 14 or June 1, 1993. Documents in the record from the VA use both dates.

¶ 14 On October 23, 2008, Davis hand delivered a letter to the CRO asserting that it had "purposed a payment" to defendants in violation of section 5904(c)(1) of title 38 of the United States Code (38 U.S.C. § 5904(c)(1) (2006)) because their "lien" letter had been sent before the BVA issued a final decision in his case. Davis posited that "[t]he $20,646.00 that has been deducted from my past due benefits *** is a violation of my Due Process Rights." According to an accounting of Davis' retroactive benefits award by the CRO in April 2009, $20,646 was an "inadvertent[ ]" "overpayment" to him.

¶ 15 On December 16, 2008, Davis filed a "Rule 21: Extraordinary Relief Petition" in the CAVC, in part, alleging that the attorney fees of $20,646 paid to defendants, in particular Krasnegor, violated section 5904(c)(1) of title 38 of the United States Code (*id.*) and requesting the fees be refunded to him. Davis alleged that two months prior, the CRO filed an "attorney lien" against him for $20,646 and a check in his name had been sent to "the Agent/Cashier" at the CRO for "$23,310.40" in attorney fees. Davis argued that the letter sent by defendants was an illegal "lien" and their actions were "[n]egligent, [u]nethical, and [i]llegal."

¶ 16 On February 10, 2009, Davis moved to amend his petition, asserting that "numerous" requests from him to the CRO to obtain an accounting of his retroactive benefits award had been ignored. As such, he requested that the CAVC order the CRO to provide him a detailed accounting of his award, including "the total amount paid, the amount deducted and who was

paid with the deductions." The CAVC granted the motion with respect to the detailed accounting, but denied his other requested relief.

¶ 17 On April 13, 2009, the Secretary of the VA responded to the CAVC's order and sent Davis a letter that attached the accounting from the CRO. In the letter, the Secretary of the VA informed Davis that, based on his "pending dispute regarding attorney fees," $25,114.35, or 20% of his $125,571.73 retroactive benefits award, was being withheld. According to the letter, the attorney fees had not been paid to defendants. The accounting from the CRO indicated that Davis had been paid part of his retroactive benefits award "minus the attorney fee of $23,310.40," which had been withheld. However, the accounting noted that the figure was based on an incorrect retroactive benefits award of $116,552 and the figure would be adjusted to reflect 20% of the correct retroactive benefits award of $125,571.73, or $25,114.35 in attorney fees. The accounting further acknowledged Davis' dispute regarding defendants' entitlement to the attorney fees and stated the matter had been referred to its legal staff for "appropriate resolution." The CRO asserted that the disputed amount had not been released to defendants.

¶ 18 That same day, the BVA received an appeal from Davis of his disability rating, wherein he contended that 50% was improper based on the evidence. Davis also stated that there had been an "[i]llegal payment of $20,646.00 made to [Krasnegor]," who had "already been paid $18,142.52 in [EAJ Act] fees and was therefore only due $2,503.48." The $18,142.52 equaled the combined payment of attorney fees defendants had obtained pursuant to their petitions under the EAJ Act in connection with representing Davis.

¶ 19 Two days later, Davis moved to amend his petition in the CAVC once again and requested that the fees being held pending resolution of the attorney fees dispute be released to him. Davis contended that Krasnegor had been paid $18,142.52 in EAJ Act fees but "$11,642.52

was illegal based upon the undisputed fact that their [*sic*] was no court order authorizing the payment." The $11,642.52 amount represented the amount of attorney fees defendants had obtained pursuant to their first petition under the EAJ Act. Davis also argued that the "$18,142.52 should have been deducted from the $23,310.40 in disputed attorney fees being withheld by the" CRO. The CAVC dismissed Davis' petition in May 2009, finding that, in light of his pending attorney fees dispute, he could not prove he lacked means to have his desired relief adjudicated because the VA would rule on his dispute. The CAVC noted that, if the VA ruled unfavorably to Davis, he could appeal that decision.

¶ 20 On August 11, 2009, Davis filed another "Rule 21: Extraordinary Relief Petition" in the CAVC, in which he requested the court order the CRO to provide him a status update on his "fee dispute" with defendants. In the petition, Davis asserted that the CRO was "holding" money owed to him "without cause or legal standing" because there had been no deduction of the EAJ Act fees defendants had obtained from the attorney fees being held by the CRO. The CAVC ultimately denied his petition, finding that his dispute was proceeding through the CRO.

¶ 21 On October 8, 2009, the CRO issued an administrative decision, concluding that defendants were entitled to 20% of Davis' retroactive benefits award as attorney fees based on their compliance with section 5904 of title 38 of the United States Code (38 U.S.C. § 5904 (2006)). That same day, the CRO sent a letter to Krasnegor, which informed him that he was entitled to $13,462.51 of Davis' retroactive benefits award as attorney fees pursuant to their agreement. The amount was based on a modified retroactive benefits award of $67,312.57, which was calculated by using Davis' initial award of $116,552 reduced by a debt he owed the VA. Also on that same day, Warren Tukes, an employee of the CRO's Appeals Team, signed a declaration, stating that Davis was sent information indicating that Krasnegor had been awarded

$13,462.51 in attorney fees, though the record is unclear exactly when Davis received this correspondence.

¶ 22 Approximately two weeks later, Davis filed a notice of disagreement with the CRO's decision, asserting that its decision ignored the terms of his agreement with defendants and miscalculated the amounts owed to them. Davis' notice of disagreement triggered a review of the decision within the CRO. In May 2011, the CRO issued a "Statement of the Case," affirming the award of $13,462.51 in attorney fees. The next month, Davis appealed that ruling to the BVA, asserting that defendants had already been awarded $18,142.51 in EAJ Act fees, which was more than the award under his agreement with defendants. Davis therefore argued that, according to the agreement, he owed "Attorney Krasnegor nothing" and "[t]he award of attorney fees is a [*sic*] error and illegal."

¶ 23 On September 9, 2011, Krasnegor, who was working for a different law firm than Wright Robinson, wrote the CRO, seeking to "waive" payment of the $13,462.51 in attorney fees to him. Although he acknowledged that the CRO's administrative decision entitled him to those fees, he requested the amount be given directly to Davis. Two months later, a check was issued from the United States Treasury paid to the order of Davis in the amount of $13,462.51. It is unclear from the record what happened to Davis' appeal to the BVA.

¶ 24 C. Bankruptcy Proceedings

¶ 25 In April 2007, Davis filed for chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois but did not list his pending disability benefits claim in the petition. Three months later, the bankruptcy court ordered a discharge of Davis' debts and closed his case. In February 2016, Davis moved the bankruptcy court to re-open his bankruptcy case for the purpose of amending his bankruptcy schedules and statement of financial affairs.

Davis asserted that, because his disability benefits claim had been pending for 14 years, denied multiple times and had not yet been granted when he filed for bankruptcy in 2007, he inadvertently omitted it as a contingent claim. The bankruptcy court granted Davis leave to re-open his case, and he amended his disclosures to include his disability benefits award. The bankruptcy case was closed four months later.

¶ 26 D. United States District Court Lawsuit

¶ 27 In November 2008, Davis filed a *pro se* complaint against Wright Robinson in the United States District Court for the Northern District of Illinois. Krasnegor was not named individually in the lawsuit. Davis brought claims of legal malpractice, breach of contract and fiduciary duty, and intentional infliction of emotional distress. The chief allegations underlying the claims were that Wright Robinson failed to have a BVA judge disqualified from ruling on his case and its "lien" letter, which had been sent by the law firm shortly after being terminated by Davis, was sent 10 months before the BVA granted his disability benefits award and thus in violation of section 5904(c)(1) of title 38 of the United States Code (38 U.S.C. § 5904(c)(1) (2006)). Davis also alleged that, during the prior month, the CRO "filed a $20,646.00 Attorney Fee Lien" against him with the VA's Debt Management Center "demanding payment for" Krasnegor, which also violated section 5904(c)(1) of title 38 of the United States Code (*id.*).

¶ 28 In May 2009, upon Wright Robinson's motion, the United States District Court for the Northern District of Illinois dismissed Davis' complaint for a lack of diversity jurisdiction. The dismissal order also noted that, even if diversity jurisdiction existed, Davis' complaint failed to state a claim upon which relief could be granted. Davis appealed the dismissal.

¶ 29 On October 23, 2009, in anticipation of an appellate settlement conference the following month, Wright Robinson's attorney wrote an attorney representing Davis. The attorney asserted

that the CRO miscalculated the amount of attorney fees owed to Wright Robinson using the reduced amount of Davis' retroactive benefits award, $67,312.57, due to his pre-existing debt owed to the VA. Instead, according to Wright Robinson's attorney, the calculation should have been based on the unreduced amount of $116,552 and thus the attorney fees should have been $23,310.40. The United States Court of Appeals for the Seventh Circuit affirmed the dismissal of Davis' complaint in January 2010.

¶ 30 E. Circuit Court of Cook County Lawsuit

¶ 31 On January 27, 2011, Davis filed a *pro se* seven-count complaint in the Circuit Court of Cook County against Wright Robinson as well as Krasnegor individually. Defendants filed a motion to dismiss the complaint based on: (1) Davis' failure to re-file his action within one year of his case being dismissed by the United States District Court for the Northern District of Illinois; (2) *res judicata*, as the dismissal order from the district court ruled that Davis' complaint failed to state a cause of action upon which relief could be granted; and (3) the claims related to Krasnegor were barred by the statute of limitations.

¶ 32 On September 21, 2011, Davis, being represented by private counsel, amended his complaint and added an eighth count, which claimed that defendants breached their fiduciary duty to him. Davis highlighted that the contract between him and defendants stated that, although defendants would be entitled to 20% of any retroactive benefits, the money would be reduced by the amount of fees they had collected under the EAJ Act. Davis stated that the CRO awarded defendants $13,462.51 of attorney fees based on their contract, but they had already had obtained $18,142.51 in attorney fees under the EAJ Act. According to Davis, because $18,142.51 was more than $13,462.51, he did not owe defendants anything and therefore claimed they had unlawfully caused the withholding of the money owed to him since October 2009.

¶ 33 Davis alleged that, by virtue of his and defendants' attorney-client relationship, they owed him a fiduciary duty, which they breached primarily by not dealing with him honestly and in good faith when they failed to pay him the equivalent of the money being withheld by the VA pursuant to their "lien." Davis contended that defendants knew or should have known that this breach would aggravate his post-traumatic stress disorder and result in emotional distress and hospitalization. Davis claimed that defendants' breach affected "his physical, mental, emotional and financial well being" and resulted in "significant emotional distress requiring medical treatment, as well as financial and pecuniary losses" He sought damages in excess of $30,000.

¶ 34 Defendants again moved to dismiss Davis' complaint based on the same three grounds in their initial motion to dismiss. The circuit court subsequently dismissed Counts I through VII with prejudice, but allowed Count VIII to proceed.

¶ 35 In September 2013, Jarma Lewis, the attorney fee coordinator of the CRO, and Daniel Howell, a decision review officer for the CRO, were deposed. Lewis testified that the reduction in attorney fees based on Davis' debt owed to the VA was an error and the amount of attorney fees should have been based on the unreduced amount. According to Lewis, $25,114.35, or 20% or $125,571.73, should have been withheld as attorney fees. In Howell's deposition, he also agreed that basing the attorney fees off the reduced amount was improper. Additionally, Howell testified that, in order for a veteran to initiate a dispute concerning attorney fees, the veteran would "contest [the fees] in writing," which would prompt the CRO to perform an audit and issue an administrative decision, as was done in this case. If unsatisfied, the veteran could appeal that decision, which would prompt the CRO to issue a more detailed "statement of the case," but only if it was affirming its original decision.

¶ 36 According to Howell, the CRO performed its actions based on title 38 of the United States Code (38 U.S.C. § 101 *et seq.* (2006)), title 38 of the Code of Federal Regulations (38 C.F.R. § 0.600 *et seq.* (2008)) and the VA's "manual reference," which interpreted the statutes and regulations. With respect to an attorney being awarded fees under both the EAJ Act and a contingency-fee agreement, Howell stated that the CRO would withhold money due under such an agreement from a veteran's retroactive benefits award and pay that amount to the attorney. The onus would then be on the attorney to refund the appropriate amount to the veteran. Howell stated the VA manual reference instructed the CRO to "not offset" fees obtained under the EAJ Act from the amount withheld under a contingency-fee agreement so long as the agreement was properly filed. Furthermore, Howell stated that, if the CRO received a "waiver" letter requesting that attorney fees be directed away from the attorney, such as the one sent by Krasnegor in September 2011, the office would not simply follow the letter, but rather "the direction of the law." Howell acknowledged the existence of a check made out to Davis in the exact amount that Krasnegor waived, but Howell could not explain how or why that happened.

¶ 37 In May 2015, Davis was deposed. He testified that he fired defendants on October 1, 2007. Shortly thereafter, he received the letter from them, wherein they asserted that they were still entitled to 20% of any retroactive benefits he might obtain. Davis acknowledged that within a week, he also received an e-mail from Krasnegor, stating that, if Davis obtained a retroactive benefits award, money would be withheld for his fees. When asked by defendants' attorney if the "lien" letter caused him stress, Davis asserted "[o]f course it did."

¶ 38 Davis asserted that, on October 23, 2008, he hand delivered a letter to the CRO in which he complained of defendants' illegal "lien" on his retroactive benefits award based on them requesting payment despite the BVA not having issued a final decision. Davis stated that he

wrote the letter based on Krasnegor sending him his "file." Defendants' attorney asked Davis if, based on the information provided to him by Krasnegor, he was "able to figure out what happened and what was done wrong to [him]?" Davis responded affirmatively, acknowledging this helped him determine that there was an "illegal lien" on his retroactive benefits award causing money owed to him to be withheld. Davis stated this "enraged" him, which he "assume[d]" exacerbated his post-traumatic stress disorder.

¶ 39 Additionally, Davis acknowledged that, in December 2008, he filed the "Rule 21: Extraordinary Relief Petition" in the CAVC. He agreed alleging that two months prior, the CRO "filed a $20,646 Attorney Lien" against him and a check in his name had been sent to a cashier at the CRO for "$23,310.40 for attorney fees." Davis knew this information because he had "checked" with the CRO. Defendants' attorney followed up, asking Davis if "in [his] mind" that money belonged to him to which he responded, "[i]t wasn't in my mind, it was the law." Davis added, however, that he "didn't know for sure because they changed it again," referencing the reported amount of attorney fees being withheld changing "from one figure to one figure to one figure." Later, Davis had the following colloquy with defendants' attorney with respect to the petition filed in the CAVC in December 2008:

> "A. *** That was the first writ that I filed.
> Q. And then you filed a number of documents?
> A. Amending the Writs and what have you.
> * * *
> Q. Your complaint was a violation of the law?
> A. My allegations. How about that?
> Q. Yes, great. The allegation was the Krasnegor violated the law by filing the lien letter?
> A. That's correct.
> Q. And as a result of that, money was being withheld from you that you should have had?
> A. That's correct.

> Q. And you knew that when you filed that first Rule 21 Petition in December of 2008?
> A. Right.
> Q. And then you knew it every time you filed the subsequent Writs and Pleadings?
> A. Yes, yes."

¶ 40 Davis also discussed his motion to amend his petition, in which he requested an accounting of his retroactive benefits award. After receiving the accounting, which indicated that $23,310.40 had been withheld as attorney fees, Davis stated that it "further validated what [he] already knew" and "aggravated" his post-traumatic stress disorder. Davis though acknowledged that, in the response from the Secretary of the VA, the purported amount of attorney fees was actually $25,114.35. Davis stated that, in March 2009, he appealed his disability rating to the BVA and included complaints about the attorney fees such as Krasnegor already being paid $18,142.52 of fees under the EAJ Act. At the time he drafted the appeal, Davis thought that Krasnegor had been paid the disputed amount but admitted not having "any way of knowing" this for certain. Davis asserted that his post-traumatic stress disorder was exacerbated throughout the dispute over the attorney fees.

¶ 41 In December 2015, defendants moved for summary judgment on Count VIII. First, they argued that Davis' failure to disclose his claim for disability benefits in his bankruptcy petition divested him of standing to bring the breach of fiduciary duty action. Second, defendants argued that Davis was judicially estopped from bringing the breach of fiduciary duty action also due to his failure to disclose the claim in his bankruptcy petition. Lastly, they argued that Davis' breach of fiduciary duty action was barred by the two-year statute of limitations.

¶ 42 The circuit court found that defendants had failed to raise the standing argument in a timely fashion and deemed the argument "waived." The court also rejected defendants' judicial

estoppel argument as being unwarranted by the facts. However, the court granted the motion based on Count VIII being barred by the statute of limitations and accordingly dismissed Davis' first amended complaint with prejudice. Thereafter, Davis timely filed his notice of appeal.

¶ 43 II. ANALYSIS

¶ 44 A. Statute of Limitations

¶ 45 On appeal, Davis contends that the circuit court erred in granting defendants' motion for summary judgment based on a violation of the statute of limitations. Summary judgment is appropriate only when the pleadings, depositions, admissions and affidavits on file demonstrate that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2014); *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10. The evidence must be viewed in the light most favorable to the nonmoving party. *Gurba*, 2015 IL 118332, ¶ 10. We review *de novo* the circuit court's order granting summary judgment. *Id.*

¶ 46 Any claim against an attorney sounding in "tort, contract, or otherwise," and arising out of the rendering of professional legal services, including breach of fiduciary duty actions, must be filed within two years of the time the plaintiff "knew or reasonably should have known of the injury for which damages are sought." 735 ILCS 5/13-214.3(b) (West 2014); *800 South Wells Commercial, LLC v. Horwood Marcus & Berk Chartered*, 2013 IL App (1st) 123660, ¶ 14. Section 13-214.3(b) of the Code of Civil Procedure (735 ILCS 5/13-214.3(b) (West 2014)) incorporates the discovery rule, which serves to toll the statute of limitations period "until the injured party knows or reasonably should know of the injury and knows or reasonably should know that the injury was wrongfully caused." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 20.

¶ 47 The concept of "wrongfully caused" contains two components: cause and wrongfulness. *Mitsias v. I-Flow Corp.*, 2011 IL App (1st) 101126, ¶ 22. Cause means that the plaintiff has "sufficient information to conclude that her injury was caused by the acts of another." *Id.* Wrongfulness means that the plaintiff "has sufficient information about her injury and its cause to spark inquiry in a reasonable person as to whether the conduct of the party who caused her injury might be legally actionable." *Id.* ¶ 23. But knowledge of wrongful conduct does not necessitate that the plaintiff know someone else's conduct fits a particular legal cause of action. *Id.* ¶ 24. Moreover, mere suspicion that wrongdoing might have occurred is not sufficient information to commence the statute of limitations, as " 'suspecting wrongdoing clearly is not the same as knowing that a wrong was probably committed.' " *Id.* (quoting *Young v. McKiegue*, 303 Ill. App. 3d 380, 390 (1999)).

¶ 48 Generally, when the plaintiff knows or reasonably should know of his injury and that it was wrongfully caused is a question of fact *(Heredia v. O'Brien*, 2015 IL App (1st) 141952, ¶ 24) and inappropriate for summary judgment. *LaSalle National Bank v. Skidmore, Owings & Merrill*, 262 Ill. App. 3d 899, 902-03 (1994). However, "[w]here it is apparent from the undisputed facts *** that only one conclusion can be drawn, the question becomes one for the court" *(Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981)), and summary judgment for a violation of the statute of limitations may be proper. *LaSalle*, 262 Ill. App. 3d at 903. This occurs when the facts known to the plaintiff are undisputed and only one conclusion may be drawn from them. *Id.*

¶ 49 Davis argues that it was not until at least October 8, 2009, when the CRO issued its administrative decision that he knew the amount being withheld from his retroactive benefits award as attorney fees was less than the amount of EAJ Act fees defendants had collected. He therefore argues that, given the terms of his agreement with defendants, only after this date could

he have known the money being withheld as attorney fees was truly owed to him and unencumbered by any legitimate claim of right by defendants. Davis concludes that, because he filed his breach of fiduciary duty action within two years of October 8, 2009, it was timely.

¶ 50 Conversely, defendants argue that, as early as October 2008, Davis knew that money he believed was his was being withheld from him due to their "lien" letter. Defendants posit that Davis' various challenges to the attorney fees throughout the remainder of 2008 and into 2009 show that, while the amount he claimed being wrongfully withheld had changed, the fact he believed money belonging to him was wrongfully withheld did not. They conclude that, well before September 21, 2009, Davis knew of the alleged wrongful withholding caused by defendants' "lien" letter, which therefore time-barred his breach of fiduciary duty action.

¶ 51 In this case, Davis' breach of fiduciary duty action against defendants originated in his first amended complaint, which was filed on September 21, 2011. To prevail on such an action, the plaintiff must prove that: (1) a fiduciary duty existed between him and the defendants; (2) the defendants breached their fiduciary duty; and (3) the breach proximately caused the plaintiff's injury. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). Generally, as a matter of law, a fiduciary duty exists between a client and his attorney, resulting in the attorney owing the client the obligations of honesty, fidelity and good faith. *Pippen v. Pedersen & Houpt*, 2013 IL App (1st) 111371, ¶ 22. According to Davis' first amended complaint, his alleged injury was an aggravation of his post-traumatic stress disorder and emotional distress resulting primarily from defendants' alleged improper withholding of the equivalent of the money owed to him under their agreement.

¶ 52 The uncontested facts are that, in October 2007, after Davis terminated the relationship with defendants, they responded by writing the VA. They asserted that they were entitled to 20%

of any retroactive disability benefits Davis might obtain and accordingly requested 20% withheld from such an award. Krasnegor also e-mailed Davis, explaining that, if he obtained a retroactive benefits award that was greater than the cumulative amount of EAJ Act fees defendants had collected, they would "refund" him the total amount of the EAJ Act fees. If, however, Davis obtained a retroactive benefits award that was smaller than the cumulative amount of EAJ Act fees defendants had collected, Davis would "not owe [them] anything." Less than one year later, the BVA determined that Davis' claim for retroactive disability benefits was justified, and the CRO assigned him a disability rating and effective date, resulting in his retroactive benefits award. In October 2008, Davis began complaining about the alleged unlawful withholding of money owed to him caused by defendants' "lien" letter to the VA. His complaints continued through the remainder of 2008 and into 2009.

¶ 53 In February 2009, Davis moved to amend the petition he had filed in the CAVC and sought an order from the CAVC to the CRO to provide him an accounting of his retroactive benefits award. Two months later, the Secretary of the VA sent him a letter which included the accounting. Collectively, the documents informed Davis that his award of $116,552 had been miscalculated and the correct amount was $125,571.73, resulting in an increase of attorney fees from $23,310.40 to $25,114.35. At this point, the attorney fees pursuant to Davis' contract with defendants were more than the $18,142.52 of fees defendants had obtained under the EAJ Act. This meant that, pursuant to the contract and Krasnegor's e-mail to Davis, defendants were entitled to the $25,114.35 in attorney fees, but were required to refund the $18,142.52 of EAJ Act fees to Davis as the smaller amount of the two.

¶ 54 However, this all changed on October 8, 2009, when the CRO issued its administrative decision resolving the attorney fees dispute between Davis and defendants, and entitling

defendants to the fees. According to the letter to Krasnegor, he was entitled to only $13,462.51 in attorney fees pursuant to the contract. It is unclear from the record when Davis received this information, but, at this point, the attorney fees pursuant to the contract were *less* than the $18,142.52 of fees defendants had obtained under the EAJ Act. This meant that, pursuant to the contract and Krasnegor's e-mail, Davis owed defendants nothing. That is why Count VIII of Davis' first amended complaint alleged that defendants breached their fiduciary duty to him when, despite this contract, they caused the attorney fees pursuant to the contact to be withheld from him. That is to say that the wrongful conduct alleged in Count VIII is defendants' failure to deal with Davis honestly and in good faith when they did not pay him the equivalent of the money being withheld by the VA pursuant to their "lien."

¶ 55 It is true that Davis began complaining about defendants' attorney fees in October 2008 and into the early parts of 2009, but his complaints were not the same as the ones forming his breach of fiduciary duty claim. For example, in Davis' letter to the CRO of October 2008, his complaint of illegal conduct was that, because defendants' "lien" letter had been sent before the BVA issued a final decision in his case, the CRO's alleged payment of attorney fees to them violated section 5904(c)(1) of title 38 of the United States Code (38 U.S.C. § 5904(c)(1) (2006)). Additionally, in Davis' appeal of his disability rating to the BVA in April 2009, he contended that defendants had been illegally paid $20,646.00. He argued this payment was illegal because defendants had already been paid in excess of $18,000 in fees under the EAJ Act and thus, were only owed approximately $2500 pursuant to the contract. Furthermore, also in April 2009, Davis moved the CAVC to amend the petition he had filed in the court, arguing in part that defendants had been paid $18,142.52 in EAJ Act fees but "$11,642.52 was illegal based upon the undisputed fact that their [*sic*] was no court order authorizing the payment."

¶ 56 For Davis' breach of fiduciary duty action, he alleged that defendants had breached their fiduciary duty to him by failing to deal with him honestly and in good faith when they did not pay him the equivalent of the money being withheld by the VA pursuant to their "lien" after it became clear that the amount of attorney fees pursuant to the contract were *less* than the $18,142.52 of fees defendants had obtained under the EAJ Act. Davis could not have learned about defendants' alleged breach until at least the date on which the CRO issued its administrative decision, entitling defendants to $13,462.51 in attorney fees. Without knowledge of this amount, Davis could only suspect defendants were engaging in various wrongdoing by causing the withholding of his money, which does not commence the statute of limitations. See *Mitsias*, 2011 IL App (1st) 101126, ¶ 24.

¶ 57 Although our supreme court "has 'never suggested that plaintiffs must know the full extent of their injuries before the statute of limitations is triggered' " (*Khan*, 2012 IL 112219, ¶ 22 (quoting *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 364 (1995))), this is not a case, as defendants argue, where Davis knew or should have known he was injured, but the full extent was not fully knowable. This is so because, here, until October 8, 2009, according to the allegations forming Davis' breach of fiduciary duty action, he could not have known of the alleged wrongful conduct and thus the ensuing injury. Because the limitations period, commences when a plaintiff knows or reasonably should know that he has suffered an injury and knows or reasonably should know that it was wrongfully caused (*id.* ¶ 20), and that time could have not been any earlier than October 8, 2009, Davis' breach of fiduciary duty action filed on September 21, 2011 in his first amended complaint was not time-barred.

¶ 58 B. Bankruptcy and Standing

¶ 59 Defendants contend that, even if Davis' breach of fiduciary duty action was timely, he nevertheless lacked standing to bring it because he failed to disclose his claim for disability benefits in his 2007 bankruptcy petition. Defendants raised this standing argument for the first time in their motion for summary judgment. In rejecting this argument as a basis for summary judgment, the circuit court found this was a:

> "[20]11 L case, and standing is being raised for the first time in this motion for summary judgment [in December 2015]; and standing can, in fact, be waived, if not pled; and at this point in time, to come up now after this has been before several judges with several attorneys and assert standing, it is waived."

¶ 60 Here, defendants argue why Davis lacked standing, but they ignore the circuit court's rationale, which, as a principle of law, was correct. See *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 252-53 (2010) ("[A] lack of standing will be forfeited if not raised in a timely manner in the [circuit] court."). As they have not presented any argument as to how they timely pled their standing defense, we find this contention forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. Nov. 1, 2017). Therefore, the circuit court properly rejected defendants' standing argument.

¶ 61 C. Judicial Estoppel

¶ 62 Defendants additionally contend that, even if Davis' breach of fiduciary duty action was timely, he should be judicially estopped from raising it because he failed to disclose his disability benefits claim in his 2007 bankruptcy petition.

¶ 63 There are certain prerequisites to apply the doctrine of judicial estoppel. "[T]he party to be estopped must have (1) taken two positions, (2) that are factually inconsistent, (3) in separate judicial or quasi-judicial administrative proceedings, (4) intending for the trier of fact to accept the truth of the facts alleged, and (5) have succeeded in the first proceeding and received some

benefit from it." *Seymour v. Collins*, 2015 IL 118432, ¶ 47. Even if the prerequisites are met, the court must still determine whether to apply the doctrine, meaning it must exercise discretion. *Id.* Generally, we review the court's exercise of discretion for an abuse of discretion. *Id.* ¶ 48. However, "where the exercise of that discretion results in the termination of the litigation" through a motion for summary judgment, we review the ruling *de novo*. *Id.* ¶ 49.

¶ 64 In this case, because the circuit court did not find that Davis was judicially estopped from asserting his breach of fiduciary duty action, its exercise of discretion did not result in the termination of litigation. As such, we review the court's failure to apply the doctrine for an abuse of discretion (see *id.* ¶¶ 48-49), which occurs only when its ruling is unreasonable, arbitrary or fanciful, or based on an error of law. *Urban Partnership Bank v. Chicago Title Land Trust Co.*, 2017 IL App (1st) 162086, ¶ 15. On this record, we cannot say the circuit court abused its discretion when it declined to apply judicial estoppel against Davis, especially because defendants fail to highlight any evidence in the record showing that Davis intended to deceive the bankruptcy court by failing to disclose his then-pending disability benefits claim in his 2007 bankruptcy petition. See *Knott v. Woodstock Farm & Fleet, Inc.*, 2017 IL App (2d) 160329, ¶ 31 (finding that, where a party provided an incomplete disclosure to a bankruptcy court but there was no evidence that he intended to deceive or mislead the court with the disclosure, the application of judicial estoppel was inappropriate).

¶ 65 III. CONCLUSION

¶ 66 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County on the issue of the statute of limitations and remand the matter for further proceedings.

¶ 67 Reversed and remanded.