FOURTH DIVISION
May 21, 2015

No. 1-13-2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IRWIN ROSMARIN and DEBRA ROSMARIN,	)	Appeal from the
	)	Circuit Court of
Plaintiffs-Appellants,	)	Cook County
	)	
v.	)	No. 12 L 3678
	)	
ARNSTEIN & LEHR,	)	Honorable
	)	William E. Gomolinski,
Defendant-Appellee,	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.[1]
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Count I of plaintiffs' legal malpractice action was properly dismissed as time-barred under section 13-214.3(d) of Code of Civil Procedure. Count II was not time-barred and was not dependent on existence of common-law duty, and thus trial court erred in dismissing that count. Affirmed in part, vacated in part, and remanded.

[1] This case was recently reassigned to Justice Ellis.

¶ 2 This appeal concerns the issue of when a party must sue an attorney for alleged professional negligence in estate planning before the action is barred by section 13-214.3 of the Code of Civil Procedure (735 ILCS 5/13-214.3 (West 2010)). It also involves the issue of an attorney's duty to disclose the existence of a statute of repose, or advise a party to seek outside legal advice, regarding that attorney's own malpractice. Plaintiffs sued defendant law firm for legal malpractice based on legal advice it provided to plaintiffs' mother prior to her death, as well as for defendant's legal advice provided to plaintiffs after their mother's death. Plaintiffs appeal the trial court's orders dismissing count I of the second amended complaint (for legal malpractice prior to their mother's death), and paragraph 36(D) of count II of the third amended complaint (based on defendant's acts after their mother's death). For the reasons that follow, we affirm the dismissal of count I, vacate the dismissal of count II, and remand for further proceedings.[2]

¶ 3 I. BACKGROUND

¶ 4 Defendant, Arnstein & Lehr, provided legal advice related to estate planning to Edith Rosmarin (Edith) from 1997 until her death on February 23, 2008. Plaintiffs, Irwin Rosmarin and Debra Rosmarin, are Edith's children and the beneficiaries of Edith's estate.

¶ 5 As part of its estate planning advice, defendant advised Edith to create a family limited partnership, the OMEG Limited Partnership (OMEG), in order to obtain valuation discounts from the asset value of OMEG for estate tax purposes. Originally, Edith held both general and limited partnership units in OMEG, both of which had certain voting rights. In approximately August 2006, defendant provided additional legal advice related to estate planning. Specifically,

[2] In vacating the dismissal of count II, we refer only to that portion of count II that was raised on appeal, namely paragraph 36(D) of count II. The remaining subparagraphs of paragraph 36 were either dismissed with prejudice or voluntarily dismissed—but none of them are the subject of this appeal, and none of them are affected in any way by this Rule 23 Order. See *infra*, note 5, for a more detailed discussion.

defendant advised Edith that the best option regarding obtaining the valuation discounts would be to recapitalize OMEG into voting and non-voting units and for Edith to give up any voting units by gift or sale (the OMEG recapitalization). Edith took this advice and sold her voting units to Irwin and Debra in exchange for $70,608 in promissory notes.

¶ 6 Edith died on February 23, 2008. A subsequent appraisal of the OMEG partnership units showed a valuation discount for OMEG of 40% for lack of marketability and voting control.

¶ 7 After Edith's death, plaintiffs hired defendant to represent them. The scope and terms of that representation are the subject of count II of the third amended complaint. Suffice it to say that this representation included, among other things, the preparation of Edith's federal estate tax return. Defendant prepared that return, which showed tax due of $160,327, which plaintiffs paid. Defendant attached a copy of the OMEG appraisal to the estate tax return but failed to include all the lifetime taxable gifts made by Edith or the promissory notes due Edith. These failures regarding the tax return preparation form the basis of additional allegations made by plaintiffs but are not at issue on appeal.[3]

¶ 8 Around September 2009, Edith's federal estate tax return was selected for audit by the Internal Revenue Service (IRS). In May 2010, as a result of audit adjustments, the IRS wrote a letter stating that it found that there was an increase in estate tax owed of $707,362. Plaintiffs initially retained defendant to address the situation with the IRS but terminated defendant's services in August 2011. Plaintiffs retained an accountant to address the situation and the increased estate tax liability was reduced to $432,567.

¶ 9 On April 5, 2012, plaintiffs filed a one-count complaint alleging that defendant was negligent in providing estate planning advice to Edith. Plaintiffs claimed that defendant's

[3] The trial court's order permitting this appeal, which we discuss below, contained the requisite language of Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

negligent legal advice and direction in August 2006 resulted in plaintiffs having to overpay significantly in estate taxes, compared to what they would have otherwise owed. Defendant responded with a motion to dismiss. After additional pleadings, plaintiffs eventually filed a second amended complaint which was divided into two counts. Count I was labeled "Legal Malpractice Prior to Edith's Death" and count II was labeled "Legal Malpractice After Edith's Death." Defendant again filed a motion to dismiss.

¶ 10 On January 10, 2013, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)), the trial court dismissed with prejudice count I of the second amended complaint (Legal Malpractice Prior to Edith's Death) based on the two-year statute of repose in subsection (d) of section 13-214.3 of the Code of Civil Procedure (735 ILCS 5/13-214.3(d) (West 2010)). Count II (Legal Malpractice After Edith's Death) was broken down into four separate allegations of duty, all contained within sub-paragraphs of paragraph 36. Paragraph 36(A) was not the subject of a motion to dismiss and is not before us. Subparagraphs B and C of paragraph 36 were dismissed with prejudice, a ruling not before this court. Finally, the court dismissed Paragraph 36(D) without prejudice pursuant to section 2-615 and granted plaintiffs leave to file a third amended complaint.

¶ 11 Plaintiffs filed a third amended complaint, which included an extremely lengthy paragraph 36(D) in count II, essentially alleging that defendant had a duty to advise plaintiffs that there was a statute of limitations and a statute of repose that could apply to any claims related to Edith's death, including the legal advice and estate planning that defendant had provided prior to Edith's death. In the alternative, plaintiffs alleged that defendant had a duty to advise plaintiffs that they should seek legal advice from other counsel regarding any possible claims, including any statutes of limitation or repose. On May 13, 2013, the trial court dismissed

paragraph 36(D) with prejudice pursuant to section 2-619. On June 6, 2013, the trial court entered an order finding that there was "no just reason to delay enforcement or appeal of the court's orders entered on January 10, 2013 and May 13, 2013." On June 18, 2013, plaintiffs filed a notice of appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)).

¶ 12 II. ANALYSIS

¶ 13 A. Jurisdiction

¶ 14 We have jurisdiction over this appeal pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010)). Although the record on appeal did not include a copy of the June 6, 2013 court order, the omission in the record was corrected by stipulation of the parties pursuant to Illinois Supreme Court Rule 329 (eff. Jan 1, 2006).

¶ 15 B. Standard of Review

¶ 16 We review *de novo* the trial court's ruling on a section 2-619 motion, which presents a question of law. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). We accept as true all well-pleaded allegations in the complaint and draw all reasonable inferences in favor of plaintiffs. *Doe v. University of Chicago Medical Center*, 2015 IL App (1st) 133735, ¶ 35. We review *de novo* the construction of a statute, also a question of law. *DeLuna*, 233 Ill. 2d at 59.

¶ 17 C. Dismissal of Count I

¶ 18 At issue here in Count I is the interplay between several provisions in section 13-214.3 of the Code of Civil Procedure, governing actions for legal malpractice (735 ILCS 5/13-214.3 (West 2010)). A portion of that statute reads as follows:

> "(b) 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 *** 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.
>
> (c) Except as provided in subsection (d), an action described in subsection (b) may not be commenced in any event more than 6 years after the date on which the act or omission occurred.

735 ILCS 5/13-214.3 (West 2010).

¶ 19 Subsection (b) of this statute is clearly a two-year statute of limitations incorporating the "discovery rule," which tolls the limitations period to the time when the plaintiff knows or reasonably should know of the injury. 735 ILCS 5/13-214.3(b) (West 2010); *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10. Subsection (c) is just as clearly a six-year statute of repose, which curtails the "long tail" of liability that can result from the discovery rule. *Snyder*, 2011 IL 111052, ¶ 10. A statute of repose begins to run when an event occurs and "extinguishes" liability after a fixed period of time, regardless of whether (or even if) an action has accrued. *Id*. On its face, however, the statute of repose in subsection (c) applies "[e]xcept as provided in subsection (d)." 735 ILCS 5/13-214.3(c) (West 2010).

¶ 20 Subsection (d), omitting the exceptions that are not relevant to this lawsuit, reads as follows:

> (d) When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action *may* be commenced within 2 years after the date of the person's death . . . ." (Emphasis added.) 735 ILCS 5/13-214.3(d) (West 2010).[4]

[4] The remainder of subsection (d) contains an exception that is not relevant here, for situations when letters of office are issued or the will is submitted to probate, in which case "the action must be commenced within the time for filing claims against the estate or a petition contesting

¶ 21 Subsection (d) is not quite as clear as its predecessor subsections. Subsection (d) applies only "[w]hen the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered." 735 ILCS 5/13-214.3(d) (West 2010). In that particular circumstance where the injury occurs after the client's death, "the action *may* be commenced within 2 years after the date of the person's death." (Emphasis added). *Id*. That language could be read as a limitations period all its own, or—principally because of the use of the word "may" instead of "shall"—it could be read as a "savings" clause that allows for an *additional* period of time to sue, even if the action were otherwise time-barred under subsections (b) or (c).

¶ 22 Our supreme court has adopted the former of the two interpretations. The supreme court has held that the two-year provision in subsection (d) "is not *in addition to* the two-year statute of limitations [in subsection (b)] and the six-year statute of repose [in subsection (c)]. Rather, the exception applies *instead of* the two-year statute of limitations and the six-year statute of repose." *Wackrow v. Niemi*, 231 Ill. 2d 418, 427 (2008). Thus, where the injury resulting from the legal malpractice occurs after the client's death, subsection (d), and that subsection alone, will determine the timeliness of the legal malpractice lawsuit filed in this case.

¶ 23 The interplay between these provisions of Section 13-214.3 is dispositive to the first issue raised in this appeal. Taking the allegations of the complaint as true and drawing all reasonable inferences in plaintiffs' favor, as we must (see *Doe*, 2015 IL App (1st) 133735, ¶ 35), the following dates are relevant:

- The alleged malpractice (the advice concerning the recapitalization of OMEG) occurred in August 2006;

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the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975." 735 ILCS 5/13-214.3(d) (West 2010).

- The client, Edith, died on February 23, 2008;
- Plaintiffs did not discover the damages resulting from the alleged malpractice "until sometime after May of 2010;" and
- This lawsuit was filed on April 5, 2012.

If subsection (d) applies to this case, plaintiffs had two years to sue following Edith's death, which would have been February 23, 2010, and their lawsuit would be time-barred. If, on the other hand, subsection (d) does *not* apply, then the timeliness of this lawsuit would be governed by the two-years-after-discovery statute of limitations in subsection (b), as well as the six-year statute of repose in subsection (c). Under that framework, plaintiffs filed their lawsuit within two years of discovery of the injury and within six years of the acts that constituted alleged malpractice—the lawsuit, in other words, would be timely.

¶ 24 As the plain language of subsection (d) indicates, "the lone inquiry made by a court in determining whether section 13-214.3(d) is applicable is simply whether the injury caused by the malpractice occurred upon the death of the client." *Petersen v. Wallach*, 198 Ill. 2d 439, 446 (2002); see *Wackrow*, 231 Ill. 2d at 424 ("Based on *Petersen*, then, we must determine whether the injury caused by the malpractice occurred upon the death of … the client.").

¶ 25 We hold, as to count I, that the injury that occurred in this case took place upon the death of the client, Edith. The advice that defendant gave Edith was clearly estate-planning advice, the impact of which would be felt only upon Edith's death. Indeed, plaintiffs' allegations in count I make this crystal clear:

> "But for the negligence of [defendant], Edith would have prepared estate planning that would have permitted her to transfer her assets with less tax ramifications than were incurred as stated above. But for the negligence of [defendant], Edith

> [and plaintiffs, her children] would not have taken actions that had an adverse effect on the taxes incurred upon Edith's death. But for the negligence of [defendant], Edith would not have recapitalized OMEG in August of 2006 and instead would have done something that would have reduced and/or eliminated any taxes after the death of Edith."

¶ 26 If the allegations above do not already make it clear that the injury resulting from the alleged malpractice occurred upon Edith's death, plaintiffs further alleged that they "did not suffer any recognizable damages as a result of [defendant's] negligence until after May of 2010," a date that corresponds to when the IRS "found that there was an increase of the estate tax owed of $707,362." The date of May 2010 is well after Edith's death. The injury alleged in this case was an overpayment of estate taxes, and it clearly did not occur until after Edith's death, when estate taxes would be owed.

¶ 27 Because the injury caused by the alleged malpractice did not occur until Edith's death, section 13-214.3(d) clearly governs the timeliness of this lawsuit. Count I, filed well after the two-year limitations provision contained in that subsection, is time-barred. See 735 ILCS 5/13-214.3(d).

¶ 28 We find support for this conclusion in *Petersen*, 198 Ill. 2d 439, where the defendant law firm allegedly gave plaintiff's mother negligent estate-planning advice by directing her to make substantial gifts during her lifetime to the plaintiff. That advice, plaintiff alleged, in fact resulted in substantially higher tax liability upon her mother's death. The defendant argued that the six-year statute of repose barred the malpractice complaint because the acts allegedly constituting malpractice occurred more than six years before the filing of the lawsuit. The supreme court held that the two-year limitations period contained in section 13-214.3(d) was applicable, because

plaintiff's alleged injury—the overpayment of estate taxes—did not occur until her mother's death. *Id*. at 445. Because in that case, plaintiff filed suit within two years of her mother's death, her lawsuit was timely. *Id*.

¶ 29 As defendant correctly notes, there is no meaningful distinction between this case and *Petersen*. Each case concerns estate-planning advice to reduce the estate taxes that would befall the client's children upon the client's death. In each case, the injury alleged is the incurring of higher estate taxes than would otherwise have occurred absent the alleged malpractice. In this case, as in *Petersen*, the injury unquestionably occurred upon the death of the client.

¶ 30 The supreme court's decision in *Wackrow* likewise supports our conclusion. There, the defendant attorney prepared an amendment to a living trust by which the client would give his sister his house upon his death. Instead, the amendment drafted by the defendant attorney was invalid, because the client's residence was owned by a land trust. Thus, when the client died, the sister discovered that, in fact, she had no claim on the residence. *Id*. at 422. The sister sued the defendant attorney for malpractice more than two years after the death of her brother. The supreme court held that subsection (d) of section 13-214.3 applied and barred her suit, finding it "clear that the injury in this case did not occur until the death of" her brother, the defendant's client. *Id*. at 425. Until the brother's death, the court reasoned, the amendment to the living trust could have been revoked, and the beneficiary of the land trust could have been changed to the sister; it was only upon the brother's death that the sister was permanently injured. *Id*.

¶ 31 Plaintiffs attempt to avoid the application of section 13-214.3(d) by arguing that the instant case is more akin to *Snyder*, 2011 IL 11052. In *Snyder*, the defendant attorney negligently prepared a quitclaim deed in 1997. *Id*. ¶ 1. The deed was supposed to convey real estate from the husband to the husband and wife as joint tenants with right of survivorship. The problem,

however, was that the land was already held in a land trust, not by the husband individually, and the beneficiary of that trust was the husband's son from a previous marriage. *Id*. After the husband died in 2007, the sole beneficial interest passed to the husband's son, the beneficiary of the trust, who filed a forcible entry and detainer action to remove the wife from the property. *Id*. ¶ 1-3. The wife filed a legal malpractice action against the defendant attorney in 2008, claiming that the attorney's instruction had been to confer an interest in the land to the wife, and he had failed to do so. *Id*. ¶ 2. The six-year statute of repose in subsection (c) of section 13-214.3 had run, but the wife contended that the injury occurred upon the death of her husband and, therefore, her action was timely filed under subsection (d). *Id*. ¶ 5. The Illinois Supreme Court disagreed, holding that subsection (c) governed the action because the injury was sustained when the alleged negligent act occurred, not when the husband died. *Id*. ¶ 5. The court reasoned that the defendant attorney's actions were intended to take effect during the client's lifetime; a joint tenancy "is a present estate in all the joint tenants," conferring an "immediate benefit" that would entitle plaintiff to possession and enjoyment of the land, regardless of whether her husband was alive or dead. *Id*. ¶ 14. Thus, "the failure of the deed drafted by defendant here to create a joint tenancy in [the husband] and [the wife] caused a present injury that occurred at the time the quitclaim deed was prepared," not upon the husband's death. *Id*.

¶ 32 Plaintiffs attempt to analogize the alleged injury here to the failed conveyance in *Snyder*. They contend that defendant "provided legal services to Edith that were intended to have and did have an immediate benefit." Plaintiffs assert that it therefore follows that "the injury" occurred prior to Edith's death, apparently at the same time of the execution of the documents related to the recapitalizing of OMEG and Edith giving up her voting rights.

¶ 33 We do not find *Snyder* controlling here. In that case, the plaintiff was supposed to obtain something with an immediate benefit—an interest in the land as a joint tenant—and she did not receive it. She may have felt the *impact* of that injury more substantially upon the death of her husband, when her stepson challenged her right to remain on the land, but that does not change the fact that the injury, in fact, had been suffered at the time of the alleged malpractice. In this case, by contrast, the point of recapitalizing OMEG, and Edith giving up her voting rights, was to minimize estate taxes after Edith died. Plaintiffs have admitted as much in their complaint, quoted at length above. There was no present benefit provided to plaintiffs. Nor can plaintiffs plausibly claim that they suffered any "injury" at the time of that transaction, which was only intended to have an impact after Edith's death; again, they affirmatively alleged that they did not suffer an injury until after Edith died, when the IRS audited their federal tax return and they realized they owed a great deal of money in estate taxes. *Snyder* is inapposite.

¶ 34 We recognize that our holding leads to a harsh result. Assuming the truth of the allegations at this stage of the proceedings, Edith and her children relied on lawyers to protect Edith's estate from taxes after her death, and they did not know, nor could they reasonably be expected to know, of the lawyers' failure to do so until the IRS came calling. They filed suit within two years of this discovery and within the six-year repose period, yet their lawsuit is time-barred, anyway. A two-year repose period in subsection (d), that appears to have been created to give recipients of bad estate-planning advice *additional* time to file malpractice claims, instead has the bizarre impact of *shortening* the amount of time they would otherwise have in subsection (b). As Justice Cook recently noted in regard to subsection (d), "It is unusual for a statute of repose to bar a claim prior to the minimal period allowed by the statute of limitations. Statutes of repose set an outside limit on actions, not a short limit." *Pugsley v. Tueth*, 2012 IL App (4th)

110070, ¶ 33 (Cook, J., concurring). The supreme court in *Wackrow* likewise recognized that "the effect of the section 13-214.3(d) exception may shorten the limitations period for legal malpractice complaints and may mean that a plaintiff's action is barred before she learns of the injury." *Wackrow*, 231 Ill. 2d at 427. Nevertheless, the court declared that "the fact that a repose provision 'may, in a particular instance, bar an action before it is discovered is an accidental rather than necessary consequence.' " (Emphasis added.) *Id*. at 427 (quoting *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 424 (1986)).

¶ 35 Justice Cook wrote that "a plaintiff filing a malpractice action should have at least two years to file his action. Section 13-214.3(d) should not be read to shorten the legal malpractice statute of limitations [in subsection (b)] or statute of repose [in subsection (c)]. I recognize that position was rejected in *Wackrow*, but the legislature should recognize the confusion caused by this statute and make any necessary changes." *Pugsley*, 2012 IL App (4th) 110070, ¶ 35 (Cook, J., concurring); see also *DeLuna*, 223 Ill. 2d at 84 ("[W]e wish to take this opportunity to encourage the legislature to undertake a comprehensive review of article XIII provisions pertaining to statutes of limitations and repose. Greater specificity and uniformity in that area of the Code would obviate the need for courts to so often speculate as to the General Assembly's intent."). We agree that it is time for the General Assembly to cure this inequity and again call on that branch of government to take up this issue.

¶ 36 As it stands, however, we are bound by the language of section 13-214.3(d) and the interpretations given it by our supreme court. That subsection governs the timeliness of the claims raised in Count I of the third amended complaint, and count I is time-barred. The trial court's dismissal of that count is affirmed.

¶ 37 E. Dismissal of Count II

¶ 38 The second issue in this appeal is whether the court correctly dismissed Count II of the third amended complaint, which was based on defendant's alleged negligent acts *after* Edith's death. Count II concerns the time period during which plaintiffs hired defendant to be their attorney (as opposed to defendant's prior representation of their mother, Edith).[5]

¶ 39 We must accept the well-pleaded factual allegations in Count II as true and draw all reasonable inferences in favor of plaintiffs. *Doe*, 2015 IL App (1st) 133735, ¶ 35. We will not accept conclusions of law. *Chatham Surgicore, Ltd. v. Health Care Services Corp.*, 356 Ill. App. 3d 795, 799 (2005).

¶ 40 Count II alleges that, after Edith's death, defendant agreed to represent plaintiffs regarding their mother's estate taxes and related matters. Count II characterizes the attorney-client relationship as follows:

> "[Defendant] agreed to represent [plaintiffs] and to provide advice about all claims they personally may have that resulted from Edith's death which included a duty to advise [plaintiffs] about all possible claims they may have personally or as a result of the advice [defendant] provided Edith that may impact [plaintiffs] including providing advice related to the applicable statute of limitations and statutes of repose that may apply to any claims during the time they provided legal advice to Edith [and plaintiffs] prior to Edith's death."

[5] The third amended complaint contains four separate allegations of defendant's duty to plaintiffs, listed as subparagraphs (A) through (D). Subparagraphs (B) and (C) were previously dismissed with prejudice by the trial court in January 2013 and are not the subject of this appeal. Subparagraph (A) was voluntarily dismissed by plaintiffs after this appeal was filed and is likewise not at issue on appeal. We are left only with determining whether the trial court properly dismissed subparagraph (D) of the third amended complaint. For the sake of simplicity, because paragraph 36(D) is the only allegation of duty before us in count II, we will dispense with using this moniker and simply refer to count II of the third amended complaint. But that should not be mistaken for a reference to the other, dismissed-and-not-appealed subparagraphs (A) through (C). Nothing in this opinion is intended to revive or otherwise affect those claims.

¶ 41 As we have just explained, we must accept all well-pleaded facts as true and draw all reasonable inferences in plaintiffs' favor, but we will not defer to plaintiffs' legal conclusions. To the extent that the allegations quoted above claim that defendant owed plaintiff a *common-law* legal duty to advise plaintiffs about any possible claims relating all the way back to the 2006 OMEG transaction, including advice regarding possible malpractice and statutes of limitations and repose, we would reject those allegations and instead decide, *de novo*, whether such a common-law duty existed. But we think that the allegations above, interpreted liberally in plaintiffs' favor, state that defendant *agreed* to such a duty as part of its new representation of plaintiffs, following Edith's death. That is not a legal conclusion—it is a well-pleaded fact.

¶ 42 Attorneys and clients may agree to whatever scope of representation they wish. Plaintiffs could have hired defendant merely to do the estate tax return and nothing more. They could have hired defendant merely to advise them on how to proceed once their mother died—the processing of the necessary paperwork or other required housekeeping. But count II alleges more than that. Read in the light most favorable to plaintiffs, count II alleges that plaintiffs hired defendant to review its previous work for Edith—to investigate any possible claims plaintiff may have had resulting from that previous work. Such claims, they specifically allege, included any negligence in defendant's prior performance of work and whether any time limitations existed governing those claims. The allegations quoted above were sufficient to allege that claim.

¶ 43 We do not and cannot know, at the pleading stage, whether these allegations are true. That is for discovery and possibly a trial to sort out. We acknowledge that it seems odd that plaintiffs would hire a law firm to review that same law firm's previous work from a few years earlier, but that is what Count II alleges, and we certainly cannot say as a matter of law that these allegations are untrue.

¶ 44 Considering the other well-pleaded allegations in the third amended complaint and taking them as true, Count II has thus pleaded that plaintiffs entered into a new attorney-client relationship with defendant following Edith's death whereby defendant agreed, among other things, to review its previous work and advise plaintiffs of their rights, including whether any malpractice may have occurred and their rights to sue for that malpractice; that defendant breached its duty to plaintiffs in failing to realize (or at least failing to tell plaintiffs) that the 2006 OMEG recapitalization would not reduce the estate tax liability but would, in fact, increase it, which at least arguably constituted malpractice; and that plaintiffs were injured because "they may have lost a claim for legal malpractice against [defendant]" arising out of the 2006 malpractice, because of defendant's failure to so advise plaintiffs. It is this new attorney-client relationship formed after Edith's death, and the malpractice alleged during the course of that new attorney-client relationship, that we must consider in determining whether count II was properly dismissed.

¶ 45 On appeal, as in the trial court, defendant raises two bases for dismissal of Count II. First, defendant argues that it owed plaintiffs no duty to advise plaintiffs of its own negligence in its previous representation of plaintiffs' mother, Edith. Defendant cites *Fitch v. McDermott, Will and Emery, LLP*, 401 Ill. App. 3d 1006 (2010), which contains facts similar to this case, but with one critical distinction. That case contained many issues and parties but, relevant to the issue before us, *Fitch* involved a plaintiff who was a beneficiary of an estate plan drafted by the defendant law firm for his mother. The estate plan was allegedly supposed to give plaintiff title to a farm, but in fact it did not—it only gave the plaintiff the right to purchase shares of a trust that owned the farm. The plaintiff first tried to sue directly for that alleged malpractice, but the

court held (as have we in count I) that the lawsuit was time-barred under section 13-214.3(d) because it was filed more than two years after the death of plaintiff's mother. *Id*. at 1023.

¶ 46 Plaintiff also argued, like plaintiffs do here in count II, that he later engaged the defendant in a distinct attorney-client relationship and that, based on that new attorney-client relationship, the defendant owed plaintiff a duty to inform him of its malpractice on his mother's estate planning. Had it done so, plaintiff argued, he could have sued in a timely manner and not been time-barred under section 13-214.3(d). *Id* at 1023-1024. The appellate court rejected this argument. The court first noted that plaintiff had cited no Illinois decision, nor could it find any, that imposed a common-law duty on defendant to inform a client of its own negligence or of the limitations period in which the client could sue for that negligence. But the court did not decide that issue. Instead, the court wrote:

> "Regardless of whether an attorney has a duty to affirmatively inform a client of his malpractice, plaintiffs have failed to plead any facts to support that the [plaintiff-defendant] attorney-client relationship gave rise to a duty to advise [plaintiff] about any work for [his mother]. [Plaintiff] was receiving advice from [defendant] regarding *his* estate planning, not [his mother's]." (Emphasis in original.) *Id*. at 1025.

¶ 47 This language in the *Fitch* opinion highlights the critical difference in this case. The plaintiff in *Fitch* hired the defendant law firm to do *his* estate work only. He did not allege that he hired the defendant to review its previous work for his mother to determine whether anything might have been done wrong. But that is precisely what plaintiffs here allege in count II. Thus, unlike in *Fitch*, here plaintiffs *have* pleaded facts regarding the attorney-client relationship to

allege that defendants undertook a duty to review its previous work for possible mistakes, and to advise plaintiffs of their rights accordingly.

¶ 48 Plaintiffs, in other words, are not alleging a common-law duty on the part of defendant, that arises by operation of law, every time an attorney represents a client. Whether such a duty exists is not before us, and we express no opinion on the issue. Rather, plaintiffs allege in count II that they retained defendant after their mother's death, among other reasons, specifically to review its previous work for their mother to determine if anything improper or negligent had been done and, if so, to advise plaintiffs of their rights. That duty arose by virtue of their attorney-client agreement, not by the common law. Thus, defendant's basis for dismissal—that they owed no duty to advise plaintiffs of their alleged malpractice concerning the 2006 OMEG recapitalization—is misplaced and contradicted by the well-pleaded allegations of count II, which we must accept as true at the pleading stage.

¶ 49 The second basis for dismissal of count II urged by defendant is timeliness. As with Count I, defendant claims that Count II is time-barred under subsection (d) of section 13-214.3. 735 ILCS 5/13-214.3(d). We have already discussed at length that the timeliness of an attorney-malpractice claim is either governed by subsections (b) and (c), which together provide a limitations and repose period, or exclusively by subsection (d). *Wackrow*, 231 Ill. 2d at 427. We have also explained that in determining whether to apply subsection (d), "the lone inquiry made by a court … is simply whether the injury caused by the malpractice occurred upon the death of the client." *Petersen*, 198 Ill. 2d at 446; see *Wackrow*, 231 Ill. 2d at 424; see 735 ILCS 5/13-214.3(d) (applicable "when the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered").

¶ 50 We find that, unlike count I, the timeliness of count II is not governed by subsection (d). The "client," with regard to count II, is not plaintiffs' deceased mother Edith, but rather plaintiffs themselves. In the language of subsection (d), "the person for whom the professional services were rendered," regarding the separate attorney-client relationship alleged in count II, was plaintiffs, not their mother. We assume that plaintiffs have not yet perished from this earth, but even if they have, the injury alleged in count II did not occur upon their death—rather, it occurred two years after their mother's death, when their right to sue over the malpractice alleged in count I expired under subsection (d) of section 13-214.3. Subsection (d) has no application to count II.

¶ 51 Because the specific exception in subsection (d) is not applicable to the timeliness of count II, the applicable statutory provisions are subsection (b)'s limitations period and subsection (c)'s repose period. 735 ILCS 5/13-214.3(b), (c); see *Wackrow*, 231 Ill. 2d at 427; *Pugsley*, 2012 IL App (4^{th}), ¶ 24. Defendant did not argue that count II was time-barred under either of those provisions, and thus we will not consider that argument. Defendant is obviously free to pursue any such argument upon remand of count II to the trial court.

¶ 52 We emphasize that we find count II at the pleading stage. We cannot know whether the proof will ultimately show that defendant, as part of a new attorney-client relationship with plaintiffs, agreed to review its previous work for Edith and to advise plaintiffs as to any possible malpractice claim relating thereto. We obviously express no opinion about whether defendant committed any malpractice whatsoever in this case. Nor do we express any opinion as to whether count II would be time-barred under the applicable statute of limitations. We hold that plaintiff's malpractice claim in count II is not reliant on a common-law duty and is not barred by subsection (d) of section 13-214.3, and nothing more.

¶ 53 For these reasons, we affirm the trial court's dismissal of count I, vacate its dismissal of count II, and remand for further proceedings.

¶ 54 Affirmed in part, vacated in part, and remanded.