2012 IL App (1st) 120054

SECOND DIVISION
November 20, 2012

No. 1-12-0054

**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

RODNEY HARRIS,	)	Appeal from the Circuit Court
	)	of Cook County, County
Plaintiff-Appellant,	)	Department, Law Division
	)	
v.	)	No. 11 L 6500
	)	
L.C. and COOK COUNTY,	)	The Honorable
	)	Moira S. Johnson,
Defendants-Appellees.	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justice Quinn concurred in the judgment.
Justice Connors specially concurred.

ORDER

Held: Plaintiff's claim of legal malpractice is barred under section 5 of the Public and Appellate Defender Immunity Act (745 ILCS 19/5 (West 2010)) because he failed to allege defendants committed willful and wanton misconduct. Accordingly, the circuit court did not err when it granted defendants' motion to dismiss.

¶ 1 Plaintiff, Rodney Harris, filed a complaint against defendants, L.C. and Cook County, alleging L.C. committed legal malpractice in her representation of him in her capacity as an

Assistant Public Defender employed by Cook County. Defendants[1] filed a motion to dismiss plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code), which the circuit court granted. 735 ILCS 5/2-619 (West 2010). At issue is whether plaintiff's claim is barred under section 5 of the Public and Appellate Defender Immunity Act (Act). 745 ILCS 19/5 (West 2010).[2]

¶ 2 JURISDICTION

¶ 3 On December 5, 2011, the circuit court granted defendants' motion to dismiss pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2010). On January 3, 2012, plaintiff timely filed his notice of appeal. Accordingly, this court has jurisdiction pursuant to Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered below. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

¶ 4 BACKGROUND

¶ 5 On June 22, 2011, plaintiff filed a one-count complaint against defendants alleging legal malpractice. In his complaint, plaintiff alleged that L.C., in her capacity as an Assistant Public Defender employed by Cook County, represented him in his underlying criminal suit. Plaintiff was arrested on or about June 14, 2001. He was 15 years old at the time of his arrest. He alleged the police interrogated him and chained him to a wall for approximately 16 hours without food or drink. Plaintiff claims he signed a false confession and was subsequently charged as an adult

[1]The Cook County State's Attorney's office has represented both defendants collectively during the pendency of the proceedings.

[2] Plaintiff raised several other arguments before this court. However, as discussed *infra*, we need not address them due to our ultimate conclusion in this case.

with two counts of aggravated criminal sexual assault against two minors. While he awaited his criminal trial, plaintiff spent "nearly one year" in the Juvenile Temporary Detention Center. During this time, L.C. represented him. Plaintiff alleged that he "heard almost nothing from [L.C.]. [L.C.] never asked [him] for his version of events that led to his arrest and criminal charges." Additionally, he alleged that L.C.: "never talked to [him] about the statement he signed or the possibility of filing a motion to suppress;" "visited [him] one time to discuss a mental fitness evaluation;" and he "informed [L.C.] that he was innocent." Plaintiff alleged that L.C. told him "that he should plead guilty to two counts of aggravated criminal sexual conduct, and that if he did not plead guilty he would be sentenced to 60 years in prison." Due to his guilty plea, plaintiff was convicted of two counts of aggravated sexual assault and sentenced to 15 years in prison. Plaintiff stated that "based upon the recommendation of [L.C.], believing that he had no option, and terrified at the prospect of 60 years in prison, Harris agreed to plead guilty. If [L.C.] had not provided this advice to Harris he would not have pleaded guilty."

¶ 6 In May of 2005, plaintiff filed a petition for postconviction relief in which he alleged that he was denied the effective assistance of counsel. The circuit court summarily dismissed the petition. This court reversed the circuit court's dismissal of the petition and remanded for further proceedings. According to plaintiff's complaint, this court noted there was insufficient evidence to convict him of aggravated criminal sexual assault because there "was no evidence of penetration of either of the victims."[3] Plaintiff further alleged that this court stated " ' the trial

[3] We note that plaintiff did not attach any opinions or orders from this court or the circuit court to either his complaint or in response to defendants' motion to dismiss regarding his postconviction proceedings. The facts of plaintiff's postconviction proceedings are taken from

counsel's advice to plead guilty to aggravated criminal sexual assault may have been unreasonable,' " and that " ' but for counsel's advice, defendant would not have pleaded guilty.' " On remand, the circuit court held an evidentiary hearing. Plaintiff alleged that L.C. "admitted that she advised Harris that he should plead guilty. She also admitted that she had not read the Illinois Supreme Court decision in *People v. Maggette* which held that the crime of aggravated criminal sexual assault requires evidence of actual penetration." After the evidentiary hearing, the circuit court denied plaintiff's petition. Plaintiff appealed. On March 4, 2010, this court reversed the circuit court's denial of the petition and remanded for further proceedings. According to plaintiff, this court held that L.C.'s "advice to plead guilty to two counts of aggravated criminal sexual assault was unreasonable, and 'but for counsel's advise, defendant likely would not have pleaded guilty.' " On June 24, 2010, the circuit court vacated plaintiff's guilty plea and conviction. Plaintiff was incarcerated from the day of his sentencing until he was released on house arrest on July 13, 2010.[4]

¶ 7 In his complaint, plaintiff alleged one count of legal malpractice against defendants. He alleged that an attorney-client relationship existed between L.C. and himself and that due to this relationship, L.C. owed him the following duties: to provide him with adequate assistance of counsel; to provide proper and current legal advice on the state of the law; to conduct a meaningful investigation of the facts of his case; to provide accurate advice on the potential penalties he faced; to confirm that he was "of sound mind and body at the time he entered his

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the allegations of his complaint.

[4] Plaintiff did not indicate in his complaint the day he was sentenced.

guilty plea;" and to make appropriate objections. Plaintiff additionally alleged that L.C. owed him a duty to file two motions: "a motion to suppress a facially inaccurate statement that was obtained under coercive an[d] suspect conditions;" and "a motion to dismiss charges against [him] for lack of sufficient factual allegations and/or supporting evidence."

¶ 8 Plaintiff alleged L.C. breached these duties in the following ways:

> "she failed to provide adequate assistance of counsel; failed to advise him that at the time of his guilty plea Illinois law required proof beyond a reasonable doubt of actual penetration to convict a defendant of aggravated criminal sexual assault, and therefore could not prove him guilty of the charges against him; failed to advise Harris that the State had no evidence of actual penetration; failed to file a motion to suppress Harris' statement despite the obvious merits of such a motion without any strategic reason for this failure; failed to file a motion to dismiss the charges against Harris despite the obvious merits of such a motion without any strategic reason for this failure; Falsely advised Harris that if he failed to plead guilty he would be sentenced to 60 years in prison; Failed to confirm that Harris was of sound mind and body at the time his guilty plea was entered despite learning that the day before he had been physically attacked and hospitalized; Failed to investigate the facts of plaintiff's case by speaking to any

> witnesses, getting Harris' version of events, obtaining medical records of the alleged victims containing information indicative of Harris' innocence, obtaining DCFS records that may have implicated other individuals; and failing to object to the State's failure to allege penetration in its colloquy setting forth a factual basis for the charges during Harris' plea hearing."

Plaintiff contended L.C.'s breach of one or more of the alleged duties owed proximately caused his subsequent conviction and sentence to 15 years in prison. Cook County was responsible, under the doctrine of *respondeat superior,* for L.C.'s actions because at the time of the alleged infractions, L.C. was employed by Cook County. Plaintiff alleged he was innocent of the charges, and that as a result of L.C.'s actions, he sustained and continues to suffer from damages including emotional distress and lost wages.

¶ 9 On July 21, 2011, defendants filed a motion to dismiss plaintiff's complaint with prejudice pursuant to section 2-619 of the Code.[5] 735 ILCS 5/2-619 (West 2010). Defendants first argued that plaintiff's complaint was barred by the statute of repose in section 13-214.3(c) of the Code because legal malpractice claims must be filed within "six years after the date on which the act or omission occurred." 735 ILCS 5/13-214.3(c) (West 2010). Specifically, that because plaintiff's guilty plea was entered on May 10, 2002, pursuant to section 13-214(c) of the Code, plaintiff's legal malpractice suit had to be filed by May 10, 2008. Because Plaintiff did not file

[5]Defendants did not specify in their motion what subsection of section 2-619 they were proceeding under. However, before this court, both parties state in their respective briefs that the circuit court granted defendants' motion pursuant to section 2-619(a)(9) of the Code.

his legal malpractice claim until June 22, 2011, defendants asserted that his claim was time-barred and must be dismissed.

¶ 10 Defendants further argued that plaintiff's claim was barred because L.C., an Assistant Public Defender, and Cook County, as her employer, were protected by Section 5 of the Act (745 ILCS 19/5 (West 2010)) because plaintiff did not allege any willful or wonton misconduct arising from L.C.'s representation of Harris in the underlying suit.

¶ 11 In response, plaintiff argued that defendants miscalculated the statute of repose, arguing that the earliest that the statue of repose could bar his claim was February 27, 2010, but acknowledged that he did not file his claim until June 22, 2011. He further argued that principles of equity required the circuit court to deny defendants' motion to dismiss. He pointed out that Illinois common law required him to wait until his criminal conviction was vacated in order to file his legal malpractice claim. In his case, he could not file his claim until after the time period ran for the statute of repose. He argued that this was inequitable and unjust. Plaintiff asserted that "because Illinois Courts have decided to apply the equitable doctrine of collateral estoppel to legal malpractice claims until a conviction is vacated plaintiff submits that equity also requires Illinois courts to complete the circle and provide a reasonable opportunity for those citizens that are eventually exonerated to assert their civil claims." He proposed that the statute of repose should be tolled for plaintiffs such as himself, who filed claims of ineffective assistance of counsel in the criminal courts within six years of the alleged misconduct, until after the criminal claims are completed. He maintained that this would be "the only logical and just way to reconcile the simultaneous application of the court-created 'exoneration first' rule and the statute

of repose."

¶ 12 Plaintiff additionally argued that applying the statute of repose to him would be unconstitutional. Specifically, he argued that its application to his case would violate Article I, Section 12 of the Illinois Constitution; his right to due process under the First and Fourteenth amendments to the United States Constitution and the Illinois Constitution; his right to the equal protection of the law; and combined with the application of the doctrine of collateral estoppel, would be an unconstitutional violation of the separation of powers.

¶ 13 Plaintiff argued that section 5 of the Act did not bar his claim. He argued that defendants cannot challenge the legal sufficiency of his factual allegations under a section 2-619 motion to dismiss because all well plead facts are admitted by the movant under section 2-619. Plaintiff additionally maintained that genuine issues of material fact exist regarding whether defendants' actions were willful and wonton, and that he alleged sufficient facts to support a finding that defendants' actions were willful and wanton.

¶ 14 In reply, defendants argued that plaintiff did not dispute that he filed his suit after the last day of the statute of repose, even though he disputed the actual calculations. Defendants asserted that plaintiff's "request that the court set aside the applicable statute of repose in the name of equity is a clear violation of one of the maxims of equity, that equity follows the law." Accordingly, defendants maintained that plaintiff's argument would violate the plain language of the statute as passed by the legislature. Defendants pointed out that Illinois courts have consistently upheld the constitutionality of the statute of repose.

¶ 15 On December 5, 2011, the circuit court granted defendants' motion to dismiss.[6] The circuit court, in its order, made the following findings:

> "Although plaintiff's claim was not barred by the statute of limitations because he was a minor at the time of the offense and was precluded from filing a claim for malpractice until his conviction was vacated, plaintiff's claim is barred by the statute of repose. Plaintiff has fallen into a category for those of whom have no legal recourse because of the statute of repose. The court need not address defendants' immunity argument."

¶ 16 On January 3, 2012, plaintiff timely appealed.

¶ 17 ANALYSIS

¶ 18 Before this court, plaintiff argues that section 5 of the Act (745 ILCS 19/5 (West 2010)) does not bar his claim for two reasons. First, because he asserts that under section 2-619 of the Code (735 ILCS 2-619 (West 2010)) the legal sufficiency of the complaint is admitted, which he maintains bars defendants from challenging the sufficiency of the factual allegations in his complaint. Second, because "genuine issues of material fact exist regarding whether defendants acted with conscious disregard for plaintiff's well-being." Plaintiff maintains that he has supplied enough facts to support a finding that defendants' conduct was willful and wanton.

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[6] We do not have a transcript of the hearing on defendants' motion to dismiss in the record. The record only contains the order entered by the circuit court. It is the burden of the appellant to present a complete record. *In re Marriage of Gulla*, 234 Ill. 2d 414, 422 (2009).

¶ 19 In response, defendants argue that plaintiff's claim is barred by section 5 of the Act (745 ILCS 19/5 (West 2010)) because section 5 of the Act is affirmative matter under section 2-619(a)(9) of the Code (735 ILCS 5/2-519(a)(9) (West 2010)) that avoids the legal effect of and defeats plaintiff's claim. Defendants characterize plaintiff's claim as a negligence action because he alleged L.C. owed him a duty, which she breached, proximately causing his injuries. Defendants argue that the purpose of the Act is to protect public defenders from claims such as plaintiff's, pointing out that plaintiff labeled the sole count in his complaint," 'legal malpractice.' " Defendants maintain that a plain reading of the statute shows that they are immune from actions seeking damages for legal or professional malpractice.

¶ 20 In his reply brief, plaintiff acknowledges that his complaint did not contain the specific phrases " ' negligence' or ' willful and wanton.' " However, he argues that he did allege sufficient facts "[i]f proven *** to support a finding of willful and wanton conduct." He requests, in the alternative, that if this court holds that his complaint is barred by section 5 of the Act (745 ILCS 19/5 (West 2010)), then the proper remedy would be to remand the matter to the circuit court to allow him the opportunity to file an amended complaint.

¶ 21 A motion to dismiss brought pursuant to section 2-619(a)(9) of the Code allows for the involuntary dismissal of a complaint when the "claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2010). When proceeding under section 2-619 of the Code, the legal sufficiency of the complaint is admitted. *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 396 (2009). All pleadings and supporting documents must be interpreted in the light most favorable to the

nonmoving party. *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). Our standard of review of a section 2-619 motion to dismiss is *de novo*. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). Similarly, our review of a statute is also *de novo*. *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). When reviewing a statute, we must "give effect to the intent of the legislature." *Solon v. Midwest Medical Records Assoc., Inc.*, 236 Ill. 2d 433, 440 (2010). "The most reliable indicator of such intent is the language of the statute, which is to be given its plain and ordinary meaning." *Id.* The statutory language's plain and ordinary meaning must be used where such language is clear. *Vancura v. Katris*, 238 Ill. 2d 352, 378 (2010).

¶ 22 Section 5 of the Act provides:

> "Sec. 5 Immunity. No public defender, assistant public defender, appellate defender, or assistant appellate defender, acting within the scope of his or her employment or contract, nor any person or entity employing, supervising, assisting, or contracting for the services of a public defender, assistant public defender, appellate defender, or assistant public defender, is liable for any damages in tort, contract, or otherwise, in which the plaintiff seeks damages by reason of legal or professional malpractice, except for willful and wanton misconduct." 745 ILCS 19/5 (West 2010).

Our supreme court has defined willful and wanton conduct "as a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows an utter indifference to or conscious disregard for a person's own safety or the safety or property of

others." *Pfister v. Shusta*, 167 Ill. 2d 417, 421 (1995). "It is the plaintiff's duty to sufficiently allege conduct that falls within the scope of a recognized cause of action. Moreover, mere conclusory allegations are not sufficient." *American National Bank & Trust Co. v. City of Chicago*, 192 Ill. 2d 274, 285 (2000).

¶ 23 In this case, we hold that plaintiff has failed to plead willful and wanton misconduct and, therefore, his claim is barred by section 5 of the Act. 745 ILCS 19/5 (West 2010). Our review of plaintiff's complaint shows that he alleged defendants were negligent, not that they acted willfully or wantonly. Plaintiff even labeled the sole count of his complaint as "Legal Malpractice." The plain language of section 5 of the Act directly addresses legal malpractice, stating "No *** assistant public defender *** acting within the scope of his or her employment or contract, nor any *** entity employing, supervising, assisting, or contracting for the services of a[n] *** assistant public defender, is liable for any damages in tort, contract, or otherwise, in which the plaintiff seeks damages by reason of *legal or professional malpractice*, except for willful and wanton misconduct." (Emphasis Added.) 745 ILCS 19/5 (West 2010). A plain reading of section 5 of the Act, as applied to plaintiff's complaint, shows that claims for legal malpractice are barred by section 5 of the Act.

¶ 24 The facts alleged in plaintiff's complaint also do not establish defendants committed willful and wanton misconduct. Our supreme court has defined willful and wanton conduct "as a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows an utter indifference to or conscious disregard for a person's own safety or the safety or property of others." *Pfister*, 167 Ill. 2d at 421. Plaintiff neither alleged any

intentional willful and wanton misconduct by defendants nor did he allege facts which show "an utter indifference to or conscious disregard for a person's own safety or the safety or property of others." *Id.* What plaintiff did allege, is that defendants were negligent, *i.e.* that they had various duties they owed him, they breached those duties, and that the breach of those duties proximately caused his injuries. After reviewing plaintiff's complaint, we cannot say that plaintiff alleged any willful or wanton misconduct by defendants. A plain reading of the language of section 5 of the Act shows that section 5 applies to claims of negligence such as plaintiff's claim in this case. 745 ILCS 19/5 (West 2010). Accordingly, plaintiff's complaint is barred by section 5 of the Act.

¶ 25 Additionally, plaintiff's allegations are conclusory. See *American National Bank & Trust Co.*, 192 Ill. 2d at 285 ("It is the plaintiff's duty to sufficiently allege conduct that falls within the scope of a recognized cause of action. Moreover, mere conclusory allegations are not sufficient."). The only attachment to plaintiff's complaint was an affidavit from his attorney in which his attorney attested to the amount of damages sought. In his complaint, plaintiff makes several allegations as to what happened to him in custody, what he told L.C., what L.C. told him, holdings from our supreme court, and the decisions that this court and the circuit court made during his postconviction proceedings. However, notably absent are any attachments supporting these allegations. Plaintiff did not include any relevant affidavits, such as one from himself, attesting to the facts in his complaint. Nor did he include any of the orders or opinions from this court or the circuit court establishing what happened during his postconviction proceedings. He supplied the name of a case decided by our supreme court, but he did not include a copy of our

supreme court's opinion or even a citation to the case. Accordingly, plaintiff did not sufficiently allege that defendants committed willful and wanton misconduct.

¶ 26 We note that the circuit court found plaintiff's claim was barred by section 13-214.3(c) of the Code (735 ILCS 5/13-214.3(c) (West 2010)) and did not address whether section 5 of the Act 745 ILCS 19/5 (West 2010)) barred plaintiff's claim. Before this court, plaintiff raised several issues regarding the circuit court's application of the statute of repose found in section 13-214.3(c) of the Code, including that applying the statute of repose to him violates his right to due process under the First and Fourteenth Amendments to the United State's Constitution and the Illinois Constitution. In response, defendants argue that the statute of repose is constitutional as applied to plaintiff because it bears a rational relationship to a legitimate state goal. Although the circuit court found Harris' claim was barred by the statute of repose of section 13-214.3(c) of the Code (735 ILCS 5/13-214.3(c) (West 2010)), we do not need to address plaintiff's arguments concerning it because our review of the circuit court's decision granting a motion to dismiss brought pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)) is *de novo*. *Czarobski*, 227 Ill. 2d at 369. Therefore, we do not defer to the circuit court's reasoning. *Nationwide Advantage Mortgage Co. v. Ortiz*, 2012 IL App (1st) 112755, ¶20. Our decision not to address the statute of repose found in section 13-214.3(c) of the Code (735 ILCS 5/13-214.3(c) (West 2010)) is consistent with the policy "that courts should avoid constitutional questions when a case can be decided on other grounds." *Innovative Modular Solutions v. Hazel Crest School District 152.5*, 2012 IL 112052, ¶ 38. Accordingly, we do not need to address, nor do we express any opinion on, plaintiff's arguments concerning the circuit court's application of the

statute of repose found in section 13-214.3(c) of the Code. 735 ILCS 5/13-214.3(c) (West 2010).

¶ 27 We also note that according to plaintiff's complaint, this court held that there was insufficient evidence to convict him of aggravated criminal sexual assault because the State did not have any evidence of penetration. As stated *supra*, defendant did not attach to his complaint, nor did he cite any of the decisions issued by this court addressing his postconviction petition, leading us to conclude that plaintiff's allegations are conclusory and lacked supporting documentation. He named our supreme court's decision in *People v. Maggette*, but he did not provide a citation.[7] Through our own research, we have found two of plaintiff's appeals: a 2006 order from this court reversing the summary dismissal of his postconviction petition (*People v. Harris*, No. 1-05-2920 (2006) (unpublished order under Supreme Court Rule 23)) and a 2010 order from this court reversing the order of the circuit court denying his postconviction petition after an evidentiary hearing (*People v. Harris*, No. 1-08-3656 (2010) (unpublished order under Supreme Court Rule 23)). We do not know, however, the ultimate disposition of plaintiff's criminal proceedings. His complaint only alleges that "[o]n June 24, 2010, the Circuit Court of Cook County entered an order vacating [his] guilty plea and conviction." Plaintiff did not state what happened after his plea was vacated.

¶ 28 According to this court's 2006 order, "[d]uring the plea proceedings, the State represented that it had evidence to prove that defendant rubbed the vaginas of the victims, three-year-old N.H., and five-year-old S.H., and that N.H. sustained a small hemorrhage to the opening of her vagina." No. 1-05-2920, at 4. Further, this court's order stated "the parties stipulated that

[7] *People v. Maggette*, 195 Ill. 2d 336 (2001).

defendant rubbed the victim's vagina's with his hand." *Id.* at 5. This court held that "defendant's hand does not constitute an 'object' such that mere contact would suffice to establish penetration." *Id*; citing *Maggette*, 195 Ill. 2d at 350. Under *Maggette*, this court held, "evidence of an intrusion by defendant's hand into the vaginas of the victims was necessary to prove the element of penetration." *Id*; citing *Maggette*, 195 Ill. 2d at 352. According to these facts, defendant would not be guilty of aggravated criminal sexual assault, but could still be found guilty of aggravated criminal sexual abuse, a class 2 felony. See *People v. Lara*, 2012 IL 112370, ¶20 (noting "the element of penetration is the only factor distinguishing [predatory criminal sexual assault] from [aggravated criminal sexual abuse]."); 720 ILCS 5/12-16(c)(2)(I) (West 2002) ("The accused commits aggravated criminal sexual abuse if: *** the accused was under 17 years of age and *** commits an act of sexual conduct with a victim who was under 9 years of age when the act was committed."); 720 ILCS 5/12-16(g) (West 2002) ("Aggravated criminal sexual abuse is a Class 2 felony."). This lends further support to our conclusion that plaintiff did not allege sufficient facts to show defendants acted willfully or wantonly.

¶ 29 CONCLUSION

¶ 30 The judgment of the circuit court is affirmed.

¶ 31 Affirmed.

¶ 32 JUSTICE CONNORS, specially concurring.

¶ 33 I fully agree with the majority that the Public and Appellate Defender Immunity Act applies to plaintiff's malpractice action against the defendants. I write separately only to highlight two points that in my opinion deserve special attention from other courts and practitioners who may face similar issues in the future.

¶ 34 The first point relates to the proper analysis for motions to dismiss that are based on statutory immunities. As the majority notes, affirmative defenses are generally raised in a motion to dismiss under section 2-619(a)(9) because they "avoid[] the legal effect of or defeat[] the claim." 735 ILCS 5/2-619(a)(9) (West 2010). Such a motion concedes the legal sufficiency of the complaint and, as with any other section 2-619 motion, the question for us is simply "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

¶ 35 But when the affirmative defense raised is a statutory immunity like the one at issue in this case, the analysis is slightly different, as Justice Freeman explained in his special concurrence to *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 331-32 (Freeman, J., concurring):

> " Governmental tort immunity has been recognized to be 'affirmative matter' upon which a section 2-619(a)(9) motion may be grounded. [Citation.] But a section 2-619 motion is a fact, not a pleading, motion [citation], despite occasional suggestion to the contrary [citation]. Though appropriate when an immunity defense calls for facts to show that

> conduct was within the scope of governmental authority, the motion's use to assert the mere 'fact' of governmental status, as [the defendants] did, is problematic. The main reason is that such use undermines operation of the burdens that section 2-619(a)(9) normally imposes [citation].
>
> It is possible, though tortured, to say that [defendants'] burden under the motion--raising the issue of governmentalness--was satisfied without need for affidavit or other proof, [plaintiff] having alleged it in her complaint. [Citation.] But it makes no sense to speak of what would be [plaintiff's] resulting burden to satisfy to avoid dismissal. Calloway could not have presented 'proof denying the facts alleged or establishing facts obviating the grounds of defect.' (See 735 ILCS 5/2- 619(c) (West 1992).) The motion raised but a legal challenge to negate liability, grounds better suited to a section 2-615 pleading-based motion."

See also *Moran v. City of Chicago*, 286 Ill. App. 3d 746, 750 (1997) ("While statutory immunity is affirmative matter that can be raised in a section 2-619 motion, it is better suited as support for a section 2-615 pleading-based motion that challenges the legal sufficiency of the plaintiff's complaint.").

¶ 36 The reason that I bring this up is that whether a motion to dismiss is considered under section 2-619 or section 2-615 has a direct bearing on whether the complaint should be dismissed with or without prejudice if the motion is granted. Unlike dismissal under section 2-619, which operates and is reviewed much like summary judgment (see *Kedzie & 103rd Currency Exch. v.*

Hodge, 156 Ill. 2d 112, 116 (1993)), a complaint should be dismissed under section 2-615 only if "it is clearly apparent that no set of facts can be proved that would entitle a plaintiff to recover." *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47. Even then, "leave to amend should generally be granted unless it is apparent that even after the amendment no cause of action can be stated." *City of Elgin v. County of Cook*, 169 Ill. 2d 53, 71 (1995).

¶ 37 The circuit court dismissed the complaint on the basis of the statute of repose, but we have elected to affirm dismissal on the alternate basis of the immunity conferred by the Public and State Appellate Defender Immunity Act. That course of action is fairly common and is in line with accepted jurisprudence (see, *e.g.*, *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 48 ("[A]n appellate court may affirm a trial court's judgment on any grounds which the record supports [citation], even where those grounds were not argued by the parties.")). Yet because the circuit court never reached the immunity issue, plaintiff was never afforded (or even had the chance to ask for) the opportunity to amend his complaint in order to include facts that might bring his malpractice claim within the willful-and-wanton exception to the Act's immunity. And now in his brief on appeal, plaintiff specifically asked that if we affirmed on the basis of immunity under the Act, which we have chosen to do, then we at least remand the case to the circuit court in order to allow plaintiff to amend his complaint and correct the deficiencies that we have identified.

¶ 38 Based on the allegations in the complaint as it currently stands, I doubt that plaintiff would actually be able to allege any new facts that might support the willful-and-wanton exception, but I am equally uncomfortable with denying plaintiff at least the opportunity to try.

After all, one of the key factors in whether leave to amend should be granted is "whether previous opportunities to amend the pleading can be identified." *City of Elgin*, 169 Ill. 2d at 71. If immunity under the Act were the sole available basis for affirming the dismissal of the complaint, then I would hesitate to agree with my colleagues about not remanding this case to the circuit court with instructions to allow an amended complaint. That remedy is within our authority (see Illinois Supreme Court Rule 366(a)(1), (a)(6) (eff. Feb. 1, 1994)), and would be just under the circumstances.

¶ 39 But there is at least one other basis for affirmance in this case that does not require remand, which brings me to my second point. The circuit court dismissed the complaint because the statute of repose on plaintiff's malpractice action had run, even though he had filed his complaint within the applicable statute of limitations. This unusual situation occurred because the statute of limitations on a particular cause of action begins running when the cause of action accrues, which in the context of a legal malpractice claim occurs when "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 2010). In contrast, the statute of repose begins running when some particular event happens, which in malpractice cases is when the allegedly negligent act occurs. See 735 ILCS 5/13-214.3(c) (West 2010); see also *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10 (2012) ("The purpose of a statute of repose *** operates to curtail the 'long tail' of liability that may result from the discovery rule [of the statute of limitations.] *** Thus, a statute of repose is not tied to the existence of any injury, but rather it extinguishes liability after a fixed period of time.").

¶ 40 There are therefore two important dates that must be identified when considering cases like the one here: the date that the cause of action accrued under the statute of limitations and the date that the negligent act occurred under the statute of repose. In this case, the parties agreed that the statute of repose began running either when plaintiff pled guilty pursuant to his attorney's allegedly negligent advice on May 10, 2002, or, at the latest, when he turned 18 on February 27, 2004. (The later date, of course, assumes that the minority-tolling provision of section 13-214.3(e) (735 ILCS 5/13-214.3(e) (West 2010)) applies to both the statute of limitations and the statute of repose.) This means that the six-year statute of repose for malpractice actions ended at the latest in February 2010, but plaintiff did not file his lawsuit until 2011, which is why the circuit court found that the action was barred by the statute of repose.

¶ 41 But plaintiff could not file his complaint earlier because of a legal quirk in malpractice actions that are premised on criminal cases. Illinois follows the "exoneration first" rule, under which "a plaintiff must prove his innocence before he may recover for his criminal defense attorney's malpractice. [Citation.] While a legal malpractice plaintiff must prove his innocence, he is collaterally estopped from arguing facts established and issues decided in a criminal proceeding." *Griffin v. Goldenhersh*, 323 Ill. App. 3d 398, 405 (2001). Although the rule refers to "innocence," as a matter of practice criminal defendants may usually file a malpractice action as soon as their conviction is overturned and the case dismissed. See, *e.g.*, *Johnson v. Halloran*, 312 Ill. App. 3d 695, 700 (2000) ("Plaintiff's cause of action accrued *** when his criminal conviction was overturned. It was at this point that all of the elements of plaintiff's cause of action were present."). But see *Herrera-Corral v. Hyman*, 408 Ill. App. 3d 672 (2011) (no cause

of action where indictment was dismissed following a successful *habeas corpus* petition.)

¶ 42 In this case, plaintiff contended that his cause of action accrued on June 24, 2010, when the circuit court vacated his guilty plea and conviction pursuant to the appellate court's mandate. But that is several months *after* the statute of repose ran, so plaintiff is in the unenviable position of possessing a cause of action that did not accrue until after he was legally barred from pursuing it. That is not particularly fair to plaintiff (but also not without precedent, see *Snyder*, 2011 IL 111052), so most of the parties' briefs on appeal deal with the question of whether the principles of equitable tolling should be invoked in this case and, if not, whether that is an unconstitutional result.

¶ 43 But what neither party has addressed (nor even mentioned) is the fact that plaintiff's cause of action never actually accrued in the first place. As it turns out, even though plaintiff's guilty plea and criminal conviction were vacated in 2010, the case itself was never dismissed. We may take judicial notice of public records of the circuit court (see *Metropolitan Life Insurance Co. v. American National Bank & Trust*, 288 Ill. App. 3d 760, 764 (1997)), and according to the records of the clerk of the circuit court the criminal case against plaintiff is still pending. See also *Khan v. Deutsche Bank AG*, 2012 IL 112219, ¶ 47 (in reviewing the legal sufficiency of a cause of action, a reviewing court may consider facts that are subject to judicial notice in addition to the allegations of the complaint). As with any other malpractice action, "[n]o cause of action accrues without actual damages, and damages are only speculative if their existence itself is uncertain." *Romano v. Morrisroe*, 326 Ill. App. 3d 26, 28 (2001). At this point in time, the viability of plaintiff's cause of action is uncertain because he could still be convicted

in the underlying criminal case, in which case he may or may not have any damages from defendants' alleged malpractice depending on the length of any sentence that might be imposed. This uncertainty about damages, in fact, is the point of the exoneration-first principle and is why "a cause of action for legal malpractice will rarely accrue prior to the entry of an adverse judgment, settlement, or dismissal of the underlying action in which plaintiff has become entangled due to the purportedly negligent advice of his attorney." See *Lucey v. Law Offices of Pretzel & Stouffer*, 301 Ill. App. 3d 349, 356 (1998). Although plaintiff's conviction was vacated he has not yet been exonerated, and without exoneration there can be no damages and therefore no cause of action for malpractice.

¶ 44 So regardless of whether defendants are immune from suit under the Act, this case must still be dismissed because any cause of action for malpractice that plaintiff might potentially have has not yet accrued, and his complaint in this case was therefore premature.