2014 IL App (2d) 130915-U
No. 2-13-0915
Order filed May 12, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PETER CANGELOSI, III,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-L-296
	)	
LAW OFFICES OF JOHN PANKAU, P.C.	)	
And JOHN PANKAU,	)	Honorable
	)	John T. Elsner,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in ruling that plaintiff's legal malpractice action was time-barred under the repose provision of subsection 13-214.3(d) of the Code. Therefore, we affirmed the trial court's grant of defendants' motion for summary judgment.

¶ 2 Plaintiff, Peter Cangelosi III, brought suit against defendants, the Law Office of John Pankau, P.C., and attorney John Pankau, alleging professional negligence in their drafting of estate planning documents for plaintiff's grandmother, Elena Epifanio. The trial court granted defendants' motion for summary judgment, ruling that the claims were time-barred under section

13-214.3 of the Code of Civil Procedure (Code) (735 ILCS 5/13-214.3 (West 1994)).[1] We affirm the trial court's grant of defendants' motion for summary judgment.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff filed his action against defendants on March 18, 2011. He filed a second amended complaint on December 14, 2011, which we summarize below.

¶ 5 A. Allegations of Second Amended Complaint

¶ 6 Claudia "Gigi" Gruber was appointed the plenary guardian of Epifanio and her estate because Epifanio had a physical disability. Defendants prepared an estate plan for Epifanio, which included a declaration of trust and a will, after duly ascertaining that Epifanio wished to have all of the estate's proceeds distributed to plaintiff upon her death, without her other grandson, Michael Cangelosi (Cangelosi) (plaintiff's brother), receiving anything. Defendants accordingly prepared documents that named plaintiff the sole beneficiary. On December 1, 2006, at defendants' direction, Gruber signed the will and declaration of trust for Epifanio. However, neither at that time nor any time thereafter did Gruber have court authorization to sign those documents.

¶ 7 Epifanio died on March 20, 2007, without signing the estate documents herself. At all relevant times, the Probate Act of 1975 (Probate Act) (755 ILCS 5/1-1 *et seq.* (West 2006))

[1] Public Act 89-7 (referred to as the Tort Reform Act) (eff. March 9, 1995) removed subsection (d) from section 13-214.3 while leaving the remainder of the statute in place. *Perlstein v. Wolk*, 218 Ill. 2d 448, 450-51 (2006). However, in *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 467 (1997), the supreme court declared Public Act 89-7 void in its entirety. Therefore, the 1994 version of the statute, which contains subsection (d), remains in effect. See *Perlstein*, 218 Ill. 2d at 451-52.

provided that upon petition of a guardian, the court could authorize the guardian to exercise power over the ward's estate and business affairs, including application of funds not necessary for the ward's current and future maintenance, in a manner approved by the court as consistent with the ward's wishes, as far as they could be ascertained. 755 ILCS 5/11a-18(a-5) (West 2006). The Probate Act also provided that the office of a representative of a ward terminates when the ward dies (755 ILCS 5/24-12 (West 2006)), and that "[w]ithout order of appointment and until the issuance of letters testamentary or of administration or until sooner discharged by the court, a representative of the estate of a deceased ward has the powers and duties of an administrator to collect" (755 ILCS 5/24-19 (West 2006)). Defendants knew or should have known of these statutes and that the will and declaration of trust which they prepared could have no legal effect unless they were signed by Epifanio or signed by Gruber after Gruber received judicial authorization to do so.

¶ 8 At all relevant times, defendants owed a duty to plaintiff, as the sole beneficiary of the estate, to exercise reasonable professional care in preparing the estate documents and having them properly signed. Defendants breached their duty to him by carelessly and negligently: failing to have Epifanio sign the will and trust before she died; failing to obtain judicial authorization for Gruber to sign the documents before Epifanio died; directing Gruber to sign the documents without court authorization; failing to inform Gruber that she needed prior legal authorization before signing; and failing to inform her that if she signed the documents without the required authorization, the will and/or trust may be legally invalid. As a direct and proximate result, Epifanio's wish that plaintiff be the sole beneficiary of her trust could not be effectuated, and plaintiff did not receive large sums of money and valuable assets.

¶ 9 On June 14, 2007, defendants filed a petition for approval and funding of the estate and for approval of the trust declaration signed by Gruber. The petition stated that Epifanio's estate was worth over $600,000. Defendants knew or should have known that there was no legal basis for the petition and that it should have been denied because under the Probate Act: Gruber could not sign the will or trust without prior court authorization; the court could not validly authorize Gruber's signing of the documents after Epifanio died; and Gruber's powers as guardian statutorily terminated upon Epifanio's death, except as to an administrator's powers to collect. Defendants never informed Gruber or plaintiff of these facts. Still, defendants succeeded in obtaining approval of their petition by court order dated July 24, 2007, which meant that no cause of action for legal malpractice arising from the invalidity of the will and trust could accrue until the court order was vacated or otherwise overturned.

¶ 10 The 2007 order was declared void by court order dated April 6, 2009. Defendants continued representing the Epifanio estate and/or Gruber until on or after that date, and they continued to assert the validity of the will and trust and their 2007 petition. This assertion misrepresented to plaintiff that the will and trust were valid and effective, and plaintiff reasonably relied on these representations. Until the court's April 2009 order, plaintiff neither knew, nor should have known, that the will and trust were invalid. Further, defendants' aforementioned actions subsequent to Epifanio's death, considered in conjunction with the July 2007 court order, fraudulently concealed the effect of defendants' failure to have the documents signed and should estop and bar them from having the case dismissed based on the statute of repose.

¶ 11 B. Proceedings in the Trial Court

¶ 12 Defendants filed a motion to dismiss the second amended complaint on January 12, 2012, pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). Defendants argued that the claim was time-barred by the repose provision of section 13-214.3(d) of the Code (735 ILCS 5/13-214.3 (West 1994)), which relates to attorney malpractice actions, and that plaintiff's allegations of fraudulent concealment and estoppel did not toll the applicable limitations period. The trial court denied the motion to dismiss on March 1, 2012.

¶ 13 On February 14, 2013, plaintiff moved for partial summary judgment as to defendants' underlying liability, excluding the issues of defendants' affirmative defenses and damages.

¶ 14 1. Defendants' Motion for Summary Judgment

¶ 15 The next day, defendants filed a motion for summary judgment. They argued that plaintiff's professional negligence claim was untimely under section 13-214.3(d); that they did not fraudulently conceal plaintiff's cause of action so as to toll the applicable limitations period; and that even if they had fraudulently concealed the claim, it was still barred because plaintiff knew or should have known of his cause of action within the limitations period of section 13-214.3(d) but failed to timely file the lawsuit. Last, defendants argued that the doctrine of equitable estoppel did not apply to plaintiff's claim.

¶ 16 Defendants attached various documents to their motion for summary judgment that indicated the following. On June 14, 2007, after Epifanio's death, defendants filed a petition for approval and funding of the estate and for approval of the Epifanio declaration of trust signed by Gruber in December 2006. Pankau stated in open court that he had prepared the estate documents and had Gruber sign them before Epifanio's death, but they had not obtained court approval before then. The trial court entered an order on July 24, 2007, approving Epifanio's will and trust dated December 1, 2006; authorizing Gruber to collect and fund the trust with

guardianship assets; and authorizing Gruber to independently administer the Epifanio trust. Plaintiff first learned that he was the sole beneficiary of Epifanio's estate at a funeral luncheon on March 20, 2007, and he became aware of the trial court's approval of defendants' estate plan for Epifanio in July 2007, shortly after the trial court's order was entered.

¶ 17 A man named Michael Happold, who had been a financial advisor to and an alleged friend of Epifanio, subsequently petitioned to have a copy of Epifanio's will dated July 3, 2000, admitted to probate; the trial court granted the petition on January 11, 2008. The trial court appointed Happold executor of the estate and ordered letters of office to issue. The July 2000 will left Epifanio's entire estate to Happold.

¶ 18 On January 16, 2008, plaintiff met with Pankau and Gruber to discuss Happold's claim regarding the July 2000 will. According to plaintiff, Pankau advised him that the July 2000 will was a photocopy that would not hold up in court and that the will and trust Pankau prepared superseded it. Plaintiff understood that Happold was challenging plaintiff's claim to be the sole heir of Epifanio's estate. Pankau said that he could not represent plaintiff because he was representing Gruber as trustee, and he advised plaintiff to retain counsel. Pankau referred plaintiff to attorney Bruce Garner, who worked at a litigation firm in the same building. On June 12, 2008, Garner entered an appearance on plaintiff's behalf in the probate action commenced by Happold. After plaintiff retained Garner, he had no further contact with Pankau concerning Epifanio's estate.

¶ 19 On July 7, 2008, plaintiff filed a petition (through Garner) to contest the July 2000 will. He asserted theories of revocation, presumed revocation, and undue influence. On October 6, 2008, Cangelosi, plaintiff's brother, filed a petition for relief from a final judgment in the consolidated probate proceedings seeking to vacate the July 2007 order approving the estate

documents signed by Gruber. Cangelosi argued that Epifanio's death removed Gruber's power as guardian to seek approval of the new estate plan and removed the court's subject matter jurisdiction to approve the plan. On April 6, 2009, the trial court declared void for lack of subject matter jurisdiction the portion of the July 2007 order approving the estate plan of December 1, 2006.

¶ 20 On June 4, 2009, plaintiff petitioned to vacate the order admitting the copy of the July 2000 will to probate on the basis that Happold failed to comply with statutory notice requirements. The trial court granted the petition on July 16, 2009, vacating the order admitting the copy of the July 2000 will to probate, removing Happold as executor of the estate, and revoking Happold's letters of office.

¶ 21 On September 14, 2009, Happold petitioned to admit to probate a different copy of a will signed by Epifanio. The will was dated November 28, 2000, and left all of Epifanio's assets to Happold, with his wife as successor beneficiary. On September 22, 2009, plaintiff filed a petition (through Garner) contesting the November 2000 will. Plaintiff alleged theories of presumed revocation of the will and undue influence. Plaintiff requested that the estate be distributed according to rules of intestate succession, which would have left plaintiff and Cangelosi as beneficiaries. Following a bench trial, on May 1, 2010, the trial court concluded that the evidence clearly and conclusively showed that the November 2000 will should be admitted to probate. As a result, plaintiff did not receive any assets from the estate.

¶ 22 Plaintiff filed the instant legal malpractice action on March 18, 2011.

¶ 23 2. Trial Court's Rulings

¶ 24 The trial court granted defendants' motion for summary judgment on April 4, 2013. The trial court stated that plaintiff's legal malpractice claim was untimely under subsection 13-

214(d)'s two-year repose period. The trial court stated that even applying equitable reasons for extending the repose period, plaintiff was put on notice to investigate Pankau's conduct in June 2008, when Garner entered an appearance on plaintiff's behalf in Happold's case, meaning that the time for filing would have expired in June 2010. The trial court stated that even if the statute of repose did not apply, the two-year limitation period under subsection 13-214.3(b) (735 ILCS 5/13-214.3 (West 1994)) had run because, again, plaintiff was put on notice to investigate Pankau's conduct in June 2008. The trial court also ruled that based on the grant of summary judgment for defendants, plaintiff's motion for partial summary judgment was moot.

¶ 25 Plaintiff subsequently filed a motion to reconsider, which the trial court denied on August 14, 2013. The trial court stated as follows. Both parties agreed that in a will contest, an injury occurs on the date of the decedent's death, which here was March 20, 2007. The "Statute of Limitations" started on that date but was tolled until plaintiff reasonably should have known of the injury for which damages were sought. Plaintiff reasonably should have known of his injury in June 2008 because at that time he knew of the decedent's March 2007 death; he knew there was never leave granted for the guardian to sign a new will prior to that date; and he knew that there was no guardianship after Epifanio's death. "Therefore, he knew that there was no Will prior to that date and there could be no new will after that date." Plaintiff's case was based upon Pankau failing to inform the guardian that she needed court approval while the decedent was alive, but Pankau never had a relationship with plaintiff and took no action after 2007. Further, plaintiff's argument that Pankau concealed his negligence merely by being in the same building as plaintiff's lawyer was without merit. Given that the two-year limitations period began in 2008, plaintiff's 2011 action was untimely.

¶ 26 Plaintiff timely appealed.

¶ 27 II. ANALYSIS

¶ 28 On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary judgment. Summary judgment is appropriate only where the pleadings, depositions, admissions, and affidavits on file, when viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Lazenby v. Mark's Construction, Inc.*, 236 Ill. 2d 83, 93 (2010). We review *de novo* a grant of summary judgment. *Metropolitan Life Insurance Co. v. Hamer*, 2013 IL 114234, ¶ 17.

¶ 29 At issue in this case are the limitations periods contained in section 13-214.3 of the Code. That section states, in relevant part:

> "(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.
>
> (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 unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting 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 (West 1994).

¶ 30 Subsection 13-214(b) is a statute of limitations incorporating the "discovery rule," which tolls the limitations period to the time the plaintiff knew or reasonably should have known of the injury. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 10. Subsection 13-214(b) provides a two-year limitations period. 735 ILCS 5/13-214.3(b) (West 1994). At the same time, subsection 13-214.3(c) is a statute of repose that serves to curtail the "long tail" of liability that could otherwise result from the discovery rule. *Snyder*, 2011 IL 111052, ¶ 10. A statute of repose begins to run when an event occurs. *Id.* It is not tied to the existence of an injury but rather extinguishes liability after a fixed period of time. *Id.* Section 13-214.3(c) provides a six-year statute of repose. 735 ILCS 5/13-214.3(b) (West 1994).

¶ 31 Subsection 13-214.3(d) contains an exception to subsections (b) and (c). *DeLuna v. Burciaga*, 223 Ill. 2d 49, 74 (2006). Subsection 13-214.3(d) provides distinct repose periods that apply when the injury caused by the malpractice does not occur until the client's death. 735 ILCS 5/13-214.3(d) (West 1994); *Wackrow v. Niemi*, 231 Ill. 2d 418, 424 (2008). Under subsection 13-214.3(d), if letters of office are issued or the decedent's will is admitted to probate within two years of the decedent's death, the action must be brought within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act (755 ILCS 5/8-3(a) (West 2006). 735 ILCS 5/13-214.3(d) (West 1994). In contrast, if no letters of office are issued and no will is admitted to probate during the relevant period, the action must be filed within two years of the death of the person to whom the professional services were rendered. *Id.*

¶ 32 We begin with the potential applicability of subsection 13-214.3(d). The initial question is whether Epifanio's will was admitted to probate within two years after her death, because if

so, it would affect the length of the repose period. See 735 ILCS 5/13-214.3(d) (West 1994). We note that a copy of a will signed by Epifanio on July 3, 2000, was admitted to probate on January 11, 2008, pursuant to Happold's petition. However, the probate court subsequently vacated that order on July 16, 2009. A few months later, on September 14, 2009, Happold petitioned to admit a will signed by Epifanio on November 28, 2000, to probate, which the trial court ultimately granted on May 21, 2010. Therefore, no letters of office were issued and no will was admitted to probate within two years of Epifanio's March 20, 2007, death. So, if plaintiff's injury did not occur until Epifanio's death, he would have two years, until March 20, 2009, to commence his action.

¶ 33 Plaintiff argues that he was not injured and his cause of action did not accrue until April 6, 2009, when the trial court ruled that the July 24, 2007, order was void. Plaintiff cites various cases for the proposition that a malpractice action cannot be brought when there is still uncertainty about whether the plaintiff has been damaged. Plaintiff maintains that defendants created the situation of having his legal malpractice claim dependent on the validity of the July 2007 court order by bringing the petition leading to the order, despite the petition's lack of merit and the trial court's lack of jurisdiction to enter such approvals. Plaintiff contends that defendants thereby protected themselves by putting him in a position where the July 2007 order had to be litigated before his cause of action could accrue against defendants. Plaintiff maintains that, before the order was vacated on March 20, 2009, he could not be expected to know that the order was invalid and lacked subject matter jurisdiction. Plaintiff maintains that as a lay person, ordinary diligence would not have allowed him to understand that the probate statutory scheme deprived the court of jurisdiction to retroactively authorize Gruber's signing of the estate documents after Epifanio died.

¶ 34 Defendants argue that plaintiff's injury could not have occurred until Epifanio's death, and therefore subsection 13-214.3(d) governs plaintiff's claim, because the basis of plaintiff's legal malpractice claim is that he did not inherit the assets of Epifanio's estate following her death due to defendants' alleged negligence in preparing the estate plan. Defendants point out that a statute of repose terminates the possibility of liability after a defined time period, regardless of a potential plaintiff's knowledge of his cause of action.

¶ 35 Defendants further argue that the trial court's judgment comports with governing precedent, citing *Wackrow* and *Poulette v. Silverstein*, 328 Ill. App. 3d 791 (2002). In *Wackrow*, the plaintiff alleged that in April 2002, the defendant attorney prepared an amendment to the living trust of the plaintiff's brother, James Woods. The amendment provided that the plaintiff would get Woods's house or $300,000 from his estate. Woods died in August 2002. *Wackrow*, 231 Ill. 2d at 420. The estate would not turn over the property or money, and the probate court denied the plaintiff's claim against the estate. *Id.* at 421. In December 2004, the plaintiff filed her malpractice action against the defendant, alleging that he failed to exercise reasonable care in drafting the trust amendment, because a title search would have revealed that a trust, rather than Woods individually, actually owned the property. *Id.* The trial court granted the defendant's motion to dismiss the action under subsection 13-214.3(d). *Id.*

¶ 36 The supreme court agreed with the application of subsection 13-214.3(d). It stated that, pursuant to the statute and *Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002), it needed to determine whether the injury caused by the malpractice occurred upon the death of Woods, the client. *Id.* at 424. The supreme court stated that, under the plaintiff's allegations:

> "it is clear that the injury in this case did not occur until the death of Woods. Plaintiff alleges legal malpractice in the drafting of the amendment to Woods' trust. Because

> Woods could have revoked that amendment or changed the beneficiary prior to his death, the injury did not occur until Woods' death. Consequently, section 13-214.3(d) applies to plaintiff's claim." *Id.* at 425.

The court rejected the plaintiff's argument that the defendant's services were also rendered to her, as a third-party beneficiary of the contract, and that section 13-214.3(d) did not apply because she was still alive. *Id.* As particularly relevant here, the supreme court also rejected the plaintiff's claim that the injury occurred when Woods's estate denied her claim.

¶ 37 In *Poulette*, the plaintiff alleged that the decedent retained the attorney defendant to prepare a will and trust. *Poulette*, 328 Ill. App. 3d at 793. Under the trust's terms, the plaintiff was to receive the remaining trust assets after certain distributions of cash and personal property. *Id.* However, the trust was insufficiently funded and the defendant allegedly failed to advise the decedent on the effect of not transferring assets from an earlier trust and failed to assist in transferring those assets. *Id.* at 794. As a result, the plaintiff did not receive the residue of the earlier trust. She filed a complaint for reformation of the trust and subsequently filed a legal malpractice action against the defendant. *Id.*

¶ 38 The defendant moved to dismiss based on subsection 13-214.3(d), arguing that the plaintiff was required to file her action within six months after the decedent's will was admitted to probate. *Id.* The plaintiff responded that her cause of action did not commence until after that time, when her complaint for reformation was resolved. *Id.* The appellate court affirmed the trial court's grant of the motion to dismiss, agreeing that subsection 13-214.3(d) applied. In doing so, it stated that in enacting a repose provision like subsection 13-214.3(d), the legislature intended to terminate the possibility of liability after a defined period of time, regardless of

whether a plaintiff's cause of action has accrued, even though the effect in some situations may be to bar an action before it is discovered. *Id.* at 796.

¶ 39 We agree with defendants that subsection (d) applies here. The relevant inquiry under subsection (d) is whether the injury caused by the malpractice did not occur until the client's death. *Wackrow*, 231 Ill. 2d at 420. Under *Wackrow*, plaintiff's injury did not occur until Epifanio's death because before that time, Gruber could have obtained court authorization to sign the estate planning documents, Epifanio could have signed them herself, or Epifanio could have changed the beneficiary of her estate. See *Wackrow*, 231 Ill. 2d at 425. In other words, until Epifanio died, plaintiff could not have been injured. Rather, the injury occurred upon Epifanio's death, when plaintiff could not legally receive the inheritance Epifanio allegedly wanted him to have due to defendants' alleged failures to ensure that the estate planning documents were properly executed. Although plaintiff emphasizes that he could not have brought this cause of action until the July 2007 court order was vacated, as defendants point out, a repose provision terminates after a defined period, regardless of a plaintiff's knowledge of his injury (*id.* at 426) and regardless of whether the cause of action has accrued (*Poulette*, 328 Ill. App. 3d at 796). The *Wackrow* court specifically acknowledged that subsection (d) could shorten the limitations period for legal malpractice claims such that a plaintiff's action could be barred before he or she learned of his or her injury. *Wackrow*, 231 Ill. 2d at 427; see also *Poulette*, 328 Ill. App. 3d at 796. Therefore, under a straight application of subsection (d), plaintiff's action had to be brought on or before March 20, 2009, the two-year anniversary of Epifanio's death, making this suit, filed in 2011, untimely.

¶ 40 Plaintiff argues that even if subsection (d) would otherwise apply, material questions of fact exist as to whether equitable estoppel and/or fraudulent concealment bar the application of

subsection (d). Looking first at the subject of fraudulent concealment, section 13-215 states: "If a person liable to an action fraudulently conceals the cause of action from the knowledge of the person entitled thereto, the action may be commenced at any time within 5 years after the person entitled to bring the same discovers that he or she has such a cause of action, and not afterwards." 735 ILCS 5/13-215 (West 2006). To succeed under this provision, a plaintiff must show that the defendant engaged in affirmative acts or representations so as to prevent the discovery of the cause of action or lead the plaintiff to delay filing a claim. *J.S. Reimer, Inc. v. Village of Orland Hills*, 2013 IL App (1st) 120106, ¶ 51. Fraudulent concealment as codified by section 13-215 is not a cause of action in and of itself but rather serves as an exception to the limitations periods for the underlying cause of action. *Wisniewski v. Diocese of Belleville*, 406 Ill. App. 3d 1119, 1154 (2011). In *DeLuna*, our supreme court held that section 13-215 was an exception to the statute of repose contained in subsection 13-214.3(c), stating, "It is our belief that the legislature originally intended that section 13-215 apply to both medical malpractice and legal malpractice limitation enactments." *DeLuna*, 223 Ill. 2d at 73-74. The *DeLuna* court also stated, "We see no reason why section 13-215 should not apply to statutes of repose." *Id.* at 72. Therefore, although *DeLuna*'s holding specifically relates to subsection 13-214.3(c), the court's broad language would also encompass section 13-215 applying as an exception to subsection 13-214.3(d).

¶ 41 Plaintiff notes that in *DeLuna*, the court stated that an attorney will owe a third party a fiduciary duty if a client hires the attorney specifically for the purpose of benefitting the third party. *Id.* at 78. Plaintiff argues that as the sole beneficiary of Epifanio's December 2006 estate plan, defendants owed him the same fiduciary duty as they did to Gruber and Epifanio.

¶ 42 Plaintiff also analogizes the facts in *DeLuna* to the circumstances in this case. In *DeLuna*, the plaintiffs alleged that their attorney: failed to inform them that he was intentionally filing the underlying medical malpractice action without the statutorily required affidavit in order to test the constitutionality of the statute; affirmatively misrepresented to them in the spring of 1992 that the case was going well, even though the trial court had dismissed the action in 1987 and the supreme court affirmed the dismissal in February 1992; and told them in the summer of 1997 that the case was going well and there was no need for more frequent contact about the case. *DeLuna*, 223 Ill. 2d at 79-80. The plaintiffs alleged that it was not until March 2000, when they received a letter from an attorney assisting with the appeal, that they learned that their attorney had used their action to test the constitutionality of a statute, that their medical malpractice action against the doctor was barred, and that they might have a legal malpractice action against their attorney. *Id.* at 80. The supreme court stated that as non-English speakers, the plaintiffs were less qualified than most other clients to conduct any of their own courthouse investigation, and they further had no reason to think such an investigation was necessary given the attorney's assurances and reassurances. *Id.* at 82.

¶ 43 Plaintiff argues that here, there are questions of material fact as to whether defendants fraudulently concealed their fatal failure to obtain court authorization for Gruber to sign Epifanio's estate documents before Epifanio died. Plaintiff argues that defendants further falsely assured him that the estate documents were valid and superseded any earlier will, and they concealed their error for more than two years by obtaining the invalid July 2007 court order. Plaintiff argues that in practical terms, if the order had not been contested, it would not have been overturned, the will and trust would still be deemed to be valid, and the proceeds would have been distributed to him.

¶ 44 Defendants respond that the uncontested facts eliminate that application of the fraudulent concealment exception. Defendants point out that in his deposition, plaintiff contended that the only misrepresentations defendants made to him between July 24, 2007, and April 6, 2009, occurred on January 16, 2008, when Pankau advised him that Happold would not succeed in establishing the validity of the copy of Epifanio's prior will, and that the will and trust that defendants prepared would trump Happold's copy. Defendants argue that Pankau's alleged statement accurately reflected the general rule that, if the original of a will is lost, the will is presumed revoked. See *In re Estate of Moos*, 414 Ill. 54, 57-58 (1953). They also argue that Pankau was ultimately correct that the July 2000 will would not be deemed valid, as the court later vacated the order admitting Happold's copy of that will to probate. Defendants further maintain that Pankau's statement cannot be construed as fraudulent concealment of a legal malpractice action because at the time of the January 2008 meeting, the probate court had deemed valid (through the July 24, 2007, court order) the Epifanio will and trust prepared by defendants. Defendants argue that they concealed nothing concerning the facts surrounding the execution of the will and trust or the status of the probate litigation, and Pankau emphasized that he could not represent plaintiff and urged him to seek counsel to protect his rights.

¶ 45 Defendants argue that even if plaintiff has raised a question of fact concerning the nature of Pankau's statements to plaintiff when they met in January 2008, subsection 13-214.3(d) still bars plaintiff's claim because he should have discovered the fraudulent concealment through ordinary diligence and a reasonable time remained in which plaintiff could have filed suit. Defendants cite *Barratt v. Goldberg*, 296 Ill. App. 3d 252 (1998). There, the plaintiff filed a legal malpractice action against the attorney and firm that had represented her in her marital dissolution action. *Id.* at 254. The trial court dismissed it as untimely under section 13-214.3,

rejecting the plaintiff's argument that the limitations period had been extended based on fraudulent concealment. *Id.* at 254. The appellate court affirmed, stating that the plaintiff discovered the alleged concealment and her cause of action when she sought the advice of a second attorney, and she still had ample time to file her complaint within the limitations period. *Id.* at 258-59. Here, defendants argue that as in *Barratt*, plaintiff retained his own attorney after the alleged concealment, in an action involving the validity of the estate planning documents, and still had a reasonable amount of time remaining in the limitations period to investigate the matter and file suit. Defendants further cite *Mauer v. Rubin*, 401 Ill. App. 3d 630, 649 (2010), where the court stated, "[W]here a plaintiff has been put on inquiry as to a defendant's fraudulent concealment within a reasonable time before the ending of the statute of repose, such that he should have discovered the fraud through ordinary diligence, he cannot later use fraudulent concealment as a shield in the event that he does not file suit within the statutory period."

¶ 46 We agree with defendants' argument that even if, *arguendo*, plaintiff raised a genuine issue of material fact regarding whether defendants fraudulently concealed his legal malpractice action, plaintiff's action would still be time-barred. Courts do not apply section 13-215 to toll the limitations period where the plaintiff either discovered the fraudulent concealment, or should have discovered the fraudulent concealment through ordinary diligence, and a reasonable time remains within the limitations period. *J.S. Reimer, Inc.*, 2013 IL App (1st) 120106, ¶ 51. Here, plaintiff testified in his deposition that he had no interaction with defendants about Epifanio's estate after June 2008. That same month, plaintiff had independent counsel representing him in Happold's action, with plaintiff's involvement directly implicating the validity of the will and trust prepared by defendants. In a petition to contest the will dated July 7, 2008, plaintiff admitted through his allegations that the December 2006 will and trust were not approved by the

court until after Epifanio's death. See *Kadlec v. Sumner*, 2013 IL App (1st) 122802, ¶ 30 (notice to and knowledge of attorney is imputed to client, regardless of whether the attorney actually communicates such information to the client). At that point, more than eight months remained in the repose period under subsection 13-214.3(d), which constitutes a reasonable time to investigate the issue and file suit. *Cf. Turner v. Nama*, 294 Ill. App. 3d 19, 28 (1997) (describing the "more than eight months" left in the repose period after the decedent should have discovered the fraudulent concealment as "ample time in which to exercise due diligence to file suit"); *Real v. Kim*, 112 Ill. App. 3d 427, 436 (1983) (10 months left in limitations period after the decedent knew or should have known of his possible cause of action was sufficient time in which to bring an action); *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1015 (1978) (eight months remaining after inducement for delay had passed was, as a matter of law, ample time to file suit); see also *Butler v. Mayer, Brown & Platt*, 301 Ill. App. 3d 919, 926 (1998) ("We have held that as little as six months remaining in a statute of limitations period is 'ample time' for a plaintiff to bring suit.").

¶ 47 Moreover, on October 8, 2008, Cangelosi filed a petition to vacate the July 2007 order on the basis that the trial court lacked the subject matter jurisdiction to approve the estate planning documents after Epifanio's death. Thus, at this point plaintiff, who had already secured legal representation for his claim of being the sole beneficiary of Epifanio's estate under the legal documents drafted by defendants, was directly faced with the allegations that underlie his legal malpractice action here, and he should have discovered any such fraudulent concealment through ordinary diligence at this time. Even if we measured the time remaining in the repose period from the date Cangelosi filed this petition (constituting over five months), we conclude that under the facts of this case, there is no genuine issue of material fact that a reasonable time remained within the limitations period, so section 13-215's fraudulent concealment exception

does not apply here. *Cf. Ennenga v. Starns*, 677 F.3d 766, 775 (7th Cir. 2012) (under Illinois law, where the plaintiff discovered the facts underlying his claim of fraudulent concealment with "almost" five months left in the limitations period, a reasonable time remained to comply with the statute of limitations); see also *Nickels v. Reid*, 277 Ill. App. 3d 849 (1996) (regardless of alleged misrepresentations to the plaintiff regarding the identity of the driver that struck his car, woman's answer in case denying that she was the driver was sufficient to put the plaintiff on notice that an inquiry into the driver's true identity was required, and the five months left in limitations period was enough time to determine the actual driver's identity).

¶ 48 Plaintiff argues that he should not have discovered defendants' negligence before the April 2009 ruling through ordinary diligence because Pankau had misrepresented that everything had been done properly, Garner gave plaintiff no reason to believe that Pankau had made a mistake, and the erroneous July 2007 court order gave plaintiff a good reason to believe that Pankau had done everything properly. Plaintiff cites *DeLuna* for the proposition that a client or intended beneficiary "is generally not qualified to monitor the technical aspects and consequences of the attorney's conduct." *DeLuna*, 223 Ill. 2d at 77.

¶ 49 We note that this case is readily distinguishable from *DeLuna* because there the attorney who had allegedly committed malpractice continued to represent and allegedly fraudulently concealed his actions from the plaintiffs, whereas here Pankau had told plaintiff to obtain new counsel, which plaintiff did. Moreover, the question is whether plaintiff should have discovered the fraudulent concealment through ordinary diligence (*J.S. Reimer, Inc.*, 2013 IL App (1st) 120106, ¶ 51), and this directly applies here because plaintiff was involved in an action relating to the validity of the December 2006 documents, which he acknowledged were approved after

Epifanio's death, and Cangelosi specifically attacked the trial court's subject matter jurisdiction to enter the July 2007 order approving the December 2006 estate plan.

¶ 50 In conjunction with his argument regarding the limitations period under subsection 13-214.3(b), plaintiff argues that adverse allegations do not require the knowledge required to trigger the statute of limitations. This argument overlaps with considerations of our fraudulent concealment analysis, so we address it here. Plaintiff cites *Jackson Jordan v. Leydig, Voit & Mayer*, 158 Ill. 2d 240 (1994). There, the defendant law firm continually reassured the plaintiff of the merits of their position during litigation but then sought to bar the subsequent malpractice claim on the basis that the limitations period began to run when the plaintiff received notice of the litigation. *Id.* at 252-53. The supreme court stated, "Throughout the proceedings, however, the client was reassured as to the soundness of its legal position. The mere assertion of a contrary claim or the filing of a lawsuit were not, in and of themselves, sufficiently compelling to induce the client to seek a second legal opinion. *** It would be a strange rule if every client were required to seek a second legal opinion whenever it found itself threatened with a lawsuit." *Id. Jackson Jordan* is distinguishable for the same reasons as *DeLuna*, as the firm representing the plaintiff in the litigation continued the fraudulent concealment that delayed the plaintiff from inquiring into the malpractice, whereas here plaintiff did not have continued contact with defendants but rather had independent counsel representing him regarding the documents that formed the basis of the alleged malpractice.

¶ 51 Plaintiff also cites *Lucy v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 358 (1998), where the plaintiff brought a legal malpractice action based on an underlying suit that had not yet been resolved. The court stated, "Sound policy reasons exist in opposition to a rule which would require the client to file a provisional malpractice action against his

attorney whenever the attorney's legal advice has been challenged." *Id.* at 357. While we do not dispute this principle, we note that the *Lucy* court also recognized that a statute of repose may still bar malpractice actions before they accrue. *Id.* at 361-62.

¶ 52 Relatedly, we recognize that in stating that plaintiff had a reasonable time to inquire into the potential malpractice and file suit within the over five to eight months remaining in subsection 13-214.3(d)'s repose period, it does not equate to the legal malpractice action having accrued, because at that point the July 2007 order had not yet been vacated. Plaintiff argues that if he had filed suit, defendants would have moved for summary judgment, and possibly threatened sanctions, for suing them in the face of an order approving what they had done and in violation of the courts' admonition against "prophylactic malpractice cases." See *York Woods Community Ass'n v. O'Brien*, 353 Ill. App. 3d 293, 299 (2004).

¶ 53 Aside from the possibility that plaintiff *may* have been able to file a premature malpractice action to conform to the limitations period and then stay it (see *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 70-71 (2007) (trial court did not abuse its discretion to stay legal malpractice action until underlying suit was resolved where there was a strong indication that the malpractice claim had merit and plaintiffs were attempting to comply with the limitations periods of section 13-214.3)), we again emphasize that a statute of repose bars an action after a defined period of time, regardless of whether the action has accrued. *DeLuna*, 223 Ill. 2d at 61. While we have determined that fraudulent concealment can serve as an exception to subsection 13-214.3(d) (see *supra* ¶ 40), this exception does not even apply if the plaintiff either discovered the fraudulent concealment, or should have discovered the fraudulent concealment through ordinary diligence, and a reasonable time remains within the limitations period (*J.S. Reimer, Inc.*, 2013 IL App (1st) 120106, ¶ 51). There is nothing in this analysis that converts our inquiry into

whether the cause of action actually accrued. *Cf. Meyers v. Underwood*, 316 Ill. App. 3d 970 985-86 (2000) (in applying a new statutory repose period, question of whether a reasonable time remained to file an action under the remaining repose period was not dependant on whether the cause of action had accrued; statutes of repose presume causes of action may be barred before they accrue).

¶ 54 Finally, we examine plaintiff's argument that defendants are equitably estopped from asserting that subsection 13-214.3(d) applies. Although the doctrine of equitable estoppel developed from case law and fraudulent concealment is based on statute, the principles behind the two are substantively the same. *Turner v. Nama*, 294 Ill. App. 3d 19, 26 (1997). A party claiming equitable estoppel must show that: (1) the other party misrepresented or concealed material facts; (2) it knew at the time it made the misrepresentations that they were untrue; (3) the party claiming estoppel did not know that the representations were false when they were made and when the party decided whether to act upon the representations; (4) the other party intended or reasonably expected that the party claiming estoppel would determine whether to act based upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to its detriment; and (6) the party claiming estoppel would be prejudiced by its reliance on the representations if the other party is allowed to deny their truth. *DeLuna*, 223 Ill. 2d at 82-83. Although the first two elements are couched in terms of fraud, "the representation need not be fraudulent in the strict legal sense or done with an intent to mislead or deceive." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 314 (2001). Still, the "party claiming the benefit of estoppel cannot shut his eyes to obvious facts, or neglect to seek information that is easily accessible, and then charge his ignorance to others." *Bank of New York v. Langman*, 2013 IL App (2d) 120609, ¶ 26.

¶ 55 For the first element, plaintiff argues that misrepresentation occurred when Pankau told him in January 2008 that the will and trust were properly prepared and superseded any earlier will, and that he had nothing to worry about. Plaintiff argues that concealment occurred by defendants' failure to reveal that the estate documents were not properly signed and by obtaining an order approving the estate documents after Epifanio's death. For the second element, plaintiff argues that the evidence indicates that defendants knew that Gruber signed the estate documents without authority and that Epifanio's death ended the possibility of effectuating her estate documents, or that defendants were grossly negligent in representing that they could obtain valid judicial authorization after Epifanio died. As for the third element, plaintiff maintains that he did not know that the estate documents were not valid until the April 2009 court ruling. For the fourth element, plaintiff argues that defendants' act of obtaining the invalid court order and telling him that everything was all right, as well as not informing him of any problems, showed that they intended or reasonably expected him to rely on their representations in determining whether to act. For the fifth element, plaintiff argues that he could reasonably rely on defendants' representations because they obtained the July 2007 court order, and they had a duty to inform him of material facts concerning the estate to which he was the sole beneficiary. Last, for the sixth element, plaintiff argues that he was prejudiced because he did not consider that malpractice might have occurred until defendants' misrepresentations were proven false by the April 2009 court order.

¶ 56 Defendants argue that the record establishes no concealment of facts given the status of the probate litigation at the time of the parties' meeting in January 2008. Defendants contend that even otherwise, equitable estoppel does not apply because their alleged conduct ended with ample time for plaintiff to file his action before the statutory deadline. Specifically, defendants

argue that any conduct allegedly giving rise to the estoppel claim terminated as of June 12, 2008, because plaintiff had no further contact with Pankau related to the Epifanio estate and had retained counsel to represent his interests in the probate litigation. Defendants argue that at this time, plaintiff still had more than nine months to file a legal malpractice claim before the expiration of the repose period of section 13-214.3(d), which constitutes a reasonable time as a matter of law. Defendants also argue that plaintiff's own deposition testimony refutes his estoppel by silence argument because it establishes that in July 2007, he became aware that defendants obtained approval of Epifanio's will and trust by a court order entered after Epifanio died. Defendants argue that plaintiff's knowledge of the circumstances, which encompasses his counsel's knowledge, establishes beyond genuine dispute plaintiff's knowledge of the fact or, at least, his access to the information.

¶ 57 We agree with defendants that even assuming that they misrepresented or concealed material facts, equitable estoppel does not apply because the conduct terminated with ample time for the plaintiff to file a cause of action within the limitations period. See *Kheirkhahvash v. Baniassadi*, 407 Ill. App. 3d 171, 182 (2011). At the same January 2008 meeting where Pankau allegedly told plaintiff that the December 2006 will was valid, he also told plaintiff to retain independent counsel in the probate action in which a will contest would be occurring. Moreover, plaintiff did not interact with Pankau concerning Epifanio's estate after June 2008, and by July 2008, plaintiff admitted through Garner in court documents that the court approved the December 2006 estate documents after Epifanio's death. At the time of the July 2008 filing, over eight months remained in the limitations period. In October 2008, Cangelosi filed his petition to vacate the July 2007 documents for reasons that underlie this malpractice action, when over five months remained in the limitations period. As discussed, either of these periods

constitute a reasonable time to file, as a matter of law, under the facts of this case. See *supra* ¶¶ 46-47. While plaintiff largely relies on defendants' silence about the invalidity of the estate documents in arguing continuing concealment, a party's silence can give rise to estoppel "only where there is knowledge of the facts on one side and ignorance on the other." *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020, 1042 (2007). Plaintiff cannot reasonably claim ignorance here where defendants were not representing him in the probate action and Cangelosi's filing laid out the factual and legal basis for the invalidity of the December 2006 documents. Accordingly, equitable estoppel does not bar the application of the two-year repose period under section 13-214.3(d), and the trial court properly granted defendants' motion for summary judgment.

¶ 58 Based on our resolution that that plaintiff's action was time-barred under the statute of repose of subsection 13-214.3(d), we do not address defendants' alternative argument that the complaint was also untimely pursuant to the two-year statute of limitations under subsection 214.3(b).

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 61 Affirmed.