FISRT DIVISION
JANUARY 21, 2014

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JAMES J. PALMICH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 11 L 3958
	)	
BERNARD M. KIRSNER, an Individual, and	)	
BERNARD M. KIRSNER, LTD., an Illinois Corporation,	)	Honorable
	)	Drella C. Savage,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in dismissing with prejudice plaintiff's action for legal malpractice; defendants' request for sanctions against plaintiff is denied.

¶ 2 This appeal arises from the June 28, 2012 order entered by the circuit court of Cook County, which dismissed with prejudice a legal malpractice action initiated by plaintiff James Palmich (Palmich) against his former attorney and the attorney's law firm, defendants Bernard Kirsner (Kirsner) and Bernard M. Kirsner, Ltd. (the Kirsner law firm), respectively. On appeal, Palmich argues that the circuit court erred in dismissing his lawsuit with prejudice. For the following reasons, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings.

¶ 3 BACKGROUND

¶ 4 In 2005, Palmich retained Kirsner to provide legal services in connection with the drafting of a prenuptial agreement between Palmich and his then fiancée, Collette Apicella (Apicella). On September 27, 2005, Palmich faxed Kirsner a document which contained the "basic framework" of terms and conditions that Palmich wished to be included in the prenuptial agreement. The terms of the basic framework specified that, should Palmich and Apicella divorce, Apicella would disavow any claim to assets that had been accumulated by Palmich prior to their marital union–including Palmich's New York Stock Exchange (NYSE) seat or its cash and stock equivalent; two homes in Miami, Florida; Citibank accounts; and various investment and retirement accounts. The basic framework noted that, in the event of divorce, Palmich agreed to provide Apicella with $100,000 per year for seven years, 50% of the value of their primary residence, and 50% of marital assets. On October 6, 2005, Palmich and Apicella, who were both represented by separate counsel, executed a prenuptial agreement. The prenuptial agreement provided for the distribution of marital and nonmarital property in the event of a termination of the couple's marriage, and incorporated the terms and conditions of Palmich's "basic framework." According to the prenuptial agreement, Palmich had premarital assets worth several million dollars and had a projected 2005 income of $550,000, while Apicella had a projected income of zero dollars and had premarital assets consisting of $2,000 and an engagement ring.

¶ 5 On October 8, 2005, Palmich and Apicella married. On November 19, 2008, after three years of marriage, Apicella filed for divorce from Palmich.[1] No children were ever born of the

[1] Case No. 08 D 11038 (Cir. Ct. Cook County, IL).

marriage. On November 25, 2008, the law firm of Grund & Leavitt, P.C., filed its appearance as legal counsel for Palmich in the underlying divorce proceedings. On October 1, 2009, Apicella filed a declaratory judgment action, seeking to enforce the prenuptial agreement against Palmich.

¶ 6 On January 4, 2011, following a prove-up hearing in the underlying divorce action, the circuit court entered a judgment for dissolution of marriage, which dissolved Palmich and Apicella's marriage pursuant to a marital settlement agreement (settlement agreement) entered into by the couple. The settlement agreement specified, *inter alia*, that Palmich and Apicella each waived their respective right to claim maintenance from the other spouse, that Palmich shall pay Apicella a sum totaling $500,000, that Apicella be provided certain marital assets, and that Palmich shall pay $15,000 toward Apicella's attorney fees. In exchange for the rights and benefits conferred in the marital settlement agreement, Palmich and Apicella agreed that the prenuptial agreement would be revoked and deemed unenforceable.

¶ 7 Following conclusion of the underlying divorce proceedings, on April 14, 2011, Palmich filed the instant legal malpractice action against Kirsner and the Kirsner law firm. The complaint alleged that Kirsner was required to exercise a reasonable degree of care and skill in representing Palmich with respect to the prenuptial agreement prior to his marriage to Apicella; that Kirsner breached his duty to Palmich by failing to advise him that it was unreasonable for Palmich to agree to the prenuptial agreement's terms of paying Apicella $100,000 per year for seven years, 50% of the value of their primary residence, and 50% of marital assets, *without regard to the duration of marriage*; that Palmich would not have entered into the prenuptial agreement with Apicella but for Kirsner's omissions; and that, as a result, Palmich suffered monetary damages.

¶ 8 On August 30, 2011, Kirsner and the Kirsner law firm filed separate section 2-615 and section 2-619 motions to dismiss (735 ILCS 5/2-615, 2-619 (West 2010)) Palmich's legal

malpractice action. On December 20, 2011, the circuit court granted the section 2-615 motion to dismiss, denied the section 2-619 motion to dismiss without prejudice, and granted Palmich leave to file an amended complaint. The circuit court anticipated that Kirsner and the Kirsner law firm would subsequently file a motion to dismiss the amended complaint, and thus, the court specifically advised Palmich's counsel "to be prepared to provide authority or case law directly holding that duties exist as a matter of law concerning premarital agreements."

¶ 9 On January 17, 2012, Palmich filed an amended complaint,[2] which contained primarily the same allegations as the original complaint. The amended complaint further alleged that Kirsner had a "duty to fully advise [Palmich] that the course of action being pursued was not the sole potential remedy in the event of a dissolution of [the] marriage and that other courses of action exist which were not being pursued"; that a reasonably careful attorney under the same or similar circumstances "would have advised" Palmich that it was unreasonable to guarantee Apicella $700,000 in maintenance, an equal division of marital assets, and an equal division of the marital residence, *without any reference to the duration of the marriage*; that a reasonably careful attorney under the same or similar circumstances "would have advised" him that it was *lawful* to condition the amount of maintenance and the division of marital property upon the *length of time they were married*; that Kirsner and the Kirsner law firm breached their duty to Palmich; that, but for Kirsner's omissions, Palmich would not have entered into the prenuptial agreement as drafted; and that Palmich suffered damages as a result.

¶ 10 On February 28, 2012, Kirsner and the Kirsner law firm filed separate section 2-615 and section 2-619 motions to dismiss (735 ILCS 5/2-615, 2-619 (West 2010)) the amended

[2] The amended complaint in the record is entitled "first amended complaint."

complaint. The section 2-615 motion to dismiss challenged the legal sufficiency of each element of the legal malpractice claim, and the section 2-619 motion to dismiss sought to dismiss the action on the bases that it was barred by judicial and equitable estoppel, as well as the statute of limitations. Attached to the motions to dismiss were various supporting documents from the underlying divorce proceedings, also included was Palmich's "basic framework" document; the prenuptial agreement; an excerpt from Palmich's discovery deposition; transcripts of the January 4, 2011 hearing; the judgment for dissolution of marriage; and the settlement agreement.

¶ 11 On April 19, 2012, Palmich filed a combined response to the motions to dismiss. On May 3, 2012, Kirsner and the Kirsner law firm filed a combined reply in support of their motions to dismiss the amended complaint.

¶ 12 On June 28, 2012, the circuit court dismissed the amended complaint with prejudice, finding that Palmich was judicially estopped from asserting a claim of legal malpractice because he had previously testified in the underlying divorce proceedings that the settlement agreement was fair and equitable and that he understood the terms therein. The circuit court, however, rejected Kirsner and the Kirsner law firm's estoppel arguments with respect to the terms in Palmich's "basic framework," and rejected their claims that the legal malpractice action was barred by the statute of limitations. Because the circuit court dismissed Palmich's legal malpractice action pursuant to section 2-619 (735 ILCS 5/2-619 (West 2010)), the court found it "unnecessary to address the 2-615 arguments." Nonetheless, the circuit court noted that Palmich had failed to provide any case law to suggest that an attorney has a duty to advise his client that the amount of maintenance and the division of marital property could be made contingent upon the *duration of marriage*; thus, absent the element of duty, Palmich could not maintain a cause of action for legal malpractice.

¶ 13 On July 26, 2012, Palmich filed a timely notice of appeal.

¶ 14 ANALYSIS

¶ 15 We determine whether the circuit court erred in dismissing with prejudice Palmich's amended complaint for legal malpractice.

¶ 16 As a preliminary matter, the parties disagree as to the standard of review. Palmich argues for *de novo* review, while Kirsner and the Kirsner law firm urge this court to apply the abuse of discretion standard. Generally, motions to dismiss are subject to a *de novo* standard of review, and a circuit court's decision to apply the doctrine of judicial estoppel typically falls within the sound discretion of the circuit court. See *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006); *Barack Ferrazzano Kirschbaum Perlman & Nagelberg v. Loffredi*, 342 Ill. App. 3d 453, 459 (2003). However, in *Smeilis v. Lipkis*, 2012 IL App (1st) 103385 (2012), this court recently reviewed *de novo* the circuit court's application of judicial estoppel in dismissing a complaint with prejudice, where both issues of dismissal and the application of judicial estoppel were inseparable. *Smeilis*, 2012 IL App (1st) 103385, ¶ 23. In *Smeilis*, this court specified that "[i]f judicial estoppel was correctly applied, the granting of the motion to dismiss would necessarily follow," and noted that, because the circuit court judge who dismissed the plaintiffs' 2007 complaint was not the circuit court judge who presided over the 2001 litigation, the court's decision to apply judicial estoppel rested solely on his "cold" record comparison of "matters spread of record in the 2007 proceeding and matters spread of record in the 2001 proceeding" and thus, deference should not be afforded to that decision. *Id.* Like *Smeilis*, both issues of the circuit court's dismissal of Palmich's legal malpractice action and its application of the doctrine of judicial estoppel were inseparable, where, if judicial estoppel was correctly applied, the granting of the motion to dismiss would necessarily follow. Like *Smeilis*, the circuit court judge who dismissed the instant

legal malpractice action was not the circuit court judge who presided over Palmich and Apicella's divorce proceedings, and her decision to apply judicial estoppel rested solely on a "cold" record comparison of the matters of record in the divorce proceedings and matters of record in the legal malpractice lawsuit. Thus, deference should not be afforded to the circuit court's decision to apply the doctrine of judicial estoppel where it appears that the court applied it as a matter of law. See *id.* ¶ 23 ("only when the trial court actually engages in an exercise of discretion should the abuse of discretion standard apply"). Therefore, we review the circuit court's application of judicial estoppel and dismissal of the amended complaint *de novo*.

¶ 17 Turning to the merits of the case, we determine whether the circuit court erred in dismissing with prejudice Palmich's amended complaint for legal malpractice.

¶ 18 A section 2-619 motion to dismiss admits the legal sufficiency of the plaintiff's complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Barber v. American Airlines, Inc.*, 241 Ill. 2d 450, 455 (2011). A section 2-619 motion admits as true all well-pleaded facts, as well as all reasonable inferences that may arise from those facts. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21. Further, in ruling on a section 2-619 motion, a court must interpret all pleadings and supporting documents in favor of the nonmoving party. *Id.*

¶ 19 Palmich argues that the circuit court erred in applying judicial estoppel to bar his claim of legal malpractice on the bases that his deposition testimony, his testimony in the January 4, 2011 prove-up hearing, and his representations in the settlement agreement and judgment for dissolution of marriage in the underlying divorce proceedings, were factually inconsistent with the position taken by him in the instant legal malpractice action. Specifically, he contends that his failure to raise the issue of Kirsner's alleged legal malpractice in the underlying divorce

action, and the ultimate settlement of the divorce action, did not provide bases for which to apply the doctrine of judicial estoppel.

¶ 20 Kirsner and the Kirsner law firm counter that the circuit court properly found that the doctrine of judicial estoppel barred Palmich's legal malpractice action. Specifically, they contend that Palmich's September 27, 2005 "basic framework" document to Kirsner, the prenuptial agreement's terms and conditions, his deposition testimony, his testimony in the January 4, 2011 prove-up hearing, and his representations in the settlement agreement and judgment for dissolution of marriage in the underlying divorce proceedings, all supported a finding that judicial estoppel barred his legal malpractice action.

¶ 21 In its June 28, 2012 order dismissing Palmich's amended complaint with prejudice, the circuit court found that Palmich was judicially estopped from asserting a claim of legal malpractice against Kirsner because he had previously testified at the prove-up hearing in the divorce proceedings that the settlement agreement was fair and equitable and that he understood the terms therein. The circuit court further found that, during Palmich's deposition testimony in the underlying divorce action, he failed to mention Kirsner's alleged malpractice as one of the bases upon which he claimed the prenuptial agreement should be deemed invalid. Thus, the circuit court found, because Palmich had taken factually inconsistent positions in the underlying divorce action and the instant legal malpractice lawsuit, judicial estoppel barred his claim of legal malpractice.

¶ 22 Under the doctrine of judicial estoppel, "a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding." (Internal quotation marks omitted.) *Loffredi*, 342 Ill. App. 3d at 460. The purpose of the doctrine is to "promote the truth and to protect the integrity of the court system by

preventing litigants from deliberately shifting positions to suit the exigencies of the moment." (Internal quotation marks omitted.) *Id.* The five elements necessary for the application of judicial estoppel include the following: "[t]he party to be estopped must have (1) taken two positions; (2) that are factually inconsistent; (3) in separate judicial or quasi-judicial proceedings; (4) with the intent that the trier of fact accept the facts alleged as true; and (5) have succeeded in the first proceeding and received some benefit from it." *Smeilis*, 2012 IL App (1st) 103385, ¶ 20.

¶ 23 The parties mainly dispute whether Palmich had taken two positions that were factually inconsistent in the underlying divorce action and the instant legal malpractice lawsuit. Based on our review of the record, we find that the doctrine of judicial estoppel did not apply to bar Palmich's legal malpractice action against Kirsner and the Kirsner law firm. In arguing for the application of judicial estoppel, Kirsner and the Kirsner law firm contend that Palmich's September 27, 2005 "basic framework" document faxed to Kirsner, the prenuptial agreement's terms and conditions, his deposition testimony, his testimony in the January 4, 2011 prove-up hearing, and his representations in the settlement agreement and judgment for dissolution of marriage in the underlying divorce proceedings, all supported a finding that judicial estoppel barred Palmich's legal malpractice action. We examine each of these bases in turn.

¶ 24 Kirsner and the Kirsner law firm argue that a review of the document entitled "basic framework," makes clear that Palmich "understood the concept of time limitations which might be included in the [prenuptial] agreement," and that Palmich, as a sophisticated individual, should not now be allowed to reverse his position after instructing Kirsner in detail regarding his wishes. We find this argument to be unpersuasive. Whether or to what extent Palmich may have informed Kirsner of certain terms that he wished to be included in the prenuptial agreement, had no bearing upon the issue of whether Kirsner committed malpractice in the course of drafting the

prenuptial agreement, and did not negate any duty Kirsner owed to Palmich in representing him in general with respect to the prenuptial agreement. Further, we find that Palmich's instructions to Kirsner as contained in the September 27, 2005 "basic framework" document were not a position taken in a "judicial or quasi-judicial proceedings" which would satisfy element (3) of the doctrine of judicial estoppel. Thus, application of judicial estoppel to bar the instant case could not be justified on this basis.

¶ 25 With regard to the prenuptial agreement's terms and conditions, Kirsner and the Kirsner law firm argue that because Palmich had signed the prenuptial agreement acknowledging the reasonableness of the terms and his voluntary assent to those terms, this demonstrated that Palmich had the benefit of proper legal counsel. We find this argument to be equally unpersuasive. The crux of Palmich's legal malpractice action was whether Kirsner allegedly failed to properly advise Palmich that it was unreasonable to sign the prenuptial agreement as drafted without regard to the length of marriage. It is unclear how Palmich's signature agreeing to the terms of the prenuptial agreement bore any relationship to whether Kirsner had fully advised him during the course of his legal representation regarding the propriety of the prenuptial agreement as drafted. Moreover, similar to Palmich's instructions in the "basic framework" document, we find that Palmich's assent to the terms and conditions of the prenuptial agreement as drafted did not constitute a position taken in a "judicial or quasi-judicial proceedings" such as would be necessary to satisfy element (3) of the doctrine of judicial estoppel. Therefore, Kirsner and the Kirsner law firm's argument that judicial estoppel applied must fail on this basis.

¶ 26 With regard to Palmich's May 14, 2010 deposition testimony in the underlying divorce action, prior to entering into the marital settlement agreement, Kirsner and the Kirsner law firm argue that none of the bases upon which Palmich contested the validity of the prenuptial

agreement pertained to Kirsner's conduct in representing Palmich. Specifically, in challenging the prenuptial agreement, Palmich identified the following bases in his deposition testimony and other written pleadings–namely, that there were "inconsistencies"; that the prenuptial agreement was entered into in bad faith because Apicella did not uphold her "side of the bargain"; that he was under extreme emotional duress at the time he entered into the agreement; and that it was a product of fraud. Kirsner and the Kirsner law firm posit that because Palmich failed to identify Kirsner's alleged negligence as a reason for challenging the validity of the prenuptial agreement in the underlying action, Palmich had taken two factually inconsistent positions in the underlying action and in the instant legal malpractice lawsuit. We disagree. We find that while Kirsner's alleged negligence was not among the reasons expressly articulated by Palmich for contesting the validity of the prenuptial agreement in the underlying action, such an omission did not necessarily constitute the taking of two totally inconsistent positions by Palmich in the underlying divorce action and the instant legal malpractice action so as to satisfy the relevant elements under the doctrine of judicial estoppel. See *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996) (the two inconsistent positions taken by the party must be "totally inconsistent"). This is not a scenario in which Palmich first asserted in the underlying divorce case that Kirsner *had* properly advised him regarding his option to include the duration of marriage provision in the prenuptial agreement, but later chose to assert in the legal malpractice action that Kirsner *had failed* to advise him accordingly. See *id.* at 553 (holding that judicial estoppel applied to bar plaintiff's complaint where he testified under oath in the underlying divorce action that he had no present or future interest in certain companies, but testified in a subsequent breach of contract action that he had a profit interest in those same companies). Moreover, even assuming that Palmich was aware of Kirsner's alleged negligence during the underlying divorce proceedings,

Palmich could not have legitimately raised the issue as grounds for relief because Kirsner's alleged negligence was not a good-faith basis upon which to challenge the validity of the prenuptial agreement in the underlying divorce action. See *Magnus v. Lutheran General Health Care System*, 235 Ill. App. 3d 173, 178, 184 (1992) (reviewing court held that a plaintiff, who had a duty to know the contents of an agreement before signing it, was bound by the terms of that agreement despite his attorney's failure to inform him that a certain provision had been omitted during negotiations). Therefore, the doctrine of judicial estoppel did not apply to bar the instant legal malpractice action on this basis.

¶ 27 With regard to Palmich's testimony in the January 4, 2011 prove-up hearing, his representations in the settlement agreement and the judgment for dissolution of marriage finalizing the divorce in the underlying action, Kirsner and the Kirsner law firm argue that Palmich testimony in the prove-up hearing and the judgment for dissolution of marriage in the underlying action barred Palmich from now alleging a cause of action for legal malpractice. Specifically, Palmich testified at the prove-up hearing that the settlement agreement resolved all issues with Apicella in the divorce proceedings, that he was satisfied with the terms of the agreement, that he understood the terms therein, and that the terms were fair and equitable. Kirsner and the Kirsner law firm contend that Palmich chose his litigation tactic in the underlying action by not mentioning Kirsner's alleged negligence as a basis upon which to contest the validity of the prenuptial agreement, that the judgment for dissolution of marriage finalizing the divorce ended the controversy, that all issues which could give rise to the legal malpractice claim could have been raised in the underlying action and thus, judicial estoppel barred Palmich from bringing the instant legal malpractice claim. In support of their arguments,

Kirsner and the Kirsner law firm cite *Larson v. O'Donnell*, 361 Ill. App. 3d 388 (2005), *overruled on other grounds by Vision Point of Sales, Inc. v. Haas*, 226 Ill. 2d 334, 352 (2007).

¶ 28 In *Larson*, the reviewing court barred the plaintiff's claim for legal malpractice pursuant to judicial estoppel. *Larson*, 361 Ill. App. 3d at 398. In *Larson*, the plaintiff alleged in a malpractice action that his attorney and the attorney's law firm misinformed him as to his obligations under a marital settlement agreement in underlying divorce proceedings. *Id.* at 393-94. However, the record in the divorce proceedings conclusively established, by the plaintiff's own testimony, that he understood his obligations under the terms of the marital settlement agreement. *Id.* at 398. The *Larson* court specifically found that the plaintiff was barred from asserting that he did not understand those terms, where he knew when he signed the agreement that he was obligated to pay a specific dollar amount in child support and maintenance based upon his potential net income of $62,000. *Id.*

¶ 29 Palmich, however, argues that *Larson* is distinguishable and contends that *Wolfe v. Wolf*, 375 Ill. App. 3d 702 (2007), compels a different result. In *Wolfe*, a plaintiff brought a legal malpractice action against her counsel in connection with her representation of the plaintiff in the underlying divorce proceedings. *Id.* at 704. In reliance on her attorney's advice , the plaintiff entered into a settlement agreement with her former husband and thereafter testified at a prove-up hearing that she understood the terms of the settlement agreement. *Id.* The plaintiff's attorney had advised her that the settlement agreement was "the best the plaintiff could do" and that the terms of the agreement "would give [the] plaintiff more than if the case were to go to trial." *Id.* In her complaint for legal malpractice, the plaintiff alleged that her attorney failed to conduct sufficient discovery, misrepresented that no discovery was available to learn of the ex-husband's business and financial assets, misrepresented that the plaintiff was not entitled to

maintenance, and failed to tell the plaintiff of her right to seek interim attorney fees to allow her to proceed to trial. *Id.* at 708. The circuit court then dismissed the plaintiff's legal malpractice claim on the basis of judicial estoppel, finding that the plaintiff had testified at the prove-up hearing that she understood and agreed to the terms of the settlement agreement. *Id.* at 704-05. On appeal, however, the reviewing court reversed the circuit court's decision, finding that judicial estoppel did not apply to bar the plaintiff's legal malpractice claim. *Id.* at 706, 709. The *Wolfe* court found that the plaintiff's testimony as to her understanding of her obligations under the settlement agreement was not totally inconsistent with her legal malpractice complaint against the attorney, where her legal malpractice action centered upon the allegation that her attorney's negligent misrepresentation did not permit her to make an informed decision about accepting the settlement agreement, rather than an allegation that she did not understand the terms of the settlement agreement. *Id.* at 708.

¶ 30 We find the facts in the case at bar to be more analogous to the facts in *Wolfe* than in *Larson*. Here, like *Wolfe*, Palmich's legal malpractice action centered upon the allegation that Kirsner's negligence in representing him in the drafting of the prenuptial agreement did not permit him to make an informed decision about the terms therein. Palmich did not allege that he did not understand his obligations under the prenuptial agreement. As an aside, while Palmich represented in the underlying action that the settlement agreement resolved all issues with Apicella in the divorce proceedings, that he was satisfied with the terms of the agreement, and that the terms were fair and equitable, we can infer that under the circumstances of the case, he did so in order to resolve the matter in an expedient manner and in an effort to minimize the impact of the prenuptial agreement. Thus, we find that Palmich did not take two positions that were factually and totally inconsistent in the underlying action and the instant legal malpractice

action. Accordingly, we hold that the doctrine of judicial estoppel did not apply to bar the instant legal malpractice action.

¶ 31 We further find Kirsner and the Kirsner law firm's alternative bases for arguing for a section 2-619 dismissal of the legal malpractice action to be just as unavailing. Kirsner and the Kirsner law firm further argue that the instant action was barred by equitable estoppel. They specifically contend that Kirsner justifiably relied on Palmich's instructions to him in the "basic framework" document in drafting the prenuptial agreement, and that Palmich could not now complain about Kirsner's conduct in preparing the document.

¶ 32 Equitable estoppel applies " 'where a person by his or her statements and conduct leads a party to do something that the party would not have done but for such statements and conduct.' " *Maniez v. CitiBank F.S.B.*, 404 Ill. App. 3d 941, 949 (2010), citing *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313 (2001). Equitable estoppel is defined " 'as the effect of the person's conduct whereby the person is barred from asserting rights that might otherwise have existed against the other party, who, in good faith, relied upon such conduct and has been thereby led to change his or her position for the worse.' " *Maniez*, 404 Ill. App. 3d at 949, citing *Geddes*, 196 Ill. 2d at 313. In order to establish equitable estoppel, the party claiming it must demonstrate: (1) that the other party misrepresented or concealed material facts; (2) that the other party knew at the time that he made the representations that they were untrue; (3) that the party claiming estoppel did not know the representations were untrue when they were made and when they were acted upon; (4) that the other person intended the party claiming estoppel would act upon the representations; (5) that the party claiming estoppel reasonably relied on the representations to his detriment; and (6) that the party claiming estoppel would be prejudiced by his reliance on the representations if the other person were allowed to deny the truth thereof.

Maniez, 404 Ill. App. 3d at 949-50. We reject Kirsner and the Kirsner law firm's arguments that equitable estoppel applied to bar Palmich's legal malpractice claim. Palmich's instructions to Kirsner in the "basic framework" document certainly could not, and did not, relieve Kirsner of any duty–the scope and extent of which we need not address here–owed to Palmich in representing him. To say that any duty Kirsner owed to Palmich in the course of his legal representative could be obviated by Palmich's detailing his wishes in the "basic framework" document, would reduce Kirsner's role to merely that of a scribe. Accordingly, we hold that the principles of equitable estoppel did not apply to bar Palmich's instant legal malpractice action.

¶ 33 Kirsner and the Kirsner law firm also argue that dismissal of the instant legal malpractice action was warranted because it was untimely filed. They contend that the applicable statute of limitations period was triggered at the time Apicella filed for divorce from Palmich in November 2008, or at the very latest, by the time Palmich and Apicella exchanged financial data during the course of the divorce proceedings in January 2009. Thus, they maintain, Palmich's instant legal malpractice action, which was filed on April 14, 2011, was untimely filed.

¶ 34 On the other hand, Palmich argues that the legal malpractice action was not time-barred, where the applicable statute of limitations period for filing the action was not triggered until the circuit court entered a judgment for dissolution of marriage on January 4, 2011. Palmich cites *Warnock v. Karm Winand & Patterson*, 376 Ill. App. 3d 364 (2007), for support.

¶ 35 Section 13-214.3 of the Code of Civil Procedure (the Code) sets forth two independent timing requirements for legal malpractice actions: (1) the two-year statute of limitations which begins to run when a person knows or reasonably should know of the injury for which damages are sought; and (2) the six-year statute of repose which places an outer limit on the time for commencing an action. 735 ILCS 5/13-214.3 (West 1994); *Sorenson v. Law Offices of Theo*

Poehlmann, 327 Ill. App. 3d 706, 708 (2002). The statute of repose runs from the time the alleged legal malpractice occurred–this is, the act or omission which gives rise to the action. *Sorenson*, 327 Ill. App. 3d at 708-09.

¶ 36 In the case at bar, the prenuptial agreement was drafted by Kirsner on October 6, 2005, and Palmich did not initiate this legal malpractice action until April 14, 2011. Kirsner and the Kirsner law firm contend that while the instant lawsuit was filed within the period of repose, it was not timely filed within the 2-year statute of limitations period under section 13-214.3 of the Code because it was inconceivable that Palmich "would not have disclosed the existence of the [prenuptial agreement] to his own divorce attorney" to aid in the preparation of financial disclosures to Apicella's attorneys in January 2009. They further posit that it was likewise inconceivable that Palmich "did not have the realization at that point that the [prenuptial agreement] might have failed to provide him with an allegedly easy excuse to avoid the maintenance and property division for which he now blames Kirsner."

¶ 37 In *Warnock*, defendants-attorneys represented the plaintiffs as the sellers in a real estate transaction. *Id.* at 365. Prior to closing, the purchasers of the real estate requested an extension of time in order to obtain necessary financing. *Id.* at 366. The defendants then drafted a letter to the purchasers' attorney, in which the defendants agreed to extend the closing date on the condition that the purchasers deposit money in an escrow account. *Id.* The letter agreement also contained a liquidated damages clause which stated that the earnest money would be forfeited in the event that the closing failed to occur. *Id.* Thereafter, the purchasers requested additional extensions, to which the sellers agreed on the condition that the purchasers deposit additional funds in the escrow account. *Id.* When the purchasers failed to secure the necessary financing by the final closing date, the earnest money in the escrow account was released to the sellers,

who refused to return the earnest money to the purchasers. *Id.* Subsequently, on October 4, 2000, the purchasers filed a lawsuit against the sellers alleging unjust enrichment. *Id.* The sellers retained another law firm to represent them in the lawsuit brought against them by the purchasers. *Id.* In the underlying lawsuit, on August 2, 2002, the trial court held that the letter agreements drafted by the defendants were unenforceable and entered judgment against the sellers. *Id.* at 367. In May 2003, the sellers filed a legal malpractice action against the defendants alleging that their failure to draft the letter agreements properly resulted in an adverse ruling in the underlying case. *Id.* The defendants filed a motion for summary judgment, arguing that the 2-year statute of limitations began to accrue in October 2000 when the sellers retained another law firm to defend them against the purchasers and thus, the legal malpractice action was time-barred. *Id.* The sellers countered that the statute of limitations did not begin to run until August 2, 2002, when the judgment in the underlying action was entered against them. *Id.* The trial court granted summary judgment in favor of the defendants. *Id.* On appeal, the reviewing court reversed and remanded the trial court's decision, reasoning that when the purchasers filed the underlying action, the sellers did not know if the action was merely a frivolous attempt by the purchasers to recover the earnest money held in escrow or whether the letter agreements were drafted in contravention of Illinois law. *Id.* at 370. The *Warnock* court stated that "a cause of action for legal malpractice will not 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." *Id.* at 372. The court stated that, because the sellers did not actually discover and reasonably could not have discovered that the letter agreements drafted by the defendants were negligently prepared until the trial court entered judgment in the purchasers' favor, the entry of that adverse judgment marked the date on which

the statute of limitations commenced. *Id.* Thus, the *Warnock* court held that the sellers' legal malpractice action was timely filed.

¶ 38 We find *Warnock* to be instructive. In the instant case, Apicella's filing of the underlying divorce action in November 2008 was insufficient to compel a finding that Palmich knew or should have known of Kirsner's purported negligence at that time. Although Palmich was aware that Apicella filed for divorce in November 2008, a judgment for dissolution of marriage finalizing the divorce pursuant to the settlement agreement was not entered by the circuit court until January 4, 2011. It was only then, on January 4, 2011, that the commencement of the statute of limitations period was triggered. Thus, based on the holding in *Warnock*, we hold that Palmich's legal malpractice action was timely filed on April 14, 2011 within the 2-year statute of limitations period. Therefore, Kirsner and the Kirsner law firm's arguments for dismissal on this basis must fail. Accordingly, dismissal of the instant legal malpractice action could not be affirmed under section 2-619 of the Code on the bases of judicial estoppel, equitable estoppel or the statute of limitations.

¶ 39 In the alternative, Kirsner and the Kirsner law firm additionally argue that the instant legal malpractice action could have been dismissed with prejudice as being deficiently pled under section 2-615 of the Code. See 735 ILCS 5/2-615 (West 2010).

¶ 40 A section 2-615 motion to dismiss attacks the legal sufficiency of a complaint. *Turner v. Memorial Medical Center*, 233 Ill. 2d 494, 499 (2009). The motion does not raise affirmative defenses, but rather alleges only defects on the face of the complaint. *Id.* When viewing the sufficiency of a complaint, the court must accept as true all well-pleaded facts and all reasonable inferences that can be drawn from those facts. *Guinn v. Hoskins Chevrolet*, 361 Ill. App. 3d 575, 586 (2005). However, we may disregard legal and factual conclusions unsupported by

allegations of facts. *Id.* The question presented by a section 2-615 motion to dismiss is whether the allegations of the complaint, when taken as true and viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Turner*, 233 Ill. 2d at 499. A cause of action will not be dismissed on the pleadings unless it clearly appears that no set of facts can be proved which will entitle the plaintiff to recover. *Id.* Because Illinois is a fact-pleading jurisdiction, a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. *Id.*

¶ 41 As noted, the circuit court dismissed the legal malpractice action on the basis of judicial estoppel, and found it "unnecessary to address the 2-615 arguments." Nonetheless, the court noted that there was no legal basis to support the element of "duty," and thus, Palmich could not maintain a cause of action for legal malpractice. The circuit court specifically noted that Palmich, in response to Kirsner and the Kirsner law firm's section 2-615 motion to dismiss the amended complaint, failed to provide any case law to suggest that an attorney has a duty to advise his client that the amount of maintenance and the division of marital property could be made contingent upon the duration of marriage. The circuit court found that, absent the element of duty, Palmich could not state a cause of action for legal malpractice.

¶ 42 Palmich argues that the amended complaint contained specific factual allegations to sufficiently plead a cause of action for legal malpractice. Kirsner and the Kirsner law firm counter that the amended complaint was deficiently pled because it contained conclusory allegations as to the elements of duty, breach of duty, proximate cause and damages.

¶ 43 To state a cause of action for legal malpractice, a plaintiff must allege facts that could support a finding that: (1) the attorney owed plaintiff a duty arising from the attorney-client relationship; (2) the duty was breached; (3) the existence of a proximate causal relationship

between the attorney's breach of duty and the damages sustained by the plaintiff; and (4) damages. *Fabricare Equipment Credit Corp.*, 328 Ill. App. 3d at 788, 767 N.E.2d at 474.

¶ 44 Based on our review of Palmich's amended complaint, we find that Palmich has sufficiently, *albeit barely so,* alleged a cause of action for legal malpractice. In the amended complaint, Palmich specifically pled a general duty in that "Kirsner was required to exercise a reasonable degree of care and skill in the representation of his client." Taking the allegation as true and viewing it in a light most favorable to Palmich, we find that the general element of duty was sufficiently pled. Thus, dismissal with prejudice was erroneous. By acknowledging that Palmich sufficiently pled the existence of a general duty, we make no finding regarding the existence of a specific duty related to the duration of marriage. That determination will be made after the parties have been put to their proofs.

¶ 45 We further find that the elements of proximate cause and damages were sufficiently, though also minimally, pled to support Palmich's amended complaint. Specifically, the assertion that "[b]ut for Kirsner's [and the Kirsner law firm's] negligent acts and/or omissions, [Palmich] would not have entered into the [prenuptial agreement] as drafted"; and that "[a]s a direct and proximate result of the negligent acts and/or omissions on the part of Kirsner [and the Kirsner law firm], [Palmich] has suffered the monetary damages, an inequitable distribution of the marital estate, unnecessary attorneys' fees and other expenses"; satisfies the necessary elements.

¶ 46 During oral argument before this court, Palmich's counsel acknowledged that there exists no legal authority to support the argument that an attorney has a duty to specifically advise his client, in the course of preparing a prenuptial agreement, that the amount of maintenance and division of marital property should be made contingent upon the length of marriage. We also note that counsel for Kirsner and the Kirsner law firm all but conceded that if his argument is

accepted, a lawyer's role under the facts of this case is essentially that of a scribe with no general duty to advise Palmich regarding *anything* outside the parameters of the "basic framework" which Palmich proposed. However, under section 2-615 the relevant inquiry before this court is whether, taking *all* well-pleaded facts as true and viewing *all allegations* in a light most favorable to the plaintiff, the allegations of the claim sufficiently stated a cause of action upon which relief can be granted. See *Turner*, 233 Ill. 2d at 499. We find that the allegations in Palmich's amended complaint, *albeit* minimally so, met the threshold for stating a cause of action. Therefore, we hold that dismissal of the amended complaint could not be sustained under section 2-615 of the Code. Accordingly, the circuit court erred in dismissing Palmich's amended complaint with prejudice.

¶ 47 Kirsner and the Kirsner law firm additionally argue that, pursuant to Illinois Supreme Court Rules 137 and 375(b) (Ill. S. Ct. Rs. 137, 375(b) (eff. Feb. 1, 1994), this court should award attorney fees as sanctions against Palmich. Specifically, they contend, without citation to the record on appeal, that Palmich "withheld from his present counsel the fact that he himself is responsible for the content of the [prenuptial agreement]," and thus, "Palmich should be the party to bear responsibility directly for such pleadings." They further assert that, in any other context, Palmich's "scurrilous accusations" against Kirsner that he committed malpractice, would be tantamount to an action for defamation.

¶ 48 Rule 137 provides that the signature of an attorney or a party on "a pleading, motion, or other paper" filed in a case constitutes a certificate that, "to the best of his knowledge, information, and belief formed after reasonable inquiry [the pleading, motion or other paper] is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," and that "it is not interposed for any

improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Ill. S. Ct. R. 137 (eff. Feb. 1, 1994). Rule 375(b) provides that "[i]f, after consideration of an appeal or other action pursued in a reviewing court, it is determined that the appeal or other action itself is frivolous, or that an appeal or other action was not taken in good faith, for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, *** an appropriate sanction may be imposed upon any party or the attorney ***." Ill. S. Ct. R. 375(b) (eff. Feb. 1, 1994).

¶ 49 In light of our holding that the circuit court erred in dismissing Palmich's amended complaint with prejudice, we decline to impose sanctions against Palmich or the attorneys representing him in the instant case.

¶ 50 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings consistent with this order.

¶ 51 Reversed and remanded.