2015 IL App. (1st) 1140810-U

FIRST DIVISION
March 30, 2015

No. 1-14-0810

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GREGORY REECE and ARDIS LONG, Plaintiffs-Appellants, v. CLIFFORD LAW OFFICES, P.C., an Illinois Professional Corporation, JEFFREY J. KROLL, THOMAS K. PRINDABLE, SEAN P. DRISCOLL, KEVIN P. DURKIN, JOHN RYAN POTTS, and ROBERT A. CLIFFORD, Individually and as agents, servants and employees of CLIFFORD LAW OFFICES, P.C., an Illinois Professional Corporation, jointly and severally, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. 11 L 010232 Honorable James N. O'Hara, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

Held: Plaintiffs forfeited review of their claims of legal malpractice and fraudulent concealment when their appellate brief failed to comply with Supreme Court Rule 341(h)(7). Plaintiffs sufficiently alleged a breach of fiduciary duty claim to withstand defendants' motion to dismiss.

¶ 1 Plaintiffs Gregory Reece (Reece) and Ardis Long (Long) were injured when an elevator they were riding fell several floors and impacted the ground floor of a building. Plaintiffs retained the current defendants to prosecute the personal injury action arising out of the elevator collapse (underlying suit). In this appeal, plaintiffs complain that defendant attorneys and law firm failed to name the premise owner of the building where the elevator was located as a defendant in the underlying suit.

¶ 2 Before the complaint at issue, plaintiffs filed two previous complaints both of which defendants moved to dismiss. Plaintiffs filed the operative complaint (legal malpractice complaint) on February 22, 2013 alleging three counts—legal malpractice, fraudulent concealment, and breach of fiduciary duty—against all defendants. Defendants moved to dismiss the complaint for failure to state a claim. On February 24, 2014, the circuit court granted defendants' motion to dismiss plaintiffs' legal malpractice complaint with prejudice. The court reasoned that plaintiffs' complaint was devoid of facts showing how defendants' failure to name the premise owner proximately caused plaintiffs to accept a lower settlement or why naming the owner of the premises would have entitled plaintiffs to a higher settlement in the underlying suit. The court found that plaintiffs failed to plead detrimental reliance to sustain a claim of fraudulent concealment. The trial court also found plaintiffs' breach of fiduciary duty claims to be duplicative of their legal malpractice cause of action. Plaintiffs now appeal.

¶ 3 I. BACKGROUND

¶ 4 A. Allegations in the Legal Malpractice Complaint

¶ 5 The allegations summarized in paragraphs 6 through 16 are taken exclusively from plaintiffs' legal malpractice complaint.

¶ 6 On July 7, 2005, the day of the elevator accident, defendants hired a private detective agency to investigate the elevator collapse. After signing retainer agreements with plaintiffs on July 11, 2005, defendants began their investigation of plaintiffs' case that included reviewing the treatise "Causes of Action Second Series – Causes of Action for Injury or Death in Elevator or Escalator Accident." The treatise explained that the premise owner where an elevator collapsed occurs is a potential defendant and may be liable as a common carrier. The treatise also explained that *res ipsa loquitur* may be an available avenue for recovery. Throughout the investigation of the case, defendants did not take steps to discover the premise owner's identity.

¶ 7 In August 2005, defendants filed a complaint on behalf of plaintiffs against World Real Estate, Inc. (WRE) and All-Types Elevators, Inc. (All-Types). WRE was the building manager where the elevator collapse occurred. All-Types was the maintenance company for the elevator that collapsed. Defendants did not name the owner of the premises, the Cosmopolitan National Bank of Chicago, as Trustee under the Trust Agreement Number 11710 (Cosmopolitan), as a defendant nor did the complaint include a count based on *res ipsa loquitur*. Defendants knew or should have known that neither WRE nor All-Types was the owner of the premises.

¶ 8 In May 2009, defendants demanded $4 million from WRE and All-Types' total available insurance coverage to settle the case.

¶ 9 On September 3, 2009, defendants filed an amended complaint on behalf of plaintiffs adding two additional counts against WRE as a "Common Carrier." On September 9, 2009, WRE moved to dismiss these two additional counts. In their motion to dismiss, WRE denied being the owner of the premises and denied that they were liable as a common carrier. The trial court denied WRE's motion to dismiss and WRE answered the amended complaint.

¶ 10 On September 16, 2009, one month before the underlying trial was set to begin, plaintiff Reece e-mailed defendants saying "doesn't the property owner bear some of the liability?" Defendant Robert Clifford (Clifford) responded by email: "Not for just being a property owner. All of the proper and necessary defendants have been named in your case." Defendants intended for plaintiffs to rely on Clifford's response in order to conceal defendants' failure to name the owner of the premises as a defendant.

¶ 11 Because of defendants' negligence, WRE and All-Types would have been able to invoke defenses. If the underlying suit had proceeded to trial, (1) WRE's defense that it bore no "common carrier" liability as it was not the owner "would have highlighted the Defendants' failure to timely name the owner of the Premises in the Underlying Litigation"; (2) both WRE and All-Types "would have been permitted to argue" that the owner of the premises was the sole proximate cause of plaintiffs' injuries which "would have further highlighted the Defendants' own negligence and risked a substantial reduction or elimination of the Plaintiffs' potential recovery"; or, (3) both WRE and All-Types "would have been permitted to argue" that the jury's verdict should be against the plaintiffs due to the premise owner's liability. Defendants prepared a motion *in limine* to try to exclude any defense of a sole proximate cause at trial.

¶ 12 Because these were defenses available to WRE and All-Types and a trial would have exposed defendants' negligence, defendants advised plaintiffs to accept an unreasonably low settlement that was not in plaintiffs' best interests. Defendants "adamantly instructed" plaintiffs to accept a $2.25 million settlement offer which included $500,000 from WRE and $1.75 million from All-Types. These amounts were offered because both WRE and All-Types "considered the probability that [they] could effectively avoid liability entirely" by arguing various defenses.

Plaintiffs accepted the $2.25 million settlement from WRE and All-Types and the case was dismissed in March of 2010.

¶ 13 Also in the background section of the legal malpractice complaint, plaintiffs included allegations that on the date of the accident, the property where the elevator was located was unencumbered by a mortgage and had a fair market value of greater than $5 million. WRE had a $1 million liability policy, All-Types had a $3 million liability policy, and only half of each policy comprised plaintiffs' settlement. Plaintiffs complained that defendants failed to pursue "documentation regarding the extent of available insurance coverage, despite the importance such information would have had upon the successful prosecution and/or settlement of the Underlying Litigation." Plaintiffs also complained that defendants failed to determine whether WRE and All-Types had any personal assets that could be applied to satisfy a potential judgment in excess of WRE and All-Types' available insurance.

¶ 14 Incorporating all previously alleged facts into count one for legal malpractice, plaintiffs further alleged that defendants failed in their prosecution of the underlying suit, that defendants knew that the premise owner should have been named a defendant, and that defendants' negligence weakened plaintiffs' case. Plaintiffs contended that defendants' negligence proximately resulted in a substantially lower settlement from the underlying defendants than they would otherwise have been entitled to based on the extent of their injuries because of (1) the limits of WRE and All-Types' available insurance coverage and their calculation of maximum risk of loss as a ratio of the total available insurance coverage and (2) WRE and All-Types' maximum risk of loss of personal property in the case of a verdict in excess of available insurance coverage.

¶ 15 Count two, fraudulent concealment, incorporated all previously alleged background facts as well as those facts alleged in count one. In this count, plaintiffs alleged that defendant Clifford falsely stated that all the proper parties were named in the suit. Plaintiffs further alleged that defendants concealed their failure to properly prosecute the underlying suit, persuaded them to forego trial, and instructed them to accept a lower settlement than would have been available if defendants had properly prosecuted the underlying suit. Plaintiffs contended that they reasonably relied on defendants' expertise and advice that the settlement offer was fair and reasonable, and that they would have insisted on proceeding to trial if they had known of defendants' negligence. Plaintiffs contended that the settlement did not "fully and fairly compensate them" for their injuries. Finally, plaintiffs alleged that defendants concealed or destroyed inculpatory evidence.

¶ 16 Count three, breach of fiduciary duty, incorporated all previously alleged facts as well as those facts alleged in counts one and two. Plaintiffs further alleged that defendants breached their fiduciary duty to plaintiffs by encouraging plaintiffs to settle the underlying suit in order to avoid trial which would have exposed defendants' failure to name the owner as a defendant in the underlying action. Plaintiffs contended that, because of defendants' breach, their damages were "substantially less than they would have recovered at trial, had the Defendants properly prepared the case for trial based upon the extent, severity, and duration of their injuries."

¶ 17 B. Appellate Brief Arguments

¶ 18 Plaintiffs' appellate brief includes the same background allegations that were included in the legal malpractice complaint.

¶ 19 As to count one for legal malpractice, plaintiffs' appellate brief argues that defendants' failure to name the owner of the premises "weakened the [sic] Plaintiffs case against [WRE and All-Types] by emboldening them as to potential defenses" that, as a result, motivated defendants

to settle the case. Specifically, plaintiffs' appellate brief argues that the legal malpractice complaint sufficiently alleged proximate cause in asserting that defendants' negligence in the underlying suit exposed plaintiffs' claim to two viable defenses, empty chair defense and "joint liability" (735 ILCS 5/2-1117 (West 2010)), and precluded an otherwise successful *res ipsa loquitur* claim against WRE and All-Types. Restating several paragraphs of its legal malpractice complaint, plaintiffs' brief argues that they were compelled to accept a substantially lower settlement than they would have been entitled to absent defendants' malpractice. Plaintiffs' reply brief argues that "[d]efendants' inexcusable failure to timely name the actual owner of the premises [] as a defendant in the Underlying Litigation, strengthened [WRE and All-Types'] negotiation position, weakened the Plaintiffs' negotiation position, and motivated the Defendants to convince the Plaintiffs to accept the undervalued settlement to avoid a trial that would have exposed the Defendants' malpractice." Plaintiffs summarize three paragraphs of their legal malpractice complaint in their appellate reply brief stating "[p]laintiffs would have received a settlement greater than the $2.25 million [sic] the received, which did not fully compensate them for the total extent of their damages."

¶ 20 As to count two, plaintiffs' appellate brief disputes the trial court's reliance on *Doe v. Brouilette*, 389 Ill. App. 3d 595, 616 (2009) for the elements of a prima facie case of fraudulent concealment. Next, plaintiffs restate paragraphs 205-240 of their legal malpractice complaint that allege (1) the defendants concealed their failure to name the property owner as a defendant in the underlying suit as evidenced by the Clifford e-mail and (2) that plaintiffs relied on the Clifford e-mail in deciding whether to accept a settlement or proceed to trial.

¶ 21 With respect to count three, plaintiffs' appellate brief argues that, because they pled their breach of fiduciary duty in the alternative to their legal malpractice claim, the trial court erred in dismissing the breach of fiduciary duty claim as duplicative.

¶ 22 In response, defendants' appellate brief argues that plaintiffs failed to allege that plaintiffs would have recovered more than $2.25 million in the underlying suit but for any breach of duty in failing to name the building owner. Defendants argue that plaintiffs' legal malpractice complaint speculates that "because Defendants never named the [] owner as a defendant in the underlying lawsuit, the other two defendants had 'potential defenses' ***, which weakened Plaintiffs' case against the two [underlying] defendants." This speculation, defendants argue, cannot amount to proximate cause. Similarly, defendants dispute that either WRE or All-Types had evidence to argue the sole proximate cause defense. With respect to fraudulent concealment, defendants contend that plaintiffs failed to allege detrimental reliance on a fact that defendants allegedly concealed. Defendants argue that plaintiffs knew that the owner had not been named a party when they accepted the settlement offer. Additionally, defendants contend that since the legal malpractice and breach of fiduciary duty claims share the same operative facts and injuries, the latter is duplicative and was properly dismissed below. Finally, defendants argue that the breach of fiduciary duty claim does not allege how any breach proximately caused plaintiffs' damages.

¶ 23 II. ANALYSIS

¶ 24 A. Standard of Review

¶ 25 We review a circuit court's order granting a motion to dismiss filed pursuant to section 2-615 of the Illinois Code of Civil Procedure (the Code) *de novo.* 735 ILCS 5/2-615 (West 2012); *Henderson Square Condominium Ass'n v. Lab Townhomes, LLC,* 2014 IL App (1st) 130764, ¶

78. Plaintiffs who settle an underlying lawsuit are not automatically barred from bringing a malpractice action against the attorney who represented them in that claim. *Merritt v. Goldenberg*, 362 Ill. App. 3d 902, 909 (2005). See also *McCarthy v. Pedersen & Houpt*, 250 Ill. App. 3d 166, 172 (1993). They must show that they would have received an amount in excess of what they settled for but for defendants' malpractice. *Id.*

¶ 26 When ruling on a motion to dismiss, the court must accept as true all well-pleaded facts in the complaint, as well as any reasonable inferences that may arise from them. *Doe v. Chicago Board of Education*, 213 Ill. 2d 19, 28 (2004). However, a court cannot accept as true mere conclusions unsupported by specific facts. *Pooh–Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). A complaint should be dismissed under section 2–615 only if it is clearly apparent from the pleadings that no set of facts can be proven that would entitle plaintiffs to recover. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 421 (2004). The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to plaintiffs, are sufficient to establish a cause of action on which relief may be granted. *Estate of Powell v. John C. Wunsch, P.C.*, 2014 IL 115997, ¶ 12.

¶ 27 B. Legal Analysis

¶ 28 Without reaching the merits of counts one and two, we find that plaintiffs' appellate brief does not comply with Illinois Supreme Court Rule 341(h)(7) and, as a result, plaintiffs have forfeited review of those counts. Ill. S. Ct. R. 341(h)(7) (Feb. 6, 2013).

¶ 29 Rule 341 governs the form and contents of appellate briefs. Ill. S. Ct. R. 341 (eff. Feb. 6, 2013); *Voris v. Voris*, 2011 IL App (1st) 103814, ¶ 8. Compliance with Rule 341 is mandatory. *Id.* This court has held that the failure to elaborate on an argument, cite persuasive and relevant authority, or present a well-reasoned argument violates Rule 341(h)(7) and results in

forfeiture of that argument. *Sakellariadas v. Campbell,* 391 Ill. App. 3d 795, 804 (2009); Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Gandy v. Kimbrough,* 406 Ill. App. 3d 867, 875 (2010) ("Supreme Court Rule 341(h)(7) requires a clear statement of contentions with supporting citation of authorities *** Ill-defined and insufficiently presented issues that do not satisfy the rule are considered waived.").[1] Furthermore, a court of review "is entitled to have the issues clearly defined with pertinent authority cited" (*People v. Hood,* 210 Ill. App. 3d 743, 746 (1991)), and " '[t]he appellate court is not a depository in which the appellant may dump the burden of argument and research.' " *Gandy,* 406 Ill. App. 3d at 877, quoting *In re Marriage of Auriemma,* 271 Ill. App. 3d 68, 72 (1995).

¶ 30 1. Count One – Legal Malpractice

¶ 31 The elements of a legal malpractice action are: (1) the existence of an attorney-client relationship establishing a duty on the part of the attorney; (2) a negligent act or omission constituting breach of that duty; (3) proximate cause establishing "but for" the attorney's negligence, the plaintiff would have prevailed in the underlying action; and (4) damages. *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007). To establish proximate cause, plaintiffs must essentially prove a "case within a case." *Id.* We will not presume a causal link between the alleged negligence and the loss of the underlying suit. *LaGrange,* 375 Ill. App. 3d at 200; *Ignarski v. Norbut*, 271 Ill. App. 3d 522, 528 (1995). Where plaintiffs fail to allege facts that would establish success in the underlying suit, they have failed to plead a cause of action. *Mauer v. Rubin*, 401 Ill. App. 3d 630 (2010), citing *Ignarski,* 271 Ill. App. 3d at 528; *Sheppard v. Krol*, 218 Ill. App. 3d 254, 257 (1991).

[1] Our quoted authority uses the term "waiver" where "forfeiture" is the appropriate choice because plaintiffs failed to comply with procedural requirements rather than voluntarily relinquished a known right. *Buenz v. Frontline Transportation Comp.*, 227 Ill. 2d 302, 320 n.2 (2008) (distinguishing forfeiture from waiver).

¶ 32 A thorough review of plaintiffs' appellate brief reveals no citations to any authority, beyond general principles, that discuss the sufficiency of allegations of proximate cause or damages at the motion to dismiss stage. In particular, the brief simply repeats the proximate cause and damage allegations of the dismissed count saying that defendants' negligence exposed their case to viable defenses, that they were "compelled" to accept a lower settlement, their negotiation position was weakened, and that they would have received more than what they settled for but for the alleged malpractice. The brief reaches the conclusion that their complaint sufficiently alleged proximate cause and damages without providing any authority applying the specific pleading standards to their particular legal malpractice action.

¶ 33 Plaintiffs cite to two cases and the Restatement that assert a premise owner's liability even if that owner has hired an agent to ensure an elevator or escalator's safe operation. *Ludgin v. John Hancock Mutual Life Insurance Co.*, 145 Ill. App. 3d 703, 708 (1986); *Lombardo v. Reliance Elevator Co.*, 315 Ill. App. 3d 111, 119 (2000); Restatement (Second) of Torts § 424 (1965). Plaintiffs also cite cases that stand for the proposition that defendants can present evidence that another cause, not defendants, precipitated plaintiffs' injury. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 93-94 (1995); *McDonnell v. McPartlin*, 303 Ill. App. 3d 391, 394-95 (1999). Plaintiffs' appellate brief also cites *Best v. Taylor Machine Works*, 179 Ill. 2d 367 (1997) which held certain amendments to the joint liability statute unconstitutional (735 ILCS 5/2-1117 (West 1996)). Furthermore, of the five cases plaintiffs rely on to set out the law as to a section 2-615 motion to dismiss, only *In re Estate of Powell*, 2014 IL 115997 (2014) concerns the sufficiency of allegations of proximate cause within a legal malpractice action. That case denied the defendants' motion to dismiss when the plaintiffs had alleged that a probate court would have (1) appointed a guardian for a disabled ward and (2) the ward would have received

settlement funds had the defendant attorneys advised that the settlement funds be administrated by the probate court. 2014 IL 115997, ¶ 14. None of the cases cited by plaintiffs shed any light on the issue at hand, namely, what are sufficient allegations of proximate cause and damages to withstand defendants' 2-615 motion to dismiss and pursuant to Supreme Court Rule 341(h)(7), arguments unsupported by legal authority are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *Gandy*, 406 Ill. App. 3d at 875. [2]

¶ 34 2. Fraudulent Concealment

¶ 35 To prove fraudulent concealment, plaintiffs must establish that (1) defendants concealed a material fact under circumstances that created a duty to speak; (2) defendants intended to induce a false belief; (3) plaintiffs could not have discovered the truth through reasonable inquiry or inspection, or were prevented from making a reasonable inquiry or inspection, and justifiably relied upon defendants' silence as a representation that the fact did not exist; (4) the concealed information was such that plaintiffs would have acted differently had they been aware of it; and (5) the plaintiffs' reliance resulted in damages. *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902-03 (2005) (citing *Schrager v. North Community Bank*, 328 Ill. App. 3d 696, 706–07 (2002)).

¶ 36 Plaintiffs' appellate brief is deficient in that it fails to provide any authority for the required elements of the fraudulent concealment cause of action. Instead, plaintiffs "distinguish" the case of *Doe v. Brouilette*, 389 Ill. App. 3d 595, 616 (2009) on which the trial court relied to set out the elements of fraudulent concealment. Plaintiffs' argument distinguishing *Doe* does not comply with Rule 341(h)(7)'s requirement to assert a well-reasoned argument and to include citations to pertinent authority. The reply brief does not correct this glaring deficiency.

[2] Had plaintiffs' legal malpractice action survived, we would have had to analyze the operative facts for both counts and whether those facts are duplicative of the breach of fiduciary duty cause of action. *Neade v. Portes*, 193 Ill. 2d 433, 440 (2000); *Fabricare Equipment Credit Corp. v. Bell, Boyd & Lloyd*, 328 Ill. App. 3d 784, 791 (2002); *Calhoun v. Rane*, 234 Ill. App. 3d 90, 95 (1992).

Moreover, the only other case relied on in count two, *Deluna v. Burciaga*, 223 Ill. 2d 49, 73 (2006), stands for the proposition, among others, that attorneys owe their clients a fiduciary duty. Plaintiffs' brief, which mostly restates allegations of its legal malpractice complaint, does not cite any relevant case law and arguments unsupported by citation of proper authority are forfeited. *Lee v. Six Flags Theme Parks, Inc.*, 2014 IL App (1st) 130771, ¶ 100.

¶ 37 3. Breach of Fiduciary Duty

¶ 38 To prevail on a breach of fiduciary duty claim, plaintiffs must allege that a fiduciary duty existed, that defendants breached their fiduciary duty, and that the breach proximately caused plaintiffs' injury. *Neade*, 193 Ill. 2d at 444. A fiduciary relationship imposes a general duty on the fiduciary to refrain from "seeking a selfish benefit during the relationship." *Kurtz v. Solomon*, 275 Ill. App. 3d 643, 651 (1995) (citing *Collins v. Nugent*, 110 Ill. App. 3d 1026, 1036 (1982)). As fiduciaries, attorneys owe their clients "the basic obligations of agency: loyalty and obedience." *Horwitz v. Holabird & Root*, 212 Ill. 2d 1, 9 (2004). In other words, the fiduciary duty owed by attorneys to their clients encompasses the obligations of fidelity, honesty, and good faith. *Metrick v. Chatz*, 266 Ill. App. 3d 649, 656 (1994) (citing *Christison v. Jones*, 83 Ill. App. 3d 334 (1980)). Given these obligations, it stands to reason that not all legal malpractice actions rise to the level of a breach of fiduciary duty. *Majumdar v. Lurie*, 274 Ill. App. 3d 267, 273-74 (1995). Attorneys will "make errors which render them liable to their clients for the resulting damages, but mere negligence is a far cry from a breach of fiduciary duty." *Metrick*, 266 Ill. App. 3d at 656.

¶ 39 Unlike counts one and two, our review of plaintiffs' third count for breach of fiduciary duty has not been forfeited. In accordance with the Illinois Supreme Court's finding in *Vancura v. Katris*, 238 Ill. 2d 352, 372 (2010), "citation to cases that are merely unpersuasive or

inapposite *** is not tantamount to failing to cite relevant authority altogether." *Id.* Accordingly, although plaintiffs fail to cite authority defining a *prima facie* case for a breach of fiduciary duty and only responds to the reasoning of the trial court granting defendants' motion to dismiss count three of their complaint, we turn to the merits of their argument.

¶ 40 Plaintiffs' count for breach of fiduciary duty alleges that defendants placed their own interests above plaintiffs' by encouraging them to settle the underlying suit in order to conceal defendants' failure to name the owner as a defendant in the underlying suit. Plaintiffs contend that defendants acted in their own interests, not the plaintiffs', when they encouraged plaintiffs to settle the case. Plaintiffs further allege that, because of defendants' breach, their settlement was "substantially less than they would have recovered at trial, had the Defendants properly prepared the case for trial."

¶ 41 First, there is no dispute that an attorney-client relationship existed between plaintiffs and defendants and plaintiffs' legal malpractice complaint sufficiently alleges the same. The second element, breach, is not simply defendants' failure to name the premise owner as a defendant in the underlying suit but rather, the violation of the fiduciary duty of honesty and good faith to the plaintiffs. *Metrick*, 266 Ill. App. 3d at 656. This breach hinges on the allegations, incorporated into count three, that defendants knew the premise owner could have been sued in the underlying suit, that defendants concealed the viability of a suit against the premise owner as evidenced by Clifford's email, and that defendants' motivation for settling the case was to avoid exposure of their failure to name the premise owner. As to the third element for breach of fiduciary duty—that the breach proximately caused the plaintiffs' injury—we infer from plaintiffs' complaint that because of defendants' alleged dishonesty about the viability of a suit against the premise owner, plaintiffs settled for a smaller amount than would have been available to them against all three

defendants because the premise owner had "common carrier" liability, whereas WRE and All-Types likely did not. Finally, plaintiffs request that defendants "be required to forfeit and disgorge the $675,000 in attorneys' fees" that they were paid as a result of the settlement in the underlying suit.

¶ 42 The gravamen of plaintiffs' legal malpractice complaint is defendants' failure to name the premise owner as a defendant in the underlying case. However, for the breach of fiduciary duty claim, the gravamen of plaintiffs' allegations is the defendants' alleged concealment or dishonesty regarding the liability of a premise owner and the viability of a suit against a premise owner in this kind of case. Without commenting on the ultimate success of this cause of action and construing the facts of the complaint in the light most favorable to the plaintiffs, we find that plaintiffs have alleged sufficient facts to withstand the defendants' section 2-615 motion to dismiss in alleging that defendants violated a fiduciary obligation in denying that the premise owner could be sued "just for being the property owner" in this case. We remand for further proceedings consistent with this ruling.

¶ 43 C. Motion to Strike

¶ 44 Attached to defendants' motion to dismiss below were two exhibits from the underlying suit: a Settlement Order and Additional Appearance. Plaintiffs moved to strike those exhibits and the trial court agreed. On appeal, defendants referenced those same exhibits. Plaintiffs moved to strike defendants' references to the previously stricken exhibits or to strike defendant's brief on appeal in its entirety. We took the motion to strike with the case. Our decision does not rely on the previously stricken exhibits. Therefore, we deny plaintiffs' motion to strike defendants' references to previously stricken exhibits.

¶ 45 Affirmed in part; reversed in part. Cause remanded.