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Cause of Action Before an Adverse Judgment

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Construction Systems provided labor and material for a building project. When the owner of the project failed to pay, Construction Systems retained the law firm FagelHaber to record a lien against the subject property. To that end, FagelHaber conducted a tract search. One month later, Cosmopolitan Bank and Trust (“Cosmopolitan”) recorded a mortgage on the property. FagelHaber waited six months before serving notice of Construction Systems’ lien on the project owner and construction manager. In that time, it did not update the tract search and so did not discover Cosmopolitan’s mortgage or include Cosmopolitan on the service list. Construction Systems retained Karen Berres (“Berres”) as new counsel during the litigation surrounding its mechanic’s lien, and executed a general release in settlement with FagelHaber concerning disagreements over outstanding fees.

Three years later, the mechanic’s lien litigation settled for approximately \$1.3 million less than the recorded lien. *Id.* at ¶12. Construction Systems sued FagelHaber for legal malpractice, claiming FagelHaber’s failure to perfect the mechanic’s lien caused it to be subordinate to Cosmopolitan’s mortgage lien. At issue was whether Construction Systems’ general release with FagelHaber included a release of legal malpractice actions. The court granted summary judgment for FagelHaber, but that decision was reversed on appeal. On remand, FagelHaber moved unsuccessfully for summary judgment again, this time on statute of limitations grounds. FagelHaber then moved successfully to compel production of Berres’ bills, which showed her various attempts to address FagelHaber’s error. FagelHaber used these bills to move for reconsideration of its earlier motion to dismiss, claiming they demonstrated that Construction Systems’ attorney knew of FagelHaber’s mistake more than two years before suing for malpractice. The motion was granted.

At issue on appeal was whether FagelHaber’s failure to perfect the mechanic’s lien was “plainly obvious” such that the malpractice action would have accrued before entry of an adverse judgment. *Id.* at ¶20. In affirming the motion, the appellate court held that both FagelHaber’s negligence and the injury it caused became obvious when Berres discovered the defect in the lien and Construction Systems paid her for her attempts to address it. *Id.* at ¶29. All of this occurred before an adverse judgment had been issued against Construction Systems, but the court held that an adverse judgment is only a necessary prerequisite where it was needed to discover a defendant’s mistake. *Id.* at ¶27. “Actual knowledge of FagelHaber’s negligence,” the court explained, “was not required under the discovery rules.” *Id.* at ¶24. Rather, “the limitations period was triggered when Construction Systems had a reasonable belief that its injury was caused by FagelHaber’s negligence.” *Id.*

***Construction Systems, Inc. v. FagelHaber* , 2019 IL App (1st) 172430**

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