

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PAUL DULBERG,)	
)	
Plaintiff,)	
)	
vs.)	No. 17 LA 377
)	
THE LAW OFFICES OF THOMAS J.)	
POPOVICH, P.C., and HANS MAST,)	
)	
Defendants.)	

MOTION FOR LEAVE TO FILE AFFIRMATIVE DEFENSE

Defendants The Law Offices of Thomas J. Popovich, P.C. and Hans Mast pursuant to 735 ILCS 5/2-613 and 735 ILCS 5/2-616, move for leave to file their Amended Affirmative Defense to Plaintiff's Second Amended Complaint, and in support state as follows:

- 1) This is a legal malpractice action. Defendants filed their Answer and Affirmative Defenses on March 12, 2019. Written discovery has been exchanged. No depositions have proceeded.
- 2) 735 ILCS 5/2-616 allows the amendment of pleadings at any time before final judgment on just and reasonable terms.
- 3) The filing of defendant's amended affirmative defenses will cause no unfair surprise, prejudice or unreasonable delay in the case.

WHEREFORE, Defendants, respectfully request that this Court grant them leave to file their Amended Affirmative Defense to Plaintiff's Second Amended Complaint (proposed

pleading attached as Exhibit A), and grant any and all further relief that this Court deems just and appropriate.

Respectfully submitted,

/s/ George K. Flynn

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**DEFENDANTS THE LAW OFFICES OF THOMAS J. POPOVICH, P.C.
AND HANS MAST’S AMENDED AFFIRMATIVE DEFENSES**

Defendants The Law Offices of Thomas J. Popovich, P.C. and Hans Mast plead the following amended affirmative defense in the alternative and without prejudice to Defendants’ earlier denials and contentions:

**FOURTH AFFIRMATIVE DEFENSE
(Judgmental Immunity/Lawyer’s Judgement Rule)**

1. Plaintiff filed a one count Complaint, sounding in negligence, alleging that Defendants failed to properly represent him in the prosecution of a personal injury case, as more fully stated in the Second Amended Complaint, which is incorporated herein.

2. Plaintiff’s damages, if any, were due to Plaintiff’s own fault. In the event Defendants are held liable, any damages awarded to Plaintiff must be reduced by Plaintiff’s proximate share of liability. The Plaintiff was negligent and caused his injuries in the following ways:

- (a) Failed to seek outside counsel if he was reluctant to settle the underlying case with the McGuires.

- (b) Provided Mast and Popovich with authority to make a settlement demand against the McGuires for less than \$100,000.
- (c) Received a written settlement agreement from the McGuires, forwarded by U.S. Mail from Mast, examined it, deliberated upon it, accepted it, signed it, and mailed it back to Mast.
- (d) Retained successor counsel after Mast and Popovich withdrew, and agreed to a “high-low” agreement at a binding mediation which limited Dulberg’s potential recovery against the remaining Defendant, Gagnon.

3. Alternatively, this suit is barred by the attorney judgment rule. Errors in attorney judgment do not constitute negligence. *Goldstein*, 154 Ill. App. 3d at 599-601; *O’Brien & Assocs., P.C. v. Tim Thompson, Inc.*, 274 Ill. App. 3d 472, 479-480 (2nd Dist. 1995). Legal advice provided in areas “where there are no sure and definite answers” or where “future courses of action [cannot be determined] by precise mathematical equations” are areas where the attorney is afforded discretion in the exercise of judgment. *Goldstein*, 154 Ill. App. 3d at 600 (citation omitted). The fact that an unfavorable result is obtained in one of these scenarios does not suggest that any standard of care was breached. *Id.* Further, if the client must speculate as to how it would have been better off, there is no actionable harm. *O’Brien*, 274 Ill. App. 3d at 479-80.

WHEREFORE, Defendants, THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. and HANS MAST, respectfully request that judgment be entered on their behalf and against Plaintiff, Dulberg.

Respectfully submitted,

/s/ George K. Flynn

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