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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISN SOFTWARE CORPORATION, Plaintiff Below, Appellant vs. RICHARDS LAYTON & FINGER, P.A., RAYMOND J. DICAMILLO and MARK J. GENTILE, Defendants Below, Appellees	)	No. 110, 2019 On appeal from the Superior Court, C.A. No. N18C-08-016 MMJ [CCLD]

OPENING BRIEF FOR APPELLANT ISN SOFTWARE CORPORATION

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NATURE OF PROCEEDINGS

This appeal is from a dismissal with prejudice based on a radical departure from Delaware precedent regarding the accrual of legal malpractice cases. ISN Software Corporation ("ISN") received and followed admittedly incorrect legal advice from Richards Layton & Finger P.A. ("RLF"), in connection with ISN's conversion to an S-Corp. RLF's incorrect advice led to more ISN stockholders receiving—and ultimately exercising—appraisal rights than RLF anticipated as a result of the transaction.

ISN and RLF agreed at the time that a malpractice claim did not yet exist and that ISN might never be harmed by the incorrect advice. Over three years later, on August 11, 2016, the Court of Chancery issued an opinion in the resulting appraisal action (the "Appraisal Action"), which caused ISN to suffer damages in excess of sixty-million dollars ($60,000,000.00) as a result of RLF's incorrect advice.

The trial court determined that the statute of limitations on ISN's malpractice claim began to run *not* when ISN suffered a resulting loss (*i.e.*, this Court's well-settled third element of a malpractice claim) *but instead* when ISN was exposed to a mere ***risk*** of future, wholly speculative damages. Indeed, the Court below held that

ISN's malpractice claim accrued at a point when it was unknown *"whether damages ultimately would be suffered*."[1]

The trial court compounded this error by failing to give any weight to the fact that ISN was never given access to its entire file, despite repeated pre-litigation requests and tailored discovery requests that were served upon RLF concurrently with the complaint. The trial court dismissed ISN's claims with prejudice even though ISN never received its lawful property and was never allowed to analyze fully its potential claims and tolling theories. Each of the trial court's numerous errors warrants reversal.

[1] Superior Court's Memorandum Opinion Granting RLF's Motion to Dismiss at 8, attached hereto as Exhibit A. All emphasis supplied unless otherwise noted.

SUMMARY OF ARGUMENT

1. The Superior Court erred as a matter of law by concluding that ISN's legal malpractice claim accrued when it learned of RLF's incorrect advice in 2013, despite the fact that ISN did not incur *any* damages until 2016. The Superior Court failed to apply this Court's well settled test for legal malpractice, which requires a "resulting loss." Instead, the Superior Court created new, unsustainable law requiring clients to file a legal malpractice action within three years of being exposed to the mere risk of speculative damages.

2. A legal malpractice claim cannot be dismissed with prejudice where the client has been refused access to its entire file. The Superior Court erred as a matter of law by denying ISN's Motion to Compel the production of ISN's entire file. The Superior Court improperly forced ISN to defend against RLF's Motion to Dismiss without first providing ISN the opportunity to review its entire file to analyze the veracity and intentions of RLF's advice provided between the time RLF admitted its mistake and when the Court of Chancery issued its opinion in the Appraisal Action.

STATEMENT OF FACTS

RLF has represented ISN in various corporate matters since 2008.[2] In 2012, ISN requested advice from RLF regarding converting from a C-Corp to a S-Corp.[3] ISN was aware that to convert from a C-Corp to a S-Corp, all stockholders of ISN must be S-Corp qualifying stockholders.[4]

At that time, four of ISN's eight stockholders were not S-Corp qualifying and owned about 25% of ISN.[5] ISN had set aside and allocated more than $34 million to a reserve fund (the "Buyout Fund") to buy back its stock from these non-qualifying stockholders.[6] ISN requested that RLF advise it of its options to buy back its own shares of stock from these four stockholders.[7]

The Erroneous Advice

RLF advised ISN that Delaware law permitted it to engage in a cash-out merger of some or all non-qualifying stockholders.[8] According to RLF, the cashed-out stockholders would have the option of accepting ISN's cash offer for their shares

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[2] A018, ¶ 5.
[3] A019-20, ¶¶ 6-10.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *Id*.
[8] A020-22, ¶¶ 11-17.

or exercising appraisal rights under Delaware law.[9] RLF informed ISN that, should the cashed-out stockholders exercise their appraisal rights, the Court of Chancery would decide the price per share at the conclusion of an appraisal action.[10]

Accordingly, RLF developed and drafted the legal documents incident to a plan for ISN to cash-out three of the four non-qualifying stockholders at $38,317 per share. RLF advised ISN that under this plan, only the three cashed-out non-qualifying stockholders would obtain appraisal rights and the fourth non-qualifying stockholder would remain a stockholder of the company and not receive appraisal rights (*i.e.*, the "Erroneous Advice").[11] ISN accepted the Erroneous Advice, and on January 9, 2013, ISN proceeded according to RLF's plan for the cash-out merger of three non-qualifying stockholders.[12]

On or before January 15, 2013, RLF realized that it had given incorrect advice to ISN regarding who would receive appraisal rights.[13] Contrary to the Erroneous

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[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] A024, ¶¶ 20-22.
[13] A024-25, ¶ 23.

Advice, Delaware law provided all four of the non-qualifying stockholders with appraisal rights.[14] RLF notified ISN of its error on January 15, 2013.[15]

RLF advised ISN that it should allow RLF to defend ISN against any appraisal action brought by the non-qualifying stockholders.[16] RLF advised ISN that despite the Erroneous Advice and given RLF's expertise, it could very well achieve a result whereby ISN would spend *less* than the Buyout Fund to purchase all shares held by the non-qualifying stockholders.[17] ISN accepted RLF's advice,[18] and on January 16, 2013, informed all four non-qualifying stockholders of their appraisal rights.[19]

The Potential Appraisal

On January 17, 2013, one non-qualifying stockholder accepted the cash merger consideration,[20] indicating that $38,317 was likely more than fair value. RLF advised ISN that this was a good sign and increased the likelihood that even if there were an appraisal lawsuit, the value would be less than the Buyout Fund.[21]

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[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] A026, ¶ 26.
[18] *Id*.
[19] A025-26, ¶¶ 25-26.
[20] *Id*.
[21] A026-27, ¶¶ 26-28.

On January 30, 2013, the three remaining non-qualifying stockholders preliminarily indicated that they might seek appraisal.[22] Importantly, the non-qualifying stockholders could have withdrawn that indication at any time over the following ninety days.[23] Between January 15 and February 13, 2013, RLF continued to advise ISN that they should work together to reach the best possible outcome.

The Consent Letter

In anticipation that ISN would continue to retain RLF, on February 13, 2013, RLF sent ISN a draft conflict consent agreement letter (the "Consent Letter").[24] On February 14, 2013, a final version of the Consent Letter was prepared and executed.[25]

In the final Consent Letter, RLF represented that its continued representation of ISN created a "***potential conflict***" because "litigating issues arising from a law firm's prior legal work ***may generate*** a conflict of interest[.]"[26] The Consent Letter further states that "there ***may be*** an issue" concerning RLF's prior advice as to "the availability of appraisal rights in connection with the merger[.]"[27] However, RLF

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[22] A025-26, ¶ 25.
[23] *Id*.
[24] A026, ¶ 26.
[25] A032-34.
[26] A033.
[27] *Id*.

advised that it believed "the availability of appraisal rights is ***not likely to be at issue in an appraisal proceeding***."[28]

RLF added that it did "not believe that [its] commitment, dedication, and ability to effectively represent" ISN's interests would be "adversely affected" by RLF's own interests," and that RLF believed it would "be able to provide [ISN] with competent and diligent representation."[29] RLF assured that its interests and ISN's interests were in complete alignment.

RLF concluded the Consent Letter by stating that neither "ISN's consent nor any other provision of this letter constitutes a waiver or release of ***potential*** causes of action the Company may have against the firm, ***if any***."[30] The Consent Letter clearly reflects RLF and ISN's agreement that ISN had no cognizable claim against RLF at that time, given the fact that ISN had not been and might not ever be injured by the Erroneous Advice.

ISN agreed to the Consent Letter because RLF advised that: (a) RLF was uniquely qualified to represent ISN in an appraisal lawsuit; (b) RLF's interests aligned with ISN's interests; (c) there was no current cognizable cause of action; and

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[28] *Id*.
[29] A034.
[30] *Id*.

(d) ISN had preserved its right to sue RLF, if ISN were damaged at the conclusion of any appraisal proceeding.[31] As of the date of the Consent Letter, RLF's Erroneous Advice had only been RLF's failure to meet its professional obligation to ISN, but there had been no "resulting loss." The Erroneous Advice had not cost ISN a single cent – and would not for several years.

The Appraisal Action

In March 2013, the remaining three non-qualifying stockholders perfected their appraisal rights, and in April 2013, the appraisal action commenced.[32] Over the next three and a half years, RLF represented ISN in the appraisal action.[33]

As the appraisal lawsuit proceeded, there was more evidence suggesting that there would be no damage to ISN from RLF's Erroneous Advice.[34] In October of 2015, RLF's expert, Daniel Beaulne of Duff and Phelps, valued ISN at $29,360 per share.[35] At $29,360 per share, the cost to purchase all shares held by the non-qualifying stockholders was far below the Buyout Fund.[36] As the appraisal lawsuit

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[31] A026, ¶ 26.
[32] A026, ¶ 27.
[33] A027, ¶ 28-29.
[34] In June of 2013, ISN and RLF learned that the four non-qualifying stockholders had been trading ISN stock amongst themselves for about $20,000 per share. At $20,000 per share, ISN could buy back all shares held by the non-qualifying stockholders for approximately $20 million.
[35] A027, ¶ 28.
[36] *Id*.

proceeded, it appeared even more likely that there would be no damage to ISN from RLF's Erroneous Advice.

ISN's Claim Accrues

On August 11, 2016, the Court of Chancery issued its opinion valuing ISN at $98,783 per share (more than three times the amount of the Duff and Phelps valuation), resulting in a merger cost more than triple that of ISN's Buyout Fund (the "Appraisal Opinion").[37] To that point, ISN had incurred only the fees and expenses that it would have incurred in the appraisal process regardless of the Erroneous Advice.

RLF advised ISN that this Court would likely reverse the Appraisal Opinion and strongly urged ISN to accept RLF's representation for an appeal. ISN again followed RLF's advice.[38] However, on October 30, 2017, this Court affirmed the Appraisal Opinion.[39]

[37] A027. ¶ 29. According to the Court below, the statute of limitations had already expired eight months before the Appraisal Opinion.
[38] A027, ¶ 30.
[39] *Id*.

RLF Refuses to Produce ISN's Entire File

On March 16, 2018, ISN requested that RLF return its entire file.[40] ISN's entire file is ISN's property – bought and paid for by ISN. RLF refused to return ISN's entire file, which would necessarily include internal memoranda, billing records, and internal emails, as required by both disciplinary rules and Delaware case law.[41] Instead, RLF hired a Texas legal malpractice defense attorney to conduct a protracted review of the file, convert it to a non-native format, and alter the dates and times on many of the documents prior to returning only a portion of ISN's entire file.[42]

On July 23, 2018, three days after representing that additional documents were forthcoming, RLF's Texas counsel advised ISN that no further documents would be produced.[43] No further explanation or basis for RLF's refusal was given prior to the commencement of these proceedings.[44]

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[40] A027-28, ¶ 32.
[41] For example, RLF never sent ISN a bill for work performed during a six-month period following the Erroneous Advice. ISN is entitled to see RLF's time and billing records during that period (regardless of whether RLF chose not to send ISN a bill for work performed), in addition to the other internal memoranda and communications.
[42] A027-28, ¶ 32.
[43] A028, ¶ 34.
[44] *Id*.

ISN Files this Action

On August 1, 2018, ISN filed its legal malpractice complaint against RLF. As of that date, RLF had produced only one new item: an intra-office email to staff requesting that a document be printed.[45] RLF produced no internal memoranda and no internal billing records.[46] Included in the documents RLF withheld (and *still* withholds) is the billing information from the time period during which the Erroneous Advice was given.[47]

ISN believed – based, in part, on the Consent Letter – that its claim against RLF had not accrued until the Court of Chancery issued its Appraisal Opinion and possibly until the Appraisal Opinion was affirmed on appeal. Out of an abundance of caution, however, ISN alternatively pled facts to support a tolling of the statute of limitations.[48] ISN pled, *inter alia*, that:

- After RLF realized it had given ISN the Erroneous Advice, it informed ISN that it had two options: a) continue with the merger; or b) attempt to reverse the merger;[49]
- RLF advised ISN to continue with the merger;[50]

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[45] A028, ¶ 33.
[46] *Id*.
[47] *Id*.
[48] *See* A018-28, ¶¶ 5-35.
[49] A025, ¶ 24.
[50] *Id*.

- RLF did not send ISN invoices for RLF's time immediately after it advised ISN of the Erroneous Advice;[51]

- RLF has refused to provide ISN with its entire file, despite repeated requests to do so.[52]

Without its entire file, ISN could not evaluate whether RLF: (1) provided honest and accurate advice about continuing with the merger or sought only to delay or otherwise protect itself from a malpractice claim; or (2) was honest and accurate when it represented in the Consent Letter that, at that time, ISN had no cognizable causes of action against RLF. Because RLF steadfastly refused to return ISN's entire file, ISN filed straightforward, tailored discovery requests centered on the production of the information concerning tolling theories, contemporaneously with the filing of its Complaint.[53]

RLF's Motion to Dismiss ISN's Complaint and Stay Discovery

On September 18, 2018, RLF moved to: (1) dismiss ISN's Complaint on limitations grounds,[54] and (2) stay discovery.[55] On October 8, 2018, ISN filed an opposition to RLF's Motion to Stay Discovery and a Motion to Compel RLF's

[51] A028, ¶ 33.
[52] A028, ¶¶ 33-34.
[53] A035-42.
[54] A043-62.
[55] A063-69.

discovery responses.[56] On October 26, 2018, the Superior Court heard both motions.[57]

At the hearing, ISN explained that its malpractice claim had not accrued until—at the earliest—the Appraisal Opinion. ISN alternatively relied on a tolling theory arising from RLF's aberrant behavior during the period for which billing records are missing (December 2012 through May 2013) as well as RLF's subsequent advice, concealment, and apparent spoliation of ISN's file.[58] ISN further argued that the Court could not properly consider the Motion to Dismiss until RLF had returned ISN's property, namely the entire file.[59] Nevertheless, the Superior Court granted RLF's motion to stay discovery and denied ISN's Motion to Compel, requiring ISN to defend the Motion to Dismiss while depriving it of access to its entire file.[60]

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[56] A070-76 and A077-82.
[57] A090-119.
[58] *Id*.
[59] *Id*.
[60] *Id*. In issuing its oral ruling, the Court below found: "When a motion to dismiss is filed on the basis of statute of limitations, that is a classic example of a time when discovery should be stayed particularly when the facts that are necessary to decide the motion to dismiss are already in possession of both parties and the facts themselves are undisputed, although obviously, as I stated before, the import of those facts is highly disputed." *Id*. at 23:1-9. However, the facts necessary to decide the motion to dismiss were clearly *not* "already in possession of both parties" as RLF had repeatedly refused to provide ISN with its entire file.

Dismissal with Prejudice

On February 18, 2019, the Superior Court granted RLF's Motion to Dismiss, determining that ISN's legal malpractice claim had accrued more than three years before ISN filed its lawsuit.[61] In short, the Court concluded that "exposure to the risk of loss is sufficient injury to create an actionable claim for legal malpractice," and because ISN knew of the Erroneous Advice on January 15, 2013, ISN's claim accrued then.[62]

The Court reached this conclusion despite explicitly acknowledging that it was unknown on January 15, 2013 ***"whether damages ultimately would be suffered."***[63] Without explanation, the Court dismissed ISN's claims *with prejudice*.[64] Not only did the Court refuse ISN an opportunity to review its entire file for evidence to support a tolling theory, the Court also refused ISN the more basic right to replead its theory that withholding the file, in itself, warranted tolling the statute of limitations.[65]

ISN filed this appeal on March 8, 2019. This is ISN's Opening Brief.

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[61] *See generally* Ex. A.
[62] *Id*. at 6-8.
[63] *Id*. at 8.
[64] *Id*.
[65] *Id*.

ARGUMENT

I. Exposure to the Mere Risk of Some Future, Speculative Loss that may Never Happen is Not an Injury Sufficient to Create an Actionable Claim for Legal Malpractice.

A. Question Presented

Whether a legal malpractice claim accrues from exposure to the mere risk of future, speculative damages, despite the absence of any actual, resulting loss. ISN preserved this issue in its filings and arguments opposing RLF's Motion to Dismiss.[66]

B. Scope of Review

"Whether a complaint is barred by a statute of limitations is a question of law that [is] review[ed] de novo."[67] "In reviewing the grant of a motion to dismiss, [this Court] view[s] the statement of claim in the light most favorable to the non-moving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations."[68]

C. Merits of Argument

This Court has repeatedly stated the elements to a legal malpractice claim are:

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[66] *See* A017-31; A120-149; A177-240.
[67] *Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1274 (Del. 2016).
[68] *King Const., Inc. v. Plaza Four Realty, LLC*, 976 A.2d 145, 151-2 (Del. 2009).

a) the employment of the attorney; b) the attorney's neglect of a professional obligation; ***and c) resulting loss***.[69] This is well settled Delaware law. Nonetheless, the trial court concluded that a mere "risk of loss" satisfied the third element of a legal malpractice claim, despite acknowledging that "***whether damages ultimately would be suffered***" had not yet been determined.[70] This is not Delaware law, nor should it be.[71] As this Court recently held in *Connelly v. State Farm Mutual Insurance Co.*, uncertainty as to the very "existence" of damages delays accrual under 10 *Del. C.* § 8106.[72]

In *Balinski v. Baker*,[73] the Superior Court determined that "an attorney must cause more than speculative damage to a plaintiff."[74] Even when proven or obvious, "[t]he mere breach of professional duty, causing only ... ***speculative harm, or the***

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[69] *See*, *e.g.*, *Tarrant v. Ramunno*, 171 A.3d 138 (Del. 2017), reargument denied (Sept. 25, 2017); *Oakes v. Clark*, 69 A.3d 371 (Del. 2013); *Tsipouras v. Szambelak*, 58 A.3d 984 (Del. 2012); *Lorenzetti v. Enterline*, 44 A.3d 922 (Del. 2012); *Flowers v. Ramunno*, 27 A.3d 551 (Del. 2011).
[70] Ex. A at 6-8.
[71] *See, e.g.*, *United States v. Anderson*, 669 A.2d 73, 77 (Del. 1995); *Carroll v. Philip Morris USA, Inc.*, 163 A.3d 91, 113 (Del. Super. Ct. 2017) ("This 'potential' for increased harm, however, is not the same as actual harm."). Under the Court below's ruling, any negligent act by an attorney would immediately create a ripe legal malpractice claim. This is not the law in Delaware.
[72] *Connelly*, 135 A.3d at 1279-80.
[73] 2013 WL 4521199, at *3 (Del. Super. Ct. 2013).
[74] *Id*.

threat of future harm—not yet realized—does not suffice to create a cause of action for negligence[.]"[75] Damages are speculative when there is merely the possibility of an injury.[76]

The *Balinski* Court dismissed the malpractice claim at issue because the plaintiff had not yet suffered any harm – *i.e*., the plaintiff had only been exposed to a risk of future harm.[77] In reaching its conclusion, the *Balinski* Court relied on *Rizzo v. Haines*, in which the Pennsylvania Supreme Court explained:

> The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. The test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages.... Thus, damages are speculative only if the uncertainty concerns the fact of damages rather than the amount.[78]

The trial judge's decision in the present case is directly at odds with these principles.

The *Balinski* Court also relied on *Schenkel v. Monheit*,[79] in which the Pennsylvania Superior Court explained that under Pennsylvania law (like Delaware), one of the "three essential elements which must be established to bring a cause of

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[75] *Id*.
[76] *Schueller v. Cordrey*, 2017 WL 3635570, at *6 (Del. Super. Ct. 2017).
[77] *Balinski*, 2013 WL 4521199, at *3.
[78] *Rizzo v. Haines*, 555 A.2d 58, 68 (Pa.1989) (citations and quotations omitted).
[79] *Balinski*, 2013 WL 4521199, at *3.

action for professional negligence" is a showing that the alleged "negligence was the proximate cause of ***damage*** to the plaintiff."[80] The *Schenkel* Court rejected the notion that a plaintiff could (let alone must) bring a malpractice claim based solely on a professional error that caused no damages, noting: "Proof of damages is as crucial to a professional negligence action for legal malpractice as is proof of the negligence itself."[81]

The *Balinski* Court likewise relied on *Budd v. Nixen*, in which the California Supreme Court addressed the very issue before this Court, *i.e.*, when does a legal malpractice claim accrue when the plaintiff did not suffer any damages until well after the attorney's legal error.[82] The *Budd* Court concluded that "[i]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort."[83]

The *Budd* Court also explicitly rejected the theory that an increased risk to the client is sufficient to either bring a malpractice claim or start the statute of limitations. The Court explained:

> The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the

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[80] *Schenkel v. Monheit*, 405 A.2d 493, 494 (Pa. Super. Ct. 1979).
[81] *Id*.
[82] *See generally Budd v. Nixen,* 491 P.2d 433 (Cal. 1971).
[83] *Id*. (citing Developments in the Law—Statute of Limitations (1950) 63 Harv.L.Rev. 1177, 1201).

> client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice. Prosser states the proposition succinctly, "It follows that the statute of limitations does not begin to run against a negligence action until some damage has occurred."[84]

Although the *Budd* Court noted that a cause of action can accrue "before the client sustains all, or even the greater part, of the damages occasioned by his attorney's negligence[,]" there must be "***appreciable and actual*** harm flowing from the attorney's negligent conduct."[85] Importantly, "the determination of the time when plaintiff suffered damage raises a question of fact."[86]

Other states' courts have similarly applied *Budd*'s analysis.[87] For example, the Alaska Supreme Court explained that "if the client discovers his attorney's

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[84] *Id*. at 436. (quoting PROSSER, LAW OF TORTS (4th ed. 1971), s 30 at p. 144.) (citations omitted).
[85] *Id*. (emphasis added).
[86] *Id*. at 437-38.
[87] Some states have followed California's lead and clarified the law through statutes. *See, e.g.*, Mo.Ann.Stat. § 516.100 (Vernon 1952) ("[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of ... duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment,"); N.C.Gen.Stat. § 1–15 (1983) (the statute of limitations does not begin to run where "damage [is not] readily apparent to the claimant at the time of its origin,"); and Kan.Stat.Ann. § 60–513(b) (1983) ("the cause of action ... shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury[.]").

negligence before he suffers damages, the statute of limitations will not begin to run until the client suffers actual damages."[88] The North Dakota Supreme Court agreed:

> [F]or one to have a cause of action for an attorney's legal malpractice, there must be damages to the client proximately caused by the attorney's breach of a duty to the client. . . [and] the statute of limitations does not begin to run until the client has incurred some damage from the alleged malpractice.[89]

More recently, the Iowa Supreme Court reached the same conclusion and explained: "[T]he statute of limitations could not have begun to run any earlier than the date an actual injury occurred."[90] The Iowa Supreme Court relied not only on Iowa law but also on multiple other states' precedents and a well-respected treatise.[91] The Court noted that Alaska, Arizona, California, Illinois, Kansas, Massachusetts, Montana, Nevada, New Jersey, New Mexico, Pennsylvania, Tennessee, and Wisconsin are all in agreement that a legal malpractice claim does not arise until actual injury results.[92]

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[88] *Wettanen v. Cowper*, 749 P.2d 362, 364 (Alaska 1988).
[89] *Larson v. Norkot Mfg., Inc.*, 653 N.W.2d 33, 36 (N.D. 2002).
[90] *Vossoughi v. Polaschek*, 859 N.W.2d 643, 650 (Iowa 2015).
[91] *See generally Id*.
[92] *Id*. at 651-52 (Citing *Greater Area Inc. v. Bookman*, 657 P.2d 828, 829 n. 3 (Alaska 1982) ("[I]f the client discovers his attorney's negligence before he suffers consequential damages, the statute of limitations will not begin to run until the client suffers actual damages."); *Amfac Distribution Corp. v. Miller*, 673 P.2d 795, 798-99 (Ariz. Ct. App. 1983) (adhering to "the time-honored principles of law which require that the plaintiff be damaged or injured in some way as a predicate to bringing an

The Iowa Court also noted that the Restatement (Third) of the Law Governing Lawyers provides:

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action for negligence"); *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison*, 958 P.2d 1062, 1070 (Cal. 1998) ("The mere breach of a professional duty, causing only ... speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence."); *Romano v. Morrisroe*, 759 N.E.2d 611, 614 (Ill. App. Ct. 2001) ("No cause of action accrues without actual damages, and damages are only speculative if their existence itself is uncertain."); *Pancake House, Inc. v. Redmond*, 716 P.2d 575, 579 (Kan. 1986) ("[T]he client does not accrue a cause of action for malpractice until he suffers appreciable harm or actual damage"); *Mass. Elec. Co. v. Fletcher, Tilton & Whipple, P.C.*, 475 N.E.2d 390, 391 (Mass. 1985) ("[T]he electric companies knew immediately of the alleged negligence . . . but it was not then clear that the alleged negligence had caused or would cause the companies any appreciable harm."); *Stanley L. & Carolyn M. Watkins Tr. v. Lacosta*, 92 P.3d 620, 630 (Mont. 2004) ("[T]he mere threat of future harm does not constitute actual damages."); *Semenza v. Nev. Med. Liab. Ins. Co.*, 765 P.2d 184, 186 (Nev. 1988) ("[W]here damage has not been sustained or where it is too early to know whether damage has been sustained, a legal malpractice action is premature"); *Grunwald v. Bronkesh*, 621 A.2d 459, 464–65 (N.J. 1993) ("[T]he statute of limitations begins to run only when the client suffers actual damage.... Actual damages are those that are real and substantial as opposed to speculative."); *Jaramillo v. Hood*, 601 P.2d 66, 67 (N.M. 1979) ("[T]he cause of action accrues when actual loss or damage results...."); *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998) ("An essential element to [legal malpractice] is proof of actual loss rather than a breach of a professional duty causing only ... speculative harm or the threat of future harm."); *Ameraccount Club, Inc. v. Hill*, 617 S.W.2d 876, 878 (Tenn. 1981) ("The Court of Appeals erred in holding that the plaintiff's cause of action accrued and the statute of limitations began to run when the plaintiff became aware of the negligence of the defendant attorneys; still more was required, *viz*., damage or injury to the plaintiff resulting from that negligence."); *Hennekens v. Hoerl*, 465 N.W.2d 812, 816 (Wis. 1991) ("A tort claim is not 'capable of present enforcement' until the plaintiff has suffered actual damage.... Actual damage is not the mere possibility of future harm.").

> [T]he statute of limitations does not start to run until the lawyer's alleged malpractice has inflicted significant injury. For example, if a lawyer negligently drafts a contract so as to render it arguably unenforceable, the statute of limitations does not start to run until the other contracting party declines to perform or the client suffers comparable injury. *Until then, it is unclear whether the lawyer's malpractice will cause harm*. Moreover, *to require the client to file suit before then might injure both client and lawyer by attracting the attention of the other contracting party to the problem*.[93]

Delaware Courts, including this Court, often rely upon the Restatement (Third) of the Law Governing Lawyers.[94]

In another case directly at odds with the decision at bar, the Superior Court applied these principles correctly in *Young Conaway Stargatt & Taylor, LLP v. Oki Data Corporation*.[95] There, the Superior Court addressed when a legal malpractice claim accrues in a situation analogous to the present case.

Oki Data Corporation allegedly infringed certain patents and hired Young Conaway Stargatt & Taylor, LLP ("YCST") to defend it.[96] YCST planned to use

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[93] *Vossoughi*, 859 N.W.2d at 650. (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54 cmt. g, at 406 (2000)).
[94] *See, e.g.*, *Matter of Beauregard*, 189 A.3d 1236, 1246 n.39 (Del. 2018); *Harper v. Beacon Air, Inc.*, 2017 WL 838224, at *4 (Del. Super. Ct. 2017); *Judy v. Preferred Commc'n Sys., Inc.*, 29 A.3d 248, 256 (Del. Ch. 2011).
[95] *See generally Young Conaway Stargatt & Taylor v. Oki Data Corp.,* 2014 WL 4102139, at *1-3 (Del. Super. Ct. 2014).
[96] *Id*.

expert testimony in support of an "on-sale defense."[97] Just prior to the expert's deposition on March 10, 2010, YCST withdrew the defense as to certain claims because it had given the expert incorrect advice, which made his opinion incorrect and irrevocably tainted as to those claims.[98] The matter proceeded before an Administrative Law Judge ("ALJ"), and the ALJ ruled against Oki Data.[99]

YCST sued Oki Data for unpaid legal fees, and Oki Data sued YCST for legal malpractice.[100] YCST moved for summary judgment, arguing that the three-year statute of limitations had accrued when Oki Data learned of YCST's incorrect advice to the expert.[101] Oki Data responded that the "continuous representation rule" tolled the statute of limitations until YCST's representation ended in early 2011.[102]

The Superior Court concluded as follows: "While the Court is not willing to stretch the statute of limitations to the degree argued by [Oki Data], ***whether the alleged errors would constitute malpractice could not have been ascertained until***

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[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*. *See In re Kaiser Grp. Int'l Inc.*, 2010 WL 3271198, at *3 (Bankr. Del. Aug. 17, 2010) (The continuous representation rule "tolls the statute of limitations until the attorney ceases to represent the client in the matter.")

the ALJ decision was issued."[103] The Court concluded that Oki Data's malpractice claim did not accrue until the ALJ issued its opinion determining that Oki Data had infringed upon the patents because it was unknown up to that point whether Oki Data would ultimately suffer damages.[104] The fact that YCST's legal error exposed Oki Data to a mere *risk* of an adverse ruling and that Oki Data knew of the error well before the ALJ decision did not alter the court's calculus.[105]

Here, the Superior Court's holding does not comport with any of the above well-settled principles and, worse, is internally inconsistent. The Court cited *Balinski* and explicitly acknowledged that, as of the dates when ISN either learned of the Erroneous Advice or the date the appraisal action was filed, "there was not yet a determination of the precise measure of damages, ***or even whether damages ultimately would be suffered.***"[106] The Court concluded, however, that "exposure to the risk of loss is sufficient injury to create an actionable claim for legal malpractice."[107] This finding is directly contrary to established Delaware law and contradicts the Court's earlier statement that: "[t]he mere breach of professional duty

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[103] *Oki Data Corp.*, 2014 WL 4102139, at *1-3.
[104] *Id*.
[105] *Id*.
[106] Ex. A at 7-8.
[107] *Id*.

causing only speculative harm is not sufficient to create a cause of action for negligence."[108]

The Court neither found nor required that ISN had suffered any actual or resulting loss. Indeed, the Court could not and did not articulate the "resulting loss" attributable to RLF's neglect of a professional obligation. To the contrary, the Court held that "the risk of loss and potential damages constitute the injury necessary to meet the third element of a legal malpractice action [and that] an injured client need not wait to bring a legal malpractice action until the client has suffered measurable financial loss."[109] Again, this is not Delaware law and must not be adopted as such.

The Court initially and correctly cited *Balinski* for the undeniable proposition that "the mere breach of professional duty causing only speculative harm is not sufficient to create a cause of action."[110] The Court, however, erred in its application of *Albert v. Alex Brown Management Services, Inc.*, writing:

> A cause of action for professional malpractice accrues as soon as the wrongful act occurs. It does not matter that at the time of the negligent act, the client has not yet suffered a loss. Exposure to the risk of loss is

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[108] *Id*. at 5.
[109] *Id*. at 8. The Court's reasoning is even more curious in light of the phrase "an injured client *need* not wait." (emphasis added). The language presupposes that the client has been injured, and what the Court really concluded was that the client *can*not wait to bring a legal malpractice action until the client has suffered measurable financial loss.
[110] *Id*. at 5.

> sufficient injury to create an actionable claim for application of the statute of limitations.[111]

The Superior Court's reliance on *Albert* is misplaced for at least two reasons: (1) this Court has subsequently rejected *Albert*'s application in contexts where "the only possible form of damages . . . awardable" has not yet "come into existence";[112] and (2) the *Albert* Court emphasized that "[w]hether or not the plaintiffs could have sued for *damages*" was "not dispositive as to whether the claim accrued, since, as soon as the wrongful act occurred, the plaintiffs could have sought injunctive relief."[113]

Unlike the present case, *Albert* involved claims by investors against the managers of two exchange funds for breach of fiduciary duty, breach of contract, fraud, negligence, unjust enrichment, and conspiracy.[114] The funds were formed and closed in 1997 and 1998 and were heavily invested in tech stocks.[115] After the Dot-

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[111] *Id*. at 6-7.

[112] *Connelly*, 135 A.3d at 1279. ("State Farm further acknowledged that, under its position, the statute of limitations would begin to run before the only possible form of damages it concedes are awardable in this context would have come into existence. In other words, State Farm argues that a claim for breach of the implied duty of good faith should accrue before the plaintiff could plead the required element of damages. We are unable to grasp the benefits to this approach that would outweigh its obvious inefficiency." (citations omitted)).

[113] *Albert v. Alex. Brown Mgmt. Servs., Inc*., 2005 WL 1594085, at *18 (Del. Ch. June 29, 2005) (emphasis added).

[114] *Id*. at *1.

[115] *Id*. at *6, 8.

com bubble burst, the plaintiffs sued the managers for mismanagement, including failure to employ proper hedging strategies.[116]

The managers contended that the plaintiffs' hedging mismanagement claims had accrued in 1999, when the funds became unhedged, and thus were time-barred.[117] The plaintiffs responded that their claims only accrued in 2001 after "a 'loss' relative to [each plaintiff's] investment," *i.e.*, when the value of the funds dropped below the initial net asset value.[118]

The *Albert* court rejected the plaintiffs' theory, holding that "[w]hether or not the plaintiffs could have sued for damages is not dispositive as to whether the claim accrued."[119] The court reasoned that "as soon as the alleged wrongful act occurred, the plaintiffs could have sought injunctive relief."[120] With that practical remedy to the alleged improper unhedging available, the plaintiffs' claims accrued when they knew of the unhedging and could have filed suit to stop it.

The court emphasized that after the managers unhedged the funds in 1999, their value skyrocketed, which "was due, of course, to the fact that the Funds were

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[116] *Id*. at *10-12.
[117] *Id*. at *12-13.
[118] *Id*. at *18.
[119] *Id*.
[120] *Id*. at *18.

exposed to much more risk."[121] The Court refused to give the plaintiffs "a call option":

> If the unhedging of the Funds works out, and the value of the Funds goes up, the plaintiffs will have no complaint. But if the hedging (or lack thereof) strategy does not work out, and the value of the Funds falls, the plaintiffs can sue. This clearly is not, and should not be, the law. The plaintiffs made the decision to ride the bubble to the top. They cannot now complain that the bubble burst.[122]

The *Albert* plaintiffs knowingly and intentionally failed to act while the funds' values skyrocketed because they were unhedged. They did not complain until they lost not only those gains, but also their initial investments. The Court's holding depended entirely upon the fact that if the plaintiffs believed the investments should have been hedged, they could have simply fixed the alleged harm through injunctive relief.

Here, ISN could not have sought injunctive relief to remedy the Erroneous Advice. Unlike asking the Court of Chancery to force fund managers to return to their prior policy of hedging through price collars and short sales, ISN could not have simply undone the cash-out merger through an injunction. Here, ISN did not initially benefit from the Erroneous Advice only to later complain that it was damaged by the Erroneous Advice. ISN did not have a "call option."

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[121] *Id.*
[122] *Id.*

The Superior Court's proposed solution to the obvious injustice resulting from dismissing ISN's complaint—prematurely filing claims and then having them stayed—would require courts "to address premature claims before the [plaintiff] can plead damages," a scenario expressly disfavored in *Connelly*.[123] Although *Connelly* is not a professional malpractice case, this Court's analysis of § 8106 is powerfully persuasive.

Connelly was struck in her vehicle by an individual insured by State Farm.[124] Connelly offered to settle the case against the insured for less than the policy limits, but State Farm refused.[125] Connelly sued State Farm's insured and obtained a large judgment against him in excess of the policy limits.[126] State Farm paid Connelly approximately half the judgment, leaving a large balance.[127] Connelly subsequently sued State Farm as its insured's creditor and assignee of the insured's rights against State Farm.[128]

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[123] *See Connelly,* 135 A.3d at 1271-80 (adopting majority rule on accrual of bad-faith failure-to-settle claims because it "avoids wasting judicial resources because it prevents the court from having to address premature claims before the insured can plead damages").
[124] *Id.* at 1272.
[125] *Id.*
[126] *Id.*
[127] *Id.* at 1272-73.
[128] *Id.* at 1273.

State Farm moved to dismiss Connelly's claim based on § 8106.[129] Relying in part on *Albert*,[130] State Farm argued that Connelly's claims accrued on either May 10, 2011, when Connelly made her settlement offer, or June 9, 2011, when the offer expired.[131]

Like the Superior Court here, the Superior Court in *Connelly* "placed importance on Connelly's allegations as to when State Farm breached its . . . duties."[132] Similarly, the *Connelly* Court "concluded that 'the statute began to run at *the time of the wrongful act*, which ... is the date [State Farm] denied [Connelly's] settlement demand' because it was then that Connelly was 'made aware of *the possibility* that her claims would be denied, putting her on notice as to *possible* causes of action.'"[133] The order of dismissal in *Connelly* was also replete with references to the date of State Farm's wrongful act.[134]

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[129] *Id*.
[130] *Id*. at 1277 n.15 ("Finally, State Farm cites *Albert v. Alex Management Services, Inc*., where the Court of Chancery found that "[a] cause of action accrues under 10 Del. C. § 8106 at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action" in the context of addressing claims against fund managers for breach of fiduciary duties, breach of contract, fraud, negligence, unjust enrichment, and conspiracy.").
[131] *Id*. at 1273.
[132] *Id*.
[133] *Id*. at 1273-74 (emphasis added).
[134] *See Id.* at 1274 n.7.

This Court reversed the dismissal of Connelly's claims, adopting the majority rule that "a claim against the insurer for bad-faith failure to settle accrues only once there is a judgment in excess of policy limits against the insured and that judgment can no longer be appealed."[135] Most relevantly, this Court underscored that State Farm's position—like that of RLF and the Superior Court here—was that "the statute of limitations would begin to run before the only possible form of damages it concedes are awardable in this context would have come into existence"[136]:

> In other words, State Farm argues that a claim for breach of the implied duty of good faith should accrue before the plaintiff could plead the required element of damages. We are unable to grasp the benefits to this approach that would outweigh its obvious inefficiency.[137]

The present matter is readily distinguishable from *Albert* and, instead, mirrors *Oki Data* and *Connelly*. In *Oki Data, Connelly,* and the instant case, the plaintiffs were undeniably aware that the defendants had made an error that did not and might never cause any harm or injury. In *Oki Data*, *Connelly,* and the instant case, the plaintiffs could not have filed for injunctive relief. As in both *Oki Data* and *Connelly*, the injuries from the Erroneous Advice did not ripen into a legal

[135] *Id*. at 1281.
[136] *Id*. at 1279.
[137] *Id*. at 1279-80.

malpractice claim until the Court of Chancery issued its Appraisal Opinion at the earliest.

As the Superior Court acknowledged in its opinion, "whether damages ultimately would be suffered," was unknown until the Court of Chancery issued its Appraisal Opinion. Before that, ISN had suffered no resulting loss from the Erroneous Advice. ISN had not incurred any more expenses on the appraisal action than it would have in the absence of the Erroneous Advice.

Balinski demonstrates (correctly) that if ISN had attempted to file a malpractice claim before the appraisal opinion, ISN's claims would have been dismissed for failure to establish the third element of a negligence claim – a resulting loss. Had ISN filed a legal malpractice claim prior to August 11, 2016, its complaint could not have alleged any facts sufficient to meet the third required element of a legal malpractice claim, "resulting loss." As explained above, the statute of limitations cannot run in the absence of a viable claim.

The public policy considerations discussed in this Court's decision in *Connelly* are the same here. First, the existence of ISN's damages claim was wholly—not partly—speculative until the disposition of the appraisal proceedings.

Second, accrual of ISN's claims against RLF earlier would have required ISN to sue RLF in Superior Court while either firing RLF or expecting RLF to zealously

defend ISN's interests in the Court of Chancery appraisal action. ISN would have been put in the untenable position of having to argue in the Superior Court malpractice action that it expected the Vice Chancellor to value ISN in excess of $38,317 per share while arguing the opposite in the Court of Chancery appraisal proceedings.

Third, delaying accrual of ISN's claims would save it and RLF litigation costs that may have turned out to be unnecessary depending on the outcome of the appraisal proceedings. Like State Farm's position rejected in *Connelly*, the Superior Court's dismissal of ISN's claims requires that "the statute of limitations would begin to run before the only possible form of damages . . . awardable in this context would have come into existence."[138] As this Court held, any benefits to such an approach "would outweigh its obvious inefficiency."[139]

Fourth, had ISN been forced to fire RLF in the appraisal action while litigating against RLF in the legal malpractice action, any successor law firm would certainly face malpractice allegations from RLF in the event of an unfavorable appraisal outcome. RLF might even escape liability for its legal malpractice by arguing that it did not proximately cause ISN's resulting loss because it did not represent ISN in

[138] *Connelly*, 135 A.3d at 1279.
[139] *Id*. at 1280.

the appraisal action. For the reasons stated above, underscored by the policy rationale stated in *Connelly*, this Court should reverse and make clear that the third element of a legal malpractice claim – resulting loss – is not satisfied by mere exposure to the risk of loss.

This Court should further clarify that Delaware law does not allow claimants to file malpractice or other tort actions that are not ripe.[140] A claim that is not ripe is nonjusticiable.[141] In the absence of an actionable claim, Delaware's trial courts lack subject matter jurisdiction.[142] This Court should reinforce its prior directive that Delaware courts should "decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate."[143] That is because "[w]henever a court examines a matter where facts are not fully

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[140] *See XI Specialty Ins. Co. v. WMI Liquidating Trust*, 93 A.3d 1208, 1217 (Del. 2014) (citations omitted) ("Generally, a dispute will be deemed ripe if 'litigation sooner or later appears to be unavoidable and where the material facts are static.' Conversely, a dispute will be deemed not ripe where the claim is based on 'uncertain and contingent events' that may not occur, or where 'future events may obviate the need' for judicial intervention.'").

[141] *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008).

[142] *See id.* at 209. ("Delaware courts do not address 'disagreements that have no significant current impact[.]'")(citation omitted)).

[143] *Stroud v. Milliken Enterprises, Inc.*, 552 A.2d 476, 480 (Del. 1989).

developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law."[144]

ISN's claim against RLF was neither ripe at the time ISN learned of RLF's Erroneous Advice nor at the time the appraisal action was filed. ISN's claim would have been based on uncertain and contingent events that may not occur, which would obviate the need for judicial intervention. As explained *supra*, when ISN learned it had been given the Erroneous Advice, it was agreed to by both parties that the outcome of any Appraisal Action would determine whether damages would ultimately be suffered from the Erroneous Advice.

Delaware law mandates a three-element standard that must be met for a client to have an actionable legal malpractice claim. The third element, "resulting loss," ensures that an attorney's provision of erroneous legal advice, without any resultant damage, does not create a ripe malpractice claim. This allows a client to continue relying on its legal counsel to ensure that the erroneous legal advice does not lead to a resulting loss. Legal malpractice actions do not accrue until a client has suffered a "resulting loss," not merely "exposure to the risk of loss."

This Court should reject the Superior Court's creation of a new standard that not only encourages but requires parties to file unripe, placeholder lawsuits and

[144] *Id.*

makes every attorney's neglect of a professional obligation a ripe legal malpractice claim. This Court should reject a standard so wholly at odds with the very purpose of statutes of limitation, which is "to prevent the bringing and enforcement of stale claims."[145]

[145] *GRT, Inc. v. Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *15 (Del. Ch. July 11, 2011).

II. The Superior Court Erred By Concluding that ISN Failed to Plead Facts Sufficient for a Jury to Determine that the Statute of Limitations had been Tolled in Light of its Denial of ISN's Motion to Compel RLF to Produce ISN's Entire File.

A. Question Presented

Whether the Superior Court erred as a matter of law by concluding that ISN had not pled facts with sufficient particularity for a jury to determine that the statute of limitations was tolled under the doctrines of fraudulent concealment or equitable tolling, where ISN pled that RLF was wrongfully withholding it entire file. ISN preserved this issue in opposing RLF's Motion to Dismiss and in the competing Motions to Compel and to Stay Discovery.[146]

B. Scope of Review

The Court erred by: (1) denying ISN's Motion to Compel RLF to produce its entire file; (2) concluding that ISN failed to adequately plead a tolling theory; and (3) dismissing ISN's complaint with prejudice. These errors are intertwined and thus presented together. This Court reviews the Court's holding on the Motion to Dismiss de novo. *See* § I(B) above. "The standard of review with respect to pretrial discovery rulings is abuse of discretion."[147] This Court recognizes:

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[146] *See* A043-44; A045-62; A063-69; A070-76; A077-82; A090-119; A120-149; A155-176; A177-240.

[147] *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006).

> [A]n abuse of discretion can occur in "three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment."[148]

"[W]hen a trial judge exceeds the bounds of reason in light of the circumstances or has ignored recognized rules of law or practice to produce injustice, discretion has been abused."[149]

C. Merits of Argument

The Court below recognized that the statute of limitations can be tolled under the doctrine of fraudulent concealment, writing that ISN must have alleged an "affirmative act of concealment by a defendant – an actual artifice that prevents a plaintiff from gaining knowledge of the facts or some misrepresentation that is intended to put a plaintiff off the trail of inquiry."[150] ISN pled that RLF is wrongfully withholding ISN's entire file, but the Court rejected that concealment as insufficient.[151] The Court's Opinion does not even address the impropriety of RLF's wrongful withholding and concealment of ISN's files.

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[148] *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 506 (Del. 2005)(quoting *Kern v. TXO Production Corp*., 738 F.2d 968 (8th Cir. 1984)).
[149] *Roache v. Charney*, 38 A.3d 281, 286 (Del. 2012).
[150] Ex. A at 8.
[151] *Id*. at 8-10.

As the Court of Chancery explained in *TCV VI, L.P. v. Tradingscreen*, "[o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse."[152] This right extends to a firm's work product, including any files, documents or memoranda created by that firm in its representation of the client.[153]

Despite repeated requests by ISN pre-litigation, RLF refused to give ISN its entire file.[154] ISN sought the Office of Disciplinary Counsel's assistance, but the office declined because the parties were by then in litigation. The ODC advised ISN that discovery would be the proper avenue to attain the file.

When given the chance to right this clear wrong through competing motions to compel and to stay discovery, the trial judge not only refused to order RLF to produce ISN's entire file but also forced ISN to defend a motion to dismiss without even having an opportunity to review its entire file. At the discovery motion hearing, RLF admitted that it had not turned over its internal communications, and ISN

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[152] *TCV VI, L.P. v. Tradingscreen*, 2018 WL 1907212 at *5 (Del. Ch. April 23, 2018)(quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 46(2)(2000)).
[153] *Id*.
[154] RLF produced only external communications and public filings.

explained to the trial judge that those internal communications could support its tolling theory.[155]

The trial court ignored that ISN's tolling theory was substantially supported by RLF's inducement of ISN to enter into the Consent Letter—in which the parties agreed ISN had no currently cognizable claim against RLF—followed by RLF's wholly inconsistent position that ISN's claims had accrued at the time of the Erroneous Advice. The Superior Court referenced the Consent Letter only to suggest—with no supporting evidence in the record—that the Consent Letter "could have" contained a formal tolling agreement.[156]

As ISN argued below, it is entitled to know whether the internal discussions in its file reflect that proceeding with the merger and appraisal truly was the best course for ISN – and not just the best course for RLF.[157] Without any rebuttal to this point by either RLF or the trial judge, the Court concluded that the Motion to Dismiss could be decided without the need to address possible tolling theories. The Court did not think it necessary to address a legal area that it characterized as "in flux" because the question could be mooted by denying the Motion to Dismiss.[158]

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[155] A090-A119, at 8-9, 13, 15.
[156] Ex. A at 9-10.
[157] A090-A119, at 18-19.
[158] *Id*. at A098, A111-13.

At the Motion to Dismiss hearing, the Court below compounded its prior error by again placing the burden on ISN to offer evidence of the missing contents of its entire file, despite having never seen it.[159] When asked "[s]o what do you think is in the file," ISN explained again the need to explore the possibility – supported by RLF's about-face from the Consent Letter *alone* – that RLF discussed internally that ISN's best course was to try to undo the merger but, nonetheless, advised ISN to proceed to protect RLF's own interests.[160] Despite this reasonable scenario, the trial court concluded that ISN was "unable to state even a tentative factual supposition in support of fraud. Plaintiffs have failed to assert even a theoretical factual scenario that might be confirmed by examination of those portions of the client file still retained by Defendants."[161]

Finally, despite all of the above and despite ISN providing viable tolling theories that may be supported by an examination of its entire file, the Court dismissed ISN's claims *with prejudice*. The Court provided no rationale for dismissing ISN's claims with prejudice or for refusing ISN a chance to cure any pleading deficiencies, as would be typical in the Superior Court.[162]

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[159] A177-240, at 40-45.
[160] *Id*.
[161] Ex. A at 9.
[162] *See Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434 (Del. 2005).

As explained above, if this Court determines that ISN's claim accrued when it learned of the Erroneous Advice and faced "exposure to the *risk* of loss," ISN adequately pled that its claim should be tolled while RLF wrongfully withheld ISN's file. Rather than placing the burden on ISN to speculate what might be in its entire file, the Court should have charged RLF with a presumption (at least at the pleadings stage) that the wrongfully withheld files contained evidence that RLF intentionally misled ISN following the Erroneous Advice. ISN was not allowed to explore this possibility, and the Court rewarded RLF's refusal to produce ISN's file.

It is unfathomable to think that a plaintiff in any other professional negligence context would be denied her entire file by: 1) the professional; 2) the governing ethics board; and 3) a Court of law. For example, it could not be that a plaintiff injured through a medical procedure would be forced to litigate her claims without being given a chance to see her files and then have her claims dismissed at the pleadings stage.

At this stage, the Court must accept well pled allegations as true. ISN has adequately pled facts for tolling the statute of limitations on fraudulent concealment grounds. When asked for specific examples of what other tolling theories might be supported by ISN's files at both the Motion to Compel hearing and the Motion to Dismiss hearing, ISN was able to provide the court with detailed examples.

Particularly where RLF has violated its duty to return ISN's entire file, the Court should have credited those theories at the Motion to Dismiss stage. At the very least, the Court should have dismissed ISN's claims without prejudice and permitted ISN to obtain its entire file and amend its complaint.

CONCLUSION

As shown above, this Court should reverse the Superior Court's decision granting RLF's Motion to Dismiss. This Court should reaffirm that a legal malpractice claim does not accrue until the claimant can plead a prima facie case, which requires the existence of a "resulting loss." This Court should further reaffirm that the mere risk of future damages that may never occur does not constitute a "resulting loss" and cannot trigger accrual. Specifically, this Court should hold that the record evidence demonstrates that ISN's claims did not accrue until, at the earliest, August 11, 2016, when the Court of Chancery issued the Appraisal Opinion.

This Court should also hold that a legal malpractice claim cannot be dismissed on limitations grounds where a client has requested but been refused its entire file—including but not limited to internal memoranda, billing records, and internal emails—and then filed a motion to compel based on the defendant's failure to comply with discovery.

Respectfully submitted.

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