IN THE SUPREME COURT OF OHIO

CASE NO. 06-1811

IRENE F. PATEREK, EXECUTRIX
Plaintiff-Appellee,

-vs-

PETERSEN & IBOLD, *et al.*
Defendant-Appellants.

ON APPEAL FROM GEAUGA COUNTY
COURT OF APPEALS
CASE NO. 2005-G-2624

MEMORANDUM OPPOSING JURISDICTION OF PLAINTIFF-APPELLEE, IRENE F. PATEREK, EXECUTRIX

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FILED
OCT 26 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED

As an initial matter, the premise of Defendant-Appellants' claim that this case presents a novel issue of law is fatally flawed. In the first sentence of their Memorandum in Support of Jurisdiction, the Defendant-Appellants boldly assert that "the tortfeasor is uncollectible beyond the $100,000 limits of his automobile insurance." *Defendant-Appellants' Memorandum, p. 1.* The foregoing statement, and the entire Memorandum upon which it is based, ignores the fact that underinsured motorist coverage was available until Defendant-Appellants failed to re-file the lawsuit against the tortfeasor in a timely manner. Plainly, if Defendant-Appellants had fulfilled their professional responsibilities an additional source of recovery of damages would have been implicated. Defendant-Appellants' inexcusable failure to pursue this avenue of recovery does not transform this case into one of great and public interest.

Contrary to Defendant-Appellants' assertion, it was also never conclusively established that the tortfeasor, Kristopher Richardson (hereinafter "Richardson"), would be unable to satisfy the jury verdict for the remainder of his lifetime. Plaintiff-Appellee agreed to stipulate that he was uncollectible at the time of the accident and trial only because that is what he would have said had he been placed on the witness stand. *Stipulations, paragraph 2.* He was still a young man and certainly appeared to be capable of earning a substantial income over time. No proof was ever submitted to the contrary. Because of the tortfeasor's potential earning capacity and the availability of underinsured motorist coverage, there is no truth to the Defendant-Appellants' repeated assertions that $100,000.00 was the most that Plaintiff-Appellee could ever recover. The record that was developed in the proceedings below thus will not permit this Court to resolve the Propositions of Law that have been devised, even if this were truly an issue of "first impression" (which it is not).

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STATEMENT OF THE CASE AND FACTS

The instant appeal arises from a legal malpractice claim that was filed by Plaintiff-Appellee, Irene F. Paterek, both individually and in her capacity as the Executrix of the Estate of Edward F. Paterek, Deceased, against Defendant-Appellants, Jonathon Evans (hereinafter "Attorney Evans") and Petersen & Ibold (hereinafter the "Firm"). The dispute proceeded to trial on December 13, 2004 in the Geauga County Court of Common Pleas. The parties stipulated in writing to their negligence as well as several other matters. *Tr. 23.* The jury was thus advised at the outset of the proceedings that they only needed to consider damages. *Tr. 24.*

The following facts were established during the jury trial in the proceedings below. Plaintiff, Irene F. Paterek, and the Decedent, Edward F. Paterek, had been married since 1948. *Tr. 122.* They resided in Geauga County, Ohio. *Tr. 122.* After serving in the Marines, the Decedent worked for years as a machinist. *Tr. 123-124.* He retired at age 62. *Tr. 125.* By all accounts, the Decedent had lived an active lifestyle and had never suffered from any significant ailments. *Tr. 73-74, 86-87, 127-128.*

On May 29, 1997, the Decedent was involved in an automobile accident near his home. *Tr. 175-176.* Richardson had caused the collision when he negligently collided into the Decedent's motor vehicle. *Stipulations, paragraph 4.* Within a month or two, the Decedent and Plaintiff retained the Firm to represent them in connection with the accident. *Tr. 143-144.* Attorney Evans was the lawyer assigned to the case. *Tr. 143.*

The Decedent's neurologist, Donald Mann, M.D. (hereinafter "Dr. Mann"), testified that Decedent had suffered lacerations, a fractured ankle, damaged ribs, and an apparent fracture of one of his low back vertebrae. *Tr. 228.* The Decedent's problems steadily worsened over the next several months. *Tr. 229.* Scans were performed which revealed a

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spinal cord injury. *Tr. 229.* By 2001 and 2002, the Decedent was experiencing difficulties with walking and speech. *Tr. 229-230.* He also developed a facial nerve problem, progressive supranuclear palsy (PSP). When Decedent could no longer ambulate or care for himself, he was placed in a nursing home. *Tr. 230.*

Plaintiff, Irene F. Paterek, had to take care of the Decedent and perform his usual chores. *Tr. 80-81 & 142-143.* Her own health began to deteriorate. *Tr. 80 & 147-150.* She eventually fractured her knee while trying to prevent the Decedent from falling. *Tr. 150.* Soon, she also was confined in the nursing home. *Tr. 150.*

After approximately six (6) months in the nursing home, the Decedent passed away. *Tr. 230.* In the ensuing autopsy, the pathologist was able to observe the damaged spinal cord. *Tr. 251-252.* In Dr. Mann's opinion, the spinal cord compression that the Decedent had suffered in the accident led directly to his paraplegic state, his confinement in the nursing home, and his ultimate demise. *Tr. 231-235.*

Over the years that followed the accident, Attorney Evans had been assuring Plaintiff that he was proceeding diligently with the civil action against Richardson. When she eventually became concerned with the prolonged delays, she contacted the court about the case and learned that it had been dismissed without her knowledge on October 6, 2000. *Tr. 145-146.* By that point in time, a year had passed and it was too late to re-file the action. *Stipulations, paragraphs 5 & 6.* As the clerk's records reflect, the Firm nevertheless commenced a second action on October 17, 2001, which was well past the additional year afforded by the savings statute, *R.C. §2305.19. Geauga C.P. Case No. 01P957.* That proceeding was dismissed on February 14, 2002 for lack of prosecution. *Id.*

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At the time of the accident and trial, the tortfeasor, Richardson, was uncollectible. *Stipulations, paragraph 2.* He was insured, however, under a motor vehicle liability policy with limits of $100,000.00. *Id., paragraph.* Plaintiff and the Decedent had also been covered by an underinsured motorist policy with limits of $250,000.00. *Id., paragraph 3.* Once the tortfeasor's limits of $100,000.00 had been exhausted, an additional $150,000.00 would have been available to them had Defendants timely filed the claim. *Id.* Because of Defendants' admitted negligence, Plaintiff and the Decedent never received these benefits to which they were plainly entitled. They also suffered years of anxiety, distress, and financial hardship as a result of Defendants' years of procrastination and delays, persistent misrepresentations as to the status of the personal injury claim, and ultimately loss of the compensation that was plainly due to them.

On December 20, 2004 the jury returned a verdict in the collective amount of $382,000.00. In response to interrogatories submitted to the jury, they indicated that they had awarded the Decedent's Estate $282,000.00 for his past medical bills, past pain and suffering, and past inability to perform usual activities. The jury awarded Plaintiff $100,000.00 in her individual capacity.

On December 30, 2004, Defendants moved for a judgment notwithstanding the verdict under *Civ.R. 50(B).* Plaintiff's timely Memorandum in Opposition thereto was submitted on February 1, 2005. In a decision dated February 16, 2005, Judge Burt concluded that Plaintiff was not entitled to collect anything more from Defendants than the $100,000.00 liability policy limits that had been maintained by the original tortfeasor, Richardson.

Plaintiff timely appealed the trial judge's reduction of the jury verdict. On August 11, 2006, the Eleventh District issued an opinion reinstating the award. *Paterek v. Petersen &*

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Ibold, 11th Dist. No. 2005-G-2624, 2006-Ohio-4179, 2006 W.L. 2337483. The majority held that the damages caused by the derelict attorney could not be artificially limited to the available liability coverage based upon the precedent established in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164. Defendants now seek further review in the Supreme Court of Ohio.

ARGUMENT

PROPOSITION OF LAW I: When an attorney has committed professional negligence in the representation of a client during civil litigation, the attorney is liable only for those damages which were proximately caused by the attorney's breach of duty. Excluded from damages that may be recovered in a legal malpractice action is any amount of an unobtained judgment against an adverse party that would not have been collectable even if the underlying litigation had been competently and successfully handled by the attorney.

PROPOSITION OF LAW II: In a legal malpractice action, the client bears the burden of proof on the element of damages. When an attorney's malpractice prevents a client from obtaining a monetary judgment against another, and when the collectibility of that judgment is disputed in a malpractice action against the attorney, the burden remains upon the client to prove the amount that would have actually been collected by the client from the adverse party had the monetary judgment been entered in the underlying litigation.

I. THERE IS NO ISSUE OF FIRST IMPRESSION PRESENTED IN THIS CASE.

A. OHIO LEGAL MALPRACTICE LAW IS SETTLED.

Defendant-Appellants have placed far too much emphasis upon the tortfeasor's "uncollectibility" in concluding that all that was really lost was his liability insurance coverage. All that was ever established on this point was that Richardson did not have any assets at the time of the accident and trial. *Stipulations, paragraph 2.* Of course, there was no way for Defendants to demonstrate at trial whether or not he would have the financial resources in the

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future to compensate Plaintiff and no stipulation was ever entered upon this point. No one will ever know whether the tortfeasor could have been forced at some later time to contribute his personal assets to compensating Plaintiff because (and only because) of Defendants' admitted malfeasance.

Defendant-Appellants' position that this case presents an issue of first impression is nothing more than an impermissible attempt to yet again visit the consequences of their own failures onto Plaintiff-Appellee. The elements and proof required for a legal malpractice claim in Ohio have been thoroughly and definitively analyzed in *Vahila*, 77 Ohio St.3d 421, 674 N.E.2d 1164. The "collectability" that Defendant-Appellants' advocates is already considered within the causation and damages framework established by *Vahila*.

That *Vahila* is the final word on this tort in Ohio is further borne out by the fact that not a single appellate or trial court in Ohio since that decision has struggled with applying its principles. Moreover, Defendant-Appellants do not remotely suggest that the appellate courts in Ohio have reached conflicting decisions regarding the availability and measure of damages in a legal malpractice action. Indeed, other than a tortured dissection of the *Vahila* case, Defendant-Appellants offer no citations from Ohio court cases supportive of the novel theory they advance. The Supreme Court of Ohio has spoken definitely on the issue of damages to be awarded in a legal malpractice action.

Defendant-Appellants' tedious parsing of the *Vahila* opinion does not alter the elements Plaintiff-Appellee was required to prove to establish her legal malpractice claim. Indeed, Plaintiff-Appellee satisfied her burden of proof as to each element, specified by *Vahila*. To that end, a jury awarded damages totaling $382,000 in favor of Plaintiff-Appellee. *Vahila* did not

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require, nor has any other Ohio court held, that collectability of the tortfeasor was an element of attorney malpractice. In fact, the *Vahila* court quite clearly rejected such a requirement:

> We are aware tat the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case. Naturally, a plaintiff in a legal malpractice action may be required, depending on the situation, to provide some evidence of the merits of the underlying claim. * * * However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim. (emphasis added).

Id. at 427-428.

B. OHIO'S PUBLIC POLICY DOES NOT WARRANT ANY FURTHER REVIEW OF THIS LEGAL MALPRACTICE ACTION.

The cases cited by Defendant-Appellants from other jurisdictions offer no precedential or persuasive value here. Specifically, those cases do not reflect the current state of the law on legal malpractice in Ohio. Since there has been definitive guidance from this state's highest court, there is no need to look to authorities in other jurisdictions under these circumstances. *Cross v. Carstens* (1892), 49 Ohio St. 548, 573, 31 N.E. 506 (review of decisions of other states is unnecessary, "as the law of this case may be satisfactorily determined without resort to them."); *The Cincinnati & Spring Grove Ave. St. Railway Co. v. Village of Cumminsville* (1863), 14 Ohio St. 523, 547 ("[I]t can matter very little, that our conclusions are not concurred in by the courts of some of our sister states. It is nevertheless the law of this state, and no longer open to doubt or question."). It also warrants brief mention that, at most, Defendant-Appellants have identified only sixteen states that have adopted "collectability" as an element of a legal malpractice claim. This is a far cry from a majority of jurisdictions and certainly

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does not constitute a mandate for this Court to abandon settled principals of legal malpractice law.

Courts since the *Vahila* opinion recognize the clarity of the Court's legal malpractice analysis. This includes the trial court below, which rejected the same argument advanced by Defendant-Appellants' here at both the summary judgment and directed verdict stages of the litigation. In *Kovacs v. Chesley* (6th Cir. 2005), 406 F.3d 393, 398-399, the court reversed the trial court's opinion, which dismissed a legal malpractice action filed by a former client against her attorney. The client alleged that the attorney failed to submit her claim under the proper category in a class action settlement and that she could have been eligible for $100,000 in damages if the attorney had properly categorized her claim. The attorney disputed whether the plaintiff could have satisfied the requirements of the claimed category and thus argued that the plaintiff, like Plaintiff-Appellee here, could not recover the claimed damages.

The *Kovacs* court observed that the type of damages potentially available to the plaintiff were not precluded under Ohio law: "[I]t is not legally certain that an Ohio court would not award Kovacs the full $100,000 despite her alleged inability to demonstrate that she would have received rupture benefits under the program, because success on the underlying matter is not categorically required under Ohio law to demonstrate legal malpractice." *Id.* at 398. The *Kovacs* court cogently opined:

> Indeed, if it is to be expected that lay persons like [plaintiff] know in advance of seeking legal advice what the exact requirements of the settlement program are, and have all medical paperwork completed in the fashion required by the settlement program, then there would be no need to hire attorneys at all. <u>This case therefore presents an excellent example of a situation in which the plaintiff may not be able to demonstrate success on the underlying matter, but nonetheless is permitted to recover for legal malpractice, as the inability to demonstrate success is directly linked to the attorney's alleged malpractice. *Vahila*</u> in fact

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> approvingly quotes a commentator discussing a similar situation--that of attorneys who negligently conduct discovery--and criticizing the result that would be reached under a rule requiring a demonstration of success on the underlying matter: [P]roblems await those who do proceed with the "trial within a trial." For example, the attorney in the original action may have negligently failed to pursue the discovery that would have insured success. If the results of that same discovery are now necessary to prove the merit of the underlying claim-- and the passage of time has precluded obtaining that information--the attorney by his own negligence will have protected himself from liability. In such a case, the more negligent the attorney, the more difficult is the plaintiff's task of proving causation. (citation omitted) (emphasis added).

Id. at 398-399. *See also Vagianos v. Halpern* (Dec. 14, 2000), 8th Dist. No. 76408, 2000 W.L. 1844752 (client settlement of underlying case is not a waiver of a legal malpractice claim against attorney where substandard representation made settlement for a lesser amount reasonable).

The "windfall" argument that Defendant-Appellants' advance is just another way of trying to deflect responsibility away from them. Such "windfall" arguments have been made frequently in Ohio courts. There is nothing novel or unique concerning this issue. Moreover, to the extent that there is any "windfall" in this case, it is in Defendant-Appellants' favor. The effect of their requested relief would be to excuse them from responsibility for the damages caused by their dereliction of duty.

C. POTENTIALLY MORE INSURANCE COVERAGE WAS AVAILABLE THAN THE TORTFEASOR'S LIABILITY POLICY LIMITS OF $100,000.00.

In their Memorandum in Support of Jurisdiction, the Defendant-Appellants take great liberties with the stipulations entered by the parties. Specifically, Defendant-Appellants omit any reference to paragraph 3 of the stipulations which was as follows:

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> *** [T]he Plaintiffs had underinsured motorists coverage with One Beacon in the amount of $250,000.00 at the time of the accident in question ($150,000.00 of which may be available to the Plaintiffs to cover damages, if necessary, after set-off of the $100,000.00 available from the tortfeasor's policy); ***

Stipulations, p. 1. When coupled with the Defendant-Appellants' admitted negligence in failing to timely refile the Plaintiff-Appellee's lawsuit, which effectively precluded the claim against the underinsured motorist insurance carrier, the stipulation obviously is sufficient to permit potential recovery of the damages asserted against the Defendant-Appellants.[1]

Like the plaintiff in *Kovacs, supra*, but for Defendant-Appellants' admitted negligence, the potential damages recoverable by the Plaintiff-Appellee encompassed the total amount of coverage available – regardless of whether the claim against the tortfeasor would have been successful. Of course, since the Defendant-Appellants – by their own admitted negligence – failed to submit a timely claim against the underinsured motorist coverage, one can never know whether Plaintiff-Appellee would ultimately prevail against the tortfeasor. Thus, to the extent that "collectability" is speculative, such speculation is entirely Defendant-Appellants' doing. Sound policy and plain common sense dictate that Defendant-Appellants should not be permitted to cloak themselves in a shroud of immunity from responsibility for the reasonable, logical and direct consequences of their own behavior.

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[1] When Defendant-Appellants failed to re-file the personal injury action within the time afforded by the statute of limitations and the saving clause, Plaintiff-Appellee forever lost her claim against the tortfeasor. *Stipulations, paragraphs 5-6.* Their own motorist insurance carrier, One Beacon, is now in a position to argue that pursuant to the text of *R.C. §3937.18(A) (as revised by 1994 S.B. No. 20)*, no uninsured or underinsured motorist benefits have to be paid since Plaintiff and Decedent are no longer "legally entitled" to recover from the tortfeasor. *Taylor v. Kemper Ins. Co.* (Jan. 16, 2003), 8th Dist. No. 81360, 2003-Ohio-177, 2003 W.L. 132428, ¶ 12-17, *aff'd*, 100 Ohio St.3d 342, 2003-Ohio-6516, 800 N.E.2d 1; *Laibson v. CNA Ins. Cos.* (May 14, 1999), 1st Dist. No. C-980736, 1999 W.L. 299899, *2. Under this reasoning, Defendants' negligence thus cost the clients the opportunity to collect both the liability policy limits of $100,000.00 and additional underinsured motorist benefits of $150,000.00, for a total of $250,000.00.

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Plaintiff-Appellee agrees that vital public policy interests at play in this case: the right of a victim to be made whole for all of the harms suffered by a victim and the sanctity of a jury verdict. Defendant-Appellants' appeal does nothing to advance these important policies and, in fact, is in derogation of them. The bottom line is that Defendant-Appellants' "issue of first impression" is a desperate attempt to avoid the ultimate result of their negligence, which is borne out by the jury verdict returned against them at trial.

As with every other tortfeasor, Defendant-Appellants must compensate Plaintiff-Appellee for the damages directly and proximately caused by their failure to re-file the personal injury complaint in a timely fashion. *See, Huffer v. Cicero* (4th Dist. 1995), 107 Ohio App.3d 65, 75, 667 N.E.2d 1031, 1037 (finding that trial court erred in limiting damages recoverable by legal malpractice plaintiff only to the amount of attorneys' fees paid by the plaintiff to the attorney). The *Huffer* court recognized that:

> In a legal malpractice action, a client is entitled to be compensated for any damages proximately caused by the attorney's malpractice. . . . Proximate cause generally requires evidence that a result was more likely than not to have been caused by a defendant's negligence. (citation omitted).

Id. See also Rafferty v. Scurry (12th Dist. 1997), 117 Ohio App.3d 240, 690 N.E.2d 104 (plaintiff in legal malpractice action was entitled to recover damages caused by his attorney's failure to respond to requests for admission, which resulted in a finding of liability against the plaintiff in the underlying action); *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 696, 576 N.E.2d 765, 776 (plaintiff in a malpractice action is entitled to recover both economic and non-economic damages); *Bauer v. Georgeff* (Sept. 1, 1998), 10th Dist. No. 97APE03-313, 1998 W.L. 614636 (plaintiff in malpractice case can recover compensatory and punitive damages, in addition to attorneys' fees); *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (8th

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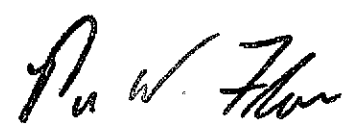
Dist. 1992), 79 Ohio App.3d 786, 801, 607 N.E.2d 1173, 1182. "The fundamental rule of the law of damages is that the injured party shall have compensation for all the injuries sustained." *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601, 612, 1992-Ohio-138, 597 N.E.2d 474, 482.

The other important public policy implicated by this case, is the sanctity of jury verdicts. The jury below returned a verdict against the Defendant-Appellants totaling $382,000. It is well settled that "an '[a]ppellate court hesitates to enter *remittitur* or set aside [a] jury's verdict, supported by creditable proof, as excessive, in [the] absence of passion or prejudice evidenced by [the] record.' * * * " *Bauer*, 1998 W.L. 614636, p. *7 (citations omitted). The jury's verdict below, the trial court's decision overruling Defendant-Appellants' motion for summary judgment and the trial court's decision overruling Defendant-Appellants' motion for directed verdict present a clear and compelling case for rejecting Defendant-Appellants' latest effort to avoid responsibility for their actions. An isolated, anomalous post-trial decision running counter to the court's previous rulings and in derogation of the jury's decision does not change this.

CONCLUSION

For all of the forgoing reasons, this Court should decline the Defendant-Appellants' invitation to exercise jurisdiction over this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Memorandum** was served by regular U.S. Mail on this 25th day of October, 2006 upon:

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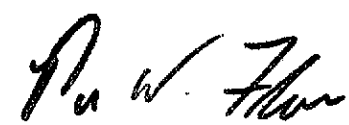

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