

IN THE SUPREME COURT OF OHIO  
CASE NO. 2006-1811

IRENE F. PATEREK, et al.,	)	On Appeal from the Geauga
	)	County Court of Appeals,
Plaintiffs-Appellees	)	Eleventh Appellate District
	)	
vs.	)	Court of Appeals
	)	Case No. 2005-G-2624
PETERSEN & IBOLD, et al.	)	
	)	
Defendants-Appellants	)	

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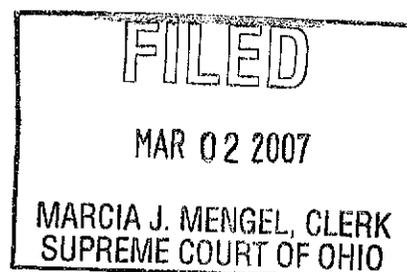


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## STATEMENT OF THE CASE AND FACTS

The Plaintiffs-Appellees (hereinafter "Plaintiffs") in this case had retained the Defendant-Appellant law firm (hereinafter "Defendant") to institute an action stemming from injuries sustained by the Plaintiff in a motor vehicle accident. (See Eleventh Appellate District Opinion, *Paterek v. Petersen & Ibold*, 11<sup>th</sup> Dist. No. 2005-G-2624, 2005-Ohio-4179, at ¶2). The Defendant failed to re-file the Plaintiffs' action within the applicable statute of limitations. (*Id.* at ¶4). After the Plaintiffs' amended complaint for legal malpractice was filed against the Defendant law firm, the Defendant admitted liability in failing to timely re-file the personal injury action. (*Id.* at ¶6). During discovery in the legal malpractice action, it was established that the underlying tortfeasor maintained liability coverage in the amount of \$100,000. (*Id.* at ¶8). The Plaintiff and Defendant stipulated that the underlying tortfeasor would not have been collectible in excess of \$100,000. (*Id.* at ¶11).

The Defendant argued during summary judgment and at trial that the potential exposure to the law firm should be limited to the amount of the collectible judgment the Plaintiff could have received as a result of the accident: \$100,000. (*Id.* at ¶¶9, 16). The jury returned a verdict against the law firm in the amount of \$382,000. (*Id.* at ¶16). In granting the Defendants' motion for judgment notwithstanding the verdict, the trial court remitted the jury verdict to \$100,000. (*Id.* at ¶17). In reversing the trial court's remittur of the jury verdict, the Eleventh Appellate District held that the trial court erred in reducing the amount of the jury verdict due to the uncollectibility of the underlying tortfeasor. (*Id.* at ¶¶30, 41, 45).

## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: The Mandates Of *Vahila v. Hall* Are Inapplicable In a Legal Malpractice Action Where Liability For Underlying Negligence Is Admitted and the Only Issue For Consideration Is the Damages Proximately Caused To the Plaintiff Where The Underlying Tortfeasor Is Proven Uncollectible. *Vahila* should be modified to permit the trial court to consider whether sufficient evidence of success in the underlying matter exists, on a case-by-case basis.**

This Court in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, set forth the rule in Ohio that it is not an absolute necessity, in every legal malpractice case, for the plaintiff to prove a successful outcome in the underlying case allegedly mishandled by the defendant-attorney. While the mandates of *Vahila* are reasonably clear, its application has been jumbled in the instant case. In the case at bar, the Eleventh District set out to determine the issue of “\* \* \* whether the trial court was correct in reducing the amount awarded in the verdict to a lesser amount due to the uncollectability of Richardson [the underlying tortfeasor].” *Paterek*, 2006-Ohio-4197, at ¶30. The Eleventh District ultimately held that the trial court erred in remitting the verdict to the amount of the collectible judgment the Plaintiff could have obtained based on this Court’s rejection of the “case-within-a-case” doctrine in *Vahila. Id.*

The Eleventh District reasoned that the trial court’s remittur of collectible damages resulted in an improper adoption of the “case-within-a-case” requirement which was rejected in *Vahila*: “In other words, the trial court, in its decision, limited consideration of damages to the collectability of damages in the underlying case against Richardson. This was a ‘case within a case’ analysis.” *Id.* at ¶39. Ultimately, the Eleventh District determined that the collectibility of the underlying tortfeasor was not relevant to the elements of the Plaintiff’s legal malpractice action. *Id.* at ¶40.

In determining that the collectibility of the underlying tortfeasor is not relevant to the elements of the Plaintiff's legal malpractice action, the Eleventh District has mis-applied *Vahila*. There is no dispute that an essential element of any legal malpractice action is: "that there is a causal connection between the conduct complained of and the resulting damage or loss." *Vahila*, 77 Ohio St.3d at syllabus. To put the issue simply: How could the attorney's misfeasance have proximately caused \$382,000 in damages if the Plaintiff could only have collected \$100,000 of their damage or loss? In the instant case, a "case within a case" analysis would have resulted if the trial court required the Plaintiff to prove the underlying liability of the tortfeasor. The liability of the Defendant was admitted and the uncollectibility of the underlying tortfeasor was stipulated. In such circumstances, the "case within a case" analysis is inapplicable. A brief review of *Vahila* on this issue is instructive.

First and foremost, the *Vahila* decision does not stand for the blanket proposition that evidence of the merits of the plaintiff's underlying case is never a relevant consideration. Rather, *Vahila* rejected the blanket rule that malpractice plaintiffs must prove, in every instance, that they would have been successful in their underlying claims before recovery against the negligent attorney may be had. To this end, this Court in *Vahila* recognized:

We are aware that the requirement of causation often dictates that the merits of the malpractice action depend on 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.

*Id.* at 427-28.

Unlike the instant case, this Court in *Vahila* addressed those factual situations in legal malpractice actions where the damages flowing from the attorney's actions, omissions, or series of actions are not readily apparent. For example, the plaintiffs in *Vahila* alleged that the defendants had mishandled a series of civil, criminal, and administrative actions. *Id.* at 422. The

defendant-attorneys in *Vahila* were essentially retained to *defend* the plaintiffs in these civil, criminal, and administrative matters. *Id.*, at 427. The defendants were ultimately granted summary judgment because the plaintiffs were unable to produce sufficient Civ. R. 56(C) evidence to establish that, but for the defendant's alleged negligence, the plaintiffs would have obtained a more favorable result in the underlying matters. *Id.* at 422-23.

In rejecting the "but for" test for proximate cause, this Court examined *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058. The *Krahn* decision rejected the proposition, in a criminal action, that the plaintiff must first obtain a reversal of his or her conviction as a prerequisite for bringing a legal malpractice action. *Id.* at 425. Requiring a reversal of the conviction would have been inequitable in *Krahn* because the plaintiff's claim did not stem from the actual conviction itself; but rather the lost opportunities to enter into a more favorable plea bargain:

Krahn's case is based in part on Kinney's alleged failure to communicate the prosecutor's offer. Consequently, Krahn was forced into a situation of having to plea to a more serious charge or risk a still greater conviction or sentence. \* \* \* the injury in such a situation 'is not a bungled opportunity for vindication, but a lost opportunity to minimize her criminal record.

*Vahila*, 77 Ohio St.3d at 425, citing *Krahn*, 43 Ohio St.3d at 106.

This Court in *Vahila* applied those principles from *Krahn* which rejected the notion a "but for" analysis because, in those factual scenarios, requiring the plaintiff to prove a virtual certainty of success on the merits of the underlying action would be inequitable to the plaintiffs. This Court distinguished these factual situations, where the damages flowing from the attorney's omission are not readily apparent, from cases such as this case where liability had been admitted and the ultimate judgment the plaintiff could collect had been stipulated: "Except in those rare instances where the initial action was a 'sure thing,' the certainty requirement protects attorneys

from liability for their negligence.” *Id.* at 426, citing Note, The Standard of Proof of Causation in Legal Malpractice Cases (1978), 63 Cornell L.Rev. 666, 670-71.

This Court in *Vahila* aptly noted that application of a strict “but for” test for proximate causation would be inequitable in a situation where the very discovery the attorney failed to pursue could have ensured recovery for the client. *Id.* at 427. Similarly, application of a rule requiring the plaintiff to prove success on the underlying merits would be inapplicable where the underlying claim lacked merit, yet the attorney negligently failed to communicate settlement opportunities. *Id.* at 426. In fact, the plaintiffs in *Vahila* alleged that the defendants failed to disclose the legal consequences of plea bargains and settlement arrangements made in the *defense* of the plaintiffs in the underlying civil matters. *Id.* at 427. In this factual situation, it would be inequitable to require the plaintiff to prove that, but for the attorney’s mishandling, the defense of the civil and criminal matters would have resulted favorably: “Thus, *given the facts of this case*, appellants have arguably sustained damages or loss regardless of the fact that they may be unable to prove that they would have been successful in the underlying matter(s) in question.” *Id.*

The analysis of proximate cause is different in a factual situation where the defendant-attorney allegedly failed to file within the statute of limitations, failed to re-file an after a Civ. R. 41(A) dismissal, or missed a filing deadline in a case with an uncollectible defendant. In such circumstances, issues regarding settlement opportunities, discovery allegedly foiled, miscommunicated plea offers or resolution attempts, or other sub-par handling on the part of the attorney are not at issue. In a case such as the case at bar, where the attorney’s act or omission has allegedly foiled the plaintiff’s ability to pursue an underlying suit, evidence of the merits of the plaintiff’s underlying action are relevant to the proximate cause analysis: “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.” *Id.* at 428. Naturally, in proving that the attorney’s malfeasance proximately caused an actual loss to the plaintiff, the plaintiff will be required to prove that the underlying judgment against the tortfeasor was collectible.

This Court’s holding in *Vahila* rejecting the strict “but for” analysis in a legal malpractice action did not abrogate the Plaintiff’s burden to prove proximate cause. Rather, in a situation such as this, where liability is admitted and the collectible amount of damages is stipulated, evidence of the amount of the collectible judgment is wholly relevant to damages proximately caused by the defendant-attorney. Requiring proof of the proximate cause of the Plaintiff’s damages in this case would not result in a trial of the underlying case within the legal malpractice trial because the collectible damages were stipulated.

Nonetheless, this court should take this opportunity to refine *Vahila*. The language of *Vahila* is too easily distorted into the proposition that professional liability claims might be legally sufficient, irrespective of the lack of merits inherent in the underlying claim. Damages are an essential element of any claim for negligence, including claims of professional negligence. As this case illustrates, *Vahila* is being interpreted to permit cases to proceed to verdict without evidence of damage, or, perhaps even worse, based purely on conjecture. Should *Vahila* permit a case to go forward where the plaintiff can offer *no* evidence that shows he or she could prevail, either on liability or damages? The case-within-a-case issue in legal malpractice actions is integral to reaching the true merits of the claim, and *Vahila* should be modified to state: *“It is within the sound discretion of the trial court to determine, on a case-by-case basis, which claims of legal malpractice may fail as a matter of law, because the plaintiff lacks sufficient evidence to demonstrate a possibility of success in the underlying case.”* Such a role would be

in keeping with the trial court's gatekeeper role in every case of articulating burden of proof, and determining whether sufficient evidence exists to sustain that burden.

In light of the foregoing, the Eleventh Appellate District's application of *Vahila* to the instant case was in error and its decision should be reversed.

**Proposition Of Law No. 2: The Collectibility of the Underlying Tortfeasor Is a Relevant Consideration Regarding the Element of Proximate Cause In a Legal Malpractice Action and should be part of a plaintiff's *prima facie* case in legal malpractice actions.**

The true issue in this case is simple: whether a legal malpractice plaintiff is entitled to recover damages from the defendant-attorney in excess of the amount of a collectible judgment in the underlying case? The Eleventh Appellate District held in *Paterek v. Peterson* that the collectibility of the underlying tortfeasor is not relevant to the elements of the Plaintiff's legal malpractice claim. (See Opinion, at ¶¶30, 41, 45). Contrary to the Eleventh District's conclusion, nearly each and every jurisdiction which has addressed this issue has held, in one form or another, that the collectibility of the underlying tortfeasor is relevant to the element of proximate cause in a legal malpractice action.

Although each state has yet to examine the issue of whether the collectibility of the underlying tortfeasor is relevant to the proximate cause analysis in a legal malpractice action, those jurisdictions which have addressed this issue have uniformly held that collectibility is relevant in one form or another. In general, states are split into two camps regarding the collectibility issue: (1) the majority view which holds that the collectibility of the underlying tortfeasor is an element of the plaintiff's case and therefore the plaintiff's burden to prove; and (2) the minority position which holds that collectibility is an affirmative defense which must be pleaded and proved by the attorney-defendant.

In most cases, the majority position rationalizes that it is the plaintiff's burden to produce evidence regarding collectibility of the underlying tortfeasor because to hold otherwise would go beyond the usual purpose of tort law to compensate for loss sustained and would give the client a windfall opportunity to fare better as a result of the lawyer's negligence than he would have fared if the lawyer had exercised reasonable care. Whereas, the minority position rationalizes that it is the defendant-lawyer's burden to plead and prove uncollectibility of the underlying tortfeasor and/or judgment as an affirmative defense because the fairer approach is to wait until after malpractice has been proven and then to impose on the negligent attorney the burden of going forward with evidence to show that the damages imposed could not in fact have been recovered from the wrongdoer in the original case.

For example, in *McKenna v. Forsyth & Forsyth* (NY 2001), 280 A.D.2d 79, 720 N.Y.S.2d 645, the court held that collectibility may be considered in legal malpractice action and it is the plaintiff's burden to prove:

We hold that, when a cause of action is lost as a result of the attorney's negligence, the client's injury is measured by the amount that would have been collected on that lost cause of action. We further hold that the client bears the burden of proving that amount. \* \* \* To hold otherwise would go beyond the usual purpose of tort law to compensate for loss sustained and would give the client a windfall opportunity to fare better as a result of the lawyer's negligence than he would have fared if the lawyer had exercised reasonable care.

*McKenna*, 280 A.D.2d at 80-83; see also *Copp v. Atwood* (Jan. 24, 2005), D.N.H. No. 03-288-JD, unreported, 2005 WL 139180 (Holding that in order to prove damages in a legal malpractice case, "the plaintiff must show the amount of judgment that he would have received in the underlying case and that the judgment would have been collectible."); *DiPalma v. Seldman* (Cal.App.1994), 27 Cal.App.4<sup>th</sup> 1499 ("A plaintiff who establishes legal malpractice in prosecuting a claim must also prove careful management would have resulted in a favorable

judgment and collection of same.”); *Jernigan v. Giard* (Ma.1986), 398 Mass. 721, 200 N.E.2d 806 (Massachusetts Supreme Court held that to recover on a claim against a former attorney for legal malpractice in not commencing an action, former clients had the burden of proving that they could have collected something on any judgment they might have obtained); *Poly v. Moylan* (Ma.1996), 423 Mass. 141, 667 N.E.2d 250 (Massachusetts Supreme Court re-affirmed holding in *Jernigan* that plaintiff in legal malpractice case bears the burden of showing that he would have been able to collect on the underlying judgment); *Whiteaker v. State of Iowa* (Iowa.1986), 382 N.W.2d 112; (“\*\*\* in proving the value of the underlying claim the client has the burden to show not just that a judgment in an ascertainable amount would have been entered, but the amount that would have been collected on that judgment.”); *Pickens, Barnes & Abernathy v. Heasley* (Iowa.1983), 328 N.W.2d 524 (Holding that in a legal malpractice case, the client must prove not only the amount of judgment that would have been obtained absent the attorney’s negligence, but also what would have been collected, and the client is limited to the amount which could have been collected); *Rorrer v. Cooke* (N.C.1985), 313 N.C. 338, 329 S.E.2d 355 (“Where the plaintiff bringing suit for legal malpractice has lost another suit allegedly due to his attorney’s negligence, to prove that but for the attorney’s negligence plaintiff would not have suffered the loss, plaintiff must prove that \*\*\* the [underlying] judgment would have been collectible.”); *McDow v. Dixon* (Ga.App.1976), 138 Ga.App. 338, 226 S.E.2d 145 (“A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectible in some amount, for therein lies the measure of his damages.”); *Allen Decorating, Inc. v. Oxendine* (Ga.App.1997), 225 Ga.App. 84, 483 S.E.2d 298 (holding same); *Sitton v. Clements* (E.D.Tenn.1966), 257 F.Supp. 63 (“The burden of proof was upon the plaintiff not only to show

that the defendant negligently breached his contract, but also if suit had been instituted he could have recovered a judgment from the [underlying] defendant, the amount of the judgment, and that defendant was solvent.”); *Payne v. Lee* (E.D.Tenn.1988), 686 F.Supp. 677 (Applying Tennessee law, court held that in order to establish proximate cause resulting from the attorney’s negligence, client would have to prove that suit against underlying tortfeasors would have resulted in a collectible judgment in the client’s favor); *Eno v. Watkins* (Neb.1988), 229 Neb. 855, 429 N.W.2d 371 (Nebraska Supreme Court held that in a legal malpractice action, when the plaintiff’s loss arises from the defendant attorney’s negligent prosecution of a prior case, the client has the burden of proving not only the amount of the judgment he would have obtained but for the attorney’s negligence, but also what he would have collected); *Taylor Oil Co. v. Weisensee* (S.D.1983), 334 N.W.2d 27 (South Dakota court cited the “well established rule” that clients suing their attorney for malpractice not only must prove that their claims was valid and would have resulted in a judgment in their favor, but also that said judgment would have been collectible in some amount); *Haberer v. Rice* (S.D.1994), 511 N.W.2d 279 (Holding that a required element of a plaintiff’s malpractice claim is “the amount of the judgment and that the judgment was collectible.”); *Cosgrove v. Grimes* (Tex.1989), 774 S.W.2d 662 (Texas Supreme Court held that jury instruction in legal malpractice action was defective in that instruction should have inquired as to the amount of damages that would have been collectible if the suit had been properly prosecuted by the attorney, rather than inquiring simply of the amount the client “would in reasonable probability have collected from the intended defendant.”); *Rodriguez v. Sciano* (Tex.App.2000), 18 S.W.3d 725 (“In order to prevail on a legal malpractice claim which arises from the alleged mishandling of an underlying claim or litigation, the plaintiff has the burden to show that ‘but for’ the attorney’s negligence, he or she would be entitled to judgment,

and show what amount would have been collectible had the judgment been recovered.”); *Klump v. Duffus* (7<sup>th</sup> Cir.1996), 71 F.3d 1368 (“While we are mindful that a minority of courts have placed the burden on the defendant to prove the uncollectibility of the underlying judgment, we conclude that the burden is properly placed on the plaintiff to prove the amount she actually would have collected from the original tortfeasor as an element of her malpractice claim.”); *Fernandez v. Barrs* (Fla.App.1994), 641 So.2d 1371 (“The general rule is that the client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation ...and that any judgment which could have been recovered would have been collectible.”); *Tilly v. Doe* (Wash.App.1988), 49 Wash.App. 727, 746 P.2d 323 (In addressing issue of first impression in Washington, appellate court held that trial court did not err in requiring plaintiff to produce evidence of collectibility in legal malpractice action, and that evidence relevant to collectibility was properly admitted on issue of proximate cause); *Staples' Ex'ors v. Staples* (Va.1888), 85 Va. 76, 7 S.E. 199 (Recognizing general rule that plaintiffs bear the burden to prove that they could have collected something on any underlying judgment they might have obtained); *Conant v. Ervin* (Va.Cir.Ct.2003), 61 Va.Cir.475, 2003 WL 22382798 (Virginia trial court held that in order to succeed on liability in legal malpractice action, the plaintiff must prove: (1) liability of the tortfeasor in the underlying personal injury action; (2) that a verdict would have been rendered against the underlying tortfeasor; and (3) that the verdict against the underlying tortfeasor would have been collectible); and *Augustine v. Adams* (D.Kan.1997), 1997 WL 298451 (Applying Kansas law, federal district court recognized that rule of law requiring plaintiff to prove proximate cause and damages in legal malpractice action requires proof on these three elements: (1) the plaintiff's underlying claim is valid; (2) the

plaintiff would have received a favorable judgment but for the attorney's error; and (3) that the judgment was collectible).

As noted above, even the minority position recognizes the relevance of the collectibility of the underlying tortfeasor within the proximate cause analysis of a legal malpractice action. However, the minority position places the burden on the defendant to plead and prove collectibility as an affirmative defense.

For example, in *Kituskie v. Corbman* (Pa.1998), 552 Pa. 275, 714 A.2d 1027, the Pennsylvania Supreme Court held, as issues of first impression, that: (1) collectibility of damages in underlying action should be considered in legal malpractice action, and (2) attorney must plead uncollectibility as affirmative defense, and bears burden of proof on that issue. The Pennsylvania Supreme Court reasoned that collectibility should be considered because:

\* \* \* it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party; the plaintiff would be receiving a windfall at the attorney's expense.

*Kituskie*, 552 Pa. at 283; see also *Smith v. Haden* (D.D.C.1994), 868 F.Supp. 1 ("The fairer approach is to wait until after malpractice has been proven and then to impose on the negligent attorney the burden of going forward with evidence to show that the damages imposed could not in fact have been recovered from the wrongdoer in the original case."); *Teodorescu v. Bushnell, Gage, Reizen & Byington* (Mich.App.1993), 201 Mich.App. 260, 506 N.W.2d 257 ("\*\*\* collectibility is an affirmative defense to an action for legal malpractice that must be pleaded and proven by the defendant."); *Jourdain v. Dineen* (Me.1987), 527 A.2d 1304 ("Because uncollectibility of a judgment should be treated as a matter constituting avoidance or mitigation of the consequences of one's negligent act, it must be pleaded and proved by the defendant."); *Hoppe v. Ranzini* (N.J.App.1978), 158 N.J.Super. 158, 385 A.2d 913 (New Jersey court held that

in a legal malpractice action, burden of proof with respect to issue of collectibility of judgment against main defendant should be upon defendant-attorney); *Power Constructors, Inc. v. Taylor & Hintze* (Alaska.1998), 960 P.2d 20 (Supreme Court of Alaska adopts minority view in holding that burden of proof regarding collectibility of underlying tortfeasor is on the attorney-defendant); and *Jenkins v. St. Paul Fire & Marine Ins. Co.* (La.1982), 422 So.2d 1109 (Adopting minority view and holding that fairer approach is to wait until after the malpractice has been proven and then to impose on the negligent attorney the burden of going forward with evidence to show that the damages imposed could not in fact have been recovered from the wrongdoer in the original case).

Whether examining the majority of minority position, one proposition is clear: the collectability of the underlying tortfeasor is relevant to the element of proximate cause in a legal malpractice case. The dissent in this case appropriately summarized the underlying rationale for this approach:

The trial court was correct in holding that “the damages actually caused by the negligence of [Evans and Petersen & Ibold] must be limited to the amount that [the Patereks] could be reasonably certain of receiving had [Evans and Petersen & Ibold] not been negligent.” *To hold otherwise, would result in a windfall for Patereks simply because they had the misfortune of being the victims of malpractice by attorneys who have deeper pockets than the tortfeasor who harmed Patereks in the first place. Such result is contrary to the purpose of tort law.* (emphasis added).

*Paterek*, 2006-Ohio-4179, at ¶55. The majority of the Eleventh District in this case erred in holding that “collectability was not an element of the case” and “the trial court had no duty to examine the collectability of Richardson.”

Pursuant to the law espoused by the Eleventh District, legal malpractice defendants will be hamstrung in their ability to effectively challenge one of the essential elements in any legal malpractice case; proximate cause. In addition, legal malpractice plaintiffs in the State of Ohio

will be placed in a better position than they would have been in had the attorney acted with all reasonable care and competence. Such a proposition is inconsistent with the fundamental precepts of tort law and proximate cause. For these reasons, the decision of the Eleventh District should be reversed.

This case presents the Court with an issue of first impression in Ohio. As noted above, following the lead of nearly every other state, the collectibility of the underlying tortfeasor is relevant in any legal malpractice action in one form or another (whether it is the plaintiff's burden to prove the underlying tortfeasor was collectible; or the defendant's burden to prove he or she was uncollectible). If the Eleventh District's ruling is reversed, this Court will be left with the determination of whether to adopt the majority or minority position as outlined above. The Amicus Curiae for the Ohio Association of Civil Trial Attorneys respectfully submits that this Court should adopt the majority position.

The majority of jurisdictions addressing the collectability issue place the burden on the Plaintiff to prove the amount he or she actually would have collected from the original tortfeasor as an *element* of his or her malpractice claim. Not only is this position adopted by a majority of jurisdictions, but placing the burden of establishing collectability on the plaintiff is more consistent with a plaintiff's burden of proof in negligence actions generally. Proof of the collectibility of the underlying tortfeasor is intertwined with the element of causation in a legal malpractice action. The plaintiff bears the burden of proof at trial on the element of causation in any legal malpractice action. As such, this Court should adopt the majority position and hold that the collectability of the underlying tortfeasor is a relevant and critical element in a legal malpractice case which the plaintiff bears the burden of proving at trial.

## CONCLUSION

For the reasons discussed above, the Amicus Curiae for the Ohio Association of Civil Trial Attorneys respectfully requests that this Court reverse the Eleventh District's ruling in *Paterek v. Petersen & Ibold*, 11<sup>th</sup> Dist. No. 2005-G-2624, 2005-Ohio-4179. Compensatory damages exist only to compensate the Plaintiffs, not to punish the Defendant. If the Plaintiffs could not have collected a judgment in excess of \$100,000 from the underlying tortfeasor, then the Defendants' negligence did not injure the Plaintiffs in excess of that amount. The Plaintiffs could not lose what they never had.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing *Merit Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys* was sent by ordinary U.S. mail to the following this 28<sup>th</sup> day of February 2007, to the following:

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