

IN THE OHIO SUPREME COURT

CASE NO. 2006-1811

IRENE F. PATEREK, et cet., et al.

Plaintiff-Appellee,

v.

PETERSEN & IBOLD, et al.,

Defendants-Appellants.

APPEAL FROM THE GEAUGA COUNTY COURT OF APPEALS,
ELEVENTH APPELLATE DISTRICT
COURT OF APPEALS CASE NO: 2005-G-2624

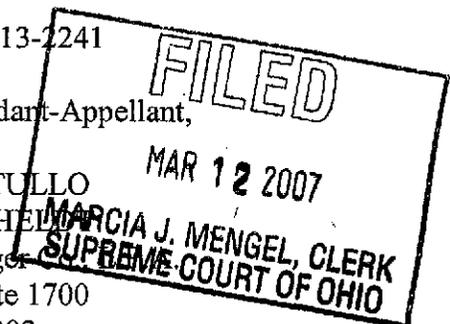
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PETERSEN & IBOLD AND JONATHON EVANS**

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STATEMENT OF THE FACTS

The Crash

On May 28, 1997 Kristopher Richardson negligently injured Edward Paterek in an automobile accident.¹ Paterek was free of any negligence in causing the accident.² A jury ultimately valued the damages sustained by Paterek and his wife at \$382,000.00.³ However, Richardson had only \$100,000 of auto liability coverage, and no other personal assets or earning capacity with which to compensate Paterek for his injuries.⁴

The Underlying Case

Shortly after the accident, Paterek and his wife, Irene, retained Attorney Jonathon Evans of the law firm of Peterson & Ibold to represent them in a personal injury action against Richardson.⁵ Evans filed a timely lawsuit against Richardson, but subsequently dismissed it without prejudice and then failed to refile within one year.⁶

The Malpractice Case

On October 2, 2002, the Patereks filed this legal malpractice suit.⁷ Both Evans and Peterson & Ibold admitted liability for the damages proximately caused by Evans' breach of the standard of care.⁸ Edward Paterek died in February 2003, and his widow was named executrix of his estate.⁹ The lawsuit was tried to a jury in December 2004, on the sole issue of damages.¹⁰

¹ Supp. p. 1; Stipulation ¶4

² Supp. p. 1; Stipulation ¶4

³ Supp. p. 3; Tr., p. 438

⁴ Supp. p. 1; Stipulation ¶2)

⁵ Supp. p. 1, 2; Stipulation ¶¶5, 6

⁶ Supp. p. 1, 2; Stipulation ¶¶5, 6

⁷ Supp. p. 30, et seq.; Complaint

⁸ Supp. p. 1, 2; Stipulation ¶¶5, 6

⁹ Supp. p. 10; Suggestion of Death; Supp. p. 24, Amended Complaint, ¶¶ 1, 2

¹⁰ Supp. p. 2; Stipulation ¶7; See also, the trial transcript, generally

The jury returned a verdict for the Patereks of \$382,000.¹¹ Interrogatories revealed that the jury awarded \$282,000 for Edward's medical bills, pain and suffering, and inability to perform usual activities, and the remaining \$100,000 for Irene's loss of consortium.¹²

Two months later, the trial court entered judgment notwithstanding the verdict, holding that Plaintiff's damages were limited to \$100,000, the amount she reasonably could have expected to recover from Richardson.¹³ The trial court summarized its rationale as follows:

The issue of collectibility of the underlying tortfeasor in a legal malpractice action appears to be a matter of first impression in the state of Ohio. After reviewing the case law from other jurisdictions, this Court concludes that if there is evidence or, as in this case a stipulation, that the underlying tortfeasor is uncollectible, the amount of damages Plaintiffs may receive from a negligent attorney is limited to what the Plaintiffs were reasonably certain to receive in the underlying case, plus any additional or other damages proven to exist.¹⁴

The trial court noted that, based on their responses to interrogatories, the jury had awarded Paterek no damages for the Defendants' malpractice, above and beyond the lost chance to receive damages from the original tortfeasor.¹⁵

The Appeal to the Eleventh District

Paterek appealed the order entering judgment, N.O.V. for Evans and the law firm to the Eleventh District Court of Appeals.¹⁶ A divided panel of that court reversed and remanded to the trial court for a ruling on Plaintiff's motion for prejudgment interest.¹⁷ The majority agreed with the trial court's observation that "it is clear that Plaintiff could not have received more than

¹¹ Supp. p. 3; Tr., p. 438; Supp. p. 4, Verdict Form.

¹² Supp. p. 3; Tr., p. 438; Supp. p. 5, 6, Jury Interrogatories.

¹³ App. p. 33.

¹⁴ App. p. 38.

¹⁵ App. p. 36-37.

¹⁶ App. p. 19.

¹⁷ App. p. 18.

\$100,000 from [Richardson] and his insurer".¹⁸ However, the majority believed that it was constrained to reverse based on this Court's opinion in *Vahila v. Hall*:

[I]n limiting appellant's damages to the amount she could be expected to receive, the trial court was adopting the "but for" test and the "case within a case" analysis, both of which have been rejected by the Supreme Court of Ohio in the case of *Vahila v. Hall*.

* * *

As we see it, the trial court incorrectly melded the rejected notion of a "case within a case" developed in the proximate cause decisions onto the element of damages in concluding that appellant's damages were limited to the liability coverage maintained by Richardson. In effect, the trial court made collectibility from Richardson an element of appellant's case. We hold that collectibility was not an element of the case.¹⁹

In her dissenting opinion, Judge Grendel recognized the fundamental flaw in the majority's reasoning, pointing out the disconnect between the majority opinion and the public policy goals of the tort law system:

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.²⁰

Judge Grendel further recognized the inapplicability of the rationale of *Vahila*, decided in the context of disputed proximate cause, to the facts of this case, which present only an issue of damages:

¹⁸ App. p. 10.

¹⁹ App. p. 10, 12-13.

²⁰ App. p. 15-16.

At issue herein is to what extent were the Patereks damaged by the failure to refile the claim, or, in other words, what was the value of their claim. The majority mistakenly equates the value of the claim with the extent of the Patereks' injuries. This is contrary to the requirement in *Vahila* that "a causal connection [exist] between the conduct complained of and the resulting damage or loss."²¹

The Court of Appeals for Geauga County remanded the case to the Court of Common Pleas for consideration of Paterek's motion for prejudgment interest. But before the trial court took up that issue, the Defendants sought further review in this Court.

The Appeal to this Court

On September 27, 2006 Evans and Petersen & Ibold timely filed their Notice of Appeal and Memorandum in Support of Jurisdiction to this Court. On January 26, 2007 this Court accepted the appeal and entered an order directing the Clerk to issue an order for the transmittal of the record from the Court of Appeals for Geauga County, and directing the parties to brief the case in accordance with the Supreme Court Rules of Practice. The Clerk received the record for filing on February 1, 2007 and notified the parties the following day.

Accordingly, Evans and Petersen & Ibold now request this Court to: (1) reverse the judgment of the Eleventh District Court of Appeals; (2) reinstate the Geauga County Court of Common Pleas' judgment notwithstanding the verdict and awarding the sum of \$100,000 to the Plaintiff as the full measure of her damages against the Defendants; and (3) establish a clear rule of law making the original tortfeasor's collectibility an element of the plaintiff's proof in a legal malpractice claim arising out of the failure to competently prosecute a civil lawsuit.

²¹ App. p. 13.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: In a legal malpractice action arising out of an alleged failure to competently prosecute a civil lawsuit, recovery for the lost opportunity to collect in the underlying litigation cannot exceed the damages Plaintiff would have collected had the attorney defendant not been negligent.

A. The Proposition of Law Presents an Issue of First Impression in Ohio.

Until now, no Ohio case had squarely addressed the measure of damages in a legal malpractice case arising out of an attorney's failure to competently prosecute a civil lawsuit. In *Cunningham v. Hildebrand*,²² the Eighth District Court of Appeals, in dicta, affirmed J.N.O.V. for an admittedly negligent lawyer, and quoted jury instructions that included the following:

The plaintiff must prove by a preponderance of the evidence that if the bankruptcy court had considered his claim it would have awarded him some amount, or that he could have negotiated a settlement for some amount with the attorneys for Continental Airlines.²³

In this case, the Eleventh District Court of Appeals held that "collectibility [i]s not an element" of a legal malpractice case against an attorney who allegedly failed to competently prosecute a civil action for damages on behalf of a client. For the following reasons, the rule announced by the Eleventh District Court of Appeals in this case of first impression is contrary to existing precedent from this Court and the public policy of this state. Moreover, if allowed to stand, the Eleventh District's opinion would place Ohio at odds with every other state in the nation that has considered the issue. Accordingly, the decision of the Court of Appeals should be reversed and the judgment of the trial court reinstated.

²² (2001), 142 Ohio App.3d 218, 755 N.E.2d 384

²³ *Id.*, at 329.

B. Existing Ohio Law Supports the Conclusion that the Tortfeasor's Collectibility is a Proper Element of the Measure of Damages in a Legal Malpractice Claim Arising out of the Failure to Competently Prosecute a Civil Suit.

In *Vahila v. Hall*,²⁴ this Court set forth the standard for proving a legal malpractice claim:

[T]o establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss.

In *Vahila*, the issue was whether the Plaintiff was required to prove that “she would have been successful in the underlying matter,” in order to overcome the defendants’ motion for summary judgment. *Vahila* involved “multiple negligent acts and/or omissions” arising from the attorneys’ defense of *Vahila* in a series of civil, criminal and administrative matters. The focus of the Court’s inquiry in that case was on whether Plaintiff had to prove a “case within a case” in order to establish the element of proximate cause. In other words, the issue was whether *Vahila* was required to prove as an element of her case, that absent the attorneys’ negligence, she would have prevailed in each of those underlying proceedings.

The *Vahila* Court held that the plaintiff was not so obligated and reversed summary judgment for the attorneys. The *Vahila* Court rejected any “blanket proposition” that would require every plaintiff to “prove, in every instance, that he or she would have been successful in the underlying matter.” Importantly, *Vahila* never rejected out of hand the notion that *some* legal malpractice plaintiffs might have to offer “*some* evidence” relevant to the original action in order to prove a legal malpractice claim:

²⁴ (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164 (emphasis added).

We are aware that 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.

In deciding *Vahila*, this Court clearly anticipated future cases, like this one, that would be unencumbered by the complex facts presented in that case. In *Vahila*, the allegedly negligent attorney was *defending* his clients in multiple civil, criminal and administrative cases. The alleged negligence involved the attorney's failures to disclose critical information to the client during settlement negotiations and plea bargains. The *Vahila* Court quoted from *Krahn v. Kinney*,²⁵ in describing the nature of the wrong done the client by the attorney's negligence in failing to competently *defend* him:

[The client] incurred extra attorney fees in rectifying [the negligent attorney's] failure to appear at the original commission hearing. *The injury is not the penalty ultimately imposed by the commission, but the expenses involved in rectifying Kinney's failure. [The client] states a cause of action regardless of whether the ultimate penalty imposed by the commission is reversed.*

In a case like this one, where the alleged malpractice is committed by an attorney representing a plaintiff, rather than a defendant, the nature of the wrong done the client is completely different. There is no complex proximate cause issue, or any need to prove a "case within a case." Indeed, in this particular case, virtually every key fact was stipulated before trial. As the *Vahila* Court recognized, "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." Where the wrong is simply the lost opportunity to pursue a claim, "that situation" requires the plaintiff to prove both the extent of her damages, and the probability that they would have actually been collected.

²⁵ (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058

The *Vahila* Court intended its holding to be much more flexible than what the Eleventh District Court of Appeals gave it credit for. The court below misread *Vahila* as standing for the proposition that a plaintiff in a legal malpractice case *never* has to prove the merits of the underlying suit. But, *Vahila* was only intended to free malpractice plaintiffs with otherwise meritorious claims from the sometimes impossible burden of *always* having to prove proximate cause in the context of a “case within a case.”

The *Vahila* Court never intended to provide malpractice claimants with a windfall recovery if their lawyer happened to have deeper pockets than the original tortfeasor. Nor did the *Vahila* Court intend to hold attorneys liable for damages other than those proximately caused by their own negligence. To the contrary, *Vahila* reaffirmed that the plaintiff in a legal malpractice action *always* has the burden of establishing “that there is a causal connection between the conduct complained of and the resulting damage or loss.” The “resulting damage or loss” referred to can logically mean only the damage or loss resulting from the *attorney’s* “conduct complained of,” not the original tortfeasor’s. Viewed from this perspective, *Vahila* implicitly stands for the proposition that the original tortfeasor’s collectibility is a necessary element of a malpractice case based on a lost chance to recover from the original wrongdoer.

C. The Rule Announced by The Court Below is Contrary to Ohio’s Public Policy.

The purpose tort law is to provide a means of redress to individuals for damages suffered as a result of tortious conduct.²⁶ Tort law is guided largely by public policy considerations.²⁷

²⁶ *Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St.3d 171, 707 N.E.2d 853.

²⁷ *Hunt v. Waterbury Farrel Mfg. Ltd. Partnership* (December 6, 1996), Darke App. No. 1409, 1996 WL 697085, citing, *Victorson v. Bock Laundry Machine Co.* (1975), 37 N.Y.2d 395, 401, 335 N.E.2d 275, 277.

“Where a loss must be borne by one of two innocent persons, it should be borne by the person who occasioned the loss. ... [S]ound public policy requires that [a] Defendant be held accountable for the injuries caused by his [wrongful conduct].”²⁸

In a legal malpractice case against a negligent personal injury lawyer, the damage caused by the lawyer’s wrongful conduct is not pain, suffering, medical bills, lost wages or lost consortium., it’s the lost opportunity to obtain compensation for those wrongs from the original tortfeasor. The rule adopted by the intermediate court of appeals in this case mistakenly holds the negligent attorney liable for damages he didn’t cause.

By establishing a rule that requires consideration of the original tortfeasor’s collectibility, this Court can assure that the malpractice defendant compensates his victim for the injury he has caused, not for injuries caused by another. When viewed from this perspective of aligning actionable conduct with the damages proximately caused thereby, the underlying tortfeasor’s collectibility is clearly an integral aspect of the of the measure of damages in a malpractice claim arising out of the failure to competently prosecute a civil suit.

D. The Majority of Other Jurisdictions Consider the Original Tortfeasor’s Collectibility In Determining Damages.

Ohio is among the few states that have yet to determine the measure of damages in a legal malpractice case arising out of an attorney’s failure to competently prosecute an underlying civil lawsuit. A survey of the jurisdictions that have addressed the issue reveals a clear national trend toward taking the collectibility of the tortfeasor into account as a relevant factor in reaching a just award. In fact, while some states make the underlying defendant’s collectibility an element

²⁸ *Roman v. Estate of Gobbo* (July 23, 2003), 99 Ohio St.3d 260, quoting, *Canis v. Fleps* (Jan. 6, 1992), Mahoning C.P. No. 88 CV 631.

of the plaintiff's case in chief and others make it an affirmative defense, *no other state has adopted the rule articulated by the Eleventh District Court of Appeals in this case*, essentially finding it irrelevant.

The majority rule in the United States is that the plaintiff in a legal malpractice action has the burden of proving by a preponderance of the evidence that: (1) he would have recovered a judgment in the underlying action; (2) the amount of that judgment; and (3) the degree of collectibility of such judgment.²⁹ The rationale for the majority rule is that the value of a case does not increase merely because it is against an attorney rather than the underlying defendant.

For example, Pennsylvania requires the trier of fact to consider collectibility of the lost judgment in assessing damages in a legal malpractice action.³⁰ That state's Supreme Court reasoned that the legal malpractice plaintiff should only be compensated for his or her actual losses, which it defined as "the recovery the plaintiff lost in the underlying action due to the attorney's negligence."³¹ The Pennsylvania Supreme Court further noted:

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.³²

Likewise, in Iowa, courts have held that the purpose of requiring plaintiffs in legal malpractice cases to prove the collectibility of the judgment is to prohibit plaintiffs from being

²⁹*Garcia v. Kozlov* (2004), 179 N.J. 343 (emphasis added).

³⁰*Kituskie v. Corbman* (1998), 552 Pa. 275, 281-282 (While *Kituskie* holds that the lawyer carries the burden of proof on collectibility, it is clear that regardless of burden, collectibility must be considered)

³¹*Id.*

³²*Id.* at 283(emphasis added).

placed in a better position as a result of the malpractice than they would have been had the attorney not been negligent.³³

Washington also requires proof of the collectibility of the underlying judgment as a component of damages in a legal malpractice case:

In a malpractice action, a plaintiff's "actual injury" is measured by the amount of money she would have actually *collected* had her attorney not been negligent . . . Hypothetical damages beyond what the plaintiff would have genuinely collected from the judgment creditor are not a legitimate portion of her actual injury; awarding her those damages would result in a windfall.³⁴

In *Klump v. Duffus*³⁵, a federal court applied Illinois law to a case in which the attorney had failed to file a personal injury lawsuit within the statute of limitations. As here, the parties stipulated that the attorney/defendant was negligent and that the suit against the underlying tortfeasor would have been successful. Nor did the attorney/defendant challenge the jury's determination that the lost case had a value of \$424,000. Rather, he argued that he should only be required to pay the portion of the verdict that was collectible against the underlying tortfeasor. The court agreed, holding:

A plaintiff is to be returned only to the same position she would have occupied had the tort not occurred. Had Duffus filed Klump's case in a timely manner and thus not committed the tort, Klump's position would have been that of a person possessing a \$424,000 judgment against an individual who was unemployed, had no assets, and had only a \$25,000 insurance policy. Hypothetical damages above the amount that Klump could genuinely have collected from Eaves are not a legitimate portion of her "actual injury."³⁶

³³*Kemin Ind. v. KPMG* (2002), Iowa App. No. WL 1767178, unreported, page 2;

³⁴*Lavigne v. Haskell* (2002), 112 Wash. App. 677, 684-685 (emphasis in original).

³⁵ (1995), 71 F.3d 1368

³⁶*Id.* at 1374.

The *Klump* court noted that holding the attorney responsible for damages the plaintiff could never have collected from the original tortfeasor would be tantamount to awarding punitive damages against the attorney.³⁷

In addition to New Jersey, Iowa, Washington, and Illinois, numerous other states, including Texas, Florida, New York, New Hampshire, California, Massachusetts North Carolina, Tennessee, Nebraska South Dakota, Kansas, and Georgia have likewise concluded that proof of the collectibility of the underlying judgment is an element of the Plaintiff's case in chief.³⁸ In addition to Pennsylvania, states holding that collectibility is an affirmative defense to be pled and proved by the defendant include the District of Columbia, Alaska, Louisiana, Maine, and Michigan.³⁹

It's clear that, without regard to burden of proof, virtually every jurisdiction that has considered the issue agrees that the collectibility of the judgment is a relevant factor to be considered by the jury in awarding damages in a legal malpractice case arising out of the failure to competently prosecute a civil lawsuit. Because the public policy rationales articulated by those courts clearly resonate with Ohio's public policy goals, the Court should reverse the judgment of

³⁷*Id.* at 1369-1370.

³⁸ See, e.g., *Ballesteros v. Jones* (1999), 985 S.W. 485, Texas; *Fernandes v. Barrs* (1994), 641 So.2d 1371, Florida; *McKenna v. Forsyth & Forsyth* (NY 2001), 280 A.D.2d 79, 720 N.Y.S.2d 645; *Copp v. Atwood* (Jan. 24, 2005), D.N.H. No. 03-288-JD, unreported, 2005 WL 139180; *DiPalma v. Seldman* (Cal.App.1994), 27 Cal.App.4th 1499; *Jernigan v. Giard* (Ma.1986), 398 Mass. 721, 200 N.E.2d 806; *Rorrer v. Cooke* (N.C.1985), 313 N.C. 338, 329 S.E.2d 355; *Sitton v. Clements* (E.D.Tenn.1966), 257 F.Supp. 63; *Eno v. Watkins* (Neb.1988), 229 Neb. 855, 429 N.W.2d 371; *Taylor Oil Co. v. Weisensee* (S.D.1983), 334 N.W.2d 27; *Augustine v. Adams* (D.Kan.1997), 1997 WL 298451; and *McDow v. Dixon* (1976), 138 Ga. App. 338.

³⁹ *Smith v. Haden* (D.D.C.1994), 868 F.Supp. 1; *Power Constructors, Inc. v. Taylor & Hintze* (Alaska.1998), 960 P.2d 20; *Jenkins v. St. Paul Fire & Marine Ins. Co.* (La.1982), 422 So.2d 1109; *Jourdain v. Dineen* (Me.1987), 527 A.2d 1304; *Teodorescu v. Bushnell* (1993), 201 Mich. App. 260;.

the Eleventh District court of Appeals and reinstate the trial court's order remitting the verdict to the amount of the tortfeasor's liability insurance.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellants Petersen & Ibold and Jonathon Evans request this Court to: (1) reverse the judgment of the Eleventh District Court of Appeals; (2) reinstate the Geauga County Court of Common Pleas' judgment notwithstanding the verdict awarding the sum of \$100,000 to the Plaintiff as the full measure of her damages against the Defendants; and (3) establish a clear rule of law making the original tortfeasor's collectibility an element of the plaintiff's proof in a legal malpractice claim arising out of the failure to competently prosecute a civil lawsuit.

Respectfully submitted,



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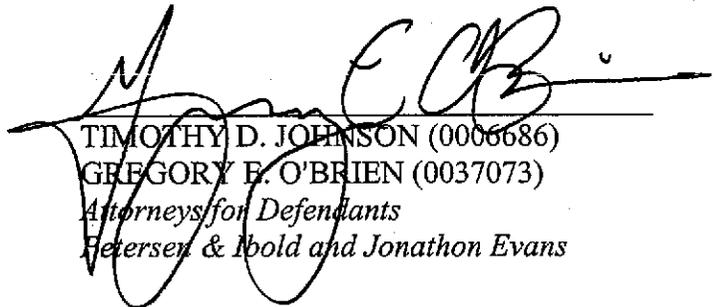
I hereby certify that a copy of the foregoing Merit Brief of Appellants has been mailed this 9th day of March, 2007 to:

LEON M. PLEVIN and EDWARD FITZGERALD, of the law firm of Plevin & Gallucci, 55 Public Square, Suite 2222 Cleveland, Ohio 44113; and, PAUL W. FLOWERS, of the law firm of Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, Ohio 44113, Attorneys for Plaintiff-Appellee;

NICHOLAS D. SATULLO and JOSEPH W. BORCHELDT, of the law firm of Reminger & Reminger Co., L.P.A., 525 Vine Street, Suite 1700, Cincinnati, Ohio 45202, Attorneys for Amicus Curiae, Ohio Association of Civil Trial Attorneys;

ALAN M. PETROV, TIMOTHY J. FITZGERALD and MONICA A. SANSALONE of the law firm of Gallagher Sharp, Bulkley Building, Sixth Floor, 1501 Euclid Avenue, Cleveland, Ohio 44115-2108, Attorneys Amicus Curiae, Minnesota Lawyers Mut. Ins. Co.; and,

JASON WINTER of the law firm of Janik & Dorman, L.L.P., 9200 South Hills Blvd., Suite 300, Cleveland, Ohio 44147-3521, Attorney for Amicus Curiae, Zurich Insurance Company


TIMOTHY D. JOHNSON (0006686)
GREGORY E. O'BRIEN (0037073)
*Attorneys for Defendants
Petersen & Ibold and Jonathon Evans*

IN THE OHIO SUPREME COURT

CASE NO. _____

IRENE F. PATEREK, et cetera, et al.

06-1811

Plaintiff-Appellee,

v.

PETERSEN & IBOLD, et al.,

Defendants-Appellants.

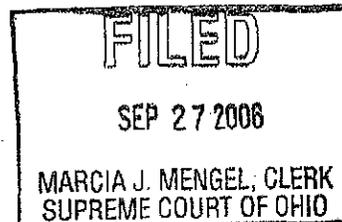
APPEAL FROM THE GEAUGA COUNTY COURT OF APPEALS,
ELEVENTH APPELLATE DISTRICT
COURT OF APPEALS CASE NO: 2005-G-2624

**NOTICE OF APPEAL OF APPELLANTS
PETERSEN & IBOLD AND
JONATHAN EVANS**

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Attorneys for Plaintiff-Appellee



**NOTICE OF APPEAL OF APPELLANTS
PETERSEN & IBOLD AND JONATHAN EVANS**

Appellants, Petersen & Ibold and Jonathan Evans hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals Case No: 2005-G-2624 on August 14, 2006.

This case is one of public or great general interest.

Respectfully submitted,



TIMOTHY D. JOHNSON (0006686)
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Attorneys for Defendant-Appellant,

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice has been mailed to LEON M. PLEVIN and EDWARD FITZGERALD, of the law firm of Plevin & Gallucci, 55 Public Square, Suite 2222 Cleveland, Ohio 44113; and, PAUL W. FLOWERS, of the law firm of Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, Ohio 44113, Attorneys for Plaintiff-Appellee this 26th day of September, 2006



TIMOTHY D. JOHNSON (0006686)
GREGORY E. O'BRIEN (0037073)
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T0J 27636

AUG 16 2006

STATE OF OHIO)
)SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

FILED
IN COURT OF APPEALS

AUG 16 2006

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IRENE F. PATEREK, INDIVIDUALLY AND
EXECUTRIX OF THE ESTATE OF
EDWARD F. PATEREK, DECEASED,

Plaintiff-Appellant,

JUDGMENT ENTRY

- vs -

CASE NO. 2005-G-2624

PETERSEN & IBOLD, et al.,

Defendants-Appellees.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the trial court is reversed. The matter is hereby remanded to the trial court for further proceedings consistent with the opinion.

JUDGE WILLIAM M. O'NEILL

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

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THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS
AUG 14 2006
DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IRENE F. PATEREK, INDIVIDUALLY AND : OPINION
EXECUTRIX OF THE ESTATE OF
EDWARD F. PATEREK, DECEASED,

Plaintiff-Appellant, :

- vs - : CASE NO. 2005-G-2624

PETERSEN & IBOLD, et al., :

Defendants-Appellees. :

Civil Appeal from the Court of Common Pleas, Case No. 02 PT 000901.

Judgment: Reversed and remanded.

Leon M. Plevin, III and Edward Fitzgerald, 55 Public Square, Suite 2222, Cleveland, OH 44113, and *Paul W. Flowers*, Terminal Tower, 35th Floor, 50 Public Square, Cleveland, OH 44113 (For Plaintiff-Appellant).

Timothy D. Johnson, 1900 The Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114 (For Defendants-Appellees).

WILLIAM M. O'NEILL, J.

{¶1} This is a legal malpractice action. Appellant, Irene Paterek, individually and as executrix of the estate of Edward F. Paterek was awarded judgment following a jury verdict in the amount of \$382,000. The verdict of \$382,000 was rendered against both appellees, Jonathon Evans ("Evans") and the law firm of Petersen & Ibold. Following the verdict, Evans and Petersen & Ibold filed a motion for judgment

notwithstanding the verdict. The trial court reduced the amount of the award to \$100,000. On review, we reverse the judgment of the trial court.

{¶2} Evans worked as an attorney for Petersen & Ibold. In 1997, he was retained to represent the Patereks in connection with a personal injury lawsuit stemming from injuries sustained by Edward F. Paterek in a motor vehicle accident caused by Kristopher Richardson ("Richardson").

{¶3} Evans filed suit against Richardson on behalf of the Patereks in the Geauga County Common Pleas Court in 1998. This suit was dismissed by the Patereks pursuant to Civ.R. 41(A)(1) in 2000.

{¶4} Evans again filed suit against Richardson in behalf of the Patereks, but the suit was untimely, having been filed beyond the one-year deadline allowed by R.C. 2305.19, and was dismissed by the Geauga County Common Pleas Court.

{¶5} On December 5, 2001, the Patereks were notified by the law firm that it was negligent in failing to timely refile their lawsuit against Richardson.

{¶6} In October 2002, the Patereks filed an action for legal malpractice against Evans and the law firm of Petersen & Ibold. Shortly thereafter, Mr. Paterek died and Mrs. Paterek was substituted as his legal representative to represent his interests in the legal malpractice action. She then filed an amended complaint in her representative capacity. The amended complaint restated the allegations of the original complaint. The law firm and Evans filed an answer to the amended complaint in which they admitted liability for failing to timely refile the lawsuit for the Patereks.

{¶7} Mrs. Paterek filed a second amended complaint against the Patereks' own insurance carrier, One Beacon Insurance, in respect to their UM/UIM claim. At the time

of the accident, the Patereks maintained \$250,000 of UM/UIM coverage. This claim was voluntarily dismissed without prejudice by appellant prior to trial.

{¶8} During discovery, appellant was advised that the limit of Richardson's insurance coverage was \$100,000.

{¶9} The law firm and Evans filed a motion for partial summary judgment. They argued that the maximum recovery to be had by appellant was \$100,000, representing the maximum insurance coverage Richardson had in force at the time of the accident. They further argued that appellant had a viable UM/UIM claim for \$250,000. Thus, they requested an order from the trial court capping appellant's damages at \$100,000.

{¶10} In overruling the motion for partial summary judgment, the trial court stated: "[a]lthough Plaintiffs will have to prove the 'case within the case', such proof does not have to go so far as to demonstrate that the tortfeasor in the underlying case was not judgment proof or, conversely stated, that the tortfeasor had assets from which a judgment could be collected."

{¶11} Prior to trial, the parties entered into a stipulation that Richardson did not have personal assets nor the earning capacity, either at the time of the accident or at the time of the jury verdict, to satisfy a judgment in excess of \$100,000.

{¶12} The trial court charged the jury on the issue of damages as follows:

{¶13} "You have been previously instructed that the defendants Petersen & Ibold and Jonathon Evans were negligent. If you find that the defendants' negligence was the proximate cause of plaintiffs' damages, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiffs for the actual injuries proximately caused by the negligence of the defendants. The first

consideration is to determine what damages, if any, may have been sustained by Edward Paterek and/or Irene Paterek as a result of the automobile accident on May 28th, 1997."

{¶14} The trial court then spelled out for the jury the types of special damages and injuries the jury could consider in making a damages award. It then elaborated on other damages the jury could consider:

{¶15} "The second consideration is to determine what damages, if any, may have been sustained by Edward Paterek and/or Irene Paterek as a result of the failure of defendants to successfully prosecute the claims against [Richardson]. Any amounts that you have determined will be awarded to the plaintiffs for any element of damages shall not be considered again or added to any other element of damages."

{¶16} On December 20, 2004, the trial court entered judgment pursuant to the jury verdict of \$382,000. Evans and Petersen & Ibold timely filed a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B). In their motion, they asked the trial court to reduce the amount they were obligated to pay from \$382,000 to \$100,000.

{¶17} On February 16, 2005, the trial court issued an order reducing the jury verdict from \$382,000 to \$100,000, together with a decision explaining its reasons for doing so. The trial court explained its rationale thusly:

{¶18} "In this action, the jury determined that plaintiff was entitled to a total of \$382,000 in damages. In response to interrogatories submitted by plaintiffs, the jury demonstrated that it reached its damages amounts based upon Mr. Paterek's medical bills, his pain and suffering, his inability to perform usual activities, and upon Mrs. Paterek's loss of consortium. The amounts the jury determined for each of the

aforementioned elements of damages equal the total amount of the jury award. Although the instructions given to the jury permitted them to consider awarding damages beyond the amounts of [the Patereks'] underlying personal injury and loss of consortium claims, the interrogatories establish that the jury chose not to do so. [Footnote omitted.] The jury limited its award to those sums it determined arose from Mr. Paterek's personal injury and Mrs. Paterek's loss of consortium."

{19} The trial court then went on to consider whether the verdict in favor of appellant should be upheld, because of the possibility of collecting UM/UIM proceeds against the Patereks' own insurer, and held that it could not speculate that someday appellant might "hit the jackpot" and actually collect another \$150,000 against the Patereks' own insurer.

{20} Appellant timely filed an appeal from the judgment entry of February 16, 2005, granting the motion for judgment notwithstanding the verdict.

{21} Appellant has raised two assignments of error. The first assignment of error is as follows:

{22} "The trial judge erred, to plaintiff-appellant's considerable detriment, by granting defendant-appellees' motion for judgment notwithstanding the verdict and reducing the total judgment from \$382,000.00 to \$100,000.00."

{23} In reviewing a trial court judgment where a motion for judgment notwithstanding the verdict has been granted, an appellate must address the issue as

one of law:

{¶24} "A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence."¹

{¶25} Therefore, the standard of appellate review of a trial court's ruling on a motion for judgment notwithstanding the verdict is de novo.²

{¶26} Civ.R. 50(B) provides, in relevant part:

{¶27} "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion[.]"

{¶28} The trial court applies the following test to a motion for judgment notwithstanding the verdict:

{¶29} "The trial judge must construe the evidence most strongly in favor of the non-movant and if upon all the evidence there is substantial evidence to support the non-movant's position upon which reasonable minds may reach different conclusions, the motion must be denied. *** The trial judge does not determine the weight of the evidence or the credibility of the witnesses, *** and although he examines the materiality of the evidence, he does not look at the conclusions to be drawn."³

{¶30} This court's analysis under the first assignment of error turns on whether

1. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus.

2. *Natl. City Bank v. Rhoades*, 150 Ohio App.3d 75, 2002-Ohio-6083, at ¶53.

3. (Internal citations omitted.) *Cardinal v. Family Foot Care Centers, Inc.* (1987), 40 Ohio App.3d 181, 183, citing *Ruta v. Breckenridge-Remy Co.*, supra, at 69.

the trial court was correct in reducing the amount awarded in the verdict to a lesser amount due to the uncollectability of Richardson. We agree with the trial court that "it is clear that Plaintiff could not have received more than \$100,000 from [Richardson] and his insurer." However, we do not agree with the trial court's statement that "the damages actually caused by the negligence of [Evans and Petersen & Ibold] must be limited to the amount that the Plaintiff could be reasonably certain of receiving had [Evans and Petersen & Ibold] not been negligent," because in limiting appellant's damages to the amount she could be expected to receive, the trial court was adopting the "but for" test and the "case within a case" analysis, both of which have been rejected by the Supreme Court of Ohio in the case of *Vahila v. Hall*.⁴

{¶31} A discussion of the decision in the case of *Vahila v. Hall* will be helpful to this analysis.

{¶32} The plaintiffs in that case sued their former attorneys for negligent representations conducted by the attorneys in various civil, criminal, and administrative matters. The trial court granted summary judgment to the attorneys, because the plaintiffs were required to, but could not, prove that they would have been successful in the underlying civil, criminal, and administrative matters in which the alleged malpractice had occurred. The appellate court affirmed the summary judgment.

{¶33} On appeal to the Supreme Court of Ohio, that court rejected the "but for" test inherent in the "case within a case" approach:

{¶34} "[W]e reject any finding that the element of causation in the context of a legal malpractice action can be replaced or supplemented with a rule of thumb requiring

4. *Vahila v. Hall* (1997), 77 Ohio St.3d 421.

that a plaintiff, in order to establish damage or loss, prove in every instance that he or she would have been successful in the underlying matter(s) giving rise to the complaint.”⁵

{¶35} That court based its decision on “[t]he inequity of requiring appellants to prove that they would have been successful in the underlying matters giving rise to their malpractice action[.]”⁶

{¶36} That court went on to hold as follows:

{¶37} “[W]e hold that to establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. *** 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.”⁷

{¶38} The *Vahila* case turned on the issue of proximate cause. By incorrectly granting the motion for judgment notwithstanding the verdict, the trial court in the instant matter was not acting erroneously with respect to proximate cause, but with respect to damages.

{¶39} In other words, the trial court, in its decision, limited consideration of

5. *Id.* at 426.

6. *Id.* at 427.

7. (Internal citations omitted.) *Id.* at 427-428.

damages to the collectability of damages in the underlying case against Richardson. This was a "case within a case" analysis. The trial court stated that a "case within a case" approach is necessary to successfully prosecute a legal malpractice action: not only must the plaintiff prove the elements of negligence against the attorney, but he must also prove as part of his case-in-chief that the underlying case handled by the attorney could have been prosecuted successfully and to plaintiff's benefit had the attorney not committed malpractice. By this approach, the underlying case serves as a measuring stick for the amount of recovery to be had against the attorney for committing malpractice. Thus, when the trial court said that the jury verdict only reflected the jury's consideration of the Patereks' injuries attributable to the motor vehicle accident, and found that, under the circumstances, only \$100,000 was recoverable from the Richardson's liability insurance carrier, it was saying, in effect, that the "case" against Evans and Petersen & Ibold was admitted, but that the value of the underlying "case" was limited to the \$100,000 that could be collected from Richardson's liability insurance carrier.

{¶40} As stated above, the "case within a case" approach was rejected by the Supreme Court of Ohio in *Vahila v. Hall*.⁸

{¶41} As we see it, the trial court incorrectly melded the rejected notion of a "case within a case" developed in the proximate cause decisions onto the element of damages in concluding that appellant's damages were limited to the liability coverage maintained by Richardson. In effect, the trial court made collectability from Richardson an element of appellant's case. We hold that collectability was not an element of the

8. *Id.*

case.

{¶42} The trial court's analysis actually creates a new legal theory in the area of legal malpractice: a case within a case within a case. That is, the trial court was unwilling to extend its own notion of collectability to a second level, meaning that it was unwilling to predict that on top of the \$100,000 appellant could collect from Richardson's insurer she could also collect another \$150,000 from the Patereks' own insurer under their UM/UIM coverage. We hold today that this exercise misses the point of the *Vahila v. Hall* case and is irrelevant in light of that case. The issue of whether appellant could collect from the Patereks' own carrier on their UM/UIM coverage was not submitted to the jury, and this court declines to weigh in as to whether such proceeds would ever be received. That issue is certainly not before us in this appeal.

{¶43} Viewing the instant case from the standpoint of damages, damages are recoverable in the full amount. As stated by the Supreme Court of Ohio, in the case of *Fantozzi v. Sandusky Cement Prod. Co.*:

{¶44} "The fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained. *** Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant. *** Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefore."⁹

{¶45} Under Civ.R. 50(B) the trial court had no duty to examine the collectability of Richardson. This consideration was irrelevant under *Vahila* and *Fantozzi*. We

9. (Internal citations omitted.) *Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St.3d 601, 612.

accept that the jury limited its verdict of \$382,000 to the personal injuries suffered by the Patereks, and did not enhance the award with any other damages that may have related to the malpractice committed by Evans and Petersen & Ibold, but this fact by itself did not enable the trial court to step in and reduce the jury verdict due to considerations of collectability of the verdict. Its duty was to examine whether the verdict was supported by "substantial evidence," not whether the verdict was collectible.

{¶46} The first assignment of error is with merit.

{¶47} Appellant's second assignment of error is as follows:

{¶48} "The trial judge abused his discretion by denying plaintiff-appellant's motion for pre-judgment interest."

{¶49} On December 28, 2004, following the entry of judgment of the trial court pursuant to the jury's verdict, appellant filed a motion for prejudgment interest. The trial court overruled this motion on February 16, 2005.

{¶50} Appellant does not support this assignment of error with argument that the trial court committed error in failing to grant her motion for prejudgment interest. Instead, she argues that, in the event the trial court's judgment is reversed pursuant to assignment of error number one, she should be entitled to a hearing on her motion for prejudgment interest. It turns out that this assignment of error is not truly an assignment of error, but is more in the nature of a request for relief in the event the judgment of the trial court is reversed. Thus, appellant argues: "[i]n the event that this Court concludes that [appellant] is entitled to more than a judgment of \$100,000 against [Evans and Petersen & Ibold], then the denial of pre-judgment interest should also be reversed and the proceedings remanded for a hearing in accordance with R.C. 1343.03(C)."

{¶51} Therefore, appellant does not assert that the trial court abused its discretion in overruling her motion for prejudgment interest. Instead, she asks for her day in court to present the merits of her motion in the event the judgment of the trial court is reversed.

{¶52} We, therefore, find this assignment of error to be without merit, but in light of our decision under the first assignment of error, we do order this matter remanded to the trial court for a hearing on the merits of appellant's motion for prejudgment interest.

{¶53} The judgment of the trial court is reversed, and this matter is remanded to the trial court. The trial court is ordered to reinstate its original judgment entry awarding damages in the amount of \$382,000 pursuant to the jury verdict. The trial court is also ordered to conduct an evidentiary hearing on the merits of appellant's motion for prejudgment interest.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶54} I respectfully dissent.

{¶55} 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.

{¶56} The majority misapplies the Ohio Supreme Court's "case within a case" analysis in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. In *Vahila*, the Ohio Supreme Court discussed the relationship between "the requirement of causation" and "the merits of the underlying case" in a legal malpractice action. *Id.* at 428. The court held: "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." *Id.* The viability of the underlying claim is not an issue in present case: the appellees did not contest the viability of the claim against Richardson.

{¶57} At issue herein is to what extent were the Patereks damaged by the failure to refile the claim, or, in other words, what was the value of their claim. The majority mistakenly equates the value of the claim with the extent of the Patereks' injuries. This is contrary to the requirement in *Vahila* that "a causal connection [exist] between the conduct complained of and the resulting damage or loss." *Id.* at 427.

{¶58} "It is axiomatic that compensatory damages must be shown with certainty, and damages which are merely speculative will not give rise to recovery." *Endicott v. Johrendt* (June 22, 2000), 10th Dist. No. 99AP-935, 2000 Ohio App. LEXIS 2697, at *26; accord *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons and Bibbo*, 10th

Dist. No. 01AP-1137, 2003-Ohio-1633, at ¶42. "The evidence must establish a calculable financial loss because of the essential elements of a legal malpractice claim is a causal connection between the conduct complained of and resulting damage or loss." *Nu-Trend*, 2003-Ohio-1633, at ¶42, citing *Motz v. Jackson* (June 29, 2001), 1st Dist. No. C-990644, 2001 Ohio App. LEXIS 2896, at *14.

{¶59} In the present case, the parties stipulated that Richardson had neither personal assets nor the earning capacity to satisfy a judgment in excess of Richardson's \$100,000 in liability coverage. Accordingly, appellees' negligence in failing to refile suit against Richardson did not result in damages in excess of \$100,000. This amount represents the "actual loss," the most that the Patereks could have recovered if Petersen & Ibold had refiled the suit.

{¶60} To allow damages beyond \$100,000, as the majority's decision mandates, is improper because it awards the Patereks damages beyond those for which Peterson and Ibold may be held responsible. Therefore, the trial court ruled correctly in this case. The Patereks' first assignment of error is without merit.

{¶61} I agree with the majority's analysis that appellant's second assignment of error is a request for additional relief if the trial court is reversed. Since the trial court's decision should be affirmed, appellant's second assignment of error should be overruled.

{¶62} For the reasons stated, the decision of the Geauga County Court of Common Pleas should be affirmed.

AUG 16 2006

STATE OF OHIO)
)SS.
COUNTY OF GEAUGA)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

FILED
IN COURT OF APPEALS

AUG 14 2006

DENISE M. KAMINSKI
CLERK OF COURTS
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Plaintiff-Appellant,

- vs -

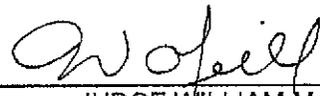
JUDGMENT ENTRY

CASE NO. 2005-G-2624

PETERSEN & IBOLD, et al.,

Defendants-Appellees.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the trial court is reversed. The matter is hereby remanded to the trial court for further proceedings consistent with the opinion.



JUDGE WILLIAM M. O'NEILL

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

11/762

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

FILED
IN COURT OF APPEALS

AUG 14 2006

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

IRENE F. PATEREK, INDIVIDUALLY AND : **OPINION**
EXECUTRIX OF THE ESTATE OF
EDWARD F. PATEREK, DECEASED,

Plaintiff-Appellant, :

- vs - : **CASE NO. 2005-G-2624**

PETERSEN & IBOLD, et al., :

Defendants-Appellees. :

Civil Appeal from the Court of Common Pleas, Case No. 02 PT 000901.

Judgment: Reversed and remanded.

Leon M. Plevin, III and Edward Fitzgerald, 55 Public Square, Suite 2222, Cleveland, OH 44113, and Paul W. Flowers, Terminal Tower, 35th Floor, 50 Public Square, Cleveland, OH 44113 (For Plaintiff-Appellant).

Timothy D. Johnson, 1900 The Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114 (For Defendants-Appellees).

WILLIAM M. O'NEILL, J.

{¶1} This is a legal malpractice action. Appellant, Irene Paterek, individually and as executrix of the estate of Edward F. Paterek was awarded judgment following a jury verdict in the amount of \$382,000. The verdict of \$382,000 was rendered against both appellees, Jonathon Evans ("Evans") and the law firm of Petersen & Ibold. Following the verdict, Evans and Petersen & Ibold filed a motion for judgment

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{¶6} In October 2002, the Patereks filed an action for legal malpractice against Evans and the law firm of Petersen & Ibold. Shortly thereafter, Mr. Paterek died and Mrs. Paterek was substituted as his legal representative to represent his interests in the legal malpractice action. She then filed an amended complaint in her representative capacity. The amended complaint restated the allegations of the original complaint. The law firm and Evans filed an answer to the amended complaint in which they admitted liability for failing to timely refile the lawsuit for the Patereks.

{¶7} Mrs. Paterek filed a second amended complaint against the Patereks' own insurance carrier, One Beacon Insurance, in respect to their UM/UIM claim. At the time

of the accident, the Patereks maintained \$250,000 of UM/UIM coverage. This claim was voluntarily dismissed without prejudice by appellant prior to trial.

{¶18} During discovery, appellant was advised that the limit of Richardson's insurance coverage was \$100,000.

{¶19} The law firm and Evans filed a motion for partial summary judgment. They argued that the maximum recovery to be had by appellant was \$100,000, representing the maximum insurance coverage Richardson had in force at the time of the accident. They further argued that appellant had a viable UM/UIM claim for \$250,000. Thus, they requested an order from the trial court capping appellant's damages at \$100,000.

{¶10} In overruling the motion for partial summary judgment, the trial court stated: "[a]lthough Plaintiffs will have to prove the 'case within the case', such proof does not have to go so far as to demonstrate that the tortfeasor in the underlying case was not judgment proof or, conversely stated, that the tortfeasor had assets from which a judgment could be collected."

{¶11} Prior to trial, the parties entered into a stipulation that Richardson did not have personal assets nor the earning capacity, either at the time of the accident or at the time of the jury verdict, to satisfy a judgment in excess of \$100,000.

{¶12} The trial court charged the jury on the issue of damages as follows:

{¶13} "You have been previously instructed that the defendants Petersen & Ibold and Jonathon Evans were negligent. If you find that the defendants' negligence was the proximate cause of plaintiffs' damages, you will decide by the greater weight of the evidence an amount of money that will reasonably compensate the plaintiffs for the actual injuries proximately caused by the negligence of the defendants. The first

consideration is to determine what damages, if any, may have been sustained by Edward Paterek and/or Irene Paterek as a result of the automobile accident on May 28th, 1997.”

{¶14} The trial court then spelled out for the jury the types of special damages and injuries the jury could consider in making a damages award. It then elaborated on other damages the jury could consider:

{¶15} “The second consideration is to determine what damages, if any, may have been sustained by Edward Paterek and/or Irene Paterek as a result of the failure of defendants to successfully prosecute the claims against [Richardson]. Any amounts that you have determined will be awarded to the plaintiffs for any element of damages shall not be considered again or added to any other element of damages.”

{¶16} On December 20, 2004, the trial court entered judgment pursuant to the jury verdict of \$382,000. Evans and Petersen & Ibold timely filed a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B). In their motion, they asked the trial court to reduce the amount they were obligated to pay from \$382,000 to \$100,000.

{¶17} On February 16, 2005, the trial court issued an order reducing the jury verdict from \$382,000 to \$100,000, together with a decision explaining its reasons for doing so. The trial court explained its rationale thusly:

{¶18} “In this action, the jury determined that plaintiff was entitled to a total of \$382,000 in damages. In response to interrogatories submitted by plaintiffs, the jury demonstrated that it reached its damages amounts based upon Mr. Paterek’s medical bills, his pain and suffering, his inability to perform usual activities, and upon Mrs. Paterek’s loss of consortium. The amounts the jury determined for each of the

aforementioned elements of damages equal the total amount of the jury award. Although the instructions given to the jury permitted them to consider awarding damages beyond the amounts of [the Patereks'] underlying personal injury and loss of consortium claims, the interrogatories establish that the jury chose not to do so. [Footnote omitted.] The jury limited its award to those sums it determined arose from Mr. Paterek's personal injury and Mrs. Paterek's loss of consortium."

{¶19} The trial court then went on to consider whether the verdict in favor of appellant should be upheld, because of the possibility of collecting UM/UIM proceeds against the Patereks' own insurer, and held that it could not speculate that someday appellant might "hit the jackpot" and actually collect another \$150,000 against the Patereks' own insurer.

{¶20} Appellant timely filed an appeal from the judgment entry of February 16, 2005, granting the motion for judgment notwithstanding the verdict.

{¶21} Appellant has raised two assignments of error. The first assignment of error is as follows:

{¶22} "The trial judge erred, to plaintiff-appellant's considerable detriment, by granting defendant-appellees' motion for judgment notwithstanding the verdict and reducing the total judgment from \$382,000.00 to \$100,000.00."

{¶23} In reviewing a trial court judgment where a motion for judgment notwithstanding the verdict has been granted, an appellate must address the issue as

one of law:

{¶24} "A motion for directed verdict or a motion for judgment notwithstanding the verdict does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence."¹

{¶25} Therefore, the standard of appellate review of a trial court's ruling on a motion for judgment notwithstanding the verdict is de novo.²

{¶26} Civ.R. 50(B) provides, in relevant part:

{¶27} "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion[.]"

{¶28} The trial court applies the following test to a motion for judgment notwithstanding the verdict:

{¶29} "The trial judge must construe the evidence most strongly in favor of the non-movant and if upon all the evidence there is substantial evidence to support the non-movant's position upon which reasonable minds may reach different conclusions, the motion must be denied. ***The trial judge does not determine the weight of the evidence or the credibility of the witnesses, *** and although he examines the materiality of the evidence, he does not look at the conclusions to be drawn."³

{¶30} This court's analysis under the first assignment of error turns on whether

1. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus.

2. *Natl. City Bank v. Rhoades*, 150 Ohio App.3d 75, 2002-Ohio-6083, at ¶53.

3. (Internal citations omitted.) *Cardinal v. Family Foot Care Centers, Inc.* (1987), 40 Ohio App.3d 181, 183, citing *Ruta v. Breckenridge-Remy Co.*, supra, at 69.

the trial court was correct in reducing the amount awarded in the verdict to a lesser amount due to the uncollectability of Richardson. We agree with the trial court that "it is clear that Plaintiff could not have received more than \$100,000 from [Richardson] and his insurer." However, we do not agree with the trial court's statement that "the damages actually caused by the negligence of [Evans and Petersen & Ibold] must be limited to the amount that the Plaintiff could be reasonably certain of receiving had [Evans and Petersen & Ibold] not been negligent," because in limiting appellant's damages to the amount she could be expected to receive, the trial court was adopting the "but for" test and the "case within a case" analysis, both of which have been rejected by the Supreme Court of Ohio in the case of *Vahila v. Hall*.⁴

{¶31} A discussion of the decision in the case of *Vahila v. Hall* will be helpful to this analysis.

{¶32} The plaintiffs in that case sued their former attorneys for negligent representations conducted by the attorneys in various civil, criminal, and administrative matters. The trial court granted summary judgment to the attorneys, because the plaintiffs were required to, but could not, prove that they would have been successful in the underlying civil, criminal, and administrative matters in which the alleged malpractice had occurred. The appellate court affirmed the summary judgment.

{¶33} On appeal to the Supreme Court of Ohio, that court rejected the "but for" test inherent in the "case within a case" approach:

{¶34} "[W]e reject any finding that the element of causation in the context of a legal malpractice action can be replaced or supplemented with a rule of thumb requiring

4. *Vahila v. Hall* (1997), 77 Ohio St.3d 421.

that a plaintiff, in order to establish damage or loss, prove in every instance that he or she would have been successful in the underlying matter(s) giving rise to the complaint."⁵

{¶35} That court based its decision on "[t]he inequity of requiring appellants to prove that they would have been successful in the underlying matters giving rise to their malpractice action[.]"⁶

{¶36} That court went on to hold as follows:

{¶37} "[W]e hold that to establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. *** 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."⁷

{¶38} The *Vahila* case turned on the issue of proximate cause. By incorrectly granting the motion for judgment notwithstanding the verdict, the trial court in the instant matter was not acting erroneously with respect to proximate cause, but with respect to damages.

{¶39} In other words, the trial court, in its decision, limited consideration of

5. Id. at 426.

6. Id. at 427.

7. (Internal citations omitted.) Id. at 427-428.

damages to the collectability of damages in the underlying case against Richardson. This was a "case within a case" analysis. The trial court stated that a "case within a case" approach is necessary to successfully prosecute a legal malpractice action: not only must the plaintiff prove the elements of negligence against the attorney, but he must also prove as part of his case-in-chief that the underlying case handled by the attorney could have been prosecuted successfully and to plaintiff's benefit had the attorney not committed malpractice. By this approach, the underlying case serves as a measuring stick for the amount of recovery to be had against the attorney for committing malpractice. Thus, when the trial court said that the jury verdict only reflected the jury's consideration of the Patereks' injuries attributable to the motor vehicle accident, and found that, under the circumstances, only \$100,000 was recoverable from the Richardson's liability insurance carrier, it was saying, in effect, that the "case" against Evans and Petersen & Ibold was admitted, but that the value of the underlying "case" was limited to the \$100,000 that could be collected from Richardson's liability insurance carrier.

{¶40} As stated above, the "case within a case" approach was rejected by the Supreme Court of Ohio in *Vahila v. Hall*.⁸

{¶41} As we see it, the trial court incorrectly melded the rejected notion of a "case within a case" developed in the proximate cause decisions onto the element of damages in concluding that appellant's damages were limited to the liability coverage maintained by Richardson. In effect, the trial court made collectability from Richardson an element of appellant's case. We hold that collectability was not an element of the

8. *Id.*

case.

{¶42} The trial court's analysis actually creates a new legal theory in the area of legal malpractice: a case within a case within a case. That is, the trial court was unwilling to extend its own notion of collectability to a second level, meaning that it was unwilling to predict that on top of the \$100,000 appellant could collect from Richardson's insurer she could also collect another \$150,000 from the Patereks' own insurer under their UM/UIM coverage. We hold today that this exercise misses the point of the *Vahila v. Hall* case and is irrelevant in light of that case. The issue of whether appellant could collect from the Patereks' own carrier on their UM/UIM coverage was not submitted to the jury, and this court declines to weigh in as to whether such proceeds would ever be received. That issue is certainly not before us in this appeal.

{¶43} Viewing the instant case from the standpoint of damages, damages are recoverable in the full amount. As stated by the Supreme Court of Ohio, in the case of *Fantozzi v. Sandusky Cement Prod. Co.*:

{¶44} "The fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained. *** Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant. *** Compensatory damages are defined as those which measure the actual loss, and are allowed as amends therefore."⁹

{¶45} Under Civ.R. 50(B) the trial court had no duty to examine the collectability of Richardson. This consideration was irrelevant under *Vahila* and *Fantozzi*. We

9. (Internal citations omitted.) *Fantozzi v. Sandusky Cement Prod. Co.* (1992), 64 Ohio St.3d 601, 612.

accept that the jury limited its verdict of \$382,000 to the personal injuries suffered by the Patereks, and did not enhance the award with any other damages that may have related to the malpractice committed by Evans and Petersen & Ibold, but this fact by itself did not enable the trial court to step in and reduce the jury verdict due to considerations of collectability of the verdict. Its duty was to examine whether the verdict was supported by "substantial evidence," not whether the verdict was collectible.

{146} The first assignment of error is with merit.

{147} Appellant's second assignment of error is as follows:

{148} "The trial judge abused his discretion by denying plaintiff-appellant's motion for pre-judgment interest."

{149} On December 28, 2004, following the entry of judgment of the trial court pursuant to the jury's verdict, appellant filed a motion for prejudgment interest. The trial court overruled this motion on February 16, 2005.

{150} Appellant does not support this assignment of error with argument that the trial court committed error in failing to grant her motion for prejudgment interest. Instead, she argues that, in the event the trial court's judgment is reversed pursuant to assignment of error number one, she should be entitled to a hearing on her motion for prejudgment interest. It turns out that this assignment of error is not truly an assignment of error, but is more in the nature of a request for relief in the event the judgment of the trial court is reversed. Thus, appellant argues: "[i]n the event that this Court concludes that [appellant] is entitled to more than a judgment of \$100,000 against [Evans and Petersen & Ibold], then the denial of pre-judgment interest should also be reversed and the proceedings remanded for a hearing in accordance with R.C. 1343.03(C)."

{¶51} Therefore, appellant does not assert that the trial court abused its discretion in overruling her motion for prejudgment interest. Instead, she asks for her day in court to present the merits of her motion in the event the judgment of the trial court is reversed.

{¶52} We, therefore, find this assignment of error to be without merit, but in light of our decision under the first assignment of error, we do order this matter remanded to the trial court for a hearing on the merits of appellant's motion for prejudgment interest.

{¶53} The judgment of the trial court is reversed, and this matter is remanded to the trial court. The trial court is ordered to reinstate its original judgment entry awarding damages in the amount of \$382,000 pursuant to the jury verdict. The trial court is also ordered to conduct an evidentiary hearing on the merits of appellant's motion for prejudgment interest.

COLLEEN MARY O'TOOLE, J., concurs,

DIANE V. GRENDALL, J., dissents with Dissenting Opinion.

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

{¶54} I respectfully dissent.

{¶55} 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.

{¶56} The majority misapplies the Ohio Supreme Court's "case within a case" analysis in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. In *Vahila*, the Ohio Supreme Court discussed the relationship between "the requirement of causation" and "the merits of the underlying case" in a legal malpractice action. *Id.* at 428. The court held: "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." *Id.* The viability of the underlying claim is not an issue in present case: the appellees did not contest the viability of the claim against Richardson.

{¶57} At issue herein is to what extent were the Patereks damaged by the failure to refile the claim, or, in other words, what was the value of their claim. The majority mistakenly equates the value of the claim with the extent of the Patereks' injuries. This is contrary to the requirement in *Vahila* that "a causal connection [exist] between the conduct complained of and the resulting damage or loss." *Id.* at 427.

{¶58} "It is axiomatic that compensatory damages must be shown with certainty, and damages which are merely speculative will not give rise to recovery." *Endicott v. Johrendt* (June 22, 2000), 10th Dist. No. 99AP-935, 2000 Ohio App. LEXIS 2697, at *26; accord *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons and Bibbo*, 10th

Dist. No. 01AP-1137, 2003-Ohio-1633, at ¶42. "The evidence must establish a calculable financial loss because of the essential elements of a legal malpractice claim is a causal connection between the conduct complained of and resulting damage or loss." *Nu-Trend*, 2003-Ohio-1633, at ¶42, citing *Motz v. Jackson* (June 29, 2001), 1st Dist. No. C-990644, 2001 Ohio App. LEXIS 2896, at *14.

{¶59} In the present case, the parties stipulated that Richardson had neither personal assets nor the earning capacity to satisfy a judgment in excess of Richardson's \$100,000 in liability coverage. Accordingly, appellees' negligence in failing to refile suit against Richardson did not result in damages in excess of \$100,000. This amount represents the "actual loss," the most that the Patereks could have recovered if Petersen & Ibold had refiled the suit.

{¶60} To allow damages beyond \$100,000, as the majority's decision mandates, is improper because it awards the Patereks damages beyond those for which Peterson and Ibold may be held responsible. Therefore, the trial court ruled correctly in this case. The Patereks' first assignment of error is without merit.

{¶61} I agree with the majority's analysis that appellant's second assignment of error is a request for additional relief if the trial court is reversed. Since the trial court's decision should be affirmed, appellant's second assignment of error should be overruled.

{¶62} For the reasons stated, the decision of the Geauga County Court of Common Pleas should be affirmed.

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GEAUGA COUNTY, OHIO

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IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

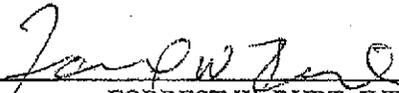
EDWARD F. PATEREK, et. al. : CASE NO. 02 PT 000901
Plaintiffs, : JUDGE FORREST W. BURT
-vs- : JUDGMENT ENTRY
PETERSEN & IBOLD, et. al. :
Defendants. :

Defendants' Motion for Judgment Notwithstanding Verdict is sustained.

The judgment previously entered in the above-captioned matter is reopened.

Judgment is entered in favor of Plaintiff Irene F. Paterek, Individually and as Executrix of the Estate of Edward Paterek and against Defendants Petersen & Ibold and Jonathon Evans, in the sum of \$100,000.

Defendants shall pay the costs of these proceedings for which judgment is entered and execution shall issue.


FORREST W. BURT, JUDGE

cc: Leon M. Plevin, Esq.
Timothy D. Johnson, Esq.

FEB 17 2005

FILED
IN COMMON PLEAS COURT

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IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

DEBORAH W. WINKSKI
CLERK OF COURTS
GEAUGA COUNTY

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|----------------------------|---|-----------------------|
| EDWARD F. PATEREK, et. al. | : | CASE NO. 02 PT 000901 |
| | : | |
| Plaintiffs, | : | JUDGE FORREST W. BURT |
| | : | |
| -vs- | : | <u>DECISION</u> |
| | : | |
| PETERSEN & IBOLD, et. al. | : | |
| | : | |
| Defendants. | : | |

This matter came on for consideration upon Defendants' Motion for Judgment Notwithstanding the Verdict.

For the reasons stated herein, Defendants' motion shall be sustained.

Statement of Facts and Case

Edward Paterek, now deceased, was severely injured as a result of an automobile collision that occurred on May 28, 1997. The driver of the other automobile involved in the collision was one Kristopher L. Richardson.

Mr. Paterek and his wife, Irene Paterek, hired the law firm of Petersen & Ibold to represent them in their personal injury lawsuit against Kristopher Richardson. A complaint against Mr. Richardson was filed on May 11, 1998. On October 6, 2000, the aforementioned complaint was voluntarily dismissed by Jonathon Evans, the attorney assigned to the case. The lawsuit was not re-filed within one year of the voluntary dismissal as permitted by Ohio's savings statute.

The within action was filed on October 2, 2002, alleging that the firm of Petersen & Ibold, and the individual attorneys in the firm, had committed malpractice. The case was tried to a jury on December 13 & 14, 2004. Prior to commencement of trial, the claims against attorneys Jerry Petersen, Dennis Ibold, Michael Ibold, and Jeffrey Orndorff, were dismissed by Plaintiff.

The parties in the instant action entered into a number of stipulations prior to trial. Relevant to the issues of this motion, the parties stipulated:

1. Kristopher Richardson had a \$100,000 automobile liability insurance policy available to satisfy a judgment against him for damages incurred by the Plaintiff as a result of the May 29, 1997 automobile accident.
2. Kristopher Richardson did not, at the time of the accident, nor does he presently have any personal assets or earning capacity sufficient to satisfy any judgment against him in excess of the \$100,000 automobile liability coverage.
3. Kristopher Richardson was at fault for the accident in question. Edward Paterek was not comparatively negligent.
4. Defendants admitted that Jonathon Evans missed a filing deadline that prevented Plaintiff from pursuing Mr. Richardson (and his liability carrier) for the damages caused in the accident.

The trial proceeded solely on the issue of damages. The jury returned with verdicts in the sum of \$282,000. in favor of Irene Paterek as Executrix of the Estate of Edward Paterek and \$100,000. in favor of Irene Paterek, individually, on her claim of loss of consortium. On December 20, 2004, this Court entered judgment in favor of Irene Paterek, Executrix of the Estate of Edward Paterek in the sum of \$282,000 and in favor of Irene Paterek, individually, in the sum of \$100,000.

Opinion

Judgment notwithstanding the verdict is to be rendered only when the Court finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted, and that conclusion is adverse to the party against whom the motion is made. The test for considering a motion for judgment notwithstanding the verdict is the same test as that for a motion for a directed verdict. Civ. R. 50(B), *Posin v. A.B.C. Motor Court Hotel, Inc.*, (1976), 45 Ohio St.2d 271.

The determinative issue in the case at hand is whether the parties' stipulation that Kristopher Richardson did not at the time of the accident, nor does he presently, have any personal assets or earning capacity sufficient to satisfy any judgment against him in excess of the \$100,000 automobile liability coverage limit Plaintiffs' judgment to the

\$100,000 she could have received from Richardson's liability insurance carrier. In other words, if an underlying tortfeasor is uncollectible or judgment proof, is the Plaintiff in a legal malpractice action limited to the amount of damages she could collect from that tortfeasor's liability insurer? Conversely stated, may Plaintiff in this action recover a total of \$382,000 from Defendants even though the most she could have recovered from Kristopher Richardson and his insurer was \$100,000? It is this Court's position that Plaintiffs is limited to a recovery of \$100,000.

Under Ohio law, to establish a cause of action for legal malpractice, a Plaintiff must establish 1) the attorney owed a duty to the Plaintiff; 2) there was a breach of that duty; and 3) there is a causal connection between the conduct complained of and the resulting damage or loss. *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259. In this case, there is no question that Defendants owed a duty to Plaintiff and that there was a breach of that duty. There is also no question that a causal connection exists between Defendants' conduct and Plaintiff's damages. The question then becomes, what is the extent of Plaintiff's damages that may be recovered from Defendants as a result of Defendants' negligence.

Plaintiff argues that *Vahila* removes collectibility of the underlying tortfeasor from any consideration in a legal malpractice action. It is Plaintiff's position that the only thing she is required to establish with respect to the damages element of legal malpractice is that there is a causal connection between the conduct complained of and the resulting damages or loss.

This Court does not agree with Plaintiff's argument. While *Vahila* certainly removed any necessity of proving "the case within the case" in every legal malpractice action, it did not relieve or lessen Plaintiff's burden of proving damages with reasonable certainty. As in any negligence action, Plaintiffs in a legal malpractice action must still show, by a preponderance of the evidence, that they are entitled to damages and the amount of those damages.

In this action, the jury determined that Plaintiff was entitled to a total of \$382,000 in damages. In response to interrogatories submitted by Plaintiffs, the jury demonstrated that it reached its damages amounts based upon Mr. Paterek's medical bills, his pain and suffering, his inability to perform usual activities, and upon Mrs. Paterek's loss of

consortium. The amounts the jury determined for each of the aforementioned elements of damages equal the total amount of the jury award. Although the instructions given to the jury permitted them to consider awarding damages beyond the amounts of Plaintiff's underlying personal injury and loss of consortium claims, the interrogatories establish that the jury chose not to do so.¹ The jury limited its award to those sums it determined arose from Mr. Paterek's personal injury and Mrs. Paterek's loss of consortium.

The determination that Plaintiff suffered damages in the amount of \$382,000 as a result of Kristopher Richardson's negligence does not mean that Plaintiff suffered damages in that same amount as a result of the negligence of Jonathon Evans and Petersen & Ibold. It is possible that Plaintiff could be entitled to damages from Defendants in addition to those resulting from the injuries caused by Mr. Richardson upon proper proof that additional damages existed. In the same vein, although Mr. Richardson caused injuries that were assigned a monetary value of \$382,000, the damages actually caused by the negligence of these Defendants must be limited to the amount that Plaintiff could be reasonably certain of receiving had Defendant not been negligent.

From the evidence before this Court, including the stipulations, it is clear that Plaintiff could not have received more than \$100,000 from Kristopher Richardson and his insurer. Mr. Richardson was uncollectible at the time of the accident and he is currently uncollectible. Although Plaintiff offers what this Court refers to as the "hit the lottery" argument, it would be sheer speculation that a judgment in the amount of \$382,000 against Kristopher Richardson would ever have been satisfied beyond the \$100,000 insurance coverage. Ohio's body of law concerning underinsured motorists insurance coverage precludes courts from taking into consideration that an underlying tortfeasor may someday hit the jackpot. Similarly, in determining the reality of the damages suffered by Plaintiff as a result of Defendants' malpractice, the Court cannot speculate that somehow, someday, Plaintiff would have been able to actually collect a judgment in the amount of \$382,000 from Mr. Richardson and his insurer.

¹ Irene Paterek was not permitted to testify regarding her emotional distress as a result of Defendants' malpractice; however, her proffer of evidence did not describe severe or debilitating emotional distress.

Plaintiff contends that damages in this matter should be based upon the lost opportunity to collect a judgment, even if that judgment proves, in the long run, to be less than fully collectible. Even if this Court were to accept that as a correct statement of the law, such a statement does not mean that the value of the lost opportunity to collect the judgment in this case is equal to the monetary amount of the damages suffered by Plaintiff as a result of Kristopher Richardson's negligence. The monetary amount of damages resulting from Kristopher Richardson's negligence was determined to be \$382,000. Kristopher Richardson has no assets, but there was an insurance policy with limits of \$100,000. It can be argued that the value of the opportunity to collect in this case was limited to the policy limits of \$100,000. It is also conceivable that an expert witness could be found who would opine that statistically the value of a \$382,000 judgment against a person of Mr. Richardson's age and financial status is of a particular worth. If that is so, no such expert testified in this trial.

Plaintiff and Defendants have presented this Court with cases from other jurisdictions that address who has the burden of proving whether an underlying tortfeasor was collectible. Some states hold that it is Plaintiffs' burden; other states require Defendants to show uncollectibility as an affirmative defense. The question of which party has the burden is not before this Court in that it was stipulated that Kristopher Richardson was without assets.

The issue of collectibility of the underlying tortfeasor in a legal malpractice action appears to be a matter of first impression in the state of Ohio. After reviewing the case law from other jurisdictions, this Court concludes that if there is evidence or, as in this case a stipulation, that the underlying tortfeasor is uncollectible, the amount of damages Plaintiffs may receive from a negligent attorney is limited to what the Plaintiffs were reasonably certain to receive in the underlying case plus any additional or other damages proven to exist.

Defendants' Motion for Judgment Notwithstanding the Verdict shall be sustained.


FORREST W. BURT, JUDGE

cc: Leon M. Plevin, Esq.
Timothy D. Johnson, Esq.