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# In the Supreme Court of Ohio

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***IRENE F. PATEREK, et al.,***

Plaintiffs-Appellees

v.

***PETERSEN & IBOLD, et al.,***

Defendants-Appellants.

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ON DISCRETIONARY APPEAL FROM THE  
COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT  
GEAUGA COUNTY, OHIO  
CASE No 2005-G-2624

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**AMICUS BRIEF OF MINNESOTA LAWYERS MUTUAL INSURANCE  
CO. IN SUPPORT OF APPELLANTS PETERSON & IBOLD, ET AL.**

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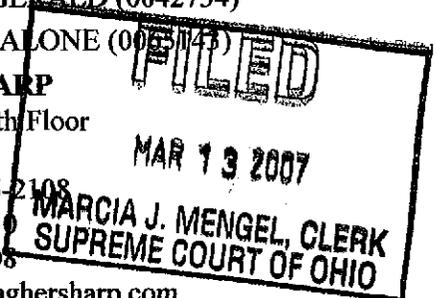
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**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE .....	1
STATEMENT OF THE CASE AND FACTS .....	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW .....	5

**Proposition of Law No. I:** When an attorney has committed professional negligence in the representation of a client during civil litigation, the attorney is liable only for those damages which were proximately caused by the attorney’s breach of duty. Excluded from damages that may be recovered in a legal malpractice action is any amount of an unobtained judgment against an adverse party that would not have been collected even if the underlying litigation had been competently and successfully handled by the attorney. .... 5

- A. Legal Malpractice Claims in Ohio ..... 5
  - 1. The *Vahila* Decision ..... 5
  - 2. Interpretation of *Vahila* by Lower Appellate Courts ..... 6
- B. Damages in Legal Malpractice Claims ..... 9
- C. *Vahila* Does Not Require the Outcome of the Majority Opinion ..... 10
- D. Collectibility has been Recognized as an Element of Proof by Other Appellate Courts in Ohio ..... 12

**Proposition of Law No. II:** In a legal malpractice action, the client bears the burden of proof on the element of damages. When an attorney’s malpractice prevents a client from obtaining a monetary judgment against another, and when the collectibility of that judgment is disputed in a malpractice action against the attorney, the burden remains upon the client to prove the amount that would have actually been collected by the client from the adverse party had the monetary judgment been entered in the underlying litigation ..... 13

- A. Which Party Bears the Burden of Proof Re: Collectibility ..... 13
  - 1. The Majority Approach - “Collectibility” as an Element to be Proved ..... 14
  - 2. The Minority Approach - “Collectibility” as an Affirmative Defense ..... 15
- B. The Majority Approach Should be Adopted in Ohio ..... 16

**TABLE OF CONTENTS (cont'd.)**

	<u>Page(s)</u>
CONCLUSION .....	17
CERTIFICATE OF SERVICE .....	18

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Beeck v. Aquaslide 'N' Dive Corp.</i> (Iowa 1984), 350 N.W.2d 149 .....	14
<i>Carbone v. Tierney</i> (N.H.2004), 864 A.2d 308 .....	15
<i>Chiaffi v. Wexler, Bergerman and Crucet</i> (1986), 116 A.D.2d 614, 497 N.Y.S.2d 703 .....	14
<i>Cunningham v. Hildebrand</i> (8 <sup>th</sup> Dist. 2001), 142 Ohio App. 3d 218 .....	7
<i>DiPalma v. Seldman</i> (1994), 27 Cal. App. 4th 1499 .....	14
<i>Endicott v. Johrendt</i> (June 22, 2000), 10 <sup>th</sup> Dist App. No. 99AP-935, 2000 Ohio App. LEXIS 2697 .....	9
<i>Environmental Network Corp., v. Goodman Weiss Miller, LLP,</i> 8th Dist. App. No. 87782, 2007-Ohio-831 .....	7
<i>Ferguson v. Lieff</i> (2003), 30 Cal. 4th 1037, 69 P.3d 965 .....	3
<i>Fernandes v. Barrs</i> (1994), 641 So. 2d 1371 (Fla. Dist. Ct. App.) .....	14
<i>Gibbons v. Price</i> (1986), 33 Ohio App.3d 4 .....	12
<i>Governmental Interinsurance Exch. v. Judge</i> (Ill. 2006), 850 N.E. 2d 183 .....	6
<i>Hester v. Dwivedi</i> , 89 Ohio St.3d 575, 2000-Ohio-230 .....	9, 10
<i>Hoppe v. Ranzini</i> (1978), 158 N.J. Super. 158, 385 A.2d 913 .....	15
<i>Jacobsen v. Oliver</i> (D.D.C. 2006), 451 F. Supp. 2d 180 .....	6
<i>Jenkins v. St. Paul Fire &amp; Marine Ins. Co.</i> (Louisiana 1982), 422 So. 2d 1109 .....	15
<i>Jernigan v. Giard</i> (1986), 398 Mass. 721, 500 N.E.2d 806 .....	14, 15
<i>Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly &amp; Lingren, Ltd.</i> (Minn. 2006), 711 N.W. 2d 811 .....	6

**TABLE OF AUTHORITIES (cont'd.)**

	<u>Page(s)</u>
<i>Johnson v. Univ. Hosp. of Cleveland</i> (1989), 44 Ohio St.3d 49 .....	10
<i>Jourdain v. Dineen</i> (Maine 1987), 527 A.2d 1304 .....	15
<i>Kennecorp Mortgage &amp; Equities Inc. v. Cline, Bischoff &amp; Cook Co.</i> (Dec. 17, 1982), Lucas App.No. L-182-30, 1982 Ohio App. LEXIS 11583 .....	12
<i>Kituskie v. Corbman</i> (Pa. 1996), 452 Pa. Super. 467, 682 A.2d 378 .....	15, 16
<i>Klump v. Duffus</i> (7th Cir. 1995), 71 F.3d 1368 .....	14-16
<i>Krahn v. Kinney</i> (1989), 43 Ohio St. 3d 103 .....	1, 5
<i>Lawson v. Sigfrid</i> (Colo. 1927), 83 Colo. 116, 262 P. 1018 .....	14
<i>Lewis v. Keller</i> , 8th Dist. App. No. 84166, 2004-Ohio-5866 .....	7
<i>Lindenman v. Kreitzer</i> (N.Y. App. Div. 2004), 7 A.D.3d 30 .....	15
<i>McKenna v. Forsyth &amp; Forsyth</i> (N.Y. App. Div. 2001), 720 N.Y.S.2d 654 .....	14
<i>McDow v. Dixon</i> (1976), 138 Ga. App. 338, 226 S.E.2d 145 .....	14
<i>Modesty v. Michael H. Peterson &amp; Assoc.</i> , 8th Dist. App. No. 85653, 2005-Ohio-6022 .....	9
<i>Moton v. Carroll</i> , 10 <sup>th</sup> Dist. App. No. 01AP-772, 2002-Ohio-567 .....	9
<i>Northwestern Life Ins. Co. v. Rogers</i> (1989), 61 Ohio App. 3d 506 .....	9
<i>Palmieri v. Winnick</i> (1984), 40 Conn. Supp. 144, 482 A.2d 1229 .....	14
<i>Paterek v. Petersen &amp; Ibold</i> , 11 <sup>th</sup> Dist. App. No. 2005-G-2624, 2006-Ohio-417 ...	1, 4, 8, 10,12
<i>Payne v. Lee</i> (E.D. Tenn. 1988), 686 F. Supp. 677 .....	14
<i>Power Constructors v Taylor &amp; Hintze</i> (Alaska 1998), 960 P.2d 20 .....	15, 16

**TABLE OF AUTHORITIES (cont'd.)**

	<u>Page(s)</u>
<i>Ridendour v. Lewis</i> (Oregon 1993), 854 P.2d 1005 .....	15, 16
<i>Rodriguez v Sciano</i> (Texas App. 2000), 18 SW3d 725 .....	14
<i>Rorrer v. Cooke</i> (N.C. 1985), 313 N.C. 338, 329 S.E.2d 355 .....	14
<i>Schirmer v. Mt. Auburn Obstetrics</i> , 108 Ohio St.3d 494, 2006-Ohio-942 .....	10
<i>Sheppard v. Krol</i> (Ill. App. 1991), 218 Ill. App. 3d 254, 578 N.E.2d 212 .....	14
<i>Smith v Haden</i> (1994), 868 F.Supp. 1 .....	15
<i>Taylor Oil Co. v Weisensee</i> (S. D. 1983), 334 N.W.2d 27, 29 .....	14
<i>Teodorescu v. Bushnell, Gage, Reizen and Byington</i> (1993), 201 Mich.App. 260, 506 N.W.2d 275 .....	15
<i>Tilly v. Doe</i> (1987), 49 Wash. App. 727, 746 P.2d 323 .....	14
<i>Trombley v. Calamunci, Joelson, Manore, Farah &amp; Silvers, L.L.P.</i> , 6 <sup>th</sup> Dist. App. No. L-04-1138, 2005-Ohio-2105 .....	9
<i>Vahila v. Hall</i> , 77 Ohio St. 3d 421, 1997-Ohio-259 .....	1, 2, 5-11, 13
<i>Victory Lane Prods., LLC v. Paul, Hastings, Janofsky &amp; Walker, LLP</i> (S.D. Miss. 2006), 409 F. Supp. 2d 773 .....	13
<i>Whiteaker v. State</i> (Iowa 1986), 382 N.W.2d 112 .....	14

**Other Authorities**

Rule 41(A)(1) of Ohio Rules of Civil Procedure .....	3
Rule 50(B) of Ohio Rules of Civil Procedure .....	4

**TABLE OF AUTHORITIES (cont'd.)**

Page(s)

**Legal Treaties & Law Review Articles**

Joseph H. Koffler, Legal Malpractice Damages in a Trial Within a Trial--A Critical Analysis of Unique Concepts: Areas of Unconscionability, 73 Marq. L. Rev. 40, 52 (1989) .....	16
Note, The Standard of Proof of Causation in Legal Malpractice cases (1978), 63 Cornell L. Rev. 666 .....	6
Prosser & Keeton, LAW OF TORTS (5 Ed.1984) 264, Section 41 .....	10

**APPENDIX**

Appx.

Notice of Appeal to The Supreme Court of Ohio Case No. 06-1811 (September 27, 2006) .....	1
Judgment Entry Geauga County Court of Appeals Case No. 2005-G-2624 (August 14, 2006) .....	2
Opinion Geauga County Court of Appeals Case No. 2005-G-2624 (August 14, 2006) .....	3
Judgment Entry Geauga County Court of Common Pleas Case No. 02 PT 000901 (February 16, 2005) .....	4

I.

**INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE**

In *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259, this Court arguably relaxed the standard of proof requirement in legal malpractice cases. *Vahila* without question rejected the suggestion that every legal malpractice plaintiff was required to prove as a prerequisite to the claim that he would have “prevailed” in a trial of the matter entrusted to an attorney but for the attorney’s negligence. *Vahila* stands for the proposition that proof of the “case-within-the-case” is not always required, but *Vahila* does not answer the question, at least not with the necessary clarity, of what is required, with respect to proximate cause and damages when proof of the case-within-the-case is not. As a result, confusion and disagreement abound, and the past ten years have seen different courts advance different interpretations of what *Vahila* means in different contexts.<sup>1</sup>

The decision under review, the majority opinion in *Paterek v. Petersen & Ibold*, 11<sup>th</sup> Dist. App. No. 2005-G-2624, 2006-Ohio-417, is a distressing and unjustified interpretation of *Vahila*. The majority has held that a client may recover in a legal malpractice claim the full extent of a judgment

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<sup>1</sup>The confusion - we believe - stems from a few, pivotal sentences of dicta - from the *Vahila* opinion:

\*\*\*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. See Note at 671; and *Krahn*, 43 Ohio St. 3d at 106, 538 N.E.2d at 1062. However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim.

*Vahila*, 77 Ohio St. 3d at 427-428 (emphasis added).

that would have been awarded against a tortfeasor in an underlying claim but for an attorney's negligence, without consideration of whether that judgment would actually have been collected had the attorney complied with the standard of care. The parties had stipulated to the amount that could reasonably have been collected from the tortfeasor, but the majority concluded that the stipulation and all limitations on the tortfeasor's collectibility were of no moment thereby allowing the legal malpractice plaintiff to recover damages which would not have been otherwise recoverable in the underlying case.

The majority comes to its conclusion regarding collectibility through a strained and unnecessary interpretation of *Vahila*. It could not have been this Court's desire in announcing *Vahila* to allow legal malpractice plaintiffs to be awarded otherwise uncollectable -- or damages not proximately caused by an attorney's malpractice. Requiring an attorney to bear damages beyond those proximately caused by malpractice is contrary to general principles of tort law, is against public policy in Ohio, and could not have been this Court's intent. The rule of law adopted by the majority penalizes lawyers unfairly and rewards clients unjustly.

Minnesota Lawyers Mutual Insurance Company ("MLM"), as Amicus Curiae, urges this Court to reverse. The decision is unwise and unfair--unfair to attorneys, to the companies that insure attorneys in Ohio, and to others who will indirectly bear the burden of increased insurance premiums. MLM provides professional liability insurance and risk management services to lawyers in Ohio and elsewhere. It is a company founded by lawyers to serve lawyers. The decision below directly impacts MLM, the attorneys it insures and seeks to insure, and other similarly situated insurance companies.

It is the position of MLM that collectibility should be a relevant issue in legal malpractice

actions and that the client should bear the burden of proving that damages claimed would have been collected but for the attorney's negligence.<sup>2</sup> The majority rule in other jurisdictions places the burden of proving collectibility on the malpractice plaintiff, and the majority position is well-reasoned.

## ***II.***

### **STATEMENT OF THE CASE AND FACTS**

On October 2, 2002, Appellee, Irene Paterek, Individually and as Executrix of the Estate of Edward F. Paterek, ("Paterek") filed suit against Jonathon Evans ("Evans") and the law firm of Petersen & Ibold (jointly "Appellants"), asserting claims for professional negligence. Evans had represented Edward Paterek and his wife relative to personal injuries Paterek sustained in a motor vehicle accident. Evans timely filed a complaint against the tortfeasor, Kristopher Richardson ("Richardson"), but the case was voluntarily dismissed pursuant to Civ. R. 41(A)(1). Evans failed to refile the case timely and was thus negligent. Appellants admitted liability in the malpractice suit with respect to the failure to refile timely.

It was undisputed and stipulated prior to trial that Richardson maintained motor vehicle

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<sup>2</sup>It is MLM's belief that if the Eleventh District's Opinion were to stand, attorneys would be held liable for damages that were not proximately caused by their negligence. Exposing attorneys to this excess liability would exact a social cost, increasing the cost of malpractice insurance and discouraging insurers from writing professional liability policies in Ohio for lawyers. Sound public policy should not impose liability upon an attorney for damages that would not have been collected even in the absence of malpractice. This policy is akin to the rationale for not holding attorneys liable for lost punitive damages as compensatory damages in a subsequent legal malpractice case. If an attorney may be held liable for lost punitive damages, the cost of malpractice insurance would increase and insurers could exclude coverage for those damages or abandon Ohio altogether. An increased financial burden on an attorney will increase the cost of services an attorney provides the public and make access to those services more difficult. See *Ferguson v. Lieff* (2003), 30 Cal. 4th 1037, 69 P.3d 965.

coverage in the amount of \$100,000 at the time of the accident. It was further stipulated before trial that Richardson did not have personal assets or the earning capacity to satisfy any judgment in excess of \$100,000.<sup>3</sup> *Paterek*, at ¶ 11.<sup>4</sup>

With negligence conceded, the sole issue at trial was damages. The jury returned a verdict in the amount of \$382,000, and judgment was entered in that amount. In a post-trial motion, Appellants argued that the judgment should be reduced from \$382,000 to \$100,000. The trial court sustained Appellants' Civ. R. 50(B) motion and reduced the judgment to \$100,000, the undisputed limit of Richardson's collectibility and, more importantly, the full measure of what the Patereks would have realized had Appellants satisfied the standard of care.

The Eleventh District Court of Appeals, in a two-to-one decision, reversed and ordered the trial court to reinstate the judgment of \$382,000. MLM, on behalf of itself and its insureds, urges

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<sup>3</sup>The Stipulation read, in part, as follows:

Now come the parties and stipulate as follows:

1. That Kristopher Richardson had a \$100,000 automobile liability insurance policy available to satisfy a judgment against him for damages incurred by the Plaintiffs as a result of the May 29, 1997 automobile accident that is the subject of this lawsuit;
2. That Kristopher Richardson did not at the time of the accident, nor does he presently, have personal assets or earning capacity sufficient to satisfy any judgment against him in excess of the \$100,000 automobile liability coverage mentioned above;

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<sup>4</sup> It should also be noted that at the time of the accident the Patereks maintained UM/UIM, coverage in the amount of \$250,000. At the time of trial on the legal malpractice claims, all UM/UIM claims remained viable, as they had originally been asserted by the Patereks in this litigation, but voluntarily dismissed prior to trial. The bonus damages awarded to the Patereks by the majority's decision are all the more obvious when one realizes that they could have been pursued in a claim under their own UM/UIM coverage.

this Court to reverse the decision of the Eleventh District Court of Appeals. The Court of Appeals misinterpreted *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259, and improperly concluded that “collectibility” is irrelevant in a legal malpractice action.

### III.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law No. I: When an attorney has committed professional negligence in the representation of a client during civil litigation, the attorney is liable only for those damages which were proximately caused by the attorney’s breach of duty. Excluded from damages that may be recovered in a legal malpractice action is any amount of an unobtained judgment against an adverse party that would not have been collected even if the underlying litigation had been competently and successfully handled by the attorney.**

#### **A. Legal Malpractice Claims in Ohio.**

##### **I. The *Vahila* Decision**

In *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259, and its predecessor, *Krahn v. Kinney* (1989), 43 Ohio St. 3d 103, this Court established the elements required for claim of legal malpractice as follows: (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that Ohio, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss. *Vahila*, 77 Ohio St. 3d 421, 1997-Ohio-259, at syllabus.

In *Vahila*, this Court also discussed the issue of proximate cause and rejected the suggestion that a universal case-within-the-case causation requirement should be imposed in every legal malpractice claim. The court discussed the subject in the following dicta:

\*\*\*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. See Note at 671; and *Krahn*, 43 Ohio St. 3d at 106, 538 N.E.2d at 1062. However, we cannot endorse a

blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim.

*Vahila*, 77 Ohio St. 3d at 427-428 (emphasis added).<sup>5</sup>

The rejection of the case-within-the-case causation requirement was based almost exclusively<sup>6</sup> on the specific facts presented therein, most notably that the plaintiffs were not claiming that they would have prevailed in a trial but for the negligent acts of their attorneys; rather, the plaintiffs argued that they were damaged by the attorneys' failure to protect their interests fully and to disclose the consequences of plea bargains and settlements negotiated in criminal and civil actions. This Court determined that requiring the plaintiffs in *Vahila* to prove the case-within-the-case would be inequitable because "given the facts of this case, appellants have arguably sustained damage 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.* at 427.

## 2. *Interpretation of Vahila by Lower Appellate Courts*

Ohio courts have interpreted *Vahila* in a variety of ways. The Eighth District Court of Appeals, for example, has determined in a number of decisions that malpractice claims have merit only if the underlying claim or defense had merit, and courts considering them have interpreted the phrase "some evidence" to mean that a plaintiff can establish proximate causation only by proving

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<sup>5</sup>Courts in other jurisdictions have expressly refused to adopt the approach taken by this Court in *Vahila*. See, e.g., *Jerry's Enterprises, Inc. v. Larkin, Hoffman, Daly & Lingren, Ltd.* (Minn. 2006), 711 N.W. 2d 811; *Governmental Interinsurance Exch. v. Judge* (Ill. 2006), 850 N.E. 2d 183; *Jacobsen v. Oliver* (D.D.C. 2006), 451 F. Supp. 2d 180.

<sup>6</sup>The *Vahila* Court relied heavily on rationale set forth in a law review note that was nearly 20 years old at the time the case was decided. See Note, *The Standard of Proof of Causation in Legal Malpractice cases* (1978), 63 Cornell L. Rev. 666.

that he should have prevailed in the underlying case. See *Lewis v. Keller*, 8th Dist. App. No. 84166, 2004-Ohio-5866, (the attorney's failure to timely file the claim did not proximately cause the statute of limitations to run; rather, the statute ran because despite the efforts of the attorney, he was unable to gather the necessary materials to file a complaint that would have been sufficient to survive a motion to dismiss. The appellate court noted that although *Vahila* does not always require the plaintiff to provide evidence indicating the likelihood of success on the merits of the underlying claim, in this instance, "the circumstances [of this case] reasonably demand it." *Id.* at ¶ 13.); *Cunningham v. Hildebrand* (8<sup>th</sup> Dist. 2001), 142 Ohio App. 3d 218 (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\*\*\*. Plaintiff must prove what the amount of his recovery probably would have been." *Id.* at 225).

Interestingly, however, the Eighth District, in an internal contradiction, has also interpreted the "some evidence" language of *Vahila* as abrogating the traditional tort definition of proximate cause and have allowed cases to proceed where there is scant proof that any damages were proximately caused by the negligent acts or omissions of an attorney. In *Environmental Network Corp., v. Goodman Weiss Miller, LLP*, 8th Dist. App. No. 87782, 2007-Ohio-831, the Eighth District recently affirmed a judgment when plaintiffs submitted only "some evidence." In that case, plaintiffs claimed that they were harmed by an allegedly coerced settlement. The Eighth District Court of Appeals relied on *Vahila* for the proposition that plaintiffs were required to present only "some evidence" of this contention to have the case submitted to a jury and were not required to prove what the result of the underlying trial would have been had the case been tried to conclusion.

The problem is that some courts have interpreted the "some evidence" language to mean that

a plaintiff in a legal malpractice case *never* has to prove that he would have prevailed in an underlying action or that a superior result would have been obtained but for malpractice. These courts misinterpret the “some evidence” language of *Vahila* and twist it out of context: that is, the plaintiff makes a case for submission to the jury by providing “some evidence” of whatever it is that the plaintiff wants to present evidence about. The threshold to prove proximate cause in such cases is not merely low, it is non-existent. The “some evidence” discussion in *Vahila*, being cast in the negative, has resulted in confusion and cases in which attorneys have been held liable for legal malpractice without any proof of proximate cause.

The Eleventh District Court of Appeals has pushed the “some evidence” dicta in *Vahila* to an illogical conclusion. The majority has interpreted this Court’s rejection of the “case within the case” doctrine in the specific facts of *Vahila* as an abrogation of the essential tort law requirement that a “causal connection” (that is, proximate cause) must exist between the attorney’s acts or omissions and the plaintiff’s actual damages. The majority below reasoned that because *Vahila* would not require the Patereks to prove that they would have received a judgment if the underlying case was tried (proof of a case-within-the-case is never required, according to the majority), the Patereks damages were not limited to what they would have been “reasonably certain” of receiving if the underlying case had gone to trial. *Paterek*, ¶ 30. The majority determined that limiting damages in the malpractice case to what the Patereks would have collected in the underlying case, would be to adopt the “but for” test and the “case-within-the-case” analysis, both of which have been rejected by the Supreme Court of Ohio in the case of *Vahila v. Hall*.” *Paterek*, ¶ 30.

The majority’s analysis allows the exception to devour the rule. *Vahila* was decided the way it was because the client in that case was not claiming that she would have “prevailed” in a trial but

for the malpractice. As no such claim was being advanced in *Vahila*, this Court concluded the lower court had erred in requiring proof of victory. The “some evidence” dicta of *Vahila* was part of the explanation of the Court’s reasoning under those particular facts. But the “some evidence” dicta has taken on a life of its own, and the majority below and other courts have interpreted it to mean that no plaintiff is ever required to prove that he would have succeeded in an underlying matter—even if he is claiming that he would have. “Some evidence” is all that is ever required of any plaintiff. It should not be this way. This could not have been the intent of *Vahila*.<sup>7</sup>

**B. Damages in Legal Malpractice Claims.**

Regardless of the dicta in *Vahila*, it remains unchanged that before liability for legal malpractice can be imposed, the client must have incurred damages that were directly and proximately caused by the attorney’s malpractice. *Northwestern Life Ins. Co. v. Rogers* (1989), 61 Ohio App. 3d 506. Damages must be shown with certainty, and damages which are merely speculative are not recoverable. *Modesty v. Michael H. Peterson & Assoc.*, 8th Dist. App. No. 85653, 2005-Ohio-6022, ¶12; *Trombley v. Calamunci, Joelson, Manore, Farah & Silvers, L.L.P.*, 6<sup>th</sup> Dist. App. No. L-04-1138, 2005-Ohio-2105, ¶33; *Endicott v. Johrendt* (June 22, 2000), 10<sup>th</sup> Dist App. No. 99AP-935, 2000 Ohio App. LEXIS 2697; *Moton v. Carroll*, 10<sup>th</sup> Dist. App. No. 01AP-772, 2002-Ohio-567.

In other professional negligence actions and contexts, this Court has appropriately limited the imposition of liability for damages, consistent with sound public policy and general principles of tort law. See, e.g., *Hester v. Dwivedi*, 89 Ohio St.3d 575, 2000-Ohio-230, ¶34 (this Court noted

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<sup>7</sup>While the issue presented in this appeal is the narrow question of collectibility of damages, the broader meaning of *Vahila* should be addressed by this Court in a legal malpractice case that was allowed to proceed to a jury verdict with merely “some evidence” on the issue of proximate cause.

that “the American civil justice system imposes outer bounds of causation, even where an event certainly would not have happened but for another’s breach of a required standard of care.”). See also *Johnson v. Univ. Hosp. of Cleveland* (1989), 44 Ohio St.3d 49, 57 [“ ‘Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.’ ” (quoting Prosser & Keeton, LAW OF TORTS (5 Ed.1984) 264, Section 41.)]

The imposition of liability against an attorney for “damages” that would have never been collected --through no fault of the attorney -- is contrary to justice and the policy of tort law in Ohio. In Ohio, “ ‘[t]he law of negligence does not hold a defendant liable for damages that the defendant did not cause.’ ” *Schirmer v. Mt. Auburn Obstetrics*, 108 Ohio St.3d 494, 2006-Ohio-942, ¶27, quoting *Hester*, supra, 89 Ohio St.3d at 583. The majority’s decision in this case is at odds with this well-established principle. Other jurisdictions that have considered the issue have come to the opposite conclusion from the majority below. See Proposition of Law No. II, infra.

**C. Vahila Does Not Require the Outcome of the Majority Opinion.**

*Vahila* certainly does not compel the majority’s decision. The majority agreed with the trial court that “ ‘it is clear that Plaintiff could not have received more than \$100,000 from [Richardson] and his insurer.’ ” *Paterek*, at ¶30. The majority did not accept, however, the trial court’s legal conclusion that the amount of damages caused by the attorneys’ negligence was limited to the amount the Patereks “ ‘could be reasonably certain of receiving had [Evans, Petersen & Ibold] not been negligent.’ ” *Paterek*, at ¶30. The majority criticized the trial court for “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*[], 77 Ohio St.3d 421, 1997-Ohio-259].” *Paterek*, ¶30.

But *Vahila* did not universally reject the case-within-the-case analysis. What *Vahila* did reject was the *universal application* of case-within-the-case analysis in legal malpractice actions.

This Court held that proof of the case within the case would not be required in every instance; it did not hold that proof of the case with the case would never be required. Whether it is or is not required should depend upon what the client is claiming. If the client is claiming that he would have prevailed in a case but for the attorney's malpractice, then proof of the case-within-the-case should be required, and we submit that *Vahila* would require this conclusion. But if a client is claiming, for example, that a settlement opportunity in a weak case was blundered away by an attorney's negligence then the client need not prove that he would have succeeded at trial, only that there was the opportunity to settle. The type of proof required depends on the claim asserted.

The majority below, however, held that the plaintiff need not prove the claim asserted. *Vahila* did not address damage issues or the collectibility issue presented here. Most importantly, *Vahila* did not hold that an attorney may be liable for a greater amount of damages than the malpractice proximately caused -- this would be against fundamental tort law.

The dissent below accurately analyzes the legal issue of collectibility. Judge Grendell correctly observes that because the attorneys admitted liability, the only issue at trial was “\*\*\*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.” *Id.* at ¶ 57. Since the parties stipulated that the underlying tortfeasor had neither personal assets nor the earning capacity to satisfy any judgment in excess of his \$100,000 liability insurance, the failure to refile the tort case could not have resulted in damages in excess of \$100,000. This amount represents the full measure of the Patereks' only “actual loss.” *Id.* at ¶ 59.

The parties stipulation of limited collectibility makes the situation far different from *Vahila*. Just as malpractice was not at issue below, neither was collectibility. Because the extent of collectibility was not disputed, the trial court's post-trial decision to reduce the judgment, to the stipulated amount was not in conflict with *Vahila*. It would have been error for the trial court to have

ruled otherwise.

Imposing liability against Appellants in any amount greater than \$100,000 would be contrary to principles that *Vahila* does confirm: that proximate cause and certain damages must be proven. The majority's opinion places the Patereks in a better position “\*\*\*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.”<sup>8</sup> *Id.* at ¶ 55. By not limiting the damages to the portion of the underlying judgment that the Paterek's could have collected, the majority is holding Petersen & Ibold liable for damages that were not directly and proximately caused by its negligence.

**D. Collectibility has been Recognized as an Element of Proof by Other Appellate Courts in Ohio.**

Two Ohio appellate decisions decided before *Paterek* expressly or implicitly acknowledge that collectibility is relevant and proper in determining damages in a legal malpractice case. In *Gibbons v. Price* (1986), 33 Ohio App.3d 4, the Eighth Appellate District held that a trial court's ruling that damages were merely speculative was error where the record clearly demonstrated that “at the very least, appellant had put forth sufficient evidence to raise a question of fact for the jury as to the existence and extent of her claims *as well as the validity and collectibility* of her claims against the estate.” *Id.* at 14 (emphasis added).

In *Kennecorp Mortgage & Equities Inc. v. Cline, Bischoff & Cook Co.* (Dec. 17, 1982), Lucas

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<sup>8</sup>The fact that the Patereks had \$250,000 of UM/UIM coverage and a viable claim against their own automobile insurance carrier at the time of the legal malpractice trial further demonstrates and emphasizes the point. Had Evans timely refiled the Patereks' lawsuit against Richardson, the tortfeasor, and successfully prosecuted the case and recovered a judgment against him for \$382,000--the presumed value of the underlying tort claim--the Patereks would still have had to pursue an underinsured motorist claim in any event in order to have been more fully compensated for their damages. The Patereks should be required to pursue the underinsured motorist claim beyond the liability limits of \$100,000, as they would have had to do regardless of any malpractice by their attorney.

App.No. L-182-30, 1982 Ohio App. LEXIS 11583, the trial court concluded in a legal malpractice case, “[o]ne of the elements that [a plaintiff] must show to show [sic] damages would be that any damage that he had sustained \*\*\* must be a direct result of an act or an omission on the part of the defendants \*\*\*” and that “I think the proof utterly fails\*\*\* on the collectibility aspect of the Royal Manor Nursing Home.” Id. at \*9-10. The Sixth Appellate District agreed and held that the record supported the trial court’s determination that the plaintiff failed to prove damages. These opinions support Appellants’ position that the law of Ohio does and should recognize that collectibility is not only relevant in a legal malpractice case, but also an element of proof required for the plaintiff. These decisions predate *Vahila*, but they are not inconsistent with it.

**Proposition of Law No. II: In a legal malpractice action, the client bears the burden of proof on the element of damages. When an attorney’s malpractice prevents a client from obtaining a monetary judgment against another, and when the collectibility of that judgment is disputed in a malpractice action against the attorney, the burden remains upon the client to prove the amount that would have actually been collected by the client from the adverse party had the monetary judgment been entered in the underlying litigation.**

**A. Which Party Bears the Burden of Proof Re: Collectibility**

All jurisdictions addressing the question of collectibility in the context of a legal malpractice action - other than the Eleventh District Court of Appeals in Ohio - treat it as an element to be proved, or sanctions disproved. The only disagreement among courts and jurisdictions is which party bears the burden of proof.

A recent highlight of a well-reasoned collectibility case from outside Ohio is *Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP* (S.D. Miss. 2006), 409 F. Supp. 2d 773, 778-779. Therein, a federal district court granted summary judgment on professional negligence claims asserted against a defendant law firm, concluding that the financial condition of the underlying wrongdoing precluded any possibility that the plaintiff would have won a collectible

judgment.

**1. The Majority Approach - "Collectibility" as an Element to be Proved.**

The majority of jurisdictions place the burden upon the legal malpractice plaintiff to prove collectibility. These jurisdictions include California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Massachusetts, North Carolina, South Dakota, Tennessee, Texas and Washington. See *DiPalma v. Seldman* (1994), 27 Cal. App. 4th 1499; *Lawson v. Sigfrid* (1927), 83 Colo. 116, 262 P. 1018; *Palmieri v. Winnick* (1984), 40 Conn. Supp. 144, 482 A.2d 1229; *Fernandes v. Barrs* (1994), 641 So. 2d 1371 (Fla. Dist. Ct. App.); *McDow v. Dixon* (1976), 138 Ga. App. 338, 226 S.E.2d 145; *Sheppard v. Krol* (1991), 218 Ill. App. 3d 254, 578 N.E.2d 212; *Whiteaker v. State* (Iowa 1986), 382 N.W.2d 112; *Beeck v. Aquaslide 'N' Dive Corp.*, (Iowa 1984), 350 N.W.2d 149; *Jernigan v. Giard* (1986), 398 Mass. 721, 500 N.E.2d 806; *Chiaffi v. Wexler, Bergerman and Crucet* (1986) 116 A.D.2d 614, 497 N.Y.S.2d 703; *Rorrer v. Cooke* (1985), 313 N.C. 338, 329 S.E.2d 355; *Taylor Oil Co. v. Weisensee* (South Dakota 1983) 334 NW2d 27, 29; *Payne v. Lee* (E.D. Tenn. 1988), 686 F. Supp. 677; *Rodriguez v. Sciano* (Texas App. 2000), 18 SW3d 725, 727; and *Tilly v. Doe* (1987), 49 Wash. App. 727, 746 P.2d 323.

The majority rule limits the recovery of an aggrieved client to that which the client would have recovered had the attorney not been negligent. The policy underlying such a rule is sound. *McKenna v. Forsyth & Forsyth*, (N.Y. App. Div. 2001), 720 N.Y.S.2d 654. The rule is succinctly stated this way:

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.

*Klump v. Duffus* (7th Cir. 1995), 71 F.3d 1368, 1374 (emphasis in original).

Hypothetical damages beyond those the client would have genuinely collected absent malpractice "are not a legitimate portion of her 'actual injury'; awarding her those damages would

result in a windfall.” *Klump*, 71 F.3d at 1374. The majority rule views collectibility as a component of the plaintiff’s prima facie case. See, e.g., *Klump*, 71 F.3d at 1374 (reasoning majority position on collectibility is consistent with burden of proof in negligence actions generally).

## 2. *The Minority Approach - “Collectibility” as an Affirmative Defense.*

A minority of jurisdictions impose the burden on the attorney to assert and prove non-collectibility as an affirmative defense. These jurisdictions include the District of Columbia, Alaska, Louisiana, Maine, Michigan, New Hampshire, New Jersey, New York, Oregon, and Pennsylvania. See *Smith v Haden* (1994), 868 F.Supp. 1, 2; *Power Constructors v Taylor & Hintze* (Alaska 1998), 960 P.2d 20; *Jenkins v. St. Paul Fire & Marine Ins. Co.* (Louisiana 1982), 422 So. 2d 1109; *Jourdain v. Dineen* (Maine 1987), 527 A.2d 1304; *Teodorescu v. Bushnell, Gage, Reizen and Byington* (1993), 201 Mich.App. 260, 506 N.W.2d 275; *Carbone v. Tierney* (New Hampshire 2004), 864 A.2d 308; *Hoppe v. Ranzini* (1978), 158 N.J. Super. 158, 385 A.2d 913; *Lindenman v. Kreitzer* (N.Y. App. Div. 2004), 7 A.D.3d 30; *Ridendour v. Lewis* (Oregon 1993), 854 P.2d 1005; and *Kituskie v. Corbman* (1996), 452 Pa. Super. 467, 682 A.2d 378.

The minority rule, generally speaking, reasons that collectibility may be a disputed issue precisely because of the attorney’s malpractice. That being so, the attorney should bear the burden and risk of proving that damages were not collectible. See *Power Constructors*, 960 P.2d at 31-32; *Jernigan*, 500 N.E.2d at 807; *Kituskie*, 714 A.2d at 1031. See also *Carbone v. Tierney* (N.H. 2004), 864 A.2d 308 (holding that “in a legal malpractice action, non-collectibility of the underlying judgment is an affirmative defense that must be proved by the defendant.”).

Other cases subscribing to the minority view reason that the face value of an existing judgment is prima facie evidence of its intrinsic value or settlement value, which the negligent attorney may rebut by pleading and proving that some or all of the damages were not collectible. See

*Ridenour*, 854 P.2d at 1006; *Kituskie*, 714 A.2d at 1031-32.

**B. The Majority Approach Should be Adopted in Ohio.**

In addressing collectibility in circumstances nearly identical to these presented here, the Seventh Circuit Court of Appeals stated:

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. 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;" awarding her those damages would result in a windfall. Thus we believe that the district court was incorrect to state that a plaintiff is entitled to the full amount of an underlying judgment if she can only prove that the hypothetical defendant was able to pay one dollar of it.

*Klump v. Duffus*, supra, 71 F.3d at 1374.

While acknowledging the minority approach, the Seventh Circuit concluded that it is more appropriate to place on the plaintiff the burden of proving the amount he would have actually collected from the tortfeasor. *Id.* Placing the burden upon the plaintiff is the position taken by the majority, and this rule is consistent with plaintiffs' burdens of proof in negligence actions generally. See Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial--A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 *Marq. L. Rev.* 40, 52 (1989) ("To predicate an award of damages upon both the requirement that a judgment would have been recovered and that it would have been collectible\*\*\*requires a showing of causation\*\*\*that is conceptually no different from that required in negligence cases generally.").

This Amicus Curiae urges that the majority rule, a rule placing of the burden of proving collectibility upon the legal malpractice plaintiff, should be expressly adopted by this Court as the law in Ohio.

**IV.**

**CONCLUSION**

**WHEREFORE**, Amicus Curiae, Minnesota Lawyers Mutual Insurance Company, supports the position of Appellants, Peterson & Ibold and Jonathon Evans, that the decision of the Eleventh District Court of Appeals be reversed and the trial court order reducing the jury verdict from \$382,000 to \$100,000 be reinstated.

Respectfully submitted,



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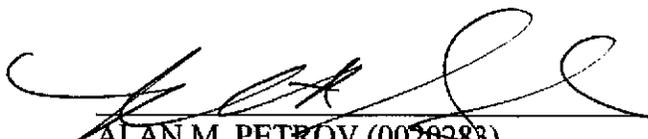
A true copy of the foregoing *Amicus Brief of Minnesota Lawyers Mutual Insurance Co. In Support of Appellants Peterson & Ibold, et al.* was served by United States Mail, postage prepaid, this 13<sup>th</sup> day of March, 2007, upon:

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Estate of Edward F. Paterek*

  
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MONICA A. SANSALONE (0065143)

**1**

IN THE OHIO SUPREME COURT

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CASE NO. \_\_\_\_\_

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

06-1811

Plaintiff-Appellee,

v.

PETERSEN & IBOLD, et al.,

Defendants-Appellants.

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

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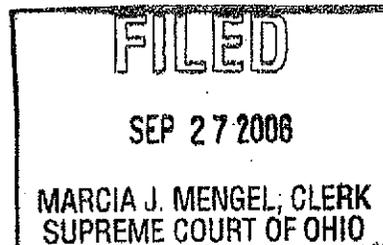
**NOTICE OF APPEAL OF APPELLANTS  
PETERSEN & IBOLD AND  
JONATHAN EVANS**

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**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,



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**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, 35<sup>th</sup> Floor, 50 Public Square, Cleveland, Ohio 44113, Attorneys for Plaintiff-Appellee this 26th day of September, 2006



TIMOTHY D. JOHNSON (0006686)  
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*Attorneys for Defendants  
Petersen & Ibold and Jonathon Evans*

**2**

TJ 27636

AUG 16 2006

STATE OF OHIO )  
 )SS.  
COUNTY OF GEAUGA )

IN THE COURT OF APPEALS  
ELEVENTH DISTRICT

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

**FILED**  
IN COURT OF APPEALS

AUG 14 2006

DENISE M. KAMINSKI  
CLERK OF COURTS  
GEAUGA COUNTY

Plaintiff-Appellant,

JUDGMENT ENTRY

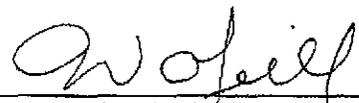
- vs -

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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**3**

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, :

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

- vs - :

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 28<sup>th</sup>, 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."<sup>1</sup>

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

{¶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."<sup>3</sup>

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

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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*.<sup>4</sup>

{¶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

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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."<sup>5</sup>

{¶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[.]"<sup>6</sup>

{¶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."<sup>7</sup>

{¶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

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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*.<sup>8</sup>

{¶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

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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."<sup>9</sup>

{¶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

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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. GRENDELL, J., dissents with Dissenting Opinion.

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DIANE V. GRENDELL, 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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FEB 17 2005

IN THE COURT OF COMMON PLEAS  
GEOUGA COUNTY, OHIO

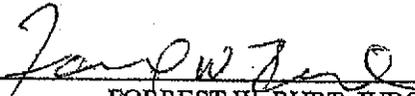
EDWARD F. PATEREK, et. al. : CASE NO. 02 PT 000901  
Plaintiffs, : JUDGE FORREST W. BURT  
-vs- : JUDGMENT ENTRY  
PETERSEN & IBOLD, et. al. :  
Defendants. :

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

2005 FEB 16 AM 11:27

IN THE COURT OF COMMON PLEAS  
GEAUGA COUNTY, OHIO

DEEPA K. RAMASAI  
CLERK OF COURTS  
GEAUGA COUNTY

EDWARD F. PATEREK, et. al. : CASE NO. 02 PT 000901  
Plaintiffs, : JUDGE FORREST W. BURT  
-vs- : DECISION  
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.<sup>1</sup> 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.

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<sup>1</sup> 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.