

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

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

MERIT BRIEF IN SUPPORT OF APPELLANTS PETERSEN & IBOLD,
ET AL. OF AMICUS CURIAE AMERICAN GUARANTEE
AND LIABILITY INSURANCE COMPANY

Leon M. Plevin, Esq. (0008631)
Edward O. Fitzgerald, Esq. (0062364)
Plevin & Gallucci Co., L.P.A.
55 Public Square, Suite 2222
Cleveland, Ohio 44113

Paul W. Flowers, Esq. (0046625)
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216

*Counsel for Plaintiff-Appellee, Irene F. Paterek
Executrix*

Timothy D. Johnson, Esq. (0006686)
Gregory E. O'Brien, Esq. (0037073)
Weston Hurd LLP
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862

*Counsel for Defendants-Appellants, Petersen
& Ibold and Jonathon Evans*

Nicholas D. Satullo, Esq. (0017364)
Joseph W. Borchelt, Esq. (0075387)
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

*Counsel for Amicus Ohio Association of Civil
Trial Attorneys*

Alan M. Petrov, Esq. (0020283)
Timothy J. Fitzgerald, Esq. (0042734)
Monica A. Sansalone, Esq. (0065143)
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108

*Counsel for Amicus Minnesota Lawyers Mutual
Insurance Company*

Steven G. Janik, Esq. (0021934)
Jason D. Winter, Esq. (0076191)
Daniel A. Scharf, Esq. (0080836)
Janik & Dorman, L.L.P.
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521

*Counsel for Amicus American Guarantee and
Liability Insurance Company*

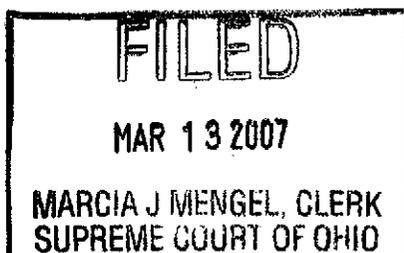


TABLE OF CONTENTS

TABLE OF AUTHORITIES ii-iii

INTRODUCTION 1

STATEMENT OF FACTS 1-2

ARGUMENT 2-6

**Proposition Of Law No. I: In a legal malpractice action,
plaintiff cannot recover damages from her attorney that she
could not have collected from the tortfeasor who caused her
injuries 2**

**Proposition Of Law No. II: In a legal malpractice action,
plaintiff must prove that the damages she seeks to recover
from her attorney could have been collected from the
tortfeasor who caused her injuries 4**

CONCLUSION 6

PROOF OF SERVICE 7

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Albee Assocs. v. Orloff, Lowenbach, Stifelman & Siegel, P.A.</i> , 317 N.J. Super. 211, 721 A.2d 750 (N.J. Super. Ct. App. Div. 1999)	4, 5
<i>Augustine v. Adams</i> , No. 95-2489-GTV, 1997 WL 298451, (D. Kan. May 2, 1997).....	4
<i>Carbone v. Tierney</i> , 151 N.H. 521, 864 A.2d 308 (N.H. 2004)	4, 5
<i>Clary v. Lite Machines Corp.</i> , 850 N.E.2d 423 (Ind. Ct. of App. 2006).....	3
<i>Conant v. Ervin</i> , No. L01-2654, 2003 WL 22382798 (Va. Cir. Ct. Apr. 21, 2003).....	4
<i>Cosgrove v. Grimes</i> , 774 S.W.2d 662 (Tex. 1989)	4
<i>DiPalma v. Seldman</i> , 27 Cal. App. 4th 1499, 33 Cal. Rptr.2d 219 (Cal. Ct. App. 1994).....	3, 5
<i>Eno v. Watkins</i> , 229 Neb. 855, 429 N.W.2d 371 (Neb. 1988).....	3-4
<i>Fernandes v. Barrs</i> , 641 So.2d 1371 (Fla. Dist. Ct. App. 1994).....	3, 5
<i>Haberer v. Rice</i> , 511 N.W. 2d 279 (S.D. 1994).....	4, 5
<i>Jenkins v. St. Paul Fire & Marine Ins. Co.</i> , 422 So. 2d 1009 (La. 1982)	3
<i>Jernigan v. Giard</i> , 398 Mass. 721, 500 N.E.2d 806 (Mass. 1986)	3, 5
<i>Jourdain v. Dineen</i> , 527 A.2d 1304 (Me. 1987)	3
<i>Kituskie v. Corbman</i> , 552 Pa. 275, 714 A.2d 1027 (Pa. 1998).....	4, 5

TABLE OF AUTHORITIES (Cont'd.)

Klump v. Duffus,
71 F.3d 1368 (7th Cir.1996)3, 5

Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.,
112 Wash. App. 677, 50 P.3d 306 (Wash. Ct. App. 2002).....4, 5

Lindenman v. Kreitzer,
7 A.D.3d 30, 775 N.Y.S.2d 4 (N.Y. App. Div. 2004)4

Paterek v. Peterson & Ibold,
No. 2005-6-2624, 2005-Ohio-4179 (Ohio Ct. App. 2007).....6

Payne v. Lee,
686 F.Supp. 677 (E.D. Tenn. 1998).....4

Power Constructors, Inc. v. Taylor & Hintze,
960 P.2d 20 (Alaska 1998)3

Ridendour v. Lewis,
121 Or. App. 416, 854 P.2d 1005 (Or. Ct. App. 1993)4

Rorrer v. Cooke,
313 N.C. 338, 329 S.E.2d 355 (N.C. 1985).....4, 5

Smith v. Haden,
868 F.Supp. 1 (D.D.C. 1994).....4, 5

Szurovy v. Olderman,
243 Ga. App. 449, 530 S.E.2d 783 (Ga. Ct. App. 2000).....3

Teodorescu v. Bushnell, Gage, Reizen & Byington,
201 Mich.App. 260, 506 N.W.2d 275 (Mich. Ct. App. 1993)3

Vahila v. Hall,
77 Ohio St. 3d 421, 1997-Ohio-259 (Ohio 1997).....2

Whiteaker v. State,
382 N.W.2d 112 (Iowa 1986).....3, 5

INTRODUCTION

The issue before the Court is whether a plaintiff in a legal malpractice action may recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries. Should the Court allow such a recovery, it will not only depart from traditional tort concepts as to bestow a windfall upon legal malpractice plaintiffs, but will also break ranks with every jurisdiction which has considered this issue, all of which have refused to award such windfall damages to legal malpractice plaintiffs. American Guarantee and Liability Insurance Company (“American Guarantee”) respectfully submits that the Court should extend *Vahila* in accordance with traditional tort concepts of damages, should join with the other jurisdictions which have considered this issue, and should hold that a legal malpractice plaintiff may not recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries, and that consistent with traditional tort concepts, the burden of proving collectibility rests with the plaintiff.

STATEMENT OF 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 and the law firm of Petersen & Ibold (collectively, “Evans”), asserting claims for professional negligence in connection with Evans’ representation of Paterek with respect to injuries sustained in a May 28, 1997 motor vehicle accident caused by Kristopher Richardson (“Richardson”).

On December 14, 2004, a jury returned a verdict in favor of Paterek in the amount of \$382,000.00, which was subject to a stipulation of the parties that Richardson was uncollectible for any amount excess of \$100,000.00.

Based upon the parties’ stipulation, on February 16, 2005, the trial court remitted the jury verdict to \$100,000.00.

On August 14, 2006, the Court of Appeals of Ohio, Eleventh Appellate District, reversed the judgment of the trial court, holding that Paterek could recover the full verdict from Evans even though she could not have done so from Richardson.

ARGUMENT

Proposition Of Law No. I: In a legal malpractice action, plaintiff cannot recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries.

In *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259 (1997), the Court did not change *what* must be proven to establish legal malpractice, but rather addressed *how* a plaintiff may prove such professional negligence. Therein, the Court rejected the blanket proposition that in every case a legal malpractice plaintiff must prove to a “virtual certainty” that she would have been successful in the underlying action but for the negligence of her attorney. *Id.* at 426, 428. In so ruling, however, the Court reaffirmed the traditional elements of an action for legal malpractice: (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. *Id.* at 427. Thus, the Court did not alter what must be proved, but merely recognized that legal malpractice plaintiffs need not always prove a “case-within-a-case.”

Unfortunately, *Vahila* does not offer sufficient guidance as to the quantum of evidence that a legal malpractice plaintiff must introduce on the merits of her underlying claim in order to warrant recovery from her attorney. Resulting confusion has led to *Vahila* being misapplied, such as in the present matter, to permit recovery in the absence of proven damages. In accordance with traditional tort concepts, the Court should take this opportunity to clarify *Vahila* such that a legal malpractice plaintiff retains the sole and exclusive burden of proving by a

preponderance of the evidence that her underlying claim was meritorious, and that she suffered actual damages as a result of her attorney's negligence.

The issue presently before the Court, which follows from *Vahila*, is whether Paterek can recover damages from Evans that she could not have collected from Richardson. As to this issue, the teachings of the United States Court of Appeals for the Seventh Circuit are instructive:

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 \$424,000.00 judgment against an individual who was unemployed, had no assets, and had only a \$25,000.00 insurance policy. Hypothetical damages above the amount that Klump could generally have collected from Eaves are not a legitimate portion of her "actual injuries;" awarding her those damages would result in a windfall.

Klump v. Duffus, 71 F.3d 1368, 1374 (1996). [*Emphasis* in original; **emphasis** added]. The Seventh Circuit further reasoned:

If Klump could not have collected full judgment from Eaves, then Duffus's negligence did not injure her in that amount; she simply could not lose what she could never have had.

Id. at 1375. [**Emphasis** added]. *Accord Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 32 (Alaska 1998); *DiPalma v. Seldman*, 27 Cal. App. 4th 1499, 1507, 33 Cal. Rptr.2d 219, 223 (Cal. Ct. App. 1994); *Fernandes v. Barrs*, 641 So.2d 1371, 1375-76 (Fla. Dist. Ct. App. 1994); *Szurovy v. Olderman*, 243 Ga. App. 449, 452, 530 S.E.2d 783, 786, FN2 (Ga. Ct. App. 2000); *Clary v. Lite Machines Corp.*, 850 N.E.2d 423, 432 (Ind. Ct. of App. 2006); *Whiteaker v. State*, 382 N.W.2d 112, 115 (Iowa 1986); *Jenkins v. St. Paul Fire & Marine Ins. Co.*, 422 So. 2d 1009, 1110 (La. 1982); *Jourdain v. Dineen*, 527 A.2d 1304, 1306 (Me. 1987); *Jernigan v. Giard*, 398 Mass. 721, 723, 500 N.E.2d 806, 807 (Mass. 1986); *Teodorescu v. Bushnell, Gage, Reizen & Byington*, 201 Mich.App. 260, 267, 506 N.W.2d 275, 278 (Mich. Ct. App. 1993); *Eno v.*

Watkins, 229 Neb. 855, 857, 429 N.W.2d 371, 372 (Neb. 1988); *Carbone v. Tierney*, 151 N.H. 521, 532, 864 A.2d 308, 317 (N.H. 2004); *Albee Assocs. v. Orloff, Lowenbach, Stifelman & Siegel, P.A.*, 317 N.J. Super. 211, 223, 721 A.2d 750, 756 (N.J. Super. Ct. App. Div. 1999); *Lindenman v. Kreitzer*, 7 A.D.3d 30, 33, 775 N.Y.S.2d 4 (N.Y. App. Div. 2004); *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (N.C. 1985); *Ridendour v. Lewis*, 121 Or. App. 416, 419, 854 P.2d 1005, 1006 (Or. Ct. App. 1993); *Kituskie v. Corbman*, 552 Pa. 275, 283, 714 A.2d 1027, 1031 (Pa. 1998); *Haberer v. Rice*, 511 N.W. 2d 279, 285 (S.D. 1994); *Cosgrove v. Grimes*, 774 S.W.2d 662, 666 (Tex. 1989); *Conant v. Ervin*, No. L01-2654, 2003 WL 22382798, at *2 (Va. Cir. Ct. Apr. 21, 2003); *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wash. App. 677, 685, 50 P.3d 306, 310-11 (Wash. Ct. App. 2002); *Payne v. Lee*, 686 F.Supp. 677, 678 (E.D. Tenn. 1998) (applying Tennessee law); *Augustine v. Adams*, No. 95-2489-GTV, 1997 WL 298451, at *4 (D. Kan. May 2, 1997) (applying Kansas law); *Smith v. Haden*, 868 F.Supp. 1, 3 (D.D.C. 1994).

Of the twenty-five (25) jurisdictions that have addressed this issue, every one has held that in a legal malpractice action, plaintiffs cannot recover damages from their attorneys that they could not have collected from the tortfeasors who caused their injuries. American Guarantee respectfully submits that Ohio should join the overwhelming judicial mainstream by holding that in a legal malpractice action, plaintiff cannot recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries.

Proposition Of Law No. II: In a legal malpractice action, plaintiff must prove that the damages she seeks to recover from her attorney could have been collected from the tortfeasor who caused her injuries.

Although every court that has addressed the issue has held collectibility to be a relevant consideration in a legal malpractice action, they have divided as to who bears the burden of proving collectibility, with a majority of courts holding that the burden remains with the plaintiff,

and a minority holding that collectibility is an affirmative defense and therefore the burden of proof lies with the defendant attorney. *Compare Carbone v. Tierney*, 151 N.H. 521, 532, 864 A.2d 308, 318 (N.H. 2004) (citing *Whiteaker v. State*, 382 N.W.2d 112, 115 (Iowa 1986); *Jernigan v. Giard*, 398 Mass. 721, 723, 500 N.E.2d 806, 807 (Mass. 1986); *Rorrer v. Cooke*, 313 N.C. 338, 361, 329 S.E.2d 355, 369 (N.C. 1985); *Haberer v. Rice*, 511 N.W. 2d 279, 285 (S.D. 1994); *DiPalma v. Seldman*, 27 Cal. App. 4th 1499, 1507, 33 Cal. Rptr.2d 219, 223 (Cal. Ct. App. 1994); *Fernandes v. Barrs*, 641 So.2d 1371, 1376 (Fla. Dist. Ct. App. 1994); *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wash. App. 677, 685, 50 P.3d 306, 310-11 (Wash. Ct. App. 2002)); *Smith v. Haden*, 868 F.Supp. 1, 3 (D.D.C. 1994); *Kituskie v. Corbman*, 552 Pa. 275, 285, 714 A.2d 1027, 1032 (Pa. 1998); *Albee Assocs. v. Orloff, Lowenbach, Stifelman & Siegel, P.A.*, 317 N.J. Super. 211, 223, 721 A.2d 750, 756 (N.J. Super. Ct. App. Div. 1999).

As to this issue, the teachings of the United States Court of Appeals for the Seventh Circuit in *Klump* again are instructive, in which the Seventh Circuit held “. . . the burden is more properly placed on the plaintiff to prove the amount she would have actually collected from the original tortfeasor as an element of her malpractice claim. This is the position taken by the majority of courts and is more consistent with a plaintiff’s burden of proof in negligence actions generally.” *Klump v. Duffus*, 71 F.3d 1368, 1374. In so ruling, the Seventh Circuit quoted with approval from *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.

Id. at 1374. [Emphasis added].

American Guarantee respectfully submits that the foregoing rationale is persuasive, and that in accordance with traditional tort concepts of damages, the Court should adopt the majority approach, and hold that the burden of proving collectibility rests with the plaintiff.

CONCLUSION

In accordance with traditional tort concepts, American Guarantee respectfully submits that in a legal malpractice action, plaintiff cannot recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries, and that plaintiff must prove that the damages she seeks to recover from her attorney could have been collected from the original tortfeasor.

Accordingly, *Amicus Curiae* American Guarantee and Liability Insurance Company respectfully requests that the Court reverse the Eleventh District's ruling in *Paterek v. Peterson & Ibold*, No. 2005-6-2624, 2005-Ohio-4179, and reinstate the trial court's remittitur.

Respectfully submitted,



STEVEN G. JANIK, ESQ. (0021934)
JASON D. WINTER, ESQ. (0076191)
DANIEL A. SCHARF, ESQ. (0080836)
JANIK & DORMAN, L.L.P.
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521
440-838-7600 – Phone
440-838-7601 – Fax
steven.janik@janiklaw.com
jason.winter@janiklaw.com
dan.scharf@janiklaw.com

Counsel for *Amicus* American Guarantee and Liability Insurance Company

PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief In Support Of Appellants Petersen & Ibold, *et al.* Of *Amicus Curiae* American Guarantee and Liability Insurance Company, was served via First Class U.S. Mail, this 13th day of March, 2007, upon:

Leon M. Plevin, Esq. (0008631)
Edward O. Fitzgerald, Esq. (0062364)
Plevin & Gallucci Co., L.P.A.
55 Public Square, Suite 2222
Cleveland, Ohio 44113

Paul W. Flowers, Esq. (0046625)
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216

*Counsel for Plaintiff-Appellee, Irene F.
Paterek Executrix*

Timothy D. Johnson, Esq. (0006686)
Gregory E. O'Brien, Esq. (0037073)
Weston Hurd LLP
1301 East 9th Street, Suite 1900
Cleveland, Ohio 44114-1862

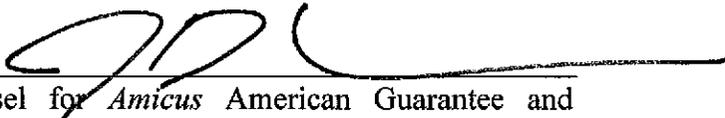
*Counsel for Defendants-Appellants,
Petersen & Ibold and Jonathon Evans*

Nicholas D. Satullo, Esq. (0017364)
Joseph W. Borchelt, Esq. (0075387)
Reminger & Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1093

*Counsel for Amicus Ohio Association of
Civil Trial Attorneys*

Alan M. Petrov, Esq. (0020283)
Timothy J. Fitzgerald, Esq. (0042734)
Monica A. Sansalone, Esq. (0065143)
Gallagher Sharp
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, Ohio 44115-2108

*Counsel for Amicus Minnesota Lawyers
Mutual Insurance Company*


Counsel for *Amicus* American Guarantee and
Liability Insurance Company