

IN THE SUPREME COURT OF OHIO

CASE NO. 06-1811

IRENE F. PATEREK, EXECUTRIX
Plaintiff-Appellee,

-vs-

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

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

MERIT BRIEF OF PLAINTIFF-APPELLEE,
IRENE F. PATEREK, EXECUTRIX

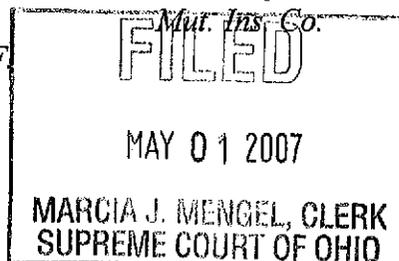
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STATEMENT OF THE CASE

Plaintiff-Appellee, Irene F. Paterek, Individually and as the Executrix of the Estate of Edward F. Paterek, Deceased, commenced this legal malpractice action in the Geauga County Court of Common Pleas on October 2, 2002. *Case No. 02PT000901*. She maintained that Defendant-Appellants Petersen & Ibold (hereinafter the "Firm"), Jonathon P. Evans (hereinafter "Attorney Evans"), and several other lawyers, violated the standard of care imposed on attorneys by dismissing without authority, and neglecting to timely re-file, a personal injury action on behalf of Edward F. Paterek, Deceased (hereinafter the "Decedent"). That action arose from an automobile accident on May 28, 1997 in which the Decedent had been seriously injured. Kristopher Richardson (hereinafter "Richardson") caused the collision.

With leave of court, Plaintiff filed an Amended Complaint on April 7, 2003 in which she identified herself as the representative of the Decedent's Estate. She submitted a Second Amended Complaint on May 5, 2004 which raised a claim for underinsured motorist (UIM) coverage against New Party Defendant, One Beacon Insurance (hereinafter "One Beacon"). It soon became apparent that the UIM claim was unlikely to succeed since Defendants had destroyed the carriers' subrogation rights against Richardson by failing to timely re-file the lawsuit. On November 22, 2004, Plaintiff voluntarily dismissed the carrier from the proceedings, without prejudice. Eventually, Plaintiff also dismissed all the claims against the individual attorneys except Attorney Evans.

The question of whether Defendants could be held liable for the damages they caused beyond Richardson's liability limits of \$100,000.00 was first raised in their Motion for Partial Summary Judgment. In an Entry dated October 21, 2003, Judge Forrest W. Burt ruled that:

Defendants ask this Court to enter Summary Judgment limiting the amount of damages Plaintiffs can obtain to the sum of

\$100,000; said sum being the policy limits of the tortfeasor in the underlying action. Although 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. [emphasis added]

Defendants' Motion for Partial Summary Judgment is overruled.

The legal malpractice claim against the Firm and Attorney Evans proceeded to trial on December 13, 2004. The parties stipulated in writing to their negligence as well as several other matters. *Tr. 23.* The jury was thus advised at the outset of the proceedings that they only needed to consider damages. *Tr. 24.* Consistent with his summary judgment ruling, Judge Burt again rejected Defendants' argument that their damages should be capped at \$100,000.00. *Tr. 349.*

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

On December 30, 2004, Defendants moved for a judgment notwithstanding the verdict under *Civ.R. 50(B)*. Plaintiffs' timely submitted her Memorandum in Opposition on February 1, 2005. In a decision dated February 16, 2005, Judge Burt reversed his two (2) prior rulings and held that the Decedent and Plaintiff were not entitled to collect anything more from Defendants than the \$100,000.00 liability policy limits maintained by the original tortfeasor, Richardson. Since there was never any dispute between the parties that the Decedent had

suffered at least \$100,000.00 in personal injury damages from the automobile accident, the court's abrupt about-face rendered the jury trial a complete waste of time.

Plaintiff filed her timely Notice of Appeal in the Eleventh District on March 8, 2005. In a ruling dated August 11, 2006, the Eleventh District reversed the lower court's judgment and reinstated the jury verdict. *Paterek v. Petersen & Ibold* (Aug. 11, 2006), 11th Dist. No. 2005-G-2624, 2006-Ohio-4179, 2006 W.L. 2337483. The Supreme Court of Ohio granted Defendants' request for further review of this ruling in an Entry dated January 24, 2007.

STATEMENT OF FACTS

The truncated "Statement of the Facts" that has been submitted by Defendants glosses over damaging evidence and is inappropriate for examining the sufficiency of the jury's verdict. *Merit Brief of Appellants, pp. 1-2.* A more complete description of the pertinent events follows.

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

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

The Decedent's neurologist, Donald Mann, M.D. (hereinafter "Dr. Mann"), testified that Decedent had suffered lacerations, a fractured ankle, damaged ribs, and an apparent fracture of one of his low back vertebrae. *Tr. 228.* The Decedent's problems steadily worsened over the next several months. *Tr. 229.* Scans were performed which revealed a spinal cord injury. *Tr. 229.* By 2001 and 2002, the Decedent was experiencing difficulties with walking and speech. *Tr. 229-230.* He also developed a facial nerve problem, progressive supranuclear palsy (PSP). When Decedent could no longer ambulate or care for himself, he was placed in a nursing home. *Tr. 230.*

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

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

After approximately six (6) months in the nursing home, the Decedent passed away on February 2, 2003. *Tr. 230.* In the ensuing autopsy, the pathologist was able to observe the damaged spinal cord. *Tr. 251-252.* In Dr. Mann's opinion, the spinal cord compression that the Decedent had suffered in the accident led directly to his paraplegic state, his confinement in the nursing home, and his ultimate demise. *Tr. 231-235.*

At the time of the accident and trial, the tortfeasor, Richardson, was uncollectible. *Stipulations, paragraph 2.* He was insured, however, under a motor vehicle liability policy with limits of \$100,000.00. *Id., paragraph 1.* Plaintiff and the Decedent had also been covered by an underinsured motorist policy with limits of \$250,000.00. *Id., paragraph 3.* Once the tortfeasor's limits of \$100,000.00 had been exhausted, an additional \$150,000.00 would have

been available to them had Defendants timely filed the claim. *Id.* Because of Defendants' admitted negligence, Plaintiff and the Decedent never received these benefits to which they were plainly entitled. They also suffered years of anxiety, distress, and financial hardship as a result of Defendants' years of procrastination and delays, persistent misrepresentations as to the status of the personal injury claim, and ultimately loss of the compensation that was plainly due to them.

ARGUMENT

PROPOSITION OF LAW:

IN A LEGAL MALPRACTICE ACTION ARISING OUT OF AN ALLEGED FAILURE TO COMPETENTLY PROSECUTE A CIVIL LAWSUIT, RECOVERY FOR THE LOST OPPORTUNITY TO COLLECT IN THE UNDERLYING LITIGATION CANNOT EXCEED THE DAMAGES PLAINTIFF WOULD HAVE COLLECTED HAD THE ATTORNEY DEFENDANT NOT BEEN NEGLIGENT.

A. SUMMARY OF ARGUMENT.

Without openly stating so, the real objective of Defendants and their *Amici* is to convince this Court to promulgate a new form of immunity that only allows attorneys to be sued for the direct economic consequences of their malpractice. A physician, on the other hand, who has violated the standard of care not only has to compensate the patient for the financial harm caused (*i.e.*, medical bills and lost wages), but can also be held liable for pain and suffering, inability to perform usual functions, loss of consortium, and other non-pecuniary damages. Even in the wake of "tort reform," the General Assembly has permitted recovery of non-economic losses against health care providers so long as an arbitrarily imposed "cap" is not exceeded. According to Defendants, non-pecuniary damages are not recoverable at all from attorneys who fail to competently prosecute a civil lawsuit.

Given the facts and circumstances presented in the proceedings below, a reasonable jury certainly could have concluded that Plaintiff and Decedent suffered extreme distress, anxiety, and financial hardship once they learned, notwithstanding Defendants' deception, that the compensation they had been expecting from the tortfeasor and their own underinsured motorist (UIM) carrier had been forever lost by the attorney's incompetence.¹ Nevertheless, Defendants

¹ In both their Memorandum in Support of Jurisdiction and Merit Brief, Defendants have refused to openly discuss Plaintiff's claims for non-economic damages. The jury had been

and their *Amici* would have this Court fashion a rule that would prohibit the victims of legal malpractice from ever recovering anything more than the money that would have been collected had the attorneys abided by the standards owed to the clients. Even though the legislature has never seen fit to afford such generous protections to the legal profession, this Court has been implored to do so in the name of “public policy in Ohio” and to avoid “increased insurance premiums.” *Amicus Brief of Minnesota Lawyers Mutual Insurance Co.*, p. 2.

Even if this Court were to agree that victims of legal malpractice are not entitled to recover damages for the anxiety, distress, and financial hardship suffered as a direct and proximate result of the attorney’s negligence, the trial judge’s conclusion that only \$100,000.00 could have been recovered is plainly untenable. Noticeably absent from the Briefs that have been submitted by Defendants and their *Amici* is any meaningful acknowledgement of the parties’ stipulation that \$150,000.00 in additional UIM coverage would have been available if the personal injury claim had been handled properly. *Stipulations, paragraph 3.*² Although Defendants had argued vehemently, but unsuccessfully, in the appellate court proceedings that the UIM benefits from One Beacon were still somehow available to Plaintiffs, this senseless position now appears to have been abandoned.³ *Court of Appeals Brief of Defendant-*

specifically instructed on this issue. *Tr. 422-423*. The Interrogatory that was returned indicates that the largest component of the award was for the Decedent’s “[p]ast pain and suffering.” *Supplement to the Briefs, p. Supp. 5*. Plaintiff also received \$100,000.00 for her loss of consortium. *Id.* There is nothing in the Interrogatory, or anywhere else in the transcript, that suggests that this compensation had been awarded solely as a result of the car accident and not as a consequence of the attorney’s incompetence.

² A copy of the Stipulations has been included in the Supplement to the Briefs at Supp. 1.

³ Any attempt by Defendants to resurrect this issue in a Reply should be rejected by this Court. Plaintiff had vigorously maintained in the proceedings below that \$250,000.00 (\$100,000.00 from the liability carrier and \$150,000.00 from the UIM insurer) would have been available had the claim been handled appropriately. *Court of Appeals Brief of Plaintiff-Appellant, pp. 8-12; Court of Appeals Reply of Plaintiff-Appellant, pp. 1-2*. Nevertheless,

Appellees, pp. 5-7. There is no dispute that their incompetence has now vested the underinsured motorist carrier, One Beacon, with the ability to deny any claims on the ground that its subrogation rights have been destroyed and Plaintiff is no longer "legally entitled" to recover from the tortfeasor. *Taylor v. Kemper Ins. Co.* (Jan. 16, 2003), 8th Dist. No. 81360, 2003-Ohio-177, 2003 W.L. 132428, pp. *2-3, *aff'd*, 100 Ohio St.3d 342, 2003-Ohio-6516, 800 N.E.2d 1; *Laibson v. CNA Ins. Cos.* (May 14, 1999), 1st Dist. No. C-980736, 1999 W.L. 299899, p. *2. Plaintiff therefore would be entitled to recover at least \$250,000.00 even if Defendants are correct that the jury was precluded from considering an award of non-economic damages.

B. STANDARD OF REVIEW.

In his ruling of February 16, 2005, Judge Burt granted Defendant's Motion for Judgment Notwithstanding the Verdict and reduced the judgment that had been entered from \$382,000.00 to \$100,000.00. It is well-settled that in the American system of justice it is the function of the trier of fact to assess damages. *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 438, 1999-Ohio-119, 715 N.E.2d 546, 533. Indeed, the Ohio Constitution guarantees "the right to have a jury determine all questions of fact, including the amount of damages to which the plaintiff is entitled." *Galayda v. Lake Hosp. Sys., Inc.* (1994), 71 Ohio St.3d 421, 425, 1994-Ohio-64, 644 N.E.2d 298, 301 (citation omitted).

Civ.R. 50(B) permits a party to challenge the legal appropriateness of a jury verdict. *Freeman v. Wilkinson* (1992), 65 Ohio St.3d 307, 309, 603 N.E.2d 993, 995; *Ruse v. Ruddy* (8th Dist. 1972), 30 Ohio App.2d 171, 176, 283 N.E.2d 818, 821. All the evidence presented at trial must be considered. *Clevecon, Inc. v. Northeast Ohio Reg. Sewer Dist.* (8th Dist. 1993), 90

Defendants' Merit Brief is silent on the issue. Litigants should never be allowed to withhold important arguments for reply briefs as a means of denying the opponent an opportunity to respond.

Ohio App.3d 215, 222, 628 N.E.2d 143, 147. When such a Motion for Judgment Notwithstanding the Verdict is filed, the following analysis must be conducted:

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 ***. [citations omitted]

Cardinal v. Family Foot Care Ctrs., Inc. (8th Dist. 1987), 40 Ohio App.3d 181, 183, 532 N.E.2d 162, 164. In other words, the plaintiff's evidence must be assumed to be true and the verdict must not be set aside unless it is contrary to the manifest weight of the evidence. *Miller v. Paulson* (10th Dist. 1994), 97 Ohio App.3d 217, 221, 646 N.E.2d 521, 523. Only issues of law are thus involved. *Whitenight v. Dominique* (3rd Dist. 1995), 102 Ohio App.3d 769, 772, 658 N.E.2d 23, 25; *White v. Center Mfg. Co.* (6th Dist. 1998), 126 Ohio App.3d 715, 723, 711 N.E.2d 281, 286. In this appeal, Judge Burt's ruling should therefore be reviewed *de novo*. *Blust v. Lamar Advertising Co.* (2nd Dist. 2004), 157 Ohio App.3d 787, 801, 2004-Ohio-5405, 813 N.E.2d 902, 912; *Pearn v. DaimlerChrysler Corp.* (9th Dist. 2002), 148 Ohio App.3d 228, 235, 2002-Ohio-3197, 772 N.E.2d 712, 718.

C. COMPENSATION FOR NON-ECONOMIC LOSSES.

1. Appropriateness of Emotional Distress Damages

If accepted by this Court, Defendants' Proposition of Law will preclude any attorney who mishandles a claim from ever being held liable for anything more than the funds they should have collected. Even where, as here, the unscrupulous lawyer conceals his wrongdoing and the clients discover on their own volition that the financial assistance they had been expecting has been forever lost, the emotional harm that has been inflicted will be non-

compensable. Of course, any other tortfeasor who does not hold a license to practice law can be held liable for the full panoply of damages that are recognized under Ohio law. *See, e.g., Morris v. Savoy* (1991), 61 Ohio St.3d 684, 696, 576 N.E.2d 765, 776 (recognizing that a plaintiff in a medical malpractice action is entitled to recovery both economic and non-economic damages). Only a few months ago, this Court recognized in the context of a consumer fraud case that:

In *Fantozzi*, 64 Ohio St.3d at 612, 597 N.E.2d 474, we defined "compensatory damages" in such a way that it includes both economic and noneconomic damages: "Compensatory damage are defined as those which measure the actual loss, and are allowed as amends therefor. For example, compensatory damages may, among other allowable elements, encompass direct pecuniary loss, such as hospital and other medical expenses immediately resulting from the injury, or loss of time or money from the injury, loss due to the permanency of the injuries, disabilities or disfigurement, and physical and mental pain and suffering." Usually awarded for pain and suffering, noneconomic damages can also include compensation for loss of ability to perform usual functions; loss of consortium, mental anguish, or other intangible loss; and humiliation or embarrassment. [emphasis added, footnotes omitted]

Whitaker v. M.T. Auto., Inc., 111 Ohio St.3d 177, 182, 2006-Ohio-5481, 855 N.E.2d 825, 831.

Section 16, Article I of the Ohio Constitution guarantees every aggrieved person the right to a meaningful remedy. *Brenneman v. R.M.I. Co.*, 70 Ohio St.3d 460, 466, 1994-Ohio-322, 639 N.E.2d 425, 430; *Galayda*, 71 Ohio St.3d at 426. "The fundamental rule of the law of damages is that the injured party shall have compensation for all the injuries sustained." *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St.3d 601, 612, 1992-Ohio-138, 597 N.E.2d 474, 482 (citations omitted). In appropriate instances, juries are authorized to provide compensation for mental anguish and emotional suffering. *Housh v. Peth* (1956), 165 Ohio St. 35, 40-41, 133 N.E.2d 340, 344; *Doyle v. Fairfield Machine Co., Inc.* (11th Dist. 1997), 120

Ohio App.3d 192, 220-221, 697 N.E.2d 667, 685-686. Spouses are also entitled to a monetary recovery when they have been wrongfully deprived of the services, support, solace, and consortium of the wife/husband. *Clouston v. Remlinger Oldsmobile Cadillac* (1970), 22 Ohio St.2d 65, 258 N.E.2d 230, paragraph two of the syllabus.

Defendants have boldly proclaimed that: "In a legal malpractice case against a negligent personal injury lawyer, the damage caused by a lawyer's wrongful conduct is not pain, suffering, medical bills, lost wages or lost consortium., it's the lost opportunity to obtain compensation for those wrongs from the original tortfeasor." *Merit Brief of Appellants*, p. 9. Defendants have apparently not been able to find a single case from the history of American or even Anglo-Saxon jurisprudence supporting this emphatic statement, because none have been cited. *Id.* No attempt has been made to identify that feature of the legal profession that justifies the imposition of a complete ban against non-economic damages. *Id.*

In the context of a legal malpractice claim it has thus been held that:

Compensatory damages may be awarded for mental suffering, anguish and humiliation where they are sustained as result of wrongful, intentional and willful conduct. [citation omitted]

David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A. (8th Dist. 1992), 79 Ohio App.3d 786, 801, 607 N.E.2d 1173, 1182. By restricting the damages recoverable from an incompetent lawyer to the money that the victim "would have collected had the attorney defendant not been negligent," the Proposition of Law presently before this Court plainly seeks to confer a special immunity upon lawyers that no other tortfeasors enjoy.

2. Evidence of Emotional Harm

In the case *sub judice*, the jurors could reasonably conclude from the evidence presented that Plaintiff and Decedent had suffered substantial emotional harm and distress as a result of

Attorney Evans' purposeful and deplorable misconduct.⁴ Beginning with the hiring of the Firm in 1997, Attorney Evans continuously led the clients to believe that he was working diligently on the case and a jury trial was just around the corner. *Tr. 143-144.* There was never any dispute that he had voluntarily dismissed the personal injury claim without advising the clients. His deception continued and by the time Plaintiff learned from court personnel of what had happened, the period afforded by the savings statute, *R.C. §2305.19*, had expired. Attorney Evans' actions were thus intentional and deliberate as no proof was ever submitted suggesting that he had simply committed some sort of inadvertent mistake.

It could certainly be reasonably inferred by the jurors that Plaintiff and Decedent placed their trust in Attorney Evans. By all accounts, the retired couple had been living modestly off their fixed incomes and were relying upon their counsel to ensure they were fully compensated for the grave losses they had suffered in the automobile accident. A family friend, Charles Kelly, testified that the Decedent had been angry when he learned that the claim against the tortfeasor had been forever lost. *Tr. 79.* Ample evidence established that his health and mental state steadily declined over the months that followed the accident until he finally passed away in a nursing home. *Tr. 77-78, 87-90, 150-152, 183-184, 194-196, 228-230.* Plaintiff suffered in similar fashion as she struggled to care for her crippled husband while maintaining their home by herself. *Tr. 80-81, 144-150, 183-184.*

⁴ In all likelihood, Defendants will maintain in their Reply for the first time in these proceedings that the evidence presented below of emotional harm from the malpractice was insufficient to merit any relief. Hopefully, it will be apparent to this Court at that point that the Proposition of Law that has been submitted is simply incorrect. Victims of legal malpractice can in appropriate instances recover non-pecuniary damages, just like any other tort claimant. Since this action involves nothing more at this stage than a simple disagreement over whether the evidence in this particular case supports the verdict, no issue of public and great general importance actually exists. *Section 2 (B)(2)(e), Article IV, Ohio Constitution.*

In accordance with long-standing Ohio law, the trial court instructed the jurors that they were entitled to consider emotional distress damages, including “nervousness, grief, anxiety, worry, shock, humiliation and indignity”. *Tr.* 422-423. He was also careful to advise them that they should evaluate the harms caused by both the automobile accident of May 28, 1997 and “the failure of defendants to successfully prosecute the claims against Kristopher L. Richardson.” *Tr.* 420-421.

Drawing upon their collective experiences, the jury was certainly entitled to find that Attorney Evans had caused far more than just “economic harm” when he repeatedly lied to his clients and deprived them of the compensation they were rightfully expecting. A prompt settlement for the available limits of \$250,000.00 would have provided Plaintiff and Decedent with the funds that were desperately needed for medical care, rehabilitation, and daily living assistance. In all likelihood, the Decedent would have been able to spend his final years in his residence instead of a nursing home. The glib manner in which Defendants and their *Amici* have casually tossed around the word “windfall” has been truly callous. Judge Burt plainly erred when he concluded that any award of non-economic damages was contrary to the manifest weight of the evidence.⁵ *Elias v. Gammel* (July 1, 2004), 8th Dist. No. 83365, 2004-

⁵ In an effort to avoid the consequences of their wrongdoing, Defendants assured the Court of Appeals that Plaintiff “failed to argue to the trial court that it should not have reduced the amount of award below \$250,000.00” and “that she was entitled to non-economic damages arising solely from the malpractice”. *Defendants’ Court of Appeals Brief*, p. 5. For good reason, they no longer are asserting this position. As Defendants are well aware, Plaintiff had argued at great length that the entire verdict should be respected and not artificially capped at \$100,000.00. See *Plaintiff’s Brief in Opposition to the Motion for Partial Summary Judgment of October 8, 2003*; *Plaintiff’s Brief in Opposition to Defendants’ Civil Rule 50B Motion for Judgment Notwithstanding the Verdict filed February 1, 2005*. Furthermore, Plaintiff’s counsel had specifically requesting during the trial that he be allowed to present evidence of the substantial anxiety and stress that had been caused by Defendants’ failure to handle the lawsuit competently and expeditiously. *Tr.* 66-70. It is entirely appropriate for an appellate brief to supply “more information and more comprehensive analysis” than was furnished below. *Salve Regina College v. Russell* (1991), 499 U.S. 225, 232, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190.

Ohio-3464, 2004 W.L. 1471038, p. *3; *Smith v. Conrad* (Apr. 26, 2004), 12th Dist. No. CA-2002-09-036, 2004-Ohio-2075, 2004 W.L. 877879, p. *3.

3. The Tortfeasor's Collectability.

In an effort to manufacture a sexy legal issue that will capture this Court's attention, Defendants and their *Amici* have insisted that the Eleventh District stands alone against the otherwise unanimous consensus of authorities that have supposedly embraced their Proposition of Law. *Defendants' Brief*, pp. 10-12. None of these opinions actually hold that, absent a statutory directive to the contrary, the common law precludes lawyers from being held liable for the non-economic consequences of their torts. None of the cases cited even considered whether and to what extent non-economic damages could appropriately be awarded to a plaintiff in a legal malpractice action.

Numerous courts that have actually considered whether non-economic damages may be awarded against a legal malpractice defendant(s) have not hesitated to uphold such damages. For example, in *Boatwright v. Derr* (Colo. 1996), 919 P.2d 221, the court held that a personal representative was entitled to recover damages for noneconomic injuries in her individual capacity in legal malpractice. *See also Salley v. Childs* (Me. 1988), 541 A.2d 1297, 1298 (client permitted to recover noneconomic damages against attorney-defendant in legal malpractice action); *Stanley v. Richmond* (Cal. App. 1995), 35 Cal. App. 4th 1070, 41 Cal. Rptr.2d 768, 784; *Perez v. Kirk & Carrigan* (Tex. Ct. App. 1991), 822 S.W.2d 261, 266-267; *Betts v. Allstate Ins. Co.* (Cal. App. 1984), 154 Cal. App.3d 688, 201 Cal. Rptr. 528; *Wagenmann v. Adams* (1st Cir. 1987), 829 F.2d 196.

The relative brevity of Plaintiff's Brief in Opposition to the Motion for Judgment Notwithstanding the Verdict that had been filed on February 1, 2005 is attributable to the fact that Judge Burt had already denied Defendants' same argument twice previously.

Upon closer examination, the authorities cited by Defendants do not demonstrate a “trend” toward taking the collectability of the “tortfeasor” into account. At best, these cases equate causation with the “collectability” of the ultimate “judgment.” *See, e.g., Krantz v. Tiger* (N.J. Super. 2007), 914 A.2d 854, 860 (“Plaintiff’s burden is to prove by a preponderance of the evidence that but for the malpractice or other misconduct, (1) he would have recovered a judgment in the action against the main defendant, (2) the amount of that judgment, and (3) the degree of collectibility of such judgment.”)(emphasis added). The “collectability” discussion does not somehow jettison established elements of a legal malpractice case. *Krantz*, 914 A.2d at 861 (elements of legal malpractice action are: duty, breach and proximate cause of damages claimed).

Even assuming for the sake of argument that “collectability” is the overriding issue in every legal malpractice claim, the trial court below plainly considered and instructed the jury regarding the potential collectability of the tortfeasor. The parties stipulated, and the jury was advised, that “Richardson did not at the time of the accident, nor does he presently have any personal assets or earning capacity ***”. *Supplement to the Briefs, p. Supp. 1*. Given that he was still a young man, the jurors were certainly free to conclude that he was reasonably certain to be able to contribute financially to the judgment as his career and earnings improved. Plaintiff had never stipulated that he would always be uncollectible.⁶ The Eleventh District thus justifiably concluded that Richardson’s lack of assets at the time of trial was not the “*coup de gras*” that Defendants were claiming. *Paterek*, 2006 W.L. 2337483, pp. *3-5.

⁶ The appellate court’s statements that they agreed “with the trial court that ‘it is clear that Plaintiff could not have received more than \$100,000.00 from [Richardson] and his insurer’” is puzzling. *Paterek*, 2006-Ohio-4179 ¶ 30. The Court had apparently lost sight of the fact that the evidence was supposed to be construed in a manner that supports the jury’s verdict. *Miller*, 97 Ohio App.3d at 221. Since there was no proof in the record that Richardson would never be collectible, both the trial judge and appellate court had plainly strayed too far into the jury’s fact-finding role.

4. The *Vahila* Decision.

The serious problems attendant to the pure “collectability” rule advocated in the Proposition of Law have been previously considered by this Court. Requiring the plaintiffs to prove the “case within a case” is often impossible, because the negligent lawyer’s failure to diligently prosecute the claim invariably precludes them from doing so. Over the years, evidence is lost and the memories of witnesses fade. Here, the individual who was best able to testify about the Decedent’s pain and suffering – the Decedent himself – had passed away before the trial could be held upon the legal malpractice action. For these and many other sound reasons, this Court has never demanded absolute and infallible proof that the defendant lawyer would have collected a full recovery had he abided by the standard of care.

Ohio law only requires that a legal malpractice claimant demonstrate “(1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach.” *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058, syllabus. In *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, this Court forcefully rejected the very rule that is now being advocated by Defendants. The trial judge had granted summary judgment in that legal malpractice action in favor of the defendants on the grounds that the plaintiffs “had failed to establish that, but for the negligence of their attorneys, [they] would have been successful in the underlying actions and proceedings in which the alleged malpractice had occurred.” *Id.*, 77 Ohio St.3d at 424. The majority specifically stated that:

***[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 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.

Id., at 426. They then concluded that:

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. *** However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim. [emphasis added].

Id., at 427-428. There is thus no merit to the notion that Defendants should not have to pay anything more than \$100,000.00 because the “collectability” of the tortfeasor beyond that sum is too “speculative.”

5. Implications of the Jury Interrogatories

In an Interrogatory that was submitted to them, the jurors indicated that \$200,000.00 of their award was attributed to the Decedent’s “[p]ast pain and suffering”. *Supplement to the Briefs, p. Supp. 5*. As this Court has previously observed, the generic phrase “pain and suffering” is typically viewed as including “mental anguish, or other intangible loss; and humiliation or embarrassment.” *Whitaker*, 111 Ohio St.3d at 182 (footnotes omitted). Plaintiff was also awarded \$100,000.00 on the consortium claim, which encompasses the loss of the spouse’s services, support, and companionship. *Clouston*, 22 Ohio St.2d at 68-75.

After acknowledging that the jury had been charged that they could award non-economic damages to Plaintiff that had been directly caused by the legal malpractice, the trial judge concluded from the interrogatories that the jury had made a conscience decision to limit the pain and suffering and loss of consortium awards to only that which had been caused in the automobile accident. *Decision of February 16, 2005, p. 4*. As can be readily observed, the Interrogatory addressed the Decedent’s damages in their entirety and did not distinguish

between those that had been caused by Richardson and those that had been inflicted by Defendants.⁷ *Supplement to the Briefs, p. Supp. 5*. The jury simply had not been asked to apportion the losses between the automobile accident and the legal malpractice. *Id.* The notion that Defendants' incompetence and ensuing cover-up had inflicted no emotional harm whatsoever upon the elderly couple is implausible. Based upon the evidence that had been presented and their collective common sense, the jurors could rationally conclude that the damages Plaintiff and Decedent had sustained included far more than just the loss of insurance proceeds.

Even if there was some ambiguity in the jury's responses to the Interrogatory, the trial judge still should have upheld the verdict. It is a well settled tenet that trial courts should strive to harmonize the responses that jurors have provided to interrogatories with the general verdict. *Altwater v. Claycraft Co.* (10th Dist. 1994), 92 Ohio App.3d 759, 764, 637 N.E.2d 97, 100. The party challenging the award bears the burden of demonstrating that any inconsistency is irreconcilable. *Becker v. BancOhio Natl. Bank* (1985), 17 Ohio St.3d 158, 162-163, 478 N.E.2d 776, 781. Vague responses from the jurors are not sufficient to undo a general verdict. *Otte v. Dayton Power & Light Co.* (1988), 37 Ohio St.3d 33, 41, 523 N.E.2d 835, 842.

⁷ At Defendants' considerable urging, the Eleventh District also appears to have fallen in this trap. *Paterek*, 2006-Ohio-4179 ¶ 45 ("We accept that the jury limited its verdict of \$382,000.00 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 [Attorney] Evans and Petersen & Ibold ***.") Perhaps the majority meant merely that Defendants' argument in this regard was being "accepted" solely to allow the Court to proceed to the more seriously flawed aspect of their assignment of error. While the trial judge did somewhat (and improperly) limit the testimony of Plaintiff's emotional harm (*Tr. 66-70*), substantial evidence was still presented from which reasonable minds could conclude that the attorney's incompetence had a been traumatic, life-altering event for Plaintiff and Decedent. Neither the lower court, nor Defendants, have ever attempted to explain how one can glean from the interrogatories that the jury had decided that the harm caused by the malpractice had been strictly pecuniary.

In the instant case, the general verdict of \$382,000.00 is in harmony with the interrogatory responses. As drafted, the interrogatories did not permit the non-economic damages to be apportioned between the automobile accident claim and the legal malpractice claim. Since liability had been stipulated on both counts and the jurors had been specifically advised that they were only to determine damages (*Tr. 23-24*), the only reasonable assumption is that they entered the figures on the form in the belief that they were addressing pain and suffering as well as loss of consortium *in toto*. The jurors did not affirmatively indicate that they had somehow found that Defendants' purposeful and deplorable misconduct had caused no emotional harm whatsoever. Judge Burt therefore erred, as a matter of law, when he reduced the general verdict of \$382,000.00.

D. IMPLICATIONS OF THE INSURANCE POLICY LIMITS.

1. Potentially Collectible Insurance Available.

Judge Burt's primary concern appeared to be that the jury's collective verdict of \$382,000.00 exceeded the original tortfeasor's liability policy limits of \$100,000.00. *Decision of February 16, 2005, pp. 2-5*. His position was that the \$100,000.00 policy limits was the most Plaintiff and Decedent would have received if Defendants had handled the claim competently. *Id.* While the parties had entered stipulations as to the coverage that would have been available in the personal injury claim, the trial court apparently overlooked paragraph 3, which stated:

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

Stipulations, p. 1. Oddly, the opinion purported to quote the Stipulations but did not mention the paragraph pertaining to the UIM coverage. *Decision of February 16, 2005, p. 2.* A total of \$250,000.00 in insurance coverage was available in connection with the automobile accident, not \$100,000.00. *Stipulations, paragraph 3.*

2. Availability of UIM Coverage from One Beacon.

When Defendants failed to re-file the personal injury action within the time afforded by the statute of limitations and the saving clause, Plaintiffs forever lost their claims against Richardson. *Stipulations, paragraphs 5-6.* Their own motorist insurance carrier, One Beacon, is now in a position to argue that pursuant to the text of R.C. §3937.18(A) (as revised by 1994 S.B. No. 20), no uninsured or underinsured motorist benefits have to be paid since Plaintiff and Decedent are no longer “legally entitled” to recover from the tortfeasor. *Taylor, 2003 W.L. 132428, pp. *2-3, aff’d, 100 Ohio St.3d 342, 2003-Ohio-6516, 800 N.E.2d 1; Laibson, 1999 W.L. 299899, p. *2.* Under this reasoning, Defendants’ negligence thus cost the clients the opportunity to collect both the liability policy limits of \$100,000.00 and additional underinsured motorist benefits of \$150,000.00, for a total of \$250,000.00.

Defendants have not suggested in these proceedings that One Beacon is likely to alter its position as a result of the opinion that was issued in *Posner v. St. Paul Fire & Marine Ins. Co.*, 104 Ohio St.3d 621, 2004-Ohio-7105, 821 N.E.2d 173. In *Posner*, although a wrongful death claim had not been filed within the two-year statute of limitations, the plaintiff was allowed to pursue uninsured motorist benefits solely because the pertinent policies did not require them to commence any litigation against the tortfeasor. *Id., at 177-178.* In the instant case, Defendants did not establish in their Motion that the One Beacon policy contained identical language to the policy considered in *Posner*.

One Beacon will also undoubtedly attempt to reject any UIM claim on the ground that its subrogation rights were prejudiced when Defendants botched the civil action against the original tortfeasor, Richardson. *Panta v. Cincinnati Ins. Co.* (Feb. 20, 2003), 8th Dist. No. 81563, 2003-Ohio-762, 2003 W.L. 361021, p. *5. It is unclear whether the presumption of prejudice recognized in *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217, 781 N.E.2d 927, paragraph two of the syllabus, can be overcome in this instance. Although the parties were in agreement that Richardson was presently uncollectible, *Stipulations, paragraph 2*, One Beacon is not bound by their stipulations. The UIM carrier will undoubtedly claim, moreover, that the company could have enforced its subrogation rights against him once his financial situation improved over the course of his lifetime. Once again, it was strictly Defendants' incompetence that has created the current predicament for Plaintiff.

3. The Equitable Solution.

Allowing Defendants to reduce the award that the jury has imposed against them on the grounds that some UIM coverage might still be available from One Beacon is plainly inequitable and unfair. The venerable doctrine of subrogation will ensure that no double recovery is ever received. Once they have paid the judgment and interest that is owed, Defendants will be subrogated to any rights Plaintiff possesses to pursue the UIM claim. See generally *Maryland Cas. Co. v. Gough* (1946), 146 Ohio St. 305, 65 N.E.2d 858, paragraph two of the syllabus; *American Ins. Co. v. Ohio Bur. of Workers' Comp.* (10th Dist. 1991), 62 Ohio App.3d 921, 924, 577 N.E.2d 756, 758. As the wrongdoers, it should be Defendants' burden to battle with One Beacon over whether UIM coverage is still available notwithstanding the loss of the claim against the tortfeasor.

CONCLUSION

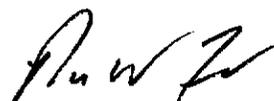
Had Defendants respected and followed the standard of care that were owed to the Decedent and Plaintiff, the personal injury claim would have been settled in short order for the available limits of \$250,000.00. Even after attorney fees and litigation expenses were deducted, the proceeds the couple would have received would have enabled them to live and recuperate relatively comfortably without fear of financial hardship. Defendants' dereliction and year-long cover up deprived the Decedent and Plaintiff of this security and left them instead with a hotly contested legal malpractice action and the stress and uncertainty of a jury trial. Just like every other tortfeasor in Ohio, attorneys should be held liable for the full economic and non-economic consequences of their negligence. This Court should therefore reject the Proposition of Law that is being championed by Defendants and their *Amici* and affirm the decision of the Eleventh District in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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