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STATEMENT OF THE CASE

The Amicus Curiae, the Ohio Academy of Trial Lawyers, adopts the Statement of the Case set forth by Ilene Paterek in the Merit Brief of the Appellees.

STATEMENT OF FACTS

The Amicus Curiae, the Ohio Academy of Trial Lawyers, adopts the Statement of the Facts set forth by Ilene Paterek in the Merit Brief of the Appellees.

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.

I. OVERVIEW OF POSITION OF AMICUS CURIAE, OHIO ACADEMY OF TRIAL LAWYERS

The Appellants argue for a court-imposed limitation or cap on the recoverable damages caused by an attorney's negligence, requesting that the legal malpractice plaintiff's damages be reduced to the amount collectable in the underlying case. In support of the Appellees' position, the Ohio Academy of Trial Lawyers opposes caps on damages in any case, whether it be from Senate Bill 281 (2003 medical malpractice damage caps), Senate Bill 80 (2005 tort reform effort), Senate Bill 117 (2006 lameduck session limits on consumer case damages), or in the context of limiting an attorney's liability for damages caused by her or his negligence.

II. CONSTITUTIONAL AND COURT RULE PROTECTIONS

The trier of fact, usually a jury, assesses damages in the Ohio legal system. *See Wrightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 438. The right to have a jury determine damages is guaranteed by the Seventh Amendment to the United States Constitution and Article I, Section 5 of the Ohio Constitution. Ohio Rule of Civil Procedure 38 provides: "The right to trial by jury shall be preserved to the parties inviolate." The jury or other factfinder shall hear "the trial of all issues so demanded". Ohio R. Civ. P. 39(A) (emphasis added).

In the Ohio Constitution, Article I, Section 16 guarantees every aggrieved person the right to a meaningful remedy. *See, e.g., Brennaman v. R.M.I. Co.* (1994), 70 Ohio St. 3d 460,

466, 1994-Ohio-322; *Galayda v. Lake Hosp. Sys.* (1994), 71 Ohio St. 3d 421, 426. Meaningful remedy includes the opportunity to receive all damages awarded by the jury, without limitations such as caps. See e.g., *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451; *Morris v. Savoy* (1991), 61 Ohio St. 3d 684.

III. COMPENSATORY DAMAGES ARE NOT REDUCED

Damages are to be considered in a broad context and do not include limitations for insurance. According to this Court's recent decision in *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St. 3d 177:

When the word "damages" is used without modification, we have held that the term is broad in scope. " 'Damages,' absent a restrictive modifier like 'compensatory,' 'actual,' 'consequential' or 'punitive,' is an inclusive term embracing the panoply of legally recognized pecuniary relief." *Rice v. CertainTeed Corp.* (1999), 84 Ohio St. 3d 417, 419, 704 N.E.2d 1217. In addition, we have consistently held that "[t]he fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained." *Fantozzi v. Sandusky Cement Prods. Co.* (1992), 64 Ohio St. 3d 601, 612, 597 N.E.2d 474.

Whitaker, at para. 14.

In *Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St. 3d 601, this Court elaborated upon the expanse of damages available to a plaintiff in a negligence action:

The fundamental rule of the law of damages is that the injured party shall have compensation for all of the injuries sustained. *Allison v. McCune* (1846), 15 Ohio 726; *Loeser v. Humphrey* (1884), 41 Ohio St. 379; *Brady v. Stafford* (1926), 115 Ohio St. 67, 79, 152 N.E. 188, 192; *Pryor v. Webber* (1970), 23 Ohio St. 2d 104, 52 O.O.2d 395, 263 N.E.2d 235, paragraph one of the syllabus. Compensatory damages are intended to make whole the plaintiff for the wrong done to him or her by the defendant. *Id.*; *Lake Shore & Michigan S. Ry. Co. v. Hutchins* (1881), 37 Ohio St. 282, 294. Compensatory damages 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. See 4 Restatement of the Law 2d, Torts

(1965), Section 903 *et seq.* These among other elements of damages are well known in Ohio jurisprudence and are allowable elements to be assessed by the jury. Some of these elements of damages, such as the costs and expenses of the injury and loss of time from employment, entail only the rudimentary process of accounting to calculate. Other elements such as pain and suffering are more difficult to evaluate in a monetary sense. The assessment of such damage is, however, a matter solely for the determination of the trier of fact because there is no standard by which such pain and suffering may be measured. In this regard, this court has recognized that "no substitute for simple human evaluation has been authoritatively suggested." *Flory v. New York Central RR Co.* (1959), 170 Ohio St. 185, 190, 10 O.O.2d 126, 128, 163 N.E.2d 902, 905.

Id. at 612.

IV. COMPENSATORY DAMAGES IN LEGAL MALPRACTICE CASES

A. Legal Malpractice Case Requirements

In a legal malpractice case, a plaintiff must prove: need only 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, syllabus para.

1.

In *Vahila v. Hall*, 77 Ohio St.3d 421, this Court addressed a similar issue to that one before it now.

...[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 427-28.

In the legal malpractice case, damages include economic and noneconomic damages. In particular, “[c]ompensatory damages may be awarded for mental suffering, anguish and humiliation where they are sustained as result of wrongful, intentional and willful conduct.” *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (8th Dist. 1992), 79 Ohio App.3d 786, 801 (citation omitted).

B. Practical considerations from the Underlying Case

In considering the underlying case and the damages that would have been awarded, had the attorney’s negligence not occurred, we note that the factfinder is not limited to issues of insurance. For example, in the automobile collision case where the tortfeasor has only \$12,500 in coverage, Ohio Rule of Evidence 411 prohibits the introduction of limits of coverage into the case. Further, even in the cases of uninsured or underinsured motorists insurance claims, the Ohio courts often to not allow the plaintiffs to introduce the limits of their own insurance coverage!

Further, courts require the jury to address the entirety of damages, regardless of whether subrogation or other interests have paid some or all of the expenses, applying the collateral source rule. See *Pryor v. Webber* (1970), 23 Ohio St. 2d 104. In *Sorrell v. Thevenir*, this Court struck down a requirement that the jury’s award be reduced by the collateral benefits received by the plaintiff, thereby requiring that the jury award all the damages, without reduction. *Sorrell v. Thevenir* (1994), 69 Ohio St. 3d 45, syllabus. This means that the jury determines the full amount of the damages proximately caused by the negligent conduct of the tortfeasor or other wrongdoer, without respect to other payments or limitations.

C. Public Policy Concerns

Should a negligent attorney's liability exposure be limited to the amount of money that she or he could recover from the tortfeasor in the underlying case? No. In addition to the above reasons, public policy should prohibit attorneys from being treated differently than other professionals or other tortfeasors. The public already perceives that attorney-litigants have an advantage in the legal system, by being a part of the everyday workings of the courts. Giving a special reduction in legal malpractice case damages would further that improper perception.

Further, limiting damages to insurance proceeds available or other collectable amounts from tortfeasors does not encourage attorneys to promote accountability for actions. Attorneys often advocate for adequate insurance coverage, taking full responsibility for the actions of wrongdoers, and other promotion of the public good. This Court should encourage attorneys that they should lead by example.

Finally, in the trial court, the judge opined that the \$100,000.00 policy limits was the most the Plaintiff and Decedent would have received if attorneys were not negligent. Decision (Feb. 16, 2005), at 2-5. When the negligent attorneys failed to re-file the personal injury action within the time provided by the statute of limitations and Savings Clause, these Plaintiffs-Appellees forever lost their claims against the tortfeasor. *Stipulations*, at para. 5-6. Attorneys hold people's lives and futures in their hands when they handle cases, the consequences of attorney negligence cost them dearly in relitigating their underlying case. Therefore, in order to get back to the place where they were with the negligent attorney, the Plaintiffs will spend far more money to recover the original case damages. If the case damages are reduced—as the Appellants suggest—some plaintiffs will never be able to pursue a recovery.

CONCLUSION

For the reasons set forth above, this Court should not limit attorney's liability for full economic and non-economic damages, caused by the attorney's negligence. Attorneys should not be treated differently than any other class of tortfeasors. The Ohio Academy of Trial Lawyers urges this Court to reject the Appellants' Proposition of Law.

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CERTIFICATE OF SERVICE

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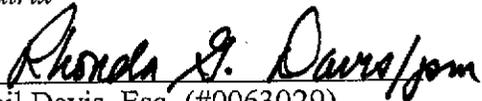
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