

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

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

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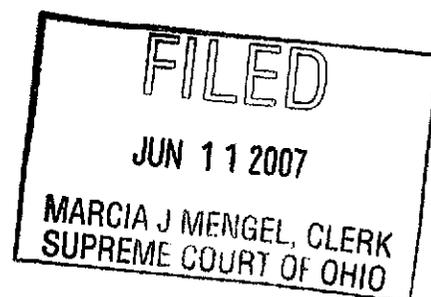


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ARGUMENT IN RESPONSE TO APPELLEES' PROPOSITION OF LAW

The Plaintiff's Measure of Damages In a Legal Malpractice Case Is the Value of the Claim Lost Where the Injury Suffered Is a Lost Cause of Action at the Hands of the Allegedly Negligent Attorney, and Damages for Emotional Injuries Are Not Recoverable in Legal Negligence Actions

In this legal malpractice action, it was stipulated by the parties that: (1) the Plaintiff was injured in a motor vehicle accident; (2) the Defendant failed to file the Plaintiffs' action within the statute of limitations; and (3) the underlying tortfeasor would not have been collectible in excess of his \$100,000 insurance policy limits. (See Appellant's Brief at Statement of the Case for specific cites to the record). Now, in an effort to avoid the axiomatic rule of law that the Plaintiff's damages are limited to the amount of a collectible judgment, the Appellees have argued in their Merit Brief that the jury's award in excess of the collectible judgment was *actually* an award for "emotional distress damages", "mental anguish and emotional suffering," and "emotional harm and distress" caused by the Appellant's handling of the case; separate and distinct from the actual economic loss caused by the loss of their personal injury cause of action. As the Amicus Curiae Ohio Association of Civil Trial Attorneys will demonstrate herein, the Appellees' novel assertion lacks merit.

Despite the fact, admitted by the Appellees, that no evidence of serious emotional distress was presented at trial (see Appellees' Brief, at p. 14; FN 5), and the fact that the Eleventh District acknowledged that the jury's verdict was based on the Appellees' personal injury damages (see Appellees' Brief, at p. 19; FN 7)¹, the Appellees attempt to assert in their Merit Brief that collectibility is a non-issue because the jury's award was actually for non-economic serious emotional distress and mental anguish damages. However, as manifested by the record and acknowledged by the Appellees, the evidence presented at trial established that the

¹ The Eleventh District specifically stated: "We accept that the jury limited its verdict of \$382,000 to the personal injuries suffered by the Patereks..." *Paterek v. Petersen*, 11th Dist. No. 2005-G-2624, 2006-Ohio-4197, at ¶45.

Appellees' damages resulted from economic harm due to their lost personal injury cause of action against the underlying tortfeasor; not the Appellant's intentional infliction of serious emotional distress.

Appellees' assertion that they can be compensated for non-economic harm, in the form of serious emotional distress damages, is mistaken. Most jurisdictions which have considered this issue "have generally held that damages for emotional injuries are not recoverable in legal negligence actions." *Magnuson v. Velikanje, Moore & Shore, Inc.* (Wash.App.1997), 85 Wash.App. 1050; see also *Wolkstein v. Morgenstern* (N.Y.App.2000), 713 N.Y.S.2d 171, 173, 275 A.2d 635, 637 ("A cause of action for legal malpractice does not afford recovery for any item of damages other than pecuniary loss so there can be no recovery for emotional or psychological injury."). Acknowledging that the object of compensatory damages is to make the injured client whole, courts have held that where, as here, the injury suffered is a loss of a cause of action, the measure of damages is generally the value of the claim lost. *Campagnola v. Mulholland, Minion & Roe* (N.Y.App.1990), 76 N.Y.2d 38, 42; see also *Vaughn v. Customer Home Mortgage Company, Inc.* (E.D.N.Y.2007), 470 F.Supp. 248, 270; *Tyborowski v. Cuddeback & Onofry* (N.Y.App.2001), 718 N.Y.S.2d 489, 491, 279 A.D.2d 763, 764.

The rationale for declining to permit emotional distress damages in legal malpractice actions was discussed in *Sanders v. Rosen* (N.Y.1993), 605 N.Y.S.2d 805, 159 Misc.2d 563. In *Sanders*, the court declined to expand the scope of the plaintiff's damages beyond the actual pecuniary loss suffered, stating:

* * * mental anguish and psychological suffering caused by defendant's actions [are] not recoverable in the guise of a malpractice claim. In a legal malpractice action, where the injury suffered is a loss of a cause of action, the measure of damages is generally the value of the claim lost.

* * *

Understandably, everyone who engages an attorney and is disappointed in the result experiences some degree of concern, distress, and frustration. Like grief, there is no way that the distress arising from a lost case or a mishandled matter can be measured or compensated for.

Id. at 572; see also *Segall v. Berkson* (Ill.App.1985), 139 Ill.App.3d 325, 331, 487 N.E.2d 752, 756 (portions of complaint alleging serious emotional distress stricken in domestic relations case where alleged emotional distress was caused solely by the performance of negligent legal work).

The Appellees have failed to cite a single case standing for the proposition that they may recover for non-economic serious emotional distress damages where the underlying tortfeasor is uncollectible. No such cases exist. However, the case of *McKenna v. Forsyth & Forsyth* (NY 2001), 280 A.D.2d 79, 720 N.Y.S.2d 645, discussed the amount of damages recoverable in a case nearly identical to the case at bar where the tortfeasor is uncollectible in excess of his insurance policy limits. In *McKenna*, as in the case at bar, the tortfeasor was uncollectible in excess of his \$50,000 limits of insurance coverage. *Id.* at 81. The defendant law firm failed to file the plaintiff's personal injury action within the applicable statute of limitations. *Id.* After the jury returned a personal injury verdict from the auto accident in the amount of \$535,251.41, the trial court reduced the judgment to the amount the plaintiff would have been able to collect from the tortfeasor; i.e. his \$50,000 policy limits. *Id.*

On appeal, the court found that the trial court properly determined that plaintiffs' damages in the legal malpractice action are limited to the amount that would have been collectible from the tortfeasor in the underlying litigation. *Id.* at 82. In discussing the amount of compensatory damages due to the plaintiff as a result of the defendant's negligence, the court held:

When the attorney's actions result directly in the loss of a cause of action, the measure of damages is generally the value of the claim lost. * * * We hold that,

when a cause of action is lost as the result of the attorney's negligence, the client's injury is measured by the amount that would have been collected on the lost cause of action. We further hold that the client bears the burden of proving that amount. (citations omitted).

Id. at 80. The court determined that limiting the plaintiff's damages in a legal malpractice action to the amount of a collectible judgment is consistent with the purpose of compensatory damages which is to make the injured client whole. *Id.* at 82.

The Appellants recognize that there are limited exceptions, not present in the case at bar, wherein serious emotional distress damages have been permitted in legal malpractice cases under the most egregious circumstances. Although generally damages for emotional distress are not recoverable in legal malpractice actions, particularly when the client's direct damages are economic or pecuniary, the exception to the general rule has permitted serious emotional distress damages where the malpractice results in direct damages to a personal interest such as the loss of liberty or damages to family relationships. See e.g., *Reed v. Mitchell & Timbanard* (Ariz.App.1995), 183 Ariz. 313, 318-319, 903 P.2d 621, 626-627. However, mere negligence will not support recovery for mental distress where, as in this case, the client's injury is based on an economic injury resulting from the loss of a personal injury cause of action. *Id.* at 319 (citations omitted); see also *Guatam v. DeLuca* (N.J.App.1987), 215 N.J.Super. 388, 399-400, 521 A.2d 1343, 1349.

In contrast to medical malpractice cases, in legal malpractice cases, generally the only foreseeable impact on the plaintiff from an attorney's failure to appropriately prosecute the client's personal injury action is economic loss. *Wehringer v. Powers & Hall* (D.Mass.1995), 874 F.Supp. 425, 429. As such, "The primary interest protected in legal malpractice actions is economic and serious emotional distress is not an inevitable consequence of the loss of money." *Id.* (citations omitted). In light of these fundamental principles, "courts have limited recovery for

emotional damages in legal malpractice to cases that involve more than the ‘garden variety’ claim of legal malpractice. *Id.*; see also *Heath v. Herron* (Tex.App.1987), 732 S.W.2d 748, 753.

This is precisely why, for example, in the case cited by the Appellee, *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1992), 79 Ohio App.3d 786, 607 N.E.2d 1173, the court noted that serious emotional distress may be recovered in the most egregious legal malpractice scenarios. In *David*, the plaintiff alleged that she provided secret information to the defendant-attorney (a specialist in domestic relations law) which she requested to be held in confidence during a consultation in February of 1982. *Id.* at 791. The plaintiff and her attorney discussed the intimate details of her marriage, her husband’s affairs, his business dealings, his transmission of venereal diseases, and his threatening her with weapons. *Id.* at 792. The defendant-attorney then acted as co-counsel for the plaintiff’s husband in their later-filed divorce action. *Id.* at 790. The plaintiff alleged that the defendant-attorney had revealed to the husband the confidential matters which they had previously discussed in February of 1982, thereby causing her to sustain serious emotional distress. *Id.*

In light of the egregious invasion of the plaintiff’s personal privacy and breach of his client’s secrets gained in the professional relationship which the plaintiff requested to remain confidential, the court held that it was error to grant summary judgment on the plaintiff’s claim for serious emotional distress damages. *Id.* at 801. However, the court determined that this error did not prejudice the plaintiff because she offered evidence at trial regarding the psychological counseling she received as a result of the defendant-attorney’s conduct. *Id.*

The instant case does not involve the invasion of a personal privacy right, disclosing confidential client secrets, the loss of liberty, a sexual assault by an attorney, or anything other than allegations of negligent conduct on the part of the Appellants. The Appellants in this case

failed to file the Appellees' personal injury action within the applicable statute of limitations thereby resulting in economic damages to the Appellees in the form of a lost cause of action. In these situations, as in the cases cited above, "damages for emotional injuries are not recoverable in legal negligence actions." *Magnuson*, supra, at *2. In the case at bar, where the injury suffered by the Appellees is the loss of their personal injury cause of action, the measure of damages is the value of the claim lost.

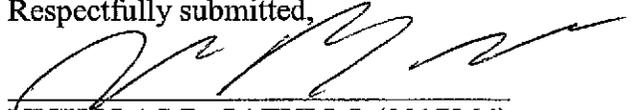
The Appellees generally do not dispute that nearly every jurisdiction examining the issue of collectibility has held that a plaintiff in a legal malpractice action is limited to recovery of the amount of the underlying judgment which would have been collectible from the tortfeasor. Instead of disputing the validity of the "collectibility" theory espoused in several of the Appellants' briefs, the Appellees instead have concocted a theory that their damages did not really stem from the loss of their personal injury action; but rather their serious emotional distress as a result of the Appellants' negligence. However, as noted above, recovery for serious emotional distress is inappropriate in the "garden variety" professional negligence case such as when an attorney fails to file a personal injury action within the applicable statute of limitations.

CONCLUSION

The Appellees' attempt to distract this Court from the true issue in this case, i.e. whether a malpractice plaintiff may collect in excess of the amount of a collectible judgment, should be disregarded. The Appellants failed to file the Appellees' personal injury action in time thereby resulting in the loss of their cause of action. In such cases, the compensable damages recoverable by the Appellees should be limited to the amount they could have collected from the underlying tortfeasor. Any different result would give the Appellees a windfall opportunity to fare better as a result of the Appellants' negligence than they would have if the Appellants had exercised

reasonable care. Wherefore, the Amicus Curiae Ohio Association of Civil Trial Attorneys respectfully requests that this court reverse the Eleventh Appellate District and reinstate the trial judge's order reducing the Appellees' damages to the amount they could have recovered from the underlying tortfeasor.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing *Reply Brief of Amicus Curiae Ohio Association of Civil Trial Attorneys* was sent by ordinary U.S. mail to the following this 8th day of June 2007, to the following:

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