IN THE OHIO SUPREME COURT

CASE NO. 2006-1811

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

Plaintiff-Appellee,

v.

PETERSEN & IBOLD, et al.,

Defendants-Appellants.

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

REPLY BRIEF OF APPELLANTS PETERSEN & IBOLD AND JONATHON EVANS

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ARGUMENT IN REPLY TO APPELLEE'S RESPONES TO PROPOSITION OF LAW

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. Rather than Respond to/Rebut Appellants' Legal Arguments, Appellee Seeks to Distract the Court by Addressing Issues Beyond the Scope of the Proposition of Law Before the Court.

On January 26, 2007, this Court elected to exercise its discretionary jurisdiction to hear an appeal in this case from the Eleventh District Court of Appeals. This Court directed the parties to brief the Proposition of Law identified in Appellant's memorandum in support of jurisdiction in accordance with the Supreme Court Rules of Practice.

Appellant's merit brief demonstrated that the question, "is the tortfeasor's collectibility a proper element of the measure of damages in a legal malpractice claim arising out of the failure to competently prosecute a civil suit?" is an issue of first impression in this state. Appellants' merit brief, and the briefs of its *amici*, further demonstrated that existing Ohio case law, public policy, and the clear trend among other jurisdictions that have addressed the issue all support resolving that question in the affirmative, adopting the proposition of law, and reversing the Court of Appeals judgment and reinstating that of the Common Pleas Court.

Appellee, and her amicus, have responded with merit briefs that fail to address the issue that this Court requested the parties to analyze. Instead, Appellee sets up and attacks a series of "straw man" arguments that aren't properly before the Court at all. First, Plaintiffs attempt to substitute the question of "whether a malpractice plaintiff can recover emotional distress damages" for the issue that this Court accepted for review: "whether a plaintiff can recover from the negligent attorney more than what she could have reasonably expected to collect from the

original tortfeasor." Next, Plaintiffs seek to resurrect their UM/UIM claim against One Beacon Insurance, a claim that they voluntarily abandoned before trial. The so-called "UM/UIM issue" is a complete "red herring," having no bearing whatsoever on the proposition of law before this Court.

Nevertheless, Appellants respond to the issues raised in Appellee's merit brief by incorporating the argument and citations to authority set forth in the Reply Briefs filed by its *amici*, and as follows:

B. Whether a Plaintiff in a Legal Malpractice Case Can Recover "Emotional Distress" Damages is Not Before this Court on this Appeal

Rather than address the issue of whether a negligent attorney's collectibility is an appropriate element of a legal malpractice claim, Paterek has chosen instead to devote the bulk of her merit brief to the task of arguing a different issue---whether a plaintiff can recover "emotional distress" damages allegedly caused by an attorney's failure to properly pursue a claim on the plaintiff's behalf. This issue has no place in the Court's determination of this appeal and should be disregarded accordingly for several reasons.

First, the issue that Paterek now wants to substitute for the one this Court accepted for review was never presented or determined in either of the Courts below. "It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal."[1] In their pleadings, the only "damage" Plaintiffs alleged to have suffered was the loss of their right to pursue the tortfeasor for compensation due them from the auto accident. At paragraph 10 of their original complaint, the Patereks asserted:

[1] *Gentile v. Ristas*, 160 Ohio App.3d 765, 2005-Ohio-2197, at ¶ 74

> As a direct and proximate result of the negligence of the defendants, individually and/or by and through their partners, agents and/or employees, the plaintiffs, Edward F. Paterek and Irene F. Paterek, were caused to lose their right to pursue their personal injury and loss of services claim and to present the same to a Court and jury for which they have been grievously damaged and suffered losses thereof.[2]

Likewise, at paragraph 11 of both the first and second amended complaints, Plaintiffs repeatedly characterized the losses for which they sought compensation as a loss of "their right to pursue their personal injury and loss of services claim."[3] In none of their various amended pleadings did Plaintiffs/Appellees ever articulate a claim for negligent or intentional emotional distress proximately resulting from the attorney defendants' handling of the case; nor did they even suggest that they suffered such damages under a more generalized negligence theory. In fact, the case proceeded from commencement to trial solely on the theory that the Plaintiffs/Appellees' damages were the lost opportunity to pursue the tortfeasor for the injuries they suffered as a result of his negligent operation of the automobile.

It wasn't until the middle of the trial that Plaintiffs/Appellees---for the first time---hinted that they intended to present testimony of, and/or request damages for, alleged "stress" and other non-pecuniary elements of damages purportedly arising from Evans' mishandling of the lawsuit. Before permitting the Plaintiffs to call Mrs. Paterek as a witness, the Trial Court dismissed the jury and conducted a lengthy side bar conference on the issue of whether the Plaintiffs should be permitted to offer such evidence.[4] First, the Court required Plaintiffs' counsel to articulate this new theory of damages for the record:

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[2] Supplement p. 33.

[3] See, Supplement p. 17, 26.

[4] Tr. Vol. I, pp. 97-120

> THE COURT: Plaintiffs' counsel, the Court has already indicated the unwillingness of the Court to hear testimony and evidence... regarding stress. And that's what I heard was stress. I want to give you the opportunity to elaborate on that, if you will, in terms of what evidence do you think you're entitled to present.
>
> MR. PLEVIN: If it please the Court, your Honor, the plaintiff should have the opportunity to be able to discuss ... the fact that there was a malpractice claim against the defendant in this case about the stress and anxiety that incurred as a result ..., and how it affected their well-being.
>
> * * *
>
> THE COURT: Would you be more specific in terms of what specific elements of damages beyond what could have been recovered from Mr. Richardson do you believe you're entitled to prove.
>
> MR. PLEVIN: I think we're allowed to prove, your Honor, that ... as a result of the activities engendered by the defendant, four and-a-half years passed by when the plaintiffs were under the impression that this case was going forward and there was going to be a trial when in fact the case had been dismissed and refiled erroneously.
>
> And therefore, we have a right ... to show specifically how they have been aggrieved, hurt, harmed, how there's been a delay in the receipt of the money, the stress they went under by having to use up their savings and things of that sort and the activities that occurred to them by reason of this negligence of the defendant which they admitted to.[5]

The Trial Court indicated its reluctance to allow such testimony, initially, because Plaintiffs could offer no legal authority to support their claim that such damages were recoverable in a legal malpractice claim brought under Ohio law:

> THE COURT: ...Now, the issue I'm asking you to address is do you have any cites that you can point me to that say in a legal

[5] Tr. Vol. I, pp. 97-101.

> malpractice case the plaintiff is entitled to damages for emotional distress and/or emotional upset or emotional stress or just stress?[6]

The only citation counsel was able to offer was to *Cunningham v. Hildebrand,*[7] the Eighth District Court of Appeals opinion (referenced in Appellants' merit brief to this Court), in which the court affirmed J.N.O.V. for an admittedly negligent lawyer. The Court then went on to confirm that Plaintiffs had no medical testimony to support a claim for pain, suffering, or emotional harm:

> THE COURT: - ...But in terms of compensatory damages being addressed for stress without any medical testimony ..., we don't have any evidence of that nature do we?
>
> * * *
>
> MR. PLEVIN: No. No. That reaction would have to come from the plaintiff herself who I don't think needs any medical testimony to testify as to the anguish that she was how hurt she was, and the emotional distress that she had which is incident to the malpractice of lawyer himself and his firm.[8]

When the Court called upon defense counsel, he stressed the surprise and unfairness of potentially permitting the Plaintiffs to raise new issues, and introduce new elements of damage for the first time during the trial itself:

> MR. JOHNSON: I would really strongly object to this. It was my understanding coming into this trial - - ... the issues that we were going to come here and try, were the issues of the damages that flowed as a result of the automobile accident from May 28th 1997.
>
> And if we are going to ... hear evidence on these issues, I would have to ask for a continuance. I did not come prepared with testimony to rebut these type of allegations. And I think they're

[6] Tr. Vol. I, pp. 101, 102.

[7] (2001), 142 Ohio App.3d 218, 755 N.E.2d 384

[8] Tr. Vol. I, pp. 116, 117.

> being offered merely to try and - -merely to try and prejudice or introduce some bias into the jury process.
>
> No one has pushed this issue or brought this issue up really before this point in time. We were going to try the damage portion of the automobile accident case. And that's what I understand it is that we're here to do. And that's where all of the stipulations that were entered into were going.[9]

Not surprisingly, at the conclusion of the sidebar conference, the Trial Court unequivocally ruled that the Plaintiffs would not be permitted to offer testimony or argue to the jury pertaining to their newly claimed emotional and other non-pecuniary damages allegedly arising out of the legal malpractice, as opposed to the car accident.

> THE COURT: Was there more?
>
> MR. FITZGERALD: The question though, your Honor, is whether or not then in closing argument we're allowed to argue it to the jury as a separate category for damages.
>
> THE COURT: As this case has been presented to the Court and argued and pled, the Court will not permit testimony in regards to the plaintiff's emotional distress or stress as a result of the conduct of either Petersen & Ibold or of Jonathon Evans.

Most importantly of all, the Plaintiffs clearly had the opportunity to appeal this ruling to the 11th District Court of Appeals when they appealed the entry of judgment N.O.V. and the order denying their claim for prejudgment interest. Because they did not exercise their right to appeal the ruling barring any testimony or argument to the jury on the admissibility of Plaintiffs' alleged emotional distress damages, the issue is waived and cannot be appealed for the first time in this Court. Accordingly, it is ludicrous for Plaintiffs to suggest on appeal to this Court that it should now debate the issue of whether the "victims of legal malpractice are entitled to recover

[9] Tr. Vol. I, pp. 117-119.

damages for the anxiety, distress, and financial hardship suffered as a result of the attorney's negligence."

Moreover, as it turned out, Plaintiffs had no real evidence of serious emotional distress in any event. The Trial Court permitted Plaintiffs to proffer for the record testimony of the emotional distress they would have offered had the Court ruled that it was admissible. Plaintiffs called Mrs. Paterek, who testified as follows:

> Q. Did you continue to have conversations with [Mr. Paterek, while he was in a nursing home] about this situation regarding the fact that your case had been dismissed?
>
> A. We didn't discuss it every day or, you know, keep it up because he was ill. I wasn't going to give him more burden than he had.
>
> Q. Was he still able to - - was he still able to understand what was going on?
>
> A. He understood everything.
>
> Q. Did you hear Mr. Kelly's testimony about how Mr. Paterek was somebody who was rarely angry? Do you remember Mr. Kelly testifying to that effect?
>
> A. Ed never got mad. I can't say never but, I mean, he never lost his temper.
>
> Q. How about regarding this situation?
>
> A. As far as the accident?
>
> Q. No, as far as the case being dismissed?
>
> A. He was upset about it.
>
> Q. And was he upset right after he found out and then he stopped being upset or did he continue to be upset until the day he died?
>
> A. He probably kept it to himself that he was upset.

> Q. And how about you? How has this - - it bothered you, right?
>
> A. Definitely.
>
> Q. And how about since that time?
>
> A. It still eats me how it could happen. I thought this could have been settled way in the beginning.[10]

Even if the trial Court had permitted Plaintiffs to offer this testimony of the "stress" they alleged as a result of the Defendants' legal malpractice, it would have been clear error to do so. This Court has previously held that, traditionally, Ohio law requires "contemporaneous physical injury" in order for a plaintiff to recover for emotional distress.[11] While it is true that in *Schultz v. Barberton Glass Company*[12], and *Paugh v. Hanks*[13] this Court expanded the availability of such damages to a bystander who witnesses an accident, in *Gearing v. Nationwide Ins. Co.,*[14] it limited recovery for claims alleging negligent infliction of emotional distress only to the "witness/bystander" situation or situations where the plaintiff was in fear of physical consequences to him/herself.[15]

Moreover, even in cases where emotional distress damages are recoverable in the absence of a contemporaneous physical injury," the plaintiff must prove that the emotional injury is both "serious" and "reasonably foreseeable." This Court has defined "serious emotional distress" as

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[10] Tr. Vol. I, pp. 215-216.

[11] *Heiner v. Moretuzzo,*73 Ohio St.3d 80, 1995-Ohio65, 652 N.E.2d 664

[12] (1983), 4 Ohio St.3d 131, 447 N.E.2d 109

[13] (1983), 6 Ohio St.3d 72, 451 N.E.2d 759

[14] (1996),76 Ohio St.3d 34, 665 N.E.2d 1115

[15] Id.

stress that is "so severe and debilitating, a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." This Court has likewise set forth three factors to be considered in determining whether a negligently inflicted emotional injury is "reasonably foreseeable": (1) whether the plaintiff was located near the scene of the accident, rather than some distance away; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) the degree of relationship between the plaintiff and victim.[16]

In this case, neither Mr. nor Mrs. Paterek suffered "contemporaneous physical injury" as a consequence of the Defendants' legal malpractice. Nor did either of them qualify as "witness/bystanders" to another's injury or fear for their own safety. And even if they had, they were unable to proffer testimony demonstrating that their emotional injuries were either "serious" or "reasonably foreseeable." Even those cases permitting recovery of emotional distress damages in situations where the injury to the plaintiff was the result of "malice" or "willful misconduct" are inapplicable here.[17] The parties stipulated that the liability of Evans and Petersen & Ibold resulted because "a filing deadline was missed by Mr. Evans that prevented the Plaintiffs from pursuing Mr. Richardson," and because "Petersen & Ibold was responsible for

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[16] *Paugh v. Hanks,* supra

[17] See, e.g., *Whitaker v. M.T. Automotive, Inc.* (2006), 111 Ohio St.3d 177, 2006 -Ohio- 5481, (damages for mental anguish or emotional distress available as part of CSPA remedy to the extent evidence shows intentional or malicious actions on the part of defendant); *Columbus Fin., Inc. v. Howard* (1975), 42 Ohio St.2d 178, 71 O.O.2d 174, 327 N.E.2d 654 (damages for mental suffering, anguish, and humiliation available if the wrongdoer acted with malice in wrongful execution of judgment); *Housh v. Peth* (1956), 165 Ohio St. 35, 59 O.O. 60, 133 N.E.2d 340 (damages for mental anguish recoverable in an action for invasion of privacy); *Brownlee v. Pratt* (1946), 77 Ohio App. 533, 33 O.O. 356, 68 N.E.2d 798 (compensatory damages for mental suffering and anguish available for the willful and intentional invasion of the right of burial).

[Evans'] actions under *respondeat superior*."[18] There was no evidence or instructions submitted to the jury that would have permitted the trier of fact to conclude that the Patereks' injuries were the result of "malice" or "willful misconduct" on the part of Evans or Petersen & Ibold.

There was no basis for the Trial court to conclude that any portion of the verdict was awarded to compensate the Plaintiffs for pain and suffering or emotional distress caused by the lawyers' failure to adhere to the appropriate standard of care in pursuing the Paterek's claim, as opposed to Kristopher Richardson's negligence in causing the automobile accident. The Trial court held, on the record, that such evidence was inadmissible, no such evidence was thereafter offered or admitted, and the jury considered no such evidence, argument or instruction that could have permitted it to make such an inference. Accordingly, the Trial Court properly granted judgment N.O.V. for the Defendants and remitted the verdict in accordance with what the Plaintiffs could have reasonably expected to collect from the tortfeasor in the absence of the lawyers' malpractice.

Finally, Plaintiffs' suggestion that the Trial Court's judgment N.O.V. resulted in treating legal malpractice defendants preferentially vis-à-vis medical malpractice defendants is without merit. Legal malpractice differs from medical malpractice in many ways, but for purposes of this appeal, the most critical difference is that medical negligence virtually *always* results in a contemporaneous physical injury, while legal malpractice *never* does. It is this critical distinction, which is premised on decades of Ohio law, that justifies treating medical malpractice cases differently from legal malpractice cases with respect to the right to seek damages for emotional distress or other non-pecuniary general damages alleged to have resulted from the professional's negligence. Plaintiff/Appellee's suggestion that the Trial Court's ruling on the

[18] Supplement p.2, (Stipulation, para. 5, 6)

motion for judgment N.O.V. created some new "immunity" for lawyers is without any merit whatsoever.

C. Plaintiffs' Abandoned UM/UIM Claim Has No Relevance to the Issue on Appeal

Plaintiffs assert their "lost" UM/UIM claim against Beacon One Insurance somehow has a bearing on the issue before the Court here. It does not. The issue this Court has requested the parties to brief is a purely legal one that will determine the proper measure of damages in a legal malpractice case against a lawyer who fails to competently prosecute a civil suit on behalf of his client. Plaintiffs "loss" of their UM/UIM claim against Beacon One has no bearing on that issue.

While Plaintiffs appear to have at one time had a viable UM/UIM claim under their Beacon One policy, and while that claim has indeed been "lost," the loss of that claim was solely a result of Plaintiffs' own waiver and abandonment. Because Plaintiffs made a conscious decision to abandon their UM/UIM claim against Beacon One, the "loss" of that claim should play no part in the determination of the issue before the Court on this appeal.

As reflected in the Trial Court's docket, the record is clear that on May 5, 2004 Plaintiffs' obtained leave and filed a second amended complaint in the Geauga County Court of Common Pleas. That pleading named Beacon One Insurance a new party defendant and asserted a UM/UIM claim for $150,000, under a policy issued by Beacon One to the Patereks. Plaintiffs asserted that their claim was for "the balance of the proceeds of the underinsurance benefits" alleged to be available under the policy, after deducting the $100,000 liability limits available from the tortfeasor's policy.

The docket further reflects that on May 12, 2004 Plaintiffs obtained service on One Beacon, and that on June 4, Beacon filed its answer. In its answer, Beacon denied that it owed coverage, but admitted essentially all of the remaining allegations. Beacon raised a multitude of

affirmative defenses---most of which raised procedural defects or substantive bars to the Plaintiffs' legal right to recover from Richardson. Of the relatively few "coverage" defenses raised, none specifically asserted "destruction of the insurer's subrogation rights," as Plaintiffs now allege.

Thereafter, Beacon commenced its defense of the allegations asserted in the second amended complaint. In response to a pretrial order docketed on June 24, Beacon filed it s pretrial statement with Trial Court on July 22. In its pretrial statement, Beacon advised the Court and the other parties that it "does not have any pending motions, nor does it intend to file any at this time." To the contrary, Beacon advised that it "required additional time to conduct discovery." Specifically, Beacon expressed a desire to depose Irene Paterek, and to determine whether it would "retain its own accident reconstructionist and defense medical expert upon conclusion of additional discovery."

The next relevant docket entry reflects that on October 20, 2004 Beacon One filed its "notice to take deposition" of Plaintiff Irene Paterek. That deposition was scheduled for November 3, 2004. Then on November 1, 2004, two days before she was scheduled to be deposed by Beacon, and less than 45 days before the trial was to begin, Plaintiffs abruptly filed their notice of voluntary dismissal, dismissing their entire case against Beacon One without prejudice. Since then, more than one year has passed, and the dismissal of Patereks' claim against Beacon One is now "with prejudice" and has truly been "lost."

There is simply no factual record to support the Patereks' recent assertion that the Defendants' legal malpractice adversely impacted on their ability to collect under their UM/UIM policy. Contrary to the premise underlying Plaintiffs' merit brief, Beacon One never sought to deny coverage for the UM/UIM claim based on Evans' or Petersen & Ibold's malpractice.

Beacon answered the complaint and defended on the merits. Beacon never filed or requested leave to file a motion for summary judgment. In fact, Beacon advised the Court and the parties early on in its participation in the case that it had no intention of seeking summary judgment or otherwise raising any legal/coverage bar to the Plaintiffs' claims. By the time Plaintiffs voluntarily dismissed Beacon One from the case, the trial date was only a few weeks away, and Beacon One would never have been permitted to seek summary judgment at that late juncture in any event.

To the contrary, from the moment Plaintiffs commenced their suit against it, Beacon evidenced an intention to dispute both Richardson's liability and the proximate connection between the accident and Edward Paterek's most serious injuries, and to defend the case on the merits of the underlying tort claim. Beacon One requested to depose Plaintiff Irene Paterek, and suggested that it would retain additional experts to testify to the reconstruction of the accident itself and to the injuries Edward Paterek suffered as a proximate result of the crash.

Beacon One's refusal to join Evans and Petersen & Ibold in stipulating to Richardson's negligence was probably why Plaintiffs made the otherwise incomprehensible decision to dismiss their UM/UIM insurer from the suit. Leaving Beacon One in the case as a defendant would have obligated Patereks to prove a negligence case against Richardson as a predicate proof to their legal entitlement to UM/UIM coverage. This turn of events would have rendered the negotiated stipulations with the legal malpractice defendants virtually worthless. Additionally, because Edward Paterek had by then passed away, and because Kristopher Richardson was believed to by residing in Florida (and was, naturally, not expected to be cooperative), Plaintiffs were faced with unexpected costs and very little time to gather the needed information to prove their case against Beacon One.

While the wisdom of the tactical choice to abandon $150,000 in UM/UIM coverage in order to save a trip to Florida to locate and depose the tortfeasor on short notice is debatable, no one can debate that the choice was freely made by the Patereks, and not forced upon them due to an alleged "loss" of their UM/UIM coverage due to the lawyers' negligence. Had the Plaintiffs chosen to do so, they could have had their day in court with Beacon One, just as they did with Evans and Petersen & Ibold. Had they done so, and been successful, they would have had the additional $150,000 coverage that they now want to charge to Evans and Petersen & Ibold. Because Plaintiffs chose to abandon that claim, they must live with the consequences of their choice.

Finally, even if Plaintiffs were correct in their assertion that Evans' failure to refile the tort action against Richardson resulted in a destruction of Beacon One's subrogation rights, or constituted a failure to commence the action against Richardson within the statute of limitations, the conclusion that the lawyers' negligence necessarily resulted in the "loss" of their right to pursue a UM/UIM claim against Beacon does not follow.

In *Ponser v. St. Paul Fire & Marine Ins. Co.,*[19] a case decided during the same month that this case was tried, this Court held that the plaintiff's failure to timely file suit against the tortfeasor within the statute of limitations was not a complete bar to a UM/UIM claim arising out of the same accident. This Court held that the policy language itself controls the insured's right to present a UM/UIM claim in a timely fashion: "To determine whether an insured must file a wrongful-death action within the statute of limitations in order to meet the contract requirement of being legally entitled to recover, we need look only to the contracts."[20]

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[19] 104 Ohio St.3d 621, 2004-Ohio-7105

[20] *Id.* at ¶ 48.

Accordingly, even if Plaintiffs had not abandoned their UM/UIM claim; even if Beacon One had not elected to defend against the second amended complaint on the issue of Richardson's liability for Paterek's injuries; even if Beacon One had instead sought summary judgment based on the attorneys' failure to refile the original case on time; Plaintiffs' UM/UIM claim against Beacon One was not "lost" as a matter of law. Because Plaintiffs chose to abandon their claim against Beacon, no one will ever know how that issue would have been resolved.

Clearly, Plaintiffs' inclusion of the "UM/UIM issue" in her merit brief is nothing more than another attempt to sidetrack the Court with a "red herring" issue. Apparently for tactical reasons, when they realized that the UM/UIM insurer intended to defend on the issue of the tortfeasor's (rather than the attorneys') negligence, the Plaintiffs elected to abandon their UM/UIM claim against Beacon and to forgo the $150,000 in potential coverage available to them. That decision has no bearing whatsoever on the purely legal issue that is presented to this Court via the Appellants' proposition of law. The "UM/UIM issue" should be disregarded in this Court's analysis of the proper measure of damages in a legal malpractice case.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellants Petersen & Ibold and Jonathon Evans request this Court to: (1) reverse the judgment of the Eleventh District Court of Appeals; (2) reinstate the Geauga County Court of Common Pleas' judgment notwithstanding the verdict awarding the sum of $100,000 to the Plaintiff as the full measure of her damages against the Defendants; and (3) establish a clear rule of law making the original tortfeasor's collectibility an element of the plaintiff's proof in a legal malpractice claim arising out of the failure to competently prosecute a civil lawsuit.

Respectfully submitted,

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