

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

IRENE F. PATEREK, *et al.*,)
)
 Plaintiffs-Appellees,)
)
 v.)
)
 PETERSEN & IBOLD, *et al.*,)
)
 Defendants-Appellants.)

On Appeal from the Geauga
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2005-G-2624

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

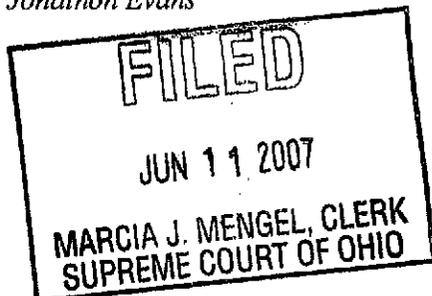
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INTRODUCTION

The issue before the Court, which follows from *Vahila*, is not whether a plaintiff in a legal malpractice action may recover non-economic damages from her attorney, as Plaintiff-Appellee, Irene F. Paterek (“Paterek”) suggests, but rather whether such a plaintiff may recover more from her attorney than she could have collected from the tortfeasor who caused her injuries. Paterek undoubtedly avoids the true issue presently before the Court because the resolution of it cannot possibly be in her favor. Consistent with both traditional tort concepts and the twenty-five (25) jurisdictions that have addressed the issue, *Amicus Curiae* American Guarantee and Liability Insurance Company (“American Guarantee”) respectfully submits that the Court should join the overwhelming judicial mainstream and hold that a legal malpractice plaintiff may not recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries, and that the burden of proving collectibility rests with the plaintiff.

ARGUMENT¹

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

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

Conspicuously absent from Paterek’s Merit Brief is any meaningful opposition to the Propositions of Law of American Guarantee. In this regard, Paterek fails to cite a single authority adverse to the traditional tort concept that a legal malpractice plaintiff cannot recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries.

¹ The Argument is organized according to *Amicus Curiae* American Guarantee and Liability Insurance Company’s Propositions of Law.

This is because no such authority exists. In fact, of the twenty-five (25) jurisdictions that have addressed this issue, every one has held that in a legal malpractice action, plaintiffs cannot recover damages from their attorneys that they could not have collected from the tortfeasor who caused their injuries.

The argument set forth in the Brief of *Amicus Curiae* The Ohio Academy of Trial Lawyers that such a rule is analogous to a damage cap, and therefore, constitutes disparate treatment of attorneys relative to other tortfeasors, is unsound as it fails to recognize a fundamental distinction: the collectibility of the tortfeasor is a consideration in the assessment of the plaintiff's damages by the fact finder, whereas the application of a damage cap is a post-verdict operation of law intended to determine the legal consequences of the fact finder's assessment of damages. In this regard, the teachings of The Supreme Court of Virginia are instructive:

. . . although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment. . . once the jury had determined the facts, the trial court applied the law and reduced the verdict in compliance with the cap prescribed by the General Assembly. . .

Etheridge, et al. v. Medical Center Hospitals, et al., 376 S.E.2d 525, 529, 237 Va. 87, 96-97 (1989).

Paterek further fails to address the traditional tort concept that a legal malpractice plaintiff must prove that the damages she seeks to recover from her attorney could have been collected from the tortfeasor who caused her injuries. A majority of courts that have addressed this issue have held the burden is more properly placed on the plaintiff to prove the amount she would have actually collected from the tortfeasor. *Klump v. Duffus*, 71 F.3d 1368, 1374 (7th Cir. 1996).

American Guarantee respectfully submits that Ohio should join the overwhelming judicial mainstream by holding that a legal malpractice plaintiff may not recover damages from her attorney that she could not have collected from the tortfeasor who caused her injuries, and that the burden of proving collectibility rests with the plaintiff.

Paterek seeks to recast the issue presented as whether a legal malpractice plaintiff may recover non-economic damages from her negligent attorney. Paterek undoubtedly avoids the true issue presented because the resolution of it cannot possibly be in her favor. It is axiomatic that a party may not address for the first time on appeal an issue not previously raised. *State ex rel. Gutierrez v. Trumbull County Board of Elections*, 65 Ohio St. 3d 175, 177 (1992). For those reasons more fully set forth in the Reply Brief of Appellants Petersen & Ibold and Jonathon Evans, American Guarantee urges the Court to reject Paterek's effort to raise an issue for review which does not have a basis in the record before the Court.

Notwithstanding the foregoing, a majority of courts addressing this issue have held that a plaintiff in a legal malpractice action predicated upon negligence may not recover non-economic damages. *Compare Reed v. Mitchell & Timbanard, P.C.*, 183 Ariz. 313, 319, 903 P.2d 621, 627 (Ct. App. 1995); *Pleasant v. Celli*, 20 Cal. Rptr. 2d 138, 142 (Ct. App. 1993) (*citing Ochoa v. Superior Court*, 39 Cal. 3d 159, 166, 216 Cal. Rptr. 661, 703 P.2d 1 (1985)); *Merenda v. Superior Court (Diamond)*, 3 Cal. App. 4th 1, 10 (1992); *Smith v. Superior Court*, 10 Cal. App. 4th 1033, 1041 (1992); *Aller v. Law Office of Carole C. Schriefer*, 140 P.3d 23, 27 (Colo. Ct. App. 2005); *O'Neil v. Vasseur*, 118 Idaho 257, 264, 796 P.2d 134, 141 (Ct. App. 1990); *Hanumadass v. Coffield, Ungaretti & Harris*, 311 Ill. App. 3d 94, 99, 724 N.E.2d 14, 18 (App. Ct. 1999); *Bowman v. Doherty*, 235 Kan. 870, 875, 686 P.2d 112, 118 (1984); *Richards v. Cousins*, 550 So. 2d 1273, 1278 (La. 1989); *Coble v. Green*, 271 Mich. App. 382, 393, 722 N.W.2d 898, 906 (2006); *Gore v. Rains & Block*, 189 Mich. App. 729, 740-41, 473 N.W.2d 813,

819 (1991); *Selsnick v. Horton*, 96 Nev. 944, 946, 620 P.2d 1256, 1257 (1980); *Gautam v. De Luca*, 215 N.J. Super. 388, 399, 521 A.2d 1343, 1348 (App. Div. 1987); *Wolkstein v. Morgenstern*, 275 A.D.2d 635, 637 (N.Y. App. Div. 2000); *Campahnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 42 (1990); *Hilt v. Bernstein*, 75 Or. App. 502, 512, 707 P.2d 88, 94 (1985); *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 784 (Tex. 2005); *Magnuson v. Velikanje, Moore & Shore, Inc. P.S.*, 85 Wash. App. 1050, 1050 (1997).

As to this issue, the thesis of the Third District Court of Appeals of the State of California is instructive:

Litigation is an inherently uncertain vehicle for advancing one's economic interest. The expectation of a recovery is rarely so certain that a litigant would be justified in resting her peace of mind upon the assurance of victory. In the unusual case, where recovery is likely, emotional distress at the economic loss should not be severe, since the loss would presumably be easy to recoup from the blundering counsel. **In our judgment, any reasonable person, normally constituted, ought to be able to cope with the mental stress of loss of hoped for tort damages without serious mental distress.**

Merenda, 3 Cal. App. 4th at 10. [**Emphasis added**]. Furthermore, the only foreseeable impact on the plaintiff from an attorney's wrongdoing is an economic loss. *Pleasant*, 20 Cal. Rptr. 2d at 142. American Guarantee respectfully submits that the foregoing rationale is persuasive, and inasmuch as the Court accepts Paterek's effort to raise an issue for review which lacks a basis in the record, the Court should adopt the majority approach that non-economic damages in a legal malpractice action predicated upon negligence are not compensable.

CONCLUSION

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

prove that the damages she seeks to recover from her attorney could have been collected from the original tortfeasor.

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

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief In Support Of Appellants Petersen & Ibold, *et al.* Of *Amicus Curiae* American Guarantee and Liability Insurance Company, was served via First Class U.S. Mail, this 11th day of June, 2007, upon:

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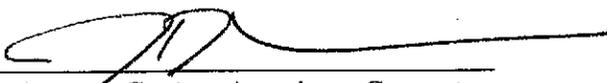
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