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Supreme Court No. 88460-9

SUPREME COURT  
OF THE STATE OF WASHINGTON

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TERESA SCHMIDT,

Respondent/Cross-Appellant,

vs.

TIMOTHY P. COOGAN, et al.

Appellant/Cross-Respondent.

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CROSS-RESPONDENT COOGAN'S ANSWER TO PETITION FOR  
REVIEW

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BEN F. BARCUS, WSBA# 15576  
[ben@benbarcus.com](mailto:ben@benbarcus.com)  
PAUL A. LINDENMUTH, WSBA #15817  
[paul@benbarcus.com](mailto:paul@benbarcus.com)  
*LAW OFFICES OF BEN F. BARCUS  
& ASSOCIATES, P.L.L.C.*  
Attorney for Appellant  
4303 Ruston Way  
Tacoma, Washington 98402  
(253) 752-4444

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## I. RESPONSE TO PETITIONER'S "OVERVIEW"

This is a legal malpractice case, where counsel for the Plaintiff failed to produce **any evidence with regard to the essential element of damages applicable to such claims**. Despite efforts by the Petitioner, (hereinafter Plaintiff), to erect procedural bars and/or technical defenses to such a lack of proof, The Court of Appeals appropriately upheld the law and found that Plaintiff's failure to present essential proof was fatal to Plaintiff's claim. As explored below, Plaintiff's counsel's effort to misdirect blame for such failings, and to erect procedural barriers to this dispositive issue, should be rejected for a multitude of reasons.

Ash shown below, Plaintiff's counsel's abused of the record in the Petition for Discretionary Review, and such efforts to mislead and deceive the Court, should be viewed as shameful and repugnant.

It must be remembered that, following the first trial in this case, which occurred in 2003, the then assigned Trial Judge denied judgment as a matter of law on the factual sufficiency of Ms. Schmidt's proof relating to liability on the underlying claim, but granted a new trial limited to the issue of damages based on a variety of reasons. These reasons included the toxically improper closing argument of Plaintiff's counsel, and the fact that

the non-economic damages awarded in the first trial were grossly excessive, and unsupported by the evidence. Additionally, the first Trial Judge found he erred by admitting evidence regarding Ms. Schmidt's "lack of medical insurance to pay her medical bills," determining that her financial condition was irrelevant.

As opposed to simply accepting the Trial Court's Order granting a new trial limited to the issue of damages, Ms. Schmidt appealed the Order granting a new trial, pursuant to RAP 2.2(9). Initially, the Court of Appeals reversed, with direction to dismiss holding that Ms. Schmidt had failed to present sufficient evidence supportive of the underlying "slip and fall" action against the "Grocery Outlet." See, 135 Wn. App. 605, 145 P.3d 1216 (2006). (In that opinion, Defendant prevailed on his cross appeal that Plaintiff had failed to prove the "case within a case," i.e., liability for the underlying slip and fall, thus, it was unnecessary for the Appellate Court to address all other issues framed within the appellate briefs). In that opinion, it was made clear that Plaintiff's counsel had failed to direct any discovery towards the Grocery Outlet Store where Ms. Schmidt suffered her slip and fall. *Id.* 135 Wn. App., at 613.

This Court disagreed and, in *Schmidt v. Coogan*, 162 Wn.2d 488, 173, P.3d 273 (2007), determined that there was sufficient evidence to support the jury's verdict with respect to the underlying slip and fall, and remanded back to the Court of Appeals the issues that it had not previously addressed due to its prior dispositive determination.

On remand, the Court of Appeals did what it was directed to do by the Supreme Court, and by way of an unpublished opinion affirmed the Trial Court Order granting a new trial limited to the issue of damages. That unpublished opinion, located at WL5752059, (Wn. App. II 2008). That opinion "reaffirm the Trial Court's denial of Coogan's motion to dismiss and its grant of a new trial on damages."<sup>1</sup>

Although the Court of Appeals found dispositive the fact that the special damages awarded by the first jury was unsupported by the evidence, it did not limit the new trial on the issue of damages solely to special damages. Thus, all aspects of Ms. Schmidt's damages were subject to full examination in the second trial.

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<sup>1</sup> In this unpublished opinion, the Court of Appeals found the lack of factual support for the special damages award to be dispositive and did not address other issues with respect to the inappropriate injection of insurance/plea of poverty evidence into the first trial as a basis for a grant of a new trial, nor did it examine the toxic closing argument of plaintiff's counsel which, frankly, was the primary reason the initial trial judge granted a new trial in this case.

Following remand, this case was assigned to the Honorable Carol Murphy of the Thurston County Bench, as a visiting judge. While this case was pending in front of Judge Murphy, the issue of “collectability” as the measure of damages in a legal malpractice case was discussed in **multiple briefs** filed by Defendant’s counsel. This, of course, was despite the fact that there was, (and is), no obligation on the part of defense counsel to either inform or educate counsel for the Plaintiff as to the essential elements of the claim which is being pursued. Despite having no such obligation, defense counsel first raised “collectability,” as a issue in the legal malpractice context, in Defendant’s Memorandum of Points and Authorities in Opposition to Plaintiff’s Motion for Summary Judgment Re: Emotional Distress Damages on a Legal Malpractice Claim. (CP 2156-2195). That pleading is attached as Appendix No. 1. In that pleading, which was opposing a rather procedurally odd and misguided effort on the part of Ms. Schmidt to have the Court rule that Ms. Schmidt was entitled to “general damages” for malpractice qua malpractice, defense counsel observed at Page 10-11 of that memorandum the following:

*The case Lavigne v. Chase, Haskell and Kalamon, P.S., 112 Wn. App. 677, 550 P.3d 306 (2002) provided a reasonable example of the **interplay between proximate cause and damages** in the legal*

*malpractice context. In that case, the attorneys involved were negligent by failing to properly renew an out-of-state judgment. Nevertheless, the trial court dismissed the case because the plaintiffs failed to muster evidence that the underlying judgment would ever have been **collectible**. The court of appeals reversed, although upholding the trial court on the issue that it was the plaintiff's burden to establish **collectability**, it nevertheless found that their issues of material fact regarding the question of **collectability**. In Lavigne, at 684-86*

*The appellate court explored damages in legal malpractice cases: 'The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. As the Matson court further reasoned: 'Courts consider the collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: It would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney which is greater than the judgment that plaintiff could have collected from the third party.' ... (citations omitted). In this case, essentially Ms. Schmidt is seeking to collect from Mr. Coogan an amount of money she could not otherwise have collected from the underlying tortfeasor, the Grocery Outlet defendant. In other words, she is seeking a windfall in that she is seeking a judgment 'which is greater than the judgment the plaintiff could have collected from the third party.' Id. As the Lavigne case further indicated, the reason why '**collectability**' is an element of a legal malpractice plaintiff's case is to prevent the acquisition of such a windfall: '**the majority of jurisdiction required the plaintiff to prove collectability. The policy basis for this approach is to avoid awarding the aggrieved more than he or she would have recovered had the***

*attorney not been negligent. As one of these courts reasoned ‘in a malpractice action, a plaintiff’s ‘actual injury’s measured by the amount of money she would have actually collected had her attorney not been negligent’. Klump v. Duffus, 71 F.3d 1368, 1374 (7<sup>th</sup> Cir. 1995). (emphasis added). Hypothetical damage beyond what the plaintiff would have genuinely collected from the judgment creditor, are not a legitimate portion of her actual injury and awarding her damages would result in a windfall. Stated another way, these jurisdictions tend to view collectability as a component of the plaintiff’s prima facie case. (Citation partially omitted; Emphasis original and added).*

It is noted that in *Lavigne*, the Appellate Court adopted the “majority approach,” **which places the burden of proof upon the plaintiff as an element of their case to prove collectability and rejected the “minority approach” which shifted the burden upon the negligent attorney to plead and prove “uncollectability.”** It is not an affirmative defense that the defendant’s lawyer is required to plead or prove.

Defense counsel once again extensively briefed the appropriate measure of damages in a legal malpractice case in “Defendant’s Reply to Plaintiff’s Motion In Limine On Availability of General Damages and Defendant’s Cross Motion In Limine Regarding The Same.” (Appendix No. 2). (CP 197-205). At Pages 4 through 8 of that Memorandum, once again the

above-referenced quote from the *Lavigne* case was set forth, and it repeatedly referenced the words “collectible” and “collectability” throughout its text.

The full relevant quote from “Defendant’s Motions In Limine and Supporting Memorandum,” which was filed after the above briefs, **which already twice had previously addressed** the issue of collectability, **does not** provide the concession that Plaintiff’s counsel suggests, i.e., that “collectability” was not at issue in the case. **The entire quote should have been provided and is as follows:**

*As the court is also aware, as this matter comes before the court solely on the issue of Ms. Schmidt’s damages, what will or will not be relevant evidence is extremely circumscribed. What is no longer at issue in this case, is the allegation that Mr. Coogan engaged the legal malpractice by failing to perfect Ms. Schmidt’s slip and fall lawsuit against the Grocery Outlet. That has already been determined as a matter of law and affirmed on appeal. Also what is not an issue in this case is the Grocery Outlet’s liability in the underlying, (case within a case), claim that should have been properly perfected by Mr. Coogan. What remains, is simply under case within a case principals, issues regarding the valuation of the underlying case, **and questions of proximate cause**. The value of the underlying case naturally would be what Ms. Schmidt would have been able to acquire had the attorney not been negligent i.e., what result would have achieved had the lawsuit been properly perfected and pursued against the Grocery Outlet. On that question the only question is what is the value of the underlying claim, given Ms. Schmidt’s physical injuries resulting from her slip and fall.” (Emphasis added).*

Thus, defense counsel was certainly not indicating that “questions of proximate cause,” (which includes “collectability”), were not at issue within the case. Frankly, care in drafting was provided to ensure that it was clear that the valuation of the underlying case was only part of what remained to be decided.<sup>2</sup> Defense counsel had already briefed “collectability” **twice**, and one of those times was a response to a specific Motion in Limine on damages. (Appendix No. 2). Thus, there was no reason to once again brief the issue as part of the defense’s general Motions in Limine, when given content of the matters being addressed, “collectability” was not germane.

The next time defense counsel briefed the issue of collectability was within ‘Defendant’s Reply to Plaintiff’s Opposition to Defendant’s Motion In Limine.’ This time, at 86 page COA article was attached to the pleading.

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<sup>2</sup> Whether collectability is characterized as an issue of “proximate cause” or “damages” is really a matter of semantics. As stated in the case heavily relied on by the Court of Appeals in its published opinion, *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000), “the measure of damages for legal malpractice is **the amount of loss actually sustained as a proximate result of the attorney’s conduct**. Courts consider collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: ‘it would be an inequitable for the plaintiff to be able to obtain a judgment against the attorney, which is greater than the amount the plaintiff could have collected from the third party’.” (Citations omitted). Thus, as should be a self-evident proposition, the reason why “collectible” is the measure of damages is **because of proximate cause principals. Thus, whether you call it an issue of damages or an issue of proximate cause, really makes no difference**. The underlying concepts are all the same and there are not conflicting Court of Appeals divisions on the issue is suggested by defense counsel. Our appellate courts have all consistently held that “collectability” is the measure of damages in this kind of legal malpractice action, **because of proximate cause principles**. Such a concept is not that complex.

At Page 5 of the pleading, a long quote from Page 72, Section 42, of the COA article was provided. (Appendix No. 3) (CP 734-844). Within that long quote it is reiterated that “although the damages were covered in a malpractice action generally cannot exceed the amount the plaintiff could have recovered in the underlying action, they be less than that amount. **Since the measure of damages is the amount the plaintiff lost through the defendant’s malpractice, the proper measure of damages [is] not the amount which would have been awarded in the underlying action but the portion of that amount which would have been collectible.**” (Emphasis added). (Appendix No. 3).

Thus, to the extent that Plaintiff suggests at page 19 that the pertinent portion of the COA article was not brought to her attention, that is contrary to the record and the facts. It was quoted in the brief upon which the article was annexed.

The same is true with the Defendant’s efforts to deceptively parse and mislead with respect to Defendant’s oral Motion to Dismiss following the completion of Plaintiff’s case-in-chief. (Appendix No. 4).

Prior to arguing Motions to Dismiss at the close of Plaintiff’s case-in-chief, counsel for the defense had filed two extensive briefs relating to issues

other than the question of collectability. (CP 1124-1237) (CP1238-1996). The first brief filed was a Motion for Directed Verdict Regarding Medical Causation issues, and the second was a written Motion for a Mistrial relating to the interjection of insurance evidence into the case. *Id.* Thus, where defense counsel stated at Page 503 of the transcript that “I did not brief this,” it must be placed in that context. Such a statement obviously did not mean that the issues were never briefed, or to suggest for that matter that defense counsel **at any time had any obligation to brief such issues prior to making a motion to dismiss due to factual insufficiency.** At the outset of the Motions to Dismiss, the Trial Judge discussed the above-referenced briefs, which had earlier been filed, and which were argued prior to the “collectability” motion to dismiss. (RP 493). Defense counsel’s comment was in light of this early discussion. The full text of defense counsel’s argument certainly places it within context, and there can be, and was, no confusion with respect to why the motion to dismiss was being made:

*MR. LINDENMUTH: Your Honor, thank you. May I go into my next issue? It is very short and I did not brief this. And a lot of times these motions are not briefed. But there is an issue here that I'd raised in summary judgment with respect to proximate cause and I remember briefing this issue and bringing this to the attention of everybody. **One element in a legal malpractice case is proof that if, in fact, the lawyer had done a better job and there would have been a better***

*result, that they actually would have been able to collect on that result. In other words, collectability is an essential element of plaintiff's case. There has been no evidence presented in this case, none whatsoever, as to whether or not even if Mr. Coogan had handled this case right, even if Mr. Coogan had taken it to a jury trial and got a verdict for Ms. Schmidt that verdict would have been collectible. That is an essential element of their case, they put on no proof, therefore dismissal is warranted. Thank you. And let me – I do have a couple of cases on that proposition. One is Lavigne v. Chase Haskell, 112 Wn. App. 677. I got these at lunch time. And another case for the Court's consideration is Matson v. Weidenkopf, 101 Wn. App. 472. And they all – they both talk about collectability as being the plaintiff's burden and an element of the claim the claim in legal malpractice. Thank you, Your Honor. (RP 503-504)*

In response to this argument, plaintiff's counsel Mr. Bridges argued that "collectability" is a liability defense. As we know, such an argument is patently erroneous.<sup>3</sup> It was further argued at Page 507:

*THE COURT: Okay. And what you're arguing about is an element of malpractice not damages, correct?*

*MR. LINDENMUTH: I would disagree. And I would disagree, because every claim of negligence has three elements. One element is the negligence. The second element is the proximate cause. The third element is damages. Clearly Element 1 has been established as a matter of law by*

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<sup>3</sup> It is noted that, during the course of this motion, at no time did Mr. Bridges ever attempt to put on an offer of proof, or argue about his proof of "collectability;" (he had none). It is axiomatic that an issue cannot be raised for the first time on appeal. Mr. Bridges' statement that he possessed admissible proof regarding the Grocery Outlet's liability insurance is inaccurate, as discussed below. There is nothing in the record that even suggests that Plaintiff's counsel ever directed any discovery requests to the Grocery Outlet which would have resulted in the production of such insurance information.

*the supreme court, court appeals, prior case. Element two proximate cause is what I'm talking about here. They're still going to have to prove proximate cause of damages. And what in this context, she has to prove that but for his negligence, she would have fared better. An element of that concept and that goes to the value of the underlying claim. An element of that concept is a plaintiff's burden of proof collectability. And that's what those cases discuss. I briefed those cases in my summary judgment reply. I raised those issues so I wasn't trying to hide the ball. Now, I didn't bring it in a summary judgment motion, I didn't bring it otherwise, I'm bringing it now. But I did alert him that, you know if he had been reading what I was telling him, he would have known that he would have to address that issue at time of trial. So I don't feel I ambushed anybody. I did my job as an advocate, which is address the issues. Thank you.*

In response to this argument, the Trial Court incorrectly analyzed as follows:

*The motion is denied. The element of proximate cause with regard to damage will be an instruction given to the jury. I appreciate the argument. I believe it is a fine line, however, this case is not about any element of malpractice other than damages and proximate cause as it relates to damages. If there was a question as to collectability, that should have been addressed at the first trial this is a trial about damages only. And I understand, Mr. Lindenmuth that you disagree with the Court on this point. Mr. Lindenmuth I understand your ruling Your Honor.*

(Appendix No. 4).<sup>4</sup>

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The COA article was also referenced in Defendant's Trial Brief, at page 35. (Appendix No. 5). The defense also submitted an instruction addressing proximate cause in the legal

As discussed in Defendant's briefing before the Court of Appeals, that is incorrect, in the sense that "collectability" is the measure of damages because of proximate cause principles, and it is not a liability issue. Reading between the lines, it is suggested the true reason no evidence of "collectability" was presented below is because Plaintiff possessed no such evidence and apparently Plaintiff's counsel lacked the basic knowledge that he needed it.

Thus, as shown above, the Plaintiff's efforts to deceptively parse various pleadings and the transcript, in order to try to manufacture a false construct, was be rejected by the Court of Appeals when it claimed a misguided Motion for Reconsideration and should be rejected by this Court. There is no question that there was, and is, substantial information within the court file, both pretrial, and during trial, with respect to the issue of "collectability."

Further, the whole predicate for the Plaintiff's argument is false. There was no obligation on the part of the defense to teach school, or otherwise inform Plaintiff's counsel with regard to the basic elements of the claim that he was prosecuting. Indeed, defense counsel could have silently

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malpractice context. Defendant's proposed Instruction No. 12. (Appendix No. 6).

waited until the close of Plaintiff's case-in-chief and raised the issue for the first time. In other words, the fact that Plaintiff was provided ample notice of the applicable law, prior to the motion for directed verdict, only underscores the fact that there was an absolute and complete failure on the part of Plaintiff to establish an essential element of her case, thus justifying the Appellate Court's decision in this action. Collectability is not an affirmative defense under Washington Law. It is an element of Plaintiff's case that must be affirmatively proved. There was, and is, no proof on that element in this case, and the Appellate Court's recognition of that fact and dismissal of this action was, and is, entirely justified, based on the record which was before it as developed below.

## **II. THE LAW OF THE CASE DOCTRINE DOES NOT BAR CONSIDERATION OF THE PLAINTIFF'S FAILURE TO PROVE DAMAGES IN A DAMAGES-ONLY TRIAL.**

The two trials in this case were remarkably different.<sup>5</sup> It is illogical to suggest in a new trial limited to the issue of damages that the issue of

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<sup>5</sup> It is noted that it appears that the file cover with the word "Safeco" on it was submitted into evidence during the course of the first trial. (Appendix No. 7), (Appendix No. 8) Thus, to the extent that this could be construed as evidence of "collectability," (it is not), that fact alone justifies the raising of "collectability" as an issue in the second trial, as opposed to the first. If, as Plaintiff suggests, the "Safeco" reference is proof of "collectability," such proof was totally absent in the second trial. The Plaintiff, with a straight face, would not argue that had she failed to present any medical testimony in the second trial that would not have an impact. The fact that they presented no evidence regarding "collectability" in the second trial, naturally, in and of itself, also would have an impact.

“collectability” would not continue to be a ripe issue, when “collectability” because of proximate cause principals **is the measure of damages** in a legal malpractice action. Again, it is emphasized “collectability” is an element of Plaintiff’s claim, and it is not a separate affirmative defense that is somehow severable from the issue of damages.

As it is, the Plaintiff never raised the “law of the case doctrine” during the course of Defendant’s argument for a directed verdict, following the close of Plaintiff’s case-in-chief. As such, it is an issue that should not be considered for the first time on appeal. See, *Cowich Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 821 P.2d 549 (1999).

In any event, the effect of the Appellate Court granting a new trial on the issue of damages, is that, as it relates to damages, the procedural posture of the case is as if the first trial had never occurred. As discussed in *Hudson v. Hapner*, 146 Wn. App. 280, 287, 187 P.3d 311 (2008), reversed on other grounds, 170 Wn.2d 22, 239 P.3d 579 (2010):

*... although a trial has occurred, our reversal of the judgment returns the proceedings to the same posture as if it had not. See, Weber v. Biddle, 72 Wn.2d 22, 28, 431 P.2d 705 (1967); cf. 15A Karl B. Tegland and Douglas J. Ende, Washington Practice: Civil Procedure § 67.18, at 514 (2007) (if trial court dismisses plaintiff’s case but is reversed on appeal, case simply proceeds as if it was never dismissed).*

As discussed by our Supreme Court long ago in the case of *Godefroy v. Reilly*, 140 Wn.650, 250 P. 59 (1926), when an Appellate Court reverses or remands a case for a retrial on the grounds that the evidence was insufficient to take a particular issue to the jury, such actions do not restrict the retrial to that issue alone. Under such circumstances, the parties are at liberty to retry the case on all issues, including issues that were decided in the party's favor in the first trial, as well as those issues which have already been determined. *Id.*

Such a proposition should be deemed equally applicable in a case which is remanded for a limited purpose, such as a tort action like this, for a redetermination on the issue of damages. Under such circumstances, both parties are free to address every aspect of such an issue, including the ability to present alternative theories relating to damage issues, which had not been previously presented during the course of the first trial. See, *Lewis River Golf, Inc. v. O. M. Scott and Sons*, 120 Wn.2d 712, 724-25, 845 P.2d 987 (1993). The *Lewis River Golf* case also suggests that even when a new trial is limited to the issue of damages, it is nevertheless incumbent upon the plaintiff to establish what damages were proximately caused by the already determined breach of duty.

While, as a general proposition, it is true that questions which have been determined on appeal, or which might have been determined had they been presented, will not be considered by an Appellate Court upon a second appeal in the same action, such a proposition has no application when the evidence presented during the course of retrial is substantially different. *Buob v. Feenaughty Machinery Co.*, 4 Wn. App. 276, 103 P.2d 325 (1940); see also *Zorich v. Billingsley*, 55 Wn.2d 865, 350 P.2d 1010 (1960).

Here, it would be a factual impossibility for Defendant Coogan to raise the Plaintiff's failure to prove "collectability" during the second trial in the first round of appeals. Such an event had not transpired, and it would have been factually impossible for defense to predict such an abysmal failure of proof occurring during a trial that had yet to occur.

The cases of *State v. Barberio*, 121 Wn.2d 48, 846 P.2d 519 (1993) and *State v. Kilgore*, 167 Wn.2d 28, 216 P.3d 393 (2009), address entirely different circumstances than that which is currently before the Appellate Court. Currently, what is before the Court is whether or not the Plaintiff proved an essential element of her damage case in a full retrial on all issues relating to damages. That is a far different situation than that which was addressed in either *Barberio* and *Kilgore*. In both of those cases, a criminal

defendant appealed their criminal conviction and sentencing, and were resentenced once the first appeal was completed. After that, the defendant filed a second appeal trying to challenge a term of the sentence which had been entered prior to the first appeal, but was not addressed within it.

In other words, once an appeal has been decided, one cannot, in a second appeal, reach back into pre-appeal court proceedings and try to challenge things which occurred therein.

That is a far different set of circumstances than that which is was before the Court of Appeals. Here, what is at issue is a failure of proof during a second trial, and not an effort on the part of the Defendant to reach back and say that errors occurred during the course of the first trial that should be subject to belated correction. The Trial Court denied Defendant's Motion to Dismiss at the close of Plaintiff's case in chief was not due to any (misapplication) of the "law of the case doctrine." She did so based on any erroneous belief that the issue of "collectability" related to any decided **liability** issues.

To hold otherwise would make the grant of a "new trial limited to the issue of damages" a genuine nullity. Both the Plaintiff and Defendant would be barred from presenting any new possible theories and/or evidence on such

issues, even though the effect of such a new trial, according to the *Hudson* opinion, should be as if the first trial had in fact never occurred. See also, *Riley v. Sturdevant*, 12 Wn. App. 808, 532 P.2d 640 (1975) (suggesting that “law of the case doctrine” only applies to issues that were actually decided in a former appeal); *State v. Trask*, 98 Wn. App. 960, 978-79, 990 P.2d 976 (2000) (the law of the case doctrine does not apply to matters which were not explicitly or implicitly considered).

Under the circumstances of a retrial, the law of the case doctrine has no application to matters upon where a retrial was ordered. Thus, the procedures outlined in *Barberio* and *Kilgor* has no application. What then remained before the appellate court were the questions of whether or not, as a matter of law, there was sufficient evidence supportive of the jury’s verdict and whether the Trial Court erred by failing to grant Defendant Coogan’s CR50 Motion. Such issues are subject to de novo review by the appellate court. See, *Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 530-31, 20 P.3d 126 (2003).

Here the Court of Appeals applied the appropriate standard of review, and Petition contentions to the contrary are wrong.<sup>6</sup>

**III. PLAINTIFF'S CONTENTION THAT THE DEFENSE SOMEHOW INAPPROPRIATELY EXCLUDED MS. SCHMIDT'S "INSURANCE EVIDENCE" IS SPECIOUS AT MANY LEVELS**

Again, Plaintiff's deceptive parsing of various pleadings and records in this case should be rejected.

As noted above, the language within Defendant's Motion in Limine, at Page 6, Line 6 through 10, very clearly separates the issues of the value of the underlying case and "questions of proximate cause." The fact that defense counsel said "on that question the only question is what is the value of the underlying claim, given Ms. Schmidt's physical injuries resulting from her slip-and-fall event" is accurate with respect to one of the issues which was presented at time of trial. As had been explored in a number of other previous pleadings, and where relevant, the questions of proximate cause, as

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The Assignment of Error related to "collectability" is attached as Appendix No. 9. Petitioner's contention that Mr. Coogan failed to properly assign error to the issue of collectability is made without authority or meaningful analysis and should not be considered. See, *Cowiche Canyon Conservatory v. Bosley*, 118 Wn 2d 801, 809, 821 P.2d 549 (1992). Such assertions are also factually and legally incorrect. Mr. Coogan's assignment provided more than sufficient notice of the nature of issues raised, and given the fact that Petitioner clearly understood Mr. Coogan's arguments and was able to respond, establishes that Petitioner's concerns are specious. See, *Vierede v. Fefreboard Corp.*, 81 Wn. App. 579, 915 P.2d 581 (1996). Petitioner's contention that even if she failed to put on an essential element of proof, the remedy is a new trial and not dismissal is wrong, and an argument without authority that should be disregarded.

related to the issue of “collectability” had already been discussed.

**At no time did Mr. Coogan ever take the position “that collectability was not an issue ....” In fact, as indicated above defense counsel did much more than what was required to place Plaintiff’s counsel on notice that collectability was something that needed to be addressed.**

With respect to the exclusion of what Ms. Schmidt contends to be her “insurance coverage” evidence, the reason Mr. Coogan sought exclusion of that evidence had nothing to do with the question of “collectability,” and even if such evidence had been admitted, it would not have been adequate proof to meet the collectability elements of Plaintiff’s claim.

The reason why “Exhibit 1,” the alleged cover of Mr. Coogan’s file, which had the word “Safeco” on it, was subject to a Motion in Limine to Exclude was because it referenced “insurance”<sup>7</sup> and included other irrelevant matters.

The Motion to Exclude Exhibit 1 with the “Safeco” reference upon it, was consistent with Defendant’s other Motions in Limine and position

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<sup>7</sup> There is nothing to suggest within the record that the Trial Court was “induced” to exclude it because defense was waiving any issues regarding collectability. Such an allegation on its face is a pure fabrication.

taken throughout trial with respect to “insurance” information. Indeed, Plaintiff counsel, himself, in his Motions in Limine sought to exclude any reference to insurance as well.<sup>8</sup> This is a standard motion in a personal injury action.

Contrary to Mr. Bridges’ assertions, at no time did Defendant’s counsel ever represent to the Court no amount of insurance was irrelevant because it did not matter. It could only not matter if collectability was not going to be raised by him. Such self-serving allegations by Mr. Bridges, who apparently did not know the basic elements of the claim in which he was pursuing on behalf of a client, are unworthy of credence and have no merit. If Mr. Bridges believed that such evidence was relevant to the issue of “collectability,” he certainly could have argued as such in response to

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<sup>8</sup> As the Court can take note, one of the primary issues raised within Mr. Coogan’s appeal was the fact that the Trial Court had admitted lack of insurance, (plea of poverty), evidence during the course of trial. Within Appellant’s Opening Brief, commencing on Page 38, Mr. Coogan argued that there should be a “bright line rule” against insurance evidence as a plea of poverty. (See, Appellant’s Opening Brief, Page 41). Thus, the Motion in Limine excluding the “Safeco file cover” was consistent with such a position. Had Plaintiff’s counsel viewed the “Safeco” cover as being admissible for “other purposes,” as allowed under ER411, he should have argued that point some time during the course of trial. Having not done so, Ms. Schmidt certainly should not be allowed to do so for the first time on appeal. As it is, even assuming arguendo that the “Safeco file cover” had been admitted into evidence, and the jury based on such evidence found in favor of the Plaintiff on the issue of “collectability,” it is clear that such a determination could not possibly withstand appellate scrutiny, because, as adroitly pointed out in the Court’s most recent published opinion in this case, a jury verdict cannot be predicated on insufficient speculative evidence.

Defendant's Motion in Limine. He could have sought admission of the document with an appropriate limiting instruction. Further, Mr. Bridges must recognize a simple notation of "Safeco" on a file cover is rank speculation as to how much insurance the Grocery Outlet may or may not have had, its exclusion, even if erroneous, was a harmless error. In fact, we do not even know at this point in time whether that reference was to the Grocery Outlet's insurance at all. It could have been a random note by Mr. Coogan, or related to insurance that was held by the current ownership of the Grocery Outlet, as opposed to the ownership group who possessed the property at the time of Ms. Schmidt's slip and fall.<sup>9</sup> Nowhere within any pleading or transcript on file in this matter did Mr. Bridges ever suggest that the cover of Mr. Coogan's file, which referenced "Safeco," was admissible because it was relevant to the issue of collectability.

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There is nothing that requires insurance companies, prior to the filing of a lawsuit, to disclose the amount of insurance held by their insured. See generally, *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 78 P.3d 1274 (2003). It is undisputed, that the underlying lawsuit against the Grocery Outlet, which is filed by Mr. Coogan's office, did not progress to the discovery phase, but was subject to dismissal due to naming current ownership, as opposed to the ownership of the grocery store at the time of Ms. Schmidt's slip and fall. To the extent that Mr. Bridges would have desired to call Mr. Coogan to "testify and clarify what he knew and what he wrote in his own file," it is noted that what Mr. Coogan may or may not have known is highly speculative, and there was nothing precluding Plaintiff's counsel from attempting to reopen his case following Defendant's Motion to Dismiss in order to explore such issues, and/or to put on the record an offer of proof. He, instead, in an "all or nothing" strategy decision, chose to ignore defendant's position, which was overwhelmingly supported by the case law.

Arguably, not only did Ms. Schmidt have to prove the fact of insurance, (or collectible assets), but also **the amount of the insurance.**

*Koeller v. Reynolds*, 344 N.W. 2d. 556 (Iowa App. (983)).

In any event, nearly every statement made within the Petition by Plaintiff's counsel, are gross misstatements of fact which are unsupported by the record. The Court should find repugnant the Plaintiff's efforts to manipulate it by taking matters out of context, in order to manufacture issues out of whole cloth, which simply do not exist. At the end of the day, it was simply either a choice ,or inexcusable neglect on the part of Plaintiff's counsel, not to put **any admissible evidence establishing an essential element of a claim which he had been pursuing for 11 years on behalf of Ms. Schmidt.**

It is suggested that for Plaintiff's efforts to contend that he was "ambushed" is an effort to cover up his own choices and errors and, frankly, is unworthy of consideration by this Court.

**IV. WHETHER CHARACTERIZED AS AN ISSUE OF PROXIMATE CAUSE OR AN ISSUE OF DAMAGES THE PLAINTIFF'S FAILURE TO PROVE "COLLECTABILITY" WAS A PROPER BASIS FOR THE APPELLATE COURT'S DETERMINATION THAT DISMISSAL WAS AND IS THE APPROPRIATE REMEDY**

The Plaintiff's position that because this was a new trial limited to the issue of damages somehow excuses the Plaintiff from having to prove what damages were **proximately caused by Mr. Coogan's negligence** is a meritless position. "Proximate cause" provides a causal connection between an act of negligence and an injury. "Proof of negligence in the air, so to speak, will not do." See, *Hansen v. Washington Natural Gas Company*, 95 Wn. 2d 773, 779, 632 P.2d 504 (1981). As recently discussed in Chief Justice Madsen's dissent in the case of *Mohr v. Grantham*, 172 Wn. 2d 844, 864, 622 P.3d 490 (2011) "Physicians, and indeed individuals involved in thousands of actions, are negligent every day without legal consequence because, despite the involvement or presence of others, their acts did not actually cause harm to the other persons." That is why even in the legal malpractice context a Plaintiff seeking damages must show that "but for" their lawyer's negligence they would have had a better outcome. See, *Daugert v. Pappas*, 104 Wn. 2d 254, 257, 704 P.2d 600 (1985); *Kommavongsa v. Haskell*, 149 Wn. 2d 288, 300, 67 P.3d 1068 (2003); *Lavigne*, supra; *Matson*, supra; see also, *Tilly v. Doe*, 49 Wn. App. 727, 732-33, 746 P.2d 323 (1987); *Kim v. O'Sullivan*, 133 Wn. App. 557, 137 P.3d 61 (2006); *Aubin v. Barton*, 123 Wn. App. 592, 606-07, 98 P.3d 126 (2004), and

*Estep v. Hamilton*, 148 Wn. App. 246, 210 P.3d 331 (2009). “But for causation” refers to the “physical connection between an act and an injury.” See, *Ang v. Martin*, 154 Wn. 2d 477, 482, 114 P.3d 635 (2005).

In this case, it appears that the Plaintiff has little problem with the notion that during the course of a retrial on the issue of damages that she was obligated to prove “but for causation” as it related to the underlying slip and fall case, i.e., that she had to show by way of competent medical testimony that her injuries have a causal connection to the negligence of the Grocery Outlet. Unfortunately, what Plaintiff apparently failed to understand, (or did not know), was that there is another level to “proximate cause”, i.e., “but for causation” in the context of a legal malpractice case. Such concerns in this context means that, not only must the Plaintiff show that there was underlying negligence, which proximately caused injury, but also, **as the actual measure of damages, that any amounts that otherwise would have been awarded in the underlying personal injury action would have been “collectable.”** In other words, the measure of damages in such cases is “collectability,” and that is because of proximate cause principles.

Because a legal malpractice case has a certain level of complexity does not change the fact that in a new trial relating to damages one still has

the obligation of proving all aspects of “proximate cause” as it relates to such a claim.

To the extent that the Plaintiff is trying to suggest that “collectability,” which is the appropriate measure of damages because of “proximate cause principles,” was not something that could or was subject to retrial in this case, makes absolutely no analytical sense. Whether “collectability” is labeled an element of damages, or a concept of proximate cause makes no difference. The Plaintiff had an obligation to prove “collectability,” and did not do so. That is the only matter that has any relevance regardless of how labeled.

#### **V. CONCLUSION**

In this case, the Plaintiff failed to prove the essential element of her damages. While apparently Plaintiff’s counsel would like to direct blame elsewhere, the Court should reject such efforts as being self-serving efforts at deflection. Whether it was by choice, innocent mistake, or ignorance, the bottom line is that Plaintiff failed to prove an essential element of her case.

It was nobody’s obligation but her own attorney’s to understand the issues in her case, and to put on the appropriate proof. It is not defense counsel’s, nor the Defendant’s obligation, to instruct the Plaintiff as to what are the elements of her claim, nor is it an opposing counsel’s obligation to get

into evidence that his opposition may view to be relevant evidence on any particular point. This is still an adversarial system.

As it is, defense counsel did everything but write Plaintiff's counsel's Trial Brief with respect to what needed to be established as a measure of damages in the Plaintiff's case. Defense counsel, nor the Defendant, should be blamed for Plaintiff's counsel's strategic decisions and choices, but that is exactly what Plaintiff's counsel is trying to do, (cover up his own failings and blame others for his decisions). Plaintiff's self-serving and misleading Petition should be unequivocally denied.

The Court of Appeals got it right and there is no basis for acceptance of review under the standards set forth within RAP 13.4. The Court of Appeals' decision obviously is correct and any alleged "conflict" between appellate court decision only exists within Plaintiff's counsel's imagination.

DATED this 20<sup>th</sup> day of March, 2013.

A handwritten signature in black ink, appearing to read "Paul Lindenmuth", written over a horizontal line.

Paul Lindenmuth, WSBA# 15817  
Of Attorney for Appellant/Cross-Respondent

**DECLARATION OF SERVICE**

I, Heather Toney, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on this 20<sup>th</sup> day of March, 2013, a true and correct copy of: **CROSS-RESPONDENT COOGAN'S ANSWER TO PETITION FOR REVIEW** was e-filed with the Supreme Court.

E-mailed to the Supreme Court, via:

[supreme@courts.wa.gov](mailto:supreme@courts.wa.gov)

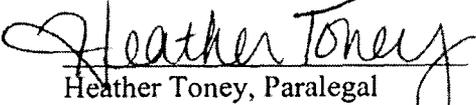
And e-mailed to:

[Dan@mcbdlaw.com](mailto:Dan@mcbdlaw.com)  
[David@mcbdlaw.com](mailto:David@mcbdlaw.com)  
[Reception@mcbdlaw.com](mailto:Reception@mcbdlaw.com)

And hand delivered to:

Dan' L. W. Bridges, Esq.  
325 118<sup>th</sup> Avenue SE Ste 209  
Bellevue, WA 98005  
Attorney for Respondent/Cross-Appellant

DATED this 20<sup>th</sup> day of March, 2013, at Tacoma, Pierce County, WA.

  
Heather Toney, Paralegal  
*The Law Offices of Ben F. Barcus*  
*& Associates, P.L.L.C.*  
4303 Ruston Way  
Tacoma, WA 98402  
253-752-4444

## OFFICE RECEPTIONIST, CLERK

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**To:** Heather Toney  
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**Subject:** Schmidt v. Coogan - No. 88460-9

Hello:

Attached please find Cross-Respondent Coogan's Answer to Petition for Review. There are 9 appendices to this document which will follow via regular U.S. Mail.

Please let me know if you have any questions.

Thank you,

Heather Toney

Heather Toney, Paralegal  
Law Offices of Ben F. Barcus & Associates, P.L.L.C.  
4303 Ruston Way  
Tacoma, WA 98402  
Phone: (253)752-4444  
Fax: (253)752-1035  
[heathert@benbarcus.com](mailto:heathert@benbarcus.com)

# APPENDIX NO. 1



00-2-12941-1 34483824 MMATH 06-15-10

The Honorable Carol Murphy  
Date of Hearing: June 25, 2010 at 9:00 a.m.

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**

TERESA SCHMIDT,  
  
Plaintiff,  
  
v.  
  
TIMOTHY P. COOGAN, et ux, et al,  
  
Defendant.

)  
)  
) NO. 00-2-12941-1  
)  
) **DEFENDANT'S MEMORANDUM OF**  
) **POINTS AND AUTHORITIES IN**  
) **OPPOSITION TO PLAINTIFF'S**  
) **MOTION FOR SUMMARY**  
) **JUDGEMENT RE: EMOTIONAL**  
) **DISTRESS DAMAGES ON A LEGAL**  
) **MALPRACTICE CLAIM**  
)  
)

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The following Memorandum of Points and Authorities is respectfully submitted on behalf of Defendants above-named and in opposition to Plaintiff's Motion for Partial Summary Judgment Re: the Availability of Emotion Distress Damages in a Legal Malpractice Claim.

**I. INTRODUCTION/RELEVANT PROCEDURAL BACKGROUND**

On December 19, 2003, the former trial judge in this matter, Daniel Bershauer (now retired), provided the following rationale for granting a new trial limited to the issues of damages only:

**ORIGINAL**

1  
2 This case is an example of what I will refer to as a "perfect storm." What I mean by  
3 that analogy is a set of circumstances which occurred in this trial, which as individual  
4 issues may not have resulted in my granting of a new trial on damages; however, the  
5 combination of these occurrences formed my conclusion that justice requires a new  
6 trial on the issue of damages. The first basis for my granting the motion for a new  
7 trial is with reference to the closing argument of Plaintiff's counsel. Plaintiff's  
8 counsel points out that the failure to object and the failure to request a curative  
9 instruction is most often deemed a waiver of that right. The case of Bellevue v.  
10 Kravik, correctly notes that absent an objection or request for a curative instruction,  
11 the issue of misconduct of counsel cannot be raised on appeal. However, the case  
12 does state there is an exception if the argument is so flagrant and ill-intentioned that  
13 no curative instruction would have obviated the prejudice. I specifically note that the  
14 argument beginning on page 44 at line 21, continuing through to page 45, line 10, is  
15 a clear request to the jury by Mr. Bridges to punish Mr. Coogan. It is clearly  
16 improper. It is clearly ill-intentioned in the sense that the Plaintiff's counsel sought  
17 to support a verdict on untenable grounds. When this comment take together with the  
18 overall tone of Plaintiff's counsel's argument, I conclude that the argument is  
19 improper, ill-intentioned, and an objection with a curative instruction would not have  
20 obviated the prejudice. The second reason I wish to discuss to support my decision of  
21 granting a new trial on the issue of damages is the excessiveness of the damage award.  
22 It is clear in the case law that when a jury verdict is deemed excessive by a trial court,  
23 ~~it is clear in the case law that when a jury verdict is deemed excessive by a trial court,~~  
24 ~~it is clear in the case law that when a jury verdict is deemed excessive by a trial court,~~  
25 cases which state what the case of Lian v. Stalick holds, and I am just going to paraphrase some of  
the quotations, but contained at page 24; "the damages must be so excessive as to unmistakably  
indicate that the verdict was a result of passion or prejudice. It must be so outside the range of the  
evidence or so great as to shock the court's conscience and the passions and the prejudice must be  
of such manifest clarity as to make it unmistakable." I think all counsel agreed that this is a very  
large burden for a party seeking to set aside a verdict of a jury based upon its excessiveness, but,  
in this case, I believe the burden has been satisfied. (Emphasis added).

(See, Exhibit "1" - Transcript of December 19, 2003, regarding Judge Bershauer's  
determination to grant Defendant's motion for a new trial, limited to the issue of damages).

Judge Bershauer's opinion goes on to provide at page 7 of the transcript that the economic  
damages awarded in this case were excessive and that the non-economic damages also were clearly  
excessive under the circumstances of this case. Judge Bershauer indicated at page 8 that he made a  
substantial evidentiary error when he allowed insurance evidence to be presented to the jury, what was  
also an inappropriate "plea of poverty." (*Id.*, page 9). With respect to the issue currently before this

1  
2 Court, at page 9, Judge Bershauer noted that issues had been raised by the Defendant as to whether  
3 or not there could be general damages for malpractice *qua* malpractice, or whether a claim of  
4 emotional distress damages had to be supported by a separate cause of action. He also noted that the  
5 there was an issue regarding the specific bills (which totaled about \$3,840.00, plus finance charges  
6 and interest), were supported by the evidence as being reasonable. *Id.*

7  
8 With regard to these issues, Judge Bershauer provided the following:

9 *I am not going to address these issues specifically by way of ruling, but I note that they*  
10 *are issues that will have to be addressed on re-trial, and counsel should not try to*  
11 *argue to the new trial judge on re-trial that my decisions are binding. I don't intend*  
12 *that they should be binding. I intend that they be reviewed de novo as I hope any trial*  
13 *judge would.*

14 Thereafter, following admitted delay, Judge Bershauer, on or about January 9, 2007, entered  
15 detailed Findings of Fact and Conclusions of Law, after a full hearing and argument. (See, Exhibit  
16 "2"). Once again, at Finding of Fact number 1.11, Judge Bershauer concluded that trial events were  
17 as such that, "the cumulative effect of the above was unfairly prejudicial to the Defendants and denied  
18 the Defendants a fair trial." Consistent with such a theme, Judge Bershauer also determined at  
19 Conclusion of Law number 2.7, reiterated that the "cumulative effect of error at the trial" prevented  
20 the Defendants from receiving a fair trial.

21 In other words, although Judge Bershauer did not specifically rule that it was inappropriate for  
22 the Plaintiff to argue general damages an act of malpractice, it is clear that he did not intend his ruling  
23 to be binding upon the current trial judge regarding such issue, and Defendants' arguments to the  
24 contrary regarding "judicial estoppel" is simply factually inaccurate and unsupportable by the record.  
25 In addition, to the extent that the Plaintiff is currently trying to argue that because this issue is still

1  
2 pending, they have been somehow "prejudiced," it is noted that as early as Defendant's Motion for  
3 a New Trial And/or for JNOV, which was filed on December 12, 2003, the Plaintiff has had notice  
4 of Defendants' claim of latent irregularities and/or errors within the damage instructions in this case,  
5 that improperly allowed for general damages, for the "malpractice." As discussed below, there is no  
6 indication that this issue has been resolved by Washington's appellate courts, and that this Court is  
7 bound by any other rulings of any court, whether appellate or trial.  
8

9 Defendants' reply brief filed in the Court of Appeals, was attached as "Exhibit 8" to  
10 Defendants' Opposition to Plaintiff's Motion to Amend Complaint, which is fully incorporated by this  
11 reference. Clearly, on appeal, the issue of general damages for malpractice per se, was squarely before  
12 our appellate courts. If one reviews the appellate opinions on file herein, it is clear that the appellate  
13 court, like the trial court, simply left that issue to be addressed by the trial court on re-trial. It is noted  
14 that in the first opinion in this case, *Schmidt v. Coogan*, 135 Wn.App 605, 145 P.3d 1216 (2006),  
15 Defendant prevailed on his cross-appeal that the Plaintiff had failed to prove "the case within a case,"  
16 i.e., liability for the underlying slip and fall, thus it was unnecessary for the appellate court to address  
17 all other issues framed by the appellate briefs. It is noted that the first *Schmidt v. Coogan*, opinion  
18 concludes at page 135 Wn.App at 613 the following:  
19

20 *Because Schmidt failed to prove the notice element of her underlying slip and fall case,*  
21 *Coogan was entitled to judgment as a matter of law and we need not discuss the other*  
22 *issues. We reverse and remand for the action to be dismissed. (Emphasis added).*

23 Also, as is self-evident, the Washington State Supreme Court disagreed with this conclusion,  
24 see, *Scmidt v. Coogan*, 162 Wn.2d 488, 173 P.3d 273 (2007), and ultimately reversed the  
25 determination of non-liability with directives "**we reverse the Court of Appeals and remand to that**

1  
2 **court for consideration of the remaining issues.”** (Emphasis added). See, *Schmidt v. Coogan*, 162  
3 Wn.2d at 493.

4       Following remand in an unpublished opinion (which is still the law of this case), the appellate  
5 court only addressed two of the issues raised by the Defendants in this case, i.e., the absence of legal  
6 expert testimony and the propriety of the trial court’s determination to grant a new trial limited to the  
7 issue of damages. As the appellate court found the jury’s award of economic damages unsupported  
8 by the evidence as a basis for the grant of a new trial, it did not have to delve into the other issues such  
9 as jury instruction questions in order to affirm the trial court’s decision to grant such a new trial.  
10 However, the Court of Appeals, in its unpublished opinion, did touch on the general damage award  
11 in a manner that between the lines one can read a skepticism as to the viability of a \$180,000.00  
12 general damage award for a slip and fall injury that generated only \$3,840.00 in medical bills (plus  
13 interest and finance charges, which were improperly included). Clearly, the appellate court rejected  
14 the notion that the Plaintiff was entitled to both an award for “the value of the underlying claim,” and  
15 an award of general damages representing “the value of the abuse to which Mr. Coogan subjected  
16 Ms.Schmidt.” In other words, under the claim that was brought by the Plaintiff herein, it should be  
17 noted that there is simply no basis for the potential for two different sources and/or types of recovery.  
18

19  
20       In any event, it is noted that based on this procedural history, the Plaintiff’s contention that the  
21 issue of the propriety of general damages for malpractice was not raised previously, is simply frivolous  
22 and unsupported by the record. This is a matter on which Judge Bershauer considered and decided  
23 would be better determined by the new judge assigned to the case at time of re-trial. The Court of  
24 Appeals had such issue before it, but did not have to reach such issues, because there were also other  
25 glaring flaws during the course of the first trial. It is also noted that the primary basis upon which

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2 Judge Bershauer granted a new trial limited to the issue of damages, was based upon Mr. Bridges  
3 improper and flagrantly ill-intentioned closing argument, yet that basis for the grant of a new trial was  
4 not addressed by any appellate opinions herein, (Perhaps, mercifully, from Mr. Bridge's point of  
5 view). It is suggested the because the appellate court did not pass on Mr. Bridges' misconduct, can  
6 not be viewed as appellate endorsement of such behavior, and permission for a repeat performance  
7 on re-trial.

8  
9 In addition, it is noted that nowhere is there any reference within the appellate opinions  
10 regarding Mr. Coogan's alleged workplace misconduct and/or what could be characterized as abusive  
11 behaviors. Obviously, if the appellate court found such behavior to be significant, it clearly would  
12 have indicated as such because as the current trial court is no doubt aware, that the Plaintiff, within  
13 its appellate briefing, if recalled correctly, was pounding that drum loudly. Yet, such allegations did  
14 not warrant a comment by the appellate courts. It is frivolous for the Plaintiff to be arguing in this  
15 case that in all instances appellate courts' failure to provide provide guidance on issues is tantamount  
16 to a decision, when the resolution of such issues were not needed in either affirming or reversing the  
17 rulings of a trial court.

18 It is noted that Mr. Coogan did not testify at time of trial because of serious medical issues.  
19 Mr. Coogan is a quadriplegic, and at the time of trial was suffering complications from his severe  
20 physical condition. It is noted however, that Mr. Coogan in his deposition did deny that he used  
21 abusive language toward Ms. Schmidt. (See, Exhibit "3" - Deposition excerpt of Coogan, pp.29 and  
22 30). Further, it is noted that this is a case where if one examines the damages, and excludes the  
23 Plaintiff's efforts to submit evidence which obviously violates ER 403 and ER 404 (b), this is in  
24 reality a "MAR" case, with \$3,840.00 in medical bills, that were spread out sporadically over an eight-  
25

1  
2 month treatment period. Thereafter, given Ms. Schmidt's multiple other accidents and incidents, it  
3 would be nearly impossible to say that the underlying injury, in any way, shape or form, had  
4 permanent impacts, or would not otherwise be overshadowed by her subsequent injuries and/or  
5 accidents. The Plaintiff is aware, in a fair trial, there is only a remote possibility that the Plaintiff will  
6 ever be awarded an amount even close to \$212,000.00, which included an unauthorized award of  
7 general damages for malpractice *qua* malpractice. This is not the law within the State of Washington,  
8 nor will it ever be. It is noted while giving Mr. Bridges credit for some level of creative advocacy,  
9 he is clearly mis-stating the law within the State of Washington, is failing to identify to the Court that  
10 his argument is an effort to advocate an advancement of the law within the State of Washington to  
11 include such damages, when in fact any reasonable interpretation of Washington law indicates such  
12 general damages for malpractice are simply unavailable. The law within the State of Washington, as  
13 discussed below, is well-established as to what damages are available for legal malpractice, and such  
14 damages are limited as to the value of the underlying claim, with slight modification.  
15

## 16 II. ARGUMENT

17 One can question whether or not this is a proper motion for summary judgment. It certainly  
18 appears to be more or less an effort to gain a declaratory ruling from the trial court, or it is some form  
19 of an offensive motion in limine, designed to ensure what evidence can or cannot be admitted at time  
20 of trial. As the Plaintiff has invoked CR 56, it is noted that there are genuine issues of material fact  
21 with respect to the alleged "abusive behavior of Mr. Coogan," and certainly Ms. Schmidt's allegations  
22 cannot be taken as being undisputed. (See, Deposition of Coogan, pp. 29 and 30).  
23

24 Further, as the Defendant has invoked CR 56, it is noted that under CR 56, even though the  
25 Defendant in this case has not moved for summary judgment on these questions, the Court is fully

1  
2 authorized to grant summary judgment in the Defendant's favor, even in the absence of such a motion.  
3 See, *Rubensen v. Felice*, 58 Wn.2d 862, 365 P.2d 320 (1961), *Impecoven v. DOR*, 120 Wn.2d 357,  
4 841 P.2d 752 (1992) <sup>1</sup>

5 In order to resolve this issue, the trial court need go no further than the recent Supreme Court  
6 opinion in *Shoemake v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010), wherein the Supreme Court  
7 found that it was inappropriate in a legal malpractice case, involving personal injury, to deduct from  
8 the award of damages the contingency fee that the negligent lawyer otherwise would have earned had  
9 he successfully pursued the claim. The Supreme Court declined to allow for the deduction of the  
10 hypothetical contingency fee, adopting Division I's rationale that it would otherwise result in the client  
11 having to pay twice for the same services, i.e., not only would there be a deduction for the contingency  
12 fee that would have been earned, had the defendant attorney not acted negligently, but also likely a  
13 contingency fee would have to be paid to the lawyer pursuing the malpractice claim.

14  
15 When reaching such a result, the Court made no reference to the notion that there could be a  
16 general damages award available for the malpractice per se. In other words, as the measure of  
17 damages in a legal malpractice claim involving personal injury is the value of the underlying personal  
18 injury claim, there could be a substantial rationale for not deducting out the negligent attorney's  
19 contingent fee, because it would not create a burdensome double reduction for attorney's fees to  
20 discouraging claims on behalf of persons who were injured by a negligent lawyer. Such a rationale  
21 and/or calculus would be entirely different, if in fact the client could acquire an award of general  
22

23  
24 \_\_\_\_\_  
25 <sup>1</sup> Naturally, the Defendant intended to address such evidentiary issues, prior to trial, by way of motions in limine by moving to exclude any evidence regarding Mr. Coogan's alleged "abusive behavior," which has no relevance to any issue of damages in this case.

1  
2 damages for the malpractice, from which a contingency could be paid to the lawyer pursuing the  
3 malpractice claim, thus not resulting in a substantial reduction of the award otherwise available to the  
4 client. In other words, if general damages were available for "malpractice" the recent *Shoemake v.*  
5 *Ferrer*, opinion simply would not make sense, nor would the Supreme Court have ignored the  
6 availability of such general damages in its analysis.

7  
8 Further, to reach such a result would eviscerate the notion of "proximate cause" applicable to  
9 legal malpractice cases. As explained in *Aubin v. Barton*, 123 Wn.App 592, 606-607, 98 P.3d 126  
10 (2004), the usual principles of proof and causation in a legal malpractice action do not differ from  
11 ordinary negligence:

12 *Where it is alleged that an attorney committed malpractice in the course of litigation,*  
13 *the trial court in the malpractice claim retried, or tried for the first time, the client's*  
14 *cause of action that the client contends was lost or compromised by the attorney's*  
15 *negligence, and the trier of fact decides whether the client would have fared better but*  
16 *for the alleged mishandling. Thus, to prove causation, the client must show that the*  
*outcome of the underlying litigation would have been more favorable, but for the*  
*attorney's negligence. The proof typically requires "a trial within a trial." (Citations*  
*omitted).*

17  
18 Stated another way, in a malpractice setting, the plaintiff must demonstrate that he or she  
19 would have prevailed, or at least would have achieved a better result had the attorney not been  
20 negligent. See, *Estep v. Hamilton*, 148 Wn.App 246, 210 P.3d 331 (2009). Typically, that means it  
21 is the burden on the plaintiff to establish in order to prove damages in a legal malpractice case, what  
22 they would have acquired had the case been appropriately handled. In this context, obviously had Mr.  
23 Coogan performed without negligence, what Ms. Schmidt would have acquired was a judgment which  
24 provided a determination of the valuation of the underlying personal injury she suffered in the slip and  
25 fall accident. There is no case law nor authority indicating to the contrary.

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The case of *Lavigne v. Chase, Haskell, Hayes and Kalamon, P.S.*, 112 Wn.App 677, 550 P.3d 306 (2002), provides a reasonable example of the interplay between proximate cause and damages in the legal malpractice context. In that case, the attorneys involved were negligent by failing to properly renew an out-of-state judgment. Nevertheless, the trial court dismissed the case because the plaintiff had failed to muster evidence that the underlying judgment would ever have been collectable. The Court of Appeals reversed, although upholding the trial court on the issue that it was the plaintiff's burden to establish collectability, it nevertheless found that there were issues of material fact regarding the question of collectability. In *Lavigne*, at 684-86, the appellate court explored damages in legal malpractice cases:

*The measure of damages for legal malpractice the amount of loss actually sustained as a proximately result of the attorney's conduct. As the Matson court further reasoned: "courts consider the collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: it would be inequitable for the plaintiff to be able to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party." ... (Citations omitted).*

In this case, essentially Ms. Schmidt is seeking to collect from Mr. Coogan an amount of money she could otherwise not have collected from the underlying tortfeasor, the Grocery Outlet defendant. In other words, she is seeking a windfall in that she is seeking a judgment "which is greater than the judgment the plaintiff could have collected from the third party." *Id.*

As the *Lavigne* case further indicates, the reason why "collectability" is an element of a legal malpractice plaintiff's case is to prevent the acquisition of such a windfall:

*The majority of jurisdictions require the plaintiff to prove collectability. The policy basis for this approach is to avoid awarding the aggrieved more than he or she would have recovered had the attorney not been negligent." As one of these courts reasoned "in a malpractice action, a plaintiff's 'actual injury' is measured by the amount of*

1  
2 *money she would have actually collected had her attorney not been negligent.*"  
3 *Klump v. Duffus*, 71 F.3d 1368, 1374 (7<sup>th</sup> Cir. 1995). (Emphasis added).

4 *Hypothetical damages beyond what the plaintiff would have genuinely collected from*  
5 *the judgment creditor "are not a legitimate portion of her 'actual injury' and*  
6 *awarding her damages would result in a windfall. Stated another way, these*  
7 *jurisdictions tend to view collectability as a component of the plaintiff's prima facie*  
8 *case."* (Citations partially omitted; emphasis original).

9 Thus, it can be reasonably stated under Washington Law Ms. Schmidt's damages are limited  
10 to her "actual injuries", i.e., what she would have acquired in her claim against the Grocery Outlet and  
11 no more.

12 Further, it is noted that despite Ms. Schmidt's policy arguments, it is suggested that if the  
13 Supreme Court in Washington had intended that general damages be available for malpractice, it  
14 would have clearly said so in the number of legal malpractice cases that have been decided within the  
15 appellate courts in the State of Washington. Naturally, anyone who has had their lawyer fail to  
16 perform adequately and negligently would be upset by the lawyer's conduct. Nevertheless, our courts  
17 have consistently held that the measure of damages is limited by case within a case principles, and  
18 thus, all of the damages that are available to a plaintiff, particularly in a personal injury claim, is the  
19 value of the underlying claim itself, no more and no less.

20 While Plaintiff in this matter may be making arguments that have some superficial level of  
21 appeal, what is being suggested by the Plaintiff is clearly not the law within the State of Washington,  
22 and it is suggested that the appropriate role of a trial court is to interpret and enforce the law as it is,  
23 as opposed to manufacturing new law for application in the specific cases that comes before it. There  
24 is no legal support for the Plaintiff's contention that emotional distress damages are available for  
25

1  
2 “malpractice” and the law in the State of Washington, though perhaps not clear, generally indicates  
3 to the exact contrary.

4 Further, efforts to analogize medical malpractice to “insurance bad faith cases” have previously  
5 been rejected by our appellate courts. See, *Kommavongsa v. Saskell*, 149 Wn.2d 288, 67 P.3d 1068  
6 (2003), and *Kim v. O’Sullivan*, 133 Wn.App 557, 137 P.3d 61 (2006). In *Kommavongsa*, the Supreme  
7 Court held that the assignment of an attorney malpractice claim to an opposing party as a party of a  
8 settlement agreement, violates public policy for the reasons state therein. In *Kim v. O’Sullivan*, the  
9 parties tried to avoid the public policy announced in *Kommavongsa* by acquiring as part of a personal  
10 injury settlement agreement that the client bring the legal malpractice action in order to fund an  
11 underlying settlement. Under the terms of the settlement agreement, despite the fact that the client  
12 was the putative plaintiff in the legal malpractice action, the opposing party in the underlying case  
13 maintained the right to control the malpractice litigation and to approve any and all settlements of that  
14 litigation.  
15

16 Based on the public policy principles set forth in the *Kommavongsa* case, the Court of Appeals  
17 in *Kim* rejected such efforts to evade the rule that attorney malpractice claims cannot be assigned to  
18 an opposing party.

19 In reaching such a result, the Court of Appeals in *Kim*, rejected the application of insurance  
20 bad faith principles, which otherwise would have allowed the underlying stipulated judgment to be  
21 “presumptive damages.” Rejecting such an analogy, the Appellate Court reasoned that not only  
22 would such efforts violate *Kommavongsa*’s prohibition against assignment of claims, but would result  
23 in a windfall to the underlying plaintiffs, who were simply trying to replace the underlying policy  
24 limits for whatever policy limits that the negligent attorney carried as malpractice insurance coverages.  
25

1  
2 In other words, the appellate court, at least in one instance, has already rejected any analogy  
3 or comparisons of insurance bad faith claims to attorney malpractice claims.

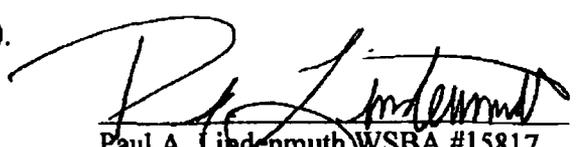
4 In any event, there is no support for the proposition that insurance bad faith damage principles  
5 have any application in the attorney malpractice context. In fact, there are reasons why such an  
6 analogy should not be applied, including that it would do nothing more than to provide a windfall to  
7 the plaintiff above and beyond their actual damages.

8 There is no authority for the position taken by the Plaintiff herein, and clearly, there is nothing  
9 precluding the current trial court from considering this issue.

10 **III. CONCLUSION**

11 When a new trial is granted, prior rulings are are vacated and have no impact. See, *Hudson*  
12 *v. Hapner*, 146 Wn.App 280, 187 P.3d 31 (2008), review granted – Wn.2d – (2009). Here, all issues  
13 relating to damages are for the current trial judge to address in the first instance. For the reasons stated  
14 above, Plaintiff's Motion for Summary Judgment Re: Malpractice General Damages should be denied.  
15 In fact, based on this record, it is respectfully suggested that an Order Granting the Defendant  
16 Summary Judgment on this issue should be provided.

17  
18 DATED this 14 day of June, 2010.

19   
20 Paul A. Lindenmuth WSBA #15817  
21 Attorney for Defendant

**RECEIVED**

**JAN 08 2004**

**BEN F. BARCUS  
ATTORNEY AT LAW**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

---

TERESA SCHMIDT, )  
 )  
Plaintiff, )  
 )  
vs. ) SUPERIOR COURT NO.  
 ) 00-2-12941-1  
TIMOTHY P. COOGAN, et al., )  
 )  
Defendants. )

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VERBATIM REPORT OF PROCEEDINGS

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BE IT REMEMBERED that on December 19, 2003, the  
above-entitled and numbered cause came on for hearing  
before JUDGE DANIEL BERSCHAUER, Thurston County Superior  
Court, Olympia, Washington.

**COPY**

Pamela R. Jones, Official Court Reporter  
Certificate No. 2154  
P. O. Box 11012  
Olympia, WA 98508-1012  
(360) 754-3355 Ext. 6484

**Exhibit**   1  

**A7**

1

A P P E A R A N C E S

For the Plaintiff: DAN'L W. BRIDGES  
Via Telephone Attorney at Law  
7610 40th Street West  
University Place, WA 98466

For the Defendant: PAUL LINDENMUTH  
Via Telephone Attorney at Law  
4303 Ruston Way  
Tacoma, WA 98402

1 December 19, 2003

Olympia, Washington

2 AFTERNOON SESSION

3 Department 7 Hon. Daniel Berschauer, Presiding

4 APPEARANCES VIA TELEPHONE:

5 Representing the Plaintiff, Dan'l Bridges,  
6 Attorney at Law; representing the Defendant,  
7 Paul Lindenmuth, Attorney at Law.

8 Pamela R. Jones, Official Reporter

9 --oo0oo--

10 THE COURT: We can go on the record.

11 For the record, this is the case of Teresa Schmidt  
12 versus Timothy Coogan, Pierce County Cause  
13 No. 00-2-1294-1. The defendant, Timothy Coogan,  
14 and his law firm moves for a new trial or, in the  
15 alternative, moves for reconsideration of some of  
16 the Court's trial decisions or, an additional  
17 alternative, for a remittitur.

18 After oral argument last week, I continued  
19 this ruling with the hope that the parties would  
20 settle the case. I announced then that I would do  
21 something with regard to the defendant's motions  
22 as opposed to nothing. This oral decision will  
23 outline the relief I have granted to the  
24 defendant, Timothy Coogan.

25 Coogan renews his request for a directed  
verdict of dismissal because, in his argument,

1           there is insufficient evidence as a matter of law  
2           on the underlying negligence claim against Grocery  
3           Outlet. That request is denied.

4           I adopt my previous ruling made during the  
5           trial by simply referencing it. There is  
6           sufficient unrebutted evidence and reasonable  
7           inferences from that evidence for a reasonable  
8           juror to conclude by a preponderance of the  
9           evidence that the Grocery Outlet store was  
10          negligent.

11          Mr. Coogan also argues that expert testimony  
12          was necessary to support the plaintiff's claim of  
13          legal malpractice. I conclude that no testimony  
14          is necessary given the fact that Mr. Coogan  
15          admitted at that deposition that the conduct that  
16          was alleged was negligent, and further given the  
17          unrebutted and unchallenged evidence in this case.  
18          Again, my previous rulings on the issue are simply  
19          adopted by referencing my trial decision.

20          Based on these two rulings, I conclude that  
21          the jury's verdict as to liability is supported by  
22          the evidence and the law. Therefore, the  
23          defendant's motion for a directed verdict, or, in  
24          the alternative for a new trial, are both denied.

25          The remaining issues relate to the damages

1 awarded by the jury. For the reasons that follow,  
2 the defendant's motion for a new trial is granted  
3 as to damages only.

4 The case law governing granting a new trial  
5 is clear. Only unusual circumstances will support  
6 such a ruling. For a variety of reasons, I  
7 believe such a decision is the only appropriate  
8 ruling. I note that I cannot recall granting such  
9 a motion but in only one prior case.

10 This case is an example of what I will refer  
11 to as *A Perfect Storm*. What I mean by that  
12 analogy is a set of circumstances which occurred  
13 in this trial, which as individual issues may not  
14 have resulted in my granting a new trial on  
15 damages; however, the combination of these  
16 occurrences supports my conclusion that justice  
17 requires a new trial on the issue of damages.

18 The first basis for my granting the motion  
19 for a new trial is with reference to the closing  
20 argument of plaintiff's counsel. Plaintiff's  
21 counsel points out that the failure to object and  
22 the failure to request a curative instruction is  
23 most often deemed a waiver of that right.

24 The case of Bellevue vs. Kravik correctly  
25 notes that absent an objection and request for a

1 curative instruction, the issue of misconduct of  
2 counsel cannot be raised on appeal. However, the  
3 case does state there is an exception, if the  
4 argument is so flagrant and ill-intentioned that  
5 no curative instruction would obviate the  
6 prejudice. I specifically note that the argument  
7 beginning on Page 44 at Line 21, continuing  
8 through to Page 45, Line 10, is a clear request to  
9 the jury by Mr. Bridges to punish Mr. Coogan.  
10 It's clearly improper. It is clearly  
11 ill-intentioned in the sense that plaintiff's  
12 counsel sought to support a verdict on untenable  
13 grounds. When this comment taken together with  
14 the overall tone of plaintiff's counsel's  
15 argument, I conclude that the argument is  
16 improper, ill-intentioned, and an objection with a  
17 curative instruction would not obviate the  
18 prejudice.

19 The second reason I wish to discuss  
20 supporting my decision to grant a new trial on the  
21 issue of damages is the excessiveness of the  
22 damage award. It is clear in the case law that  
23 when a jury verdict is deemed excessive by a trial  
24 court, that can be the basis for an award of a new  
25 trial. I want to briefly quote from an opinion at

1 Page 24 of Mr. Jensen's brief in support of a  
2 motion for a new trial, but there are many cases  
3 which state what the case of Lian vs. Stalick  
4 holds, and I'm just going to paraphrase some of  
5 the quotation, but contained at Page 24.

6 "The damages must be so excessive as to  
7 unmistakably indicate that the verdict was a  
8 result of passion or prejudice. It must be  
9 outside the range of evidence or so great as to  
10 shock the court's conscience, and the passion or  
11 prejudice must be of such manifest clarity as to  
12 make it unmistakable."

13 I think all counsel will agree that that is a  
14 very large burden for a party seeking to set aside  
15 a verdict of a jury based upon its excessiveness,  
16 but, in this case, I believe the burden has been  
17 satisfied.

18 First I'll deal with the award of past  
19 economic damages. The jury awarded some \$32,000  
20 for past economic damages. In my judgment, that  
21 is clearly excessive because it is absolutely  
22 unsupportable from the evidence in the case. Just  
23 as importantly, in my judgment it is a clear  
24 indication that that portion of the verdict was  
25 affected by prejudice. By itself if it could be

1 excised from the overall damage award of the jury,  
2 this Court may have adjusted that award by way of  
3 remittitur. However, I've already indicated and  
4 repeat that my decision today is based upon the  
5 totality of circumstances.

6 I also conclude that the award for  
7 non-economic damages is clearly excessive as well.  
8 In my judgment, this award is well beyond what  
9 actually plaintiff's counsel suggested during  
10 argument and well beyond what I would consider  
11 that is a reasonable range of acceptable jury  
12 awards given the evidence in this case. I also  
13 must note that this award is also suspect because  
14 of the prejudice I've already referred to, and, in  
15 my judgment, was clearly demonstrated by the  
16 jury's award for past economic damages which could  
17 not be supported by any inference from the  
18 evidence produced by the plaintiff.

19 I also accept some responsibility for my  
20 ruling regarding insurance. I allowed plaintiff's  
21 counsel to ask his client to testify, over  
22 objection, to the fact that she lacked medical  
23 insurance. I did so to allow her to testify about  
24 finance charges which she was claiming as  
25 additional damages. In hindsight, I should have

1           either sustained the objection or at least limited  
2           the use of the evidence. What is now clear to me  
3           is that the jury may very well have used the  
4           evidence of, quote, poverty, unquote, to enhance  
5           their award of damages. The excessiveness of the  
6           damage award is evidence, in my judgment, that  
7           this factor may have played a part in their  
8           decision.

9           I will note for the record that the  
10          defendants raise additional issues with regard to  
11          the damage claim and the damage award. The  
12          defendants argue that there could have been no  
13          possible claim for malpractice beyond the  
14          underlying negligence claim against the grocery  
15          store. The defendants submit that such a claim,  
16          if it was to be brought before the jury, would  
17          have to be based upon an independent cause of  
18          action such as the tort of outrage or negligent  
19          infliction of emotional distress.

20          The defendants also argue that there is no  
21          evidence supporting the reasonableness of specific  
22          charges for past medical expenses and those bills  
23          should have not been presented to the jury. I'm  
24          not going to address these issues specifically by  
25          way of ruling, but I note they are issues that

1 will have to be addressed on retrial, and counsel  
2 should not try to argue to the new trial judge on  
3 retrial that my decisions are binding. I don't  
4 intend that they should be binding. I intend that  
5 they be reviewed de novo, as I hope any trial  
6 judge would.

7 I've included them here in my list of reasons  
8 why a new trial is necessary because I recognize  
9 that these are honestly debatable issues and have  
10 some overall impact upon granting a new trial. I  
11 want to be specific as to why I have not utilized  
12 the remittitur procedure. If the constellation of  
13 circumstances were not so pervasive I could have  
14 done so. For example, if the only error involved  
15 an unsupportable award for past economic damages,  
16 then a remittitur would have been the appropriate  
17 remedy. However, in this case for the reasons  
18 already given, I conclude that the combination of  
19 circumstances clearly resulted in an excessive  
20 award of damages and is clear evidence that the  
21 jury unfairly prejudiced Mr. Coogan by its  
22 excessive award.

23 To allow this verdict on damages to stand  
24 would be contrary to the principles of justice  
25 that I have stood for my entire career. I am

1 keenly aware that this decision to grant a new  
2 trial on the issue of damages will result in  
3 additional delay and expense to all parties. I'm  
4 also aware even though I am not a citizen of  
5 Pierce County, that those citizens through their  
6 tax dollars will have to pay for a retrial of this  
7 case. I have want to assure counsel that my  
8 decision today has not been an easy one. I want  
9 to especially acknowledge the difficulty I always  
10 have in recognizing my role in this process. I am  
11 aware that my decision today is appealable by both  
12 parties.

13 I want to close by once again suggesting that  
14 even though I've granted the motion for a new  
15 trial as to damages only, I hope that the parties  
16 and their lawyers will sit down, explore the  
17 possibility of settlement, and, in quoting my  
18 former colleague, Robert Doran, exercise all  
19 reasonable efforts to resolve this case by  
20 settlement. If counsel needs clarification, I  
21 will attempt to respond.

22 MR. LINDENMUTH: Your Honor, Paul  
23 Lindenmuth here. Just a couple quick points. I  
24 think there's a requirement under the terms of --  
25 I'm not sure which rule, but I think we have to do

1 findings of fact and conclusions of law to support  
2 your order, so could I ask Madam Court Reporter to  
3 go ahead and type this up, or Mr. Court Reporter,  
4 I'm not sure.

5 THE COURT: It is Madam Court Reporter.

6 MR. LINDENMUTH: Madam Court Reporter  
7 to type this up, and we would like to order a copy  
8 of the transcript so we could draft appropriate  
9 findings of fact and conclusions of law.

10 THE COURT: What I will let you do  
11 after we complete the conference call on the  
12 record, I will let her talk to you directly and  
13 she can tell what you she requires.

14 MR. LINDENMUTH: Thank you, Your Honor.

15 THE COURT: Are there any other issues  
16 for clarification?

17 MR. BRIDGES: No.

18 THE COURT: I do agree with Mr.  
19 Lindenmuth, I recall the last time and the only  
20 time I've granted a new trial under these  
21 circumstances there were findings of fact that I  
22 had to make, and obviously the conclusions of law  
23 are pretty clear. I would ask counsel to  
24 cooperate with each other in producing those  
25 findings so that they can be noted for

1 presentation if they're not agreed upon, or, if  
2 agreed upon, they can simply be submitted to me as  
3 a matter of formality and by ex parte procedure.

4 What I also want to indicate is that since I  
5 have granted a new trial as to damages, I assume  
6 that that automatically stays the previous  
7 judgment signed by Judge McCarthy. Do I need to  
8 sign a separate order so stating?

9 MR. BRIDGES: I wouldn't flaunt the  
10 intent of your order here today, Your Honor, by  
11 trying to execute on that judgment, regardless of  
12 what the requirements were.

13 MR. LINDENMUTH: Your Honor, I may just  
14 draw a line in the findings of fact and  
15 conclusions of law in that regard, that's fine.

16 THE COURT: If there are no other  
17 questions, that closes these proceedings. I'll  
18 let you both remain on the line and you can talk  
19 to the reporter.

20 MR. BRIDGES: I would like to stay on  
21 the record for a moment, if I could. My  
22 understanding of the Court's ruling is that your  
23 oral ruling here today is, of course, instructive  
24 to us in terms of drafting findings of fact and  
25 conclusions of law, but until the signature entry

1 of findings of fact and conclusions of law takes  
2 place, the calculation of 30 days for the time of  
3 appeal does not begin. That's my understanding.  
4 You are not trying to direct us based on your oral  
5 ruling today for the time for appeal starts today.

6 MR. LINDENMUTH: Your Honor, I think  
7 there has to be an order to trigger an appeal.  
8 Whether that would be findings of fact and  
9 conclusions of law is beyond my analysis at this  
10 time.

11 MR. BRIDGES: I agree with what Paul  
12 just said, but I have seen occasionally in the --  
13 every so often you get situations the court will  
14 note that the trial court went to such length in  
15 their oral opinion, I don't want there to be any  
16 confusion as to when the clock starts ticking.

17 THE COURT: I can't speak to when the  
18 time for appeal runs. What I can say is that I  
19 believe until I sign a formal order granting a new  
20 trial that there's nothing from which to appeal.  
21 Now, I can't speak any more than saying that, but  
22 that's my understanding.

23 As far as the calculation of that time, that  
24 would be an advisory opinion of which I am not  
25 prepared to give.

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MR. BRIDGES: Right. I suppose it's rather moot. I wouldn't wait until the last day anyway.

MR. LINDENMUTH: I think there has to be at least an order, whether it's the actual findings of fact and conclusions of law, whether it's the final order, the clock starts ticking.

MR. BRIDGES: And, as I understand, defendant did not submit anything for you to sign today, Judge.

THE COURT: I'm not signing anything today and I would not sign it unless it had been an agreed order or unless it had been formally presented for presentation.

MR. BRIDGES: I apologize, Your Honor. This is presumptuous. A lot of this is logistics.

THE COURT: Let's go off the record.

\* \* \* \* \*

CERTIFICATE OF REPORTER

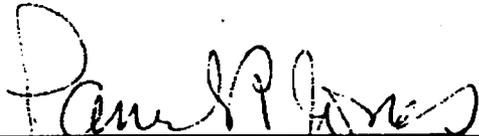
STATE OF WASHINGTON )

COUNTY OF THURSTON )

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 5<sup>th</sup> day of January, 2004.

  
PAMELA R. JONES, RMR  
Official Court Reporter  
Certificate No. 2154

FILED  
SUPERIOR COURT  
THURSTON COUNTY WASH

05 JAN -7 10:42

NETTY J. GORDON CLERK

BY — The Honorable Visiting Daniel Berschauer  
DEPUTY in Thurston County

SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY

TERESA SCHMIDT,

Plaintiff

v.

TIMOTHY P. COOGAN and "JANE DOE"  
COOGAN and the marital community comprised  
thereof; and THE LAW OFFICES OF  
TIMOTHY PATRICK COOGAN and all  
partners thereof,

Defendant.

NO. 00-2-12941-1

DEFENDANT COOGAN'S PROPOSED  
FINDINGS OF FACTS AND  
CONCLUSIONS OF LAW

THIS MATTER having come before this Court on Defendant's Motion for a New Trial/Remittitur and/or for Reconsideration and the Court having considering the submissions of the party and oral argument of counsel for the Plaintiff, Dan'l W. Bridges and Paul Lindenmuth hereby makes the following Findings of Facts and Conclusions of Law and Order Granting a New Trial Limited to the Issues of Damages Only.

I. FINDINGS OF FACTS

1.1 That this matter was tried before a jury of 11 from the period of November 17 through November 19, 2003. The jury herein rendered a verdict in favor of the Plaintiff, Teresa Schmidt on

Law Offices Of Ben F. Barcus  
& Associates, P.L.L.C.  
4303 Ruston Way  
Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035

DEFENDANT COOGAN'S PROPOSED FINDINGS  
OF FACTS AND CONCLUSIONS OF LAW - 1

Exhibit 2

FILE COPY

1  
2 November 20, 2003 on a claim of legal malpractice, (professional negligence,) in the gross amount  
3 of \$212,000.00. The verdict was comprised of \$32,000.00 for "past economic damages" and  
4 \$180,000.00 for her "non-economic damages."

5 1.2 During the course of trial Defendant moved for a directed verdict of dismissal at the close of  
6 Plaintiff's case in chief on the grounds that Plaintiff failed to present sufficient evidence to establish  
7 a prima facie case of the grocery store's negligence in the underlying slip and fall case, which for the  
8 purposes of this legal malpractice case constitutes the case within the case. The Court denied  
9 Defendant's motion for dismissal.

10  
11 1.3 During the course of trial, Plaintiff presented four lay witnesses including herself and one  
12 medical witness regarding her personal injuries. During the course of trial the Plaintiff presented no  
13 legal expert testimony to establish or explain to the jury the standard of care applicable to an attorney  
14 practicing law within the State of Washington.

15 1.4 During the course of trial, the Court finds that the Plaintiff presented sufficient evidence with  
16 respect to the case within a case, that the grocery store, who was the Defendant in the underlying case,  
17 was negligent. The Court finds that there was sufficient evidence for a reasonable jury to conclude,  
18 based on the preponderance of the evidence, that the Grocery Outlet, the Defendant in the underlying  
19 case, was negligent. ~~Amended~~ *Am. Judgment P. (D)*

20  
21 1.5 The Court finds that the evidence was sufficient on the issue of professional negligence and  
22 under the facts of this case, it was not necessary for the Plaintiff to call a legal expert to establish the  
23 standard of care applicable to legal practitioners within the State of Washington. *(D)*

24 1.6 During the course of trial, a number of events occurred which have caused the Court to conclude  
25 that a new trial on the issue of damages is appropriate. The first and most paramount consideration  
in the grant of a new trial in this case, was the closing argument of Plaintiff's counsel. During the

1  
 2 course of closing argument, Plaintiff's counsel argued without objection for a punitive result. The  
 3 Court specifically finds that the argument of Plaintiff's counsel, was so flagrant and ill-intentioned,  
 4 that no curative instruction would have obviated the prejudice created by it. The argument was ill-  
 5 intentioned in the sense that Plaintiff's counsel sought to support a verdict by the jury based on  
 6 untenable grounds. When the comments of Plaintiff's counsel are taken together, the trial court  
 7 concludes that the argument was improper, ill-intentioned, and an objection with a curative instruction  
 8 would not have obviated the prejudice. ~~Such findings are predicated on not only the words used by~~  
 9 ~~Plaintiff's counsel, as reflected in the transcript, but also the Court's first-hand observations, which~~  
 10 ~~occurred during the course of trial.~~

11  
 12 1.7 In addition, the Court finds that the damages awarded in this case to the Plaintiff are so  
 13 excessive, based on the evidence presented before the jury as to be unmistakably indicative of the  
 14 operation of "passion and prejudice."

15 1.8 In the instant matter the jury award of the sum of \$32,000.00 for past economic damages, is  
 16 clearly excessive, because it is absolutely unsupported by any evidence presented before the jury. In  
 17 addition, the non-economic damages awarded are also so clearly excessive as to unmistakably indicate  
 18 the operation of "passion and prejudice." It is noted that the amount awarded is substantially greater  
 19 than the amount suggested by Plaintiff's counsel during closing argument, and well beyond what the  
 20 Court considers to be within the reasonable range of an acceptable jury verdict, given the evidence  
 21 presented in this case.

22  
 23 1.9 The Court finds that the excessiveness of the jury verdict is indicative of the "passion and  
 24 prejudice" created by the improper closing argument of Plaintiff's counsel.

25 1.10 In addition, during the course of trial evidence was submitted by the Plaintiff that the Plaintiff  
 lacked medical insurance to pay her medical bills, and that she had been subject to finance charges.

In hindsight, the allowance of such evidence was error. The financial condition of the Plaintiff is irrelevant, and constitutes an irrelevant plea of poverty, which is designed to inflame the "passion and prejudices" of the jury.

1.11 That the Court finds that the cumulative effect of the above was unfairly prejudicial to the Defendants and denied the Defendants a fair trial.

1.12 That the Court intends to the Findings of Facts and Conclusions of Law set forth herein to be interpreted in conformance with the Court's oral ruling of December 19, 2003, which is attached hereto as Exhibit No. 1 to these findings and conclusions and order, which are hereby incorporated by the reference.

II. CONCLUSIONS OF LAW

2.1 To the extent that the above Findings of Facts should be deemed Conclusions of Law, and the Conclusions of Law set forth below, should be deemed Findings of Facts, it is the Court's intention that they be treated as any reviewing court deems appropriate.

2.2 The grant or denial of a new trial is a matter that rests within the trial court's discretion. In the exercise of such discretion, the trial court concludes that the Defendant in this matter was denied a fair trial.

2.3 The Court specifically concludes that a new trial on the issue of damages only is warranted on a number of the grounds set forth in CR 59. The Court specifically finds that a new trial is warranted under CR 59 (a) (1) based on an "irregularity" in the proceeding created by an adverse party, i.e., the improper closing argument of Plaintiff's counsel.

2.4 In addition, pursuant to CR 59 (a) (5), the Court finds that the damages are so excessive as to unmistakably indicate that the verdict must have been the result of "passion and prejudice." This conclusion is not only supported by the size of the verdict, but also the events discussed above that occurred during the course of trial.

1  
2 2.5 The Court concludes, that pursuant to CR 59 (a) (7), that the verdict for non-economic damages  
3 is not supported by the evidence. The Court specifically finds that there was no evidence nor  
4 reasonable inferences from of the evidence to justify or support the verdict for non-economic  
5 damages.

6  
7 2.6 The Court also finds that pursuant to CR 59 (a) (8) that an error of law occurred during the  
8 course of trial that was objected to by the defense in this matter, to wit the allowance of lack of  
9 insurance testimony to be presented during the course of trial.

10 2.7 Finally, the Court concludes that pursuant to CR 59 (a) (9), that substantial justice has not been  
11 done in this case. The lack of substantial justice is a by-product of the cumulative events occurring  
12 during the course of trial that prevented the Defendants in this matter from receiving a fair trial.

13 III. ORDER

14 THEREFORE, the Court fully advised of the premises, it is hereby

15 ORDERED, ADJUDGED and DECREED that Defendant's Motion for a new trial on the issues  
16 of Damages Only is hereby GRANTED; it is also further

17 ORDERED, ADJUDGED and DECREED that the Defendant's Motion to Dismiss and/or for  
18 Judgment as a Matter of Law and Remittitur with respect to the issues of attorney negligence and  
19 negligence in the underlying case, is hereby DENIED; it is further

20 ORDERED, ADJUDGED and DECREED that this Court declines to rule on Defendant's  
21 contention that no damages are available for legal malpractice beyond those that would have been  
22 available, had there been success in the underlying case, and reserves this issue for resolution during  
23 the course of re-trial of this case, it is further  
24  
25

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ORDERED, ADJUDGED and DECREED that the judgement previously entered in this matter is hereby vacate.

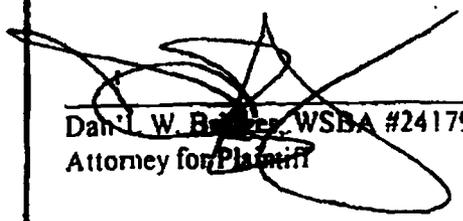
Dated this 7 day of January, 2005.

  
Judge Daniel Berschauer

Presented by:

  
Paul A. Lindenmuth, WSBA #15817  
Of Attomeys for Defendant

Approved as to Form;  
Notice of Presentment Waived:

  
Dan L. W. Barcus, WSBA #24179  
Attorney for Plaintiff

11766 2/2/2005 00016

**Exhibit 1**

A.M. JAN 09 2004 P.M.  
PIERCE COUNTY WASHINGTON  
BY KEVIN STOCK, County Clerk  
DEPUTY

<b>SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY</b>	
SCHMIDT, TERESA	Plaintiff(s).
vs.	
COOGAN, TIMOTHY	Defendant(s).

NO. 00-2-12941-1

JUDGE DANIEL J BERSCHAUER

CT REPORTER PAM JONES

CLERK EDISON HERRON

DATE: DECEMBER 19, 2003

Plaintiff Appearing:  Yes  No

Attorney for Plaintiff: DAN'L BRIDGES

Present:  Yes  No

Defendant Appearing:  Yes  No

Attorney for Defendant: PAUL LINDENMUTH

Present:  Yes  No

THIS MATTER CAME ON BEFORE THE COURT FOR: ORAL RULING

3:10 Court called into session, both parties participated by way of teleconference. Court addressed the parties on the matter and indicated that it was prepared to give its oral opinion.

- Court granted a new trial, only on the damages issue. Court addressed the parties on its ruling.

Court answered any questions for clarification. Court will sign order and findings of fact when presented.

3:26 Court adjourned.

11/18/2003 11:21:30 AM

9257 11/21/2002 0800

COURT OF THE STATE OF WASHINGTON

AND FOR THE COUNTY OF PIERCE

TERESA SCHMIDT, )  
 )  
 Plaintiff, )  
 vs. )  
 )  
 TIMOTHY P. and JANE DOE COOGAN and )  
 the marital community comprised )  
 thereof; MICHAEL D. and JANE DOE )  
 SHEEHAN and the marital community )  
 comprised thereof; THE LAW OFFICES )  
 OF TIMOTHY PATRICK COOGAN and all )  
 partners thereof; and JOHN AND JANE )  
 DOE individuals, marital communi- )  
 ties, and partnerships 1-10, )  
 )  
 Defendants. )

No. 00-2-12941-1

COPY

FILED  
 IN OPEN COURT  
 VISITING JUDGE  
 NOV 18 2003  
 By *ll*  
 DEPUTY

TIMOTHY COOGAN, )  
 )  
 Third Party Plf., )  
 vs. )  
 )  
 JOHN P. McMONAGLE and "TERESA DOE" )  
 McMONAGLE, )  
 )  
 Third Party Defts.)

*Ordered opened  
 & published by  
 Vis. Judge  
 Daniel Brannen  
 J. Andrews  
 Jrd Dist*

DEPOSITION UPON ORAL EXAMINATION OF  
 TIMOTHY PATRICK COOGAN  
 Taken Monday, February 25, 2002

*Dan F. Bern*

REPORTER: H. Milton Vance, CCR, CSR  
 Lic. #VA-NC-EH-M371MU

Exhibit 3



## Deposition of Timothy P. Coogan, 02/25/02

1 A It was over -- Ms. Schmidt's lawsuit against -- was  
2 not going to succeed. The statute of limitations had  
3 been violated.

4 Q There was a time when Ms. Schmidt was an employee of  
5 your firm, correct?

6 A Yes.

7 Q Do you know the -- I don't need the dates obviously,  
8 but can you approximate for me -- use this personal-  
9 injury lawsuit as a reference if you like -- when she  
10 did work for you?

11 A I would say -- I don't think it was -- for about  
12 several months before this.

13 Q Leading up to December 1998 when the lawsuit was  
14 ultimately filed, Ms. Schimidt brought it to your  
15 attention that the statute of limitations was  
16 approaching on this case, didn't she?

17 A I don't recall.

18 Q So you're not saying she didn't do that; you just  
19 don't know either way. Is that what you're saying?

20 A I don't recall if Ms. Schmidt brought it to my  
21 attention, correct. I knew that there was a statute  
22 of limitations coming up on her case for a long time.  
23 And I don't remember if Ms. Schmidt also brought it to  
24 my attention separately.

25 Q Let me see if I can refresh your recollection. Do you

Deposition of Timothy P. Coogan, 02/25/02

1 recall Ms. Schmidt ever bringing to your attention the  
2 fact that the statute of limitations was about ready  
3 to run and your saying words to the effect, "Fuck off.  
4 I'm the attorney. Put the file back on my desk"?

5 A No. I specifically recall not making a comment like  
6 that.

7 Q Did you ever prepare a settlement demand on behalf of  
8 Ms. Schmidt?

9 A No, I don't believe we did. (Pause) Oh, yeah, now, I  
10 remember.

11 MR. BRIDGES: Please mark that.

12 (Whereupon, Exhibit 5 was  
13 marked for identification.)

14 Q Handing you what's been marked as Exhibit Number 5,  
15 can you identify that please.

16 A Yes. It appears to be a settlement demand on the  
17 Teresa Schmidt matter.

18 Q Do you know who drafted it?

19 A No.

20 Q Was it done at your request?

21 A I'm -- it must have been.

22 Q Do you recognize this document?

23 A I -- no, I really don't. I couldn't remember if we  
24 did this.

25 Q Is that your letterhead?

# APPENDIX NO. 2

August 03 2010 4:12 PM

KEVIN STOCK  
COUNTY CLERK  
NO: 00-2-12941-1

**The Honorable Carol Murphy**  
**Date of Hearing: August 6, 2010**

**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**

TERESA SCHMIDT,

Plaintiff,

v.

TIMOTHY P. COOGAN, et ux, et al,

Defendant.

**NO. 00-2-12941-1**

**DEFENDANT'S REPLY TO PLAINTIFF'S  
MOTION IN LIMINE ON AVAILABILITY OF  
GENERAL DAMAGES AND DEFENDANT'S  
CROSS-MOTION IN LIMINE REGARDING  
THE SAME**

The following Memorandum of Points and Authorities is respectfully submitted in Opposition to Defendant's Motion in Limine on Availability of General Damages and in Support of Defendant's Cross-Motion in Limine Excluding Evidence Re: the Same.

**I. INTRODUCTION**

For the time being, ignoring the fact that Plaintiff's Motion in Limine on Availability of General Damages, is simply not a proper Motion in Limine, in that it does not seek to exclude prejudicial evidence, but rather seeks its inclusion, Defendant notes that there is simply not a scintilla of authority cited by the Plaintiff herein indicating that within a claim for legal malpractice, where damages are based on "case within a case principles," that general damages are available for the "malpractice" in and

**COPY**

1 of itself. Clearly the case law is to the contrary to such a proposition.

2  
3 It is suggested that a reasonable way to "cure" procedural irregularities of the Plaintiff's Motion,  
4 is that the Court should consider the Plaintiff's materials as being responsive to a Motion in Limine that  
5 clearly would have been filed by the defense in this case, seeking to exclude all testimony and evidence,  
6 arguments or suggestions (or will be) of any kind, that general damages are available for "malpractice"  
7 as irrelevant, given the absence of the availability of such damages and given liability has already been  
8 determined. Had Defendant filed a Motion in Limine, it would have been as follows:

9 *Defendant's move in Limine to exclude any and all evidence, arguments*  
10 *(whether direct or indirect) that the Plaintiff is entitled to an award of*  
11 *general damages for the fact that the Defendant committed legal*  
12 *malpractice, when the case law is clear that damages in such case, are*  
13 *limited to case within a case principles.*

14 Alternatively, it is suggested that the Plaintiff's Motion simply should be stricken as an attempt  
15 to acquire an advisory opinion by the Trial Court on an issue which is not properly before it. It is noted  
16 that we have already spent an inordinate amount of time in this case, regarding this issue.

## 17 **II. COUNTER-STATEMENT OF THE FACTS**

18 As the Court is aware, liability for legal malpractice has already been established in this case as  
19 a matter of law and affirmed on appeal. In addition, the Supreme Court's opinion in this case removes  
20 from this case, any issue as to whether or not within the underlying case, the Grocery Outlet was  
21 negligent for the slip and fall injury which allegedly caused Ms. Schmidt to suffer a neck sprain/strains,  
22 which according to her own words, resolved within a few months following the event. In other words,  
23 two issues now have been resolved conclusively in this case; (1) that Mr. Coogan committed legal  
24 malpractice by failing to name and serve the appropriate Defendant in the underlying lawsuit; and (2)  
25 that the underlying Defendant, Grocery Outlet, was negligent and such negligence caused Ms. Schmidt

1 some level of harm, which ultimately must be determined based on an evaluation under "case within  
2 case" principles. In other words, Ms. Schmidt has the burden of proving what the underlying case would  
3 have been worth had it been properly prosecuted.<sup>1</sup>  
4

5 As such, all the evidence cited to in Plaintiff's Memorandum and the attachments thereto, should  
6 be stricken and should not be considered in this case because liability for malpractice has already been  
7 determined, and general damages are not available for the malpractice per se. Such evidence should be  
8 excluded pursuant to ER 402 (general irrelevancy); ER 403 (prejudicial value outweighs probative effect,  
9 misleading and confusing, as well as a waste of time and being and impermissible effort toward character  
10 assassination, when character and/or matters such as intent are simply not at issue. See ER 404 (b).  
11

12 Such a proposition is further bolstered by the operate Complaint in this case, which only sets forth  
13 two claims, (1) for general negligence, and (2) a claim for breach of contract. There is no specific  
14 pleading relating to any cause of action predicated on "a special relationship," or breach of any other  
15 duties, which might generate a claim for general damages. The Plaintiff made no claim for outrage  
16 and/or negligent infliction of emotional distress in the Complaint, and even if assuming that such claims  
17 would have had factual sufficiency, and would not be subject to summary dismissal, prior the efforts  
18

---

19 On these issues, there still remains issues regarding Ms. Schmidt's comparative fault,  
20 proximate cause and damages. While one could argue the fact that the Supreme Court  
21 ultimately affirmed on the liability of the Grocery Outlet, it is noted that comparative fault  
22 is an entirely separate and distinct issue from whether or not the Grocery Outlet was  
23 negligent under premise of liability theories. See generally, *Owen v. Burlington Northern*,  
24 114 Wn. App. 227, 233, 56 P.3d 1006 (2002), affirmed 153 Wn. 2d 788, 108 P.3d 1220  
25 (2005). It is noted that under "case with a case" principle, Ms. Schmidt's comparative  
fault now relates to the issue of damages as opposed to liability. There was and is no  
contention that even though Ms. Schmidt was personally involved in the preparation of  
the faulty Complaint in the underlying case, that she was comparatively at fault for the  
legal malpractice which occurred herein. In other words, the relevant "*res gestae*" regarding  
Ms. Schmidt's injuries are the events surrounding the slip and fall, and not the malpractice in and  
of itself.

1 were made to amend the Complaint some 9-10 years after filing, **have already been rejected by this**  
2 **Court.**  
3

4 At this point, it is suggested that we are “simply beating a dead horse,” and once again dealing with  
5 a procedurally irregular Motion, brought in a desperate attempt to expand this case well beyond its  
6 boundaries in a manner which would create a substantial prejudice to the defense. Had this matter been  
7 properly pled and notice provided, the Defendant certainly would have an option to seek a psychological  
8 IME of Ms. Schmidt, under CR 35, and would have explored in detail, other stressors in her life, such  
9 as how she was emotionally impacted by her felony theft conviction, which involved her stealing checks  
10 and a large restitution order, from the employer she worked for prior to being employed by Mr. Coogan.<sup>2</sup>  
11

12 In any event, there is simply no statutory or case law within the State of Washington, which  
13 permits or authorizes an award of general damages for malpractice. Ms. Schmidt’s damages are limited  
14 by a “case within a case” principles and proximate cause.

### 15 III. ARGUMENT

16 In order to resolve this issue, the trial court need go no further than the recent Supreme Court  
17 opinion in *Shoemaker v. Ferrer*, 168 Wn.2d 193, 225 P.3d 990 (2010), wherein the Supreme Court  
18 found that it was inappropriate in a legal malpractice case, involving personal injury, to deduct from  
19 the award of damages the contingency fee that the negligent lawyer otherwise would have earned had  
20 he successfully pursued the claim. The Supreme Court declined to allow for the deduction of the  
21 hypothetical contingency fee, adopting Division I’s rationale that it would otherwise result in the  
22 client having to pay twice for the same services, i.e., not only would there be a deduction for the  
23

24 \_\_\_\_\_  
25 2

Naturally, Mr. Coogan was never informed of such a felony theft conviction related to employment prior to hiring Ms. Schmidt.

1 contingency fee that would have been earned, had the defendant attorney not acted negligently, but  
2 also likely a contingency fee would have to be paid to the lawyer pursuing the malpractice claim.  
3

4 When reaching such a result, the Court made no reference to the notion that there could be a  
5 general damages award available for the malpractice per se. In other words, as the measure of  
6 damages in a legal malpractice claim involving personal injury is the value of the underlying  
7 personal injury claim, there could be a substantial rationale for not deducting out the negligent  
8 attorney's contingent fee, because it would not create a burdensome double reduction for attorney's  
9 fees to discouraging claims on behalf of persons who were injured by a negligent lawyer. Such a  
10 rationale and/or calculus would be entirely different, if in fact the client could acquire an award of  
11 general damages for the malpractice, from which a contingency could be paid to the lawyer pursuing  
12 the malpractice claim, thus not resulting in a substantial reduction of the award otherwise available  
13 to the client. In other words, if general damages were available for "malpractice" the recent  
14 *Shoemake v. Ferrer*, opinion simply would not make sense, nor would the Supreme Court have  
15 ignored the availability of such general damages in its analysis.  
16

17 Further, to reach such a result would eviscerate the notion of "proximate cause" applicable to  
18 legal malpractice cases. As explained in *Aubin v. Barton*, 123 Wn.App 592, 606-607, 98 P.3d 126  
19 (2004), the usual principles of proof and causation in a legal malpractice action do not differ from  
20 ordinary negligence:

21 *Where it is alleged that an attorney committed malpractice in the course of litigation, the*  
22 *trial court in the malpractice claim retried, or tried for the first time, the client's cause of*  
23 *action that the client contends was lost or compromised by the attorney's negligence,*  
24 *and the trier of fact decides whether the client would have fared better but for the*  
25 *alleged mishandling. Thus, to prove causation, the client must show that the outcome of*  
*the underlying litigation would have been more favorable, but for the attorney's*  
*negligence. The proof typically requires "a trial within a trial." (Citations omitted).*

1  
2 Stated another way, in a malpractice setting, the plaintiff must demonstrate that he or she  
3 would have prevailed, or at least would have achieved a better result had the attorney not been  
4 negligent. See, *Estep v. Hamilton*, 148 Wn.App 246, 210 P.3d 331 (2009). Typically, that means it  
5 is the burden on the plaintiff to establish in order to prove damages in a legal malpractice case, what  
6 they would have acquired had the case been appropriately handled. In this context, obviously had  
7 Mr. Coogan performed without negligence, what Ms. Schmidt would have acquired was a judgment,  
8 (up to and including a defense verdict), which provided a determination of the valuation of the  
9 underlying personal injury she suffered in the slip and fall accident. There is no case law nor  
10 authority indicating to the contrary.

11 The case of *Lavigne v. Chase, Haskell, Hayes and Kalamon, P.S.*, 112 Wn.App 677, 550 P.3d  
12 306 (2002), provides a reasonable example of the interplay between proximate cause and damages in  
13 the legal malpractice context. In that case, the attorneys involved were negligent by failing to  
14 properly renew an out-of-state judgment. Nevertheless, the trial court dismissed the case because the  
15 plaintiff had failed to muster evidence that the underlying judgment would ever have been  
16 collectable. The Court of Appeals reversed, although upholding the trial court on the issue that it  
17 was the plaintiff's burden to establish collectability, it nevertheless found that there were issues of  
18 material fact regarding the question of collectability. In *Lavigne*, at 684-86, the appellate court  
19 explored damages in legal malpractice cases:  
20

21 *The measure of damages for legal malpractice the amount of loss actually sustained as a*  
22 *proximately result of the attorney's conduct. As the Matson court further reasoned:*  
23 *"courts consider the collectability of the underlying judgment to prevent the plaintiff*  
24 *from receiving a windfall: it would be inequitable for the plaintiff to be able to obtain a*  
25 *judgment, against the attorney, which is greater than the judgment that the plaintiff*  
*could have collected from the third party." ... (Citations omitted).*

1  
2 In this case, essentially Ms. Schmidt is seeking to collect from Mr. Coogan an amount of  
3 money she could otherwise not have collected from the underlying tortfeasor, the Grocery Outlet. In  
4 other words, she is seeking a windfall in that she is seeking a judgment "which is greater than the  
5 judgment the plaintiff could have collected from the third party." *Id.*

6 As the *Lavigne* case further indicates, the reason why "collectability" is an element of a legal  
7 malpractice plaintiff's case is to prevent the acquisition of such a windfall:

8 *The majority of jurisdictions require the plaintiff to prove collectability. The policy basis*  
9 *for this approach is to avoid awarding the aggrieved more than he or she would have*  
10 *recovered had the attorney not been negligent." As one of these courts reasoned "in a*  
11 *malpractice action, a plaintiff's 'actual injury' is measured by the amount of money she*  
*would have actually collected had her attorney not been negligent." Klump v. Duffus,*  
*71 F.3d 1368, 1374 (7<sup>th</sup> Cir. 1995). (Emphasis added).*

12 *Hypothetical damages beyond what the plaintiff would have genuinely collected from the*  
13 *judgment creditor "are not a legitimate portion of her 'actual injury' and awarding her*  
14 *damages would result in a windfall. Stated another way, these jurisdictions tend to*  
*view collectability as a component of the plaintiff's prima facie case." (Citations*  
*partially omitted; emphasis original).*

15 Thus, it can be reasonably stated under Washington Law Ms. Schmidt's damages are limited to  
16 her "actual injuries", i.e., what she would have acquired in her claim against the Grocery Outlet and  
17 no more.

18  
19 Further, it is noted that despite Ms. Schmidt's policy arguments, it is suggested that if the  
20 Supreme Court in Washington had intended that general damages be available for malpractice, it  
21 would have clearly said so in the number of legal malpractice cases that have been decided within  
22 the appellate courts in the State of Washington. Naturally, anyone who has had their lawyer fail to  
23 perform adequately and negligently would be upset by the lawyer's conduct. Nevertheless, our  
24 courts have consistently held that the measure of damages is limited by case within a case principles,  
25 and thus, all of the damages that are available to a plaintiff, particularly in a personal injury claim, is

1 the value of the underlying claim itself, no more and no less.

2  
3 While Plaintiff in this matter may be making arguments that have some superficial level of  
4 appeal, what is being suggested by the Plaintiff is clearly not the law within the State of Washington,  
5 and it is suggested that the appropriate role of a trial court is to interpret and enforce the law as it is,  
6 as opposed to manufacturing new law for application in the specific cases that comes before it.

7 There is no legal support for the Plaintiff's contention that emotional distress damages are available  
8 for "malpractice" and the law in the State of Washington, is to the exact contrary.

9 **IV. CONCLUSION**

10 This is now the Plaintiff's third attempt at a judgment advisory ruling by the Court regarding the  
11 viability of emotional distress damages for malpractice qua malpractice. Clearly given such effort, one  
12 would think that Plaintiff's counsel would have found a **single case** authorizing the award of such  
13 damages under Washington law. Given the absence of such citation to authority, clearly we can be  
14 confident now that there is simply no such authority. In fact, all authority that is available, suggests and  
15 leads to an exact contrary conclusion, i.e. the damages in cases such as this, are limited to the value of  
16 the underlying claim...and no more.

17  
18 In order to make this Motion procedurally proper, the Court should consider it to be a reply to  
19 Defendant's Motion in Limine to exclude all evidence regarding "emotional distress damages," inclusive  
20 of those materials attached to Plaintiff's Motion in this case. Such information has nothing to do with  
21 the issues that remain in this case, are irrelevant, inflammatory and should and must be excluded.<sup>3</sup>

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Such "facts" are disputed and it is noted that Mr. Coogan did not testify at time of trial due to significant health concerns.

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The evidence in this case will establish that Ms. Schmidt had a slip and fall event at the Grocery Outlet in December 1995. Based on her own testimony, that the shampoo on which she slipped on, was there to be seen. This raises substantial questions about her own comparative fault for any injuries. Ms. Schmidt at trial, will have to prove the value of her underlying case, and to date, and as established by her own records, included nothing more than \$3,840.00 in medical care, that spanned less than a year. Naturally, as a result of the underlying physical injuries of the slip and fall event (after consideration of comparative fault), she is entitled to some portion of her medical bills, and a fair percentage of her general damages.

She is not entitled to a windfall, simply because her lawyer made a regrettable error. It is suggested that this should be the last time the Court should consider this issue, in that it has already examined this issue two other times in two different forms. It is suggested that enough is simply enough.

DATED this 7 day of August, 2010.



Paul A. Lindenmuth, WSBA #15817  
Attorney for Defendant

# APPENDIX NO. 3

August 19 2010 11:39 AM

The Honorable Carol K. Winton  
PIERCE COUNTY CLERK  
NO: 002-12941-1  
Hearing: 8/20/10 @ 9:00 a.m.

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR PIERCE COUNTY**

TERESA SCHMIDT,	)	
	)	<b>NO. 00-2-12941-1</b>
	)	
Plaintiff,	)	<b>DEFENDANT'S REPLY TO</b>
	)	<b>PLAINTIFF'S OPPOSITION TO</b>
v.	)	<b>DEFENDANT'S MOTIONS IN</b>
	)	<b>LIMINE</b>
TIMOTHY P. COOGAN, et ux, et al,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S  
MOTIONS IN LIMINE**

The following memorandum of points and authorities is respectfully submitted in reply to plaintiff's opposition to defendant's motions in limine.

A. Defendant's motions in limine were timely filed under Thurston County Local Rule 5(b)(2).

**DEFENDANT'S REPLY TO  
PLAINTIFF'S OPPOSITION  
TO DEFENDANT'S MOTIONS  
IN LIMINE - 1**

**Law Offices Of Ben F. Barcus**  
4041 Ruston Way, Suite 1-B  
Tacoma, Washington 98402  
(206) 752-4444 • FAX 752-1035

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As the court may recall during the course of the parties' pre-trial conference and discussion regarding our motion in limine hearing on August 20, 2010, defense counsel queried the court as to whether or not Pierce County local rules and/or Thurston County local rules had application to the pleading's relevant to such motion. It is defense counsel's clear recollection that the court stated a preference for the application of Thurston County local rules with respect to service of work copies (on different colored paper), and the like. Further, the Clerks Minute Entry from August 10, 2010, verifies such understanding. (Exhibit 1).

Pierce County Local Rule 5(b)(2) indicates under the heading of "non-dispositive civil motions" that "briefs and all supporting materials for a motion which is not dispositive shall be filed and served before 12:00 noon, five court days before hearing". (emphasis added).

The court is also reminded that on or about November 20, 2009, this court issued a case scheduling order which specifically amended thereto directions to follow Thurston County local rules particularly as it relates to briefs, memorandum, bench copies and the like. A portion of the order specifically directs the party to comply with LCR 5.

Thus, under the terms of this court's prior orders; Thurston County local rules are to be applied to this case. It is also noted that this case despite being a Pierce County visiting judge case, utilized Thurston County ADR procedures in order to comply with such requirements.

**B. The Events Surrounding Mr. Coogan's Malpractice, the Availability of General Damages for Legal Malpractice, and the Previously Dismissed Cross Claim are Inadmissible.**

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It is clear that the plaintiff simply does not get it. This case is before the court for a limited retrial on the issue of damages only. Such a limited retrial order, would simply become purposeless, if in fact we spent the entirety of this trial trying to reargue liability related facts. It would simply be inefficient, and interject wholly and completely irrelevant matters into the case on an issue which has already been resolved.

Also it is noted that the plaintiff is simply wrong that defendant " puts forth yet another effort to exclude issue of general damage for legal malpractice from this case". That is simply not true this is the first time the defendants have actually moved to exclude such evidence, and it is simply specious that general damages are available for legal malpractice per se. That is not the law in the State of Washington, and the plaintiffs have been able to muster absolutely no support for such a proposition. All such cases are resolved on a case within case principles and the damages in this case are the value of the underlying claim. It is suggested that the plaintiff's repeated effort to try to pound the table on this issue, without any legal support is simply nothing more than the background noise that this case has had to suffer through now for a period of in excess of six months. It is suggested that enough, is simply enough and we should now go about addressing the issues which still are matters of concern in this case.<sup>1</sup>

In this matter the court has already had before it three different times, in three different

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<sup>1</sup> Recently the writer, consulted with Sam Franklin, of the Lee Smart Firm who is a legal malpractice "guru" and he verified that it would simply be unprecedented to allow for general damages for the act of malpractice in and of itself, and verified that damages are limited to case within the case principles. Mr. Franklin most recently was trial and appellate counsel in the case of *Ang v. Martin* 154 WN. 2d 477, 114 P. 3d 637 (2005).

1 form the issue of whether or not general damages are available for malpractice per se. In each  
2 instance, the Court rejected the plaintiff's position, and although, in its last ruling definitively  
3 ruled all actions before the alleged failure to file the subject lawsuit would be excluded, the  
4 natural extension of such a ruling is that all evidence beyond the bare facts that the case was not  
5 properly perfected in a timely manner, simply are issues that should not be placed before the  
6 jury.  
7

8 Clearly there is a reason that this case is currently before the court on a retrial. One would  
9 suggest if one reads between the lines of Judge Berschauer's order granting a new trial in this  
10 case, part of it was the concern about potentially inflammatory evidence getting before the jury  
11 creating an improperly inflated verdict due to passion and prejudice. It is clear that the  
12 plaintiff's counsel is advocating and urging that the court allow him to engage in a repeat  
13 performance. It simply should not be allowed. Further, to the extent that plaintiff's counsel is  
14 contending that Ms. Schmidt suffered emotional distress because of the language utilized by  
15 Mr. Coogan, necessarily opens the door whether or not she herself regularly used such language,  
16 and clearly defendant could present substantial evidence indicating the same. There is no  
17 indication that Ms. Schmidt had any particular susceptibility to the use of fowl language, and  
18 frankly, this Ms. Schmidt, a felon, is far from a shrinking violet.  
19

20 However, that being said such issues simply have no relationship to any compensable  
21 damage she suffered in this case.  
22

23 Attached hereto is a COA article (Causes of Action) relating to "causes of action against

1 attorney for malpractice in handling personal injury claims". While the COA article is clearly  
2 not definitive and/or controlling, it may aid the Court in understanding the issues which may  
3 arise during the course of this trial and which may aid the court in identifying other relevant  
4 issues. This article is attached hereto as Exhibit No. 2. If one actually reviews the article at  
5 Page 72, Section 42, it discusses what damages are available on a legal malpractice claim  
6 involving failures relating to personal injury claims. This article provides under the heading of  
7 "Compensatory Damages" the following:  
8

9           'The successful plaintiff in a legal malpractice action is entitled to  
10 recover for the losses sustained as a proximate result of defendant's malpractice.  
11 Where an attorney is alleged to have mishandled a personal injury claim, the  
12 loss is measured by the amount of damage the plaintiffs actually could have  
13 recovered if the claim had been properly handled, and includes all items of  
14 damages which could have been recovered in collection in an action on the  
15 claim. The amount of damages claimed in a legal malpractice action generally  
16 cannot exceed the amount of damages claimed in the underlying action. In  
17 order to recover more than the amount claimed in the underlying action, it is  
18 necessary of plaintiff to show special damages above that amount: for example,  
19 by showing that the defendant's negligence caused the plaintiff to incur  
20 additional legal costs in pursuing the underlying action.

21           Although the damages recoverable in a malpractice action generally  
22 cannot exceed the amount the plaintiff could have recovered in the underlying  
23 action, they may be less than that amount. Since the measure of damages is the  
amount the plaintiff lost due to the defendant's malpractice, the proper measure  
of damages not the amount which would have been awarded in the underlying  
action but the portion of that amount which would have been collectible.  
Recovery also may be reduced by percentage of the recovery in the underlying  
action which would have been paid to the defendant as a contingent fee. In  
addition, since persons with personal injury claims are frequently willing to  
settle their claims for a reduced amount, rather than risk the outcome of the trial,  
if it seems more likely that the plaintiff's claim would have been settled  
(citations omitted)."

1           The COA article further provides at Page 72 citing California law the proposition that  
2  
3           “a plaintiff cannot recover damages for emotional distress suffered as a result of an attorney’s  
4           negligent legal malpractice, but can recover, as compensatory damages, the amount which  
5           would have been received as punitive damage on the discharge claim against the third party”.  
6           See *Merenda v. Superior Court* 31 Cal. App. 4<sup>th</sup> 1, 4 Cal. Rptr. 2d 87 (1992). As the Court can  
7           take note punitive damages are not available within the state of Washington unless specifically  
8           otherwise authorized by statute. Thus, the *Merenda* case simply indicates that emotional  
9           distress damages are not available on legal malpractice claims.

10           As discussed in previous pleadings before this court, Ms. Schmidt’s burden in this case  
11           is to prove “but for” Mr. Coogan’s negligence she would have received a positive result. She  
12           also has to prove the amount of such a result, taking into consideration the method and manner  
13           in which personal injury claims are typically valued. As what is currently at issue is the value  
14           of the underlying claim such damage calculations would include any comparative fault she  
15           would have had in the underlying lawsuit.

16           What her damages do not include is the bare fact that there was a mishandling of the  
17           complaint, because that would place her in the better position than she otherwise would have  
18           been had the attorney acted appropriately. If Ms. Schmidt truly believed she had a claim for  
19           emotional distress damages which occurred at her workplace, she clearly had the alternatives  
20           of bringing alternative claims than those the ones that she has brought. As it is, it is unlikely such  
21           claims would have any merit, because Ms. Schmidt simply cannot and would not be able to  
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1 reach the high threshold for claims like outrage, and clearly does not have any form of objective  
2 symptomology which would support a claim of negligent infliction of emotional distress.  
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4  
5 Again it is noted this issue has now become an absolute waste of the court and defense  
6 counsel's time, and should be conclusively put to rest by the Court when addressing the parties'  
7 motions in limine.

8 Many of the concerns raised by the plaintiff in her response to defendant's motion,  
9 frankly are indicative of a great need by the Court to control plaintiff's counsel at time of trial  
10 to ensure that we do not have to try this case again. For example Mr. Bridges writes "regarding  
11 the admission of evidence pertaining to Mr. Coogan's failure to inform Ms. Schmidt that her  
12 case was dismissed, defendants argue it should be excluded because the jury might believe that  
13 Mr. Coogan was negligent in his ethical obligation with plaintiff for doing so". That is correct  
14 otherwise because punitive damages are not available for malpractice per se there is simply no  
15 other reason to submit such evidence. Further, it is noted that such allegations are clearly  
16 disputed in this case, and frankly given the fact that Ms. Schmidt was working in Mr. Coogan's  
17 very small law office, at the time, it strains credulity that she did not have an understanding as  
18 to what was occurring regarding her own case. In fact as with her felony conviction, any  
19 allegations by Ms. Schmidt regarding such irrelevant matters are dubious at best, given her  
20 shocking lack of credibility.  
21

22 **3. Evidence Pertaining to John McMonagal.**  
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2 Clearly Mr. Coogan had a proper cross claim against Mr. McMonagal, who was actually  
3 the person factually responsible for the error in Ms. Schmidt's case. Whether or not he had a  
4 signed fee agreement with Ms. Schmidt, he undertook the task of providing her legal  
5 representation and failed in his actions when doing so. Further Mr. Coogan's cross claim  
6 against Mr. McMonagal clearly had validity, but now is no longer an issue in this case. Thus  
7 any evidence in that regard has no relevancy to any issues remaining i.e. the proximate cause  
8 and/or damages in the underlying case.

9 As indicated in Mr. Coogan's deposition testimony set forth at Page 5 of plaintiff's  
10 motion in limine, at the time of his deposition it was an open question as whether or not  
11 Mr. Coogan would ultimately be fully responsible for any damages to Ms. Schmidt, and whether  
12 or not some fault could be allocated to Mr. McMonagal. It was a valid legal position, and for  
13 Mr. Bridges to try to turn it into something which it is not, is simply irresponsible and indicative  
14 of an inflammatory style of practice that really has no place in this case.  
15

16 **C. Plaintiff's Medical Expert Dr. Brobeck did not Establish a Sufficient**  
17 **Foundation for the Admission of Medical Bills.**

18 It appears that Mr. Bridges has never actually read Dr. Brobeck's deposition, because  
19 what he says about that deposition simply is not there. Nowhere within the deposition does not  
20 Dr. Brobeck examine Ms. Schmidt's medical bills, nor provide any opinions with respect to the  
21 bills' reasonableness and necessity.

22 One will have to look long and hard within Dr. Brobeck's deposition to find what  
23 doesn't exist there, i.e. any offer into evidence the exhibits to his deposition. Thus had such

1 exhibits been offered then it would have afforded defense counsel an opportunity to object to  
2 their context as being simply a mishmash of records and bills that were never clearly identified,  
3 authenticated nor for which there was ever a foundation laid for their admission.  
4

5 At Page 19 of Dr. Brobeck's deposition the following question was asked: "Referring  
6 back to Exhibits 1 through 6 - and we can go through them one by one if you like, but I'm going  
7 to ask you the question en masse as to all of these exhibits and all the treatment that is  
8 demonstrated in there, and based on your review of the records, does it appear to be on a  
9 medically more likely than not basis that the treatments memorialized in Exhibits 1 through 6  
10 were medically reasonably necessary for the injuries Ms. Schmidt sustained in the 1995 slip and  
11 fall? Answer: Yes."

12 Although the medical bills were interlaced within the exhibits to Dr. Brobeck's  
13 depositions, such exhibits were never offered into evidence during the course of Dr. Brobeck's  
14 deposition testimony, and clearly there is no other witness listed by the plaintiff who can  
15 sponsor such evidence within the current trial. Further nowhere within the subject testimony  
16 did Dr. Brobeck ever testify that the bills set forth within the exhibits themselves were  
17 reasonable and necessary, and were causally related to the subject slip and fall. Generally  
18 medical expenses must be both reasonable and necessary to be recovered as damages. See  
19 *Palmer v. Jensen* 132 Wn 2d 193, 199, 937 P. 2d 597 (1997). Medical expenses are not  
20 reasonable and necessary if related to an event other than defendant's negligence act, or if they  
21 are due to exaggerated injuries. *Kadmiri v. Claassen* 103 Wn App. 146, 151, 10 P. 3d 1076  
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1 (2000). The burden of proving the reasonableness and necessity of medical expenses rest with  
2 the plaintiff. *Patterson v. Horton* 84 Wn App. 531, 543, 929 P. 2d 1125 (1997). To prove the  
3 reasonableness and necessity of the past medical expenses, the plaintiff may not rely solely on  
4 his or her own testimony as to the amount incurred but also must establish such a fact through  
5 medical expert testimony and the bills alone are insufficient to meet this burden of proof. See  
6 *Patterson v. Horton*; see also *Nelson v. Fairfield* 40 Wn 2d 495, 501, 244 P. 2d 244 (1952).  
7 *Torgeson v. Hanford*, 79 Wn 56, 59, 139 P. 648 (1914). "Medical records and bills are relevant  
8 to past medical expenses only if supported by additional evidence that the treatment and  
9 the bills were both reasonable and necessary". *Patterson v. Horton* 84 WN App. at 543.  
10

11 In this case, Dr. Brobeck's testimony at Page 19 does serve to establish that "the  
12 treatment" memorialized in Exhibit 1 through 6 were medically reasonable and necessary for  
13 the injuries Ms. Schmidt sustained in the 1995 slip and fall, but is insufficient to establish that  
14 the bills were reasonable and necessary and under *Patterson v. Horton*, you must establish both.  
15 In fact there is no mention of the medical bills as being reasonable and necessary nor are they  
16 even discussed, at any point during Dr. Brobeck's deposition.  
17

18 To the extent that one could argue that the testimony is ambiguous enough that it could  
19 be construed as referencing the bills (even though it does not), such ambiguity is insufficient to  
20 meet the plaintiff's burden of proof on this issue. To quote Mr. Coogan this isn't "rocket  
21 science," had Mr. Bridges intended to seek admission of the medical bills through Dr. Brobeck  
22 he should have done so in the proper fashion and clearly on the record. As it is not even the  
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records were offered into evidence during the course of the deposition, so arguably there is simply not a foundation for such records in this case anyway.

Further, plaintiff's counsel has been repeatedly warned by defense counsel, that efforts would be made to strike Dr. Brobeck's deposition because of its obsolescence. There are also substantial problems with the admissibility of much of Dr. Brobeck's testimony, and if one actually reads it it really just simply does not say anything other than the bare fact that Ms. Schmidt suffered a dorsal sprain/strain and received medical treatment related thereto. That's all that Dr. Brobeck's testimony establishes, save for the fact that she may have "susceptibility" but there is simply no foundation for any testimony that such potential has ever come to fruition or has in any way impacted Ms. Schmidt currently and/or into the future. Further Dr. Brobeck's testimony is just simply obsolete given the fact that it no longer has an adequate foundation, and its initial foundation in and of itself was obviously manipulated by plaintiff's counsel who failed to provide Dr. Brobeck relevant medical records wherein Ms. Schmidt denied or neglected to mention the 1995 slip and fall under circumstances where it should have been mentioned or she indicated that she had only received limited very temporary injuries as a byproduct of that event.

**D. Friendship Between Mr. Coogan and Defense Counsel and Ms. Schmidt.**

As the plaintiff's counsel concurs with this issue primarily it is noted that where he does not concur his allegations regarding what evidence can be submitted is simply frivolous. Mr. Coogan's liability has already been established in this case. There is simply no purpose in

1 presenting evidence to the jury, other than wasting time, or trying to inflame them, regarding  
2 "events surrounding the act of malpractice". The jury should be instructed as a matter of law  
3 that Mr. Coogan committed malpractice in failing to perfect Ms. Schmidt's lawsuit and that they  
4 must decide the issue of the value of the underlying lawsuit and no more. At the end of the day,  
5 such evidence regarding how the malpractice occurred no longer has any relevance because it  
6 has no connection to any issues remaining in this case i.e. proximate cause and/or damages.  
7

8 **E. Plaints Subsequent Accidents and the Like.**

9 See defense Response to Plaintiff's Motion in Limine on this issue.

10 **F. Dr. Brobeck's Testimony is Inadmissible Because it is Obsolete, Lacks  
11 Foundation, and/or Should be Deemed Admissible It is only Admissible in  
12 an Extremely Limited Sense.**

13 To some degree defendants concur that Dr. Brobeck's testimony has some perhaps  
14 limited viability. It's true that Dr. Brobeck did testify that the treatment that is within the  
15 exhibits was reasonable and necessary related to the 1995 slip and fall injury and did indicate  
16 that "the slip and fall 'lit up' the degenerative disc condition in Ms. Schmidt's neck and that she  
17 sustained a cervical/dorsal sprain/strain relating to the slip and fall.

18 However, there is nothing within Dr. Brobeck's testimony which would in any way  
19 support plaintiff's current claims that all of her other injuries have been "re-aggravations" from  
20 the injuries discussed in Dr. Brobeck's testimony. With respect to the other injuries that were  
21 before him at that time i.e. the 1997 accident, Dr. Brobeck could not say whether or not  
22 Ms. Schmidt's then current 2001 condition related to the 1995 slip and fall or the 1997 accident.  
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However, plaintiff can not use Dr. Brobeck's testimony that she could be susceptible to other injuries as a predicate and/or a springboard for making all kinds of wild allegations how this rather minor injury has been the source of 15 years of medical problems relating to her neck despite interim injuries, and within her medical records there is no indication that the 1995 slip and fall had anything to do with any condition she suffered past November of 1996. It's only logical that medical treatment which occurred up until November 1996 would be unrelated to the 1997 automobile accident. However Ms. Schmidt at the time of the former trial not only testified about her prior conditions but also her then current conditions, and no doubt Mr. Bridges will try to argue that her condition over the last 15 years has some kind of relationship to what occurred in 1995, and may even try to argue that she's entitled to damages for future pain and suffering and the like. In that respect, Dr. Brobeck's testimony is woefully insufficient and the plaintiff simply has no proof of any damages suffered by Ms. Schmidt past November of 1996. Anything else would be based on pure rank speculation and conjecture and in fact would be patently false and misleading.

To the extent that Dr. Brobeck's testimony is limited to those very core facts, perhaps it has some continuing relevancy. However to the extent that any efforts are made to extrapolate from such core facts to create a laundry list of subsequent ailments and events, it is simply insufficient in that regard. Obviously Dr. Brobeck's testimony is inadequate to establish any relationship between the 1995 slip and fall and the two 2005 "falls down the stairs" which resulted in surgery and any condition Ms. Schmidt may have suffered after the 2009 accident.

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In this case clearly the plaintiff has made willful efforts to hide discovery. This fact was hammered home to the court as it related to Ms. Schmidt's failure to identify her prior felony conviction in response to defendant's interrogatories. Her subsequent effort to explain away her conviction and lack of an honest answer in her interrogatories frankly did not pass the "laugh test". Further it is very clear that plaintiff's counsel at one point in time had a full copy of Ms. Schmidt's 1997 accident related medical records including the records and reports of Dr. Klein. Yet to date, they can only produce the front page of Dr. Klein's report which just happens to stop when he begins discussing the 1995 accident?

When it comes to Dr. Brobeck's report it is noted that he was a paid forensic examiner, and it is simply outlandish to assume that he did not give a copy of the report to Mr. Bridges who would have retained such an important document in his case file. As Dr. Brobeck has not been able to produce such a report in response to defendant's stipulations, there is a substantial need and work product principles simply have no application to matters otherwise held within plaintiff's counsel's file.

It is simply false for Mr. Bridges to state that there has been a lack of diligence in seeking to procure such a report. Former counsel asked for the report at the beginning of the first trial. Yet even though that was only shortly after Dr. Brobeck's deposition was taken, Mr. Bridges failed to produce a copy of the report. Further repeated requests have been made by defendant's current counsel (who were not involved in the case prior to the first trial) for a copy of Dr. Brobeck's report which may contain critical information. Yet plaintiff's counsel,

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consistently has not produced such a report for no apparent good reason. It is respectfully noted that one must become somewhat cynical when in response to basic discovery requests, the opposing party responds with "I forgot" and "Oh I must have lost it". This is particularly troubling when the things that are supposedly forgotten and lost are simply not the kind of things that one would forget or lose in a case that has been ongoing for a number of years.

It is suggested that the plaintiff's effort to point the finger at defense counsel's "inaction" is simply an attempt to excuse obvious discovery violations that have occurred in this case, but apparently this court is willing to permit.

Finally with respect to the witnesses disclosure regarding Dr. Brobeck, it is significant in that had it been done appropriately we would now have a copy of his report. Also what's good for the goose is good for the gander to the extent that obnoxiously the plaintiff in this case is contending that the disclosure regarding Dr. Colefell was insufficient. If one compares the two disclosures obviously the plaintiff's disclosure wasn't even close to the mark while the defense disclosure of Dr. Colfelt was reasonable under the circumstances when it was filed, given the fact that the plaintiff was dragging her feet with respect to providing the defense with essential information regarding her medical history, identity of medical providers and the basic essential information from which a CR35 examination could be based. There is simply no excuse for the plaintiff in this case to fail to produce the discovery that has been requested that is essential for the defense's preparation. Frankly, there appears to be a repeated effort on the part of this plaintiff to try to mislead the court. That is particularly so when it comes to lack of

1 candor towards the tribunal with regard to "forgetting" about her only felony conviction, and  
2 the willfully and inadequate responses provided by plaintiff's counsel as to why on earth he  
3 cannot find the essential medical records of his client's which he previously had in his  
4 possession, including but not limited Dr. Klein's records as well as Dr. Brobeck, his hired  
5 forensic examiner's report. It is suggested that at some point the court must come to the  
6 conclusion that plaintiff and her counsel are simply playing games.  
7

8 **G. through M.**

9 As the plaintiff does not object to these motions in limine they shall not be discussed  
10 further herein.

11 **N. Plaintiff's Previously Submitted Exhibits Should not be Admitted as they**  
12 **are no Longer Relevant to any Matter in this Case. Exhibit 1, cover Mr.**  
13 **Coogan case file for Ms. Schmidt.**

14 The expiration of the 90 day safe harbor set forth an RCW 4.16.710 for service of the  
15 complaint is really a matter of no moment. As explored in defendant's counsel's case of *LaRue*  
16 *v. Harris* 128 Wn App. 460, 456 – 66, 115 P. 3d 1077 (2005) a complaint can be amended  
17 within that 90 day timeframe to clarify and/or name an appropriate party. Thus, where  
18 plaintiff's counsel is trying to indicate it was somehow inappropriate for Mr. Coogan to attempt  
19 to amend the complaint after statute of limitations had expired, is a misconstruction of the law  
20 and frankly would require a legal expert, to address and to explain the implications (if any) of  
21 such a fact. In fact, if anything Mr. Coogan's attempt to amend the complaint was an  
22 opportunity for him to mitigate damages, it certainly was not a matter which would have caused  
23

1 any harm to Ms. Schmidt one way or another. Thus, there is simply no reason for the various  
2 complaints filed in the underlying case to be submitted to the jury in that to do so would simply  
3 be misleading, confusing, and ultimately not serve to prove any matter at issue in this case.  
4

5 Exhibit 4: as previously discussed in defendant's motion in limine which was really not  
6 substantively responded to by Ms. Schmidt, it is noted that any estimate of value of the subject  
7 case provided by Mr. Coogan was based on a number of inaccurate premises, such as projected  
8 future medical bills that never came to fruition, a wage loss claim which has now been  
9 abandoned, and other matters, that make such an estimate patently irrelevant, and misleading.  
10 Ultimately it is up to the jury to make a determination as to the value of Ms. Schmidt's  
11 underlying claim. However it is noted that defense counsel generally do agree with  
12 Mr. Coogan's assessment that the case was not "worth anything" to the extent that Ms. Schmidt  
13 obviously would have had substantial comparative fault as it came to her own injuries, very  
14 limited medical bills, and no appreciable permanent injury as a result. On a great day, it is  
15 unlikely Ms. Schmidt's case would settle for an amount anything above \$15,000.00. But  
16 obviously that is an aside, the real issue here is what Ms. Schmidt can prove as to the value of  
17 her case, not what preliminary estimates Mr. Coogan may have made based on faulty premises  
18 and/or information.  
19

20 Exhibit 5: as liability has already been established it is simply irrelevant as to what  
21 efforts were made by Mr. Coogan to investigate and prepare Ms. Schmidt's case against the  
22 grocery outlet.  
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**Exhibit 6:** letter to Schmidt from Sheehan dated March 20, 2000, as Ms. Schmidt cannot claim general damages in this case, this letter has no relevance in this case. The fact that Mr. Coogan denied malpractice, is irrelevant in this case where his liability has already been established and it is factually true that Ms. Schmidt herself contributed to the failure to file the complaint against the proper party because she and Mr. McMonagal were the individuals who actually drafted the complaint. Whether she can be held to a standard of lawyer is irrelevant and there is no claim that she was comparative fault with respect to the malpractice which occurred, but it is true that her actions did contribute to her own harm.

**Exhibit 7:** draft demand letter the same is true with respect to Exhibit 4, as the demand letter simply cannot come into evidence for the reasons previously stated in plaintiff's motion in limine.

**Exhibit 9:** statement of Theresa Louise Schmidt. To the extent the plaintiff may need to use this statement to refresh her recollection regarding the underlying facts of the slip and fall case, that would be an appropriate use of such document. However, it is believed that Ms. Schmidt herself will testify regarding what occurred with respect to her underlying claim, thus there is no need for cumulative evidence even if it can be construed as a "recorded recollection".

**Exhibit 10:** letter from Coogan to Bridges dated August 17, 2000, the question is does Mr. Bridges himself want to become a witness in this case given the fact that this letter is obviously a response to a letter written by Mr. Bridges. It is noted that it is understood that once Ms. Schmidt left Mr. Coogan's employ, she had her aunt, "Aunt Peggy" who was working at

1 Mr. Coogan's law firm remove the file from Mr. Coogan's law firm and give it to Ms. Schmidt,  
2 while at the same time Mr. Bridges was writing letters to Mr. Coogan demanding a copy of the  
3 file. Thus, the letter itself draws in the question of Mr. Bridges' credibility regarding his initial  
4 letter in the first place which demanded a copy of the file since it had been removed by Ms.  
5 Schmidt. It is reasonably understandable that not having reviewed the file Mr. Coogan, who  
6 was helping out a friend and an employee, may have forgotten that he had entered a formal fee  
7 agreement with Ms. Schmidt.  
8

9 Exhibit 11 and 12: The easiest way to respond to the plaintiff's objection to this motion  
10 in limine is "you've to got to be kidding"? There is no authority from any case cited by the  
11 plaintiff in this case that is appropriate for the jury to have before it the preliminary pleadings  
12 of the parties. The fact that Mr. Coogan raised in defense of this matter regarding Ms.  
13 Schmidt's and Mr. McMonagal's conduct regarding the improper filing of course is simply a  
14 matter which is factually accurate. The jury should not be permitted to speculate as to the legal  
15 consequences of such action in a case now that is limited to the issue of damages, and the jury  
16 will not be instructed regarding either Mr. McMonagal's claim and/or Ms. Schmidt's  
17 comparative fault as it relates to the filing of the subject complaint. Naturally if the plaintiff will  
18 stipulate that there is a claim of comparative fault against Ms. Schmidt and that the jury should  
19 with regard to the malpractice portion of the case, naturally defendant may be willing to revisit  
20 this issue so such evidence has a relevant basis for submission to the jury. At this juncture,  
21 those such issues are no longer the case and the jury should not be provided a copy of the  
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complaint and answer in this case and to suggest otherwise frankly is simply silly.

**Exhibit 13:** photographs of the Grocery Outlet.

The copy of the photographs defendant currently has available are unrecognizable as being a grocery store let alone that of being "The Grocery Outlet". Defense may desire to revisit this objection once there has been an opportunity to actually see the photographs, and to see what they actually show and/or if the defendant in advance can provide us a reasonable basis to think that they are true and accurate or in any way shape or form actually depict the conditions at or around the time of Ms. Schmidt's slip and fall.

**Exhibit 15:** Theresa Schmidt's medical bill summary. In the first trial of this case plaintiff's counsel admitted that the medical bill summary was inaccurate because it included finance charges within the total and that document was withdrawn and never submitted to the jury. If the plaintiff desires to prepare a new accurate medical bill summary, that does not include finance charges, the defendant would be happy to revisit this issue.

**Exhibit 17:** medical records and exhibits of Dr. Brobeck's deposition. As during the course of Dr. Brobeck's deposition, such medical records and exhibits were never offered into evidence, there is simply no foundation for the admission of these records into evidence at this time. Further the notion to that "the defendant objects to specific charges on some of the bills goes to weight and not admissibility" is simply frivolous. This case was in part subject to a grant of a motion for a new trial because the fact that there were finance charges to Ms. Schmidt's bills improperly got into evidence. Any bills submitted in this case should be

1 appropriately redacted to exclude finance charges and the like, as well as insurance information,  
2  
3 etc.

4 **O. The Video Deposition of Timothy Coogan is not Relevant and Inadmissible.**

5 Again it is almost laughable how plaintiff fails to misunderstand the implications of the  
6 fact that this is a new trial limited to the issue of damages. How Mr. Coogan engaged in any  
7 act of malpractice is simply irrelevant in that that has already been determined as a matter of  
8 law. The court has already decided, contrary to the plaintiff's wishful thinking, that there is  
9 simply no general damages for malpractice per se. If the court did not make such ruling it  
10 should do so now affirmatively, so no more additional time need be wasted on these issues.

11 **P. Ms. Schmidt's Testimony Should be Limited.**

12 Ms. Schmidt's testimony in this case should be limited to what damages she suffered as  
13 a byproduct of the underlying slip and fall claim. Her testimony must also be limited to the  
14 limited medical testimony which is available I this case for the plaintiff. In other words  
15 Ms. Schmidt certainly cannot testify to any matter beyond November of 1996 when she last  
16 sought treatment for the subject slip and fall, and to the extent she tries to contend that she has  
17 other symptoms and/or problems occurring after that point in time, there is no competent  
18 medical evidence in this case indicating that said symptoms are a byproduct of the 1995 slip and  
19 fall and by raising such issues she is clearly "opening the door" to the admission of all of her  
20 subsequent injuries, accidents, ailments, medical records and the like.  
21

22 **1. Evidence pertaining to other accidents.** In this case Dr. Brobeck testified that  
23

1 Ms. Schmidt was injured in a slip and fall, had accident related medical treatment until  
2 November 1996 and no more. However, Dr. Brobeck clearly testified that following the 1997  
3 accident he simply cannot say whether her symptoms were related to the 1995 accident or the  
4 1997 accident. Ms. Schmidt's own medical records established that all of her complaints  
5 following the 1997 accident related to the 1997 accident and not the 1995 slip and fall. Thus  
6 Ms. Schmidt should simply not be able to testify in any way, shape or form that following the  
7 1997 accident that she had any injuries related to the 1995 slip and fall or any symptoms related  
8 to the 1995 slip and fall. Such an assertion is not supported by her medical records, nor by Dr.  
9 Brobeck.  
10

11 In this case it is clear that the plaintiff is trying to mislead the court with respect to what  
12 Dr. Brobeck actually said. All Dr. Brobeck said was that Ms. Schmidt suffered an injury in  
13 1995 and that it resolved by November of 1996 (i.e. when she ended treatment). He never  
14 expressed any opinions that any subsequent conditions she had suffered from were a byproduct  
15 of the 1995 slip and fall. Thus given the absence of any cogent medical testimony, there can be  
16 no testimony by the plaintiff in this case regarding any injuries, conditions, symptoms or  
17 otherwise occurring after November of 1996.  
18

19 **2. Mr. Coogan's Treatment of Ms. Schmidt.** Such treatment is irrelevant, and  
20 clearly has no purpose in this case other than to try to explain the passions and prejudice to the  
21 jury. Ms. Schmidt will never be entitled to general damages for legal malpractice under the laws  
22 of the state of Washington, and "the contextual nature of Mr. Coogan and Ms. Schmidt's  
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attorney-client relationship" is irrelevant to this case given that liability has already been established.

With respect to the remainder of the plaintiff's response to defendant's motions in limine they are equally without merit and it is noted that the plaintiff obviously wants to make this case something other than it really is. This case is an extremely limited case on the issue of damages which in the context of legal malpractice would be the value of the underlying claim. At the end of the day the claim in this case has very little value, and given that fact and all the effort that has been put into this case by the plaintiff to date, they simply refuse to accept that fact and are now desperately trying to make this case into something greater than it really is. The court should reject such efforts because if such efforts are in any way successful it will simply lead to another decade of litigation in a case where the underlying claim was "run of the mill" at best.

Dated this 19 day of August, 2010.

By:   
Paul Lindenmuth WSBAR#1587  
Attorney for Defendant Coogan

**Exhibit 1**



00-2-12941-1 34810730 CME 08-10-10

# COUNTY SUPERIOR COURT

FRIDAY, AUGUST 6, 2010  
CIVIL MOTION CALENDAR - 9:00 A.M.

JUDGE CAROL MURPHY  
DAWN M. NASTANSKI, CLERK  
AURORA SHACKELL, COURT REPORTER

Underlined Parties Present at Hearing

FILED  
IN COUNTY CLERK'S OFFICE

A.M. AUG 10 2010 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY: [Signature] DEPUTY

00-2-12941-1 (Pierce County)

SCHMIDT, TERESA  
VS  
COOSAN, TIMOTHY

BRIDGES, DAN'L WAYNE

LINDENMUTH, PAUL

26.

PRETRIAL CONFERENCE  
MOTIONS IN LIMINE

Mr. Bridges presented argument to the Court, Mr. Lindenmuth responded.

Ruling: The Motion in Limine, regarding availability of general damages, prior to the act of malpractice, is denied.

Pretrial Motions are to be filed, noted and decided prior to trial, pursuant to Thurston County Local Court Rules.

**Exhibit 2**

Westlaw

10 COA 87  
10 Causes of Action 87 (Originally published in 1986)

Page 1

Causes of Action First Series  
Database updated September 2009

**Cause of Action Against Attorney for Malpractice in Handling Personal Injury Claim**

*James Lockhart, JD*

**COA ACTION GUIDE**

**PRIMA FACIE CASE**

- A prima facie case in an action against an attorney for legal malpractice in handling a personal injury claim requires proof that:
  1. the defendant owed a duty of care to the plaintiff (this will usually be established by evidence of an attorney-client relationship between the parties) [ § 5];
  2. the defendant breached the duty either by acting negligently or failing to fulfill the obligations created by the agreement to represent the plaintiff [ § 6]; and
  3. the plaintiff suffered an injury or loss as a proximate result of the defendant's breach [ § 7].

**DEFENSES**

- Possible claims in defense include the following:
  1. the defendant owed no duty to the plaintiff (usually because there was no attorney-client relationship between the parties or because the relationship did not encompass the plaintiff's personal injury claim). § 14
  2. there was no attorney-client relationship at the time the claim was lost. § 15
  3. the defendant exercised reasonable care in representing the plaintiff. § 16
  4. the defendant acted in accordance with the plaintiff's instructions or decisions. § 17
  5. ethical obligations dictated the defendant's actions. § 18
  6. the plaintiff's actions contributed to the loss of the claim. § 19
  7. the negligence of a successor attorney caused or contributed to the loss of the claim. § 20
  8. the plaintiff suffered no injury as a proximate consequence of the defendant's conduct. § 21
  9. the action is barred by the determination, settlement, or justification of the plaintiff's personal injury claim. § 22
  10. the malpractice claim was settled. § 23

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#### **PARTIES ENTITLED TO BRING ACTION**

- action for legal malpractice in handling a personal injury claim may be brought by a person or persons who had a right of action on the claim, provided there is an attorney-client relationship between this person or persons and the defendant. § 24
- To have standing to sue, a person must have suffered an injury or loss as a result of the defendant's malpractice in handling the person's personal injury claim. § 24

#### **PARTIES POTENTIALLY LIABLE**

- Liability for legal malpractice in handling a personal injury claim rests with the attorney who represented the plaintiff on the claim and whose negligence caused a loss to the plaintiff. § 25
- Law partner, law firm, or professional corporation may be vicariously liable. § 26

#### **JURISDICTION**

- A legal malpractice action may be brought in state court, or, if the requirements for diversity jurisdiction are satisfied, in a federal district court. § 26

#### **LIMITATIONS OF ACTIONS**

- Statute of limitations of the jurisdiction in which a legal malpractice action is brought is controlling. § 28
- Limitations period governing the plaintiff's personal injury claim may be relevant in determining when a legal malpractice action accrues and when the limitations period begins to run. § 28
- Limitations period generally begins to run when the plaintiff's personal injury claim is lost or diminished in value. § 29
- Running of the limitations period may be tolled by various circumstances, including the defendant's continued representation of the plaintiff or the defendant's misrepresentation as to the continuing viability of the plaintiff's personal injury claim. § 30

#### **RECOVERY**

- Compensatory damages include any damages which might have been recovered in an action on the plaintiff's personal injury claim. § 42
- Expenses incurred in hiring another attorney to take any action the defendant specifically agreed to take may be recovered as special damages. § 43
- Punitive damages may be awarded if the defendant's conduct was willful, malicious, fraudulent, oppressive, or reckless. § 44

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- § 2 Basis of Action
- § 3 Related Actions
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      - § 5 Attorney-Client Relationship
      - § 6 Breach of Duty by Attorney
      - § 7 Injury to Client as Result of Attorney's Breach
    - 2 Specific Acts or Omissions
      - § 8 Generally
      - § 9 Inadequate Investigation
      - § 10 Erroneous Advice
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    - § 16 Exercise of Reasonable Care
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    - § 19 Contributory Fault
    - § 20 Negligence of Successor Attorney
    - § 21 Absence of Injury
    - § 22 Determination, Settlement, or Satisfaction of Underlying Claim
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    - § 24 Persons Entitled to Bring Suit
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  - A In General
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    - § 28 Limitations
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## I. Introduction

### § 1. Scope

This article discusses actions against attorneys for legal malpractice in handling personal injury claims.

The elements of the plaintiff's prima facie case are discussed in §§ 4- 13. Matters in defense are considered in §§ 14- 23. Persons entitled to bring a legal malpractice action and persons potentially liable are specified in §§ 24, 25. General procedural matters, including jurisdiction, limitations, and pleadings, are treated in §§ 26- 32. Matters of proof are considered in §§ 33- 41. Damages issues are discussed in §§ 42- 44.

References to statutes are derived from the cases discussed herein.

### § 2. Basis of Action

#### [Cumulative Supplement]

A legal malpractice action is generally considered to sound in both tort and contract, and to confer a right of action based upon an attorney's negligence or breach of contract, or both. See Authority, this this section.

Generally, no distinction is made between the two theories of recovery, either in establishing the elements of a prima facie case [see § 4, as to the elements of a prima facie case], or in determining procedural matters such as the applicable limitations period. See, e.g., *Land v Greenwood*, 133 Ill App3d 537, 88 Ill Dec 595, 478 NE2d 1203 (1985) [counts in tort and contract based on same allegations must be treated identically on motion to dismiss]; *Duke & Company v Anderson*, 275 Pa Super 65, 418 A2d 613 (1980) [plaintiff must allege actual damages whether claim sounds in tort or contract]. Consequently, a client who is dissatisfied with the manner in which his or her attorney handled a personal injury claim, but who prevailed in an action on the claim and therefore cannot demonstrate that the attorney was negligent, cannot characterize a malpractice action as one for breach of contract in order to state a claim. *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983). But see *Harrison v Casto*, 271 SE2d 774 (W Va 1980) [suggesting that plaintiff's characterization of malpractice action as one in tort or contract may be determinative].

**PRACTICE GUIDE**

It frequently is a good idea to evaluate a malpractice claim from both tort and contract perspectives. For example, in determining whether there was an attorney-client relationship, which is an element of the prima facie case, [see § 5], a contract analysis may indicate that such a relationship existed only if the plaintiff paid for the defendant's services or was the beneficiary of those services under circumstances which would give rise to a promissory estoppel. A negligence analysis may indicate the existence of an attorney-client relationship whenever an attorney renders legal advice under circumstances which make it reasonably foreseeable to the attorney that, if the advice is based on a negligent evaluation of the facts or the law, the person to whom the advice is given may be injured thereby. *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980).

**Authority**

- Legal malpractice claims may be characterized as actions based on either negligence or breach of contract: Georgia  
*Rogers v Norvell*, 174 Ga App 453, 330 SE 2d 392 (1985)
- California  
*Neel v Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal13d 176, 98 Cal Rptr 837, 491 P2d 421 (1971)
- Illinois  
*Land v Greenwood*, 133 Ill App3d 537, 88 Ill Dec 595, 478 NE2d 1203 (1985)
- Indiana  
*Whitehouse v Quinn*, 477 NE2d 270 (Ind 1985)
- Louisiana  
*Jackson v Zito*, 314 So2d 401 (La App 1975) cert den 320 So2d 551 (La 1975) cert den 320 So2d 553 (La 1975)
- Minnesota  
*Togstad v Vesely, Otto, Miller & Keefe*, 291 NW 2d 686 (Minn 1980)
- Pennsylvania  
*Duke & Company v Anderson*, 275 Pa Super 65, 418 A2d 613 (1980)
- West Virginia  
*Harrison v Casto*, 271 SE2d 774 (W Va 1980)

**CUMULATIVE SUPPLEMENT****Cases:**

Representation of driver by attorney for automobile insurer, which issued policy to owners of automobile, created substantial conflict of interest in personal injury action that was brought by passenger, who was an insured under policy, against driver, who was not an insured, although attorney chose not to pursue driver's allegation that passenger was sole proximate cause of accident; defending driver required insurer to oppose passenger. *Perez v Kleinert*, 211 S.W.3d 468 (Tex. App. Corpus Christi 2006), rule 53.7(f) motion granted, (Feb. 20, 2007); West's Key Number Digest, Attorney And Client ~~C~~21.5(5).

Attorney's conduct in failing to inform client that her personal injury case had been voluntarily dismissed, failing to keep client informed about the status of her workers' compensation claim, failing to return client's telephone calls, and failing to return client's files to client after client terminated representation violated the professional rules requiring a lawyer to abide by a client's decisions concerning the objectives of representation, to consult with a client as to the means by they were pursued, to keep a client reasonably informed about the status of a matter, and to take steps to the extent reasonably practicable to protect a client's interest upon termination of representation. In re Disciplinary Proceedings

Against Paul, 2007 WI 11, 298 Wis. 2d 629, 726 N.W.2d 253 (2007); West's Key Number Digest, Attorney And Client ¶59.13(3).

Sixty-day suspension from the practice of law was warranted, in attorney disciplinary case filed by stipulation, where attorney failed to inform client that her personal injury case had been voluntarily dismissed, failed to keep client informed about the status of her workers' compensation claim, failed to return client's telephone calls, and failed to return client's files to client after client terminated representation, in violation of the professional rules. In re Disciplinary Proceedings Against Paul, 2007 WI 11, 298 Wis. 2d 629, 726 N.W.2d 253 (2007); West's Key Number Digest, Attorney And Client ¶44(1).

[Top of Section]

[END OF SUPPLEMENT]

### § 3. Related Actions

[Cumulative Supplement]

In addition to an action for legal malpractice, a number of other actions may be available to a person who has lost a personal injury claim because of the way the claim was handled by the person's attorney. If the attorney made deliberate misrepresentations or deliberately acted contrary to the client's interest, an action for fraud may be possible. See, e.g., *Cline v Lever Brothers Co*, 124 Ga App 22, 183 SE 2d 63 (1971); *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980); *Reynolds v Picciano*, 29 AD2d 1012, 289 NYS2d 436 (1968); *Brantley v Dunstan*, 17 NC App 19, 193 SE2d 423 (1972); *O'Callaghan v Weitzman*, 291 Pa Super 471, 436 A2d 212 (1981). An action for fraud may be available even where a malpractice action is not yet available because the client's personal injury claim remains viable. See *Cline*, above. [For a discussion of when a malpractice cause of action accrues, see § 29.] An action for fraud also may be brought even though a malpractice action based on the same facts would be time-barred. See *O'Callahan*, above.

### PRACTICE GUIDE

The possibility of bringing an action for fraud is of particular relevance where the client has not discovered the attorney's apparent malpractice until the statute of limitations has run on a malpractice claim. A fraud action may be appropriate if the attorney has deliberately concealed an act of malpractice for the purpose of preventing the client from taking action before the statute of limitations has run. See *Brantley v Dunstan*, 17 NC App 19, 193 SE2d 423 (1972); *O'Callaghan v Weitzman*, 291 Pa Super 471, 436 A2d 212 (1981). An action for fraud may also be appropriate if a person is injured by the conduct of an attorney who is not the person's attorney. See *Edmondson v Dressman*, 469 So2d 571 (Ala 1985) [plaintiff could bring action for fraud, but not malpractice, against attorney who represented person allegedly responsible for plaintiff's injury]; *Pollack v Lytle*, 120 Cal App3d 931, 175 Cal Rptr 81 (1981) [attorney could bring action for fraud, but not malpractice, against associate counsel]. If both fraud and malpractice actions are available, a malpractice action may be the preferable alternative for the client because differences in the elements of proof and the evidence necessary to establish a prima facie case may increase the client's chance of success. See *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980).

If a client's personal injury action was successful, either at trial or through settlement, and the client's attorney failed to pay over to the client the amount recovered, the appropriate remedy may be a suit against the attorney for breach of fiduciary duty. See, e.g., *Perez v Pappas*, 98 Wash2d 835, 659 P2d 475 (1983) [attorney held to have breached fiduciary duty by deducting fees in excess of agreed contingent fee from settlement]. Where a question as to the propriety of an attorney's conduct is related to a question as to the size of the fee to which the attorney is entitled, the propriety question may be considered in a proceeding to fix the attorney's fee in the underlying personal injury action. See *Wade v Clem-*

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mons, 84 Misc2d 822, 377 NYS2d 415 (1975) [reducing attorney's fee where attorney failed to apprise client that his fee and client's hospital expenses would consume entire amount of settlement, leaving nothing to compensate client for physical disability].

#### PRACTICE GUIDE

Complaints concerning an attorney's professional conduct may also be filed with attorney disciplinary boards or licensing authorities. See *In re Minor*, 681 P2d 1347 (Alaska 1983); *Mitchell v Transamerica Insurance Co*, 551 SW2d 586 (Ky App 1977); *Brown v Johnstone*, 5 Ohio App3d 165, 450 NE2d 693 (1982) mot ovrld. This may be an appropriate alternative to a legal malpractice action if the client is not seeking to recover damages. *Mitchell v Transamerica Insurance Co*, 551 SW2d 586 (Ky App 1977). Damages, as such, are generally not awarded in a disciplinary proceeding, since the purpose of such a proceeding is to determine whether to discipline an attorney. However, an attorney who is the subject of a disciplinary proceeding may be ordered to make restitution to a client, or restitution may be made a condition of an attorney's reinstatement to good standing. See, e.g., *In re Minor*, 681 P2d 1347 (Alaska 1983). If the client seeks to recover damages, it should be recognized that filing a complaint with a disciplinary board may trigger the running of the statute of limitations with respect to a malpractice action. See *Brown v Johnstone*, 5 Ohio App3d 165, 450 NE2d 693 (1982) mot ovrld. For a discussion of when a malpractice cause of action accrues, see § 29.

#### CUMULATIVE SUPPLEMENT A.L.R. Library

Power of Court to Order Restitution to Wronged Client in Disciplinary Proceeding against Attorney, 75 A.L.R. 3d 307

#### Cases:

Under Connecticut law, there was no common-law right to file apportionment claim; thus, such claim could not be filed by defendant in legal malpractice action, since statutes creating right of apportionment required that underlying action be one for personal injury, wrongful death, or damage to property. *Newby v. Enron Corp.*, 446 F.3d 585 (5th Cir. 2006) (applying Connecticut law); *West's Key Number Digest, Attorney And Client* ¶105.5.

Attorneys' failure to obtain a nominal judgment against motorist in clients' personal injury action arising out of an automobile accident directly and proximately caused clients to lose their right to make claim against and recover from their uninsured motorist (UM) insurance carrier, and thus such failure could support legal malpractice claim against attorneys if it breached the applicable standard of care. *Butler v. Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.L.*, 280 Ga. App. 207, 633 S.E.2d 614 (2006); *West's Key Number Digest, Attorney And Client* ¶112.

The injury in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself; rather, it is a pecuniary injury to an intangible property interest caused by the lawyer's negligent act or omission. *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 305 Ill. Dec. 584, 856 N.E.2d 389 (2006); *West's Key Number Digest, Attorney And Client* ¶105.5.

Attorney's misconduct in handling rear-ended driver's personal injury action amounted to legal malpractice, where attorney did not inform driver of the dismissal of her claim and continued to assure her of the viability of her claim, and he continued to mislead her to believe that he was actively engaged in representing her after his license to practice law was suspended. *Bland v. Hammond*, 177 Md. App. 340, 935 A.2d 457 (2007). *West's Key Number Digest, Attorney And Client* ¶112.

Essence of client's complaint against attorney alleging that, following settlement of personal injury action, attorney

failed to prudently invest net proceeds of settlement on behalf of client and failed to properly advise client was claim for legal malpractice and breach of fiduciary duty to properly advise. *Nesvig v. Nesvig*, 2004 ND 37, 676 N.W.2d 73 (N.D. 2004); *West's Key Number Digest, Attorney And Client* ¶105.5.

Attorney's failure to refile his client's personal injury suit in Arizona before statute of limitations ran, although negligent, fell short of affirmative deception required by the Deceptive Trade Practices Act (DTPA), where nonsuit was filed in Texas without prejudice, attorney was actively attempting to reach a settlement with defendant, even after statute ran, attorney testified that he believed in good faith that Arizona's savings provision would allow his client to bring suit after the customary two-year statute of limitations had expired, and attorney did not misrepresent material fact. *James V. Mazuca and Associates v. Schumann*, 82 S.W.3d 90 (Tex. App. San Antonio 2002), reh'g overruled, (June 3, 2002) and review denied, (Oct. 31, 2002); *West's Key Number Digest, Attorney And Client* ¶112.

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[END OF SUPPLEMENT]

## II. Substantive Law Overview

### A. Prima Facie Case

#### 1. In General

#### § 4. Elements, Generally

[Cumulative Supplement]

Although a legal malpractice action may be characterized as an action in either tort or contract [see § 2] the elements which must be pleaded and proved in order to establish a prima facie case are the same despite the characterization. The plaintiff must plead and prove: (1) a duty on the part of the defendant to the plaintiff, (2) a breach of the duty, and (3) an injury proximately caused by that breach. *Herston v Whitesell*, 374 So2d 267 (Ala 1979); *Weiner v Moreno*, 271 So2d 217 (Fla App 1973); *Cook v Gould*, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982).

To establish the duty element, the plaintiff must ordinarily prove an attorney-client relationship with the defendant, although proof of a formal, contractual agreement may not be necessary. See § 5. In order to establish the breach element, the plaintiff must ordinarily prove either a failure on the part of the defendant to act in accordance with the ordinary knowledge, care, or skill common to members of the legal profession or a failure to fulfill the obligations created by the agreement to represent the plaintiff. See § 6. In order to establish an injury proximately caused by the defendant's breach, the plaintiff must prove both an actual loss arising out of the defendant's mishandling of the underlying personal injury claim, and also that the plaintiff would have prevailed on the claim had it not been for the way it was mishandled by the defendant. See § 7.

#### CUMULATIVE SUPPLEMENT

##### Cases:

When a person sues his former attorney for legal malpractice in the civil arena, he must prove a breach of the attorney's duty to use professional skill, a causal connection between the breach and the injury, and actual loss or damage. *Salisbury v. County of Orange*, 131 Cal. App. 4th 756, 31 Cal. Rptr. 3d 831 (4th Dist. 2005), as modified, on other grounds, on denial of reh'g, (Aug. 17, 2005) and review denied, (Oct. 26, 2005). *West's Key Number Digest, Attorney And Client* ¶105.5.

Client's decision to allow professional corporation (P.C.) to continue representing her by filing lawsuit and settling her personal injury lawsuit after P.C. previously breached its fiduciary duty to client by allowing non-attorney to settle case without attorney supervision and without client's consent, was not waiver of client's cause of action for breach of fiduciary duty against P.C.; breach of fiduciary duty and resulting harm was unrelated to fact that, after P.C. discovered the misconduct of its employee, it took steps to properly handle case. *Joel v. Chastain*, 2 Fulton County D. Rep. 835, 2002 WL 378188 (Ga. Ct. App. 2002); West's Key Number Digest, Attorney And Client ¶112.

The basis of a legal malpractice claim is that had it not been for negligence on the part of plaintiff's attorney, plaintiff would have been compensated for an injury caused by a third party. *Webb v. Damisch*, 2005 WL 3470215 (Ill. App. Ct. 1st Dist. 2005). West's Key Number Digest, Attorney And Client ¶105.5.

Attorneys' failure to file client's personal injury complaint within applicable statute of limitations constituted legal malpractice, absent any justification for untimely filing. *Diver v. Gross, Hanlon, Truss & Messer, P.C.*, 317 N.J. Super. 547, 722 A.2d 623 (Law Div. 1998).

Before a claim for legal malpractice may be asserted, there must exist an attorney-client relationship. *Ryckde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009).

The elements of a legal malpractice claim are: (1) the attorney owed a duty to the plaintiff; (2) the attorney breached that duty; (3) the breach proximately caused the plaintiff's injuries; and (4) damages occurred. *Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C.*, 2005 WL 3291844 (Tex. App. Dallas 2005), reh'g overruled, (Dec. 16, 2005) and rule 53.7(f) motion granted, (Jan. 12, 2006). West's Key Number Digest, Attorney And Client ¶105.5.

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[END OF SUPPLEMENT]

#### § 5. Attorney-Client Relationship

In order to establish an actionable case of legal malpractice, it is necessary for the plaintiff to prove that the defendant owed a duty to the plaintiff to provide professional legal services. This requires the plaintiff to plead and prove that an attorney-client relationship existed between the defendant and the plaintiff. See Authority, this section. Specifically, the plaintiff will have to prove that: (1) an attorney-client relationship existed between the parties; (2) the relationship involved an obligation on the part of the defendant to perform legal services on behalf of the plaintiff; and (3) the obligation encompassed the particular matter or claim which is the subject of the malpractice action.

In order to establish that an attorney-client relationship existed, the plaintiff must ordinarily prove not only that the plaintiff authorized the defendant to handle the underlying personal injury claim on the plaintiff's behalf, but also that the defendant agreed to act as the plaintiff's attorney. Particularly in the case of a personal injury claim, which normally would be handled on a contingent fee basis, an attorney's silence is not sufficient to create a contract or retainer. *McGlone v Lacey*, 288 FSupp 662 (D SD 1968).

However, no formal contract, arrangement, or fee agreement is necessary to create an attorney-client relationship, and the plaintiff may establish the existence of the relationship merely by showing that the defendant agreed to handle the plaintiff's personal injury claim, even though the plaintiff does not show that any fee was ever paid to the attorney or that a contingent-fee arrangement was ever agreed upon between the parties. *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979).

#### PRACTICE GUIDE

The crucial element creating a legal duty on the part of an attorney appears to be the attorney's acceptance of the personal

injury claim, or promise to represent the client in the matter. Thus, in *McGlone v Lacey*, 288 FSupp 662 (D SD 1968), the court held that no attorney-client relationship was created where the defendant did not respond to the plaintiff's letter authorizing the defendant to represent him in a personal injury action on a contingent fee basis. A partner of the defendant answered the letter and explained that the defendant was presently unavailable but would contact the plaintiff in the future. The court held the defendant's failure to contact the plaintiff until after the statute of limitations had run on the personal injury claim could not be a basis for a legal malpractice action because of the absence of an attorney-client relationship.

In *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979), on the other hand, the court held that an attorney-client relationship would be established by evidence of the defendant's promise to handle a wrongful death claim on behalf of the plaintiff, together with the defendant's subsequent representations to the plaintiff that he was handling the claim, even though the defendant believed that he was not committed to handling the claim until a contingent fee agreement had been reached.

Since it is possible for one person to retain an attorney to represent another person, it is necessary to show that the defendant was retained to represent the plaintiff personally. See *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975) [attorney hired by parents specifically to represent child did not represent parents]. If it can be shown that another person retained or consulted the defendant specifically with a view toward representing the plaintiff, the plaintiff may establish an attorney-client relationship without proving that he or she personally employed or directly consulted with the defendant. See *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980) [attorney could be liable for loss of plaintiff's medical malpractice claim where plaintiff's wife consulted defendant regarding claim]. Similarly, an attorney agreeing to handle a wrongful death claim may be deemed to have undertaken to do so on behalf of the decedent's distributees, even though the attorney was retained by the representative of the decedent's estate. See *Baer v Broder*, 86 AD2d 881, 447 NYS2d 538 (1982).

#### PRACTICE GUIDE

An attorney who joins a case as associate or local counsel is also deemed to have undertaken an obligation on behalf of the client, even though the attorney is employed through the intermediary of the client's principal attorney, and has no direct contact with the client. *Hood v McConeny*, 53 FRD 435 (D Del 1971); *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982).

Since an attorney is not obligated to act on behalf of a client in a matter which does not pertain to the duties the attorney has undertaken, the plaintiff must establish that the subject matter of the malpractice action involves the duties undertaken by the defendant in representing the plaintiff on the underlying personal injury claim. See *Piel v Dillard*, 414 So2d 87 (Ala App 1982); *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978); *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975). The plaintiff must establish that the defendant was retained or consulted with respect to the injury suffered by the plaintiff, but ordinarily need not show that the defendant expressly undertook to bring suit or take any other particular type of action. The mere fact that an attorney advises a person in a legal matter may be sufficient to create an attorney-client relationship respecting that matter, even though the attorney is not retained to take action on the matter and does not receive a fee for rendering services. *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). Thus, for example, it may be possible to state a claim against an attorney for erroneously advising that the plaintiff has no case respecting the injury suffered by the plaintiff, even though the plaintiff is charged no fee for this advice. However, if an attorney does not receive a fee for rendering advice, it will be necessary for the plaintiff to show that the advice was rendered under circumstances in which the attorney would have known that a reasonable person would rely on the advice and might be detrimentally affected if the advice was incorrect and was negligently rendered.

Togstad, above.

#### PRACTICE GUIDE

The reason the plaintiff need only show that the defendant was retained with respect to the subject matter of the malpractice action is that an attorney, as a legal expert, is expected to know better than a client what actions are necessary or appropriate to properly pursue the client's claim. Even if the agreement between the parties called for the defendant to take some specific action, the defendant would not be free to disregard evidence that some other action, or some additional action, was necessary or appropriate to enforce the plaintiff's rights. See *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978); *Smith v Becnel*, 396 So2d 444 (La App 1981).

Because an attorney is liable only for errors or omissions which proximately cause injury to a client [see § 7], it may also be necessary for the plaintiff to establish that the attorney-client relationship was in existence at a time when the defendant, by appropriate action, could have preserved the plaintiff's rights on the underlying personal injury claim. For example, where the plaintiff alleges that the defendant failed to bring a timely action on the personal injury claim, it will be necessary for the plaintiff to establish that the attorney-client relationship began prior to the expiration of the period during which a timely action could have been brought. *Piel v Dillard*, 414 So2d 87 (Ala App 1982). It may be equally necessary for the plaintiff to show that the attorney-client relationship continued until the consequences of the defendant's negligence could no longer be remedied. The mere fact that an attorney-client relationship has been terminated does not necessarily relieve an attorney of further liability to a client. See, e.g., *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). However, the question whether an attorney remains liable notwithstanding termination of the attorney-client relationship depends upon whether the attorney's negligence is the proximate cause of the client's injury, and this in turn depends upon such questions as whether termination of the relationship prevented the attorney from remedying the injury to the client, and whether the injury could have been remedied by succeeding counsel. See § 20.

#### Authority

Duty element of prima facie case may be established by evidence that an attorney-client relationship existed between the parties:

- Georgia
  - Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985)
- Second Circuit
  - Wagner v Tucker*, 517 FSupp 1248 (SD NY 1981)
- Third Circuit
  - Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985)
- Delaware
  - Pusey v Reed*, 258 A2d 460 (Del Super 1969)
- Florida
  - Kyle v McFadden*, 443 So2d 497 (Fla App 1984)
  - Weiner v Moreno*, 271 So2d 217 (Fla App 1973)
- Illinois
  - Cook v Gould*, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982)
- Kentucky
  - Daugherty v Runner*, 581 SW2d 12 (Ky App 1978)
- Maryland
  - Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983)

**Minnesota**

Togstad v Vesely, Otto, Miller &amp; Keefe, 291 NW2d 686 (Minn 1980)

**New Mexico**

George v Caton, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979)

**Pennsylvania**

Duke &amp; Company v Anderson, 275 Pa Super 65, 418 A2d 613 (1980)

Schenkel v Monheit, 266 Pa Super 396, 405 A2d 493 (1979)

**Washington**

Hansen v Wightman, 14 Wash App 78, 538 P2d 1238 (1975)

**§ 6. Breach of Duty by Attorney****[Cumulative Supplement]**

Once the plaintiff in a legal malpractice action has established a duty on the part of the defendant [see § 5], the plaintiff must show that the defendant breached that duty, either by acting negligently or failing to fulfill the obligations created by the agreement to represent the plaintiff. See Authority, this section.

Any number of acts or omissions, either individually or in combination, on the part of an attorney representing a client on a personal injury claim may be actionable. Defined in general terms, these acts or omissions involve the failure of an attorney to adequately investigate a client's claim [see § 9]; giving erroneous advice [see § 10]; failing to commence or prosecute an action based on the claim [see § 11]; failing to try an action with the requisite degree of knowledge, skill, and diligence [see § 12]; and wrongfully setting or advising settlement of the claim [see § 13].

By agreeing to represent a client, an attorney impliedly represents that he or she: (1) possesses the requisite degree of knowledge, skill, and ability necessary to practice the law that other attorneys similarly situated ordinarily possess; (2) will exert his or her best judgment in the prosecution of the matter entrusted by the client; and (3) will exercise reasonable and ordinary care and diligence in handling the matter. *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979).

The question whether an attorney has handled a matter with the requisite degree of knowledge, care, and skill is judged by the degree to which the attorney's conduct deviated from the standard of professional care customarily exercised by members of the legal profession. *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978).

An attorney is required to act with the degree of knowledge, care, and skill expected of attorneys generally, but if an attorney claims to be a specialist possessing greater than ordinary knowledge and skill in a particular field, the attorney may be held to the standard of performance expected of attorneys who hold themselves out as specialists in that field. *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978); *Walker v Bangs*, 92 Wash2d 854, 601 P2d 1279 (1979).

**PRACTICE GUIDE**

As far as the applicable standard of care is concerned, an attorney's performance is sometimes measured by reference to the knowledge, skill, and practices of other attorneys practicing in the community or a similar locality. See *Cook v Irion*, 409 SW2d 475 (Tex Civ App 1966) [rejecting expert testimony of attorney from another community]. But see *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979) [holding local custom irrelevant where attorney seeking to establish custom had apparently failed to follow it]. On the other hand, since all attorneys prac-

ting in a particular state presumably must meet the same criteria for admission to the bar, the standard of care for attorneys practicing within a state is sometimes deemed to be a statewide standard, which does not vary depending on the community where an attorney is practicing. See *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975).

The actionability of an attorney's conduct depends to a large extent on the specific obligations undertaken by the attorney on behalf of a client. The question of the exact nature of an attorney's responsibilities to a client, including the question whether a particular action is required or even permitted, is judged not by the attorney's general undertaking as an attorney, but rather by the nature of the attorney's employment agreement with the client, and therefore must ultimately be determined by reference to that agreement. *Hood v McConeary*, 53 FRD 435 (D Del 1971).

#### Authority

Breach of an attorney's duty to a client in handling a personal injury claim may be established by evidence of the attorney's negligence:Georgia

*Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985)

#### Third Circuit

*Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985)

#### California

*Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978)

#### Delaware

*Pusey v Reed*, 258 A2d 460 (Del Super 1969)

#### Illinois

*House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977)

#### Kentucky

*Daugherty v Runner*, 581 SW2d 12 (Ky App 1978)

#### Maine

*Sohn v Bernstein*, 279 A2d 529 (Me 1971)

#### New Jersey

*Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978)

#### North Carolina

*Rorrer v Cooke*, 313 NC 338, 329 SE2d 355 (1985)

#### Pennsylvania

*Duke & Company v Anderson*, 275 Pa Super 65, 418 A2d 613 (1980)

*Schenkel v Monheit*, 266 Pa Super 396, 405 A2d 493 (1979)

#### Texas

*Cook v Irion*, 409 SW2d 475 (Tex Civ App 1966)

#### Washington

*Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975)

Breach of an attorney's duty to a client in handling a personal injury claim may be established by evidence of the attorney's failure to fulfill obligations created by the attorney's agreement to represent the client:Florida

*Kyle v McFadden*, 443 So2d 497 (Fla App 1984)

*Weiner v Moreno*, 271 So2d 217 (Fla App 1973)

#### Illinois

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- Cook v Gould, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982)
- Maine  
Sohn v Bernstein, 279 A2d 529 (Me 1971)
- Maryland  
Fishov v Simpson, 55 Md App 312, 462 A2d 540 (1983)
- Minnesota  
Togstad v Vesely, Otto, Miller & Keefe, 291 NW2d 686 (Minn 1980)
- New Mexico  
George v Caton, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979)
- Washington  
Hansen v Wightman, 14 Wash App 78, 538 P2d 1238 (1975)

#### CUMULATIVE SUPPLEMENT

##### Cases:

If attorney had accepted a referral of client's personal injury case from another lawyer to the expiration of the statute of limitations and allowed the statute to expire without filing a complaint, then attorney could be liable to client for legal malpractice or breach of a fiduciary duty even though client had never met, had never spoken to, and never had any contact with attorney before the statute of limitations expired. *Lenches-Marrero v. Law Firm of Aversa & Gardner*, 326 N.J. Super. 382, 741 A.2d 605 (App. Div. 1999) (App. Div. 1999); West's Key Number Digest, Attorney And Client ¶112.

Client's decision to allow professional corporation (P.C.) to continue representing her by filing lawsuit and settling her personal injury lawsuit after P.C. previously breached its fiduciary duty to client by allowing non-attorney to settle case without attorney supervision and without client's consent, was not waiver of client's cause of action for breach of fiduciary duty against P.C.; breach of fiduciary duty and resulting harm was unrelated to fact that, after P.C. discovered the misconduct of its employee, it took steps to properly handle case. *David C. Joel, Attorney at Law, P.C. v. Chastain*, 254 Ga. App. 592, 562 S.E.2d 746 (2002), cert. denied, (Sept. 6, 2002); West's Key Number Digest, Attorney And Client ¶112.

Attorney's negligence in settling client's personal injury action through binding arbitration without first obtaining the consent of client's workers' compensation carrier, despite statutory rule requiring carrier's consent or judicial approval to allow client to continue receiving workers' compensation benefits, was proximate cause of client's damages, where record demonstrated that, but for attorney's failure to obtain carrier's consent to the settlement or a court-issued compromise order, the client's workers' compensation benefits would not have been terminated. *Northrop v. Thorsen*, 46 A.D.3d 780, 848 N.Y.S.2d 304 (2d Dep't 2007). West's Key Number Digest, Attorney And Client ¶112.

In an attorney malpractice action based on the negligent handling of personal injury action, the court found that the defendant attorney had breached his duty to the plaintiff client where he failed to estimate the value of the plaintiff's claim against the personal injury defendant, failed to make an independent evaluation of the personal injury defendant's assets, failed to consult his client about the offer of judgment and to inform him of the entry of judgment until more than six months had passed, and failed to appeal the trial court's order which terminated the plaintiff's claims to underinsured motorist coverage. The court found the successive failures constituted an omission of reasonable care and diligence that proximately caused damage to the clients. Thus, the trial court properly entered summary judgment in favor of the plaintiffs on the issue of legal malpractice. *Patrick v Ronald Williams P A*, 102 NC App 355, 402 SE2d 452 (1991).

The Texas Supreme Court held that there is no subjective good faith excuse for attorney negligence. A lawyer in Texas is held to the standard of care which would be exercised by a reasonably prudent attorney. A jury must evaluate the conduct based on the information the attorney had at the time of the active negligence. In some instances an attorney is required to make tactical or strategic decisions. Ostensibly, the good faith exception was created to protect this unique

attorney work product. However, allowing the attorney to assert his subjective good faith when the acts he undertakes are unreasonable as measured by the reasonably competent practitioner's standard, creates too great a burden for wrong to clients to overcome. An attorney, however, cannot be held strictly liable for all of their clients unfulfilled expectations. The standard is an objective exercise of professional judgment, not the subjective belief that his acts are in good faith. *Cosgrove v Grimes*, 774 SW2d 662 (Tex 1989).

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[END OF SUPPLEMENT]

#### § 7. Injury to Client as Result of Attorney's Breach

[Cumulative Supplement]

After establishing a duty on the part of the defendant, usually on the basis of an attorney-client relationship, [see § 5], and the defendant's breach of that duty [see § 6], the plaintiff must plead and prove that an injury was suffered as a proximate result of the defendant's breach. See Authority, this section. This requires the plaintiff to prove both that some injury was suffered and that the defendant's actions or failure to act proximately caused this injury.

To establish that an actionable injury was suffered, the plaintiff must ordinarily prove that some appreciable harm was suffered as a consequence of the attorney's conduct. *Schenkel v Monheit*, 266 Pa Super 396, 405 A2d 493 (1979). A client who has suffered no appreciable harm as a result of an attorney's conduct ordinarily cannot maintain an action to recover only nominal damages. *Duke & Company v Anderson*, 275 Pa Super 65, 418 A2d 613 (1980). But see *Brantley v Dunstan*, 10 NC App 706, 179 SE2d 878 (1971) [suggesting attorney error may be actionable and nominal damages awarded even though substantial damages are unaccrued at time of action].

#### PRACTICE GUIDE

It may be possible to state a cause of action for legal malpractice upon proof that the plaintiff suffered a real, substantial injury, even though substantial monetary damages ultimately cannot be recovered because of the difficulty of precisely quantifying the extent of the plaintiff's injury. *Kluge v O'Gara*, 227 Cal App2d 207, 38 Cal Rptr 607 (1964) [punitive damages were possible]. [See also § 35 regarding proof of damages.] However, unless the prospect exists of obtaining punitive damages, this possibility is of only theoretical interest and, as a practical matter, the plaintiff must be able to prove not only an injury, but also the nature and extent of the injury. See *Thompson v D'Angelo*, 320 A2d 729 (Del Sup 1974).

In the specific context of a legal malpractice action for mishandling a personal injury claim, to show injury the plaintiff must prove that the defendant's mishandling of the claim caused the plaintiff to lose all or part of the amount that could have been recovered in damages if the claim had been properly handled. The plaintiff must prove, if properly handled: (1) that the claim would have succeeded, (2) that damages would have been awarded, (3) the amount of damages that would have been awarded, and (4) that damages could have been recovered from a defendant in the action. *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978); *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978); *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979).

If some damages were recovered on the underlying claim, either after trial on the merits or through settlement, the plaintiff can still state a cause of action for malpractice if it can be demonstrated that the amount recovered was inadequate and that proper handling of the claim would have led to a more favorable recovery. *Tassin v Labranche*, 365 So2d 31 (La App 1978). It will be necessary to prove that the damages actually recovered were inadequate because, if the

amount recovered was adequate, any claim that the amount awarded would have been greater had the claim been properly handled may be regarded as pure conjecture and speculation, not susceptible to proof. See *Mitchell v Transamerica Insurance Co*, 551 SW2d 586 (Ky App 1977). See also *Tassin*, above [plaintiff must show that damages awarded on underlying claim were so inadequate as to constitute abuse of discretion]; *Katsaris v Scelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982) [plaintiff must show that damages were inadequate as matter of law].

#### PRACTICE GUIDE

An exception to the rule that the plaintiff must show a loss or diminution in value of the underlying claim may apply where the defendant clearly contracted to provide particular services to the plaintiff, such as filing suit, and the defendant's failure to fulfill this obligation compelled the plaintiff to employ another attorney at additional expense to provide the same services. Thus, for example, if the defendant originally agreed to represent the plaintiff for a contingent fee, and the defendant's failure to perform forced the plaintiff to employ another attorney on a fixed-fee basis, payable regardless of the outcome of the suit, the plaintiff may be able to prove that the defendant's negligence caused the plaintiff a loss, measured by the amount of the second attorney's fee, even though the plaintiff ultimately fails to prevail in the personal injury suit. See *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982).

Another exception applies where the plaintiff has been awarded a judgment or has settled for the full amount of damages sought, but has been unable to realize or recover the judgment or settlement due to the defendant's misconduct. See, e.g., *Green v Bartel*, 365 So2d 785 (Fla App 1978) [where attorney recovered settlement but allegedly paid proceeds to wrong person; proper recipient of settlement may bring malpractice action against attorney].

To prove that an injury was suffered as a proximate consequence of the defendant's mishandling of the plaintiff's claim, it is ordinarily necessary for the plaintiff to show that, absent the defendant's negligence, the plaintiff would have prevailed on the claim. *Williams v Bashman*, 457 FSupp 322 (FD Pa 1978); *Baker v Beal*, 225 NW2d 106 (Iowa 1975); *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982); *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). This requires the plaintiff to prove not only that the claim failed because of the defendant's negligence, but also that there were grounds on which the claim would have succeeded. For example, a plaintiff who alleges legal malpractice on an attorney's failure to adopt a particular theory of recovery must prove not only that the attorney was negligent in adopting the theory of recovery actually advanced, but also that other theories of recovery were available and would have resulted in a favorable verdict. *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983). Similarly, a plaintiff who alleges malpractice on an attorney's failure to object to the introduction of evidence must establish not only that the attorney was negligent in failing to make the objection, but also that the objection, if made, would have been sustained. *St Pierre v Washofsky*, 391 So2d 78 (La App 1980) cert den 396 So2d 1328 (La 1981).

#### PRACTICE GUIDE

In establishing that the defendant's conduct was a proximate cause of the injury suffered, it may be necessary for the plaintiff to satisfy a "but for" test and show that, but for the defendant's conduct, the plaintiff would have been successful on the underlying claim. See, e.g., *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982); *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). However, merely showing that the defendant's conduct was the substantially contributing factor to the plaintiff's injury may be sufficient. See *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978).

#### Authority

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10 Causes of Action 87 (Originally published in 1986)

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*Prima facie* case of legal malpractice based on an attorney's mishandling of a personal injury claim requires proof that the defendant's breach of duty was a proximate cause of an injury suffered by the plaintiff: Georgia

Rogers v Norvell, 174 Ga App 453, 330 SE2d 392 (1985)

## Third Circuit

Gaus v Mundy, 762 F2d 338 (3rd Cir Pa 1985)

## Alabama

Herston v Whitesell, 374 So2d 267 (Ala 1979)

## Delaware

Thompson v D'Angelo, 320 A2d 729 (Del Sup 1974)

## Florida

Kyle v McFadden, 443 So2d 497 (Fla App 1984)

Weiner v Moreno, 271 So2d 217 (Fla App 1973)

## Illinois

Cook v Gould, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982)

## Kentucky

Daugherty v Runner, 581 SW2d 12 (Ky App 1978)

## Louisiana

Jenkins v St Paul Fire & Marine Insurance Co, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982)

St Pierre v Washofsky, 391 So2d 78 (La App 1980) cert den 396 So2d 1328 (La 1981)

## Maryland

Fishow v Simpson, 55 Md App 312, 462 A2d 540 (1983)

## Minnesota

Togstad v Vesely, Otto, Miller & Keefe, 291 NW2d 686 (Minn 1980)

## New Mexico

George v Caton, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979)

## New York

Fidler v Sullivan, 93 AD2d 964, 463 NYS2d 279 (1983)

## Pennsylvania

Duke & Company v Anderson, 275 Pa Super 65, 418 A2d 613 (1980)

Schenkel v Monheit, 266 Pa Super 396, 405 A2d 493 (1979)

## Washington

Hansen v Wightman, 14 Wash App 78, 538 P2d 1238 (1975)

**CUMULATIVE SUPPLEMENT****Cases:**

Injury is an essential element of a legal malpractice cause-of-action under Illinois law; if there has been no injury, there has been no malpractice. In re Holstein, 321 B.R. 229 (Bankr. N.D. Ill. 2005). West's Key Number Digest, Attorney And Client ¶105.5.

In a legal malpractice action, a finding that the attorney had been negligent, but that this negligence had not caused any damage to the client, was supportable, since, while the attorney failed to remind the client of the possibility of the statute of limitations running on the client's personal injury claim, the client's correspondence with the attorney revealed

the client's awareness of a time limit on litigation. *Diamond v. Wagstaff*, 873 P.2d 1286 (Alaska 1994).

Notice of claim that motorist, who was injured in collision with vehicle driven by state employee, faxed to adjustor for the State failed to provide any facts supporting the amount motorist demanded to settle his claim, as required in order for motorist to subsequently bring a tort action against the State, and thus negligence of attorney in failing to bring motorist's negligence action against the State within one-year limitations period did not proximately cause injury to motorist, as required in order for motorist to maintain a malpractice action against attorney; motorist did not describe his injury in his notice or even claim to be injured. A.R.S. §§ 12-821, 12-821.01(A). *Beynon v. Trezza*, 221 Ariz. 179, 211 P.3d 1203 (Ct. App. Div. 2 2009).

Because then-current one-year limitations period for former client's personal injury claim had already run when she retained attorneys, she could not prove damages element of her legal malpractice claim; client was aware of her claim well in advance of her retention of attorneys, she could not have obtained a better result in absence of alleged malpractice, and settlement that attorneys procured for her was a windfall. *Slovensky v. Friedman*, 142 Cal. App. 4th 1518, 49 Cal. Rptr. 3d 60 (3d Dist. 2006), as modified on denial of reh'g, (Oct. 12, 2006) and review denied, (Nov. 29, 2006); West's Key Number Digest, Attorney And Client ¶112.

In an attorney malpractice case based on a breach of fiduciary duty, the element of causation is satisfied when the plaintiff proves that the defendant's conduct was a substantial contributing cause of the injury. *Aller v. Law Office of Carole C. Schriefer, P.C.*, 140 P.3d 23 (Colo. Ct. App. 2005), cert. denied, 2006 WL 1530184 (Colo. 2006). West's Key Number Digest, Attorney And Client ¶105.5.

Former attorney's alleged negligence in failing to properly investigate and pursue former client's personal injury claim against third party was not proximate cause of client's damages, as required to establish legal malpractice claim; although, after terminating attorney and hiring new counsel, client was unable to serve third party because third party had left the jurisdiction, client was able to file suit before the limitations period expired, and it was speculative as to whether attorney's delay in filing suit affected the opportunity to serve the third party, absent evidence as to when third party left the jurisdiction. *Oehlerich v. Llewellyn*, 285 Ga. App. 738, 647 S.E.2d 399 (2007), cert. denied, (Sept. 10, 2007). West's Key Number Digest, Attorney And Client ¶112.

In a legal malpractice action against the attorney who represented the plaintiff in a prior personal injury action, the plaintiff's claim that a \$2,500 settlement agreed to by the attorney was inadequate was not precluded by the plaintiff's having subsequently entered into a \$4,000 successor settlement in the action. After the \$2,500 settlement, the plaintiff discharged the attorney and retained new counsel, who negotiated the \$4,000 settlement. The latter settlement did not preclude injury to the plaintiff from the earlier settlement, the court said. *Huntington v. Fishman*, 212 Ga. App. 27, 441 S.E.2d 444 (1994).

Injury required to be proven in a legal malpractice action is not a personal injury, nor is it the attorney's negligent act itself; rather, it is a pecuniary injury to an intangible property interest caused by the attorney's negligent act or omission. *Northern Illinois Emergency Physicians v. Laudau, Omaha & Kopka, Ltd.*, 216 Ill. 2d 294, 297 Ill. Dec. 319, 837 N.E.2d 99 (2005). West's Key Number Digest, Attorney And Client ¶105.5.

To establish proximate cause in a legal malpractice action the plaintiff must essentially prove a case within a case, which means that but for the attorney's negligence, the plaintiff would have prevailed in the underlying action. *Orzel v. Szewczyk*, 908 N.E.2d 569 (Ill. App. Ct. 1st Dist. 2009).

Injuries resulting from legal malpractice are not personal injuries but pecuniary injuries to intangible property interests. *Merritt v. Goldenberg*, 362 Ill. App. 3d 902, 299 Ill. Dec. 271, 841 N.E.2d 1003 (5th Dist. 2005). West's Key Number Digest, Attorney And Client ¶105.5.

For the purpose of a legal malpractice claim, a plaintiff must demonstrate that, but for the attorney's negligence, he would not have suffered the alleged injury. *Larson v. O'Donnell*, 361 Ill. App. 3d 388, 297 Ill. Dec. 132, 836 N.E.2d 863 (1st Dist. 2005), appeal denied (Ill. Jan. 25, 2006). West's Key Number Digest, Attorney And Client ¶105.5.

Under Maryland law, new counsel lacked sufficient time to file complaint within statute of limitations in different

forum, and therefore new counsel's failure to file complaint was not intervening cause of client's harm in client's malpractice action against former counsel alleging that former counsel failed to file suit within applicable statute of limitations, even though new counsel was retained ten weeks before expiration of statute of limitations in different forum; the availability of a different forum was not clear from the circumstances of the underlying personal injury case arising out of car accident, since the only information client provided to new counsel was the accident report and the name of the other driver's insurer, new counsel's failure to investigate other driver's possible connections to different forum was not unreasonable since former counsel similarly failed to do so and the only way to investigate would have been to call other driver directly, and therefore new counsel could not have ascertained that other driver was subject to personal jurisdiction in different forum within ten weeks. *Norton v. Sperling Law Office, P.C.*, 437 F. Supp. 2d 398 (D. Md. 2006) (applying Maryland law); *West's Key Number Digest, Attorney And Client* ¶112.

Lessee who was sued by subrogee of automobile lessor seeking indemnification for damages incurred in settlement of personal injury lawsuit failed to establish that purported failure of her attorneys to obtain release from lessor when settling prior litigation was proximate cause of subrogation action, as required to maintain legal malpractice claim under New York law; lessee was unable to show that, if attorneys had asked lessor to release her from indemnity clause in lease agreement, it would have done so. *Allianz Ins. Co. v. Lerner*, 305 F. Supp. 2d 191 (E.D. N.Y. 2004) (applying New York law); *West's Key Number Digest, Attorney And Client* ¶112.

Client failed to prove that but for her attorneys' negligence, she would have prevailed on merits in underlying personal injury litigation, in which attorneys represented her, as required to support claim for legal malpractice. *Engler v. Kalmenowitz*, 60 A.D.3d 540, 876 N.Y.S.2d 366 (1st Dep't 2009).

Absent showing that companies which maintained elevators had either actual or constructive notice of alleged dangerous condition of elevators, client could not have prevailed in his personal injury action against those companies, as required to support his claim that attorneys who represented him in that action committed legal malpractice. *Cohen v. Wallace & Minchenberg*, 39 A.D.3d 691, 835 N.Y.S.2d 285 (2d Dep't 2007), leave to appeal dismissed in part, denied in part, 9 N.Y.3d 980, 848 N.Y.S.2d 16, 878 N.E.2d 599 (2007). *West's Key Number Digest, Attorney And Client* ¶112.

Client, who fell in vomit while walking through lobby of casino and injured her back, did not show under New Jersey law that casino had constructive knowledge of dangerous condition, in order to prevail in subsequent lawsuit which alleged that lawyer and law firm were negligent for not investigating client's case and timely commencing underlying action against casino on premises liability theory, where client admitted that she did not have any information regarding length of time that vomit was on floor prior to her accident. *Aquino v. Kuczinski, Vila & Associates, P.C.*, 39 A.D.3d 216, 835 N.Y.S.2d 16 (1st Dep't 2007). *West's Key Number Digest, Attorney And Client* ¶112.

Evidence established that client's accident did not result in any serious injury, as claimed, and that client would have prevailed in any personal injury action against building owner; thus, attorneys were not liable for malpractice in declining to pursue a legal action on client's behalf against the owner of the premises where the accident took place. *Nazarfo v. Fortunato & Fortunato, PLLC*, 32 A.D.3d 692, 822 N.Y.S.2d 236 (1st Dep't 2006); *West's Key Number Digest, Attorney And Client* ¶112.

Failure of attorneys who represented former client in personal injury action to discover facts about underlying accident that differed from facts which former client had given them regarding accident did not support legal malpractice claim, given that such facts were known to former client but not disclosed to attorneys or others at their firm before complaint was filed, and former client did not show that attorneys failed to exercise ordinary reasonable skill and knowledge possessed by member of legal profession. *Green v. Conciatori*, 26 A.D.3d 410, 809 N.Y.S.2d 559 (2d Dep't 2006); *West's Key Number Digest, Attorney And Client* ¶112.

Any negligence by attorneys in failing to adequately investigate the assets and insurance coverage of driver whose vehicle was involved in collision with client, for purposes of client's personal injury action, was not the proximate cause of the client's alleged damages, barring client's legal malpractice action, where client discharged attorneys and hired new counsel two months before client settled his claim against driver. *Perks v. Lauto & Garabedian*, 306 A.D.2d 261, 760

N.Y.S.2d 231 (2d Dep't 2003); West's Key Number Digest, Attorney And Client ¶112.

Law firm was not liable for legal malpractice, inasmuch as proximate cause of any damages sustained by client was not firm's alleged failure to name certain parties as defendants in underlying federal personal injury action, but intervening and superseding failure of client's successor attorneys to timely serve any potentially liable parties in closely ensuing state court action. *Pyne v. Block & Associates*, 305 A.D.2d 213, 760 N.Y.S.2d 30 (1st Dep't 2003); West's Key Number Digest, Attorney And Client ¶112.

Client's allegation that attorneys' failure in the underlying personal injury trial to introduce available documentary evidence demonstrating that client had missed more than 90 days of work following the automobile accident caused jury to determine that client had not suffered a serious injury, for purposes of no-fault insurance statute's threshold for tort recovery, supported proximate cause element of legal malpractice claim. *Locovello v. Weingrad & Weingrad, P.C.*, 262 A.D.2d 156, 691 N.Y.S.2d 20 (1st Dep't 1999); West's Key Number Digest, Attorney And Client ¶112.

Attorney's allegedly negligent failure to file timely motions to vacate the default orders and judgments against client did not harm client, precluding legal malpractice action, where attorney withdrew as counsel before damages were determined in personal injury action arising out of automobile accident and client stipulated to damages. *Soratsavong v. Haskell*, 133 Wash. App. 77, 134 P.3d 1172 (Div. 1 2006); West's Key Number Digest, Attorney And Client ¶112.

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[END OF SUPPLEMENT]

## 2. Specific Acts or Omissions

### § 8. Generally

[Cumulative Supplement]

Acts or omissions giving rise to a cause of action for legal malpractice in connection with an attorney's handling of a personal injury claim may occur at any stage of an attorney's relationship with a client. Frequently, more than one negligent or wrongful act or omission on the part of an attorney will be alleged. See, e.g., *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. Tenn 1980) cert den 449 US 888 (1980) [alleging numerous negligent acts during trial of personal injury claim]. In many cases, the negligent act which allegedly caused injury to the plaintiff may itself have been proximately caused by an earlier negligent act or omission. For example, a cause of action based on an attorney's negligent failure to obtain an adequate settlement [see § 13], will frequently be predicated upon the attorney's failure to properly investigate the client's claim [see § 9], which led the attorney to form an erroneous belief as to the value of the claim. See *Glenna v. Sullivan*, 310 Minn 162, 245 NW2d 869 (1976).

### PRACTICE GUIDE

Where concurring acts of negligence are alleged, it may be necessary for the plaintiff to treat each as a separate act which must be independently established. For example, where it is alleged that an attorney's failure to properly investigate a claim led the attorney to advise the plaintiff to accept an inadequate settlement, in order to prove a cause of action for malpractice in advising acceptance of the settlement, the plaintiff must prove that the attorney was negligent at the time the advice to settle was given. If the attorney conducted an inadequate investigation and formed an erroneous belief as to the value of the plaintiff's claim, but later obtained the information necessary to properly evaluate it and, at the time the advice to accept the offer of settlement was given was completely and accurately informed as to all relevant factors involved in that decision, the attorney's decision to advise settlement will not be actionable, and the question whether the attorney may have been negligent in not discovering the factors earlier will be irrelevant. *Glenna v. Sullivan*, 310 Minn 162, 245 NW2d 869 (1976). In such a case, the attorney's failure to discover the factors in time to avoid an unfavorable

settlement may be actionable in its own right as a failure to adequately investigate. However, it will be the attorney's negligent investigation, rather than their recommendation to settle, that will form the basis of the plaintiff's malpractice claim.

Although legal malpractice actions are commonly grounded in negligence, an attorney's violation of professional standards of ethics may be actionable regardless of whether it is negligent or intentional. An attorney's intentional misconduct also may be actionable on grounds of fraud or breach of fiduciary duty, but not legal malpractice. See § 3. Frequently, an intentional act will involve a violation of an attorney's ethical duty to a client. For example, if an attorney representing multiple clients with diverse interests deliberately adopts a trial strategy that is beneficial to one client but detrimental to another, and does not obtain the consent of the client adversely affected, that client will have grounds for bringing an action for legal malpractice even though the attorney arguably exercised good judgment as to the best way of handling the case. *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 SCt 1924, 80 LE2d 470 (1984).

#### PRACTICE GUIDE

No matter how flagrant an attorney's violation of ethical standards may have been, to state a cause of action for legal malpractice, the plaintiff must establish that some injury was caused by the violation. *Kluge v O'Gara*, 227 Cal App2d 207, 38 Cal Rptr 607 (1964). For example, where it is alleged that an attorney's representation of multiple clients with adverse interests prejudiced one client's case, that client must establish not only that the case was prejudiced, but also that he or she would have been entitled to recover if the attorney had handled the case in a competent and ethical manner. *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 SCt 1924, 80 LE2d 470 (1984). If no damages were suffered, a grievance claim to an attorney disciplinary body may be the client's only recourse. See § 3.

#### CUMULATIVE SUPPLEMENT

##### Cases:

Whether attorney breached contract with client to provide representation in medical-malpractice action, by commencing adulterous affair with client's wife after client moved out of state, was question for jury. *Pierce v. Cook*, 992 So. 2d 612 (Miss. 2008).

Attorney's failure to send settlement offer to opposing party via certified mail, rather than regular mail, in personal injury action would support claim for legal malpractice. *Emery v. Carnahan*, 88 S.W.3d 138 (Mo. Ct. App. S.D. 2002); *West's Key Number Digest, Attorney And Client* ¶112.

Counsel retained by primary insurer to represent insured general contractor in subcontractor's employee's personal injury action did not have privity with contractor's excess insurer, and thus excess insurer could not maintain legal malpractice action against counsel based on his failure to assert anti-subrogation rule in response to owner's motion for summary judgment, where excess insurer's decision to settle action was not based on any affirmative representation by attorney upon which it relied. *Federal Ins. Co. v. North American Specialty Ins. Co.*, 47 A.D.3d 52, 847 N.Y.S.2d 7 (1st Dep't 2007). *West's Key Number Digest, Attorney And Client* ¶105.5.

Former client failed to establish that he would have prevailed in underlying personal injury action but for the law firm's alleged malpractice in failing to identify vacant lot where injury occurred during course of firefighting duties, as required for client to prevail in legal malpractice action against law firm; client failed to demonstrate a violation of statute, ordinance, or rule as required to prevail in injury action related to firefighting duties. *Golden v. Barasch & McGarry, P.C.*, 11 A.D.3d 314, 782 N.Y.S.2d 729 (App. Div. 1st Dep't 2004); *West's Key Number Digest, Attorney And Client* ¶112.

Attorney's conduct of nonsuited defendant in personal injury action did not establish client's legal malpractice claim, absent evidence that defendant in personal injury action was solvent. *James V. Mazuca and Associates v. Schumann*, 2001 WL 518300 (Tex. App. San Antonio 2001); West's Key Number Digest, Attorney And Client ¶112.

Underlying issue of whether shampoo on floor existed long enough at grocery store so that store employees should have reasonably discovered it was for the jury in former client's legal malpractice action against attorney based on attorney's failure to serve proper party in her slip-and-fall case, which resulted in dismissal of case. *Schmidt v. Coogan*, 162 Wash. 2d 488, 173 P.3d 273 (2007). West's Key Number Digest, Attorney And Client ¶129(3).

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[END OF SUPPLEMENT]

### § 9. Inadequate Investigation

[Cumulative Supplement]

A common basis for bringing a legal malpractice action in connection with an attorney's handling of a personal injury claim is the attorney's alleged failure to make an adequate investigation of the facts underlying the claim. Inadequate investigation may be actionable if the attorney, on the basis of the investigation, incorrectly informs the plaintiff that the claim does not support a cause of action. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). It may also be actionable if the attorney fails to prosecute the claim under a belief, based on the investigation, that the claim is meritless. *Kirsch v. Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978). Even if the attorney brings an action based on the claim, inadequate investigation may be actionable if, as a result of the failure to investigate adequately, the attorney fails to discover evidence for use at trial. *Woodruff v. Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Glenna v. Sullivan*, 310 Minn 162, 245 NW2d 869 (1976). It should be noted that the mere fact that an attorney could have conducted a more extensive or detailed investigation than actually was conducted does not establish malpractice unless the plaintiff can show that the failure to investigate more completely had some actual, negative effect on the outcome of the case. *Glenna v. Sullivan*, 310 Minn 162, 245 NW2d 869 (1976).

### PRACTICE GUIDE

One of the reasons that inadequate investigation is a common basis for legal malpractice suits is that it constitutes negligence in and of itself. Consequently, if the plaintiff can show that the defendant failed to conduct the type of investigation that an ordinarily prudent attorney would conduct before making a decision, the defendant cannot then argue that the decision amounted to nothing more than an error in judgment. See *Woodruff v. Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Togstad v. Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). However, regardless of the manner in which an attorney's failure to make an adequate investigation is alleged to have resulted in injury to the plaintiff, it will be necessary for the plaintiff to establish not only that the attorney failed to conduct an adequate investigation, but also that the attorney was negligent in failing to do so. *Kirsch v. Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978).

### CUMULATIVE SUPPLEMENT

#### Trial Strategy

Legal Malpractice — Inadequate Case Investigation, 16 Am. Jur. Proof of Facts 2d 549

#### Cases:

Plaintiff failed to state a cause of action against defendant attorney with respect to defendant's alleged inadequate investigation and other mishandling of plaintiff's personal-injury claim against a restaurant in which he was injured by criminal acts of third parties, where plaintiff was unable to state a viable cause of action against the restaurant due to lack of a breach of any duty owed to plaintiff under the circumstances. *Ignarski v Norbut*, (1995, 1st Dist) 271 Ill App 3d 522, 207 Ill Dec 829, 648 NE2d 285.

Any duty to client to apply for nunc pro tunc approval of settlement reached by personal injury attorney, after personal injury attorney failed to obtain consent of client's workers' compensation carrier or judicial approval, as required by statutory rule for client to continue receiving workers' compensation benefits, was owed by personal injury attorney, and not attorney representing client in front of Workers' Compensation Board or client's attorney bringing legal malpractice action, and therefore personal injury attorney could not shift legal responsibility to client by asserting affirmative defense that client failed to mitigate damages by failing to make application for nunc pro tunc judicial approval, in legal malpractice action; application for nunc pro tunc approval of settlement was directed to court in which tort action was settled, and it was in that action, and before that court, that personal injury attorney represented client. *Northrop v. Thorsen*, 46 A.D.3d 780, 848 N.Y.S.2d 304 (2d Dep't 2007). West's Key Number Digest, Attorney And Client ¶112.

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[END OF SUPPLEMENT]

#### § 10. Erroneous Advice

[Cumulative Supplement]

An attorney representing a client with a personal injury claim will frequently act as an advisor as well as an advocate. An attorney may be liable for malpractice based on advice given a client if the client can demonstrate that an injury was suffered due to the attorney's negligence in recommending a particular course of action or in failing to advise alternative courses of action.

An attorney may be liable for giving erroneous advice even if the attorney undertakes no further services for the client. For example, one of the most common grounds of malpractice liability is erroneously advising a client with a valid personal injury claim that the client has no cause of action. See *Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) aff'd 385 F2d 869 (6th Cir 1967); *Davis v United Parcel Service Inc*, 427 So2d 921 (La App 1983) cert den 433 So2d 1053 (La 1983); *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980).

Liability may be based upon an attorney's failure to advise a client of a single, pertinent aspect of the client's case. See, e.g., *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980) [holding attorney liable for failure to advise client of potential cause of action against third party]. It may also be based upon a general failure to inform the client of the progress of the client's case. See *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985) [holding that attorney kept client adequately informed].

Giving erroneous or harmful advice may result in liability even if the advice is not directly related to the conduct or merits of the case. For example, in *Blegen v Superior Court*, 125 Cal App3d 959, 178 Cal Rptr 470 (1981), an attorney was held liable for advising client to postpone surgery pending resolution of the client's medical malpractice action in order to increase the potential amount of recovery, even though he knew that postponement could and did result in permanent injury to the client.

**PRACTICE GUIDE**

An attorney's failure to adequately investigate a client's personal injury claim [see § 9], is frequently closely connected to an allegation that the attorney gave the client erroneous advice. In *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980), for example, an attorney was held liable for advising a client that she and her husband had no valid medical malpractice claim where the attorney based his opinion on only a short conversation with the client and did not review her husband's hospital records or consult an expert in the field of medical malpractice.

#### CUMULATIVE SUPPLEMENT

##### Legal Encyclopedias

7 Am. Jur. 2d, Attorney at Law §§ 200, 201

C.J.S., Attorney & Client § 257

##### Law Reviews and Other Periodicals

Legal Malpractice—Expansion of the Standard of Care: Duty to Refer, 56 Wash L Rev 505 (1981)

Schnidman, The Collateral Effects of Legal Specialization on the Applicable Standard of Care as it Relates to a Duty to Consult and Duty to Advise, 6 Ohio North L Rev 666 (1979)

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#### END OF SUPPLEMENT

#### § 11. Failure to Commence or Prosecute Action

[Cumulative Supplement]

Loss of a client's right of action due to an attorney's negligence is one of the more common grounds of liability in legal malpractice actions based on an attorney's handling of a personal injury claim. Most commonly, the alleged basis of liability will be the attorney's failure to bring suit within the time period required by the statute of limitations. See Authority, this section. However, liability may also be based on the attorney's erroneous advice that the client has no cause of action, in reliance on which the client fails to consult other counsel or bring suit within the limitations period. See *Siton v Clements*, 257 FSupp 63 (ED Tenn 1966) aff'd 385 F2d 869 (6th Cir 1967); *Davis v United Parcel Service Inc*, 427 So2d 921 (La App 1983) cert den 433 So2d 1053 (La 1983); *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). Liability may also result if the attorney files suit, but then fails to take action necessary to prevent dismissal. See *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978); *Beer v Florsheim*, 96 AD2d 485, 465 NYS2d 196 (1983). Even if the attorney has brought an action on the claim, the attorney may be liable based on the failure to bring additional, related claims, or to join additional parties as defendants. See *Walker v Porter*, 44 Cal App3d 174, 118 Cal Rptr 468 (1974) [failure to join additional defendants]; *Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982) [failure to serve additional defendant]; *Baker v Beal*, 225 NW2d 106 (Iowa 1975) [failure to bring additional actions]; *Lewis v Collins*, 349 So2d 444 (La App 1977) [failure to pursue earlier claim].

#### PRACTICE GUIDE

If the allegation of malpractice is based upon the attorney's failure to bring suit against any of a number of potential defendants, the plaintiff need not identify the particular defendant who was the proper party to sue, but merely needs to show that one or more of the potential defendants was legally responsible for the injury suffered. *Walker v Porter*, 44 Cal

App3d 174, 118 Cal Rptr 468 (1974). If, on the other hand, it is alleged that the attorney brought the wrong action or named the wrong defendant, the plaintiff is obligated to establish not only that the action actually brought cannot afford complete recovery, but also that had another action been brought or another defendant been named, more complete recovery of damages would have been possible. Since an attorney is not obligated to allege every conceivable theory of recovery or join every conceivable defendant in a personal injury action, the plaintiff must show that the attorney's failure was more than a mere error of judgment, but amounted to a lack of judgment so serious as to constitute negligence. *Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982); *Baker v Beal*, 225 NW2d 106 (Iowa 1975).

In general, an attorney is liable for failing to preserve a client's cause of action only if the statute of limitations on the client's claim has run, or the claim has otherwise expired, during the period in which the attorney was representing the client. See § 20. However, an attorney may be liable for failing to preserve a client's cause of action even though the attorney withdrew as counsel for the client if the attorney failed to fulfill those obligations to the client which arise upon an attorney's withdrawal as counsel. See *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978).

#### PRACTICE GUIDE

To establish malpractice based on improper withdrawal from a case, it will be necessary for the plaintiff to establish that there was an attorney-client relationship, since an attorney has no duty to make a proper withdrawal if there is no attorney-client relationship. *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975).

#### Authority

Action for legal malpractice in handling a personal injury claim may be based on an attorney's failure to bring suit on the claim within the applicable limitation period: Third Circuit

*Wagner v Tucker*, 517 FSupp 1248 (SD NY 1981)

#### Sixth Circuit

*Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) aff'd 385 F2d 869 (6th Cir 1967)

#### Alabama

*Piel v Dillard*, 414 So2d 87 (Ala App 1982)

#### California

*Walker v Porter*, 44 Cal App3d 174, 118 Cal Rptr 468 (1974)

#### Iowa

*Baker v Beal*, 225 NW2d 106 (Iowa 1975)

#### Kentucky

*Daugherty v Runner*, 581 SW2d 12 (Ky App 1978)

#### Louisiana

*Davis v United Parcel Service Inc*, 427 So2d 921 (La App 1983) cert den 433 So2d 1053 (La 1983)

#### Maine

*Sohn v Bernstein*, 279 A2d 529 (Me 1971)

#### Mississippi

*Golden v Duggins*, 374 So2d 243 (Miss 1979)

#### New Jersey

*Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978)

#### New Mexico

*George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979)

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Hansen v Wightman, 14 Wash App 78, 538 P2d 1238 (1975)

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Legal Malpractice by Permitting Statutory Time Limitation to Run against Client's Claim, 90 A.L.R. 3d 293

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7 Am. Jur. 2d, Attorneys at Law §§ 202, 203

C.J.S., Attorney & Client § 259

#### Cases:

The plaintiff in a legal malpractice action could recover both her actual damages for her attorney's failure to file her personal injury action before the statute of limitations expired and damages for her attorney's misconduct in attempting to conceal his failure to file, his misrepresentations to her, and the breach of his fiduciary duty to her. *Holmes v Drucker*, 201 Ga App 687, 411 SE2d 728 (1991).

An attorney was negligent in his handling of a client's personal injury action, even though the attorney informed the client that the client would have to proceed in forma pauperis, since the attorney failed to instruct the client of the necessity of commencing litigation in advance of the running of the statute of limitations, and the client's claim ultimately prescribed after he failed to return the necessary forms to the attorney's office, and the attorney failed to monitor the status of the matter. *Finkelstein v Collier*, 636 So2d 1053 (La App 1994).

A utility company employee stated a legal malpractice claim against an attorney for failure to file, prior to the running of the statute of limitations, a products liability action against the manufacturer of chemicals to which the employee had been exposed in the course of his employment. Although the employee had noticed some breathing problems during the 1970s, the problems always abated. His medical difficulties became significantly worse when he was transferred to a new position in 1980, and a physician's examination in July, 1981 revealed physical deterioration. The court said that while the statute of limitations was two years, under the "discovery rule" the statute did not begin to run until the plaintiff discovered, or reasonably should have discovered, the injury. Thus, there was a question of fact whether the statute had or had not expired prior to the employee's retention of the defendant attorney in February, 1981. *Cooke v Wilentz, Goldman & Spitzer*, 261 NJ Super 391, 619 A2d 222 (1992).

Client stated legal malpractice cause of action against attorney on allegations that he lost his personal injury claim based on expiration of limitations period as result of attorney's having commenced action against wrong entity, even though there had not been adverse disposition of action. *Rivas v. Raymond Schwartzberg & Associates, PLLC*, 52 A.D.3d 401, 861 N.Y.S.2d 313 (1st Dep't 2008).

Allegations that attorneys who had represented worker injured in construction accident had failed to file tort claim on worker's behalf within applicable limitations period were sufficient to state claim for legal malpractice, even though retainer agreement signed by client had limited scope of relationship to workers' compensation claim and complaint did not allege that but for claimed negligence worker would have prevailed in tort action; extent of duty was not limited by retainer, as possibility that personal injury action could lie was reasonably apparent matter of which attorney might be

expected to apprise client. *Greenwich v Markhoff*, 650 NYS2d 704 (NY AD 1 Dept, 1996).

In a legal malpractice action against the attorney hired to represent the plaintiff in a personal injury action, the attorney's liability was supportable in part. The plaintiff, who had allegedly been assaulted by a hospital security guard, originally retained the attorney to commence litigation against the hospital. The attorney took no action, however. The plaintiff's claim against the hospital for respondeat superior liability for the guard's assault may have been supportable, the court held, as the question of agency was a fact-intensive one that should have been submitted to the jury. Accordingly, the court said, the attorney's liability for failure to pursue this claim was supportable. However, the court continued, since the plaintiff failed to show that the hospital knew or should have known of the guard's alleged propensity for violence, the plaintiff's claim against the hospital for negligent hiring would have been unavailing, so that the attorney was not liable for failing to pursue this theory. *Santamarina v Citrynell*, 203 AD2d 57, 609 NYS2d 902 (1994).

The former client stated a supportable legal malpractice claim against her former attorneys, whom the client had engaged to represent her in a slip-and-fall action against a hospital. The client slipped on a freshly-waxed floor when visiting a friend who was a patient at the hospital, and the court held that the client would have been successful in her claim against the hospital. The attorneys delayed filing the action until it became barred by the statute of limitations. *Little v Mathewson*, 114 NC App 562, 442 SE2d 567 (1994) aff'd 455 SE2d 160 (1995).

A client's legal malpractice claim against his former attorney was supportable. The client consulted the attorney in order to pursue a personal injury claim against an officer of the client's former employer, and the client's malpractice claim was based on the attorney's having permitted the statute of limitations to run without filing suit. The client, who was injured in an altercation with the officer at work, had previously entered into a settlement of his worker's compensation claim with his employer. The settlement provided that the client would have "no further right to compensation or any other legal right related to" the compensation claim. Rejecting the attorney's contention that the settlement precluded the client's claim against the officer, so that the client was not injured by the attorney's failure to file suit, the court interpreted the settlement as barring only an action against the employer. Under the state workers' compensation act, the client had a claim against the officer if the officer intentionally harmed the client, the court observed, and this claim was distinct from the client's workers' compensation claim against the employer. *Tennis v Stodd*, 126 Or App 666, 870 P2d 835 (1994).

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[END OF SUPPLEMENT]

## § 12. Failure to Properly Try Case

[Cumulative Supplement]

The way in which an attorney handles the trial of a case involving a personal injury claim may be the basis of a legal malpractice action if the attorney fails to exercise the requisite degree of knowledge, skill, and diligence. Allegations of malpractice may involve virtually every aspect of the trial itself, the strategy employed, and the attorney's preparation for trial. The basis for allegations of malpractice respecting strategic matters frequently include:

failure to join additional parties. *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985); *St Pierre v Washofsky*, 391 So2d 78 (La App 1980) cert den 396 So2d 1328 (La 1981); *Arp v Kerrigan*, 287 Or 73, 597 P2d 813 (1979); *Schenkel v Monheit*, 266 Pa Super 396, 405 A2d 493 (1979); *Cook v Irion*, 409 SW2d 475 (Tex Civ App 1966).

failure to select the best venue for bringing action. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980).

failure to try the case on a particular theory of liability or raise a particular argument. *Baker v Beal*, 225 NW2d 106 (Iowa 1975); *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983); *Rorrer v Cooke*, 313 NC 338, 329 SE2d 355 (1985); *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975).

employment of a trial strategy adverse to one of several clients. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 SCt 1924, 80 LB2d 470 (1984).

Tactical matters on which allegations of malpractice may be based include:

failure to employ or call expert witnesses. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980).

failure to cross-examine adverse witnesses. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980).

failure to introduce evidence. *Lewis v Collins*, 349 So2d 444 (La App 1977); *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983).

failure to object to inadmissible evidence. *St Pierre v Washofsky*, 391 So2d 78 (La App 1980) cert den 396 So2d 1328 (La 1981).

failure to request jury instruction. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980).

Allegations of malpractice also may be based on pre-trial and post-trial matters, including:

inadequate preparation for trial. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Glenna v Sullivan*, 310 Minn 162, 245 NW2d 869 (1976); *Rorrer v Cooke*, 313 NC 338, 329 SE2d 355 (1985); *Walker v Bangs*, 92 Wash2d 854, 601 P2d 1279 (1979).

failure to appeal. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Pusey v Reed*, 258 A2d 460 (Del Super 1969).

failure to perfect an appeal. *Katsaris v Soelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982).

failure to preserve an error on appeal. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980).

For a checklist of common types of legal malpractice in litigation practice, see Stern and Felix-Retzke *A Practical Guide to Preventing Legal Malpractice* (Shepard's/McGraw Hill 1983) § 3.12.

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Regardless of the basis of the allegation of malpractice, it is not enough for the plaintiff to prove that the attorney made an error in judgment or failed to handle the trial in the best possible manner. The plaintiff must prove the attorney's negligence, or in other words, that the attorney failed to employ that degree of knowledge, skill, or care common to members of the legal profession similarly situated. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983). Because of the need to prove negligence, the way in which an attorney handles the trial of a personal injury claim is more likely to form the basis of an allegation of malpractice if it involves inadvertence, rather than an error in judgment. In *Katsaris v Soelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982), for example, an attorney was held negligent as a matter of law where he filed a notice of appeal, but then failed to file a timely brief and failed to provide an adequate excuse for an untimely filing. By contrast, where an attorney's failure to appeal is based on a considered judgment that the appeal would not be successful, the decision is less likely to furnish the basis for a malpractice claim, since the plaintiff must establish not only that the appeal would have been successful had it been made, but also that the attorney's decision not to appeal amounted to such a failure to understand and apply well-established law, or to use reasonable diligence in keeping abreast of the law, that a reasonably prudent and well-informed attorney would not have decided that an appeal would be without merit. *Woodruff*, above.

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7 Am. Jur. 2d, Attorneys at Law §§ 202, 204

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Attorney Malpractice—Applying a Negligence Standard of Care to Review the Subjective Decisions of an Attorney During Conduct Litigations, 15 Suffolk U.L. Rev 115 (1981)

Mallen and Evans, Attorney's Liability for Errors of Judgment—At the Crossroads, 48 Tenn L Rev 283 (1981)

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**[END OF SUPPLEMENT]****§ 13. Wrongful or Inadequate Settlement****[Cumulative Supplement]**

Liability for malpractice in handling a personal injury claim may be based on an attorney's decision to settle the claim or advise its settlement for an amount that is inadequate. See *Glenna v Sullivan*, 310 Minn 162, 245 NW2d 869 (1976); *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980). An inadequate settlement also may be the basis of an allegation of malpractice if the plaintiff was forced to accept the settlement offer by the attorney's failure to timely commence or prosecute a suit based on the plaintiff claim. See *Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985). See also *Mitchell v Transamerica Insurance Co.*, 551 SW2d 586 (Ky App 1977). However, regardless of the reason for the settlement, the plaintiff must demonstrate that it is inadequate. It is not enough to rely on mere speculation that a greater recovery would have been obtained had it not been for the attorney's conduct. *Mitchell*, above; *Glenna v Sullivan*, 310 Minn 162, 245 NW2d 869 (1976).

An attorney may also be liable for settling or dismissing the claim without the plaintiff's authorization [ *Hood v McConemy*, 53 FRD 435 (D Del 1971); *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980)], or for failing to disclose and discuss with the plaintiff a good faith settlement offer [ *Joos v Auto-Owners Insurance Co.*, 94 Mich App 419, 288 NW2d 443 (1979) later app *Joos v Drilllock*, 127 Mich App 99, 338 NW2d 736 (1983) rev'd on other grds 338 Mich App 736].

Allegations of malpractice also may be based on other conduct relating to settlements, such as charging an unreasonable fee, failing to disclose fee-splitting arrangements, and failing to pay over settlement proceeds. See *Dubree v Myers*, 464 FSupp 442 (D Vt 1978).

**CUMULATIVE SUPPLEMENT****A.L.R. Library**

Legal Malpractice in Settling or Failing to Settle Client's Case, 87 A.L.R. 3d 168

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7 Am. Jur. 2d, Attorneys at Law § 206

C.J.S., Attorney & Client § 261

**Cases:**

An attorney is liable for negligently causing a client to settle a claim for an amount below what a properly represented client would have accepted. *Fishman v Brooks*, 396 Mass 643, 487 NE2d 1377 (1986).

In an action against an attorney who had represented a minor in personal injury actions, fact issues existed as to whether the attorney acted reasonably in handling settlement proceeds, and as to the foreseeability of alleged wrongdoing of the minor's parents with respect to the settlement proceeds. The "one satisfaction rule" entitled the attorney to partial credit against any damages that would be awarded. *Byrd v Woodruff*, (1994, Tex App Dallas) 891 SW2d 689, writ den (May 4, 1995) and reh denied (Sep 28, 1995).

An attorney's alleged malpractice in counselling a client in a medical malpractice case to accept a settlement offer was required to be assessed under the law at it existed at the time of the settlement offer. *Hipwell v Sharp*, 858 P2d 987 (Utah 1993).

[Top of Section]

[END OF SUPPLEMENT]

**B. Defenses**

**§ 14. Absence of Attorney-Client Relationship**

[Cumulative Supplement]

A defense frequently raised in a legal malpractice action involving an attorney's handling of a personal injury claim is the absence of an attorney-client relationship between the parties. The defendant will establish that there was no attorney-client relationship by showing that there was no agreement to represent the plaintiff. *McGlone v Lacey*, 288 FSupp 662 (D SD 1968). The defendant may also be able to show that there was no agreement to handle the plaintiff's claim, but only to investigate the claim to determine its validity, and to take further action only if the defendant concluded that the claim was valid. *Hood v McConemy*, 53 FRD 435 (D Del 1971). However, if an attorney agrees to investigate the validity of a claim, some kind of attorney-client relationship is established, even though the duties the attorney undertakes are limited, and an attorney may be liable if an insufficient effort is made to obtain the information necessary to ascertain the merits of the claim, or if the attorney permits the claim to expire without notice to the plaintiff. *Hood*, above. In such a case, even though the attorney intended to agree only to investigate the claim and the parties never entered into a contract specifically calling for the attorney to proceed further, the attorney may be liable for loss of the claim based on the failure to clarify the need for such an agreement if this misleads the plaintiff into reasonably believing that the attorney had agreed to do more than investigate. *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979). Even if there was an attorney-client relationship between the parties, there will be no liability if the relationship did not cover the claim on which the malpractice action is based. *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975). This is because an attorney is not obligated to inquire into matters which do not pertain to the duties which the attorney has undertaken. *Hansen*, above. However, since an attorney is generally retained to represent a client with respect to a particular claim or cause of action, rather than to bring a particular type of suit, an attorney cannot disregard evidence that an action other than the action originally anticipated is necessary or appropriate merely by relying on the fact that the parties' agreement did not specifically require the attorney to take that action. *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978); *Smith v Becnel*, 396 So2d 444 (La App 1981).

Even if an attorney undertakes to handle a personal injury claim respecting a particular accident or occurrence, the attorney will not be liable if there was no agreement to represent the plaintiff's interest in the claim. See, e.g., *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den, (US) 104 S Ct 1924, 80 LED2d 470 (1984) [attorney who undertook to represent driver of motor vehicle did not thereby undertake duty to represent passengers in vehicle, even though they were joined as co-plaintiffs in action against driver of other vehicle involved in collision]; *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975) [attorney who specifically undertook to represent child was not liable for failing to bring an action on behalf of child's parents where retainer agreement entered into by attorney and child's parents indicated that attorney had been retained to represent child only]. Nor will there be liability if the responsibility undertaken by an attorney was limited and did not involve the act or omission on which the allegation of malpractice is based. Such a claim in defense is frequently raised by an attorney who is associated in a case in a subordinate role and has a responsibility only to perform particular, limited services for the plaintiff's primary counsel. See *Hood v McConemy*, 53 FRD 435 (D Del 1971); *Ortiz v Barrett*, 222 Va 118, 278 SE2d 833 (1981).

#### PRACTICE GUIDE

Since the members of a law firm may be vicariously liable for the negligence of another member of the firm [see § 25], the "subordinate" or "associate" role of defense is ordinarily available only to an outside counsel retained to perform limited services in a case for a fixed fee. It is generally unavailable to attorneys who in effect become participants in a case by agreeing to share contingent compensation or control and management of the case. *Ortiz v Barrett*, 222 Va 118, 278 SE2d 833 (1981). There may be liability, notwithstanding an attorney's subordinate or associate status, if neglect of the case by the plaintiff's retained attorney becomes so manifest that even associate or local counsel might reasonably have been expected to inform or confer with the plaintiff regarding the status of the case. *Hood v McConemy*, 53 FRD 435 (D Del 1971).

#### CUMULATIVE SUPPLEMENT

##### Cases:

A Florida attorney contacted by the plaintiffs' New Jersey counsel in order to commence the plaintiffs' personal injury action against a Florida defendant never entered into an attorney-client relationship with the plaintiffs. The court pointed out that, after the New Jersey counsel contacted the Florida attorney, the Florida attorney responded that he needed additional information in order to accept the case, and the New Jersey attorney failed to send the requested information. The court also stressed that the Florida counsel never signed the proposed contract sent him by the New Jersey attorney. *Voutsinas v Stutin*, 626 So2d 300 (Fla App 1993).

Attorney for liability insurer of truck in suit brought by driver of vehicle with which truck collided against insurer had no duty, under rule of professional conduct requiring lawyer to maintain prompt and appropriate communications with his client as to status of a matter, to communicate with insurer regarding matters involving suit brought by passenger in vehicle against insurer that attorney learned during his representation of insurer in driver's suit, and, thus, insurer could not maintain legal malpractice action against attorney for violation of such duty, as neither attorney nor his firm were retained to represent anyone in suit brought by passenger against insurer. *State Bar Articles of Incorporation*, Art. 16, Rules of Prof. Conduct, Rule 1.4, LSA-R.S. foll. 37:222. *St. Paul Fire and Marine Ins. Co. v. GAB Robins North America, Inc.*, 999 So. 2d 72 (La. Ct. App. 4th Cir. 2008).

There was no attorney-client relationship between liability insurer for driver of truck involved in accident and attorney and his law firm as to suit against insurer brought by passenger in vehicle with which truck collided, as required to maintain legal malpractice action; while attorney and his firm were retained by truck driver's employer to represent insurer in driver's suit against insurer, the scope of that retention was limited to that suit, this limitation was expressed in

correspondence between attorney and truck driver's employer regarding services that attorney and his firm were retained to provide, and attorney took no action and made no appearance in passenger's suit. *St. Paul Fire and Marine Ins. Co. v. GAB Robins North America, Inc.*, 999 So. 2d 72 (La. Ct. App. 4th Cir. 2008).

No cause of action for legal malpractice was established where plaintiff failed to establish that law firm had a duty to bring a personal injury action or, on behalf of worker's estate, an action for wrongful death or a claim for workers' compensation death benefits. *Block v. Brecher, Fishman, Feit, Heller, Rubin & Tannenbaum*, 753 N.Y.S.2d 84 (App. Div. 1st Dep't 2003); *West's Key Number Digest, Attorney And Client* ¶112.

The defendant law firm was not liable to the plaintiff for legal malpractice in connection with the handling of the plaintiff's personal injury claim, where the attorney withdrew his representation of the plaintiff with the plaintiff's consent, despite the attorney's failure to strictly comply with the requirements of CR 714 with regard to withdrawal. The court found that the failure to comply with CR 714 did not impede in any way the ability of the successor attorney to make timely service of process on one or more of the defendants. *Lockhart v Greive*, 66 Wash App 735, 834 P2d 64 (1992).

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[END OF SUPPLEMENT]

#### § 15. Time of Commencement or Termination of Relationship

[Cumulative Supplement]

Even if there was an attorney-client relationship between the parties, the defendant ordinarily will not be liable for loss of the plaintiff's claim unless the loss resulted from acts or omissions during the term of the relationship. The defendant will not be liable for loss of the claim if the attorney-client relationship did not come into being prior to the point at which a timely claim could have been brought. *Piel v Dillard*, 414 So2d 87 (Ala App 1982). Nor will the defendant ordinarily be liable if a cause of action based on the claim was still viable at the time the attorney-client relationship terminated. *Steketee v Lintz, Williams & Rothberg*, 38 Cal3d 46, 210 Cal Rptr 781, 694 P2d 1153 (1985); *Kyle v McFadden*, 443 So2d 497 (Fla App 1984); *Sohn v Bernstein*, 279 A2d 529 (Me 1971). In such circumstances, the defendant is relieved of liability not because the attorney-client relationship has terminated, but because termination of the relationship severs the causal link between the defendant's alleged malpractice and the loss of the claim. However, the defendant may be liable notwithstanding withdrawal or dismissal as plaintiff's counsel if the defendant's act or omission remains the cause of the loss of the claim. See, e.g., *Stokes v Wilson & Redding Law Firm*, 72 NC App 107, 323 SE2d 470 (1984) review den 313 NC 612, 332 SE2d 83 (1985) [where attorney-client relationship terminates because suit attorney has filed on behalf of client is voluntarily dismissed and attorney undertakes no new obligations on behalf of client, attorney may still be liable for failing to advise client of time limits for reinstating suit].

#### PRACTICE GUIDE

The manner in which an attorney-client relationship terminates is relevant to the question whether an attorney may be liable for malpractice based upon a subsequently occurring event, since an attorney's obligation to a client is greater in cases in which an attorney has voluntarily withdrawn than it is in cases in which an attorney has been involuntarily dismissed. An attorney may, as a matter of law, be free from liability for the loss of a client's cause of action if the client dismissed the attorney at a time when the cause of action remained viable. *Sohn v Bernstein*, 279 A2d 529 (Me 1971). If, instead, an attorney withdraws against a client's wishes, the attorney may be liable if the withdrawal is untimely and leaves the client with insufficient time to retain other counsel to preserve the cause of action. See *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978) [holding withdrawal timely].

In order to avoid liability for events occurring after withdrawal, an attorney must have had good cause for withdrawal, must have made an effective withdrawal, and must have fulfilled those obligations which arise upon withdrawal. See *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978); *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975). An attorney who withdraws for good cause nevertheless has a duty to protect the welfare of the client, which requires, for example, that the attorney give notice of withdrawal, suggest employment of other counsel, return papers and property to which the client is entitled, cooperate with successor counsel, refund compensation not earned, and take steps to minimize the possibility of harm to the client. *Hansen*, above. However, even if an attorney fails to fulfill the obligations arising on withdrawal, the attorney nevertheless may be relieved of liability if the client obtains new counsel in time to prevent loss of the client's cause of action. *Steketee v Lintz, Williams & Rothberg*, 38 Cal3d 46, 210 Cal Rptr 781, 694 P2d 1153 (1985).

#### CUMULATIVE SUPPLEMENT

##### A.L.R. Library

Legal Malpractice in Connection with Attorney's Withdrawal as Counsel, 6 A.L.R. 4th 342

##### Cases:

Patients could not demonstrate that they would have prevailed on their products liability claims against hospital for personal injuries allegedly caused by defective temporomandibular joint (TMJ) implants designed, manufactured and marketed by hospital, and thus attorneys' alleged negligence in failing to pursue patients' claims did not constitute malpractice, where Texas' two-year statute of limitations on each claim had been triggered at time each patient was told by her doctor that her health problems were caused by her implants, more than two years prior to patients' filing suit. *Schutze v Springmeyer*, 16 F. Supp. 2d 767 (S.D. Tex. 1998).

Intervening decisions of client and lawyer he retained after defendant-attorney was allowed to withdraw in client's underlying personal injury action rendered attorney's alleged negligence in failing to timely effect service on proper parties prior to his withdrawal too remote to satisfy proximate cause requirement for legal malpractice claim. *White v Rolley*, 225 Ga App 467, 484 SE2d 83, 97 FCDR 1474 (1997).

Where the former client discharged his former attorney, whom the client had engaged to represent him in a personal injury action, prior to the running of the statute of limitations governing the action, the attorney was, as a matter of law, not liable for legal malpractice where the statute subsequently expired prior to the commencement of an action. *McGee v Danz*, 261 Ill App3d 232, 198 Ill Dec 772, 633 NE2d 234 (1994).

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[END OF SUPPLEMENT]

#### § 16. Exercise of Reasonable Care

[Cumulative Supplement]

Because liability for legal malpractice is based on an attorney's failure to exercise reasonable knowledge, skill, and care, it is a defense to a malpractice action based on an attorney's handling of a personal injury claim that the attorney exercised a reasonable degree of knowledge, skill, and care in handling the claim. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Cook v Irion*, 409 SW2d 475 (Tex Civ App 1966); *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975). The way in which the defendant may attempt to show that reasonable care was exercised will depend, of course, on the specific allegations of negligence made by the plaintiff. Depending on the plaintiffs

allegations, it may be important for the defendant to seek to show, for example, that an adequate investigation was made of the facts underlying the claim, that any advice given the plaintiff was not the product of negligence, that any action instituted on the basis of the claim was timely and that trial of the action was properly handled, and that, if the claim was settled, the settlement was adequate.

#### CUMULATIVE SUPPLEMENT

##### Cases:

Law firm which had defended Chapter 11 debtor in state court personal injury action arising out of explosion on off-shore dredging vessel did not act unreasonably in failing to raise, as affirmative defense, a release executed on behalf of company for which debtor had submitted bid on dredging contract, which purported to release injured worker's claims against any "charterer" of vessel; while state appellate court ultimately determined that debtor was "charterer," it did so only on reconsideration, after first concluding that release did not apply to debtor, and law firm, in not contending that debtor was "charterer," reasonably sought to limit its exposure by minimizing its role in dredging project. *In re Gibson & Cushman Dredging Corp.*, 225 B.R. 543 (Bankr. E.D.N.Y. 1998).

Law firm which had defended Chapter 11 debtor in state court personal injury action arising out of explosion on off-shore dredging vessel did not act unreasonably, and was not liable in malpractice under New York law, in electing to await conclusion of liability portion of case prior to raising claims sounding in indemnification and/or contribution. *In re Gibson & Cushman Dredging Corp.*, 225 B.R. 543 (Bankr. E.D.N.Y. 1998).

Personal injury attorneys breached duty to clients and committed legal malpractice in personal injury action against gas station by failing to file suit against all of the potentially liable parties, failing to advise clients of existence of lessees of gas station, advising clients that no other parties were liable for clients' damages, and urging clients to enter into a consent final judgment without filing claim against lessees. *Kates v. Robinson*, 786 So. 2d 61 (Fla. Dist. Ct. App. 4th Dist. 2001); *West's Key Number Digest, Attorney And Client* ¶112.

Summary judgment was entered and affirmed in favor of the defendant attorneys in an action brought by the administrator of a minor's estate. The court found, *inter alia*, that the minor had been contributorily negligent as a matter of law in an accident at a railroad crossing. The court noted that contributory negligence is a complete defense, independent of any negligence on the part of the defendant. Further, the statute of limitations did not run while the defendants represented the plaintiff as to any of their choices in action. The plaintiff had four months between the time the attorneys withdrew from the case and the running of the statute. The defendants did their duty toward the plaintiff by having a conference with them and sending them a letter indicating that they had to secure other counsel. The defendant attorneys were justified in withdrawing from the case where another attorney contacted them and told them that the plaintiff had a choice in action for malpractice against them. *Bailey v. Martz*, 488 NE2d 716 (Ind App 1986).

An attorney has a nondelegable duty to his or her clients to exercise due care in the service of process and, therefore, may be held liable to the client for negligent service of process, even though the task was "farmed out." *Kleeman v. Rheingold*, 81 NY2d 270, 598 NYS2d 149, 614 NE2d 712 (1993).

Attorneys did not breach any duty owed to client they represented in underlying automobile accident case, and thus could not be liable to client for alleged legal malpractice; personal injury attorney reviewed complaint and discovery materials in underlying case and stated that, in his professional opinion, one attorney had at all times complied with the standards of practice for lawyers practicing personal injury law community, and that second attorney had insufficient involvement in the underlying case and thus no standard of care was applicable to her. *Hackos v. Smith*, 669 S.E.2d 761 (N.C. Ct. App. 2008).

An attorney will not be held liable for lack of knowledge as to the true state of the law where a doubtful or debatable point is involved. In this case, the plaintiffs attempted to hold the defendant attorneys liable for failing to accurately predict future changes in the law. At the time the complaint was filed, the law was clear. The statute of limitations began

running on an asbestos claim from the date of the plaintiff's last exposure. The fact that the law firm took the case hoping the law would change does not subject them to liability for failing to accurately predict when and how the law would change. Holding an attorney liable under these facts would place an impossible burden on the attorneys who might be willing to accept a case in the hope that the law might be changed. The effect of such a holding would be that attorneys would no longer take such cases, a result which would be contrary to public policy. An attorney's acts must necessarily be governed by the law as it existed at the time of the act. The failure to predict a subsequent change in a settled point of law cannot serve as a foundation for professional negligence. *Howard v Sweeney*, 27 Ohio App3d 41, 499 NE2d 383 (1985).

The plaintiff filed an action against her former attorney for malpractice in connection with a personal injury claim which was denied by the Industrial Claim Service for allegedly defective notice under the Oregon Torts Claim Act. The court found that the defendant attorney had substantially complied with the notice requirements of the Torts Claim Act and had exercised reasonable care in performing his duty to the plaintiff. The plaintiff's remedy on the denial of the claim was an appeal of that denial. *Jacobs v Macmillan*, 79 Or App 380, 719 P2d 504 (1986) review den 301 Or 667, 725 P2d 1294 (1986).

Evidence was insufficient that attorney breached his fiduciary duty to his personal injury client, in context of client's legal malpractice suit predicated on dissatisfaction with amount of attorney fees and medical bills deducted from underlying personal injury settlement; although client alleged that attorney misinformed him that he was obligated to pay \$13,190 in doctors' bills and evidence showed that attorney did not specifically deny telling client so, there was no conclusive evidence that attorney knew of falsity of such statements, and attorney and client's wife testified that client expressly requested that said doctors' bills be paid out of his settlement. *Gibson v. Ellis*, 126 S.W.3d 324 (Tex. App. Dallas 2004); *West's Key Number Digest, Attorney And Client* ¶129(2).

[Top of Section]

[END OF SUPPLEMENT]

#### § 17. Adherence to Client's Instructions or Decision

[Cumulative Supplement]

Since the client has the ultimate right to decide whether a suit will be maintained, settled, or abandoned, it is ordinarily a defense to an action for legal malpractice based on an attorney's handling of a personal injury claim that the attorney merely followed the client's instructions or abided by the client's decision, provided that the client was fully informed and therefore was in a position to make an informed decision. See *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985) [attorney was not liable for failing to settle case where record indicates that attorney communicated settlement offer to client and advised its acceptance, and client elected to reject offer and proceed to trial]. An attorney's compliance with a client's explicit decision or instructions does not however, furnish a defense where the attorney failed to ensure that the client was informed of all relevant considerations. See *Smith v Becnel*, 396 So2d 444 (La App 1981) [fact that client specifically instructed attorney to file workers' compensation claim did not relieve attorney of liability for failing to inform client of other remedial alternatives which might have provided better or more appropriate means of recovering damages].

#### CUMULATIVE SUPPLEMENT

Cases:

Even if attorneys who represented clients in personal injury action against driver and owner of automobile that struck client as he was crossing intersection committed malpractice during negligence phase of first personal injury trial

by failing to object to jury instruction that erroneously stated rights and duties of drivers and pedestrians at intersections, clients failed to demonstrate actual damages, as required to support award of compensatory damages; clients were granted new trial by Supreme Court, Appellate Division, and after liability verdict was rendered at second trial, they obtained \$750,000 settlement, which was greater than damages they would have received after first trial even if \$255,000 liability verdict had been entirely in their favor. *Rudolf v. Shayne, Dachs, Stanisci, Corker & Sauer*, 31 A.D.3d 418, 818 N.Y.S.2d 153 (2d Dep't 2006), leave to appeal granted, 7 N.Y.3d 713, 824 N.Y.S.2d 605, 857 N.E.2d 1136 (2006); *West's Key Number Digest, Attorney And Client* ¶112.

The plaintiff hired the defendant attorney to handle his personal injury case. The plaintiff excluded the potential worker's compensation claim from the defendant's employment contract, electing to handle the claim pro se. The court noted that it would be an anomaly for the plaintiff to handle the worker's compensation claim and yet impose a duty on the defendant to advise him how to proceed in the action, or where to file the complaint, or the fairness of the settlement. Under the circumstances of this case, the worker's compensation claim was outside the contract of employment between the plaintiff and defendant and the defendant had no duty to advise the plaintiff with respect to the claim. *Jamison v Norman*, 771 SW2d 408 (Tenn 1989).

[Top of Section]

[END OF SUPPLEMENT]

#### § 18. Ethical Obligations

[Cumulative Supplement]

An attorney's responsibilities are measured not only in terms of the attorney's obligations to a client, but also in terms of the attorney's ethical obligations. *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978). Consequently, when a malpractice action is brought against an attorney for allegedly failing to handle a personal injury claim properly, the attorney may be able to defend by demonstrating that ethical obligations required the attorney to do what was done. For example, even though it might be to a client's advantage to file suit with little or no chance of success, in the hope that the expense and uncertainty of trial will induce the opposing party to settle, an attorney has an ethical obligation not to file a frivolous suit, and must instead inform the client of the weakness of the client's case and, as a last resort, withdraw rather than obey the client's instructions to file a suit the attorney knows to be frivolous. Where an attorney has sought to withdraw for ethical reasons, even if it appears in retrospect that the attorney misjudged the viability of the client's claim, there will be no liability unless the attorney's decision to withdraw was so manifestly erroneous that no prudent attorney would have done so. *Kirsch*, above.

Claiming that ethical obligations justified an attorney's conduct will not always be a valid defense. For example, where an attorney is consulted about bringing an action, but is not retained expressly to bring the action, the attorney cannot avoid liability merely by claiming that the ethical obligation to avoid solicitation of clients prevented contacting the person to resolve the ambiguity, since contacting the person under these circumstances would not be an ethical violation. See *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979). Nor does an attorney's ethical obligation furnish a defense to a malpractice claim that the attorney has failed to take action on behalf of the client which was consistent with the attorney's ethical obligation. See also *Kirsch*, above [attorney who has withdrawn for ethical reasons may be liable if notice of intent to withdraw was not given in sufficient time to permit client to consult and retain other counsel, or if attorney failed to afford client opportunity to voluntarily dismiss attorney, and thereby avoid alerting opposing parties of possible weakness of case].

CUMULATIVE SUPPLEMENT

**Cases:**

Attorney did not breach duty to his clients and commit legal malpractice by failing to advise clients, who hired attorney to pursue collection of personal injury judgment, that previous attorneys hired by clients did not file claims against all potentially liable parties in prior personal injury suit. *Kates v. Robinson*, 786 So. 2d 61 (Fla. Dist. Ct. App. 4th Dist. 2001); West's Key Number Digest, Attorney And Client ¶112.

Trial court's acceptance of a legally unsound basis for granting summary judgment in client's personal injury action against Chicago Transit Authority (CTA) served as an intervening cause, and thus, former attorneys, who provided defective notice of injury claim to CTA, but were discharged prior to filing complaint, did not proximately cause former client's injury given that at the time of discharge, client's personal injury case remained actionable despite the defective initial notice. *Cedeno v. Gambiner*, 347 Ill. App. 3d 169, 282 Ill. Dec. 600, 806 N.E.2d 1188 (1st Dist. 2004); West's Key Number Digest, Attorney And Client ¶112.

Whether attorney's alleged negligence in failing to file lawsuit on behalf of client, in fact, caused client's injury, namely that her personal injury claim was now time barred, was a question for the trier of fact in legal malpractice action. *Wood v. Hollingsworth*, 603 S.E.2d 388 (N.C. Ct. App. 2004); West's Key Number Digest, Attorney And Client ¶129(3).

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[END OF SUPPLEMENT]

### § 19. Contributory Fault

An action or inaction on the part of a client may form the basis of a claim in defense by an attorney who allegedly mishandled the client's personal injury claim. Conduct by a client on which it may be possible to base a claim in defense includes:

failure to notify the attorney of relevant information. See *Woodruff v. Tomlin*, 616 F.2d 924 (6th Cir. Tenn. 1980) cert den 449 US 888 (1980) [client failed to inform attorney of move to another state, making federal diversity suit possible].  
delay. See *Hill v. Greene*, 124 Ga. App. 759, 186 SE2d 118 (1971) [clients delayed notifying attorney that they had decided to reject settlement offer until time for filing suit had passed]. See also *Kirsch v. Duryea*, 21 Cal.3d 303, 146 Cal. Rptr 218, 578 P.2d 935 (1978) [client delayed selecting new attorney after original attorney stated intent to withdraw from case].

lack of cooperation. See *Delfyette v. Fisher*, 40 AD2d 674, 336 NYS2d 147 (1972) [client refused to submit to physical examination, leading to dismissal of suit].

failure to carry out a duty specifically assumed. See *Hansen v. Wightman*, 14 Wash. App. 78, 538 P.2d 1238 (1975) [attorney need not inquire into matter where responsibility is assumed by client].

It may be possible to raise the defense of contributory fault on the part of a client even though the client has done nothing more than follow the attorney's advice, provided that the advice is so clearly erroneous or mistaken that a reasonable person would not follow it even with the recommendation of an attorney. See *Blegen v. Superior Court*, 125 Cal. App.3d 959, 178 Cal. Rptr 470 (1981) [client was advised by attorney to forego necessary surgery to increase value of personal injury claim].

### PRACTICE GUIDE

Where the defense of contributory fault is predicated upon the failure of the client to reveal information, it may be neces-

sary for the attorney to show that the client failed to respond to a request for information, or deliberately withheld information the client knew or should have known was important to the case. An attorney has a duty to investigate matters relevant to a client's claim (see § 9), and unless an attorney has satisfied this duty by requesting information, a client cannot be considered negligent in failing to disclose it. *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975). See also *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978) [imposing duty on attorney to investigate matters related to client's claim which may indicate that additional or different action is appropriate]. And see *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979) [imposing duty on attorney to inquire whether client still wished to retain attorney].

#### PRACTICE PROBLEM

In some instances, an attorney will be unable to communicate information directly to a client, but will have to rely on an intermediary, such as an interpreter. To what extent may an attorney claim in defense to a malpractice action that an intermediary erroneously translated or otherwise misconveyed the attorney's advice to the client? According to the court in *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979), an attorney's duty to ensure that a client understood the attorney's advice was actually greater where the attorney knew the client could not speak English and was relying on a family member to interpret. In such a situation, the court suggested, the attorney had a duty to inquire whether the interpreter correctly translated the parties' conversation, and could not avoid this obligation by alleging the interpreter's negligence unless the record showed that the interpreter was disqualified to so act. The implication is that, although an attorney faced with the unusual situation of being unable to communicate directly with a client may be able to avoid liability by showing that the responsibility for an error in communications lay with an intermediary, the attorney may be required to show that, in recognition of the unusual situation, appropriate steps were taken to ensure that information was being accurately transmitted.

#### § 20. Negligence of Successor Attorney

[Cumulative Supplement]

Even if an attorney was negligent in handling a client's personal injury claim, there will be no liability for loss of the claim if the proximate cause of its loss was the negligence of another attorney retained by the client after the original attorney's withdrawal or dismissal. *Steketee v Lintz, Williams & Rothberg*, 38 Cal3d 46, 210 Cal Rptr 781, 694 P2d 1153 (1985); *Land v Greenwood*, 133 Ill App3d 537, 88 Ill Dec 595, 478 NE2d 1203 (1985); *Titsworth v Mondo*, 73 AD2d 1049, 425 NYS2d 422 (1980). See, e.g., *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985) [plaintiff's original attorney could not be held liable for failure to join party as defendant where, after attorney had been dismissed by plaintiff and new attorney hired, new attorney could have pursued claim against party].

An attorney may be relieved of liability not only where a successor attorney perpetuates the attorney's error, but also where the successor attorney fails to take additional affirmative steps to rectify the error. In *Titsworth*, above, as a result of the demand for damages in a complaint filed by the plaintiffs' attorney, the plaintiffs were forced to settle for less than their injuries warranted after unsuccessfully moving to amend the complaint to increase the amount of damages claimed. The attorney sought to show by way of defense that the plaintiffs' loss was not caused by any negligence on his part, but rather by the negligence of the plaintiffs' successor attorney in failing to appeal the denial of the motion to amend the complaint. *Titsworth*, above.

In such a case, even though the successor attorney may have no duty to take action to relieve the original attorney of liability, the successor attorney nevertheless owes a duty to the client to preserve the client's cause of action if it is viable at the time the successor is retained. *Land*, above.

Another circumstance under which the original attorney may be relieved of liability is where the successor attorney erroneously concludes that the client's claim has been irrevocably lost, and fails to take timely action to preserve the claim. In such a case, it is the successor attorney's error, rather than the original attorney's delay, which is the proximate cause of the loss of the claim. *Sticketee*, above.

The defense of negligence of a successor attorney may require the original attorney to establish more than merely the fact that the successor attorney could have preserved the client's claim. For example, in *Wimsatt v Haydon Oil Co*, 414 SW2d 908 (Ky 1967), a legal malpractice action based upon the failure of the defendants to file a timely suit on behalf of a man who had been injured in an automobile accident, the court held that even though it was apparent that the successor attorney could have preserved the man's claim by amending the complaint which the defendants had filed, the defendants would not be relieved of liability merely because the successor attorney failed to amend the complaint. The court said that the successor attorney was not negligent and therefore the defendants were not relieved of liability for their negligence. This does not mean that an attorney is precluded from raising a successor's attorney negligence as a defense; it means that the defense will fail if the successor attorney's negligence does not amount to a superseding cause of the loss of the client's claim. See *Daugherty v Runner*, 581 SW2d 12 (Ky App 1978).

#### PRACTICE GUIDE

Actions taken by a successor attorney may demonstrate that the plaintiff's claim was not viable. If, for example, a successor attorney brings a timely action on the claim and fails to prevail, this establishes that the plaintiff's original attorney was not negligent in failing to bring an action on the same claim. *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985).

#### CUMULATIVE SUPPLEMENT

##### Cases:

An attorney's failure to properly serve the defendant, in the plaintiff's personal injury suit, did not injure the plaintiff, where the plaintiff changed attorneys six months prior to the expiration of the two-year statute of limitations, the attorney (who was the plaintiff's first attorney) called the plaintiff's new counsel and explicitly advised him that service had not been made, and the new counsel failed to properly serve the dependent within the statutory period. The court said that the new counsel's negligence was not foreseeable and, thus, under traditional causation analysis, precluded the first attorney's liability. *Meiners v Fortson & White*, 210 Ga App 612, 436 SE2d 780 (1993).

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[END OF SUPPLEMENT]

#### § 21. Absence of Injury

[Cumulative Supplement]

Even if an attorney mishandled a client's personal injury claim, there will be no liability if the attorney's negligence did not cause any loss to the client, either because the client suffered no harm as a result of the attorney's actions, or, if harm was suffered, because it would have been suffered regardless. See, e.g., *Kluge v O'Gara*, 227 Cal App2d 207, 38 Cal Rptr 607 (1964) [notwithstanding attorney's error, full amount of damages sought by plaintiff were awarded, and judgment was paid in full].

Even if the negligence of the attorney representing the plaintiff undeniably led to a total loss of the plaintiff's personal injury claim, the attorney may be able to show that the claim was never viable, and that, had the case proceeded to tri- )

al, the verdict would have been against the plaintiff. *Weiner v Moreno*, 271 So2d 217 (Fla App 1973); *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983). If the plaintiff alleges that the attorney's negligence resulted in a recovery that was smaller than would otherwise have been recovered, the attorney may succeed in avoiding liability by showing that the plaintiff would not have received a larger recovery even if there had been no negligence. *Katsaris v Scelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982); *Schenkel v Monheit*, 266 Pa Super 396, 405 A2d 493 (1979).

#### PRACTICE GUIDE

Even if an attorney clearly has been negligent, a plaintiff who has recovered some damages may find it impossible to prove that recovery would have been greater but for the attorney's negligence. For example, in *Mitchell v Transamerica Insurance Co*, 551 SW2d 586 (Ky App 1977), an attorney failed to file a timely suit in Kentucky, leading to loss in that state of the plaintiff's cause of action. However, the plaintiffs, represented by another attorney, were able to bring suit in federal court in Indiana, and ultimately settled for \$60,000. The court held that although a different result might have been obtained if the plaintiffs had settled for patently inadequate damages, the plaintiffs could not prevail in a malpractice action against their original attorney based purely on conjecture and speculation that a Kentucky jury would have awarded more than \$60,000 in damages to the plaintiffs.

Since an award of damages in a legal malpractice action is to put the client in the same position the client would have been in but for the attorney's negligence, an attorney may be able to defend by showing that any judgment for the plaintiff would have been uncollectible, in whole or in part, because of the insolvency or financial insufficiency of the defendant. See, e. g., *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985); *Baker v Beal*, 225 NW2d 106 (Iowa 1975).

Since some injury must be suffered as a consequence of an attorney's negligence in order to state a claim for legal malpractice [see § 7], and since a client with a personal injury claim can ordinarily prove no injury as long as the claim may yet terminate favorably, it is generally a defense that the client's claim remains viable. *Chapman v Garcia*, 463 So2d 528 (Fla App 1985) later proceeding 465 So2d 618 (Fla App 1985); *Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985); *Eddleman v Dowd*, 648 SW2d 632 (Mo App 1983); *Jewett v Part*, 95 Nev 246, 591 P2d 1151 (1979).

#### CUMULATIVE SUPPLEMENT

##### Cases:

Attorney's conduct, in arbitration proceeding on client's claim against manufacturer of certain intrauterine device (IUD), in stipulating to admission of two chlamydia tests on client, one taken by trust overseeing claims against manufacturer, allegedly positive, and one taken by her personal doctor, which was negative, was not a but for cause of client's losing her arbitration claim, as required under New York law to support client's malpractice claim against attorney, even though chlamydia was potential cause of the pelvic inflammatory disease (PID) that client contended was caused by the IUD; the trust's positive test was likely admissible without the stipulation. *Rubens v. Mason*, 527 F.3d 252 (2d Cir. 2008) (applying New York law).

Under Florida law, law firm's alleged breach of duty of care to client was not proximate cause of any redressable harm to client, thereby precluding recovery for legal malpractice, negligence, breach of fiduciary duty, and breach of contract, where three years remained before statute of limitations expired on client's underlying personal injury claim, 20 months remained when client received his entire file from firm, and client accepted voluntary settlement with tortfeasor more than seven months before statutory period ran. *Jones v. Law Firm of Hill and Ponton*, 223 F. Supp. 2d 1284 (M.D. Fla. 2002); *West's Key Number Digest, Attorney And Client* ¶112.

Legal client failed to establish causation in her malpractice action against attorney for allegedly filing untimely personal injury action against two third parties, where one of the third parties defaulted thereby waiving statute of limita-

tions defense and other third party answered complaint without asserting statute of limitations as affirmative defense. *Giron v. Koktavy*, 2005 WL 427697 (Colo. Ct. App. 2005); West's Key Number Digest, Attorney And Client ¶112.

The plaintiff sued the defendant for legal malpractice arising from the plaintiff's retention of the defendant to prosecute on behalf of the plaintiff any and all claims arising out of an employment accident. The plaintiff was injured when a forklift operated by a fellow employee ran over his foot. The plaintiff claimed that the defendant was negligent in failing to inform him of the possibility of suing the former fellow employee for negligent operation of the forklift under the Workers' Compensation Act. However, the court found that the plaintiff could not have recovered under the employer's comprehensive general liability policy. There being no material issue of fact regarding the uncollectibility of a punitive judgment against the plaintiff's fellow employee, summary judgment for the defendant was proper. *Palmieri v Winnick*, 10 Conn App 18, 521 A2d 210 (1987).

In a personal injury claimant's legal malpractice action against the attorney who initially represented the claimant in the personal injury action, which was against the claimant's employer under the Federal Employers' Liability Act [FELA; 45 U.S.C.A. §§ 51 et seq.], summary judgment for the attorney was proper. Although the attorney failed to include a claim for a second injury the employee allegedly suffered at work two days prior to the injury for which recovery was sought, the court held that the claimant would have been unable to recover for the second injury even if the attorney had included a claim for that injury. The employee alleged, with respect to the second injury, that she slipped on an unknown substance at work, and the court noted that cases were legion in which a plaintiff attempting to recover for a slip and fall caused by an unknown agent had been unsuccessful. Accordingly, the claimant suffered no loss from the attorney's failure to include a claim for her second injury. *Brooks v Brennan*, 255 Ill App3d 260, 625 NE2d 1188 (1994).

The plaintiffs sued their attorney claiming they were coerced into an inadequate and unfair settlement in a personal injury action. In proving attorney negligence in the context of challenging a settlement or jury award as inadequate, the plaintiff must show that had the attorney not been negligent, the settlement or verdict award would have been greater. The attorney set forth material facts denying that the plaintiffs were damaged by his negligence and the plaintiffs failed to adduce facts that would be admissible in evidence contradicting the attorney's material. Consequently, no issue of material fact with respect to damages was raised and summary judgment was properly entered for the attorney on the count of negligence. The affidavits of the plaintiff only expressed their personal opinion as to the value of the wife's scar to them and not in the context of the many considerations relevant to value in a settlement context, such as liability, expense of trial, etc. A litigant's personal opinion of a scar's value to the litigant, standing alone, is irrelevant to the issue of the settlement value of the scar and, accordingly, does not controvert a factual assertion of value based upon relevant considerations. Further, a report prepared by a verdict research corporation which was based on information within the special knowledge of the corporation, as well as facts submitted by the plaintiff's attorney did not represent facts within the personal knowledge of the attorney as required by TR 56. Therefore, because the affidavit was not submitted by a representative of the research corporation, the report contained hearsay for which there was no exception. Moreover, excerpts from a magazine on jury verdicts could not be considered in determining whether the plaintiffs created a genuine issue of fact on damages since it, too, was hearsay. The defendant submitted an affidavit from the plaintiff's insurance company stating that the company would not pursue any subrogation claim it might have against the plaintiffs and an affidavit of an attorney stating the settlement amount was reasonable. The defendant also set forth circumstances surrounding the settlement, including an unfavorable doctor's report and his own opinion that the case would not be favorably viewed. In response to the defendant's information, the plaintiffs were required to respond with appropriate materials in opposition showing genuinely disputed facts surrounding the breach of duty and damages. *Sanders v Townsend*, 509 NE2d 860 (Ind App 1987).

Failure of attorneys, retained by insurer to represent plastic surgeon in medical malpractice action, to post jury bond, which surgeon alleged precipitated settlement of the action, and attorneys' violation of ethical duty to keep surgeon informed of the status of the settlement efforts, did not legally cause damage to surgeon, as required for surgeon to maintain a legal malpractice claim against attorneys; policy did not contain a consent to settle clause, surgeon did not have the

right to control settlement and insurer settled the medical malpractice action within policy limits, and, though settlement was reported to data bank for adverse information on physicians, surgeon did not show that but for the loss of the right to a jury trial and his lost opportunity to hire independent counsel the case against him would not have been settled. (Per Gaidry, J., with two judges concurring.) State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rules 1.0(e), 1.2, 1.4, Art. 16, LSA-R.S. foll. 37:222. *Teague v. St. Paul Fire and Marine Ins. Co.*, 10 So. 3d 806 (La. Ct. App. 1st Cir. 2009), writ denied, 10 So. 3d 722 (La. 2009).

A legal malpractice action was premature where the underlying medical malpractice action, in which the client's attorneys allegedly were negligent, was being appealed. The court said that until a final resolution was reached in the medical malpractice action, it was unknown whether the client had been injured by the attorneys' alleged malpractice. *Jure v Barker*, 619 So2d 717 (La App 1993).

Although client's former firm was negligent in serving intended personal injury defendant at address where she no longer resided, clients could not prove that but for firm's negligence, cause of action against intended defendant would not have been dismissed, and thus client's legal malpractice claim would fail, as client's new firm had 120 days to recommence action against intended defendant after original action was dismissed for failure to effect proper service. *Kozmol v Law Firm of Allen L. Rothenberg*, 660 NYS2d 63, 1997 NY Slip Op. 6756 (AD 2nd Dept, 1997).

Failure of attorneys, who were assigned by truck rental company's insurer to defend purported truck lessee in personal injury action, to advise lessee of conflict of interest and right to independent counsel once ownership of truck involved in collision became an issue did not cause purported lessee's exposure to uninsured liability, as would support lessee's legal malpractice action, though rental company's attorneys settled case and lessee was responsible for paying settlement amount; conflict was implicit in parties' correspondence, and lessee failed to contact its own insurance carrier. *Sumo Container Station, Inc. v. Evans, Orr, Pacelli, Norton & Laffan, P.C.*, 719 N.Y.S.2d 223 (App. Div. 1st Dept 2000); *West's Key Number Digest, Attorney And Client* ¶112.

The court upheld the dismissal of a legal malpractice claim based on the defendant attorneys' failure to timely commence litigation after the plaintiff had retained the attorneys to represent him in a personal injury action against his employer, a railroad company. The plaintiff was injured while traveling on a free pass issued by the railroad; the pass released the railroad from any liability resulting from its use. The court held that since the plaintiff had been using the pass when he was injured, he would have been bound by the release and thus would not have prevailed in an action against the railroad. Thus, the defendants' inaction caused him no harm. *Gonzales v O'Hagen & Reilly*, 189 AD2d 801, 592 NYS2d 431 (1993).

Even if report of former client's expert witness was considered, such report did not establish that former client would have recovered an additional \$380,000 in damages in the underlying action, as required in order for former client to prevail in legal malpractice action against law firms that had represented him in hip replacement implant class action; under the settlement agreement in the class action former client was entitled to additional settlement benefits if he could establish he had developed major complications from removal or replacement of a defective implant or had suffered permanent injury as a result of a defective implant, former client did recover some additional settlement benefits but contended but for the malpractice he would have recovered more, but expert's report did not state that client would have prevailed on his requests for more benefits. *Duerr v. Brown*, 262 S.W.3d 63 (Tex. App. Houston 14th Dist. 2008).

A law firm did not commit legal malpractice in failing to timely pursue its clients' medical malpractice claim against two physicians, since the claim was, at the time the clients first contacted the law firm, already barred by the statute of limitations. Accordingly, the firm's delay in filing the action did not cause injury to the clients. *Mathew v McCoy*, 847 SW2d 397 (Tex App 1993).

Counsel's rejection of settlement offer by automobile insurer pursuant to which insurer would pay to clients \$150 million in exchange for clients' petition to Supreme Court to vacate prior judgment affirming jury verdict of \$2.6 million in compensatory damages and \$145 million in punitive damages was not proximate cause of client's reduced damages award when judgment of Supreme Court was subsequently overturned by United States Supreme Court and punitive

damages award was reduced to \$9,018,780.75 on remand, and thus, client could not recover against counsel for legal malpractice; clients had executed agreement with respect to litigation against insurer providing that any decisions with respect to settlement had to be unanimous, counsel had discussed settlement offer with all three clients, other two clients had decided after consultation to reject settlement offer, condition of petition for vacatur was not subject to further negotiation, counsel had informed clients of possibility of pursuing individual settlement by settling their rights to litigating financing company, but and any amount that client might have received in attempt at individual settlement was pure speculation. *Christensen & Jensen, P.C. v. Barrett & Daines*, 2008 UT 64, 194 P.3d 931 (Utah 2008).

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[END OF SUPPLEMENT]

## § 22. Determination, Settlement, or Satisfaction of Underlying Claim

[Cumulative Supplement]

If a result adverse to the plaintiff was reached in proceedings on the plaintiff's personal injury claim, this may have the effect of providing a defense to a legal malpractice action based on the defendant's handling of the claim. For example, in a case involving an injury to an employee, the employee's exact status and relationship to the employer may determine which of a number of worker-protection statutes affords the employee an appropriate remedy. In such a case, even though a judgment on the issue of liability is adverse to the employee, it may determine the employee's appropriate employment classification, and thereby negate the possibility that the employee's attorney was negligent in failing to bring suit under another statute which affords a remedy only to persons in another employment classification. See *Case v St Paul Fire & Marine Insurance Co*, 324 F.Supp 352 (E.D. La 1971) [holding that judgment of suit had been properly brought under Federal Longshoremen and Harbor Workers' Act ( 33 U.S.C.A. §§ 901 et seq.) negated malpractice claim based on failure to bring suit under Jones Act ( 46 U.S.C.A. § 688)].

A judgment may also prevent the plaintiff from demonstrating that an injury was suffered as a result of the defendant's negligence. For example, if the plaintiff alleges that the negligence of the plaintiff's attorney caused an erroneous court order to be entered, the plaintiff may have to contest the order and have it overturned as a prerequisite to bringing a successful malpractice action, since the presumption that the order is correct will prevent the plaintiff from proving any injury resulting from issuance of the order. See *Thompson v D'Angelo*, 320 A.2d 729 (Del Sup 1974). Similarly, where an action based on the plaintiff's personal injury claim proceeds to trial, the plaintiff may be required to challenge the verdict as a prerequisite to bringing a malpractice suit. For example, since it is the jury's role to determine the amount of damages, if the jury has done so without challenge by the plaintiff, it will not be possible for the plaintiff to base a malpractice suit on a claim that damages were inadequate unless the damages award has been overturned on appeal. See *Schenkel v Monheit*, 266 Pa Super 396, 405 A.2d 493 (1979).

## PRACTICE GUIDE

A judgment in an action based on the plaintiff's personal injury claim may also constitute a bar to relitigation of various issues by the defendant. For example, where the plaintiff alleges that the defendant permitted the claim to expire by failing to file suit within the limitations period, and the defendant seeks to raise as a defense a matter which it is claimed would have estopped the defendant in the personal injury action from raising the statute of limitations as a bar to the action, the fact that this issue was litigated in the action and determined not to bar the defendant from raising a limitations defense will prevent the relitigation of the issue. *House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977).

A judgment in an action based on the plaintiff's personal injury claim generally bars a malpractice action based on

the defendant's handling of the claim only if the institution of the malpractice action would constitute an impermissible collateral attack on the validity of the judgment; it does not bar a malpractice action that does not attack the validity of the judgment. For example, if a personal injury action is dismissed because of the failure to bring it within the time permitted by the statute of limitations, a malpractice action alleging a negligent failure by the plaintiff's attorney to bring timely suit in no way contests the validity of the dismissal and thus is not barred. *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 SCt 1924, 80 LED2d 470 (1984). The plaintiff's failure to appeal a judgment of dismissal might prevent the plaintiff from recovering damages in a malpractice action if the judgment were in fact reversible [see, e.g., *Titsworth v Mondo*, 73 AD2d 1049, 425 NYS2d 422 (1980)], but the failure to appeal the dismissal will not prevent the plaintiff from recovering damages in a malpractice action if the plaintiff could not have revived the personal injury claim by taking an appeal. *Wimsatt v Haydon Oil Co*, 414 SW2d 908 (Ky 1967). Even if a legal malpractice action seeks to challenge the validity of the underlying judgment, it may be deemed not to constitute an impermissible collateral attack if the judgment, even if found erroneous, would nevertheless remain conclusive in respect to the plaintiff's claim against the defendant in the underlying action. See, e.g., *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 SCt 1924, 80 LED2d 470 (1984). See also *Edmondson v Dressman*, 469 So2d 571 (Ala 1985) [malpractice action was not impermissible collateral attack on consent judgment].

A settlement with the defendant in the underlying action may furnish a defense to a malpractice claim. A settlement may act as a bar to a malpractice action, but only if the action is a collateral attack on the settlement. See *Edmondson*, above. A settlement may also furnish a defense by negating the causal link between the defendant's conduct and the plaintiff's injury. Since mishandling of the underlying action combines with the conduct of the defendant in that action to produce but a single injury to the plaintiff, satisfaction of the plaintiff's personal injury claim through settlement may extinguish not only the cause of action based on that claim, but also any cause of action for legal malpractice, by eliminating the attorney's negligence in handling the action as the proximate cause of any damage to the plaintiff. See *Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985). Even if the settlement is inadequate, if it extinguished a viable cause of action, it is the plaintiff's voluntary decision to settle and accept inadequate compensation, rather than any negligence on the part of the plaintiff's attorney, which may be deemed to be the proximate cause of any loss suffered by the plaintiff. See *Rogers*, above; *Douglas v Parks*, 68 NC App 496, 315 SE2d 84 (1984) review den 311 NC 754, 321 SE2d 131 (1984). Thus, for example, in *Douglas*, by agreeing to settle the underlying personal injury action, the plaintiff was held to have waived any right to proceed against his attorney for malpractice since the settlement fixed the amount of damages which the plaintiff was entitled to recover and prevented him from asserting in a malpractice action that he would have received a larger recovery had it not been for his attorney's negligence. On the other hand, if an attorney's negligence leaves the plaintiff with no real alternative except settlement, assuming any right to sue has been irretrievably lost, the plaintiff's acceptance of an inadequate settlement may not be deemed to constitute a voluntary decision to compromise a viable claim, and may not furnish a defense to a malpractice action. See *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980); *King v Jones*, 258 Or 468, 483 P2d 815 (1971). Nor does the plaintiff's stipulation to dismiss the personal injury action following satisfaction of claims that survived the defendant's motion to dismiss constitute a voluntary extinguishment of a dismissed claim, so as to prevent the plaintiff from bringing a malpractice action against the attorney for negligently allowing the claim to be dismissed. *Wimsatt v Haydon Oil Co*, 414 SW2d 908 (Ky 1967).

#### CUMULATIVE SUPPLEMENT

##### Cases:

Settlement by premises owner of personal injury action asserted by injured employee of contractor did not operate as an intervening cause sufficient to bar legal malpractice claim asserted by contractor against its attorney, which was based

on attorney's failure to timely notify State Insurance Fund (SIF), which had paid workers' compensation benefits to injured employee, that building owner had asserted third-party claim against contractor, where settlement was compelled by attorney's alleged breach of standard of care. *Fireman's Fund Ins. Co. v. Farrell*, 289 A.D.2d 286, 734 N.Y.S.2d 217 (2d Dep't 2001); West's Key Number Digest, Attorney And Client ¶109.

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[END OF SUPPLEMENT]

### § 23. Settlement of Malpractice Claim

If the plaintiff's claim of malpractice against the attorney who handled the plaintiff's personal injury claim was compromised or settled, compromise or settlement may be raised as a defense in a subsequent action against the attorney for legal malpractice. See *Lafayette v County of Los Angeles*, 162 Cal App3d 547, 208 Cal Rptr 668 (1984). However, a release executed by the plaintiff in the course of settling with the defendant in the personal injury action will not be deemed to automatically release the plaintiff's attorney from any malpractice claim which the plaintiff may have against the attorney, since the attorney is not a defendant in the personal injury action. *Young v Jones*, 149 Ga App 819, 256 SE2d 58 (1979); *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979); *King v Jones*, 258 Or 468, 483 P2d 815 (1971). For similar reasons, where the plaintiff has been represented by more than one attorney, a release executed in favor of one attorney will not release an attorney against whom rights have been expressly reserved. *Wilson v Econom*, 56 Misc2d 272, 288 NYS2d 381 (1968).

### PRACTICE GUIDE

Release is an affirmative defense which the defendant must timely raise. *Young v Jones*, 149 Ga App 819, 256 SE2d 58 (1979).

### C. Parties

### § 24. Persons Entitled to Bring Suit

[Cumulative Supplement]

The appropriate party or parties to bring an action for legal malpractice based on an attorney's handling of a personal injury claim is the person or persons who had a right of action based on the claim itself, provided it is possible to establish an attorney-client relationship with the attorney. [The attorney-client relationship is discussed in § 5.] Since a legal malpractice action is a hybrid, partaking of aspects of both tort and contract [see § 2], the persons who may bring a legal malpractice action tend to be more narrowly defined than the persons who may bring a typical negligence action, although they may be more broadly defined than the persons who may bring a normal contract action. An attorney owes a duty to those persons whom the attorney specifically undertakes to represent. See § 5. Consequently, although privity of contract is required in the ordinary malpractice action to establish that the defendant owed a duty to the plaintiff, an attorney's duty may be extended to a group or class of persons whose interests the attorney has undertaken to represent. See, e.g., *Baer v Broder*, 86 AD2d 881, 447 NYS2d 538 (1982) [attorney handling wrongful death action represents distributees of deceased]. An attorney may sometimes be sued for malpractice by a person with whom the attorney had neither a contractual nor a face-to-face relationship. For example, in *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980), a husband and wife were permitted to bring a legal malpractice action jointly, even though only the wife had consulted directly with the attorney and neither had contracted with the attorney to take any specific action, where the attorney's failure to properly advise the wife that her husband had a cause of action for medical malpractice not

only caused the husband to lose the claim, but also caused his wife to lose a claim for loss of consortium.

#### PRACTICE GUIDE

If an attorney has been consulted or retained by a person acting in a legal capacity, it may not be necessary for the person to bring a legal malpractice action against the attorney in the same capacity. In *Baer v Broder*, 86 AD2d 881, 447 NYS2d 538 (1982), the court rejected an argument by an attorney that a woman who was the executrix of her deceased husband's estate and who retained the attorney to prosecute a medical malpractice and wrongful death action on behalf of the estate could not thereafter, in her individual capacity, bring a legal malpractice action against the attorney. The court held that, due to the unique character of a wrongful death action, which may be brought by a representative of a decedent's estate but does not benefit the estate, the general rule requiring privity between attorney and client would not prevent the woman from bringing a legal malpractice action where, as an individual and a distributee of her husband's estate, she had an interest in the recovery in the wrongful death action. The court added that it should have been foreseeable to the attorney that a breach of his duty would harm the woman individually, and that the woman was one of the real parties in interest in the wrongful death action, even though she did not bring the action in her individual capacity.

#### CUMULATIVE SUPPLEMENT

##### Law Reviews and Other Periodicals

Probert and Hendricks, *Lawyer Malpractice: Duty Relationships beyond Contract*, 55 *Notre Dame Law* 708 (1980)

##### Cases:

A default judgment was entered against the plaintiffs for failure to comply with discovery orders. As a result, the plaintiffs were foreclosed from defending a personal injury action on the issue of liability and trial was held on the issue of damages only. The injured party and the plaintiffs then entered into a consent agreement in which, inter alia, the plaintiffs agreed to file a legal malpractice action against the attorneys and to give any moneys received as damages in that suit to the injured party, less costs and attorneys' fees. The plaintiffs filed suit against their attorneys and partial summary judgment was entered in favor of the attorneys on the basis of the consent agreement. In reversing the judgment, the Court of Appeals held that the plaintiffs did not assign the claim or cause of action to the injured party. The plaintiffs merely agreed to give the injured party any proceeds recovered. An assignment is defined as a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right. To constitute a valid assignment, there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. Since the plaintiffs agreed to assign only a portion of their recovery, if any, from the malpractice suit, and since they did not specifically assign the claim or cause of action to the injured party, the court concluded there was no assignment of the legal malpractice action. An action can only be prosecuted in the name of the real party in interest. A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another. In this case, the plaintiffs, not the injured party, were the real parties in interest. The plaintiffs contracted for the attorney's services and suffered the loss. Any duty owed by the defendants was to the plaintiffs. It was irrelevant to the determination of the real party in interest that the plaintiffs attempted to reduce their damages through entering a consent judgment with the injured party. The plaintiffs were the real parties in interest, although, under the terms of the consent agreement, the injured party obtained a beneficial interest in the lawsuit. The plaintiffs had the right to pursue their cause of action on their behalf. *Weston v Dowty*, 163 *Mich App* 238, 414 *NE2d* 165 (1987).

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**[END OF SUPPLEMENT]****§ 25. Persons Potentially Liable****[Cumulative Supplement]**

Liability for legal malpractice in handling a personal injury claim rests with the attorney who represented the plaintiff on the claim and whose negligence caused a loss to the plaintiff. See, e.g., *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985); *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983); *Wingate v National Union Fire Insurance Co.*, 435 So2d 594 (La App 1983) cert den 440 So2d 762 (La 1983). If more than one attorney was involved in handling the claim, it is only the attorney or attorneys who were negligent who will be liable. See *Hunt v Brewer*, 266 Ark 182, 585 SW2d 12 (1979); *Land v Greenwood*, 133 Ill App3d 537, 88 Ill Dec 595, 478 NE2d 1203 (1985); *Carter v Mule*, 346 So2d 882 (La App 1977) cert den 349 So2d 870 (La 1977); *Ortiz v Barrett*, 222 Va 118, 278 SE2d 833 (1981).

Since all attorneys representing a client have an obligation to the client, the fact that an attorney participates as associate or local counsel will not prevent the attorney from being liable if the attorney was negligent. *Hood v McConemy*, 53 FRD 435 (D Del 1971); *Jenkins v St Paul Fire & Marine Insurance Co.*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982).

**PRACTICE PROBLEM**

To what extent does an associate or local counsel's obligation to a client supersede the fiduciary duty the attorney owes to the client's principal attorney? It appears that, depending upon the particular circumstances of the case, an attorney may be subject to liability for either acting to protect the client's perceived best interest, or for failing to act. An obligation on the part of associate or local counsel to inform the client of negligence or misconduct on the part of the principal attorney may arise where such negligence or misconduct threatens the viability of the client's cause of action, making a failure to inform the client actionable as legal malpractice. See *Ortiz v Barrett*, 222 Va 118, 278 SE2d 833 (1981). However, conduct which interferes unduly with the principal attorney's handling of the case, or which is intended to undermine the client's confidence in the principal attorney, constitutes a breach of fiduciary duty which may confer a right of action on the part of the principal attorney against associate or local counsel. See *Pollack v Lytle*, 120 Cal App3d 931, 175 Cal Rptr 81 (1981).

If more than one attorney was involved in handling the plaintiff's claim, a joint action against the attorneys may be instituted if it cannot be determined which attorney was responsible for the loss suffered by the plaintiff. *Jenkins v St Paul Fire & Marine Insurance Co.*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982). A joint action may also be appropriate if none of the attorneys was solely responsible for the loss. Attorneys handling a case together may be jointly liable even though they were involved in separate acts of negligence, where their joint actions led to the loss suffered by the plaintiff, and therefore constitutes a single injury to the plaintiff. *Hood v McConemy*, 50 FRD 435 (D Del 1971).

**PRACTICE GUIDE**

If the plaintiff was represented at various times by different attorneys, and the plaintiff alleges that they are jointly responsible for the loss suffered, it will be necessary for the plaintiff to bring a malpractice action against all the attorneys. A plaintiff who brings an action against only one of the attorneys in effect argues that that attorney's actions were the sole cause of the plaintiff's loss, and therefore cannot contend that the attorney or attorneys who are not named as defendants should contribute to payment of the plaintiff's damages. *Land v Greenwood*, 133 Ill App3d 537, 88 Ill Dec 595, 478 NE2d 1203 (1985). If more than one attorney handled the plaintiff's claim but the plaintiff brings a malpractice action

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against only one attorney, the attorney who is the defendant in the action may be permitted to implead another attorney who is alleged to be actually responsible for the plaintiff's loss. However, a failure to implead does not extinguish the defendant's cause of action against the other attorney. *Young v Jones*, 149 Ga App 819, 256 SE2d 58 (1979). An attorney who has been sued for legal malpractice may be able to impose liability on another attorney on such grounds as breach of contract, indemnity, or breach of fiduciary duty. See *Pollack v Lytle*, 120 Cal App3d 931, 175 Cal Rptr 81 (1981).

Where an attorney is a member of a law firm, legal partnership, professional corporation, or the like, the entity itself or its members may also be named as defendants. See, e.g., *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985) [action against law firm]; *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978) [action against law firm]; *Joos v Auto-Owners Insurance Co*, 94 Mich App 419, 288 NW2d 443 (1979) later app *Joos v Drillock*, 127 Mich App 99, 338 NW2d 736 (1983) [action against law firm]; *Cotton v Travaline*, 179 NJ Super 362, 432 A2d 122 (1981) [action against partner].

#### CUMULATIVE SUPPLEMENT

##### A.L.R. Library

Liability of Professional Corporation of Lawyers or Individual Members Thereof for Malpractice or other Tort of Another Member, 39 A.L.R. 4th 556

Legal Malpractice: Defendant's Right to Contribution or Indemnity from Original Tortfeasor, 20 A.L.R. 4th 338

Liability of Professional Corporation or Association for Practice of Law for Torts of Individual-Attorney Member, 76 A.L.R. 3d 1202

##### Law Reviews and Other Periodicals

Malpractice Suits against Local Counsel or Specialists, 68 Va L Rev 571 (1982)

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[END OF SUPPLEMENT]

### III. Practice and Procedure

#### A. In General

##### § 26. Jurisdiction

[Cumulative Supplement]

As with legal malpractice actions generally, most malpractice actions based on an attorney's handling of a personal injury claim are brought in state court, since, in order to bring a legal malpractice action in federal court, there must be diversity of citizenship. *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980); *Edmondson v Dressman*, 469 So2d 571 (Ala 1985). See 28 U.S.C.A. § 1332. Even though the plaintiff's personal injury claim may have been based on a federal statute, a malpractice action represents a state cause of action and may be brought in federal court only if there is diversity of citizenship. *Edmondson*, above.

Because a malpractice action is separate and distinct from the personal injury claim on which it is based, it is not necessary to bring the action in the same court that an action based on the personal injury claim was brought. Thus, for example, an action for legal malpractice may be brought in federal court even though the action based on the underlying

claim was brought in state court. See, e.g., *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980). The reverse is also true, and a malpractice action may be brought in state court even though the underlying action was brought in federal court. See, e.g., *Walker v Bangs*, 92 Wash2d 854, 601 P2d 1279 (1979).

It may be possible to bring a malpractice action in a jurisdiction other than the jurisdiction in which the defendant practices or in which the negligent acts complained of were committed. However, if the plaintiff seeks to bring the action in some other jurisdiction, there may be a question whether the attorney is amenable to suit there, and whether jurisdiction can properly be exercised pursuant to the forum state's long-arm statute. In order to be amenable to suit in a foreign jurisdiction, an attorney must have significant contacts with the jurisdiction sufficient to permit a court to exercise personal jurisdiction over the attorney. *Dubree v Myers*, 464 FSupp 442 (D Vt 1978); *Keith v Freiberg*, 492 FSupp 65 (D Neb 1980) aff'd 621 F2d 318 (8th Cir 1980). Thus, for example, a plaintiff who is a resident of State A, but who is injured in State B and who hires an attorney licensed to practice in State B to bring suit in that state may be required to bring malpractice action in State B, rather than State A, if there are insufficient contacts between the attorney and State A. *Keith*, above. Significant contacts, for purposes of exercising jurisdiction, may be established by showing, for example, that the attorney entered the forum state in the course of representing the plaintiff and actively served as the plaintiff's legal representative while in the state, by, for example, conferring with the plaintiff or deposing witnesses. *Dubree*, above. However, the mere fact that the attorney carried on telephone conversations with the plaintiff while the plaintiff was in the forum state, or represented other parties in the forum state in unrelated actions may be insufficient to establish significant contacts for the exercise of long-arm jurisdiction. *Keith*, above.

#### PRACTICE GUIDE

If an action based on the plaintiff's personal injury claim could have been brought in more than one jurisdiction, state law may be relevant not only to determine the proper forum for a malpractice action, but also to determine whether a cause of action for malpractice even exists. Even though an attorney's negligence may have made it impossible to bring an action on the personal injury claim in one jurisdiction, a cause of action for malpractice will generally not accrue as long as it remains possible for the plaintiff to bring a personal injury action and recover adequate damages in another jurisdiction. See *Mitchell v Transamerica Insurance Co*, 511 SW2d 586 (Ky App 1977); *Golden v Duggins*, 374 So2d 243 (Miss 1979). If a personal injury action was successful, the plaintiff has a cause of action for malpractice only if it is possible to prove, among other things, that the attorney was negligent in failing to bring the action in a jurisdiction where greater recovery would have been possible. See *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980).

#### CUMULATIVE SUPPLEMENT

##### A.L.R. Library

In Personam Jurisdiction, Under Long-Arm Statute, Over Nonresident Attorney in Legal Malpractice Action, 23 A.L.R. 4th 1044

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[END OF SUPPLEMENT]

#### § 27. Applicable Law

Since legal malpractice actions based on an attorney's handling of a personal injury claim may be brought in a court

other than the court which could, or actually did, hear an action on personal injury claim [ § 26], choice-of-law questions are relatively frequent in these sorts of malpractice actions. In general, the law of the state in which a malpractice action is brought governs the malpractice action, but the law of the state in which the personal injury action was or could have been brought governs issues directly related to that action. For example, the law of the state in which the malpractice action is brought will determine whether the attorney is amenable to suit in that jurisdiction. *Dubree v Myers*, 464 FSupp 442 (D Vt 1978); *Keith v Freiberg*, 492 FSupp 65 (D Neb 1980) affd 621 F2d 318 (8th Cir 1980). The law of the state in which the underlying personal injury action was or could have been brought will determine the damages the plaintiff could have recovered in that action, and thus the damages the plaintiff may recover in the malpractice action. *Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) affd 385 F2d 869 (6th Cir 1967). The law of the state in which the malpractice action is brought will determine whether the action is timely, but if the basis of a malpractice action is the attorney's failure to bring a timely action on the plaintiff's personal injury claim, the law of the state in which an action on the claim should have been brought will determine whether the attorney failed to file a timely suit. See, e.g., *Sohn v Bernstein*, 279 A2d 529 (Me 1971); *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974).

The law of the state in which the alleged malpractice occurred ordinarily governs the question whether the attorney breached a duty owed to the plaintiff, since the standard of care required by attorneys is determined not by the law of the state in which the malpractice action is brought, but rather by the law of the state in which the alleged malpractice occurred. *Hood v McConeny*, 53 FRD 435 (D Del 1971).

#### PRACTICE GUIDE

Where an attorney has failed to bring an action on the plaintiff's personal injury claim, it may be necessary to determine where such an action should have been brought in order to determine the applicable limitations period for filing such an action. See, e.g., *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974) [New York was appropriate forum for personal injury action where one of potential defendants was not amenable to process elsewhere].

#### § 28. Limitations

##### [Cumulative Supplement]

The limitations period within which a legal malpractice action must be brought is governed by state law, and is ordinarily determined by the law of the state in which the action is brought. If a state has a statute of limitations applicable to actions for "professional malpractice" the statute may apply. See, e.g., *Brown v Johnstone*, 5 Ohio App3d 165, 450 NE2d 693 (1982) not overrid. However, such a statute may be inapplicable if it specifically relates only to medical malpractice actions. See, e.g., *Wingate v National Union Fire Insurance Co*, 435 So2d 594 (La App 1983) cert den 440 So2d 762 (La 1983). Because a legal malpractice action partakes of elements of both tort and contract [see § 2], various statutes of limitations may apply, including those applicable to actions for personal injuries [see e.g., *Cordial v Grimm*, 169 Ind App 58, 346 NE2d 266 (1976)], actions for tortious injuries to an intangible right [see, e.g., *Hood v McConeny*, 53 FRD 435 (D Del 1971) (Delaware law); *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974)], or contract actions [see, e.g., *Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) affd 385 F2d 869 (6th Cir 1967) (Tennessee law); *Dolce v Gamberdino*, 60 Ill App3d 124, 17 Ill Dec 274, 376 NE2d 273 (1978); *Hillhouse v McDowell*, 219 Tenn 362, 410 SW2d 162 (1966)]. Legal malpractice actions are sometimes viewed as actions for both personal injury and breach of contract in order to apply the more favorable limitations statute. See, e.g., *Wingate v National Union Fire Insurance Co*, 435 So2d 594 (La App 1983) cert den 440 So2d 762 (La 1983); *Jackson v Zito*, 314 So2d 401 (La App 1975) cert den 320 So2d 551 (La 1975) cert den 320 So2d 553 (La 1975); *Harrison v Casto*, 271 SE2d 774 (W Va 1980). In some instances, the plaintiff may have what is in effect an election of remedies, permitting the action to be pleaded in tort or contract, thereby determining the applicable limitations period. See *Harrison*, above. Generally, however, courts will dis-

regard the plaintiff's characterization of the action and will determine the applicable limitations period by reference to the substance of the action, rather than the form of the pleadings. See, e.g., *Cordial*, above; *Wingate*, above; *Jackson*, above.

Where the allegation of malpractice is a failure to bring an action on the plaintiff's personal injury claim prior to the expiration of the statute of limitations, both the limitations period governing the personal injury claim and the limitations period governing a legal malpractice claim must be considered together to determine the appropriate time for filing an action for legal malpractice. Since a cause of action for malpractice does not accrue until the attorney misses the deadline for filing suit on the personal injury claim [see § 29], reference to the limitations period applicable to the personal injury claim is necessary to determine not only when a legal malpractice action can be brought, but also whether there was any malpractice. See *Hood v McConemy*, 53 FRD 435 (D Del 1971).

#### PRACTICE GUIDE

An attorney representing the plaintiff in a legal malpractice action must know not only what the limitations period is for a legal malpractice action, but also what the limitations period is for the underlying action, as well as the rules for determining when a cause of action for legal malpractice accrues [see § 29], since all these factors may be relevant in determining the deadline for filing a malpractice action.

#### CUMULATIVE SUPPLEMENT

##### A.L.R. Library

What Statute of Limitations Governs Damage Action against Attorney for Malpractice, 2 A.L.R. 4th 284

##### Cases:

The one-year limitation period for tort actions applies to legal malpractice actions. The 10-year limitation period for breach of contract will only apply in the rare exception when an attorney expressly warrants a particular result. *Albares v Exnicios* 480 So2d 473 (La App 1985); *Elzy v ABC Ins Co*, 472 So2d 205 (La App 1985) cert den 475 So2d 361 (La 1985).

Although client's alleged injury occurred on the date the statute of limitations ran on client's underlying personal injury claim and the statute of limitations ran after termination of the attorney-client relationship, the acts that gave rise to client's injury occurred during the attorney-client relationship when client informed attorney to file suit on his personal injury claim and attorney did not, and thus, client stated claim for legal malpractice. *Wood v. Hollingsworth*, 603 S.E.2d 388 (N.C. Ct. App. 2004); *West's Key Number Digest, Attorney And Client* ¶112.

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[END OF SUPPLEMENT]

#### § 29. Limitations—When Cause of Action Accrues

[Cumulative Supplement]

Depending on the terms of the applicable statute of limitations, the limitations period within which an action for legal malpractice based on an attorney's handling of a personal injury claim will begin to run when: the act or omission on which the action is based occurred. See, e.g., *Dolce v Gamberdino*, 60 Ill App3d 124, 17 Ill Dec 274, 376 NE2d 273 (1978); *Brantley v Dunstan*, 10 NC App 706, 179 SE2d 878 (1971). expiration of the statute of limitations bars bringing an action on the personal injury claim. See, e.g., *Wingate v Na-*

tional Union Fire Insurance Co, 435 So2d 594 (La App 1983) cert den 440 So2d 762 (La 1983); Jackson v Zito, 314 So2d 401 (La App 1975) cert den 320 So2d 553 (La 1975).

an action on the personal injury claim terminates adversely to the plaintiff. See, e.g., Hood v McConerny, 53 FRD 435 (D Del 1971) [termination by dismissal]; Cordial v Grimm, 169 Ind App 58, 346 NE2d 266 (1976) [termination by adverse determination].

the plaintiff discovers, or should have discovered, the defendant's malpractice. See, e.g., Neel v Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal3d 176, 98 Cal Rptr 837, 491 P2d 421 (1971); Green v Bartel, 365 So2d 785 (Fla App 1978); Berry v Zisman, 70 Mich App 376, 245 NW2d 758 (1976). See also Jewett v Patt, 95 Nev 246, 591 P2d 1151 (1979) [cause of action accrues when plaintiff knew or should have known all facts material to cause of action, and plaintiff sustained damage].

the defendant is dismissed as the plaintiff's attorney. Dolce v Gamberdino, 60 Ill App3d 124, 17 Ill Dec 274, 376 NE2d 273 (1978).

In most cases, the question whether a malpractice cause of action has accrued will depend on the viability of the personal injury claim. Although a malpractice cause of action arising in other contexts frequently is considered to accrue at the time of the attorney's negligent act, or failure to act [see 7 Am. Jur. 2d, Attorneys at Law § 221; C.J.S., Attorney and Client § 267], a cause of action for malpractice in handling a personal injury claim generally does not accrue as long as the claim remains viable. *Chapman v Garcia*, 463 So 2d 528 (Fla App 1985) later proceeding 465 So2d 618 (Fla App 1985); *Eddleman v Dowd*, 648 SW2d 632 (Mo App 1983); *Jewett v Patt*, 95 Nev 246, 591 P2d 1151 (1979). This means that the cause of action generally does not accrue, even though the plaintiff's right of action may have been extinguished in one jurisdiction, as long as it remains possible to bring an action in some other jurisdiction. *Mitchell v Transamerica Insurance Co*, 551 SW2d 586 (Ky App 1977); *Golden v Duggins*, 374 So2d 243 (Miss 1979). Nor does it accrue, even though the plaintiff's right to sue under one theory of recovery may be barred, as long as timely suit under another theory of recovery remains possible. *Sohn v Bernstein*, 279 A2d 529 (Me 1971). However, it may be possible to commence a malpractice action during the pendency of an action based on the personal injury claim if the plaintiff is able to prove that the action cannot terminate favorably and that the plaintiff has suffered injury due to the attorney's negligence. See *Reynolds v Picciano*, 29 AD2d 1012, 289 NYS2d 436 (1968). It also may be possible to bring a malpractice action as soon as the attorney's negligence occurs if state law permits immediate suit, notwithstanding the fact that substantial damages are not then ascertainable. See *Brantley v Dunstan*, 10 NC App 706, 179 SE2d 878 (1971). See *Brantley v Dunstan*, 17 NC App 19, 193 SE2d 423 (1972) [concealment of negligence until malpractice claim is barred may be actionable as fraud].

## PRACTICE GUIDE

There are two reasons why a cause of action for legal malpractice generally does not accrue until the plaintiff's personal injury claim has been resolved. In the first place, a malpractice action is generally regarded as a substitute for, rather than an alternative to, an action on the personal injury claim. The plaintiff does not have an election of remedies, and may not choose between pursuing the claim or suing the attorney for malpractice, but must pursue the claim as long as it remains viable, even though the attorney's handling of the claim may have made that possibility more difficult or the prospects of full recovery more doubtful. See, e.g., *Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985) [no malpractice cause of action where plaintiff voluntarily settled personal injury claim]; *Titworth v Mondo*, 73 AD2d 1049, 425 NYS2d 422 (1980) [no malpractice action where plaintiff failed to appeal adverse pretrial ruling in action based on personal injury claim]. But see *Case v St Paul Fire & Marine Insurance Co*, 324 FSupp 352 (ED La 1971) [permitting malpractice cause of action where, even if laches would not bar suit on personal injury claim, laches would be formidable defense, available only because attorney had not timely filed suit]. In the second place, until the personal injury claim is resolved, the plaintiff ordinarily is not able to demonstrate that any injury was suffered as a result of the attorney's handling of the

claim, since, notwithstanding the attorney's negligence, subsequent remedial action, by the attorney or others, may yet enable the plaintiff to fully recover on the claim. See *Eddleman v Dowd*, 648 SW2d 632 (Mo App 1983).

Where a malpractice action is based on an attorney's failure to act, such as a failure to bring suit on the personal injury claim, the malpractice cause of action ordinarily accrues only when the statute of limitations has run on the personal injury claim. *Jackson v Zito*, 314 So2d 401 (La App 1975) cert den 320 So2d 551 (La 1975) cert den 320 So2d 553 (La 1975); *Sohn v Bernstein*, 279 A2d 529 (Me 1971); *Golden v Duggins*, 374 So2d 243 (Miss 1979). This may be the case even in a state which ordinarily deems a malpractice cause of action to accrue on the date of the attorney's negligence, since a failure to act does not occur on a distinct date, and thus is not considered to occur until the passage of time makes performance of the act impossible. See *Dolce v Gamberdino*, 60 Ill App3d 124, 17 Ill Dec 274, 376 NE2d 273 (1978). However, a malpractice cause of action may accrue before the expiration of the statute of limitations if the action is based on an attorney's express refusal to bring suit on the personal injury claim, rather than on a failure to bring suit on the claim prior to the expiration of the statute of limitations. *Walker v Porter*, 44 Cal App3d 174, 118 Cal Rptr 468 (1974). The cause of action may also accrue earlier if it is based on an attorney's misrepresentation to the plaintiff that an action on the claim was being prosecuted. *Beer v Florsheim*, 96 AD2d 485, 465 NYS2d 196 (1983). Under such circumstances, the cause of action accrues because the action, instead of being grounded on loss of the personal injury claim, is grounded on the theory that the attorney, by unreasonably delaying prosecution of an action based on the claim, failed to exercise an ordinary and reasonable degree of care and skill. *Beer*, above. A malpractice action may also be instituted before the statute of limitations has run on the personal injury claim if the attorney's delay has rendered the claim worthless, as, for example, where it appears likely that an action on the claim would be barred by the defense of laches, and would not have been barred but for the failure of the attorney to bring the action on a timely basis. *Case v St Paul Fire & Marine Insurance Co*, 324 FSupp 352 (ED La 1971).

#### PRACTICE GUIDE

The fact that it is possible for the plaintiff to bring a malpractice action for the defendant's failure to bring suit on the personal injury claim while it is still possible to do so does not mean that this is always the wise or proper course of action. In such a case, the question of the viability of the claim remains relevant to the merits of the malpractice action, and particularly to the question whether the plaintiff has suffered any loss caused by the defendant's failure to bring suit. *Beer v Florsheim*, 96 AD2d 485, 465 NYS2d 196 (1983). Since the institution of a malpractice action against an attorney effectively terminates the attorney-client relationship [see § 30], and since an attorney is generally not responsible for the loss of a claim if the loss occurs after the attorney has been dismissed [see § 20], institution of a malpractice action while the underlying personal injury claim remains viable cannot be viewed as an alternative to continuing to pursue the personal injury claim, but should be viewed as a means of recovering only those damages proximately caused by the defendant's delay, together with any additional damages which may have been incurred as an incident to the dismissal of the defendant and the retention of successor counsel.

The time at which the plaintiff's personal injury claim is deemed to expire depends upon the circumstances of the claim, the actions which have or have not been brought to enforce the claim, and the manner in which any such actions have terminated. A malpractice action based on an attorney's handling of the claim may be deemed to accrue when an action on the claim is terminated with prejudice. *Cordial v Grimm*, 169 Ind App 58, 346 NE2d 266 (1976). In such a case, the fact that the plaintiff may have the right to attempt to reinstate the action or bring a new action may be insufficient to prevent the malpractice action from accruing. *Hood v McConerny*, 53 FRD 435 (D Del 1971) [possibility of reinstatement did not prevent malpractice action from accruing]; *Cordial*, above [plaintiff's attempt to bring new action did not prevent malpractice action from accruing]. On the other hand, even though an action on the claim has been dismissed, the cause of action on the claim may be deemed to remain viable and pending until the validity of the dismissal has been re-

solved on appeal. *Chapman v Garcia*, 463 So2d 528 (Fla App 1985) later proceeding 465 So2d 618 (Fla App 1985).

The date of accrual of a malpractice cause of action may pose a particularly difficult question where an attorney is alleged to have failed to bring suit on the personal injury claim within the time permitted by law. In such a case, the malpractice action may be deemed to accrue on the date of expiration of the limitations period. See *Jackson v Zito*, 314 So2d 401 (La App 1975) cert den 320 So2d 551 (La 1975) cert den 320 So2d 553 (La 1975). Even though expiration of the statute of limitations is technically an affirmative defense which must be pleaded, the plaintiff may be able to establish that a malpractice action has accrued merely by showing that the limitations period has run on the personal injury claim, without also showing that an action was brought on the claim and that a limitations defense was successfully raised. *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974). However, if an action was brought on the claim and it is merely the plaintiff's contention that the action was untimely, it may be necessary to show that the action was dismissed in order to establish the accrual of a malpractice cause of action. See *Chapman*, above. *Jewett v Patt*, 95 Nev 246, 591 P2d 1151 (1979).

Due to the duty of trust imposed on an attorney and the difficulty which a layperson experiences in recognizing that legal malpractice has occurred, some states apply the rule that a malpractice cause of action does not accrue until the material facts essential to establishing a claim of malpractice are known, or should have been known, by the plaintiff. *Neel v Magana, Olney, Levy, Cathcart & Gelfand*, 6 Cal3d 176, 98 Cal Rptr 837, 491 P2d 421 (1971); *Jewett*, above. See also *Green v Bartel*, 365 So2d 785 (Fla App 1978) [statute of limitations does not begin to run until plaintiff learns of alleged malpractice]. The time by which the plaintiff must discover that a right of action exists may be limited by statute. See *Baright v Willis*, 151 Cal App3d 303, 198 Cal Rptr 510 (1984) [applying four-year period for bringing suit].

#### PRACTICE GUIDE

The plaintiff's ability to recover damages in an action for legal malpractice frequently depends upon an accurate assessment of the underlying personal injury claim to determine the point at which it becomes appropriate to abandon the claim and commence a legal malpractice action. Since many states have relatively short limitations periods for personal injury or malpractice actions, and because the limitations period applicable to a malpractice action frequently begins to run on the date that the malpractice claim accrues, inordinate delay may lead to a loss of the claim. However, institution of a premature malpractice action may also effectively extinguish the claim. If the plaintiff commences a malpractice action in the erroneous belief that a viable cause of action based on the plaintiff's personal injury claim has been lost and the cause of action expires thereafter, the proximate cause of the loss may be deemed to be the plaintiff's abandonment of the claim rather than any error or omission on the part of the attorney. See, e.g., *Steketee v Lintz, Williams & Rothberg*, 38 Cal3d 46, 210 Cal Rptr 781, 694 P2d 1153 (1985). Furthermore, institution of a malpractice action may be deemed to result in a dismissal of the attorney, which will not only terminate the attorney's liability for a subsequent loss of the personal injury claim, but will terminate any responsibility the attorney might otherwise have had to take remedial action and will also start the running of the statute of limitations with respect to any other malpractice claim the plaintiff might have against the attorney. See *Berry v Zisman*, 70 Mich App 376, 245 NW2d 758 (1976). Consequently, if the plaintiff believes that some error or omission by the attorney may have been prejudicial, the plaintiff's first step should be to determine whether an action on the personal injury claim is possible. Even if the plaintiff believes that the claim has been irrevocably lost, the plaintiff must consider whether any pending judicial proceedings must be exhausted in order to demonstrate that the claim is no longer viable. Only then can the plaintiff bring a malpractice action against the attorney.

#### CUMULATIVE SUPPLEMENT

##### Cases:

Former client's legal malpractice claims against law firm for alleged failure to name additional parties as defendants in underlying medical malpractice and wrongful death suit accrued, commencing under three-year limitations period, when law firm advised client in writing of unwillingness to pursue underlying action due to weaknesses in case. McKinney's CPLR 214(6). *Frenchman v. Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc. 3d 486, 884 N.Y.S.2d 596 (Sup 2009).

Generally, two-year statute of limitations for legal malpractice claim begins to run at time facts have come into existence that provide basis for claimant to seek judicial remedy. V.T.C.A., Civil Practice & Remedies Code § 16.003(a). *Sotelo v. Stewart*, 281 S.W.3d 76 (Tex. App. El Paso 2008), reh'g overruled, (June 18, 2008) and review denied, (Mar. 27, 2009).

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[END OF SUPPLEMENT]

### § 30. Limitations—Tolling of Limitations Period

[Cumulative Supplement]

The running of the statute of limitations applicable to an action for legal malpractice may be tolled for a number of reasons. If an attorney deliberately misleads a client as to the existence of an actionable act of malpractice, the statute of limitations may be tolled until the client discovers or should have discovered the attorney's malpractice. *Madden v Palmer*, 371 Mass 894, 358 NE2d 415 (1976); *Brantley v Dunstan*, 17 NC App 19, 193 SE2d 423 (1972). However, a client's mere unawareness of an attorney's malpractice, in the absence of deception by the attorney, may be insufficient to toll the statute of limitations. *Jackson*, above. Consequently, an attorney's concealment of malpractice by mere silence may be insufficient to establish that the statute of limitations was tolled, and the client may be required to show active concealment. *Wingate v National Union Fire Insurance Co*, 435 So2d 594 (La App 1983) cert den 440 So2d 762 (La 1983).

### PRACTICE GUIDE

Where the plaintiff retained more than one attorney to handle the plaintiff's personal injury claim and if there is a question whether the plaintiff knew or should have known that the original attorney was negligent, the knowledge of the plaintiff's successor attorney generally will not be imputed to the plaintiff. Thus, if the successor attorney fails to inform the plaintiff of a possible malpractice claim against the original attorney, the statute of limitations will not begin to run merely because the attorney knew or should have known of the plaintiff's right of action against the original attorney. *Baright v Willis*, 151 Cal App3d 303, 198 Cal Rptr 510 (1984).

Regardless of whether the attorney has deliberately misled the plaintiff concerning the attorney's malpractice or the viability of the plaintiff's personal injury claim, the statute of limitations may be tolled during the period the attorney represented the plaintiff on the claim. See *Baright v Willis*, 151 Cal App3d 303, 198 Cal Rptr 510 (1984); *Berry v Zisman*, 70 Mich App 376, 245 NW2d 758 (1976); *Wilson v Econom*, 56 Misc2d 272, 288 NYS2d 381 (1968); *Brown v Johnstone*, 5 Ohio App3d 165, 450 NE2d 693 (1982) mot ovld. Where the plaintiff's injury gives rise to several potential claims or causes of action, as frequently is the case with an automobile collision or industrial accident, the limitations period respecting a legal malpractice action may be tolled as long as the attorney continues to represent the plaintiff with respect to the subject matter giving rise to the plaintiff's potential personal injury claims, even though certain individual claims are not pursued. The effect of this rule is that if the attorney has made a mistake in determining which claim to pursue, the plaintiff is not bound to second-guess the attorney, but may await the outcome of the action the attorney elected to bring without forfeiting the right to sue in malpractice for failure to bring an action on an alternative claim.

Baright, above.

#### PRACTICE GUIDE

A possible basis for concluding that the statute of limitations is tolled during the period the attorney represented the plaintiff is the theory of waivable breach of contract. Under this theory, if the plaintiff continues to employ the attorney despite the attorney's breach of the employment contract with the plaintiff, the plaintiff is deemed to have waived the breach of anticipation that the attorney would take curative action. If the attorney failed to do so, this failure constitutes a separate breach of the contract and a separate cause of action accruing at the time the error becomes incurable. However, this theory is dependent upon the actual occurrence of second breach of the contract. If the plaintiff discharges the attorney after the first breach, thereby preventing the attorney from committing a second breach, this theory may be available, and even if available, it will not permit the plaintiff to allege an accrual date for a cause of action against the attorney any later than the date of the attorney's discharge, since the discharge terminates the attorney's right to act on behalf of the plaintiff. See *Brantley v Dunstan*, 10 NC App 706, 179 SE2d 878 (1971).

The attorney's continued representation of the plaintiff may be deemed to terminate on the date that a court formally relieves that attorney. *Berry v Zisman*, 70 Mich App 376, 245 NW2d 758 (1976). It may also terminate on the date the plaintiff specifically discharges the attorney. *Baright v Willis*, 151 Cal App3d 303, 198 Cal Rptr 510 (1984). *Berry*, above; *Brantley v Dunstan*, 10 NC App 706, 179 SE2d 878 (1971). Even if the plaintiff does not expressly discharge the attorney, the attorney may be constructively discharged by some act on the part of the plaintiff indicating that the plaintiff no longer wishes to be represented by the attorney. For example, institution of a malpractice action against an attorney may be deemed the equivalent of a discharge. *Berry*, above. An attorney may also be deemed constructively discharged by the plaintiff's initiation of grievance proceedings against the attorney based on the attorney's handling of the plaintiff's personal injury claim. *Brown v Johnstone*, 5 Ohio App3d 165, 450 NE2d 693 (1982) not overruled.

The statute of limitations may also be tolled for other reasons, such as the incapacity of the plaintiff [ *Cline v Lever Brothers Co.*, 124 Ga App 22, 183 SE2d 63 (1971)], the minority of the plaintiff [ *O'Callaghan v Weitzman*, 291 Pa Supcr 471, 436 A2d 212 (1981)], or the absence of the attorney from the state [ *Wilson v Econom*, 56 Misc2d 272, 288 NYS2d 381 (1968)].

#### PRACTICE GUIDE

The statute of limitations may be tolled for more than one reason. For example, where an attorney continues to represent the plaintiff after the occurrence of an act of malpractice, and subsequently leaves the state permanently, the attorney's continued representation of the plaintiff and the attorney's absence from the state may combine to toll the statute of limitations. *Wilson v Econom*, 56 Misc2d 272, 288 NYS2d 381 (1968).

#### CUMULATIVE SUPPLEMENT

##### A.L.R. Library

When Statute of Limitations Begins to Run upon Action against Attorney for Malpractice, 32 A.L.R. 4th 26

##### Cases:

Continuous representation doctrine did not apply to toll statute of limitations on clients' legal malpractice action against attorney, although law firm was never formally substituted for attorney as counsel in underlying medical malpractice action, where clients had clearly retained firm to represent her in underlying action. *Gotay v. Breitbart*, 58

A.D.3d 25, 866 N.Y.S.2d 638 (1st Dep't 2008), appeal dismissed, 12 N.Y.3d 780, 879 N.Y.S.2d 55, 906 N.E.2d 1089 (2009), order vacated, 12 N.Y.3d 830, 2009 WL 1259020 (2009) and rev'd on other grounds, 2009 WL 1794769 (N.Y. 2009).

Under doctrine of continuous representation, limitations period was not tolled for former client's legal malpractice claims against law firm that had sent written notice to client of unwillingness to pursue underlying medical malpractice and wrongful death suit, although law firm failed to seek leave to withdraw as counsel, since client acknowledged receipt of letter notifying of termination of their relationship, client considered law firm to have abandoned underlying action, and client began seeking new counsel. McKinney's CPLR 214(6), 321(b)(2). Frenchman v. Queller, Fisher, Dienst, Serins, Washor & Kool, LLP, 24 Misc. 3d 486, 884 N.Y.S.2d 596 (Sup 2009).

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[END OF SUPPLEMENT]

### § 31. Complaint and Answer

In order to state a cause of action for legal malpractice, it is necessary that the complaint fairly apprise the defendant of the alleged acts of malpractice the plaintiff intends to prove. *Richardson v King*, 36 AD2d 781, 319 NYS2d 218 (1971). For example, if the plaintiff alleges malpractice involving the defendant's failure to diligently prosecute an action based on the plaintiff's injury claim, it is necessary for the plaintiff to describe the nature of the claim in sufficient detail to permit the defendant to identify it, and to allege that, had the defendant prosecuted it diligently, the plaintiff would have obtained recovery. It is not necessary for the plaintiff to specifically plead negligence on the part of the defendant or the plaintiff's freedom from contributory negligence. *Richardson*, above.

#### PRACTICE GUIDE

A legal malpractice claim partakes of elements of both tort and contract. See § 2. Although the plaintiff, out of an abundance of caution, will probably wish to characterize the action as one in tort and contract, the plaintiff's characterization will ordinarily have no effect on the outcome of the action since modern rules of notice pleading require a complaint to contain a statement of the claim and demand for relief, but not a statement of the legal theory upon which the claim is based. See, e.g., *Cordial v Grimm*, 169 Ind App 58, 346 NE2d 266 (1976). Moreover, courts will ordinarily consider a legal malpractice action to involve claims in both tort and contract, even though the complaint refers to only one or the other theory of recovery. See *Wingate v National Union Fire Insurance Co*, 435 So2d 594 (La App 1983) cert den 440 So2d 762 (La 1983). Nor can the plaintiff ordinarily control the outcome of the action by asserting a right to recover only in tort or only in contract, since it is the nature or substance of the action, rather than the asserted theory of recovery, that will determine such matters as the appropriate statute of limitations. See *Whitehouse v Quinn*, 477 NE2d 270 (Ind 1985). But see *Harrison v Casto*, 271 SE2d 774 (W Va 1980) [suggesting that language of complaint may determine whether suit sounds in tort or contract, and whether tort or contract statute of limitations governs].

The defendant, in answering the plaintiff's complaint, should specify the grounds upon which the complaint is being contested, including any affirmative defenses which are sought to be raised, even though the possible bifurcated nature of the trial of a legal malpractice action [see § 32] may mean that certain issues are not considered until the plaintiff has prevailed on other issues. For example, even though the question of the solvency of the defendant in the underlying personal injury action becomes relevant only after it has been shown that the plaintiff would have prevailed in the action and would have been awarded a judgment for damages, it is nevertheless necessary for the defendant to raise the issue of the collectibility of damages in a timely fashion, rather than defending on the ground that the plaintiff could not have prevailed in the action, and then seeking to raise a question as to the collectibility of the judgment only after the

primary defense has failed. See *Baker v Beal*, 225 NW2d 106 (Iowa 1975). See also *Wagner v Tucker*, 517 FSupp 1248 (SD NY 1981) [defendant has burden of going forward with evidence on issue of collectibility].

### § 32. Conduct of Trial

Unless an action based on the plaintiff's personal injury claim proceeded to trial and judgment, a legal malpractice action based on the defendant's handling of the claim will involve the question whether the plaintiff would have prevailed in the underlying action had it proceeded to trial. Consequently, the parties will have to conduct a "trial within a trial" to determine not only the question whether the defendant breached some duty to the plaintiff, but also whether this breach led to the loss of the plaintiff's personal injury claim. Frequently, trial of the malpractice action will be bifurcated to consider separately the question of the defendant's negligence and the possible effect of such negligence. See *Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982); *Young v Jones*, 149 Ga App 819, 256 SE2d 58 (1979); *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978); *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974). For example, the issue of the defendant's alleged negligence may be tried first, leaving for a later trial, if necessary, all questions relating to the underlying personal injury action, including both the liability of the defendant in that action and the damages the plaintiff might have been awarded. *Fuschetti*, above. The court may also order consideration together with questions of the defendant's negligence and the amount of damages the plaintiff would have been awarded in the underlying personal injury action, but for the defendant's negligence, leaving for later consideration the question of the amount of the judgment which could have been collected from the defendant in that action. *Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982); *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978).

#### PRACTICE GUIDE

The trial court has considerable discretion as to the manner in which trial of a malpractice action may be bifurcated. For example, notwithstanding a bifurcation order, the court may permit the plaintiff to present its entire case uninterrupted and in its entirety as long as the defendant is not thereby precluded from presenting contradicting evidence as to any part of the plaintiff's case. *Young v Jones*, 149 Ga App 819, 256 SE2d 58 (1979). The two portions of a bifurcated malpractice action may also be tried as though they were two separate suits. However, where this is done, it is generally preferable to try both portions before the same jury, since a second jury, hearing only evidence on the damages issue, would be unable to take into account the extent to which the defendant's negligence may have handicapped the plaintiff in producing evidence of damages. *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974). For similar reasons, in a non-jury trial, the most appropriate procedure may be to schedule both portions of the case for sequential hearing before the same judge. *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979).

Even if a trial is bifurcated, the plaintiff may be entitled to partial summary judgment. Thus, for example, partial summary judgment may be ordered on the issue of the defendant's negligence if the defendant fails to set forth any facts excusing a failure to prosecute an action on the plaintiff's personal injury claim. *Gladden v Logan*, 28 AD2d 1116, 284 NYS2d 920 (1967).

#### PRACTICE GUIDE

The question of an attorney's negligence is ordinarily a question of fact. *House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977); *Katsaris v Scelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982). However, the question may be decided as a matter of law if the facts supporting a finding of negligence are so compelling that no conflicting inference could be drawn. *Katsaris*, above.

Since a malpractice action may require reconsideration of some aspects of the claim from which it arises, such as the

adequacy of the verdict, the malpractice action may be referred for trial to a judge other than the judge who conducted the trial of the action on the underlying claim. See *Katsaris v Scelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982).

#### PRACTICE GUIDE

If resolution of a malpractice action requires the court to consider the validity of the judgment in the underlying action, the question may arise as to whether it is proper to permit the judgment to be reviewed by the court hearing the malpractice action, rather than an appellate court. Some states permit the court hearing the malpractice action to consider the validity of the underlying judgment, thereby obviating the need to refer the question to an appellate court. See *Katsaris v Scelsi*, 115 Misc2d 115, 453 NYS2d 994 (1982). Where this is the case, the court hearing the malpractice action will be barred from retrying the case on its facts and will be able to find the underlying judgment erroneous only if it would be reversible as a matter of law. *Katsaris*, above. If the court hearing the malpractice action is not permitted to pass on the propriety of the judgment, an attempt to raise a question as to the judgment's propriety may be deemed to constitute a collateral attack on the judgment, in which case the judgment would act as a bar to bringing a malpractice action unless and until it is overturned on direct challenge. See § 22.

#### B. Proof

##### § 33. Plaintiff's Proof

###### [Cumulative Supplement]

The plaintiff in a legal malpractice action bears the burden of establishing a prima facie case [see §§ 4- 7, respecting specific elements of a prima facie case] by a preponderance of the evidence. *Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985). Thus, to establish an attorney's liability for malpractice in handling a personal injury claim, the plaintiff must prove that the attorney was employed to handle the claim on behalf of the plaintiff, that the attorney mis-handled the claim in a manner amounting to a failure to exercise the ordinary knowledge, care, skill, and diligence expected of attorneys, and that the attorney's handling of the claim caused injury to the plaintiff.

In order to establish that there was an attorney-client relationship between the parties, the plaintiff should place into evidence the written agreement by which the plaintiff retained the defendant, if such an agreement exists. Oral testimony is ordinarily admissible on this matter, but if the parties had a written agreement, the parol evidence rule may bar the plaintiff from seeking to alter the terms of the written agreement by oral testimony. See *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975).

#### PRACTICE GUIDE

If the defendant is deceased, the plaintiff or anyone else interested in the action may be barred from testifying as to the existence of an attorney-client relationship by reason of a "deadman's statute." In such a case, the attorney-client relationship will have to be established through written evidence or the testimony of a person who is neither a party to the action nor interested in its outcome. If a written agreement is unavailable, it may be possible to document the relationship by correspondence from the defendant referring to the plaintiff's case, or by letters or other documents signed by the defendant in the capacity of attorney for the plaintiff. *Wagner v Tucker*, 517 FSupp 1248 (SD NY 1981).

Once an attorney-client relationship is established, the plaintiff must prove that the defendant, either through an act or failure to act, failed to exercise on behalf of the plaintiff the ordinary knowledge, care, skill, and diligence expected of attorneys. Evidence of the attorney's malpractice must be produced, since the mere fact that the plaintiff's personal injury claim reached an unfavorable conclusion creates no presumption that the defendant breached a duty to the plaintiff. *Gens*

v Mundy, 762 F2d 338 (3rd Cir Pa 1985). The testimony of the plaintiff or other nonexpert may be used to establish what the defendant did or failed to do, but expert testimony is ordinarily required to establish that the defendant's conduct amounts to malpractice. See, § 39, respecting expert testimony.

#### PRACTICE GUIDE

Although the defendant's breach of duty to the plaintiff is an element of proof that is separate and distinct from proof of the consequences of the breach, it is seldom possible to establish a breach without relating the defendant's conduct to its consequences. Most errors or omissions do not exist in the abstract, but only in relation to the particular facts of a case. To establish a breach of duty, the plaintiff must prove not only what the defendant did or failed to do, but also what the defendant should have done and how this would have changed the outcome of the case. For example, the plaintiff cannot establish the defendant's malpractice merely by alleging that, if more attention had been paid to the case, the defendant could have discovered its weaknesses and taken steps to overcome these weaknesses, but must also establish that such steps actually could have resulted in a more favorable outcome. *Glenna v Sullivan*, 310 Minn 162, 245 NW2d 869 (1976).

However, the damages the plaintiff suffered may be established without reference to how or why the plaintiff's claim was lost. Consequently, if the defendant admits mishandling the claim and specifically denies only a causal link between the way the claim was handled and the loss suffered by the plaintiff, the plaintiff may be barred from introducing any evidence as to the defendant's conduct. In such a case, this evidence is not only irrelevant to the questions of damages, but also prejudicial, because it impugns the character of the defendant without demonstrating the validity of the underlying claim. *Cook v Gould*, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982).

#### CUMULATIVE SUPPLEMENT

##### Cases:

Under New York law, former client was not required to show that he would have had certain success on appeal of adverse judgment in personal injury action, in legal malpractice claim, based upon attorney's failure to perfect appeal of adverse judgment; rather, the district court was required to determine what the appellate court would have done upon review of the personal injury action, using the same standards that the appellate court would have applied. *Ocean Ships, Inc. v. Stiles*, 315 F.3d 111 (2d Cir. 2002); *West's Key Number Digest, Attorney And Client* ¶112.

Legal client, who sufficiently alleged in her legal malpractice action that attorney was representing her when statute of limitations ran on her personal injury claim against third party without timely action being filed, was not required to file certificate of review, attesting that consulted expert had concluded action did not lack substantial justification, to establish existence of attorney-client relationship with attorney. *Giron v. Koltavy*, 2005 WL 427697 (Colo. Ct. App. 2005); *West's Key Number Digest, Attorney And Client* ¶129(1).

A legal malpractice action to recover for the failure, of the client's former attorney, to properly pursue the client's medical malpractice action was properly dismissed after the trial court, as a discovery sanction, barred the client from calling any expert witnesses, since, in order to establish a prima facie case, the client was required to present both expert legal testimony (to establish the standard of care applicable to the attorney's conduct) and expert medical testimony (to establish the standard of care governing the conduct of the medical malpractice defendants). *Prather v McGrady*, 261 Ill App3d 880, 199 Ill Dec 460, 634 NE2d 299 (1994).

[Top of Section]

[END OF SUPPLEMENT]

**§ 34. Plaintiff's Proof—Merits of Underlying Claim****[Cumulative Supplement]**

The plaintiff bears the burden of proving not only that the defendant mishandled the plaintiff's personal injury claim, but also that the claim was meritorious and would have resulted in recovery for the plaintiff, but for the way in which it was handled by the defendant. *Cook v Gould*, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982); *Lowe v Continental Insurance Co*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 SCt 1924, 80 LBD2d 470 (1984). To meet this burden, the plaintiff must place into evidence those facts which are necessary to establish a cause of action based on the claim under the law of the state in which the action on the claim would have been brought. *House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977). However, the plaintiff does not necessarily have to negate all possible affirmative defenses which the defendant might have raised to the action. *Piel v Dillard*, 414 So2d 87 (Ala App 1982). Thus, where it is alleged that the attorney failed to bring a timely action on the plaintiff's claim, although the plaintiff ultimately must prove that the defendant was negligent in permitting the statute of limitations to run, the plaintiff may not be required to prove that an action actually was brought on the claim and that the defendant in the action raised the statute of limitations as an affirmative defense. *Walker v Porter*, 44 Cal App3d 174, 118 Cal Rptr 468 (1974); *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974). Rather, the plaintiff may establish a prima facie case by showing that the statute of limitations has run, whereupon the burden shifts to the defendant attorney to show that the statute of limitations would not operate as a bar to the action. *Fuschetti*, above. Likewise, although the plaintiff may bear the burden of proving that one or more of several potential defendants in the underlying personal injury action would have been liable, it may not be necessary to prove which defendant or defendants were actually liable. *Walker v Porter*, 44 Cal App3d 174, 118 Cal Rptr 468 (1974).

Both the proof that is necessary to establish the merits of the underlying claim and the evidence which will be available to do so depend in large measure upon how far the claim proceeded toward judgment before terminating adversely. The record of any court proceedings involving the claim will be of relevance not only to show what the defendant did or failed to do, but also whether the defendant's act or omissions were responsible for the unsuccessful outcome of the case. *St Pierre v Washofsky*, 391 So2d 78 (La App 1980) cert den 396 So2d 1328 (La 1981); *Walker v Bangs*, 92 Wash2d 854, 601 P2d 1279 (1979). The record may also have the effect of eliminating certain issues. For example, where the plaintiff sues the defendant for failing to bring an action on the underlying claim within the time required by the statute of limitations, the plaintiff may show that a limitations defense was raised and upheld in order to prevent the defendant from arguing that the claim remained viable. *House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977).

**PRACTICE GUIDE**

Where the record of an action brought on the underlying claim is available, it is the best evidence of the events that transpired. *Walker v Bangs*, 92 Wash2d 854, 601 P2d 1279 (1979). Such records are generally admissible in a malpractice action, even if they technically are hearsay, because of the high degree of trustworthiness which follows from their manner of production. However, in many cases, such records will not be subject to a hearsay objection since they will be offered not to establish the truth or falsity of the matters contained therein, but merely to establish that such matters were raised or considered. *Walker*, above.

In many legal malpractice actions, the underlying personal injury claim will not have proceeded to trial or judgment, and there will be at most an incomplete record of the issues and evidence relevant to the claim. In such a case, it will be necessary for the parties to conduct a "trial within a trial" to determine the intrinsic validity of an action based on the claim, any negligence by the defendant in handling the claim, and its probable effect on the outcome would have been favorable to the plaintiff. *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978); *Cook v Gould*, 109 Ill App3d 311, 64 Ill

Dec 896, 440 NE2d 448 (1982); *Lowe v Continental Insurance Co.*, 437 So2d 925 (La App 1983) cert den 442 So2d 460 (La 1983) cert den (US) 104 S Ct 1924, 80 LED2d 470 (1984); *Christy v Saliterman*, 288 Minn 144, 179 NW2d 288 (1970); *Gladden v Logan*, 28 AD2d 1116, 284 NYS2d 920 (1967). In general, this phase of the malpractice action proceeds as though it were an original proceeding on the personal injury claim, with the plaintiff presenting evidence and seeking to establish the claim. *Herston v Whitesell*, 374 So2d 267 (Ala 1979). Thus, for example, where the plaintiff alleges that the defendant's failure to bring suit led to the loss of a claim for injuries suffered in an automobile accident, evidence of the plaintiff's injuries, including medical records, expert testimony, and the testimony of the plaintiff's relatives and other acquaintances as to the plaintiff's physical condition before and after the accident may be relevant to demonstrate the value and viability of the claim, since this is the type of evidence the plaintiff would produce in an action to recover for these injuries. *Piel v Dillard*, 414 So2d 87 (Ala App 1982). Some additional evidence may be available to the plaintiff which would not have been available or admissible in an action on the personal injury claim. For example, evidence of settlement offers by the defendant in the personal injury action is admissible to show that the plaintiff had a valid claim. *House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977). However, an admission by the attorney with a view toward compromise of the plaintiff's malpractice claim is inadmissible. *Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982).

#### PRACTICE GUIDE

Although the plaintiff generally approaches a malpractice action in the same manner that the underlying personal injury action would have been approached, there will be some differences. By bringing a malpractice action, the plaintiff effectively denies the current viability of the personal injury action and seeks to prove only that the personal injury claim was once viable, and that it was lost or diminished in value through the defendant's handling of it. On issues relating to the merits of the personal injury claim, the plaintiff must continue to take the same approach that would have been taken in an action on the claim, since the plaintiff must prove that the claim was meritorious in order to recover damages for malpractice. However, with respect to issues not going to the merits of the claim, such as the defense of limitations, the plaintiff may adopt the position that would have been taken by the defendant in an action on the claim, asserting that the defense is valid and prevents recovery on the claim. The defendant-attorney adopts the position that would have been taken by the plaintiff in the underlying action, asserting that the defense is invalid, or at least was invalid at the time the attorney was representing the plaintiff, so that the plaintiff's remedy is to bring an action on the personal injury claim, not a malpractice action.

#### CUMULATIVE SUPPLEMENT

##### Cases:

To establish damages as a result of attorney's malpractice, client had burden of proving that judgment in underlying suit would have been obtained in her favor, and thus, trial court's explanation that jury first had to decide what underlying case was worth did not prejudice attorney, as jury could have freely decided underlying case was worth nothing. *Lewis v Uselton*, 224 Ga App 428, 480 SE2d 856, 97 FCDR 131 (1997).

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[END OF SUPPLEMENT]

#### § 35. Plaintiff's Proof—Satisfaction of Judgment

Since an attorney's malpractice in handling a personal injury claim results in a loss to the plaintiff only if damages

could actually have been recovered in an action on the claim, in order to establish the attorney's liability, the plaintiff must prove not only that damages would have been awarded in an action on the claim, but that the judgment would or could have been satisfied. *Wagner v Tucker*, 517 FSupp 1248 (SD NY 1981); *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978); *Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) aff'd 385 F2d 869 (6th Cir 1967); *Baker v Beal*, 225 NW2d 106 (Iowa 1975); *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978). The plaintiff may do this by showing that the defendant's assets and income would be sufficient to satisfy the judgment. *Sitton*, above; *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983). The plaintiff may also produce evidence that the defendant carried insurance from which the judgment could be satisfied. *Koeller*, above. The plaintiff may be able to rely on indirect evidence of the defendant's lifestyle. *Sitton*, above. If the current assets of the defendant are insufficient to satisfy the judgment, the plaintiff may produce evidence of the defendant's potential earnings, together with evidence of the maximum length of time the plaintiff would have to recover the judgment under the applicable state law. *Sitton*, above. Regardless of the type of proof presented, the plaintiff may be required to do more than present evidence that any judgment in the underlying action could have been recovered from the defendant; the plaintiff may be required to produce evidence sufficient to establish that the plaintiff could have recovered from the defendant the entire amount which the plaintiff seeks as damages from the attorney. *Sitton*, above. See also *Koeller*, above [plaintiff must prove not only that tortfeasor was insured, but also exact limits of insurance policy, or that tortfeasor had assets from which judgment in excess of insurance policy limits could have recovered].

#### PRACTICE GUIDE

Many courts have displayed a reluctance to transform the plaintiff's burden of proving the collectibility of a judgment in the underlying action into a presumption of the insolvency of the defendant in that action. Consequently, some courts apply the rule that, although the plaintiff bears the burden of proving collectibility, the attorney bears the burden of at least raising collectibility as an issue by introducing some evidence that the defendant in the underlying action was insolvent or of limited means. See *Wagner v Tucker*, 517 FSupp 1248 (SD NY 1981). See also *Christy v Saliterman*, 288 Minn 144, 179 NW2d 288 (1970) [noting that attorney failed to raise collectibility issue]. The plaintiff may not have to produce evidence that the judgment would have been collectible if the defendant is a person or party whose solvency is known beyond question. *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983). Even if the defendant's solvency is not known beyond question and the plaintiff fails to produce any evidence whatsoever as to the question of solvency, the court may be willing to take judicial notice of various state laws, such as mandatory minimum automobile liability insurance requirements or a statute allowing an extended period of time for recovering personal injury judgments as a basis for concluding that it is probable that at least some damages could have been recovered from the defendant. See *Wagner*, above. Even a stipulation that the defendant was uninsured and insolvent may not prevent the plaintiff from attempting to prove that some damages would have been recoverable. *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978).

Since evidence of the defendant's ability to respond in damages is irrelevant to the question whether the plaintiff's attorney was negligent in failing to obtain recovery of damages, the plaintiff may be allowed to introduce evidence of the defendant's financial status only after the question of the attorney's liability has been decided favorably to the plaintiff. *Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982).

#### PRACTICE GUIDE

The facts the plaintiff must prove to establish the attorney's liability always depend upon the nature of the malpractice alleged. Although it is ordinarily necessary for the plaintiff to establish that a potential defendant in an action on the personal injury claim was solvent in order to show that damages would have been recoverable, this is not always the case. For example, the particular facts of the plaintiff's malpractice claim may require the plaintiff to establish that a specific

potential defendant was financially unable to satisfy a judgment in order to show that the attorney mishandled the claim by proceeding against that defendant. See, e.g., *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980) [action against attorney for inducing inadequate settlement with financially responsible defendants]. In such a case, in addition to establishing the basic fact that the defendant was insolvent, the plaintiff may also need to introduce evidence as to the attorney's failure to advise the plaintiff of the defendant's financial condition and the small likelihood of recovering damages. See *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978).

### § 36. Defendant's Proof

#### [Cumulative Supplement]

As a general rule, an attorney is presumed to have properly discharged the duties of representing a client until the contrary is shown. *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985). Consequently, an attorney who is a defendant in a malpractice action does not bear the burden of proving the propriety of his or her actions. However, in some instances, the attorney may bear the burden of going forward with the evidence to explain an apparent error or omission. For example, where an attorney has agreed to handle a client's personal injury claim, thus implicitly representing that the claim is meritorious, but then fails to bring a timely action on the claim, the attorney may be required to explain why an action was not brought. *Cook v Gould*, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982); *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982); *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). In such a case, the attorney cannot simply rely on the usual presumption that the matter was handled properly, because of the inconsistent manner in which it was handled. Therefore, the plaintiff may establish a prima facie case in an action based on the loss of a meritorious claim by proving that the defendant agreed to represent the plaintiff on the claim and then failed to assert the claim on a timely basis. The burden of going forward with the evidence then shifts to the defendant to overcome the plaintiff's case by evidence that the plaintiff could not have succeeded on the claim. *Jenkins*, above. The defendant's responsibility to present at least some evidence as to the lack of value of the plaintiff's personal injury claim is sometimes viewed as an equitable estoppel. Under this view, since it is the defendant's responsibility that the merits of the claim were never established at trial, the defendant is barred from simply denying the viability of the claim, and instead bears the burden of presenting at least some evidence as to its lack of merit. *Cook v Gould*, 109 Ill App3d 311, 64 Ill Dec 896, 440 NE2d 448 (1982).

### PRACTICE GUIDE

If the defendant originally admits an allegation made in the complaint, but subsequently seeks to litigate the matter, the admission in effect reverses the burden of proof, placing upon the defendant the burden of making an exceedingly strong showing that the allegation is untrue. Thus, for example, in *Duncan v Lord*, 409 FSupp 687 (ED Pa 1976), where the defendant, by permitting a default judgment, was deemed to have admitted all material allegations in the complaint, including the collectibility of any judgment which might have been rendered in the underlying personal injury action, the defendant could not avoid liability by asserting that the plaintiff failed to prove collectibility, but was required to make a strong showing that the judgment in the underlying action would have been uncollectible.

Of course, the defendant bears the burden of proving any affirmative defense, such as contributory negligence on the part of the plaintiff. *Piel v Dillard*, 414 So2d 87 (Ala App 1982); *Hansen v Wightman*, 14 Wash App 78, 538 P2d 1238 (1975).

Reference to the record of any proceedings involving the plaintiff's personal injury claim may serve to counter the plaintiff's factual allegations or establish that the defendant's alleged negligence was not the cause of the unsuccessful outcome of the case. *St Pierre v Washofsky*, 391 So2d 78 (La App 1980) cert den 396 So2d 1328 (La 1981) [granting

summary judgment where, as matter of law, defendant's alleged negligence could not have caused loss of underlying claim].

If an action on the underlying claim did not proceed to trial, the defendant, like the plaintiff, will have to offer evidence not only on the question of the defendant's alleged negligence, but also the viability of the claim and its potential for resulting in the actual recovery of damages. In general, the defendant will seek to establish matters in defense in much the same manner as the plaintiff seeks to establish the elements of a prima facie case, *i.e.*, through the testimony of legal experts to rebut evidence of negligence, through the testimony of witnesses to the events giving rise to the underlying personal injury claim, possibly medical or other expert testimony to rebut the plaintiff's claim of damages, and also through evidence concerning the financial resources of the defendant in the underlying action to establish that damages would not have been recoverable even if a favorable verdict had been rendered in the action.

#### PRACTICE GUIDE

As is pointed out in *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978), an attorney's own negligence may be an important factor in the attorney's favor, since the plaintiff will face evidentiary problems in proving that the underlying action would have been successful where, because of the defendant's negligence in failing to bring the action, no discovery was undertaken and only limited and circumstantial evidence exists as to the circumstances of the plaintiff's injury.

#### CUMULATIVE SUPPLEMENT

##### Cases:

See *Ignarski v Norbut*, (1995, 1st Dist) 271 Ill App 3d 522, 207 Ill Dec 829, 648 NE2d 285 § 9.

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[END OF SUPPLEMENT]

#### § 37. Defendant's Proof—Handling of Underlying Claim

One piece of evidence which will be of particular relevance to the defendant is the case file or other documentation of the defendant's handling of the plaintiff's personal injury claim. Records of the defendant's communications with the plaintiff may be important in showing that the defendant's method of handling the claim was proper. Since the plaintiff will usually have greater knowledge of the circumstances of the injury on which the claim was based than will the defendant, statements made by the plaintiff to the defendant describing the circumstances in which the injury was suffered may show that the defendant's method of handling the claim was appropriate in light of the available information. See *Woodruff v Tomlin*, 616 F2d 924 (6th Cir Tenn 1980) cert den 449 US 888 (1980) [where it was alleged that defendant failed to inform plaintiff of possible cause of action against driver of vehicle in which plaintiff was riding at time of accident, defendant could seek to justify failure by showing that plaintiff had consistently stated that driver of other automobile in accident was entirely at fault].

Evidence of the defendant's communications with the plaintiff may also be of particular importance where the defendant alleges that the plaintiff's negligence was a contributing or concurring cause of the plaintiff's injury. For example, in *Hill v Greene*, 124 Ga App 759, 186 SE2d 118 (1971), where it was alleged that the defendant was negligent in failing to file a timely personal injury action, the defendant submitted correspondence with the plaintiffs to establish that it was the plaintiffs' own negligence, in first leading the defendant to believe that they wished to accept a settlement offer, and then in delaying in informing him that they had decided not to accept the offer, which prevented the defendant

from filing suit before the statute of limitations had run. Evidence of communications with the plaintiff may also be relevant in establishing that the defendant kept the plaintiff adequately informed. *Gans v Mundy*, 762 F2d 338 (3rd Cir Pa 1985).

#### PRACTICE GUIDE

An adequate record-keeping system is essential, not only to justify an attorney's actions and decisions in retrospect, but also to prospectively avoid potential malpractice claims through the establishment of adequate information, docket control, and conflict of interest avoidance systems. See Stern and Felix-Retzke, *A Practical Guide to Preventing Legal Malpractice* §§ 6.01–8.11 (Shepard's/McGraw-Hill 1983).

#### § 38. Defendant's Proof—Settlement Value of Claim

Since personal injury actions are frequently settled before trial, another matter of proof of particular relevance to the defendant is any uncertainty as to the plaintiff's ability to prevail at trial which might have led the plaintiff to settle the claim for an amount less than that originally sought, rather than proceeding to trial and risking an adverse outcome. The settlement value of a claim is a matter which requires expert testimony. See § 39.

#### PRACTICE GUIDE

Evidence of settlement value may be excluded if it is too speculative, if its probative value would be substantially outweighed by the time that its admission would necessitate, or if its admission would confuse the jury, which must ultimately determine the merits of the plaintiff's personal injury claim. *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974). It is not necessary to consider the question of settlement value if it can be found that the plaintiff would not have settled. *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978).

#### § 39. Expert Testimony

##### [Cumulative Supplement]

Ordinarily, the plaintiff in a legal malpractice action must present expert testimony to establish that the defendant's acts or omissions amounted to malpractice. See Authority, this section. Expert testimony may be required regardless of whether the action is tried before a jury or the court. *House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977); *Fishow v Simpson*, 55 Md App 312, 462 A2d 540 (1983). The plaintiff cannot avoid the need for producing expert testimony merely by claiming a breach of contract by the defendant. *Fishow*, above.

The plaintiff generally will have to establish by expert testimony not only the defendant's negligence in handling the plaintiff's personal injury claim, but also that the defendant's negligence had an effect on the outcome of the claim. Thus, for example, where a malpractice action is based on the defendant's alleged failure to conduct an adequate investigation of the underlying claim, the plaintiff must do more than merely present expert testimony that the defendant should have investigated the claim more thoroughly to identify all possible theories of recovery. Rather, the plaintiff must present expert testimony that an alternative theory was viable and supportable, and that the defendant was negligent in not asserting it. *Rorrer v Cooke*, 313 NC 338, 329 SE2d 355 (1985).

#### PRACTICE GUIDE

Although the defendant will ordinarily present expert testimony that the defendant's conduct was not negligent, cross-examination of the plaintiff's expert may produce the same result. For example, where the plaintiff's expert testifies that proper representation would ordinarily require joining a person as a defendant even if there was room for doubt whether

the person might or might not be liable, the defendant, on cross-examination of the witness, may be able to elicit from the witness an admission that there may have been valid reasons not to name the person as a defendant. *Cook v Irion*, 409 SW2d 475 (Tex Civ App 1966). The defendant may also be able to get a witness to admit that errors of the type in question are commonly made, even by competent attorneys. See *Arp v Kerrigan*, 287 Or 73, 597 P2d 813 (1979) [expert admitted making error in serving parties similar to defendant's error].

A possible exception to the rule requiring expert testimony applies where the defendant's negligence is so obvious that even a lay person would have no difficulty in recognizing it. *Gans v Mundy*, 762 P2d 338 (3rd Cir Pa 1985); *Kirsch v Duryea*, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978); *House*, above; *Baker v Beal*, 225 NW2d 106 (Iowa 1975); *Fishow*, above; *Joos v Auto-Owners Insurance Co*, 94 Mich App 419, 288 NW2d 443 (1979) later app *Joos v Drillock*, 127 Mich App 99, 338 NW2d 736 (1983) rev'd on other grds 338 NW2d 736; *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979). For example, a nonexpert may well be able to recognize that it is negligent to file suit after the statute of limitations has run, where the fact that the defendant missed the filing deadline is neither disputed nor excused. *House*, above. However, even a failure to file a timely action may not amount to negligence if the failure was based on the reasonable belief that the plaintiff did not have a viable cause of action. Therefore, expert testimony will be necessary to establish whether such a failure amounted to actionable negligence. *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983).

The need for expert testimony to establish the extent of an attorney's duty to investigate is particularly acute where investigation would require the attorney to make out-of-pocket expenditures, since the extent to which an attorney, in the exercise of due care, should advance funds to hire investigators, depose witnesses, etc. is not a matter of common knowledge which can be determined without expert testimony. *Kirsch*, above. The plaintiff may be required to produce expert testimony on issues other than the defendant's negligence. Expert testimony may also be required to prove that the plaintiff's personal injury claim was viable. See *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983) [expert testimony required to establish whether traffic accident aggravated plaintiff's preexisting injury]; *Davis v United Parcel Service Inc*, 427 So2d 921 (La App 1983) cert den 433 So2d 1053 (La 1983) [medical testimony required to establish whether plaintiff could have recovered on underlying workers' compensation claim]; *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980) [expert testimony required to establish physician's malpractice]. In addition, it may be necessary to present expert testimony as to the amount the plaintiff probably would have recovered on the claim. *Duncan v Lord*, 409 FSupp 687 (ED Pa 1976). In particular, the question of settlement value [see § 38], is a matter which requires expert testimony. See *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978); *Duncan v Lord*, 409 FSupp 687 (ED Pa 1976); *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974). The witness should be prepared to testify as to the probability of settlement and the anticipated size of the settlement based upon the outcome of similar cases and considering such factors as the merits of the claim, the anticipated size of the damages award if the case had gone to trial, and the possible willingness of the defendant to settle. *Williams*, above.

#### PRACTICE GUIDE

Settlement value may be estimated by the trial judge, provided the parties stipulate to the judge's competence to make an estimate. *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978).

#### Authority

Expert testimony is ordinarily necessary to establish an attorney's negligence in representing a client with a personal injury claim: Georgia

*Gibson v Talley*, 162 Ga App 303, 291 SE2d 72 (1982)

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**Third Circuit**

Gans v Mundy, 762 F2d 338 (3rd Cir Pa 1985)

**California**

Kirsch v Duryea, 21 Cal3d 303, 146 Cal Rptr 218, 578 P2d 935 (1978)

**Illinois**

House v Maddox, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977)

**Iowa**

Baker v Beal, 225 NW2d 106 (Iowa 1975)

**Maryland**

Fishow v Simpson, 55 Md App 312, 462 A2d 540 (1983)

**Michigan**

Joos v Auto-Owners Insurance Co, 94 Mich App 419, 288 NW2d 443 (1979) later app Joos v Drillock, 127 Mich App 99, 338 NW2d 736 (1983) revd on other grds 338 NW2d 736

**New Mexico**

Rodriguez v Horton, 95 NM 356, 622 P2d 261 (NM App 1980)

**New York**

Fidler v Sullivan, 93 AD2d 964, 463 NYS2d 279 (1983)

**Washington**

Walker v Bangs, 92 Wash2d 854, 601 P2d 1279 (1979)

**CUMULATIVE SUPPLEMENT****A.L.R. Library**

Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney, 14 A.L.R. 4th 170

**Cases:**

The plaintiff filed a legal malpractice action against the defendant attorney alleging negligence in failing to file a personal injury action against the company he alleged was responsible for his back injuries. In substance, the expert testimony demonstrated that because the evidence so clearly showed the plaintiff caused his own injuries, the attorney was not negligent in not filing an action against the corporation. Experts testified on the reasonableness of the attorney's judgment that no viable cause of action against the third party existed. Moreover, the legal implications of the plaintiff's contributory negligence in moving a barrel had to be presented through expert testimony because a jury would not be able to understand the issues. *Nika v Danz*, 199 Ill App3d 296, 144 Ill Dec 255, 556 NE2d 873 (1990).

Expert testimony was required in legal malpractice action brought by father of adult child killed in car accident against attorney who had settled wrongful death action brought in Illinois by child's mother, who was attorney's client; father's experts were prepared to testify about attorney's conduct in settling a wrongful death action that had been filed in Illinois, which required knowledge of the Illinois Wrongful Death Act and the statutory requirements to be followed, and these issues were not within the common knowledge of the community as a whole. *S.H.A. 740 ILCS 180/0.01 et seq. Storey v. Leonas*, 904 N.E.2d 229 (Ind. Ct. App. 2009).

The plaintiffs appealed a judgment in favor of the defendant attorney in a legal malpractice action stemming from the attorney's handling of a personal injury action. The plaintiffs sued the attorney on the basis that no expert testimony was presented in the personal injury action to prove negligence. The plaintiffs argued that the lack of expert testimony was both legal malpractice and the cause of the judgment in the personal injury action being reversed on appeal. The

court noted, that it was somewhat ironic that the plaintiff clients presented no expert testimony in their malpractice action as to the proper conduct of an attorney in circumstances the same as or similar to those in the personal injury suit. Therefore, their malpractice action could not be sustained and the judgment in favor of the attorney was affirmed on appeal. *Houillon v Powers & Nass*, 530 So2d 680 (La App 1988).

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[END OF SUPPLEMENT]

#### § 40. Expert Testimony—Qualification of Expert

In order to qualify to testify as an expert in a legal malpractice action, a witness must ordinarily be an attorney, and preferably be a member of the bar in the state where the plaintiff's personal injury claim arose. The fact that a potential witness is not a member of the bar of that state does not necessarily mean the person will not be qualified to testify as an expert, particularly where the person is a specialist in handling the type of personal injury claim in question. See, e.g., *Walker v Bangs*, 92 Wash2d 854, 601 P2d 1279 (1979) [attorney who was not member of Washington bar but who specialized in personal injury litigation was qualified to testify as expert in malpractice action in Washington]. However, the mere fact that an attorney is licensed to practice in the state where the plaintiff's claim arose may not be sufficient to qualify the attorney as an expert. See, e.g., *Cook v Irion*, 409 SW2d 475 (Tex Civ App 1966) [attorney who practiced in town located 220 miles from city where plaintiff's claim arose was not qualified to testify on issue of parties who should have been named as defendants].

#### PRACTICE GUIDE

If an accident in which the plaintiff was injured also resulted in injuries to other persons, and if their claims to recover for their injuries were successful, the attorney who handled their claims may be an effective expert witness for the plaintiff. This attorney's testimony as to how the claims were handled may establish not only that an alternative approach to that taken by the defendant was possible, but also that this approach was preferable and in fact led to a more favorable outcome. See, e.g., *Arp v Kerrigan*, 287 Or 73, 597 P2d 813 (1979) [attorney representing person who was injured in same collision in which plaintiff was injured testified as to how he located and obtained service on all potential defendants].

#### § 41. Expert Testimony—Defendant as Expert

The defendant ordinarily will be qualified to testify as an expert in a legal malpractice action. *Rogers v Norvell*, 174 Ga App 453, 330 SE2d 392 (1985). See also *Arp v Kerrigan*, 287 Or 73, 597 P2d 813 (1979) [permitting attorney to testify as expert in his own behalf]. Furthermore, since the defendant has presumably investigated the plaintiff's claim to determine not only its merits but also the prospects of recovery, the defendant is qualified to testify as an expert on the value of the claim. *George v Caton*, 93 NM 370, 600 P2d 822 (1979) cert quashed 93 NM 172, 598 P2d 215 (1979).

#### PRACTICE GUIDE

If the defendant has been disbarred, this fact may be used to impeach the credibility of the defendant's testimony. Evidence of disbarment is generally admissible if the ground for disbarment was some factor bearing upon the defendant's veracity, and is not subject to challenge on the ground that it is more prejudicial than probative. *Fuschetti v Bierman*, 128 NJ Super 290, 319 A2d 781 (1974).

There may be circumstances under which the plaintiff will find it advantageous to call the defendant as a witness.

*House v Maddox*, 46 Ill App3d 68, 4 Ill Dec 644, 360 NE2d 580 (1977); *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983). The defendant's responses to some questions may prove useful in establishing other matters. For example, asking the defendant to assess the merits of the plaintiff's claim may place the defendant on the horns of a dilemma: by admitting that the claim was meritorious, the defendant establishes an element of the plaintiff's *prima facie* case and invites further questions as to why the claim did not succeed; by denying that the claim was meritorious, the defendant admits at the very least an error in judgment in originally agreeing to represent the plaintiff on the claim, and may invite the question whether a person capable of such an error may not have committed other errors during the course of handling the claim. Such an approach is not without risk, however, since the defendant undoubtedly has a plausible explanation for the way the claim was handled.

Certain inferences favorable to the plaintiff may be drawn from the fact that the defendant is an attorney, even though the defendant is not called to testify as a witness. For example, the fact that the defendant agreed to handle the plaintiff's claim is relevant evidence that the claim was meritorious. See *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) *aff'd* 422 So2d 1109 (La 1982) [fact that defendant agreed to represent plaintiff was *prima facie* evidence that claim was meritorious, shifting to defendant burden of going forward with evidence that claim was nonmeritorious]. *George v Caton*, 93 NM 370, 600 P2d 822 (1979) *cert quashed* 93 NM 172, 598 P2d 215 (1979) [fact that defendant recommended pursuing claim barred summary judgment on ground that claim was worthless].

### C. Recovery

#### § 42. Compensatory Damages

##### [Cumulative Supplement]

The successful plaintiff in a legal malpractice action is entitled to recovery for the loss sustained as a proximate result of the defendant's malpractice. *Koeller v Reynolds*, 344 NW2d 556 (Iowa App 1983). Where an attorney is alleged to have mishandled a personal injury claim, this loss is measured by the amount of damages the plaintiff actually could have recovered if the claim had been properly handled, and includes all items of damages which could have been recovered and collected in an action on the claim. *Williams v Bashman*, 457 FSupp 322 (ED Pa 1978). The amount of damages claimed in a legal malpractice action generally cannot exceed the amount of damages claimed in the underlying action. *Baer v Broder*, 86 AD2d 881, 447 NYS2d 538 (1982). In order to recover more than the amount claimed in the underlying action, it is necessary for the plaintiff to show special damages above that amount: for example, by showing that the defendant's negligence caused the plaintiff to incur additional legal costs in pursuing the underlying action. See § 43.

Although the damages recoverable in a malpractice action generally cannot exceed the amount the plaintiff could have recovered in the underlying action, they may be less than that amount. Since the measure of damages is the amount the plaintiff lost due to the defendant's malpractice, the proper measure of damages is not the amount which would have been awarded in the underlying action, but the portion of that amount which would have been collectible. *Hoppe v Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978). Recovery also may be reduced by the percentage of the recovery in the underlying action which would have been paid to the defendant as a contingent fee. See § 43. In addition, since persons with personal injury claims are frequently willing to settle their claims for a reduced amount, rather than risk the outcome of the trial, if it seems most likely that the plaintiff's claim would have been settled, the proper measure of damages may be the most reasonable settlement amount. *Duncan v Lord*, 409 FSupp 687 (ED Pa 1976).

#### PRACTICE GUIDE

Since the plaintiff is not entitled to a double recovery for the personal injury suffered, not only will the amount recoverable in the malpractice action be reduced by the amount of recovery in the underlying action, but the amount recoverable

in that action will be reduced by any amount the plaintiff recovers in the malpractice action. Thus, for example, where uncertainty of the effect of an attorney's apparent malpractice leads to a compromise of a malpractice claim while an action on the underlying personal injury claim is still in progress, and full recovery is ultimately obtained in the underlying action, the judgment in that action must be reduced to the extent that settlement of the malpractice claim represents compensation for a perceived loss of value of the underlying action, rather than compensation for additional damages occasioned solely by the attorney's malpractice. *Lafayette v County of Los Angeles*, 162 Cal App3d 547, 208 Cal Rptr 668 (1984).

In order to be entitled to recovery, the plaintiff does not have to prove damages with mathematical certainty. *Baker v Beal*, 225 NW2d 106 (Iowa 1975). Where it is certain that the plaintiff has suffered some damages, and there is merely uncertainty as to the amount, this uncertainty will not preclude a right to recovery; rather, the trier of fact must estimate the amount of damages from the evidence available. *Hoppev Ranzini*, 158 NJ Super 158, 385 A2d 913 (1978).

#### PRACTICE GUIDE

Although a jury would undoubtedly be permitted to award only nominal damages in a legal malpractice action, the plaintiff generally is not permitted to bring a legal malpractice action for the purpose of seeking only nominal damages. *Duke & Company v Anderson*, 275 Pa Super 65, 418 A2d 613 (1980). But see *Brantley v Dunstan*, 10 NC App 706, 179 SE2d 878 (1971) [suggesting availability of action for nominal damages].

Interest on the principal judgment amount may be awarded to the extent that it is allowed by state law. See *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980).

#### CUMULATIVE SUPPLEMENT

##### Cases:

In an attorney malpractice action, where the client sued on the basis of the attorney's failure to relay a \$90,000 settlement offer to his client, and where the client took nothing at trial, the gross recovery was fixed at \$90,000. The verdict against the defendant attorney was for \$12,000, which represented the \$90,000 offer less a \$30,000 hypothetical contingent fee, \$5,000 in advanced costs, and a \$43,000 insurance company lien. *Moores v Greenberg*, 834 F2d 1105 (1st Cir 1987).

A plaintiff cannot recover damages for emotional distress suffered as a result of an attorney's negligent legal malpractice, but can recover, as compensatory damages, the amount which would have been received as punitive damages on the discharged claim against the third party. *Merenda v Superior Court*, 3 Cal App4th 1, 4 Cal Rptr2d 87 (1992).

Client presented sufficient medical-causation evidence, in his legal malpractice action against attorney who represented him in automobile tort case, that a later-diagnosed ruptured disc resulted from his automobile accident, so as to support jury's finding in malpractice case that client reasonably expected to recover more than attorney had secured for him in a \$10,000 settlement of the automobile tort case; although report of client's orthopedic surgeon omitted opinion language connecting the disc condition to the accident, a chiropractor treated client two years after the accident and explicitly related his treatments and client's residual spinal instability to the accident. *Shinnick v. Rodibaugh*, 2007 Mass.App.Div. 106.

The proper measure of damages in an attorney malpractice action is the difference between the client's recovery and the amount that would have been recovered by the client except for the attorney's negligence. A claim of malpractice must be supported not only by a showing of malpractice by the attorney, but also by a showing that "but for" the negligence, the client would have recovered additional amounts. The failure to prove damages is fatal to an attorney malpractice action. *Merzлак v Purcell*, 252 Mont 527, 830 P2d 1278 (1992).

The determination of an award of damages in a legal malpractice action requires the plaintiffs to establish the injuries suffered and their value. *Chiaffi v Wexler, Bergeman & Cruet*, 116 AD2d 614, 497 NYS2d 703 (1986).

The defendant attorney challenged the award of damages in a legal malpractice action in which the plaintiffs sued him for failure to file a medical malpractice action. The defendant attorney admitted his negligence in failing to file the action and admitted the negligence of the hospital. The court found that the plaintiff was entitled to plead a claim for the emotional distress which directly flowed from the conduct of the hospital. The court further found that the plaintiffs could recover damages for the deprivation of the chance to have future healthy children and future medical expenses. *Harris v Kissling*, 80 Or App 5, 721 P2d 838 (1986).

Although pre-judgment interest is an appropriate award in a successful legal malpractice action, where the underlying action was one for personal injury, the interest accrues from the date of the attorney's malpractice, not from the date of the injury for which the plaintiff attempted to recover in the personal injury action. *Sample v Freeman*, 873 SW2d 470 (Tex App 1994).

In a legal malpractice action based on the failure to promptly pursue a personal injury action, public policy considerations prevent the plaintiff from recovering an award for the loss of a larger settlement or for the loss of the use of the settlement money. Delay alone by an attorney cannot cause damages unless it is probable that it caused the loss of a witness, the passing of a statute of limitations, or something similar. In this case, there was no proof that the insurance carrier dealing with the defendant attorney or the other defense counsel would have settled the plaintiff's claim any earlier than it was done. The court found that proximate cause was lacking. The injury in this case was too remote from the negligence and too out of proportion to the culpability of the tortfeasor. *Schlomer v Perina*, 169 Wis2d 247, 485 NW2d 399 (1992).

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[END OF SUPPLEMENT]

#### § 43. Compensatory Damages—Attorneys' Fees and Duplicative Expenses

[Cumulative Supplement]

In an appropriate case, attorneys' fees may either be added to or deducted from the damages the plaintiff would have recovered in an action based on the underlying personal injury claim. Attorneys' fees may be recovered as a separate or additional item of damage if the defendant undertook to provide specific legal services, such as filing an action on the plaintiff's personal injury claim, and the defendant's failure to do so compelled the plaintiff to retain another attorney at additional expense to take the same action. See *Jenkins v St Paul Fire & Marine Insurance Co*, 393 So2d 851 (La App 1981) aff'd 422 So2d 1109 (La 1982). If the plaintiff can establish that it was necessary to pay a larger fee to the second attorney than would have been payable to the defendant, the difference may be recoverable even though it is ultimately determined that the plaintiff would not have prevailed in the action. See *Jenkins*, above.

If the parties agreed that the plaintiff's personal injury claim would be handled by the defendant on a contingent fee basis, the amount of recovery in a malpractice action may be reduced by some courts by the amount of the contingent fee to avoid awarding the plaintiff more than would actually have been realized in the underlying action. See *Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) aff'd 385 F2d 869 (6th Cir 1967). See also *McGione v Lacey*, 288 FSupp 662 (D SD 1968) [dismissing malpractice suit, but stating that, had plaintiff prevailed, damages would have been reduced]. Other courts decline to reduce the recovery to reflect the parties' contingent fee agreement, on the ground that the plaintiff is typically required to incur additional legal fees in bringing the malpractice action. Where this is the case, deduction of the contingent fee would, in effect, place the plaintiff in a worse position than by requiring the plaintiff to pay the fees of two attorneys to achieve one recovery. *Togstad v Vesely, Otto, Miller & Keefe*, 291 NW2d 686 (Minn 1980). See also

*Duncan v Lord*, 409 FSupp 687 (ED Pa 1976) [refusing reduction of damages to reflect contingent fee, but allowing deduction of quantum meruit value of attorney's services, where plaintiff agreed to deduction].

#### PRACTICE GUIDE

The difficulties inherent in calculating the effect that a contingent fee would have upon the plaintiff's hypothetical recovery, and then applying that amount to reduce the size of the award in a malpractice action, are illustrated in *Sitton v Clements*, 257 FSupp 63 (ED Tenn 1966) aff'd 385 F2d 869 (6th Cir 1967). In that case, the defendant argued that since the plaintiff would have been required to pay a 50% contingent fee on whatever award was obtained in the underlying action, the plaintiff's recovery in the malpractice action could be only half the amount of the judgment that would have been awarded in the underlying action. The trial court in effect instructed the jury that it could award as damages only half the amount which could have been recoverable in the underlying action. The jury returned a verdict awarding damages of \$162,500, whereupon the defendant, claiming that that verdict was the equivalent of an award in the underlying action of double that amount, or \$325,000, argued first that the verdict could not be sustained because such a judgment in the underlying action would have been considered excessive, and, in the alternative, that the judgment would have been uncollectible from the defendant in that action. The trial court, apparently agreeing that a judgment of \$325,000 could not have been recovered, required a remittitur reducing the amount by half, so that the plaintiff ultimately recovered only \$81,250.

#### CUMULATIVE SUPPLEMENT

##### Cases:

Clients of law firm were not entitled to recover, as damages, attorney fees either for defending against firm's quantum meruit claim or for prosecuting clients' claim that law firm misappropriated settlement funds in personal injury litigation, under equitable exception to general rule that fees are not recoverable unless allowed by statute or contract, since fees clients sought were not incurred in litigation involving third party but in original litigation with firm itself. *Oscar M. Telfair, III, P.C. v. Bridges*, 2005 WL 309533 (Tex. App. Eastland 2005); West's Key Number Digest, Attorney And Client ¶129(4).

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[END OF SUPPLEMENT]

#### § 44. Punitive Damages

[Cumulative Supplement]

To obtain punitive damages in an action against an attorney for legal malpractice, it is necessary for the plaintiff to establish that the attorney's conduct was willful, malicious, fraudulent, oppressive, reflected a wanton disregard of the plaintiff's rights, or the like. *Blegen v Superior Court*, 125 Cal App 3d 959, 178 Cal Rptr 470 (1981); *Rodriguez v Horton*, 95 NM 356, 622 P2d 261 (NM App 1980). A claim for punitive damages was adequately stated by a complaint in which it was alleged that the defendant advised the plaintiff to delay medical treatment of his injury, claiming that this would increase the value of the plaintiff's personal injury claim, and continued to so advise the plaintiff even after the claim had been lost due to the defendant's negligence, to keep the plaintiff from learning of his negligence. *Blegen*, above. Similarly, punitive damages were awarded in *Rodriguez*, above, where the defendant's entire course of conduct in representing the plaintiff was characterized by fraud and deception, including deliberately misleading the plaintiff as to the terms of the settlement, settling claims without the plaintiff's authorization, and charging excessive fees for services.

An award of punitive damages may be contingent on evidence that the plaintiff suffered actual damages. *Kluge v O'Gara*, 227 Cal App2d 207, 38 Cal Rptr 607 (1964). Punitive damages are allowable where there is no question that the plaintiff suffered actual damages, even though the difficulty in measuring these damages means that the plaintiff can be afforded only a token recovery of actual damages. *Kluge*, above. But see *Mitchell v Transamerica Insurance Co*, 551 SW2d 586 (Ky App 1977) [reversing award of punitive damages where award of compensatory damages was set aside as too speculative].

Punitive damage must bear a reasonable relation to the plaintiff's actual damages, but may exceed the amount of actual damages where the defendant's conduct warrants. *Rodriguez*, above.

#### CUMULATIVE SUPPLEMENT

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##### Cases:

In an action against an attorney for malpractice in connection with a personal injury action the court found that the attorney failed to advise his client of her right to pursue a claim against her insurance carrier, unilaterally increased the agreed contingency fee from 25 percent to one third the amount recovered in the settlement, and that he intentionally, and without notice to his client, caused a stop payment order on a \$2,500 insurance company check endorsed to the client. In view of these findings, the court found that a legal predicate existed for the imposition of punitive damages in a sum reasonably proportionate to the award of compensatory damages. *Cummings v Pinder*, 574 A2d 843 (Del Super 1990).

A personal injury claimant stated a supportable claim for punitive damages in a legal malpractice action against the attorneys who represented the claimant in the personal injury action. The personal injury claim was first submitted to arbitration, which yielded a defense verdict, and since the attorneys failed to file a subsequent jury trial demand that would have had the effect of permitting judicial review of the arbitration result, the defense verdict became final. Acknowledging that negligence alone would not support a punitive damages award, the court pointed out that the claimant's punitive damages claim was not predicated on the attorneys' failure to file the jury trial demand. Rather, the court explained, the punitive damages claim was based on the attorneys' allegedly: (1) willfully concealing from the claimant the fact that her case had been lost, (2) willfully and falsely telling the claimant that the jury trial demand was not filed because the claimant had not requested the attorneys to do so, and (3) willfully and fraudulently refusing to communicate with the claimant about her case after she realized that her claim had been lost. The court noted that the attorneys misrepresented to the claimant that the defendant in the personal injury action had offered to settle for \$30,000 (whereas in fact no offer of settlement was made), and that the claimant finally found out that the claim was lost from the attorneys' secretary. The court also found significant the varying explanations given by the attorneys for the omission, in that they told the claimant that she was responsible for failing to instruct the attorneys to file the demand, while the attorneys told their malpractice insurance carrier that they had prepared the demand, but their secretary had failed to file it as they had requested. *Thomas v White*, 211 Ga App 140, 438 SE2d 366 (1993).

The plaintiff could not recover punitive damages in a legal malpractice action based on the characterization of the attorney's conduct in attempting to cover up his malpractice, as willful and wanton. The court held that the allegations of willful and wanton conduct were related to the original acts of professional malpractice and, thus, punitive damages were barred by Illinois Revised Statutes Ch 1102-1115 (1989). *Calhoun v Rane*, 234 Ill App3d 90, 175 Ill Dec 304, 599 NE2d 1318 (1992).

The defendant attorney appealed from a judgment awarding the plaintiff compensatory and punitive damages stemming from the defendant's failure to disperse promptly funds obtained on behalf of the plaintiff in an underlying personal injury action. The court found that the attorney's breach of his fiduciary duty, fraud, and conversion provided a sufficient basis for the awarding of punitive damages. Moreover, in view of the defendant's misconduct the award of \$39,000 was not excessive. *Lurz v Panek*, 172 Ill App3d 915, 123 Ill Dec 200, 527 NE2d 663 (1988).

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[END OF SUPPLEMENT]

IV. Appendix

§ 45. Sample Case

COA Synopsis

In a legal malpractice action arising out of the failure of the plaintiff's attorney to join a potential defendant in an action on the plaintiff's personal injury claim, the defendants, the plaintiff's attorney and his law firm, were entitled to summary judgment where they averred that their conduct was not negligent, and the plaintiff failed to establish by expert testimony that there was a genuine issue of fact whether the conduct of the defendants was negligent.

*Gans v. Mundy*, 762 F.2d 338 (3d Cir. Pa. 1985)

§ 46. Sample Complaint

	_____ (Name of Court)	
_____ (plaintiff's name)	)	
Plaintiff	)	
	)	
	)	
v	)	No. _____
	)	COMPLAINT
_____ (defendant's name)	)	
Defendant	)	

I.

The Plaintiff, \_\_\_\_\_ (plaintiff's name), an individual, resides at \_\_\_\_\_ (street address) in the City of \_\_\_\_\_ (name), County of \_\_\_\_\_ (name), State of \_\_\_\_\_ (name).

II.

The Defendant, \_\_\_\_\_ (defendant's name), is admitted to the bar in the State of \_\_\_\_\_ (name), and is licensed to practice law therein. The defendant is a resident of the State of \_\_\_\_\_ (name) and maintains offices for the practice of law at \_\_\_\_\_ (address).

## III.

On or about \_\_\_\_\_ (date), the Plaintiff slipped on a patch of ice on a sidewalk maintained by the \_\_\_\_\_ (name) Store on its business premises at \_\_\_\_\_ (address). As a consequence of the fall, the Plaintiff sustained extensive injuries requiring medical and hospital treatment, preventing the Plaintiff from being gainfully employed for (\_\_\_\_\_) weeks, and causing the Plaintiff extensive pain and suffering. As of the present date, the Plaintiff has received no compensation from \_\_\_\_\_ (name) Store for the injuries which he/she suffered in the fall.

## IV.

On or about \_\_\_\_\_ (date), the Plaintiff consulted the Defendant at his/her office concerning the Plaintiff's right to recover from \_\_\_\_\_ (name) Store as a result of the injuries which he/she suffered in the fall. The Defendant informed the Plaintiff that he/she should commence a personal injury suit against \_\_\_\_\_ (name) Store, and agreed to represent the Plaintiff in bringing such a suit.

## V.

On or about \_\_\_\_\_ (date), said date being the second anniversary of the Plaintiff's accident, the period for commencing a personal injury action prescribed by \_\_\_\_\_ (reference to state statute of limitations) expired. As of this date, the Defendant had filed no civil action against \_\_\_\_\_ (name) Store to recover damages for the Plaintiff's injury. At the present time, the statute of limitations acts to bar an action to recover damages from \_\_\_\_\_ (name) Store.

## VI.

In failing to commence a timely action against \_\_\_\_\_ (name) Store, the Defendant failed to exercise reasonable care, skill, and diligence in representing the Plaintiff. This failure resulted in the permanent and irrevocable loss of the Plaintiff's right of action, leaving the Plaintiff with no opportunity to obtain compensation for the injuries he/she suffered in the fall. The Defendant's failure to file a timely action constituted both a negligent act and a breach of his/her contractual obligation to the Plaintiff.

## VII.

Had an action been timely brought against \_\_\_\_\_ (name) Store, the Plaintiff would have recovered a judgment for personal injuries, medical expenses, permanent disability, and pain and suffering in an amount not less than \_\_\_\_\_ (\$ amount). The loss of a judgment in this amount was the proximate result of the Defendant's failure to preserve the Plaintiff's right of action.

## VIII.

As a proximate result of the Defendant's failure to preserve the Plaintiff's right of action, the Plaintiff has been forced to retain another attorney and incur additional attorneys' fees, in an amount as yet indeterminate, in order to attempt to recover compensation for his/her injuries.

WHEREFORE, the plaintiff prays for judgment against the Defendant as follows:

1. General damages of \_\_\_\_\_ (\$ amount);

2. Costs and attorneys' fees associated with this suit, together with such other relief as the Court deems appropriate.  
Dated: \_\_\_\_\_

\_\_\_\_\_  
(signature of attorney)

\_\_\_\_\_  
(typed name of attorney)  
Attorney for Plaintiff

\_\_\_\_\_  
(attorney's address)

**§ 46.10. Sample complaint alleging legal malpractice**

*[Caption]*  
Pursuant to \_\_\_\_\_ *[cite statutory authority]*, plaintiff \_\_\_\_\_ *[name]* files this action for professional malpractice against defendant \_\_\_\_\_ *[name of attorney]*. In support of this action, plaintiff would show the court the following:

I

Plaintiff, \_\_\_\_\_, resides at \_\_\_\_\_ *[address]*, City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_.

II

Defendant, \_\_\_\_\_, is an attorney licensed to practice law in the State of \_\_\_\_\_. Defendant maintains an office for the purpose of practicing law at \_\_\_\_\_ *[address]*, City of \_\_\_\_\_, County of \_\_\_\_\_, State of \_\_\_\_\_.

III

\_\_\_\_\_ *[Allege facts showing understanding between attorney and client establishing an attorney-client relationship with regard to the transactions at issue in case, for example: On \_\_\_\_\_ [date], plaintiff employed defendant to \_\_\_\_\_ [describe matter for which plaintiff hired defendant]. A copy of the written agreement of representation executed by plaintiff and defendant on \_\_\_\_\_ [date], is attached as Exhibit "\_\_\_\_\_" and incorporated by reference.]*

IV

\_\_\_\_\_ *[If applicable, add the following: Defendant agreed to represent plaintiff \_\_\_\_\_ [state fee arrangement, if any, for instance: on a contingent basis, and plaintiff agreed to reimburse defendant for any expenses incurred by defendant in handling plaintiff's case]].*

V

\_\_\_\_\_ *[Describe attorney's legal duty, for example: As a result of the attorney-client relationship created by*

*the above conduct of the parties, defendant had a duty to represent plaintiff with the reasonable care, skill, and diligence possessed and exercised by the ordinary attorney in similar circumstances.]*

## VI

*\_\_\_\_\_ [Describe actions or omissions of attorney that form basis of malpractice claim, such as: Defendant failed to file suit on behalf of plaintiff until after the expiration of the applicable statute of limitations. Thus, plaintiff's suit was dismissed, and plaintiff was denied relief on the basis of \_\_\_\_\_ [his or her] claims.]*

## VII

*\_\_\_\_\_ [Assert breach of duty of care by attorney, for instance: Defendant's conduct in failing to timely file a lawsuit on behalf of plaintiff was a breach of defendant's duty to exercise reasonable care, skill, and diligence on plaintiff's behalf.]*

## VIII

*\_\_\_\_\_ [Set forth allegations as to proximate cause, for example: As a result of defendant's negligent failure to institute an action for \_\_\_\_\_ [type of action] on plaintiff's behalf prior to the expiration of the statute of limitations, plaintiff sustained injury and loss. Specifically, plaintiff's injury includes the loss of a verdict, settlement, or award, and the interest that plaintiff would have recovered but for the defendant's negligence.]*

## IX

*\_\_\_\_\_ [If required, negate defense of contributory negligence, such as: The damage sustained by plaintiff was proximately caused by defendant's breach of duty as set forth above. Plaintiff committed no acts of negligence which contributed to \_\_\_\_\_ [his or her] damages.]*

## X

*\_\_\_\_\_ [If applicable, include allegations giving rise to claim for exemplary damages, for instance: Defendant failed to inform plaintiff of \_\_\_\_\_ [his or her] failure to timely file the action at issue, and concealed dismissal of the action from plaintiff until \_\_\_\_\_ [date]. Therefore, plaintiff seeks exemplary damages for such conduct on the part of defendant.]*

## XI

Solely as a result of defendant's negligence, plaintiff has been damaged in the sum of \$ \_\_\_\_\_, plus the cost of this suit.

Wherefore, plaintiff respectfully requests the following relief:

- a. Judgment against defendant for actual damages \_\_\_\_\_ [in the amount of \$ \_\_\_\_\_ or in an amount to be proven at trial];
- b. \_\_\_\_\_ [If applicable, add the following: Judgment against defendant for exemplary damages \_\_\_\_\_ [in the amount of \$ \_\_\_\_\_ or in an amount to be proven at trial]];
- c. Court costs; and

d. Any further relief to which the plaintiff is entitled.

Dated: \_\_\_\_\_  
[Signature, Verification]  
[Attach exhibits]

§ 47. Sample Answer

	_____ (Name of Court)	
_____ (plaintiff's name)	)	
Plaintiff	)	
	)	
	)	
v	)	No. _____
	)	ANSWER
	)	
_____ (defendant's name)	)	
Defendant	)	

I.

The Defendant admits the allegations contained in paragraphs 1 and 2 of the Plaintiff's complaint.

II.

The Defendant admits that, on or about \_\_\_\_\_ (date), the Plaintiff consulted the Defendant concerning the personal injury described in paragraph 3 of the Plaintiff's complaint, but denies the remainder of the allegations in paragraph 3 of the Plaintiff's complaint. The Defendant specifically denies informing the Plaintiff that she should commence a personal injury action against \_\_\_\_\_ (name) Store or agreeing to represent Plaintiff in bringing such an action.

III.

At the time of their consultation, the Defendant agreed only that he/she would investigate the Plaintiff's personal injury claim and determine whether an action on the claim was appropriate and likely to result in a significant recovery of damages.

IV.

The Defendant investigated the Plaintiff's claim at length and concluded, based on the Plaintiff's own statements and the statements of eyewitnesses, that the Plaintiff was primarily or entirely responsible for his/her injuries, thereby precluding the Plaintiff from recovering damages.

V.

On or about \_\_\_\_\_ (date), the Defendant reported fully to the Plaintiff concerning the results of this investigation, including the Defendant's considered opinion that any action against \_\_\_\_\_ (name) Store would be unlikely to result in a favorable verdict or settlement. The Defendant specifically stated the he/she intended to take no further action on the Plaintiff's behalf. The defendant specifically informed the Plaintiff of his/her right to consult another attorney, and informed the Plaintiff that if he/she wished to do so, it must be done well in advance of \_\_\_\_\_ (date), the date upon which the statute of limitations governing the Plaintiff's claim would expire.

## VI.

The Defendant asserts that his actions and advice to the Plaintiff were proper, given the facts of the case as stated by the Plaintiff and confirmed by the Defendant's own investigation.

## VII.

The Defendant further asserts that, regardless of any action taken by the Defendant or others, the Plaintiff could not have recovered damages from \_\_\_\_\_ (name) Store or any other person or entity, and that the Defendant's actions therefore cannot be considered the proximate cause of any injury to the Plaintiff.

WHEREFORE, the Defendant prays that the Plaintiff be awarded no damages by reason of the complaint, and that the complaint be dismissed with an award of costs to the Defendant, together with such other relief as the Court deems appropriate.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(signature of attorney)

\_\_\_\_\_  
(typed name of attorney)  
Attorney for Defendant

\_\_\_\_\_  
(attorney's address)

## V. Practice Checklists

## § 48. Checklist—Complaint

A complaint or petition against an attorney for damages due to negligent handling of a client's case should, among other things, allege:

- Jurisdictional facts, when required.
- Facts establishing venue, when required.
- Diversity of citizenship, and amount in controversy, if complaint is filed in federal court as a diversity action.
- Existence of attorney-client relationship, giving rise to duty owing from defendant to plaintiff.

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- Scope and payment of retainer, if required.
- Negligent acts or omissions by defendant breaching duty.
- Freedom from contributory negligence, when required.
- Causal relation between defendant's negligence and plaintiff's injuries.
- Actual loss sustained by plaintiff.
- Damages.
- Prayer for relief.

Mallen and Levit, *A Manual on Legal Malpractice* (Federal Publications Inc 2d ed 1981)

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Meiselman, *Attorney Malpractice: Law and Procedure* (Lawyers Cooperative Publishing Co 1980)

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# APPENDIX NO. 4

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF PIERCE

3  
4 TERESA SCHMIDT, )

5 Plaintiff, )

6 v. )

7 TIMOTHY P. and DEBORAH COOGAN and )  
8 the marital community comprised )  
9 thereof, and THE LAW OFFICES OF )  
TIMOTHY PATRICK COOGAN and all )  
partners thereof, )

10 Defendants. )

) Superior Court  
) No. 00-2-12941-1  
) Court of Appeals  
) No. 32840-2-II

) VOLUME 3 OF 5  
)

11 VERBATIM TRANSCRIPT OF PROCEEDINGS

12  
13 August 25, 2010  
14 Pierce County Courthouse  
15 Tacoma, Washington  
16 Before the  
17 Honorable Carol Murphy

18 A P P E A R A N C E S

19 For the Plaintiff:

20 DAN'L BRIDGES  
21 McGAUGHEY BRIDGES DUNLAP, PLLC

22 For the Defendants:

23 BEN F. BARCUS  
24 PAUL LINDENMUTH  
25 LAW OFFICES OF BEN F. BARCUS & ASSOCIATES

Lanre Adebayo, CCR  
Official Court Reporter  
Department 14 Superior Court  
(253) 798-2977

COPY

1 that you go to the jury room at this time. You may leave  
2 your notebooks on your chairs and we'll be back here in about  
3 ten minutes or so.

4 (Jury exits.)

5 THE COURT: Please be seated.

6 Mr. Lindenmuth, I want to be clear that the Court  
7 appreciates briefings that support motions even during trial.  
8 It is somewhat frustrating to not have time during trial to  
9 review it before having to make a decision, but I appreciate  
10 a written brief on -- that you've provided to the Court. And  
11 I want you to know that I have thoroughly reviewed the brief  
12 that I reviewed this morning.

13 I understand that you have a motion that you want the  
14 Court to consider at this time and I will ask you to make  
15 your comments as brief as possible.

16 MR. LINDENMUTH: Your Honor, I thank you for your  
17 comments and note just the frustration levels of trying to  
18 get here and then still being not satisfactory of the Court.  
19 It's certainly never intended.

20 Your Honor, we are moving for a directed verdict on  
21 this matter based on the lack of evidence of any medical  
22 testimony or any medical causation related to any symptoms  
23 Ms. Schmidt has suffered as a result of this slip and fall  
24 accident.

25 The only medical testimony presented in this case was

1 the testimony of Dr. Brobeck, and I think I alerted the Court  
2 in pretrial motions about our concerns in that regard. Dr.  
3 Brobeck's deposition was taken in 2003. He obviously could  
4 be stating no opinions at that time about anything that  
5 happened after that date.

6 Also, he was basing his testimony on records that the  
7 last of the records I think were about 1999, and he also  
8 indicated that his examination of Ms. Schmidt was in 2001.  
9 So we're dealing with essentially a stale examination at  
10 least as it comes to current symptomology.

11 And if we actually analyze and parse what Dr. Brobeck  
12 actually said, he came to a one diagnostic conclusion that  
13 she suffered a dorsal or a cervical dorsal sprain/strain. He  
14 indicated that it was a lighting up of a preexisting  
15 condition. He provided no testimony about permanency. He  
16 provided what testimony he did provide about the current  
17 symptomology being expressed by Ms. Schmidt at the time of  
18 the exam indicated that he could not, based on reasonable  
19 medical probability, separate out any symptoms she might have  
20 been suffering from the '95 fall to the 1997 accident.

21 So what we have here is he's authenticated the medical  
22 records that go to November of 1996. And we suggest based on  
23 the actual proof presented in this case, and we can't -- the  
24 lay testimony isn't good enough. They can't testify as to  
25 medical probabilities or certainties. They have their

1 opinions, but they're not doctors. There is a standard they  
2 must meet. They have not met that standard; therefore, we  
3 think we have to limit this case now to the evidence that was  
4 presented in the plaintiff's case. And that is at the most  
5 we can say is that he authenticated records saying the  
6 treatment was reasonable and necessary to November of 1996.  
7 Then we have this other accident in April 1st, 1997, where he  
8 cannot differentiate or provide an opinion based on the  
9 proper standards as to whether those symptoms relate to the  
10 '95 fall or the '97 accident.

11 What we're left with, given the testimony that's now  
12 been provided about this long 15-year history, is just simply  
13 rank conjecture and speculation. There is no medical  
14 support; therefore, at least in part, the plaintiff's damage  
15 claim should be dismissed.

16 Thank you, Your Honor.

17 THE COURT: Mr. Bridges?

18 MR. BRIDGES: Frankly, I'm confused of what he's  
19 asking for relief on because the brief actually says to  
20 exclude damages past 1996 and I heard him just now orally  
21 articulate that there should be no damages at all. So I  
22 don't know if it's appropriate or not. May I ask for  
23 clarification? Is he asking that there are simply no damages  
24 at all from this accident, or am I to rely on the caption of  
25 the brief he's trying to limit it after 1996?

1 THE COURT: What I heard him say was that Dr.  
2 Brobeck testified that treatment was reasonable and necessary  
3 through 1996.

4 MR. BRIDGES: I heard -- okay. I appreciate that.

5 Well, what the defendant is ignoring is the testimony  
6 of Dr. Brobeck starting at Page 17. And while they may not  
7 have ignored in the context that they acknowledge it, they  
8 don't recognize it for what it means.

9 I discussed with him in detail at Page 17 asking him,  
10 you know, what even causes this pain and he explains, well --  
11 at Page 17, Line 12: It can occur from impingement of the  
12 nerve, occur from degenerative changes in the supporting  
13 structures, what we refer to as facet joints. If they become  
14 arthritic they can cause pain.

15 Then I asked him to follow-up on that in terms of Ms.  
16 Schmidt specifically at Page 18: We have an MRI dated March  
17 11, '96 with the findings you just described and a subjective  
18 complaint of pain. Can you put two and two together for me  
19 and explain to the jury what the significance of this finding  
20 is?

21 At Line 11: It would be my opinion, based on the  
22 history, she had degenerative changes within the disk, at  
23 least three of them, and they're in her neck area. They were  
24 asymptomatic before this injury but the injury irritated them  
25 and they became painful. Whether that's from the disk or the

1 joints or the nerves, it's hard to say.

2 So right there he establishes on a medical more likely  
3 than not basis an injury, a preexisting asymptomatic  
4 condition that was aggravated by her fall that led to -- he  
5 was candid. Well, was it -- is it the nerve coming out of  
6 the spinal column, is it inside the spinal column, because he  
7 can't say for sure that this is a clear issue of aggravating  
8 a preexisting condition that caused pain.

9 Then he started talking about the concept of being lit  
10 up. And I don't need to repeat what Mr. Lindenmuth said. I  
11 think he acknowledges the testimony, but he ignores its  
12 import. We do talk about "lit up" when we talk about it at  
13 Page 19.

14 "Does it seem more likely to you that the slip and fall  
15 lit up this condition in Ms. Schmidt?"

16 Answer: In my opinion, that would be a reasonable  
17 assumption, yes.

18 So what we have here is a medical establishment of a  
19 preexisting condition, disk herniations that lit up, causing  
20 pain via the nerve irritation.

21 So we go on at Page 20. As we all know from our common  
22 experience, if you have a disk herniation it's not going to  
23 get any better. A herniated disk is a herniated disk unless  
24 you go in and operate on it.

25 So I asked him at Page 20, at Line 1, "If a person has,

1 as you've described, a degenerative condition that is  
2 asymptomatic --" well, actually this is slightly different  
3 but it's important as well. "If a person has, as you've  
4 described, a degenerative condition that's asymptomatic, once  
5 it is lit up, does that person become susceptible to  
6 additional aggravations as time goes on?"

7 Answer: Yes.

8 Question: Would that same dynamic apply to Ms.  
9 Schmidt?

10 Answer: Yes.

11 So that in and of itself is an independent injury. She  
12 has now been made more susceptible to later injury because of  
13 this aggravation of a condition that was completely  
14 asymptomatic before she fell.

15 So then to kind of wrap all that up I asked him at Page  
16 20, Line 16 -- oh, actually, I'm skipping part of the page.  
17 Line 9: Just to wrap this up, did you reach any conclusions  
18 or diagnoses on a medically more likely than not basis as to  
19 the injury Ms. Schmidt sustained due to the 1995 slip and  
20 fall in the store?

21 Answer: I felt that she sustained a cervical dorsal  
22 sprain/strain related to the injury on December 23rd, 1995 on  
23 a more probable than not basis.

24 And what I would respectfully submit counsel is  
25 ignoring was the next question.

1 "And will you also add to that the discussion we've  
2 been having for the last ten minutes as it relates to the MRI  
3 finding?"

4 Answer: Yes.

5 There has been no accounting for that critical  
6 testimony. I spent all this time talking to the doctor  
7 about, you know, preexisting asymptomatic disk herniations  
8 that were lit up and caused the nerve irritation and pain and  
9 he -- you know, rather than being repetitive and asking him  
10 all those questions again, I tied it back in there, does this  
11 include -- does your opinion include that, and he says, yes.  
12 So he's established really three different injuries at that  
13 portion of the testimony.

14 At Page 23 I asked him: Does a disk bulge heal?

15 Answer: Not usually, it does not. So the bulge can  
16 decrease with time.

17 On Line 24: Does it appear that it's happened to her  
18 in this case?

19 Answer: No.

20 So what has he testified to? He has testified to a  
21 previously asymptomatic condition that became symptomatic  
22 because of a disk bulge. And there's been no showing that  
23 that disk bulge has ever changed or got any better. That's  
24 what he testified to.

25 And, yeah, part of his diagnosis is she definitely had

1 a cervical strain, without question. That is one injury for  
2 sure. But what they're ignoring and asking you to ignore is  
3 the lighting up of the asymptomatic condition in her discs.

4 Frankly, she could have simply had the strain with no  
5 lighting up. That would have been an injury as well. But  
6 she had two injuries. They're just asking you to focus on  
7 the first while ignoring the second. She could have had a  
8 lighting up of her disk condition with no cervical strain.  
9 It's possible she could have done that. And we wouldn't be  
10 talking about cervical strain, we'd only be talking about the  
11 lighting up of her disk condition. But in here we have both.

12 THE COURT: Mr. Bridges?

13 MR. BRIDGES: Yes, Your Honor.

14 THE COURT: Is there any medical support, any  
15 medical testimony that supports any medical costs incurred  
16 after 1996 associated with the 1995 slip and fall?

17 MR. BRIDGES: No. But, of course, it does not mean  
18 she was not feeling pain.

19 THE COURT: I understand that. So you would agree  
20 no medical specials after 1996?

21 MR. BRIDGES: I have to agree to that, yeah.

22 THE COURT: Okay.

23 MR. BRIDGES: Yeah.

24 The last thing I'll address is that Mr. Lindenmuth said  
25 that Dr. Brobeck said he cannot separate out the pain from

1 the 1995 slip and fall from the 1997 accident. And what I  
2 would suggest to him and what I was just scrambling to find  
3 right here, although we did talk about it in previous  
4 objections, I'm hoping it's in Your Honor's mind.

5 What Dr. Brobeck was very candid about was in terms of  
6 whether the EMG finding that related to carpal tunnel, he was  
7 very candid. He said I can't tell you whether that was  
8 caused by the MVA or the slip and fall. But that was the  
9 only thing he said he couldn't segregate out. He said maybe  
10 it was, maybe it wasn't. But that doesn't diminish his other  
11 testimony that I just got done relating to you.

12 They're trying to apply that minimal testimony on one  
13 issue to everything else. And he was clearly lasering in on  
14 the EMG based on a question asked by then Mr. Jensen who was  
15 representing Mr. Coogan at the time.

16 THE COURT: Thank you.

17 Mr. Lindenmuth, briefly.

18 MR. LINDENMUTH: Very briefly, Your Honor, and I'm  
19 not going to editorialize about a few things there.

20 THE COURT: Then don't.

21 MR. LINDENMUTH: I won't.

22 One, we're not responsible for the disk bulges.

23 Two, a lighting up, there is no evidence that this  
24 lighting up had any specific duration, any permanency or  
25 otherwise. All a lighting up means is she has a preexisting

1 condition and on top of that there is a cervical dorsal  
2 sprain and strain.

3 That doesn't mean the dorsal sprain and strain can't  
4 heal. It doesn't mean it's permanent. And if we actually  
5 look at what he's saying, he says she may be more susceptible  
6 but there is no evidence in this case that any of her  
7 conditions from 1996 onward is a byproduct of such  
8 susceptibility.

9 What we have is susceptibility in the air, we have a  
10 lighting up of no specific duration, and the evidence in the  
11 case is that she doesn't even believe that her back injury or  
12 post-motor vehicle accident problems have anything to do with  
13 her 1995 slip and fall.

14 But even putting that aside, he's got the burden of  
15 proof on this issue. He has the burden to come forward with  
16 proper medical testimony based on the proper evidentiary  
17 standard and present that to this jury. He hasn't done it.  
18 We have a lighting up of unspecified duration. We have no  
19 opinion as to permanency that could justify all of these  
20 laundry list of symptoms. And just simply because they said  
21 that she could be susceptible, doesn't mean everything that  
22 happens, given the fact of other traumas, is a byproduct of  
23 the susceptibility.

24 If the jury was left with just that then they're just  
25 left to speculate without any medical testimony to tie it in

1 to provide the causal link between a susceptibility and her  
2 prior problems. It's not there. It's just not there.

3 THE COURT: Thank you, counsel.

4 This will be the Court's ruling on this particular  
5 matter. I am somewhat unclear as to a remedy being sought  
6 here. But I think that the appropriate remedy with regard to  
7 this argument is perhaps a proposed instruction regarding the  
8 calculation of damages in this case, which is after all, the  
9 only thing that this trial is about.

10 And so to the extent that defense counsel has not  
11 already proposed an instruction appropriate for this jury to  
12 make a determination of damages based upon appropriate  
13 evidence, I invite them to do so as soon as possible. We  
14 will be finalizing instructions soon in this case.

15 I do believe that based upon the evidence, there can be  
16 no medical specials after 1996 and Mr. Bridges conceded as  
17 much. And so with regard to the arguments made, I believe  
18 that this would be an appropriate subject of jury  
19 instructions at the end of the case.

20 MR. LINDENMUTH: Your Honor, thank you.

21 May I go into my next issue? It's very short and I did  
22 not brief this. And a lot of times these motions are not  
23 briefed. But there is an issue here that I raised in summary  
24 judgment with respect to proximate cause and I remember  
25 briefing this issue and bringing this to the attention of

1 everybody.

2 One element in a legal malpractice case is proof that  
3 if, in fact, the lawyer had done a better job and there would  
4 have been a better result, that they actually wouldn't have  
5 been able to collect on that result. In other words,  
6 collectability is an essential element of the plaintiff's  
7 case.

8 There has been no evidence presented in this case, none  
9 whatsoever, as to whether or not even if Mr. Coogan had  
10 handled this case right, even if Mr. Coogan had taken it to a  
11 jury trial and got a verdict for Ms. Schmidt that that  
12 verdict would have been collectible. That is an essential  
13 element of their case, they put on no proof; therefore,  
14 dismissal is warranted. Thank you.

15 And, let me -- I do have a couple of cases on that  
16 proposition. One is Lavigne v. Chase Haskell, 112 Wn. App.  
17 677. I got these at lunchtime. And another case for the  
18 Court's consideration is Matson v. Weidenkopf, 110 Wn. App.  
19 472. And they all -- they both talk about collectability as  
20 being the plaintiff's burden and an element of the claim in  
21 legal malpractice.

22 Thank you, Your Honor.

23 THE COURT: Well, obviously, I haven't read those  
24 cases, having -- although I think at least one of them is  
25 familiar to me. But I have not read those in the context of

1 this particular motion. I guess I'll hear from Mr. Bridges  
2 at this time.

3 MR. BRIDGES: Well, malpractice, like negligence, is  
4 a term of art and it requires all the elements to be found  
5 before the conclusion is found. And just like negligence,  
6 malpractice requires the element of probable cause without  
7 question. I think at least in that regard we agree.

8 But I think what the argument of defendant ignores is  
9 that the issue of malpractice or negligence has already been  
10 tried, and that if this issue was to have any merit, or to be  
11 argued, or when it should have been argued was at the first  
12 trial. If Ms. Schmidt could not have demonstrated that any  
13 judgment would have been collectible, that would have been a  
14 liability defense. It's not an issue of quantum of damages  
15 and people often ignore this. You can have liability and be  
16 liable but there'd be no damages. That's a fine result. Or  
17 you could have damages, but no proximate cause and,  
18 therefore, no liability.

19 The argument of the defendant blurs the line and it's  
20 impermissible. If there was no proximate cause, even if he  
21 was negligent in terms of not exercising reasonable care, the  
22 conclusion of negligence would not apply because negligence  
23 requires duty, breach, proximate cause and damage.

24 The first trial established and I think, I hope, and  
25 I've heard defendant argue this many times already, this is a

1 damages only trial. Division II has already indicated duty,  
2 breach, proximate cause. That's what the first trial  
3 established. Now we are only here to talk about the damage  
4 Ms. Schmidt sustained.

5 And I would also point out that, and I'm sure there was  
6 no bad faith intended, but it would be a fairly large trial  
7 ambush to raise this at this time when the case has been  
8 sitting for ten years -- that's an exaggeration, four years,  
9 since this issue originally came down after the new trial, to  
10 raise this now. We've always approached this, the bench and  
11 I believe the parties, it's going to be a case about medical  
12 damages and what are the damages.

13 To inject a new element at this time, which frankly has  
14 already been tried and resolved, would itself be an ambush  
15 even if it were a proper argument to make, and it's simply  
16 not a proper argument to make in the first place.

17 THE COURT: Mr. Bridges, you would agree that the  
18 jury needs to be instructed on proximate cause related to  
19 damages?

20 MR. BRIDGES: Of course.

21 THE COURT: Mr. Lindenmuth, do you have anything  
22 else on this matter?

23 MR. LINDENMUTH: Your Honor, just two seconds.  
24 Well, that's a lawyer exaggeration again.

25 THE COURT: I'm used to that.

1 MR. LINDENMUTH: I know it. You've got to be  
2 calloused to it by now. It's an element of his case. It's  
3 not my job to manage the plaintiff's case.

4 THE COURT: Mr. Lindenmuth, I guess I beg to differ,  
5 because malpractice has already been established in this  
6 case; isn't that correct?

7 MR. LINDENMUTH: Yes.

8 THE COURT: Okay. And what you're arguing about is  
9 an element of malpractice not damages, correct?

10 MR. LINDENMUTH: I would disagree. And I would  
11 disagree, because every claim of negligence has three  
12 elements. One element is the negligence. The second element  
13 is the proximate cause. The third element is damages.

14 Clearly, element one's been established as a matter of  
15 law by the Supreme Court, Court of Appeals, prior case.

16 Element two, proximate cause is what I'm talking about  
17 here. They're still going to have to prove proximate cause  
18 of damages. And in this context, she has to prove that but  
19 for his negligence, she would have faired better. An element  
20 of that concept and that goes to the value of the underlying  
21 claim. An element of that concept is the plaintiff's burden  
22 of proof collectability. And that's what those cases  
23 discussed.

24 I did brief those cases in my summary judgment reply.  
25 I raised those issues so I wasn't trying to hide the ball.

1 Now, I didn't bring it in a summary judgment motion, I didn't  
2 bring it otherwise, I'm bringing it now. But I did alert him  
3 that, you know, if he had been reading what I was telling  
4 him, he would have known that he would have had to address  
5 that issue at time of trial. So I don't feel I ambushed  
6 anybody. I did my job as an advocate, which is to address  
7 the issues. Thank you.

8 THE COURT: Thank you.

9 The motion is denied. The element of proximate cause  
10 with regard to damages will be an instruction given to this  
11 jury. I appreciate the argument. I believe it is a fine  
12 line, however, this case is not about any element of  
13 malpractice other than damages and proximate cause as it  
14 relates to damages.

15 If there was a question as to collectability, that  
16 should have been addressed at the first trial. This trial is  
17 about damages only.

18 And I understand, Mr. Lindenmuth, that you disagree  
19 with the Court on this point.

20 MR. LINDENMUTH: I understand your ruling, Your  
21 Honor.

22 THE COURT: Are we ready to proceed?

23 MR. LINDENMUTH: We are.

24 (Jury enters.)

25 THE COURT: Please be seated.

1 Mr. Barcus, you may call your first witness.

2 MR. LINDENMUTH: Actually, I'll be calling the first  
3 witness, Your Honor.

4 The defense would like to call Dr. Robert Colfelt.

5 **ROBERT H. COLFELT, M.D.,**

6 having been called as a witness by the Defendant, being  
7 first duly sworn, was examined and testified as follows:

8 THE COURT: Thank you. Please be seated.

9 Mr. Lindenmuth, you may proceed.

10 MR. LINDENMUTH: Thank you, Your Honor.

11 **DIRECT EXAMINATION**

12 **BY MR. LINDENMUTH:**

13 Q. Sir, can I have you state your name and spell your last  
14 name for the benefit of the court reporter.

15 A. Robert H. Colfelt, C-o-l-f-e-l-t.

16 Q. Sir, what is your profession?

17 A. I'm a board certified neurologist.

18 Q. And are you a physician licensed to practice law (sic)  
19 here in the State of Washington?

20 A. I am. I need to find my other glasses here.

21 Q. Can I be of any assistance, Doctor?

22 A. Look in that case and see if they're in there.

23 Q. Perhaps I can ask you some preliminary questions --

24 A. Go ahead, yeah.

25 Q. -- and Mr. Barcus can give us some assistance.

# APPENDIX NO. 5

1 is relevant as it relates to Ms. Schmidt's damages.

2  
3 General Damages for Mr. Coogan's Malpractice Are Not Allowed.

4 This issue has been repeatedly briefed and at this point we are simply "beating a dead  
5 horse". As such defendant hereby incorporates by reference his response to plaintiff's  
6 unsuccessful effort to amend her complaint, defendant's response to plaintiff's effort to gain  
7 summary judgment on this issue, and plaintiff's response to defendant's motion in limine  
8 regarding availability of general damages.

9 In addition, additional legal research has revealed that there is simply **no basis** for an  
10 award of general damages on a claim of legal malpractice. Attached to plaintiff's reply to  
11 defendant's motion in limine is a copy of 10COA87 (2009) which is a lengthy article entitled  
12 "Cause of Action Against Attorney for Malpractice in Handling Personal Injury Claims". At  
13 Page 73 of that article under Section 43, under the heading of Compensatory Damages is an  
14 analysis of the damages available in attorney malpractice claims. This discussion is fully  
15 quoted in defendant's reply to defendant's motions in limine and it will not be repeated here.  
16 Clearly under the law, and as is well recognized, general damages are simply not available in  
17 legal malpractice claims and the damages are limited to what the client would have acquired  
18 had the attorney properly performed his job. Specifically the case of Merenda v. Superior  
19 Court, 34 Cal. App. 4<sup>th</sup> 1, 4 Cal. Rptr.2d 87 (1992) clearly holds a plaintiff cannot recover  
20 damages for emotional distress suffered as a result of an attorney's negligent legal  
21 malpractice.  
22  
23

That is also the rule here, within the State of Washington where the damages and

# APPENDIX NO. 6

1 **Defendant's Proposed Instruction No 12**

2  
3 To establish the element of proximate cause in a legal malpractice action,  
4 the former client must show that but for any breach of the standard of care in the  
5 performance of duty by the attorney that the client would have obtained a better result  
6 and must further prove the amount or extent of that improve result.  
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24 *Diecks v. Sherry*, 29 Wn. App. 433, 438 rev. denied 96 Wn.2d 1003, 628 P.2d

25 1336

26 *Halverson v. Ferguson*, 46 Wn. App. 708, 735 P.2d 675;

27 *Martin v NW Wash Legal Servs* , 43 Wn. App. 405, 717 P.2d 779  
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# APPENDIX NO. 7



00-2-12941-1 20040806 EXRV 11-21-03



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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

TERESA SCHMIDT,  
Plaintiff(s)

Cause No. 00-2-12941-1

vs.

EXHIBIT RECORD

TIMOTHY P COOGAN ET UX,  
Defendant(s)

**IN VAULT**

P D	No.	Description	Off	Obj	Agreed Illustrative Published Redacted Reserved Withdrawn	Admit Date	Rec'd by Clerk's Office
P	1	Copy of Front of Plaintiff's File	X			11/18/03	✓
P	2	Contingent Fee Agreement	X			11/18/03	✓
P	3	Complaint for Personal Injuries	X			11/18/03	✓
P	4	Tim Coogan Notes					✓
P	5	Coogan Handwritten Notes	X			11/18/03	✓
P	6	Letter	X			11/18/03	✓
P	7	Demand Letter	X	X		Not Admitted	✓
P	8	Oct. 28, 1996 Note	X			11/18/03	✓
P	9	Statement of Teresa Schmidt					✓
P	10	Aug. 17, 2000 Letter	X	X		Not Admitted	✓
P	11	Complaint	X			11/18/03	✓
P	12	Answer & Third Party Complaint	X			11/18/03	✓
P	13	Photographs	X			11/18/03	✓

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P D	No.	Description	Off	Obj	Agreed Illustrative Published Redacted Reserved Withdrawn	Admit Date	Rec'd by Clerk's Office
P	14	Copy of Teresa Schmidt Check for \$49.38	X			11/19/03	✓
P	15	List of Teresa Schmidt's Medical Bills	X	X		11/19/03	✓
P	16	Copies of Rankos' Pharmacy bills	X	X		11/19/03	✓
P	17	Medical Records of Teresa Schmidt	X	X		11/19/03	✓
P	18	Medical Records removed from Ex. #15				Not	✓
P	19	Tim Coogan video deposition				Not	✓
P	20	Dr. Alan Brobeck video deposition				Not	✓
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# APPENDIX NO. 8

17662 6/27/2005 18854

00-2-12941-

PLAINTIFF'S  
EXHIBIT  
NO. 7

# APPENDIX NO. 9

**motor vehicle accident.** (CP 26A)

As discussed in detail below, the Trial Court erred by instructing the jury in a manner which permitted the plaintiff to argue that she was entitled to an Award of non-economic damages up to the date of trial and into the future, based on her forensic examiner's deposition, which was taken in the year 2003, wherein it was never opined that she had suffered a permanent injury and the undisputed evidence clearly established that since the slip and fall at issue, she had been involved in two motor vehicle accidents, and a number of falls in her home which resulted in an unrelated significant neck surgery. (CP 1124-1237).

Such issues were raised and presented before trial, during trial, and within defendant's motion for judgment as a matter of law and/or for a new trial, (CP 1329-1369).

Once again Mr. Coogan did not receive a fair trial.

**II. ASSIGNMENT OF ERROR**

1. The Trial Court erred in failing to grant the defendant's motion for judgment as a matter of law at the close of plaintiff's case in chief, and after the jury's verdict in this case, when the plaintiff, in this legal malpractice case, relating to the failure to perfect a personal injury lawsuit, failed to establish the essential element that any judgment in the underlying case, had it been properly perfected, would have been "collectible."

2. The Trial Court erred by failing to grant judgment as a matter of law on issues relating to damages, when there was **no evidence** supporting

12. The Trial Court erred in failing to grant a new trial due to the plaintiff's springing on the defense a "surprise" witness, Tina Edwards.

13. The Trial Court erred by entering a final judgment in this case in favor of plaintiff.

### **III. ISSUES RELATED TO ASSIGNMENTS OF ERROR**

1. Did the Trial Court err, as a matter of law, in failing to dismiss Plaintiff's case following completion of Plaintiff's case in chief or by failing to grant Defendant's Motion for Judgment as a Matter of Law, when the undisputed facts show that the Plaintiff, in this legal malpractice case, relating to the failure to properly perfect a personal injury lawsuit, failed to establish the essential element that any settlement or judgment in the underlying case could have been "collected"?

2. Did the Trial Court err by failing to grant partial judgment as a matter of law on issues relating to the Plaintiff's damages, when there was no medical testimony supporting any causal link between any injuries and/or symptoms suffered by the Plaintiff after the end of the year 1996, particularly considering that following the accident at issue in this case, there had been a number of intervening accidents, including two motor vehicle accidents and a number of falls within her home, where Plaintiff suffered injury to the identical parts of her body?

3. Did the Trial Court err in submitting to the jury instructions which allowed them to award non-economic damages past the end of the year