SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CAUSE NO. 2009-CA-01547

PEGGY CRIST; THERESA EDWARDS;
PATRICIA GUTHRIE; JANE HAMILTON;
HELEN HEARD; BERTHA MIXON;
JENNIE PARKER; JAMES REED, JR.;
GLENDA RIVERS; PAMELA ROBINSON;
KAREN THORNTON; VIRGINIA TOWNSEND;
VERA WELLS; MARY WHITTINGTON;
LINDA WILLIAMS; AND PEGGY WINTERS — APPELLANTS

V.

PAUL KELLY LOYACONO AND
E. SCOTT VERHINE — APPELLEES

APPEAL FROM THE
CIRCUIT COURT OF WARREN COUNTY, MISSISSIPPI

BRIEF OF APPELLEES

ORAL ARGUMENT REQUESTED

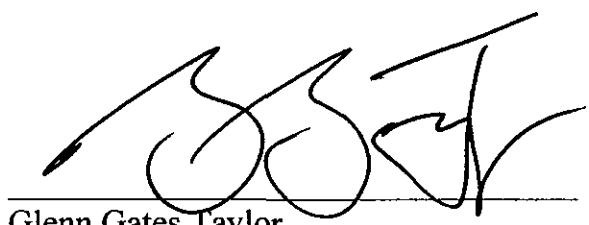
Glenn Gates Taylor (MBN[redacted]
Christy M. Sparks (MBN[redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
200 Concourse, Suite 200
1062 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, MS 39158
601-856-7200
601-353-6235 (fax)

August 6, 2010

CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Peggy Crist, Theresa Edwards, Patricia Guthrie, Jane Hamilton, Helen Heard, Bertha Mixon, Jennie Parker, James Reed, Jr., Glenda Rivers, Pamela Robinson, Karen Thornton, Virginia Townsend, Vera Wells, Mary Whittington, Linda Williams, and Peggy Winters, Appellants and Plaintiffs below.
2. Ronald W. Lewis, David G. Hill, David Minyard, and T. Kilpatrick, attorneys for Appellants.
3. Paul Kelly Loyacono and E. Scott Verhine, Appellees and Defendants below.
4. Glenn Gates Taylor and Christy M. Sparks, Copeland, Cook, Taylor, & Bush, P. A., attorneys for Appellees.



Glenn Gates Taylor

STATEMENT REGARDING ORAL ARGUMENT

Appellees request oral argument. This is the second appearance of this case before the Court, but this time on the issue of what is the proximate cause requirement for a legal malpractice claim that is alleged to be grounded in breach of fiduciary duty, as opposed to negligence. Oral argument may be helpful to the Court if, after considering the briefs, the Court has questions concerning the facts and the law. Oral argument will aid the Court in its decision-making process.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules of Civil Procedure

Secondary Sources

INTRODUCTION

Plaintiffs sued Defendants for legal malpractice, claiming that Defendants obtained inadequate settlements (not enough money) of Plaintiffs' underlying claims arising out of their use of diet drugs manufactured by American Home Products ("AHP").[1] The only evidence Plaintiffs proposed to offer at trial as to the alleged inadequacy of their respective settlements was testimony from a lawyer (Keith Morgan) who, some five months after Plaintiffs agreed to their settlements, entered into a block settlement with AHP to settle the diet drug claims of other persons. Plaintiffs proposed to have Morgan testify as to how *he* decided to allocate his block settlement monies among his clients. Morgan, however, is not an expert and was not designated as an expert. In limine, the trial court excluded Morgan's proposed testimony. Plaintiffs did not have any expert testimony or other admissible evidence that, but for Defendants' alleged malpractice, Plaintiffs would have obtained a more favorable result in the trial or settlement of their underlying diet drug cases. The trial court granted summary judgment because Plaintiffs failed to satisfy the causation element that is required in a legal malpractice claim.

On appeal, Plaintiffs now present an argument that they did not make in opposing summary judgment: their legal malpractice claim is based on an alleged breach of fiduciary duty by Defendants instead of negligence, and such a claim is *not* subject to the "case-within-a-case" proximate cause requirement that they prove that, but for the alleged legal

[1] American Home Products is now known as Wyeth Pharmaceuticals.

malpractice, they would have been successful in their underlying claims against AHP and they would have been awarded a monetary sum greater than the settlements negotiated by Defendants.

Defendants' position is, that in order to make out a genuine issue of material fact for trial in a legal malpractice action in which the claim is based on the alleged mishandling of an underlying suit or the settlement thereof, a plaintiff must satisfy the usual proximate cause requirement of showing by admissible evidence that the plaintiff would have prevailed in the underlying suit and there would have been a more favorable result, *regardless* of whether the act or omission at issue is negligence or breach of a fiduciary duty.

STATEMENT OF THE ISSUES

The following issues are presented for review on appeal:

1. Whether the circuit court correctly granted summary judgment on Plaintiffs' legal malpractice claim based on an alleged inadequate settlement agreement where Plaintiffs failed to offer any proof, expert or otherwise, of causation?

2. Whether Plaintiffs' argument that, if adopted, would eliminate the causation requirement for a legal malpractice claim based on breach of fiduciary duty, is procedurally barred because Plaintiffs did not make that argument to the trial court?

3. Whether Plaintiffs failed to present any competent, admissible evidence of their claimed injury or the extent of their alleged damages.

4. Whether the trial court abused its discretion in excluding the speculative, opinion testimony of a witness, Keith Morgan, who Plaintiffs concede is not an expert and who Plaintiffs did not designate as an expert witness.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

This case arises against the backdrop of a dispute that broke out between two groups of lawyers over the representation of clients who had claims arising out of their use of diet drugs. On January 5, 2004, Plaintiffs filed suit against their attorneys, Paul Kelly Loyacono and E. Scott Verhine ("Loyacono & Verhine"),[2] asserting claims for legal malpractice, negligence, gross negligence, and conspiracy arising out of settlements that Loyacono & Verhine negotiated with AHP for claims arising out of Plaintiffs' use of diet drugs, such as "Fen-Phen." Plaintiffs alleged that Loyacono & Verhine committed malpractice by negotiating settlement offers for inadequate monetary amounts, by recommending that Plaintiffs accept those offers, and by making various misrepresentations to induce Plaintiffs to accept those offers.

Loyacono & Verhine filed a motion to dismiss or, in the alternative, for summary judgment on the grounds that Plaintiffs' claims were barred by the statute of limitations. Finding, among other things, that Plaintiffs' claims were barred by the statute of limitations, the lower court entered summary judgment for Loyacono & Verhine. Plaintiffs appealed.

On appeal, this Court affirmed in part and reversed and remanded in part. *Channel v. Loyacono*, 954 So. 2d 415 (Miss. 2007). The court held that, if a given Plaintiff had notice

---

[2] In addition to Loyacono & Verhine, the original complaint also named as defendants the attorneys for AHP, including Butler, Snow, O'Mara, Stevens & Cannada, PLLC, Arnold & Porter, Lee Davis Thames, Brian P. Leitch. These other defendants were dismissed by the lower court, and Plaintiffs did not appeal their dismissal.

of any alleged wrongdoing by Loyacono & Verhine before January 1, 2001, his or her claims would be barred by the statute of limitations. *Id.* at 422. Based on that ruling, the Court held that the claims of Plaintiffs Sarenthia Channel and Molly Robinson were barred. However, because the record was not clear as to when each of the other Plaintiffs had notice of any alleged wrongdoing, the court remanded the case to determine when each remaining Plaintiff had notice of his or her claims. *Id.* at 423. On remand, the trial court bifurcated discovery to first take up the statute of limitations issue. Following discovery on that issue, Defendants moved for summary judgment based on the statute of limitations. In June 2008, the trial court denied that motion on the ground that there were genuine issues of material fact as to when each of the remaining Plaintiffs first had notice of any alleged wrongdoing.

The parties proceeded with discovery on the underlying claims. Each of the Plaintiffs testified that his or her settlement was inadequate because, approximately five months after Plaintiffs agreed to settle with AHP, another law firm, Varas & Morgan, supposedly obtained a better settlement with AHP. Plaintiffs relied on a "Settlement Matrix" that Keith Morgan prepared and used to allocate among his clients monies that Varas & Morgan obtained from a "block settlement" with AHP. That Morgan Settlement Matrix and Morgan's testimony regarding it were Plaintiffs' only purported evidence of an inadequate settlement and any damages.[3]

---

[3] As discussed *infra* Part II.B, Morgan does not claim to be an expert, Plaintiffs told the trial court that Morgan would not be offered as an expert witness, and Plaintiffs never designated him as an expert witness.

Following the conclusion of discovery, Defendants filed a motion in limine and a motion for summary judgment. Among other things, the motion in limine sought to exclude Plaintiffs' proposed evidence that the monetary amount of their individual settlements was inadequate and proximately caused by legal malpractice based on the "Morgan Settlement Matrix" and Morgan's testimony related thereto. The companion motion for summary judgment sought dismissal of all claims on grounds that included Plaintiffs' failure to present admissible evidence that, if they had not entered into the settlements at issue, they would have prevailed on their underlying claims against AHP and they would have been awarded a monetary sum greater than the settlements negotiated by Defendants. The trial court granted both of Defendants' motions, and entered a final judgment. This appeal followed.

B. Statement of the Facts

1. The Hiring of Loyacono & Verhine

In February and March 2000, Kelly Loyacono and Scott Verhine, attorneys with separate law firms in Vicksburg, Mississippi, entered into written contracts to represent approximately fifty-five individuals, mostly residents of Warren County, Mississippi, against AHP for injuries that they allegedly sustained from the use of certain diet drugs manufactured by AHP, including "Fen-phen," Pondimin and Redux. Each contract gave Loyacono & Verhine the "right to employ additional counsel in his sole discretion to litigate this matter." Among the individuals who hired Loyacono & Verhine are the present Plaintiffs. RE. 9, R. 321-Q to -U (Motion Exhibit 7, Verhine affidavit).

2. Loyacono & Verhine Associate Varas & Morgan

In May 2000, Loyacono & Verhine associated the law firm of Varas & Morgan (Jeff Varas and Keith Morgan) and their "associated attorneys" as co-counsel to assist in pursuing the claims. In that at-will association, Loyacono & Verhine never assigned or transferred to Varas & Morgan or anyone else any of the representation contracts, and Varas & Morgan never entered into any representation contracts with Loyacono & Verhine's clients. RE. 9, R. 321-R (Motion Exhibit 7, Verhine affidavit). Varas & Morgan filed complaints against AHP and others on behalf of scores of plaintiffs, including some of Loyacono & Verhine's clients.[4]

3. Loyacono & Verhine Negotiate Settlements With AHP

By November 2000, Loyacono & Verhine became dissatisfied with Varas & Morgan's handling of the claims and their failure to obtain settlement offers for their clients. In late November and early December 2000, Loyacono & Verhine initiated settlement discussions with AHP on behalf of their fifty-five clients, who included the Plaintiffs in this case, and they obtained a settlement offer for each client. RE. 9, R. 321-R to -S (Motion Exhibit 7, Verhine affidavit). At pages 10-11 of their Principal Brief, Plaintiffs assert that Loyacono

---

[4] The filed cases were: *Green, et al. vs. American Home Products, Corp., et al.*, Civil Action No. 2000-143, in the Circuit Court of Jefferson County, Mississippi, filed September 15, 2000; *Williams, et al. vs. American Home Products, Corp., et al.*, Civil Action No. 2000-200, in the Circuit Court of Jefferson County, Mississippi, filed September 15, 2000; and *Harried, et al. vs. American Home Products, Corp., et al.*, Civil Action No. 2000-109-(CM)(J), in the Circuit Court of Jefferson County, Mississippi, filed December 18, 2003 (collectively, the "Prior Actions").

& Verhine assigned settlement dollars to clients without regard to medical condition, and negotiated settlement amounts as between clients. Those accusations are not supported by the facts.

It is undisputed that Loyacono & Verhine did not negotiate a "block" or "lump sum" settlement with AHP. Instead, they negotiated with AHP to obtain a settlement offer for each client, an offer that took into consideration the client's age, echocardiogram test results and other medical data. *See* R. 325-28 (Motion Exhibit 8, Verhine Depo., pp. 95-100, 139, 170-172); R. 332-33 (Motion Exhibit 9, Loyacono Depo., pp., 16, 40); and RE. 10, R. 411-25 (Motion Exhibit 13, Verhine's expert witness report with attached settlement negotiation spreadsheets and related correspondence with AHP). Verhine testified to the procedure that was followed and the settlement spreadsheets that were used in the negotiations with AHP:

> When we negotiated with AHP, we did not negotiate to do a block settlement like Mr. Morgan says he did. We negotiated–Mr. Loyacono took the lead on that to negotiate settlement offers based on the category of injury they had, their opt-out status, and it was a negotiation so that any client could choose it and accept it or reject it based on their category or their level, if you want to call it that, of damage . . . . What we had done is we had gone to AHP and said, "Here's what we're willing to do; we want to negotiate offers; we don't want to do a blind settlement." * * * We went to AHP and said, Here's what we want to do; we want to negotiate settlement offers for categories based on the level of damage they have. * * * And then we sent AHP a spreadsheet which detailed individual offers for each client that we represented at that time.

R. 325-26 (Verhine Depo., pp. 96, 98-99).

Loyacono & Verhine met with each of their clients (Plaintiffs included) to present AHP's settlement offer for each individual client. On November 27, 2000, Loyacono &

Verhine met with Plaintiffs Jane Hamilton and Glenda Rivers. On December 22, 2000, they met with Plaintiffs Theresa Edwards, Patricia Guthrie, Helen Heard, Alice McRaven, Jenny Parker, James Reed, Pamela Robinson, Virginia Townsend, Mary Whittington, and Linda Williams. On December 26, 2000, they met with Plaintiff Peggy Winter; on December 27, 2000, Plaintiffs Peggy Crist and Karen Thornton; and on December 28, 2000, Plaintiffs Vera Wells and Bertha Mixon. RE. 9, R. 321-R to -S (Motion Exhibit 7, Verhine affidavit). At these meetings, Loyacono & Verhine explained to each client that the client had the option of accepting the offer, or rejecting the offer and holding out for more money and possibly a trial. Each client was advised of the risks and benefits of refusing the settlement offer, including the possibility that the offer would not be made again, that the claims could take months or even years to be resolved, and that representatives of AHP had mentioned the possibility of bankruptcy, which had occurred with other defendants in mass tort cases. RE. 9, R. 321-S (Motion Exhibit 7, Verhine affidavit).

By late December 2000, Loyacono & Verhine had presented settlement offers to each of Plaintiffs. Some clients chose not to accept the settlement offer for him or her. For some clients, Loyacono & Verhine were able to get a higher offer which some clients found acceptable. Some clients refused AHP's offer and rejected settlement. Ultimately, each Plaintiff accepted the given offer for him or her, and received settlement proceeds on January 26, 2001. RE. 9, R. 321-S to -T (Motion Exhibit 7, Verhine affidavit).

At page 11 of their Opening Brief, Plaintiffs assert that Plaintiff James Reed

"negotiated directly with Verhine for money from the other plaintiffs' pockets." However, Plaintiffs never came forth with any evidence to corroborate that accusation, and the settlement spreadsheets that were sent to AHP evidence that there was no such horse-trading among the clients. For example, the original settlement *demand* for Mr. Reed was $700,000. In the ensuing negotiations, AHP first offered approximately $250,000. Verhine testified at length regarding the negotiations to get AHP to pay more money for Mr. Reed's claim. Further negotiations resulted in an of $450,000, an offer that Mr. Reed accepted. R 326, 328 (Motion Exhibit 8, Verhine Depo., pp. 97-100, 169, 172); RE. 10, R. 415, 419-20 (Motion Exhibit 13, Expert Report of Scott Verhine).

At pages 6 through 9 of their Opening Brief, Plaintiffs attempt to portray Loyacono & Verhine's negotiations with AHP and the attendant letters as "secret" and "backdoor dealings." There was nothing improper about conducting those negotiations with AHP; indeed, those are the very types of discussions and letters one would expect there to be in the course of negotiating a settlement between the lawyers who had the representation contracts with the clients and AHP. Moreover, the fact that those discussions occurred as well as the offers that resulted therefrom were disclosed to the clients, Plaintiffs included. Some of those letters do pertain to the dispute between Loyacono & Verhine and Varas & Morgan over who had the right to represent Plaintiffs and negotiate with AHP—but the circuit court long-ago resolved that dispute in favor of Loyacono & Verhine and upheld the settlements. In any event, none of those letters and the related events is evidence that the settlements that

were negotiated and accepted by Plaintiffs were inadequate or that Plaintiffs would have prevailed in the underlying suits against AHP and would have recovered more money that they received via the settlements.

4. Varas & Morgan's Attempts to Get Loyacono & Verhine's Clients

At the end of December 2000, after learning that Loyacono & Verhine were presenting settlement offers to their clients, Varas & Morgan started a fight over who had the right to represent and negotiate for Loyacono & Verhine's clients. Varas & Morgan first tried to contact the clients in an effort to get them to fire Loyacono & Verhine and hire Varas & Morgan, to find out how much money AHP had offered for settlement, and to persuade the clients to reject any settlement offers. Despite those efforts, none of Plaintiffs retracted his or her settlement agreement, and each accepted and kept the settlement proceeds that he or she had received. RE. 9, R. 321-T (Exhibit 7, Verhine affidavit).[5]

Varas & Morgan did not stop their efforts to interfere with the settlements. In late January 2001, Varas & Morgan filed motions in two of the Prior Actions (*Green* and *Williams*) challenging Loyacono & Verhine's right to represent the present Plaintiffs (and others) and the validity of the settlements that had been negotiated by Loyacono & Verhine. In December 2003, Varas & Morgan filed an identical motion in the third of the Prior

---

[5] Varas & Morgan's actions did cause ten of Loyacono & Verhine's clients to fire them. Loyacono & Verhine subsequently filed a civil lawsuit against Morgan and others for tortious interference with contractual relations. The suit also deals with the issue of the proper splitting or sharing attorney's fees among the attorneys. That suit is pending in the Warren County Circuit Court.

Actions (*Harried*) in which Pamela Robinson was a named plaintiff. The motions essentially accused Loyacono & Verhine of acting dishonestly, negligently, and fraudulently in negotiating the settlements.

On January 18, 2002, the circuit court held an evidentiary hearing on the motions in *Green* and *Williams*. In March 2004, the circuit court held a hearing in *Harried* to consider Pamela Robinson's settlement. In those hearings, all but two of the present Plaintiffs appeared to challenge the validity of his or her settlement agreement, and many of the Plaintiffs testified. With the assistance of Varas & Morgan, Plaintiffs' accusations and arguments were essentially that Loyacono & Verhine had acted dishonestly, negligently, and fraudulently in negotiating the settlements, and that they felt that they should have been awarded more money. However, each Plaintiff testified that each signed his or her settlement agreement, received the settlement proceeds, and deemed their individual case settled. Moreover, none of Plaintiffs returned or refunded any of the settlement proceeds.

In March 2004, the circuit court issued its rulings in *Green* and in *Williams*. It held that Loyacono & Verhine were Plaintiffs' attorneys; Loyacono & Verhine negotiated the settlement agreements at issue; and Plaintiffs knowingly and voluntarily agreed to and signed the settlement agreements, received the monies that were due under the settlement agreements, and considered their respective claims settled. In April 2004, the circuit court made the same ruling in *Harried*. Pursuant to Rule 54(b), the circuit court entered a final judgment to that effect in each of the Prior Actions. Plaintiffs did not appeal any of those

final judgments.

5. Varas & Morgan's Block Settlement With AHP

Plaintiffs agreed to the settlement at issue during December 2000. In late April 2001, five months after Plaintiffs agreed to settle with AHP, Varas & Morgan and other law firms, calling themselves the "Coxwell Litigation Group," negotiated a $120 million "block" or "lump sum" settlement with AHP that supposedly covered hundreds of their collective clients. RE. 13, R. 321-I to -J (Motion Exhibit 4, Memorandum of Settlement Agreement). That block settlement was reached without the Coxwell Litigation Group (including Varas & Morgan) identifying by name any of their respective clients, or any of their clients' respective injuries, and without listing or otherwise identifying what monies would be paid to any given client. Morgan admitted that he never made any effort to try to negotiate with AHP for any individual settlement for any client. RE. 11 (Motion Exhibit 2, Morgan Depo., Jan 19, 2009, pp. 108-109, 175, 184).

6. Morgan's Allocation of Block Settlement Monies

The Coxwell Litigation Group split up the $120 million block settlement among the member law firms. Varas & Morgan received a total of $39 million. In his depositions in this case, Morgan admitted: (1) the April 2001 settlement with AHP was in fact a "block" or "lump sum" settlement[6]; (2) no effort was made to try to negotiate with AHP for an

---

[6] We cannot help but comment on Plaintiffs' appellate flip-flop on their position as to the propriety of a block settlement. Their amended complaint alleges that Defendants committed malpractice in part by negotiating a block settlement:

individual settlement for a given client; (3) *after* the block settlement was reached with AHP, Morgan prepared several drafts of his own "settlement matrix" in which he ultimately devised thirteen different injury classification levels; and (4) he, in his sole discretion, assigned a monetary value to each injury classification level; he alone decided who among his clients fell into which injury classification level; and he alone decided the amount of money that was assigned to each injury classification level. RE. 11 (Motion Exhibit 2, Morgan Depo., Jan 19, 2009, pp. 108-109, 184); RE. 15, R. 321-O to -P (Motion Exhibit 6, final version of "Morgan's Settlement Matrix").

Morgan further admitted that his settlement matrix was not used to reach the block settlement with AHP, he prepared it after the block settlement was reached with AHP, he never showed it to AHP, and he did not have any expert or medical doctor assist in preparing

---

> (j) Negotiating with AHP for a single block of money, constituting the aggregate settlement amount for all plaintiffs–a finite number-and then exercising arbitrary discretion to distribute proceeds to the plaintiffs without regard to the merits of each plaintiff's claim.

R. 27 (First Amended Complaint at ¶ 36(j). It is, however, undisputed that Loyacono & Verhine did not negotiate a block settlement for their clients, but that Varas & Morgan did. Thus, Plaintiffs have switched to this position:

> "While there is nothing wrong with negotiating a lump sum settlement, it is essential that each client first be placed on a scale, or matrix, and a value assigned to each level of the matrix *prior to negotiating the settlement.*"

Plaintiffs' Opening Brief at 10 n.5 (emphasis added). That, however, is precisely what the Coxwell Litigation Group—Varas & Morgan included—did *not* do prior to negotiating the $120 million block settlement with AHP. Varas & Morgan prepared their settlement matrix *after* they settled with AHP.

the matrix, or review or check it. RE. 11 (Morgan Depo., Jan 19, 2009, pp. 111-128, 164). Finally, Morgan admitted that, before he prepared his Settlement Matrix (RE. 15, R. 321-O to -P, final settlement matrix), he prepared two earlier drafts in which he added a level and he used different monetary values for some of the levels. RE. 12 (Morgan Depo., Feb. 26, 2009, pp. 1-29), RE. 14, R. 321-K to -N (Morgan's first and second drafts of a matrix).

Plaintiffs never designated Morgan as an expert for any purpose in this case. Indeed, Plaintiffs took the position with the trial court that Morgan would *not* be offered or designated as an expert witness. R. 854 (Plaintiffs' response to motion in limine) ("Plaintiffs readily agree that Mr. Morgan was not designated as an expert in this case.").

7. Plaintiffs' Expert Witness William F. McMurray

The sole expert designated by Plaintiffs was William McMurry, an attorney from Kentucky. McMurry's expert report simply repeats the facts and allegations in the complaint, does not discuss the elements of a legal malpractice claim, and does not address the issue of proximate cause. RE. 16 (Appellants' record excerpts). His report does not state any opinion that, if Plaintiffs had not entered into the settlement at issue, Plaintiffs would have been successful in their underlying claims against AHP and each of them would have received more money than they received in the settlements. Indeed, McMurry's report does not mention the underlying claims against AHP, does not assess or offer any opinions about the strengths and weaknesses of each Plaintiff's claims against AHP, does not offer any opinion about the value of any given claim, and states that Loyacono & Verhine made a block or

lump sum settlement with AHP—a "fact" which is undisputedly not true.

SUMMARY OF THE ARGUMENT

The Court should affirm the lower court's grant of summary judgment for Loyacono & Verhine. Plaintiffs' new argument is that the causation requirement in a legal malpractice action does not apply to a claim based on breach of fiduciary duty. However, Plaintiffs never made this argument below, and as a result, they have waived the issue on appeal. Even if the Court were to consider Plaintiffs' new legal argument, that argument is without merit. To make out a genuine issue of material fact for trial in a legal malpractice action in which the claim is based on the alleged mishandling of an underlying suit or the settlement thereof, a plaintiff must satisfy the usual proximate cause requirement of showing by admissible evidence that the plaintiff would have prevailed in the underlying suit and there would have been a more favorable result, *regardless* of whether the act or omission at issue is negligence or breach of a fiduciary duty. Finally, summary judgment is appropriate because Plaintiffs did not offer any admissible evidence of their damages. They made no showing that they were damaged as a result of Defendants' alleged malpractice or the extent of any damages. Because Plaintiffs failed to present specific facts sufficient to establish the existence of each element of their claim for legal malpractice, summary judgment should be affirmed.

The trial court's decision to exclude the Morgan Settlement Matrix and his opinion testimony related thereto should also be affirmed. Morgan's proposed testimony is impermissible opinion testimony offered by an individual who Plaintiffs conceded was not

an expert and who was not designated as an expert. Because he is not an expert, Morgan's opinion testimony is not admissible under Rule 701 or 702. Therefore, the trial court did not abuse its discretion in granting Defendants' motion in limine, thereby excluding the Morgan Settlement Matrix and his opinion testimony related thereto.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS FAILED TO SHOW AN ISSUE OF FACT ON EACH ELEMENT OF THEIR LEGAL MALPRACTICE CLAIM

A. The Standard of Review

The standard for reviewing a trial court's grant or denial of summary judgment is de novo. *Leffler v. Sharp*, 891 So. 2d 152, 156 (Miss. 2004); *Davis v. Hoss*, 869 So. 2d 397, 401 (Miss. 2004). Summary judgment is appropriate if, when taking the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c); *Davis*, 869 So. 2d at 401; *Russell v. Orr*, 700 So. 2d 619, 622 (Miss. 1997). The existence of a genuine issue of material fact will preclude summary judgment. *Massey v. Tingle*, 867 So. 2d 235, 238 (Miss. 2004). However, the mere presence of factual issues in the record does not automatically entitle a party to avoid summary judgment. *Simmons v. Thompson Mach. of Miss., Inc.*, 631 So. 2d 798, 801 (Miss. 1994). Rather, to defeat a motion for summary judgment, the contested issues of fact must be *material*. *Id.* ("[T]he existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute

regarding the material issues of fact.").

If the moving party properly supports its motion for summary judgment, the party opposing the motion may not simply rest upon mere allegations or denials in the pleadings, but instead, must produce "significant probative evidence" demonstrating genuine issues of material fact. *Aladdin Constr. Co. v. John Hancock Life Ins. Co.*, 914 So. 2d 169, 175 (Miss. 2005); *Richmond v. Benchmark Constr. Corp.*, 692 So. 2d 60, 61 (Miss. 1997); *Young v. Wendy's Int'l Inc.*, 840 So. 2d 782, 784 (Miss. Ct. App. 2003). The lower court's grant of summary judgment should be affirmed if, after reviewing the record, it is evident that no triable issue of fact exists. *Coleman Powermate, Inc. v. Rheem Mfg. Co.*, 880 So. 2d 329 (Miss. 2004); *Simpson v. Boyd*, 880 So. 2d 1047, 1050 (Miss. 2004). Here, the lower court properly determined that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. Therefore, the Court should affirm summary judgment for Loyacono & Verhine.

B. Plaintiffs Waived Their New Argument Regarding the Causation Element for a Legal Malpractice Claim Based on Breach of Fiduciary Duty

On appeal, Plaintiffs argue for the first time that no evidence, expert or otherwise, regarding the success and/or value of the underlying claim is required in a legal malpractice case if the malpractice is based on an alleged breach of fiduciary duty. Plaintiffs, however, never made that argument to the trial court below. RE. 1 (Plaintiffs' Response). The Court has been "consistent in holding that [it] need not consider matters raised for the first time on appeal, which practice would have the practical effect of depriving the trial court of the

opportunity to first rule on the issue." *Williams v. Skelton*, 6 So. 3d 428 (Miss. 2009) (quoting *Alexander v. Daniel*, 904 So. 2d 172, 183 (Miss. 2005)). A trial judge cannot be held in error on a matter not presented to him for his decision. *Bender v. North Meridian Mobile Home Park*, 636 So. 2d 385 (Miss. 1994).

The Court has repeatedly applied this well-settled principle in cases where the lower court granted summary judgment and the appellant raised a new legal issue for the first time on appeal. For example, in *Stephens v. Miller*, 970 So. 2d 225, 226 (Miss. Ct. App. 2007), this Court affirmed the circuit court's grant of summary judgment against the plaintiff. On appeal, the plaintiff raised a new issue, claiming that the defendant owed the plaintiff a duty because she was an invitee during the accident. Because the party did not raise the issue below, the Court refused to address the argument. Similarly, in *Williams v. Skelton*, 6 So. 3d 428, 430 (Miss. 2009), the Mississippi Supreme Court refused to address a new legal argument that was raised for the first time on appeal regarding the constitutionality of a statute, and affirmed the circuit court's grant of summary judgment. *See also Hataway v. Nicholls*, 893 So. 2d 1054, 1057 (Miss. 2005) (rejecting a new argument that was never presented to the chancery court and affirming the chancery court's grant of summary judgment).

In order to preserve an issue for purposes of appeal, a party must explicitly raise the argument below. For example, in *Triplett v. Mayor and Bd. of Aldermen of City of Vicksburg*, 758 So. 2d 399, 401 (Miss. 2000), the plaintiff, in a bill of exceptions to the

circuit court, alleged that the "provisions for appeal contained in the city ordinance constitute[d] a lack of due process in violation of the [plaintiff's] constitutional rights." In the brief on appeal, however, the plaintiff claimed that a Mississippi statute, rather than the city ordinance, violated due process. *Id.* The Supreme Court held that the issue was procedurally barred because it was raised for the first time on appeal. *Id.* In *Shaw v. Shaw*, 603 So. 2d 287, 292-93 (Miss. 1992), for the first time on appeal, the party contested the validity of a deed conveying the subject property. Because they had never alleged that the deed was executed as a result of undue influence, nor had they sought to have the conveyance set aside, the Court held that the party had waived the right to contest the validity of the conveyance. *Id.*

The Court has applied this principle even if it agreed with the party on the new issue that was raised for the first time on appeal. For instance, in *Bender v. North Meridian Mobile Home Park*, 636 So. 2d 385, 389-90 (Miss. 1994), the appellant alleged on appeal that the attachment for rent statutes were unconstitutional. Because the issue was not specifically raised in the lower court, the Supreme Court was procedurally barred from directly addressing the issue on appeal. The Court explained that "[i]f the question was properly before the Court, it would very likely find the attachment for rent statutes unconstitutional." *Id.* However, the issue was procedurally barred from consideration.

In response to Loyacono & Verhine's motion for summary judgment, Plaintiffs did not argue that a claim for legal malpractice based on breach of fiduciary duty is not subject

to the same causation standard as is a legal malpractice claim based on negligence; and Plaintiffs did not argue that they were not required to present proof regarding the underlying action because their malpractice claim was based on breach of fiduciary duty. They certainly never argued that a different standard applies to a case in which the alleged legal malpractice was a breach of fiduciary duty. Rather, Plaintiffs simply took the position that they were not required to present any evidence regarding the underlying claim because AHP was settling diet drug claims. RE. 1, R. 546-E (Plaintiffs' Response).

At the trial court level, Plaintiffs repeatedly argued that their malpractice claim was subject to the negligence standard.[7] For example, in their brief in opposition to Loyacono & Verhine's motion for summary judgment, Plaintiffs stated that they presented "genuine issues of material fact as to the *negligence* on the part of their lawyers in handling their settlements." RE. 1, R. 546-E (Plaintiffs' Response) (emphasis added). Citing *Wilbourn v. Stennett*, 687 So. 2d 1205, 1213 (Miss. 1996), Plaintiffs then stated that to prevail on their malpractice claim, they were required to show an attorney-client relationship, "*negligence* on the part of the lawyer," and that "the injury that was proximately caused by the lawyer's negligence." RE. 1, R. 546-D to -E (Plaintiffs' Response). Plaintiffs then cited several

[7] In their appellate brief, Plaintiffs contend that the trial court erred by applying the same causation standard to their legal malpractice claim based on breach of fiduciary duty as it did to the malpractice claim based on negligence. However, Plaintiffs do not argue that the lower court erred by requiring proof of success on the underlying claims with respect to their claim for legal malpractice based on negligence. Thus, Plaintiffs waived this argument. In addition, Plaintiffs did not raise the issue of the lower court's dismissal of their conspiracy claim. Therefore, the only remaining issue for this Court is whether the case-within-a-case causation element applies to legal malpractice claims that are based on both breach of fiduciary duty and negligence.

examples which allegedly established how Loyacono & Verhine were "negligent in handling [Plaintiffs'] affairs." RE. 1, R. 546-G to -H (Plaintiffs' Response). They did not, however, describe how Plaintiffs breached any fiduciary duty. Clearly, in opposing summary judgment, Plaintiffs claimed and argued legal malpractice based on negligence. Because Plaintiffs never raised the issue regarding the causation standard that applies to legal malpractice claims that are based on breach of fiduciary duty, they waived this issue. The Court should affirm the trial court's grant of summary judgment.

C. The Causation Element Is Not Eliminated in a Legal Malpractice Claim Based on Breach of Fiduciary Duty

1. Plaintiffs Failed to Offer Admissible Evidence of Proximate Cause

Even if Plaintiffs' new argument were properly before the Court, the argument is without merit. Although Mississippi has recognized that legal malpractice may be based on negligence or breach of fiduciary duty, the causation element is applicable to every claim for malpractice. A showing of causation is required whether the legal malpractice claim is based on negligence or breach of fiduciary duty. *See, e.g., Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593 (N.Y. 2004) (holding that whether the same rules of causation apply whether the claim is based on fiduciary duty or negligence). In essence, Plaintiffs are asking the Court to carve out an exception to a well-established rule of law that would eliminate the causation element, essentially creating a strict liability standard, for a legal malpractice claim that is based on breach of fiduciary duty rather than negligence. It would be contrary to established law, as well as illogical, to have two different

standards of causation depending upon whether the plaintiff asserted a claim for legal malpractice based on negligence or breach of fiduciary duty. To make out a genuine issue of material fact for trial in a legal malpractice action in which the claim is based on the alleged mishandling of an underlying suit or the settlement thereof, a plaintiff must satisfy the usual proximate cause requirement of showing by admissible evidence that the plaintiff would have prevailed in the underlying suit and there would have been a more favorable result, *regardless* of whether the act or omission at issue is negligence or breach of a fiduciary duty.

Every legal malpractice cases requires the plaintiff to establish causation. The vehicle or means by which a party shows causation is the "case-within-a-case" method. In order to establish a claim for legal malpractice based on allegations of negligence, Plaintiffs must prove by a preponderance of the evidence (1) the existence of an attorney-client relationship; (2) negligence on the part of the lawyer in handling his client's affairs entrusted to him; and (3) some injury proximately caused by the lawyer's negligence. *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1215 (Miss. 1997). To show causation in a legal malpractice claim based on allegations of negligence, the plaintiff bears the burden of establishing by a preponderance of the evidence causation by showing that "but for the attorney's negligence, he would have been successful in the prosecution or defense of the underlying action." *Wilbourn*, 687 So. 2d at 1215. It is well-settled that "expert testimony is necessary to establish the breach of the duty of care in a claim of legal malpractice" based

on negligence. *Lane v. Oustalet*, 873 So. 2d 92, 99 (Miss. 2004).

The elements of a claim based on breach of fiduciary duty are "the same as other legal malpractice actions except, instead of proving negligence, the plaintiff must prove a violation of the attorney's fiduciary duty." *Lane*, 873 So. 2d at 99. Therefore, "the plaintiff must prove the existence of an attorney-client relationship, an act or acts in violation of the attorney's fiduciary duty, the violation of that fiduciary duty caused injury, and the fact and extent of the injury." *Williams v. Williamson*, 2006 WL 47355, *2 (S.D. Miss. Jan. 6, 2006). In addition, the Court has been clear that a showing of proximate cause is required in breach of fiduciary duty cases. "Recovery [for an attorney's breach of a fiduciary duty], requires proof of proximate cause." *Singleton v. Stegall*, 580 So. 2d 1242, 1245 (Miss. 1991). Moreover, in *Wilbourn*, the Court stated that the plaintiff must establish that the "fiduciary breach was a proximate cause of the injury. These requirements are consistent with the *Hickox* requirement of proximate cause." *Wilbourn*, 687 So. 2d at 1217. Simply stated, this Court has never held that the causation element is eliminated if the alleged malpractice is based on breach of fiduciary duty. That is not the law, nor would it make sense.

2. Expert Testimony Is Necessary Where Plaintiffs' Claims Are Based on an Allegedly Inadequate Settlement

In their Opening Brief, Plaintiffs argue that expert testimony is not required in a legal malpractice case that is based on breach of fiduciary duty. That is not the law. "Expert testimony usually is necessary to establish a fiduciary breach because the standards governing loyalty and confidentiality may not be matters of common knowledge." Mallen & Smith,

Legal Malpractice § 35:20 at 1286. Under Mississippi law, whether expert testimony is required in malpractice claims based on a breach of fiduciary duty depends on the nature of the case.

In support of their argument that expert testimony is not necessary in a legal malpractice case based on breach of fiduciary duty, Plaintiffs rely on *Lane v. Oustalet*, 873 So. 2d 92 (Miss. 2004), and *Pierce v. Cook*, 992 So. 2d 612 (Miss. 2008). However, both of these cases are distinguishable from the facts at issue here. These cases establish that whether expert testimony is necessary depends on the nature of the case. In addition, neither case states that a showing of proximate cause is not required when the claim is one for breach of fiduciary duty.

In *Lane*, 873 So. 2d 92, there was no claim of malpractice regarding the handling of an underlying suit. There, the purchasers of a home brought a claim for legal malpractice based on breach of fiduciary duty against the closing attorney as result of his failure to inform the purchasers about a termite inspection report that disclosed unrepaired termite damage. The closing attorney was aware of the termite damage and knew of the importance of the report. *Id.* The Court concluded that the lack of expert testimony to prove a breach of a fiduciary duty should not preclude a jury from deciding the issue. *Id.* According to the Court, the breach at issue was "*not the kind of question that necessarily confronts a jury with issues that require specialized knowledge or experience.*" *Id.* (emphasis added). Therefore, under "facts such as these," which are within the common knowledge of a jury, expert

testimony was not required.

In *Pierce v. Cook*, 992 So. 2d 612, a lawyer represented both a husband and wife in a medical malpractice action for injuries to their minor child. The attorney subsequently had an affair with the wife. In upholding the jury verdict, the Court concluded that expert testimony was not necessary "*under the facts of this case*" because "[o]rdinary jurors possess the requisite knowledge and lay expertise to determine if an adulterous affair between an attorney and his client's wife is a breach of duty." *Id.* at 618 (emphasis added). The Court further explained that "expert testimony would not lend guidance *under this circumstance*." *Id.* (emphasis added). Thus, whether expert testimony is required depends on the facts and circumstances of the case.

Unlike *Lane* and *Cook*, expert testimony is absolutely necessary in this case in order to make out a prima facie case that the settlements that Loyacono & Verhine obtained were inadequate because of negligence or breach of fiduciary duty. Plaintiffs have alleged that Loyacono & Verhine negotiated and recommended inadequate monetary settlements of alleged personal injuries that were claimed to have resulted from the ingestion of diet drugs. This is the type of questions that presents a jury with issues that require specialized knowledge or experience. Ordinary jurors do not possess the requisite knowledge and lay expertise to determine whether the settlement of such a claim entered into among numerous individuals in complex diet drug litigation is inadequate. Whether a given Plaintiff had heart damage, whether the cause of any heart damage was proximately caused by a diet drug, and

what was the value of such a claim were all issues that required scientific and medical evidence. The jurors would require expert testimony to help them understand these issues. In addition, expert testimony regarding the strengths and weaknesses of the Plaintiffs' claims against AHP would be necessary in order to help the jury determine whether the individual settlements were inadequate. To determine the strengths and weaknesses under these facts, jurors would need to hear testimony regarding complicated medical issues. Therefore, it is clear that based on the complicated nature of the facts of this case, expert testimony is necessary.

D. Plaintiffs Did Not Present Probative Evidence on Damages

Even if the Court were to agree that Plaintiffs were not required to establish an issue of fact regarding their success on the underlying claims, the trial court properly granted summary judgment because Plaintiffs did not present any admissible evidence with respect to damages. "An appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reasons." *Methodist Hosp. of Hattiesburg v. Richardson*, 909 So. 2d 1066, 1070 (Miss. 2005); *see also Chitty v. Terracina*, 16 So. 3d 774, 777 (Miss. Ct. App. 2009) ("even if the trial court did apply an incorrect statutory interpretation in reaching its decision, we may affirm the judgment if the court achieved the correct result and the grounds for the decision are to be found in the record") (citing *DeFoe v. Great S. Nat'l Bank, N.A.*, 547 So. 2d 786, 788-89 (Miss. 1989)).

In response to a motion for summary judgment, Plaintiffs are required to present

"specific facts sufficient to establish the existence of each element of their claims." *Smith v. Campus Edge of Hattiesburg, LLC*, 30 So. 3d 1284, 1288 (Miss. Ct. App. 2010). As an element of their malpractice claim, Plaintiffs are required to establish damages. In any malpractice case, whether based on allegations of negligence or breach of fiduciary duty, Plaintiffs are required to establish "the certainty of the fact of damage and the extent of damage." Mallen & Smith, *Legal Malpractice* § 35:13 at 1237 (2009 ed.). "The evidence cannot be remote, speculative, or uncertain." Mallen & Smith, *Legal Malpractice* § 35:13 at 1237-38 (2009 ed.).

Where a plaintiff fails to present probative evidence of damages, summary judgment is appropriate. For example, in *Edmonds v. Williamson*, 13 So. 3d 1283 (Miss. 2009), the plaintiff failed to present any evidence of injury or damages. In affirming summary judgment, the Supreme Court explained that *a plaintiff cannot establish a legal malpractice claim absent a showing that he suffered damages as a result of the alleged legal malpractice. Id.* at 1290-91. Because the plaintiff failed to present evidence on damages, there were no issues of fact and the legal malpractice claim failed as a matter of law. Similarly, in *Milligan v. Milligan*, 956 So. 2d 1066, 1077 (Miss. Ct. App. 2007), the plaintiff claimed in his complaint that he was entitled to damages in the amount of $2 million or $2,000 per month in rent for the use of his property, but he did not produce any evidence to justify these damages. Explaining that a party opposing summary judgment cannot rest on the mere allegations and denials in the pleadings, the Court affirmed summary judgment regarding

damages. *See also, e.g., Hudson v. Palmer*, 977 So. 2d 369, 382 (Miss. Ct. App. 2007) (explaining that "bare assertions are simply not enough to avoid summary judgment," and because there were no genuine issues of material fact as to whether the plaintiff suffered any damage from the defendant's alleged fraud, the defendant was entitled to summary judgment as a matter of law).

The record clearly establishes that Plaintiffs did not present any admissible evidence that they were damaged or the extent of any damages; therefore, Loyacono & Verhine are entitled to judgment as a matter of law. Plaintiffs' claim for damages is based solely on the "Morgan Settlement Matrix," which constitutes inadmissible opinion testimony and was properly excluded by the trial court.[8] It is evident that Plaintiffs' entire case is based on the claim that they should have received the settlement amounts that Keith Morgan decided to allocate among his clients. This conclusory allegation is insufficient to survive summary judgment. Each of Plaintiffs testified that their damages were based solely on Morgan's Settlement Matrix. R. 334-69 (Motion Exhibit 10, excerpts from Plaintiffs' depositions). In addition, Plaintiffs' answers to Defendants' interrogatories also take the position that Plaintiffs' claims for damages are based solely on Morgan's Settlement Matrix. For example, Pamela Robinson, one of the Plaintiffs, provided the following answers to Defendants' interrogatories:

---

[8] Whether the trial court properly excluded this Matrix and testimony related thereto is discussed *infra* Part II.B.

INTERROGATORY NO. 8: For each claim asserted by you or on your behalf in this action, state, describe, specify, itemize and quantify what you claim are the damages and other monies that you seek to recover in this action and from whom; to whom you claim those damages and other monies are owed and should be paid; and the identity and address of each person who has knowledge of the facts and documents that support your claimed damages.

ANSWER: As asserted in the First Amended Complaint Loyacono and Verhine are liable to me for the difference between what I received in gross settlement of my AHP claim ($200,000.00) and the gross amount which is set out in the Morgan chart – $300,000.00. The difference is $100,000.00.

INTERROGATORY NO. 11: With respect to your claim that your settlement award from AHP was inadequate, state, identify, and describe:

(a) Why you believe that the amount that you received was inadequate;
(b) What amount you claim you should have received;
(c) The facts, data, or other evidence that you rely on for your claim that you were entitled to a larger settlement award
(d) The documents supporting those facts and the persons with knowledge of those facts and documents.

ANSWER: Based on the Morgan chart, which I now understand was used to settle claims of similarly situated plaintiffs, who did not go through settlement with Loyacono and Verhine, but rather stayed with counsel of record [Keith Morgan], I believe I did not receive the true amount I should have received in this settlement. I received a gross settlement of $200,000.00. The correct amount according to the Morgan chart was $300,000.00 Furthermore, the settlements negotiated by Loyacono and Verhine do not correlate with the severity of each individual's injury category on the Morgan matrix.

R. 370-73 (Motion Exhibit 11, excerpts of Plaintiffs' interrogatory answers). The "Morgan chart" is the Morgan Settlement Matrix. RE. 15, R. 321-O to -P (Motion Exhibit 6). Each of Plaintiffs' answers are identical with the exception that they include their own settlement amount and the monetary amount they allege they would have received through Morgan's

Settlement Matrix.

The only evidence Plaintiffs offered to show and quantify their damages was the Morgan Settlement Matrix and Morgan's opinion testimony related thereto (even though he was not designated as an expert). However, the trial court excluded the Morgan Settlement Matrix and all testimony related thereto as inadmissible, speculative and opinion testimony offered by someone who is not an expert and was not designated as an expert witness. Inadmissible evidence cannot be used to defeat a properly supported motion for summary judgment. *See* Miss. R. Civ. P. 56(e) (requiring that evidence in support of or in opposition to a motion for summary judgment must be admissible).

Morgan's proposed opinions on his Settlement Matrix cannot be used to establish Plaintiffs' claimed damages because the evidence is speculative in nature. There is no evidence that Plaintiffs would have received the amount they claim they were due under the Morgan Settlement Matrix. Moreover, the "block settlement" that Morgan agreed to was a different type of settlement involving different circumstances than the Loyacono & Verhine settlement. Morgan made his block settlement five months after Plaintiffs agreed to the settlement offers obtained by Loyacono & Verhine. Because Morgan is not an expert and was not designated as an expert, he could not offer his opinions regarding what he thinks the Plaintiffs would have received if they settled their claims at a later date through him. In addition, Morgan admitted in his deposition that he took the lump sum and then divided up the money among the clients he represented. If he added the Loyacono & Verhine claimants

to the "pot" of money, the settlements would have had to have been divided up differently among the claimants because there would have been more claimants.

Plaintiffs have not offered any evidence other than the Morgan Settlement Matrix to show damages. Indeed, in response to Defendants' motion in limine, Plaintiffs conceded that the exclusion of Morgan's Settlement matrix and related testimony would be dispositive of the case. R. 854 (Plaintiffs' response to motion in limine). Aside from the offers that Loyacono & Verhine obtained for them, Plaintiffs have not presented any proposed evidence regarding a higher value of their claims other than Morgan's Settlement Matrix. Plaintiffs have no expert to testify that they would have received the same settlement award that Morgan's claimants received. Plaintiffs' sole expert, McMurry, does not state in his expert report that Plaintiffs would have received the same settlement award that Morgan's claimants received. McMurry's report does not quantify, describe, or state what Plaintiffs' damages were, and he can only testify to the opinions that are set forth in his report. Because Plaintiffs have no expert testimony or other evidence to quantify their damages, their alleged damages are speculative. An attorney is not liable for malpractice for a damage claim that is speculative. Mallen & Smith, *Legal Malpractice* § 21.3 (2009 ed.). Even if McMurry purported to rely on Morgan's Settlement Matrix to establish Plaintiffs' damages, he could not testify regarding that matrix at trial because the trial court properly excluded the evidence.

Plaintiffs failed to set forth specific facts based on admissible evidence sufficient to

establish the existence of each element of their claims, which includes damages and proximate cause. Because Plaintiffs failed to come forward with evidence that supports each element of their legal malpractice claim, the Court should affirm the circuit court's grant of summary judgment.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING THE MORGAN SETTLEMENT MATRIX AND TESTIMONY RELATED THERETO

A. Standard of Review

It is well settled that "[t]he standard of review for the admission or exclusion of evidence is an abuse of discretion." *Evans v. State*, 25 So. 3d 1054, 1057 (Miss. 2010). A court does not abuse its discretion in granting a motion in limine where the court determines that: "(1) the material or evidence in question will be inadmissible at trial under the rules of evidence; and (2) the mere offer, reference, or statements made during trial concerning the material will tend to prejudice the jury." *Id.* (quoting *Whittley v. City of Meridian*, 530 So. 2d 1341, 1344 (Miss. 1988)). Furthermore, the admission of expert testimony is within the sound discretion of the trial judge and will stand "unless [the Court] conclude[s] that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion." *Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31 (Miss. 2003).

B. Morgan's Settlement Matrix and Related Testimony Were Properly Excluded As Impermissible Opinion Testimony

The lower court did not abuse its discretion when it properly excluded Morgan's Settlement Matrix and his opinions related thereto. Plaintiffs intended to call Keith Morgan

at trial to give a variety of opinions which include an opinion that, if Morgan had represented Plaintiffs in their settlement negotiations with AHP, Plaintiffs would have received the monetary values set forth in Morgan's Settlement Matrix. That proposed testimony would amount to Morgan's opinions as to what he thought was the worth or value of his clients' claims against AHP based on the April 2001 aggregate settlement agreement between AHP and Morgan for other claimants, his opinions about the similarity of his clients' claims to Plaintiffs' claims, and his opinions about the value or worth of Plaintiffs' claims. Therefore, the lower court properly excluded Morgan's proposed testimony and his Settlement Matrix because it would be either inadmissible speculation or *opinion testimony* from a witness who has not been designated as an expert in this case and has not provided an expert witness report.

In his deposition in this case, Morgan admitted that the April 2001 settlement with AHP *was* a block settlement or lump sum settlement,[9] and that it was *he* who decided how much money would be allocated to each of his various clients:

> Q: Did you make a block settlement?
>
> A: We did
>
> * * *
>
> Q: And was the–was the settlement made going plaintiff by plaintiff, injury level by injury level, with AHP?

---

[9] Oddly enough, Morgan has admitted to entering into the very type of "block settlement" with AHP that Defendants have been accused of, but of which there is no evidence.

A: No.

* * *

Q: . . . if I understand it, you never made any effort to try to negotiate individual settlements with AHP?

A: No.

RE. 11 (Motion Exhibit 2, Morgan Depo., Jan 19, 2009, p. 108-109, 184). He further testified that:

Q: In your negotiations with AHP when y'all were negotiating for the $120 million, did you–*did you provide them with any documents showing how much of the settlement money you were asking for was going to initial op-outs versus intermediates?*

A: *No.*

Q: So I guess what I'm saying: Out of the money AHP gave you, *did you exercise your discretion as to how much should go to the intermediate opt-outs as a group and then how much should go to the individuals in the intermediate opt-outs?*

A: *Yes.*

Q: Did you get any medical experts to help you do that?

A: I didn't, no.

RE. 11 (Motion Exhibit 2, Morgan Depo., Jan. 19, 2009, p. 175) (emphasis added). Morgan testified that, *after* entering into the settlement agreement with AHP, he then prepared his Settlement Matrix on which he listed thirteen different "injury classification levels" and *he* assigned a monetary value to each level. Morgan also testified that, *before* he prepared the Settlement Matrix, (RE. 15, R. 321-O to -P), he prepared two earlier drafts in which he added

a level and he used different monetary values for some of the levels. RE. 12, R. 321-A to -H (Morgan Depo., Feb. 26, 2009, pp. 1-29); RE. 14, R. 321-K to -N (Morgan's first and second matrices).

Morgan's Settlement Matrix, his two earlier drafts of his final matrix, any testimony that he would offer about the April 2001 settlement, and how much of that block/lump sum settlement *he* decided to allocate to each of his clients are inadmissible *opinions* about how much of the block/lump sum settlement he thought should be allocated to each of his clients. The April 2001 settlement agreement with AHP clearly does not state what monies AHP agreed to pay for any particular claimant, nor has Morgan or Plaintiffs produced any such evidence. To the contrary, Morgan has admitted that *he* was the person who exercised *his discretion* to decide how much of AHP's block/lump sum settlement monies would be allocated to a given client of his. It is undisputed that Morgan joined with other lawyers as the "Coxwell Litigation Group" to enter into an aggregate settlement agreement with AHP that covered several hundreds of claims against AHP. AHP agreed to pay a total of $120 million to settle those claims *without* identifying any claimant or their respective claimed medical injuries, and without allocating to or putting a settlement value or "worth" on the claim of any given claimant.[10] With respect to Morgan's clients, it was Morgan who, *after*

[10] The aggregate settlement agreement Morgan was a party to is similar to the aggregate settlement agreement at issue in *Waggoner v. Williamson*, 8 So. 3d 147 (Miss. 2009) ("Based on an aggregate settlement agreement drafted by a representative of AHP and approved by Williamson and Miller, AHP would not allocate the $55 million offered to the Mississippi claimants and the $18.5 million to the Washington, D.C., and Virginia claimants, but rather required the settling attorneys to [do so].").

signing the aggregate agreement with AHP, decided who among his clients would be allocated and offered what monies. Morgan drafted several versions of his "Settlement Matrix" (none of which were ever disclosed to AHP), he devised thirteen different "injury classification levels," and he exercised his discretion to decide who among his clients fell into which level and what amount of money he would assign to each level. At each point in that process, Morgan came up with *his opinions* on, *e.g.*, how many injury classification levels there should be, what should be the criteria for each level, which of his clients fell into which level, and what did he think was the value or worth of a claim that fell within a given level, and how much money he was going to allocate to a given level and a client in that level.

Clearly, any testimony about what AHP agreed to pay to settle with a given claimant would be sheer speculation and hearsay, and any testimony by Morgan about what *he* considered to be the monetary value of a claim or the monetary value *he* assigned to a client's claim could be admissible only as the opinion of a qualified expert witness under Rule 702. Morgan, however, is not an expert. Plaintiffs did not designate Morgan as an expert witness, but instead expressly told the Court in a prior hearing (R. 854, Plaintiffs' response to motion in limine) that Morgan would not be offered as an expert witness. Therefore, there is no evidentiary basis on which to admit into evidence Morgan's Settlement Matrix, any testimony that he would offer about the April 2001 settlement, or how much of that block/lump sum settlement *he* decided to allocate to each of his clients.

In order to decide those issues and reach those several opinions, Morgan had to rely on something *more* than the experience or expertise of a average, randomly selected adult. Presumably, he relied on his knowledge, skill, experience, training or education. Yet, instead of designating and calling Morgan as an expert witness, *Plaintiffs expressly represented to the Court that Morgan was not going to be or testify as an expert witness, and they did not designate him as one*. Because Plaintiffs expressly represented that Morgan was *not* going to be an expert witness in this case, Plaintiffs cannot offer Morgan's testimony under Rule 702. They should not be allowed to circumvent Rule 702 and the rules that govern discovery and qualification of a proposed expert witness by offering the testimony as a "lay opinion" under Rule 701.

Plaintiffs contend that Morgan's testimony and Settlement Matrix are admissible under Rule 701, which provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to the clear understanding of the testimony or the determination of a fact in issue, and (c) *not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.*

(Emphasis added). The trial court correctly determined that Morgan's opinion testimony was not admissible under Rule 701, thereby refusing to allow Plaintiffs to use Rule 701 to offer opinion testimony by Morgan that, had he been designated as an expert witness, would be subject to the procedural rules governing the designation and discovery that apply to a proposed expert witness, and the qualification requirements of Rule 702. Because Morgan's

proposed opinion-riddled testimony is beyond that of the average, randomly selected adult, it clearly is not allowed under Rule 701. "[W]here in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a M.RE. 702 opinion and not a Rule 701 opinion." *Cotton v. State*, 675 So. 2d 308, 311 (Miss. 1996) (conviction reversed because of the improper admission of opinion testimony by a witness who was not designated as an expert and whose opinion required specialized knowledge).

Moreover, "Rule 701 does not open the door to any and all opinion testimony." *McGowen v. State*, 859 So. 2d 320, 345 (Miss. 2003) (quoting *Jackson v. State*, 551 So. 2d 132, 144-45 (Miss.1989)). In *Brown v. State*, 981 So. 2d 1007 (Miss. Ct. App. 2007), the court discussed the type of testimony that is allowed under Rule 701, and the interplay between Rules 701 and 702:

> Under Rule 701 of the Mississippi Rules of Evidence, a lay witness is permitted to give opinion testimony in certain limited circumstances. * * * If the witness is not testifying as an expert under Rule 702, his testimony in the form of opinions or inferences is limited to those which are: "(a) rationally based on the perception of the witness and (b) helpful to the clear understanding of his testimony or the determination of a fact in issue. * * * Rule 701 allows a lay witness to testify as to his opinion on matters of which he has first-hand knowledge which other lay people do not have. * * * In contrast where "in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a M.R.E Rule 702 opinion and not a Rule 701 [lay] opinion." * * * Rule 701 lay opinions require no specialized knowledge, whereas testimony requiring particular knowledge to assist the trier of fact is expert testimony governed by Rule 702.

The type of lay opinions that have been allowed under Rule 701 are not remotely akin to

Morgan's proposed opinion testimony. For example, Rule 701 has been held to allow testimony by a police investigator that, during the questioning of a criminal suspect, the suspect did not appear to be suffering from any mental disease or illness (*Brown v. State*, 981 So. 2d 1007 (Miss. Ct. App. 2007)); testimony by a police officer that a shoe print that he found at a crime scene appeared to be of the same pattern as the shoe print that he found at the defendant's house (*Smith v. State*, 725 So. 2d 922 (Miss. Ct. App. 1998)); and testimony by a witness about his impression of a testator's mental condition at the time of observation by the witness. (*In re Estate of Prine*, 208 So. 2d 187 (Miss. 1968)).

Plaintiffs rely on *Scafidel v. Crawford*, 486 So. 2d 370, 372 (Miss. 1986), for the proposition that Morgan's opinion testimony is permissible. *See* Plaintiffs' Opening Brief at 34-35. This reliance is misplaced. *Scafidel* does not support the use of Rule 701 to allow Morgan to give his opinions. In *Scafidel*, the defendant in a medical malpractice case called as witnesses two of the treating physicians, neither of whom had been designated as an expert witness in the case. Nevertheless, the trial court allowed each treating physician to testify to the facts and circumstances of his treatment of the plaintiff, including the statement that plaintiff was anemic. The Supreme Court held that the testimony was properly admitted:

> The question is whether these two fact witnesses crossed an impermissible line between fact testimony and expert opinion when they stated Mrs. Scafidel was anemic. We conclude they did not. Their opinions in this regard, according to their testimony, were acquired through their care and treatment of her during this illness. Just as they testified as fact witnesses that she had fever, chills, and diarrhea, so could they state, in our opinion, that she was anemic without becoming expert witnesses.

Scafidel does not discuss Rule 701, but nothing in that decision supports allowing Morgan to give his proposed speculative testimony or opinions on the basis of Rule 701. There simply is no comparison between the testimony of the treating physicians in *Scafidel* (their personal observations and findings from their care and treatment of a patient) and Morgan's proposed speculative and opinion-riddled testimony about, for example, how he exercised his discretion to devise the thirteen injury classifications levels of his Settlement Matrix, what medical criteria he assigned to a given level, how he decided what was the worth or value a given level, how he decided to put which of his clients in a given level and what to pay them, all of which would require experience or expertise beyond that of the "average, randomly selected adult." Rule 701 cannot be used to offer that kind of opinion testimony.

Plaintiffs could attempt to offer Morgan's proposed speculative and opinion-riddled testimony and his Settlement Matrix *only* if Morgan had been timely designated as an expert under the discovery rules and met the requirements of Rule 702. Plaintiffs, however, elected not to designate Morgan as an expert. Consequently, the trial court properly excluded his testimony. Because the testimony is not admissible under Rule 701 or 702, the trial court properly excluded Morgan's opinion testimony.

Morgan's Settlement Matrix and any testimony that he would offer about his settlements were properly excluded on the grounds of relevancy, hearsay, and the lack of any supporting documents. Morgan did not produce any documents and notes from the

negotiations with AHP that led to the April 2001 settlement. Indeed, Morgan testified that he threw away or destroyed or cannot find any of the records that he has on the Varas & Morgan clients for whom he settled with AHP, including the medical records, echocardiograms and settlement documents for a given client.

Q: Now, are there any other documents that you have that reflect the settlement, the actual settlement, with American Home Products?

A: No.

Q: Well, what happened? Were there documents; you just don't have them? What- -

A: No. There were no other documents that I'm aware of.

Q: What about the form of release or the settlement you got from your clients?

A: The releases would have gone to AHP. I would have had copies of them, but I don't have them. I don't have them.

RE. 11 (Morgan Depo., Jan. 19, 2009, pp. 127-28). Morgan also testified that, although he prepared the Morgan Settlement Matrix using a matrix that George Fleming (another lawyer who sued AHP) prepared and gave to him, Morgan no longer had the Fleming matrix ("I didn't retain a copy of it" and "I have no idea" where it is). RE. 11 (Morgan Depo., Jan 19, 2009, p. 109-10). The trial court properly concluded that Defendants are thus deprived of the documents that Morgan allegedly used to prepare his matrix and allocate monies to his clients.

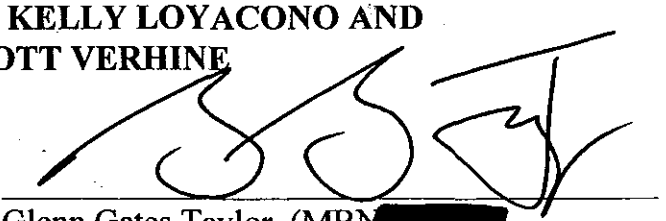
CONCLUSION

The Court should affirm summary judgment. The circuit court correctly determined that Plaintiffs failed to present evidence on causation or damages and, therefore, failed to present an issue on each element of their legal malpractice claim. Because there were no genuine issues of material fact and Loyacono & Verhine were entitled to a judgment as a matter of law, this Court should affirm the lower court's grant of summary judgment. In addition, the trial court did not abuse its discretion in excluding Morgan's Settlement Matrix and his opinion testimony related thereto as inadmissible opinion testimony. The Court should affirm the decision of the circuit court below.

This the 6th day of August, 2010.

Respectfully submitted,

PAUL KELLY LOYACONO AND
E. SCOTT VERHINE

By: 

Glenn Gates Taylor (MBN [redacted]
Christy M. Sparks (MBN [redacted]
COPELAND, COOK, TAYLOR & BUSH, P.A.
600 Concourse, Suite 100
1076 Highland Colony Parkway (39157)
Post Office Box 6020
Ridgeland, MS 39158
Telephone: 601-856-7200
Facsimile: 601-353-6235

ATTORNEYS FOR APPELLEES
PAUL KELLY LOYACONO AND
E. SCOTT VERHINE

CERTIFICATE OF SERVICE

I, Glenn Gates Taylor, hereby certify that I have this day served via U.S. Mail, postage prepaid, a true and correct copy of the foregoing to the following:

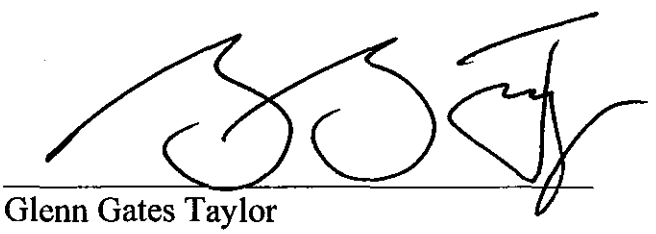
Honorable Kosta N. Vlahos
5 Bayou Oaks Lane
Gulfport, MS 39503

David G. Hill, Esq.
David L. Minyard, Esq.
Hill & Minyard, P.A.
Post Office Box 429
Oxford, MS 38655

Ronald W. Lewis, Esq.
2621 West Oxford Loop, Suite C
Oxford, MS 38655

T. Kilpatrick, Esq.
The Kilpatrick Firm
1124 N. Lamar Blvd.
Oxford, MS 38655

This the 6th day of August, 2010.



Glenn Gates Taylor