2009-CA-01547 RT

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A. PLAINTIFFS' CLAIM FOR ATTORNEY MALPRACTICE BASED UPON BREACH OF FIDUCIARY DUTY WAS PROPERLY RAISED BEFORE THE TRIAL COURT; THUS, THE PROCEDURAL BAR DOES NOT APPLY.

Defendants properly cite existing Mississippi common law that Mississippi appellate courts "need not consider maters raised for the first time on appeal, which 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. Daniels, 904 So.2 d 172, 183 (¶ 26) (Miss. 2005)). In the Alexander opinion, this Court explained that the defendant "may" have been afforded relief pursuant to Section 29-1-87 of the Mississippi Code of 1972, as amended, had he "chosen in his pleadings and at trial to avail himself of this statute . . . . His pleadings are silent as to this issue," thus, this Court imposed the procedural bar as to his newly-stated claim. 904 So. 2d at 183 (¶ 26). Certainly Mississippi law requires parties to first raise an issue before the trial court in order for appellate courts to later review the issue. However, the issue need only be "raised." There exists no sub-requirement that the party additionally expound upon each and every issue in pages-long, law-review prose. The only question to be determined in applying the procedural bar is whether the issue was raised at the trial stage such that the trial court had the opportunity to rule on the issue. Common sense dictates that a party may raise an issue in response to a motion in limine, a response to motion for summary judgment, or, as demonstrated by the Alexander opinion, in his initial pleadings, or at some other stage in the litigation. Again, the issue need only be raised in order to successfully overcome the procedural bar.

In the instant Plaintiffs' First Amended Complaint immediately under the heading titled "CLAIMS," the following subheading appears in capitalized, bold font: **ATTORNEY**

MALPRACTICE – BREACH OF FIDUCIARY DUTY AND MATERIAL MISREPRESENTATION AND OMISSION. R. at 34 (Amended Complaint). Following that subheading, the Complaint reads, "Defendants Loyacono and Verhine committed attorney malpractice by breach of fiduciary duty to their clients . . ." and, tracking the standard-of-conduct language utilized in the breach-of-fiduciary duty arena, the Amended Complaint further states "Defendants Loyacono and Verhine had a duty to deal with each plaintiff herein in a manner of utmost honesty, good faith, integrity, and fidelity."[1] *Id.* There is no mention of negligence within this claim and certainly the language tracks that of a breach-of-fiduciary-duty claim.

Further, the Plaintiffs' Memorandum of Facts and Authorities in Opposition to Defendants' Motion for Summary Judgment (hereinafter "Memorandum") begins with the introduction, "Defendants are mistaken that Plaintiffs herein are obligated in the trial of this case prove by a preponderance of the evidence that they would have prevailed in a trial of their diet drug claims against American Home Products (AHP)." R. at 534. All the material facts upon which the Plaintiffs base their multiple claims are then set forth under the Material Facts subheading. R. at 535. Immediately prior to stating the individual claims, the Memorandum sets forth the duty of care, which is the negligence component of a legal malpractice claim, and the duty of loyalty, which is the fiduciary-duty component of a legal malpractice claim. R. at 546-B – 546-C. Following this basic summation, the Memorandum addresses each and every claim then pending. After addressing the negligence-based claim for legal malpractice, the Memorandum displays a new subheading addressing Plaintiffs' second claim for breach-of-fiduciary-duty claim in bold, capitalized lettering displayed as follows: **ATTORNEY MALPRACTICE – BREACH OF FIDUCIARY DUTY AND MATERIAL**

[1] The underlying facts supporting this claim were set forth immediately supra under the subheading "**UNDERLYING FACTS REGARDING DEFENDANTS LOYACONO AND VERHINE.**" R. at 29.

MISREPRESENTATION AND OMISSION.[2] R. at 546-G. This subsection then enunciates the fiduciary duties owed to Plaintiffs by Defendants and how these particular Defendants violated those fiduciary duties.[3] R. at 546-G – 546-H.

There seems little more that one can do to properly preserve an issue for appeal aside from separately identifying and defining his claim in the complaint and again in response to a motion for summary judgment . . . in bold, capitalized font no less. The instant Plaintiffs preserved the issue of breach of fiduciary duty and, as such, this issue is ripe and properly before this honorable Court for review.

B. PLAINTIFFS' INIITAL BRIEF DID NOT ARGUE THAT THE PROXIMATE CAUSATION REQUIREMENT IS EXMEPTED IN BREACH-OF-FIDUCIARY-DUTY CLAIMS; RATHER, THE CAUSATION REQUIRED IN BREACH-OF-FIDUCIARY-DUTY CLAIMS MUST BE TAILORED TO THE INJURY.

Defendants mistakenly argue that Plaintiffs "are asking the Court to carve out an exception of 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." Br. Appellees 22. Defendants maintain their trial-level position that in every legal malpractice suit, "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 of omission at issue is negligence or breach of fiduciary duty." Br. Appellees 23.

Plaintiffs stand on their Opening Brief as to the clear inapplicability of the trial-within-a-trial proximate causation standard in the breach-fiduciary-duty arena. However, just to be clear,

[2] This claim is then followed by a discussion of the third claim of conspiracy.

[3] Admittedly, the word "negligence" does appear once in the breach-of-fiduciary duty subsection of the Memorandum; however, the mere inartful use of the word "negligence" is not fatal. It is clear from the title of the subsection and the enunciation of the fiduciary duties owed to Plaintiffs by Defendants that this subsection speaks to the fiduciary breach – as opposed to negligence – that damaged the Plaintiffs.

Plaintiffs never argued that proximate cause is exempted in the breach-of-fiduciary-duty arena of legal malpractice. Rather, Plaintiffs correctly stated that Mississippi common law demands that proof of proximate cause in breach-of-fiduciary-duty claims should "be tailored to the injury the client claims and the remedy he elects." Singleton v. Stegall, 580 So. 2d 1242, 1245 (Miss. 1991).

The explanation of Justice Prather set forth in the Plaintiffs' brief that proximate cause and the damages incurred naturally flow from a finding that the fiduciary breach itself occurred does not invoke a strict liability standard.[4] Justice Prather was merely identifying that the same underlying facts that constitute the breach generally constitute the proximate causation as well when that the act itself logically damages the plaintiff. For instance, the attorney in Pierce[5] who committed adultery with his client's wife breached a fiduciary duty to his client; moreover, the resulting injury naturally flows from the act such that the underlying fact -- *id est* the adultery -- constitutes the proximate cause resulting in injury to the client. The distinguishable point seems to be the egregiousness of the attorney's fiduciary breach. Some breaches are so egregious that gut instinct guides us to the undeniable fact that the client suffered damages as a result; when a breach of this magnitude occurs, such damages can be said to naturally flow from the breach. There are too many circumstances, such as committing adultery with a client's spouse, that give rise to a viable breach-of-fiduciary duty claim such that it would be impossible for this Court to enunciate one bright-line standard for proximate causation. Hence, proximate causation must be tailor-fit to the circumstances.

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[4] As Justice Prather opined in the Hartford dissent,"if the jury found that [the attorney defendants] Coker and Williamson breached their fiduciary duty, it naturally follows that Coker's and Williamson's breach of duty was the proximate cause of [plaintiff] Foster's injury." Hartford Accident & Indem. Co., v. Foster, 528 So. 2d 155, 285 (Miss. 1988) (Prather, J., dissenting).

[5] Pierce v. Cook, 992 So. 2d 612 (Miss. 2008).

In this case, the "big picture" is that Defendants breached various fiduciary breaches in order to garner higher percentage of attorneys fees on a lower settlement amount to the detriment of the instant Plaintiffs. These Plaintiffs suffered financial damages as a result of no less than thirteen separate breaches of fiduciary duties by the Defendants. R. at 837 (Pl.s' Expert Report). The breaches pled by Plaintiffs rise to the level of egregiousness that one can easily ascertain that the requisite proximate cause flows naturally from the breach itself. This is not to say that the element of proximate causation is exempted from this type of legal malpractice claim. On the contrary, proximate cause is simply all too apparent in the instant circumstances.

C. ADDITIONAL EXPERT TESTIMONY IS NOT NECESSARY UNDER THE INSTANT CIRCUMSTANCES

Defendants argue that due to the "complicated nature of the facts," that expert testimony would be necessary in order to prove proximate cause. Defendants' brief concedes that there is no *per se* requirement of expert testimony in the breach-of-fiduciary-duty arena; however, they argue that jurors would require expert testimony in order to determine the strengths and weaknesses of the Plaintiffs' underlying claims against AHP and in order to determine whether the Plaintiffs' settlements were inadequate. First, clearly Defendants' argument as to the necessity of expert testimony hinges on their continued position that Plaintiffs must prove success in the underlying litigation; thus, this issue is moot pursuant to Mississippi law regarding breaches of fiduciary duties as opposed to negligence-based legal malpractice claims.[6] Second, Plaintiffs properly designated an expert, albeit a non-medical expert, to provide testimony as to the fiduciary duties owed to the Plaintiffs and resulting breaches of said duties.

Third and more importantly, the entire thrust of Plaintiffs' case rests on facts, the ascertainment of which does not require the jury to possess any specialized knowledge or skill

[6] Plaintiffs stand on their opening brief as to the inapplicability of proving that they would have been successful as to their underlying claims against AHP. Consequently, Plaintiffs will not and need not provide any medical expert testimony on the same at the trial of this matter.

set. For example, Plaintiffs will prove the underlying fact that Defendants knowingly and secretly negotiated settlements behind the backs of counsel of record through a series of documentary evidence to and from Defendants wherein they admit that they are secretly negotiating a settlement behind the back of counsel of record – the review of these documents and final conclusion as to whether this action occurred requires no specialized knowledge. Likewise, the statement from Brian Leitch to attorney-of-record Keith Morgan that he would settle the lowest claims for One Hundred Thousand Dollars, which is less than the lowest claims received by virtue of Defendants' handling of their claims, requires no specific skill set for the jury to determine the veracity of such testimony. The jury will not be called on to review echocardiograms in order to render some medical evaluation; the Plaintiffs' main argument as to the echocardiograms is that the Defendants failed to review said echocardiograms when they began negotiating settlement amounts as between Plaintiffs.

The jurors will not weigh evidence requiring some medical or scientific knowledge. The only specialized knowledge that would aid the jury is of course that of fiduciary duties, for which the Plaintiffs properly designated William F. McMurry as an expert to testify. The jurors will then be left to weigh the probability of whether certain actions by Defendants took place and, if so, whether those actions constitute a breach of fiduciary duty, as explained by the Plaintiffs' expert, and the financial damage that those actions caused.

D. DEFENDANTS' ARGUMENT THAT PLAINTIFFS FAILED TO PRESENT PROOF OF DAMAGES IS NOT SUPPORTED BY THE FACTS.

Defendants argue that the Plaintiffs failed to present any proof of damages, which in and of itself renders summary judgment proper in the instant case. Br. Appellees 24, 27-28. The basic gist of Defendants' argument is that Plaintiffs failed to present admissible evidence as to damages given the trial court's exclusion of the Morgan Settlement Matrix and all testimony

related thereto[7], that Plaintiffs' basing their damages on the Morgan Settlement Matrix is merely a "conclusory allegation" insufficient to survive summary judgment, and, because Plaintiffs have no other means of quantifying their damages, their alleged damages are speculative and, thus, cannot be proven. Br. Appellees 29, 32.

Proof of damages requires two things: one, proof that the plaintiff is actually damaged (*id est*, the existence of damage), and, two, proof of the extent of such damage in as precise a measure as possible under the circumstances. There exists a "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount. Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 562 (1931). "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Id.*

There should be no question as to the existence of genuine issues of fact regarding the damage itself in the facts and circumstances as pled by Plaintiffs and set forth in their response to the motion for summary judgment; thus, the real question at issue is the *extent* of the damages. Indeed, Defendants' own argument focuses on the *extent* of damage as opposed to the *existence* of damage. To be clear, Plaintiffs entire claim does not rest upon the Morgan Settlement Matrix; even had Keith Morgan not settled the remaining clients (thus no Morgan Settlement Matrix), the instant Plaintiffs would have still been damaged in that the Defendants breached multiple fiduciary duties owed to them *and* in that they received lower settlement amounts as a result of those breaches.

[7] Plaintiffs stand on their brief in that such evidence should not have been excluded.

This Court succinctly defined the requisite burden of proof as to the extent (as opposed to existence) of damages in the recent J.K. v. R.K. decision as follows:

> It is well-understood that in an action seeking damages, the plaintiff bears the burden of proof as to the amount of damages. Puckett Machinery Co. v. Edwards, 641 So. 2d 29, 36 (Miss. 1994) (citing City of New Albany v. Barkley, 510 So. 2d 805, 808 (Miss.1987)). This requires the plaintiff to place into evidence such proof of damages as the nature of case permits, with as much accuracy as is reasonably possible. Thomas v. Global Boat Builders & Repairmen Inc., 482 So. 2d 1112, 1116 (Miss. 1986) (citation omitted). "Where the existence of damages has been established, the plaintiff will not be denied the damages awarded by a [fact finder] merely because a 'measure of speculation and conjecture is required' in determining the amount of the damages." TXG Intrastate Pipeline Co. v. Grossnickle, 716 So. 2d 991, 1017 (Miss. 1997) (quoting Piney Woods Country Life Sch. v. Shell Oil Co., 905 F.2d 840, 845-46 (5th Cir. 1990)). As it is well-recognized in Mississippi, "a party will not be permitted to escape liability because of the lack of a perfect measure of damages his wrong has caused." Aqua-Culture Technologies, Ltd. v. Holly, 677 So. 2d 171, 184 (Miss. 1996) (quoting R & S Dev., Inc. v. Wilson, 534 So. 2d 1008, 1012 (Miss. 1988)).

30 So. 3d 290, 299 (¶ 34) (Miss. 2009).

Thus, even were it determined that the Morgan Settlement Matrix constitutes an imperfect calculation of the settlement dollars Plaintiffs should have received, it is the best calculation that Plaintiffs can possibly proffer and, as such, the Plaintiffs have satisfied the requisite burden of proving damages. There simply exists no yardstick for perfectly measuring the dollar-figure attributable to breaches of fiduciary of duty due to the very nature of this type of breach, but juries are called on to make such probable estimates in other amorphous situations as well, for instance, pain and suffering damages. Again, Plaintiffs would note that they are not only utilizing the settlement dollars of similarly-situated clients but are using the settlement figures from their actual attorney of record, who – but for Defendants' wrongful acts – would have settled their claims. Inasmuch as policy considerations, Defendants should bear the risk of any resulting uncertainty caused by their actions. To hold otherwise would condone a substantial injustice and further injure these and future plaintiffs while relieving the wrongdoers.

E. THE TRIAL COURT ABUSED ITS DISCRETION BY EXCLUDING THE MORGAN SETTLEMENT MATRIX AND TESTIMONY RELATED THERETO.

Plaintiffs largely stand on their Opening Brief so as not to belabor this issue; however, a few finer points should be made. Again, the standard for review of the admissibility of evidence is abuse of discretion; however, "[t]he discretion of the trial court must be exercised within the boundaries of the Mississippi Rules of Evidence." Johnston v. State, 567 So. 2d 237, 238 (Miss 1990).

Defendants' argument as to the inadmissibility of the Morgan Settlement Matrix and testimony related thereto rests on two theories: one, that the amount of money Keith Morgan allocated to each client constitutes an opinion as to how much he thought his or her claim was worth, and two, that he relied on specialized expertise to arrive at the amount he allocated to each client thus rendering his testimony on the issue opinionated. As for the first theory, the amount of money Morgan actually allocated to each client indeed constitutes a fact. To take the issue further begs the constraints of common sense. Were this Court to accept Defendants' theory, then, theoretically, what would constitute a fact anymore? If a man purchases his home for Two Hundred Thousand Dollars, then he as a matter of fact bought his home for Two Hundred Thousand Dollars; Two Hundred Thousand Dollars is *not* an opinion as to how much he or the bank thought the house was worth. The fact remains that he bought if for Two Hundred Thousand Dollars. Likewise, the fact remains that those clients included in the Morgan Settlement Matrix received that specific amount of money as indicated by that matrix.[8] The matrix does not indicate how much money Keith Morgan *thought* his client's claims were worth.

[8] In response to footnote 9 of Defendants' Brief, Plaintiffs want to make clear that there is nothing *per se* inappropriate with block settlements in general; Plaintiffs do argue, however, that Defendants did in fact reach a lump sum settlement figure with AHP and then arbitrarily distributed those fund and negotiated monies as between clients under the false pretense that the clients were somehow negotiating with AHP vis-à-vis the Defendants.

The matrix indicates what each client received. To take the reverse, what if each of those clients who received money pursuant to the Morgan Settlement Matrix testified as to how much he or she received, would that somehow constitute an opinion? Of course not. Certainly Morgan has just as much personal knowledge of the amount that each client received as the client himself possesses as a matter of fact.

As for the second argument, Morgan utilized no specialized expertise to arrive at the amount he allocated to each client. Certainly Morgan distributed the monies pursuant to different levels of injury; however, Morgan is neither a doctor nor otherwise especially skilled at making medical determinations. The fact that claimants with different levels of injury receive different levels of money in a class action lawsuit is within the common knowledge of the average person this day and age.[9] Thus, assuming arguendo, those settlement amounts and testimony related thereto constitute opinions, those opinions were not based on experience or expertise beyond that of the average person and, consequently, should be admitted as Rule 701 lay opinion.

Further assuming arguendo that the Morgan Settlement Matrix and testimony related thereto (1) constitutes opinions *and* (2) were based on specialized expertise beyond that of the average person, such opinions would be analogous to the treating-physician standard enunciated in Scafildel v. Crawford, 486 So. 2d 370 (Miss. 1986), APAC Mississippi, Inc. v. Johnson, 15 So. 3d 465 (Miss. Ct. App. 2009), and Griffin v. McKenney, 87 So. 2d 425 (Miss. Ct. App. 2003) and would still be properly admissible under Rule 701. The treating-physician standard allows a person of expertise to testify as a lay witness pursuant to Rule 701 if his testimony is limited to his actual first-hand knowledge of his treatment of the patient and is limited to that

[9] Opinions based on common knowledge are properly Rule 701 lay opinions. Boone v. State, 811 So. 2d 402 (Miss. Ct. App. 2001) (reasoning that knowledge of computer drives was so common that one need not be an expert to know how to search computer drives).

particular context. *Id.* For instance, in Griffin, the Mississippi Court of Appeals held that testimony comprised of technical knowledge outside the range of knowledge of an ordinary layperson constitutes lay opinion testimony where said testimony is limited to the physician's care and treatment of the patient. 87 So. 2d 425. Any testimony from Morgan would be based on his personal observations made during his representation of his clients, including the instant Plaintiffs, which is essentially the same circumstance of a treating physician to his patient, and Mississippi law clearly allows the admission of such evidence under Rule 701 as opposed to Rule 702.

More importantly, the sums of money that those clients received constitute facts upon which the jury can and should consider in rendering its decision as to how much the instant Plaintiffs should have received in settlement dollars. In this vein, the United States Supreme Court, quoting a Michigan Supreme Court decision, has stated:

> Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.

Story Parchment Co., 282 U.S. at 562 (quoting Allison v. Chandler, 11 Mich. 542, 550-556 (1863).

The inescapable truth is that there is no perfect measure of damages in this or any other tort. However, Plaintiffs have a right and an obligation to put forth their best measure of damage. The fact is that those clients included in the Morgan Settlement Matrix are as closely situated to the instant Plaintiffs as possible and that the instant Plaintiffs were represented by Keith Morgan as their attorney of record. More importantly, Keith Morgan would have settled the instant Plaintiffs' claims with those claims represented in the matrix but for the Defendants'

fiduciary breaches. Thus, the matrix, which consists of facts, and testimony related thereto represents the truest measuring stick available for this type of action.

IV.

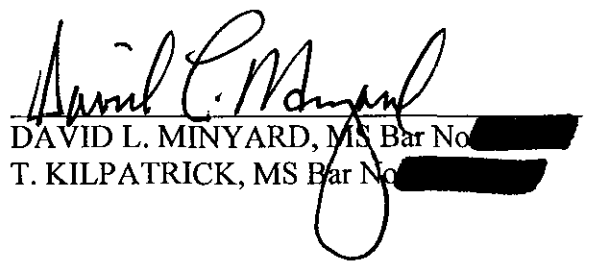
CONCLUSION

The lower court applied an erroneous legal standard to the Appellants' breach-of-fiduciary- duty legal malpractice claim, and, therefore, the Appellants respectfully pray that this Court will reverse the lower court's grant of summary judgment and remand this matter for trial. The matrices Morgan formulated to allocate settlement monies to his clients and any testimony concerning the Morgan Settlement Matrix constitute facts, and, consequently, the lower court abused its discretion in excluding this evidence, which the Plaintiffs' respectfully pray this Court will reverse.

DATED this 22nd day of September, 2010.

RESPECTFULLY SUBMITTED,

PEGGY CRIST, et al, Plaintiffs

BY: 

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V.

CERTIFICATE OF SERVICE

I, DAVID L. MINYARD, attorney for the Plaintiffs/Appellants in the above-referenced matter, do hereby certify that I have this day served a true and correct copy of the Appellants' Reply Brief via first class United States Mail, postage prepaid, on the following persons at these addresses:

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