IN THE COURT APPEALS FOR THE STATE OF MISSISSIPPI

CASE NO. 2009-TS-01547-COA

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
PLAINTIFFS/APPELLANTS

VS.

PAUL KELLY LOYACONO AND E. SCOTT VERHINE
DEFENDANTS/APPELLEES

APPEAL FROM THE CIRCUIT COURT
OF
WARREN COUNTY, MISSISSIPPI

APPELLANTS' OPENING BRIEF

DAVID L. MINYARD, MS BAR NO. [redacted]
Hill & Minyard, P.A.
1210 Office Park Drive, 3rd Floor
P.O. Box 429
Oxford, Mississippi 38655-0429
Telephone (662) 234-4315

T. KILPATRICK, MS Bar No. [redacted]
The Kilpatrick Firm, PLLC
1124 N. Lamar Blvd.
Oxford, Mississippi 38655
Telephone (662) 236-2007

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II.

CERTIFICATE OF INTERESTED PERSONS

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

Honorable Kosta N. Vlahos, Special Judge
Peggy Crist, Plaintiff/Appellant
Theresa Edwards, Plaintiff/Appellant
Patricia Guthrie, Plaintiff/Appellant
Jane Hamilton, Plaintiff/Appellant
Helen Heard, Plaintiff/Appellant
Bertha Mixon, Plaintiff/Appellant
Jennie Parker, Plaintiff/Appellant
James Reed, Jr., Plaintiff/Appellant
Glenda Rivers, Plaintiff/Appellant
Pamela Robinson, Plaintiff/Appellant
Karen Thornton, Plaintiff/Appellant
Virginia Townsend, Plaintiff/Appellant
Vera Wells, Plaintiff/Appellant
Mary Whittington, Plaintiff/Appellant
Linda Williams, Plaintiff/Appellant
Peggy Winters, Plaintiff/Appellant
Ron Lewis, Esq., Plaintiffs'/Appellants Trial Counsel
David G. Hill, Plaintiffs'/Appellants' Trial Counsel
David L. Minyard, Plaintiffs'/Appellants' Trial/Appellate Counsel
T. Kilpatrick, Esq., Appellants' Appellate Counsel
Glenn Gates Taylor, Esq., Appellees' Trial/Appellate Counsel
Christy M. Sparks, Esq., Appellees' Trial/Appellate Counsel
Paul Kelly Loyacono, Defendant/Appellee
E. Scott Verhine, Defendant/Appellee

DATED this the 4th day of May, 2010.

DAVID L. MINYARD, MS Bar N[redacted]
T. KILPATRICK, MS Bar No[redacted]
Attorneys of Record for Appellants

III.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

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IV.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs believe that oral argument would assist the Court in reaching a just decision in this case because of the specific facts of this case and the issues presented in this appeal. Accordingly, Plaintiffs request that oral argument be granted.

V.

JURISDICTIONAL STATEMENT

This Court enjoys appellate jurisdiction over this action pursuant to §11-51-3 of the Mississippi Code, which provides that an appeal may be taken to the Supreme Court from any final judgment of a circuit or chancery court in a civil case, not being a judgment by default, by any of the parties or legal representative of such parties.

VI.

STATEMENT OF ISSUES

1. THAT THE TRIAL COURT ERRONEOUSLY APPLIED THE STANDARD OF LAW RELATED TO LEGAL MALPARACTICE BASED ON THE FACTS OF THIS CASE. ALTERNATIVELY, THE APPELLATE COURT SHOULD RECOGNIZE THAT THE FACTS OF THIS CASE WOULD REQUIRE FURTHER CLARIFICATION OF THE APPLICATION OF LAW RELATED TO LEGAL MALPRACTICE LAWSUITS.

2. THAT THE TRIAL COURT ERRONEOUSLY EXCLUDED THE KEITH MORGAN MATRIX AND RELATED TESTIMONY THERETO FROM THIS CASE.

VII.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Plaintiffs[1] had been represented by attorneys Paul Kelly Loyacono and E. Scott Verhine (hereinafter referred to collectively as "Loyacono & Verhine") in actions against American Home Products Corporation (hereinafter referred to as "AHP") due to Plaintiffs' use of the diet drugs "Fen-phen," Pondimin and Redux. On January 5, 2004, Plaintiffs filed suit in Hinds County Circuit Court against their former attorneys Loyacono & Verhine and certain law firms and attorneys for AHP[2] asserting claims for legal malpractice based upon breach of fiduciary duty, negligence, gross negligence and conspiracy. Plaintiffs essentially alleged Loyacono & Verhine knowingly negotiated inadequate settlement agreements for their own financial gain and knowingly made material misrepresentation to induce Plaintiffs to accept such settlement agreements. Loyacono & Verhine filed a motion to dismiss or, in the alternative, for summary judgment on the ground that Plaintiffs' claims were barred by the statute of limitations, upon which the lower court did in fact grant summary judgment. Plaintiffs appealed to this Court, and this Court affirmed in part and reversed and remanded in part.[3]

On remand, the lower court bifurcated discovery such that the first phase of discovery was dedicated to determining those Plaintiffs whose claims were barred due to the statute of limitations. Defendants then filed a motion for summary judgment to dismiss certain Plaintiffs, which was denied by the lower court on June 17, 2008. The parties then entered into the second

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[1] For ease of identification and to avoid confusion, this Brief will refer to the instant Appellants as "Plaintiffs."

[2] All of these AHP-related defendants were later dismissed by the trial court.

[3] Channel v. Loyacono, 954 So.2d 415 (Miss. 2007). This Court held that if a Plaintiff knew prior to January 1, 2001, of any alleged wrongdoing by Loyacono & Verhine, his claims were barred by the statute of limitations. Id. at 422. The issue was remanded due to the fact that the record did not specify the time by which each Plaintiff had notice of any wrongdoing. Id. at 423.

phase of discovery regarding Plaintiffs' substantive claims. On March 10, 2009, Loyacono & Verhine filed Defendants' Motion for Summary Judgment and Defendants' Motion in Limine. R. at 247, 252. In response to Defendants' Motion for Summary Judgment, Plaintiffs conceded that their separate claims for negligence and gross negligence should be dismissed as they were subsumed into their claim for legal malpractice. R. at 532, 546-I. Thus, only Plaintiffs' claims for (1) legal malpractice based upon breach of fiduciary duty and material misrepresentation and (2) legal malpractice based upon negligence and (3) conspiracy remained.

On March 23, 2009, the lower court conducted a hearing on Defendants' Motion for Summary Judgment and on the limited issue of Defendants' Motion in Limine seeking to exclude Keith Morgan's settlement matrices and testimony related thereto. The lower court sustained Defendants' Motion in Limine in regard to Morgan's settlement matrices and related testimony and found:

> [t]hat evidence concerning the Keith Morgan Matrixes [sic], which were based, to a degree, on another attorney's matrix, is inadmissible on the grounds of hearsay, lack of any supporting documentation, the failure to designate Morgan as an expert, and speculation. The testimony by Morgan about what he, without any medical support, considered to be the existence of a claim, would be speculative, hearsay, and would only be admissible under Rule 702. Rule 701 clearly states that a witness, not designated as an expert, cannot present evidence which is: "***...based on scientific, technical, or other specialized knowledge within the scope of Rule 702.***" (emphasis added).

RE-3.

The lower court likewise sustained Defendants' Motion for Summary Judgment. The lower court held that, in order to establish a claim for legal malpractice, 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) injury that was proximately caused by the lawyer's negligence." RE-2 at 890 (citing Wilbourn v.

Stennett, Wilkinson & Ward, 687 So.2d 1205, 1215 (Miss. 1996)). Citing the Wilbourn opinion, the trial court additionally held that, in order for Plaintiffs to establish proximate cause, they had the burden of proving that "'but for the attorney's negligence, he would have been successful in the prosecution or defense of the underlying action.'" RE-2 at 890 (citing Wilbourn, 687 So.2d at 1215)). The lower court held:

> In this case, Plaintiffs were required to make out a prima facie case that, if Plaintiffs 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. Plaintiffs failed to present any evidence to establish that they would have successful in their underlying tort claims against AHP, or that, if successful, they would have been awarded more money than they received in the settlements at issue. Plaintiffs' only designated expert witness, William McMurry, an attorney from Kentucky, did not express any opinions as to whether Plaintiffs would have been successful in their underlying claims against AHP. Furthermore, Plaintiffs failed to designate a medical expert to establish proximate cause in the underlying case, i.e., to establish that each Plaintiff had a medical injury, and that such alleged injury was proximately caused by an AHP diet drug. Without such legal and medical expert testimony, Plaintiffs cannot prove their case.

RE-2 at 890.

The lower court entered the Final Judgment dismissing with prejudice Plaintiffs' claims against Loyacono & Verhine on August 25, 2009. RE-4. Plaintiffs noticed their appeal to this honorable Court on September 23, 2009. RE-5.

B. STATEMENT OF FACTS

1. Summary: Rather than collect Twenty-five Percent of the attorneys fees on a higher settlement, Loyacono & Verhine intentionally set out to collect One Hundred Percent of the attorneys fees on a lower lump sum settlement for their clients (including the Plaintiffs) through a course of wrongful conduct and numerous breaches of fiduciary duties owed Plaintiffs by Defendants. Loyacono & Verhine forced a backdoor, bottom-dollar settlement so that they

could obtain their increased attorneys fees before the sole attorneys of record could learn of their scheme. Loyacono & Verhine materially misrepresented facts to clients, negotiated the actual lump sum settlement monies as between their own clients and failed to distribute settlement monies to the Plaintiffs based on their medical injury pursuant to some sort of scale or matrix, such that a value is assigned to each client's claim. Had the Defendants not breached multiple fiduciary duties to the clients, the Plaintiffs' claims would have been settled for a far greater sum of money.

2. Verhine Approaches Morgan to Handle "Fen-phen Claims: Toward the end of year 1999, attorney Keith Morgan (of the law firm Varas & Morgan) informed Defendant attorney Scott Verhine that Morgan was in the process of developing "Fen-phen" cases. R. at 314 (Morgan Dep.). Verhine, who practiced law individually in Vicksburg, Mississippi, advised Morgan that he could develop clients in Vicksburg and asked Morgan to be associated on those cases and "handle it for us." R. at 314 (Morgan Dep.).

3. The Hiring of Loyacono & Verhine: In February and March of 2000, Loyacono & Verhine entered into written contracts to represent fifty-five local individuals (hereinafter referred to as "the clients), including the present Plaintiffs, against AHP for injuries sustained through the use of certain diet drugs manufactured by AHP including "Fen-phen," Pondimin and Redux. R. at 321-Q (Verhine Affidavit).

4. Loyacono & Verhine Associate Morgan and Morgan's Litigation Group: In late February or early March of 2000, by verbal agreement Loyacono & Verhine forwarded approximately fifty-five clients to the law firm of Varas & Morgan and Varas & Morgan's associated attorneys (hereinafter referred to collectively as "Morgan's Litigation Group") to litigate the claims of Loyacono & Verhine's clients, for which Loyocano & Verhine would receive Twenty-five Percent of the attorneys fees. R. at 313, 315 (Morgan Dep.), 608 (Verhine

Corr.). That verbal agreement was memorialized in writing in a letter by Defendant attorney Verhine to Keith Morgan on May 21, 2000, which essentially demonstrates that Loyacono & Verhine's role was to be the "face guys" for these forwarded clients R. at 608 (Verhine Corr.)

5. Morgan's Litigation Group & Morgan's Representation of the Fifty-Five Clients: Morgan and Morgan's Litigation Group filed lawsuits on behalf of the fifty-five clients and, consequently, became their attorneys of record. R. at 568 (Morgan Dep.).[4] Neither Loyacono nor Verhine entered an appearance or otherwise entered any of the actions on behalf of the clients and, consequently, were never attorneys of record for those fifty-five clients. R. at 572 (Morgan Dep.). Morgan and Morgan's Litigation Group opted the clients out of the national class action suit; Morgan kept Verhine & Loyacono abreast of the litigation developments; Morgan met with the clients; and Morgan and his group retained medical expert Dr. Malcom Taylor to analyze and report the echocardiograms for each client. R. at 312-313 (Morgan Dep.).

6. Loyacono & Verhine Begin Secret Negotiations to Procure Settlements Without the Knowledge of their Attorneys of Record: As late as October 3, 2000, Scott Verhine wrote the clients that "eight attorneys with approximately twenty support secretaries are working on your individual claims," obviously meaning Morgan and Morgan's Litigation Group. R. at 613 (Verhine Corr.). Suddenly, on October 23, 2000, Verhine wrote the clients and advised them of his desire to have individual, private meetings with them in November, of which he does not advise Morgan. R. at 615 (Verhine Corr.). Shortly thereafter in November 2000, Loyacono & Verhine joined two clients with an Alabama group of plaintiffs and secretly settled their claims

[4] The filed cases were: Green, et al. v. American Home Products' Corp., et al., Civil Action Number 2000- 143, in the Circuit Court of Jefferson County, Mississippi; Williams, et al. v. American Home Products' Corp., et al., Civil Action Number 2000- 2000, in the Circuit Court of Jefferson County, Mississippi; Harried, et al. v. American Home Products' Corp., et al., Civil Action Number 2000- 109, in the Circuit Court of Jefferson County, Mississippi.

with AHP without first apprising Morgan or Morgan's Litigation Group. R. at 586 (Verhine Dep.), 573 (Morgan Dep.).

On December 4 -6, 2000, Morgan and Morgan's Litigation Group attended a mediation session with AHP on behalf of the clients at a Gulf Coast casino. Verhine attended one day, and Loyacono failed to attend. RE-10. At this point, Morgan and Morgan's Litigation Group are oblivious to the fact that Loyacono & Verhine have begun secret negotiations with AHP. As he would later admit during his deposition in this matter, Loyacono specifically intended to conceal these backdoor settlement negotiations with AHP from the clients' attorneys of record Morgan and Morgan's Litigation Group. R. 594-595 (Loyacono Dep.). Not surprisingly, AHP offers a very low lump sum settlement to Morgan and Morgan's Litigation Group, which they do not accept. R. at 564 (Morgan Depo.).

On December 11, 2000, Verhine issued correspondence to the clients that indicates that their interests are still being represented by Morgan and Morgan's Litigation Group. R. at 637 (Verhine Corr.). Yet, on December 13, 2000, Loyacono secretly wrote to AHP attorney Brian Lietch on plain paper (i.e., not on his firm's letterhead) and insisted that the listed plaintiffs were his individual clients and that he had authority to act for them. R. at 639-641 (Loyacono Corr). He further advised Leitch, ""[s]ince these cases in the past have been presented as a part of another group of cases, Varas-Morgan, I would ask that you treat my communication **confidentially**. Please communicate only with me about these cases during these negotiations for it we are not able to agree, we will probably still remain with that group." R. at 639-641 (Loyacono Corr.) (emphasis in original). Loyacono attached to this correspondence a master sheet of the list of plaintiffs and what purports to be corresponding echocardiograms test reports. R. at 639-641 (Loyacono Corr). On December 22, 2000, Loyacono & Verhine secretly began

bringing the clients into the office to sign settlement agreements with AHP without advising counsel of record. R. at 647 – 798 (Clients' Collective Releases).

7. Morgan Discovers the Backdoor Dealings: On December 28, 2000, Vicksburg attorney Jerry Campbell telephones Morgan and informs him that Loyacono & Verhine were settling the clients' cases with AHP. R. at 577-578 (Morgan Dep.) Morgan immediately issued a letter to AHP attorney Brian Leitch declaring that he understood settlements were being negotiated by Loyacono but that he (Morgan) was counsel of record for these clients and had not been released by the court. RE-6. By letter dated January 4, 2001, Loyacono sought verification form AHP attorney Brian Leitch and Jackson attorney Lee Davis Thames, who assisted AHP with its Mississippi cases, that AHP would settle the clients' cases for 4.1 Million Dollars. RE-7. At that time, Loyacono and Thames's children were married, and Loyacono and Thames were former law partners. R. at 591-592 (Loyacono Dep.). Loyacono failed to disclose these relationships and potential conflicts of interest with any of the clients. R. at 591-592 (Loyacono Depo.). Loyacono enclosed a proposed indemnification agreement whereby AHP lawyers would be indemnified by Loyacono in the event that a claim was made against AHP by Morgan or Morgan's Litigation Group due to these settlements. RE-7, R. at 832 (AHP/Loyacono Indemnity Agreement). Loyacono falsely informed Leitch and Thames that he had fired Morgan, which Loyacono had not done at that point. RE-7.

8. Loyacono & Verhine "Fire" Morgan: On January 5, 2001, after all of the settlement agreements had been signed, Loyacono issued two letters to Morgan stating that Morgan was fired as associated counsel, one of which was dated January 4th (but not sent on that date) and one dated January 5th. RE-8. Loyacono then wrote another letter to Leitch on January 8, 2001, requesting to set up a conference call and indicating that he wanted to end the settlement process soon because some clients were changing their minds about the settlements. RE-9. Also

on January 8, 2001, Morgan wrote a letter to Loyacono acknowledging receipt of the termination letters but asserting his representation could only be terminated with leave of court. RE-10.

9. Loyacono & Verhine's Distribution of Settlement Monies: On January 10, 2001, more than one month after Loyacono & Verhine began obtaining clients' settlement releases, Loyacono forwarded Leitch the signed releases, proof of usage forms and proof of opt-out forms for thirty-four clients and asserted his demand to settle thirty-one initial opt-out cases and three intermediate opt-out cases for Four Million Fifty Thousand Dollars. RE-11. Loyacono emphasized that all communications regarding these settlements were to go only through him. RE-11. Also on January 10, 2001, Loyacono issued a cryptic letter (not on letterhead) to attorney Lee Davis Thames and referenced inclusion of a court decision to which he had referred in a letter faxed to Thames the previous week; Loyacono again emphasized that all communication should be only with him. RE-12. On January 26, 2001, Loyacono again wrote Thames and another individual, enclosing his termination letter to Morgan and another letter from Morgan to a client who had fired Loyacono, which he asked not be made available to anyone absent court order. RE-13.

On January 23, 2001, Loyacono faxed a letter to AHP attorney Jonathon Boonin instructing him to wire the settlement proceeds into two accounts, of which Three Hundred Fifty Thousand Dollars was to be deposited into Loyacono's Trust Account II and the remaining Five Hundred Thousand Dollars was to be deposited into the Loyacono Law Firm General Account. RE-14. Obviously the court had not at this point in time approved the attorney's fees. Nonetheless, Loyacono & Verhine considered the Five Hundred Thousand Dollars to be their attorneys fees, which were immediately withdrawn by Loyacono & Verhine. R. at 597-599 (Loyacono Dep.). The following day, Loyacono faxed a sample settlement disbursement form to attorney Boonin which listed different amounts and types of withheld expenses then those

actually charged to the clients. RE-15. Settlement monies were disbursed to all of the plaintiffs on January 26, 2001. R. at 647-798 (Clients' Collective Releases).

10. Loyacono & Verhine Assign Settlement Dollars to Clients Without Regard to Medical Condition and Negotiate the Settlement Amounts as Between the Clients (Not AHP): Loyacono & Verhine failed to evaluate the medical conditions of these clients prior to assigning portions of the lump sum settlement to each client.[5] For instance, Plaintiffs Jane Hamilton and Glenda Rivers signed their medical releases for Verhine to obtain their medical records on the very day that they signed their settlement releases. R. 808-811 (Christ, Edwards Releases). Even more indicative of this failure is the fact that clients with the same level of injury received different sums. For instance, of the eight clients who took the diet drugs but had echocardiograms demonstrating no injury, Jane Hamilton, Jennie Parker and Glenda Rivers received gross settlements of Seventy-two Thousand Dollars from Loyacono & Verhine whereas Helen Heard, Alice McCraven, Bertha Mixon, Karen Thornton and Peggy Winters received Forty-five Thousand Dollars. RE-19; R. at 647-798 (Plaintiffs Collective Releases); RE-17 (Generated by Loyacono & Verhine After Settlement Releases Signed).

Patricia Gurthrie, Pamela Robison and Molly Robinson also had the same level of injury, yet each received amounts varying from One Hundred Thousand Dollars to Two Hundred Thousand Dollars. RE-19; R. at 647-798 (Plaintiffs Collective Releases); RE-17 (Generated by Loyacono & Verhine After Settlement Releases Signed). Peggy Christ, Theresa Edwards and Mary Whittington -- all of whom had more serious injury than Patricia Gurthrie, Pamela Robison and Molly Robinson -- received only One Hundred Thousand Dollars, which is a sum less than that received by Ms. Guthrie and Ms. Robinson. RE-19; R. at 647-798 (Plaintiffs Collective

[5] 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.

Releases); RE-17 (Generated by Loyacono & Verhine After Settlement Releases Signed). Those clients with the most severe injuries also received varied settlements ranging from Vera Wells at One Hundred Thousand Dollars to James Reed at Four Hundred Fifty Thousand Dollars.[6] RE-19; R. at 647-798 (Plaintiffs Collective Releases); RE-17 (Generated by Loyacono & Verhine After Settlement Releases Signed).

Even more troubling, Plaintiff James Reed negotiated directly with the Verhine for money from the other plaintiffs' pockets. Mr. Reed increased his settlement amount, rejecting two figures before agreeing to Four Hundred Fifty Thousand Dollars. R. at 604-605 (Reed Dep.). Verhine told Mr. Reed that "the more money that I [Reed] got, the less money other people would get. He [Verhine] said we had one lump sum." R. at 604 (Reed Dep.), similar dialogue at 605-606.[7]

11. The Importance of the Morgan Matrix as a Matter of Fact: Again, neither Loyacono nor Verhine entered an appearance or otherwise entered any of the actions on behalf of the clients and, consequently, were never attorneys of record for those fifty-five clients. R. at 572 (Morgan Dep.). Morgan and Morgan's Litigation Group were the attorneys of record, and Morgan negotiated with AHP and settled his clients' cases pursuant to a matrix whereby he set a

[6] There is no way to justify giving clients with severe injuries hundred of thousands of dollars less than those with much less severe injury.

[7] Obviously the other clients did not realize that they had the ability to takes dollars from the other clients' settlement amount by simply negotiating with Loyacono & Verhine or that they were receiving arbitrary amounts unrelated to their medical condition . Had Loyacono & Verhine assigned some reasonable value to each client's claim, they would not have created this conflict of interest. These disparities taken together with the failure of the Defendants to obtain medical records until the last minute, or to reach settlements consistent with his/her level of injury demonstrates an arbitrary settlement procedure rife with conflicts of interest and material misrepresentations resulting in unfair division of the settlement proceeds as among the Plaintiffs. Furthermore, the frantic, backdoor dealings of the Defendants resulted in the Plaintiffs receiving far less in way of settlement dollars. As a matter of commonsense negotiation, AHP attorneys understood that Defendants were in a hurry to settle these plaintiffs' cases in order to garner One Hundred Percent of the attorneys fees and, thus, realized the weakened bargaining position of the Defendants and took advantage of that fact. Certainly Defendants, seasoned attorneys, understood the position that they placed the clients but were more concerned with bank accounts than fiduciary obligations.

value for each of his client's level of injury and allocated each settlement funds pursuant to that matrix. R. at 321 – C (Morgan Depo). Morgan set the lowest level of injury (i.e., individuals who took the diet pill but showed no injury) at One Hundred Thousand Dollars because AHP attorney Brian Leitch "said he thought that the noninjured individuals, he would be glad to base settlement of those at $100,000.00." R. at 321 – D (Morgan Dep.). Loyocano & Verhine settled the Plaintiffs cases for far less, with the lowest level of injury receiving Forty-five Thousand Dollars.[8] R. at 647-798 (Plaintiffs Collective Releases). A compilation demonstrating the nearly Five Million Dollar Difference between what the Plaintiffs would have received had their attorney of record Morgan settled their cases and that which Loyacono & Verhine settled their cases may be found in the Record at page 848. RE-19. A copy of Morgan's matrix may be found in the Record at page 846. RE-18.

12. Opinions of Plaintiffs' Expert: To be clear, Plaintiffs' expert William F. McMurray offered no opinion as to whether Plaintiffs could win their underlying suits against AHP. RE-16. Rather, Mr. McMurry's opinions were limited to the material misrepresentations, negligence, and breaches of fiduciary duties of the Defendants as to the Plaintiffs. RE-16. Specifically, Mr. McMurray opined that Defendants breached their fiduciary duties to the Plaintiffs by their: (1) wrongful course of conduct calculated to enrich themselves at the expense of these Plaintiffs; (2) failure to disclose conflicts of interest resulting in a substantial reduction in settlement proceeds; (3) failure to disclose that they were not attorneys of record; (4) secretly reaching an agreement with AHP for an undifferentiated lump sum settlement which they subsequently negotiated arbitrarily with their clients without regard to the client's medical

[8] For instance, Teresa Edwards, a level 3 plaintiff in terms of AHP settlement, received $100,000.00 as her settlement with AHP as negotiated by Loyacono & Verhine. Under Morgan's matrix, she would have in fact received $550,000.00. Again, Verhine did not have Edwards sign a release so that he could access her medical records until the very day that he brings her into the office to sign the Settlement Release.

condition; (5) failure to disclose the relationship between Loyacono and attorney Thames, who assisted AHP in the settlement; (6) intentionally misrepresenting and exaggerating to Plaintiffs the risks of trial; (7) misrepresenting to Plaintiffs that AHP would likely declare bankruptcy and that Plaintiffs would get nothing if they did not immediately settle; (8) failing to inform clients of their right to opt-out and seek benefits in the event their disease progressed; (9) withholding expenses from the Plaintiffs' settlement which were not incurred by them and were undocumented; (10) misleading Plaintiffs into believing that they had negotiated each client's claims with AHP on an individual basis; (11) misrepresenting the character and ability of Morgan and Morgan's Litigation Group to the Plaintiffs for the purpose of alienating Plaintiffs from those attorneys in order to secretly obtain quicker and increased attorneys fees; (12) failing to inform themselves of the Plaintiffs' medical conditions prior to determining the each Plaintiff's settlement share; (13) failure to disclose that they had not conferred with the Plaintiffs' physicians to establish their medical conditions. RE-16.

The main thrust of Mr. McMurray's expert opinion is that, given the fact that the clients who refused to settle with Loyacono & Verhine later received settlements consisted with the Morgan matrix through Morgan's handling of their cases, the Plaintiffs would have received higher settlement figures consistent with the Morgan matrix. RE-16. Further, even without taking the Morgan matrix into account, the Plaintiffs received far less in settlement due to Loyacono & Verhine's multiple breaches of fiduciary duties throughout their entire course of wrongful conduct. R. at 838-845 (Expert Report).

VIII.

STANDARD OR SCOPE OF REVIEW

As to Issue One, this Court employs a de novo standard of review as to summary judgment. Duckworth v. Warren, 10 So. 3d 433, 436 (Miss. 2009) (citing One South, Inc. v.

Hollowell, 963 So.2d 1156, 1160 (Miss. 2007)). Summary judgment properly may be granted where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Miss. R. Civ. P. 56(c). *See also* Johnson v. City of Cleveland, 846 So.2d 1031, 1034-35 (Miss. 2003). In considering a motion for summary judgment in this fashion, the trial court must view all evidence before it as properly submitted pursuant to Rule 56 in the light most favorable to the nonmoving party. Duckworth, 10 So. 3d at 436-37 (citing One South, 963 So.2d at 1160). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990).

The standard for review for application of the wrong legal standard by the trial court is de novo. Quitman County v. State, 910 So.2d 1032, 1035 (¶ 6) (Miss. 2005); Smith v. City of Gulfport, 949 So.2d 844 (Miss. Crt. App. 2007). This Court has held that if the trial court applies the wrong legal standard, the review of the ruling is de novo. Quitman County, 910 So.2d at 1032 (¶6) (citing Baker v. State, 802 So.2d 77, 80 (Miss. 2001)). This Court has also stated "where . . . the trial judge has applied an erroneous legal standard, we should not hesitate to reverse." Id. (citing McClendon v. State, 539 So.2d 1375, 1377 (Miss. 1989)).

As to Issue Two, regarding the lower court's sustaining of Defendants' Motion in Limine excluding the Morgan Matrix and related testimony thereto, the standard of review for the trial court's admission or suppression of evidence is abuse of discretion. Haggerty v. Foster, 838 So.2d 948, 958 (¶25) (Miss. 2002).

IX.

SUMMARY OF THE ARGUMENT

The Plaintiffs do not take issue with the trial court's determination as it applies to their negligence legal malpractice claim. However, the Plaintiffs will demonstrate that the trial court erred in applying the elements of a negligence legal malpractice claim – including its distinctive trial-within-a-trial burden -- to their breach-of-fiduciary-duty legal malpractice claim. Again, the lower court granted summary judgment on the basis that Plaintiffs could not prove their case due to a lack of legal and medical expert testimony demonstrating that Plaintiffs would have successfully prosecuted their claims against AHP.

As stated by the Mississippi Supreme Court, "legal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, *or* the breach of fiduciary duty." Wilbourn v. Stennet, Wilkinson & Ward, 687 So.2d 1205, 1215 (Miss. 1996) (citing Hartford Accident & Indem. Co. v. Foster, 528 So.2d 155, 285 (Miss. 1988) (Prather, J., dissenting)) (emphasis added). The lower court failed to consider that legal malpractice is a broad tort that has been divided into two categories: (1) negligence, also referred to as "standard of care" and (2) breach of a fiduciary duty, also referred to as "standard of conduct." Both categories fit nicely under the umbrella of legal malpractice and require the same general elements of any tort, *id est*, duty, breach, causation and damages. However, each category of legal malpractice carries its own unique essential elements. For example, in order for the plaintiff to prove the essential elements of the negligence category of legal malpractice, he must prove (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) injury that was proximately cause by the lawyer's *negligence*," which carries the additional burden of requiring the plaintiff to prove that, but for the attorney's

negligence, he would have been successful in the prosecution or defense of the underling action; and (4) the fact and extent of the injury. Wilbourn, 687 So.2d at 1215; Hickox v. Holleman, 502 So.2d 626, 633 (Miss. 1987). In order for a plaintiff to prevail on a breach-of-fiduciary-duty claim, the plaintiff must prove the violation of the attorney's fiduciary duty as opposed to negligence. Lane v. Oustalet, 873 So.2d 92, 99 (¶ 27) (Miss. 2004) (citing Harford Accident, 528 So.2d at 285).

Another key difference between the two categories of legal malpractice claims is the different standards of proving proximate causation. Negligence claims require that the plaintiff demonstrate that she would have been successful in the prosecution or defense of the underlying action whereas there is no corresponding requirement in proving proximate cause for breach of fiduciary duty. Consequently, whereas expert testimony is oft utilized, and sometimes mandatory, in order to prove proximate causation and damages in negligence legal-malpractice claims, expert testimony is rarely necessary in the breach-of-fiduciary-duty arena due to the fact that (1) there is no "trial within a trial" standard and (2) because, in most cases, a finding of the breach itself establishes proximate causation and the damages naturally flow from the breach. As a general rule, jurors simply would not need specialized knowledge in order to determine whether a fiduciary duty has been breached; the attorney either did or did not commit the acts constituting the breach of the fiduciary duty.

Finally, the lower court abused its discretion in excluding the testimony of the matrix utilized by Keith Morgan in settling the underlying AHP claims and his testimony related thereto. Morgan's testimony relating to the matrix would consist of facts within his own personal knowledge, not opinions. Furthermore, Morgan, as Plaintiffs' attorney of record, would have settled the instant Plaintiffs' cases pursuant to the matrix at issue, and Morgan did in fact utilize this matrix in settling the claims of those clients who were forwarded from Loyacono &

Verhine but who refused to accept the bottom-dollar settlements procured by Loyacono & Verhine. As such, the matrix and Morgan's testimony were improperly excluded.

X.

ARGUMENT

A. THE TRIAL COURT ERRONEOUSLY APPLIED THE STANDARD OF LAW RELATED TO LEGAL MALPRACTICE BASED ON THE FACTS OF THIS CASE

1. Introduction

Plaintiffs plead in their Complaint and argued in response to Loyacono & Verhine's Motion for Summary Judgment that Loyocano & Verhine committed legal malpractice through their negligent representation of Plaintiffs *and* by breaching their fiduciary duties owed to Plaintiffs. Again, this brief focuses only on the breach-of-fiduciary-duty claim. The instant appeal is derived from one statement of law which was taken out of context from this Court's 1996 Wilbourn v. Stennet, Wilkinson & Ward opinion and erroneously applied to the Plaintiffs' breach-of-fiduciary-duty legal malpractice claim. Specifically, the trial court erroneously applied a negligence standard to both the Plaintiffs' negligence and breach-of-fiduciary-duty claim under the false assumption that *all* legal malpractice claims require a showing of negligence. The lower court, citing Wilbourn, found that "in order to establish a claim for legal malpractice, a plaintiff 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) injury that was proximately cause by the lawyer's *negligence*," which carries the additional burden of requiring the plaintiff to prove that, "'but for the attorney's *negligence*, he would have been successful in the prosecution or defense of the

underling action.'"[9] R. at 890 (citing Wilbourn, 687 So.2d at 1215) (emphasis added). Because the lower court utilized the negligence elements in determining the non-negligence claim for breach of fiduciary duty, the lower court erroneously found that the "trial within a trial" standard (which is solely applicable in negligence claims) also applied to the breach-of-fiduciary-duty claim and consequently found that, without legal and medical expert testimony to prove that the Plaintiffs would have been successful in the underlying actions against AHP, that the Plaintiffs could not prove their case and so granted summary judgment. RE-2 at 890-891.

Clearly the trial court applied a negligence standard to both the negligence legal malpractice claim *and* the breach-of-fiduciary-duty claim. Thus, the trial court failed to consider that legal malpractice is a broad tort that has been divided into two categories: (1) negligence, also referred to as "standard of care" and (2) breach of a fiduciary duty, also referred to as "standard of conduct." Obviously the trial court confused these two distinct categories of legal malpractice, which was clearly born from a misunderstanding of the Wilbourn decision.

Out of context, the statement of law from Wilbourn and other opinions declaring that "in order to establish a claim for legal malpractice" may seem to be setting out the elements for any and all legal malpractice claims whether based on negligence or breach of a fiduciary duty. However, such a statement of law would be illogical given the fact that it explicitly requires negligence. More importantly, a full reading of the context within which that statement was rendered in the Wilbourn decision clearly demonstrates that the opinion was merely speaking to the negligence category of a legal malpractice claim at that point in its analysis and had yet to discuss any breach of fiduciary claim and its requisite elements. Further, pre- and post-Wilbourn decisions make plain that there exists a distinction between the requisite elements of a

[9] The lower court did not state the fourth element of a negligence legal malpractice claim regarding damages.

negligence-based action and a breach-of-fiduciary-duty action. Due to the confusion of the lower court, a brief study of the modern evolution of these two categories of legal malpractice is in order.

2. Foundation of Wilbourn: The Hartford Dissent

In the oft-cited Hartford Accident & Indemnity Company v. Foster opinion issued in 1988, Justice Prather penned a dissent in which she succinctly set forth the material differences between a legal malpractice claim for negligence and a legal malpractice claim for breach of fiduciary duty. The plaintiff in Hartford instituted suit against both his insurance company and the attorneys who represented him in defending a personal injury case due the defendants' alleged bad-faith refusal to settle a case within plaintiffs policy limits and, as to the attorneys alone, for breach of fiduciary duty. Id. at 257. Significantly, the en banc majority opinion itself never contemplates negligence, negligence elements or the inclusive "trial-within-a-trial" standard when analyzing whether the defendant attorneys acted in bad faith or otherwise breached a fiduciary duty to plaintiff Foster. Id. at 267-276. Thus, it is clear from the Hartford majority opinion that this Court applies different standards as to these two distinct categories of legal malpractice. Nonetheless, the Hartford dissent has gained prominence due to Justice Prather's clearly stated distinctions between claims for negligence and breach of fiduciary duty. In pertinent part, Justice Prather opined:

> According to Mallen and Levit, Legal Malpractice Sec. 1 (2d ed. 1981):
>
> > "Some courts seem to distinguish a breach of the fiduciary obligations from legal malpractice. The prevailing and more reasonable view, however, is that legal malpractice encompasses any professional misconduct whether attributable to a breach of the standard of care or of the fiduciary obligations. In recognition of the dual bases of an attorney's liability, some courts have referred to the fiduciary obligations as setting forth a standard of "conduct." Thus, under the theoretical approach legal malpractice may be

> defined as "a breach by an attorney of either the standard of care or of the standard of conduct."
>
> Thus, legal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, or the breach of a fiduciary duty. The declaration here charges a fiduciary violation as the basis for this malpractice action.
>
> To recover under the negligence theory of legal malpractice, the client must prove the existence of an attorney-client relationship, the acts constituting negligence, that the negligence proximately cause the injury, and the fact and extent of the injury. Hickox v. Holleman,[10] 502 So.2d at 634; Hutchinson v. Smith, 417 So.2d 926 (Miss. 1982); Thompson v. Erving's Hatcheries, Inc., 186 So.2d 756 (Miss. 1966).
>
> However, the legal malpractice alleged in this case is a violation of the standard of conduct, not breach of the standard of care. The elements of this cause of action 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.

Id. at 284-285 (emphasis added). The Hartford dissent provides the foundation for Wilbourn, as discussed infra, and its logic essentially transcends into positive law in this State.

3. Post-Hartford, Pre-Wilbourn Distinction of Negligence and Breach of Fiduciary Duty

Following the Hartford decision, this Court addressed these two different categories of legal malpractice in Singleton v. Stegall, 580 So.2d 1242 (Miss. 1991). The Singleton Court announced that Mississippi law had long held attorneys to the duty of care and skill. Id. at 1244 (citing Fitch v. Scott, 4 Miss. 314, 317 (1839), quoted in Thompson v. Erving's Hatcheries, Inc., 186 So.2d 756, 757 (Miss. 1966)). The Singleton opinion goes on to state, "[o]f late we have spoken of a negligence standard, e.g., Bass v. Montgomery, 515 So.2d 1172, 1174 (Miss. 1987);

[10] Minor child Hickox brought suit through her father as next friend against defendant attorneys and law firm alleging legal malpractice due to negligence – not breach of fiduciary duty -- for their negligent failure to file a claim medical malpractice claim within two-year statute of limitations.

Thompson v. Erving Hatcheries, Inc., 186 So.2d at 759, but obviously more need be said." Id. (emphasis added). Singleton then identifies that, "[t]oday a lawyer owes his client duties falling into three broad categories: (a) the duty of care, (b) a duty of loyalty, and (c) duties provided by contract." Id. Noting that the duty of loyalty is not "wholly separable" from the duty of care, this Court stated that the duty of loyalty speaks to the fiduciary nature of an attorney's duties to his client of confidentiality, candor and disclosure. Id. at 1245 (internal citations omitted).

Singleton does not provide a succinct enunciation of the essential elements of a breach-of-fiduciary claim but states that proof of proximate cause should "be tailored to the injury the client claims and the remedy he elects." Id. Thus, Singleton demonstrates that plaintiffs are not required to prove the "trial within a trial" standard in proving proximate cause in the breach-of-fiduciary-duty arena.

Citing Singleton shortly thereafter in 1992, this Court in Tyson v. Moore, 613 So.2d 817, 823, stated that it had recently recognized the distinction between the duty of care (negligence) and the duty of loyalty (fiduciary duty) as to legal malpractice claims. Tyson quotes the legal malpractice treatise Mallen & Smith for the proposition that an attorney's fiduciary obligations set a standard of conduct as distinguished from the standard of care, which pertains only to the requisite skills and knowledge. Tyson, 613 So.2d at 823 (quoting Mallen & Smith, Legal Malpractice §11.1 (3d ed. 1989)). Citing the Hartford dissent, Tyson specifically states that breach of the duty of loyalty is a species of malpractice. Id. (citing Hartford Accident & Indemnity Co. v. Foster, 528 So.2d 255, 284 (Miss. 1988)). It is at this point that the Mississippi Supreme Court clearly begins to utilize Justice Prather's logic in the Hartford dissent in regard to breach of fiduciary duty.

4. Wilbourn

In 1996, the Mississippi Supreme Court issued the Wilbourn v. Stennet, Wilkinson & Ward[11] opinion, upon which the bar and bench alike have heavily relied since its inception as setting forth the elements of a legal malpractice claim. 687 So.2d 1205 (Miss. 1996). The first paragraph quoted immediately infra is the statement of law upon which the lower court relied in granting summary judgment as to the Plaintiffs' claim of breach of fiduciary duty. However, it is the language following this paragraph, which is derived from Singleton and the Hartford dissent, that does apply to the Plaintiffs' breach-of-fiduciary-duty claim. In pertinent part, the Wilbourn decision states:

> To recover in a legal malpractice case in this state, it is incumbent upon the plaintiff to prove by a preponderance of evidence the following: (1) Existence of a lawyer-client relationship; (2) Negligence on the part of the lawyer in handling his client's affairs entrusted to him; and (3) Proximate cause of the injury. Hickox v. Holleman, 502 So.2d 626, 633 (Miss. 1987). As to the second factor, a lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated. Failure to do so constitutes negligent conduct on the part of the lawyer. Id. at 634. As to the third essential ingredient, the plaintiff must show that, but for their attorney's negligence, he would have been successful in the prosecution or defense of the underlying action. See Thompson v. Erving's Hatcheries, Inc., 186 So.2d 756 (Miss. 1966); Nause v. Goldman, 321 So.2d 304 (Miss. 1975); Hickox v. Holleman, infra.
>
> This Court has stated that legal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, **or** the breach of a fiduciary duty. Hartford Acc. & Indem. Co. v. Foster, 528 So.2d 255, 285 (Miss. 1988).
>
> This Court has recognized each lawyer owes his client duties falling into three broad categories: (a) the duty of care; (b) a duty of loyalty; and (c) duties provided by contract. Singleton v. Stegall, 580 So.2d 1242, 1244 (Miss. 1991). The duty of loyalty, or sometimes, the duty of fidelity speaks to the fiduciary nature of the lawyer's duties to his client, of confidentiality and of candor and

[11] Wilbourn's Complaint, among other claims, alleges that the defendant attorney and law firm intentionally, negligently or grossly negligently breached their fiduciary duties owed him. Id. at 1211.

disclosure. See Mississippi State Bar v. Attorney D, 579 So.2d 559 (Miss. 1991); Singleton v. Stegall, 580 So.2d at 1245.

Id. at 1215 (emphasis added).[12]

5. Analyzing Wilbourn

Though the Wilbourn opinion prefaces the enunciation of the negligence elements with the words, "[t]o recover in a legal malpractice case in this state," the Court was clearly speaking solely to the negligence category of legal malpractice and was *not* attempting to define the elements of a breach-of-fiduciary-duty claim.[13] For instance, immediately following the negligence elements, the Wilbourn opinion defines the standard of care owed by attorneys and so states, "a lawyer owes his client the duty to exercise the knowledge, skill, and ability ordinarily possessed and exercised by the members of the legal profession similarly situated. Failure to do so constitutes *negligent* conduct on the part of the lawyer." Id. (emphasis added). Obviously the duty enunciated in this section is a negligence duty – not a fiduciary duty. Put another way, this language only considers the duty of care and not the duty of conduct. More importantly, Wilbourn opinion cites to Hickox as establishing these essential elements. In Hickox, the minor child, through her father, brought suit against the defendant attorneys and law firm solely on the basis of the defendants' negligence; Hickox never alleged nor does the Hickox opinion

[12] The holding in Wilbourn hinges upon the fact that the plaintiff, though he alleged that the defendant attorney and law firm breached confidences gained through their representation of plaintiff, never stated with specificity the confidences breached but, rather, relied upon the potential for breach of confidentiality. Id. The Mississippi Supreme Court found that "[i]f a complaint is intended to allege a breach of fiduciary duty, it would be necessary to state with particularity the facts which purportedly created the duty that was breached, so that the court could determine as a matter of law whether there was such a duty." Id. at 1216 (citing Parker v. Gordon, 442 So.2d 273, 275 (Fla. App. 1983). Because the Court found that Wilbourn's complaint "merely" made the conclusory statement that the defendants breached a fiduciary duty without ever stating the underlying facts constituting the alleged breach, the Court held that Wilbourn could not, then, possibly establish that the fiduciary breach was a proximate cause of the injury.

[13] Again, Wilbourn alleged both negligence and breach of fiduciary duty as legal malpractice claims.

contemplate the breach-of-fiduciary-duty category of legal malpractice. Hickox, 502 So.2d at 633.

It is only when speaking of negligence in that first paragraph quoted supra that the opinion considers the "trial within a trial" standard of proving proximate causation, a point to which it cites to Nause v. Goldman, 321 So.2d 304 (Miss. 1975) and Thompson v. Erving's Hatcheries, Inc., 186 So.2d 756 (Miss. 1966), both of which consider only negligent legal malpractice claims -- not breach of a fiduciary duty. Both Nause and Thompson rely on the fact that in negligence cases, " '[t]he damages claimed are usually the value of the claim lost or the judgment suffered as an alleged result of the attorney's negligence, and it has frequently been held that the lawyer may not be found liable unless it appears that if the action had been properly prosecuted or defended the client would have been successful.'" Nause, 321 So.2d at 307 (citing Thompson, 186 So.2d at 759 (citing 45 A.L.R. §5, at 19 (1945)) (emphasis added). Certainly both Nause and Thompson rely on the "trial within a trial" standard to distinguish the point at which an attorney fails to utilize reasonable skill and diligence.[14]

The next paragraph of Wilbourn expresses that legal malpractice may *also* be a breach of a fiduciary duty, a proposition for which it cites to Justice Prather's dissent in Hartford. Clearly Wilbourn makes the distinction that there is another category of legal malpractice and, thus, introduces the breach-of-fiduciary-duty category into the opinion *after* enunciating the negligence elements. Consequently, the elements cited in the first portion apply only to that which was being discussed: negligent legal malpractice claims.

Upon stating that a breach of fiduciary duty may also constitute legal malpractice, the opinion then articulates the three broad categories of fiduciary duties. The Wilbourn decision's

[14] For brevity's sake, this brief will not discuss each and every article relied upon by Thompson in formulating the "trial within a trial" standard for negligent legal malpractice claims, but it is readily apparent that these articles center around negligence and not breach of fiduciary duty.

citation to Justice Prather's dissent in Harford demonstrates that the Wilbourn Court agreed with Justice Prather's logic in the Hartford dissent as to these two, distinct categories of legal malpractice. Thus, it naturally follows that the Wilbourn Court likewise agreed that the essential elements of these two categories differ and that the plaintiff claiming breach-of-fiduciary-duty malpractice must prove that a fiduciary duty was breached instead of proving negligence.

More importantly, seven years following Wilbourn, this Court issues Lane v. Oustalet, 873 So.2d 92 (Miss. 2004), which clearly adopts the Hartford dissent distinction and, quoting Hartford, states that the elements of a breach-of-fiduciary-duty legal claim are the same as other legal malpractice actions except, instead of proving negligence, a plaintiff must prove that a fiduciary duty was in fact violated.

6. The Evolution of the Hartford Dissent

In 2004, this Court again distinguished a breach-of-fiduciary-duty claim from negligence and held that expert testimony was not required to prove the breach of a fiduciary duty in Lane v. Oustalet, 873 So.2d 92 (Miss. 2004).[15] The Lane decision not only cites to the Harford dissent but essentially transcends the Hartford dissent logic as to the differing requisite elements of the two categories of legal malpractice into positive law, specifically, that a breach-of-fiduciary-duty claimant must prove that the defendant breached a fiduciary duty rather than negligence. More importantly, Lane demonstrates that there the plaintiff is not required to prove the "trial within a trial" standard in that the Court held that the plaintiffs were not required to provide expert testimony in proving their case for breach of fiduciary duty. Relying heavily upon and directly quoting Justice Prather's dissent in Hartford, the Lane decision states:

[15] The Lanes alleged that attorney Rosetti breached his fiduciary duty, thus committing legal malpractice, by failing to inform them at their real estate closing of unrepaired termite damage and failing to provide them with a copy of the termite report. Id. at 98 (¶ 25). The trial court entered a directed verdict in favor of attorney Rosetti because the Lanes failed to offer expert testimony to support their malpractice claim, which the Mississippi Court of Appeals upheld.

¶26. The Lanes argue that their claim against Rosetti was not that he breached a standard of care of minimally competent attorneys, but that his failure to disclose the unfavorable termite report was a breach of standard of conduct. As such, they assert, there was no need to present expert testimony to support the claim because there were no special skills, knowledge, experience, or the like involved. We think the Lanes are correct. . . .

¶27. In an action involving a legal malpractice claim where the attorney had represented both the insurer and the insured in a personal injury action arising from an automobile accident, this Court held that legal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, **or** the breach of a fiduciary duty. Hartford Acc. & Indem. Co. v. Foster, 528 So.2d 255, 285 (Miss. 1988). We stated:

> Some courts seem to distinguish a breach of the fiduciary obligations from legal malpractice. The prevailing and more reasonable view, however, is that legal malpractice encompasses any professional misconduct whether attributable to a breach of the standard of care or of the fiduciary obligations. In recognition of the dual bases of an attorney's liability, some courts have referred to the fiduciary obligations as setting forth a standard of "conduct." Thus, under the theoretical approach legal malpractice may be defined as "a breach by an attorney of either the standard of care or of the standard of conduct." Thus, legal malpractice may be a violation of the standard of care of exercising the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, or the breach of a fiduciary duty. The declaration here charges a fiduciary violation as the basis for this malpractice action.
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> To recover under the negligence theory of legal malpractice, the client must prove the existence of an attorney-client relationship, the acts constituting negligence, that the negligence proximately caused the injury, and the fact and extent of the injury. Hickox v. Holleman, 502 So.2d at 634; Hutchinson v. Smith, 417 So.2d 926 (Miss. 1982); Thompson v. Erving's Hatcheries, Inc., 186 So.2d 756 (Miss. 1966). However, the legal malpractice alleged in this case is a violation of the standard of conduct, not breach of the standard of care. The elements of this cause of action 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.

528 So.2d at 285. Clearly established law provides that expert testimony is necessary to establish the breach of a duty of care in a claim of legal malpractice; *however, when the claim is for breach of the standard of conduct, we conclude*

that lack of expert testimony should not preclude the issue from being heard by a jury.

¶28 Whether Rosetti breached his fiduciary duty to the Lanes is not the kind of question that necessarily confronts a jury with issues that require specialized knowledge or experience. . . . The Lanes testified that they did not receive a copy of the termite report at closing, and the trial court found that Rosetti did not provide a copy to them. We find that a jury should have been allowed to make the determination on the issue of breach of the standard of conduct or breach of the fiduciary duty without an expert witness' testimony. . . .

¶30 The standard of care and the standard of conduct are two distinguishable components of a legal malpractice claim. Where a legal malpractice claim is based solely on a breach of a standard of conduct, as opposed to a breach of a standard of care, proof of the violation of the fiduciary duty to disclose is sufficient to create a jury question which, under facts such as these may be determined without the benefit of expert testimony.

Lane, 873 So.2d at 98-99 (¶¶ 26, 27, 28, 30) (emphasis added).

In 2008, this Court addressed a near-similar situation in Pierce v. Cook, 992 So.2d 612 (Miss. 2008). Cook had sued his former attorney Pierce based on the allegations that, while Pierce represented Cook in a medical malpractice action, Pierce began an adulterous affair with Cook's then wife. Id. at 615 (¶¶ 4, 5). Instead of claiming legal malpractice, Cook claimed breach of contract, which was considered by the jury without expert testimony on the subject and resulted in a judgment against attorney Pierce. Id. at 616 (¶¶ 6-7). On appeal, attorney Pierce argued that the breach-of-contract claim was in actuality a legal malpractice claim and, thus, required expert testimony in order to prove proximate cause; such expert testimony was not presented at the underlying trial. Id. (¶9). Cook attempted to argue before the Court that he was suing Pierce based upon the attorney's breach of a fiduciary duty under the breach-of-contract claim, *not* legal malpractice, and, therefore, was neither required to prove the elements of legal malpractice nor present expert testimony. Id. at 616-617 (¶ 10). In the precise same fashion as Wilbourn, the Pierce decision begins analyzing the purported breach-of contract claim with the Hickox/Nause negligence standard for negligence-based legal malpractice claims. Id. at 617 (¶

11). Immediately, however, the Court states: "*That being said*, this Court has recognized that each lawyer owes his or her client certain duties which fall into three broad categories: " (a) the duty of care; (b) a duty of loyalty; and (c) duties provided by contract." Id. (¶ 12) (citing Singleton v. Stegall, 580 So.2d 1242, 1244 (Miss.1991)) (emphasis added).[16]

In determining that Cook was not required to present expert testimony on the subject, the Supreme Court stated that "this Court has recognized that experts are not required in all legal-malpractice cases," Id. at 617 (¶ 15), and found that Cook did not need an expert to testify 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 a duty owed by an attorney to his client. Expert testimony would not lend guidance under this circumstance." Id. at 618 (¶ 17).

7. Current State of the Law as to Legal Malpractice Claims

In the instant action, the trial court mistakenly understood Wilbourn as purporting to set forth the requisite elements of any and all legal malpractice suits such that a plaintiff in *all* legal malpractice suits – whether based in negligence or breach of fiduciary duty – must prove negligence and prove, through expert testimony, that he would have been successful in the underlying action. However, the elements utilized by the trial court as gleaned from Wilbourn are that of negligent legal malpractice and *not* a breach-of-fiduciary-duty legal malpractice. Commonsense alone dictates that negligence and its sub-requirement of proving underlying success are not required in all legal malpractice actions.

[16] Again, just as in Wilbourn, it is clear that the Supreme Court was discussing the negligence category in paragraph 11 and discussing the breach-of-fiduciary-duty category in paragraph 12 because the Court intended that there be a distinction between the negligence category and the breach-of-fiduciary-duty category. The Pierce opinion does not further discuss which standard applied to Pierce nor was such an explanation warranted under the facts presented.

This Court has continuously held since the Hartford dissent that legal malpractice encompasses more than negligence and that there exists a separate, distinct cause of action for the breach of fidelity as demonstrated by Singleton, Lane, Pierce and a full reading of Wilbourn itself. The sum and substance of the cases discussed in this brief clearly demonstrate that Mississippi law holds attorneys to a duty of care and a duty of fidelity (or loyalty) and those duties provided by contract. Where the attorney fails to exercise the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession similarly situated, he violates the standard of care and thus commits legal malpractice vis-à-vis negligence. Where the attorney fails to provide his client candor, confidentiality and disclosure, he violates the standard of conduct and likewise commits legal malpractice vis-à-vis breach of fiduciary duty.

To recover under the negligence theory of legal malpractice pursuant to Wilbourn, Hickox and Thompson, the plaintiff must prove the existence of an attorney-client relationship, the acts constituting negligence, that the negligence proximately caused the injury, and the fact and extent of the injury. In order to establish that the attorney was in fact negligent and that such negligence resulted in injury (i.e., proximate causation), the plaintiff must demonstrate that she would have been successful in the prosecution or defense of the underlying action but for the attorney' actions. Obviously this "trial within a trial" standard is necessary in order to safeguard attorneys from liability as to every mistake and renders attorneys liable only for those mistakes that adversely impact the client's position in the underlying action. Further, the "trial within a trial standard" provides a bright-line demarcation between those attorneys providing requisite skill and diligence and those who breach this duty of care.

On the other hand, pursuant to Lane and the Hartford dissent logic, the plaintiff must prove the following essential elements in a breach-of-fiduciary-duty claim: (1) the existence of an attorney-client relationship, (2) the acts constituting the breach of the fiduciary duty owed, (3)

that the breach of the fiduciary duty proximately injured the client, and (4) the fact and extent of the injuries. Negligence is simply not considered. Success in the underlying action is likewise not considered. Because damages from a breach of fiduciary duty are not necessarily related to the success of the underlying action, there can be no corresponding "trial within a trial" standard applicable in proving breach of fiduciary duty.

Were such a "trial within a trial" standard applicable to breach-of-fiduciary claims, this Court would not have exempted the Lane and Pierce plaintiffs from providing expert testimony. Rather than utilize the "trial within a trial" negligence standard, the Singleton court found 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, 580 So.2d at 1245. Logically the court must apply the "trial within a trial" standard in negligence cases to ensure that an attorney is not answerable for every mistake, just those mistakes that actually result in injuring to the client, such that the plaintiff can only recover where an attorney fails to perform as another reasonably prudent attorney would have performed in like circumstances. The same cannot be said for an attorney's breach of fiduciary duty. An attorney owes his client the duty of fidelity regardless of the situation, and every attorney is duty-bound to provide the same level of fidelity regardless of circumstance. The attorney either did or did not break his fiduciary duty. There exists no sliding scale as to breaches of fiduciary duty.

More importantly, as opposed to negligence situations, the proximate cause in a breach-of-fiduciary-duty claim is the actual breach itself, and the damages incurred as a result of a lawyer's breach of fiduciary duty flow from the breach itself regardless of the outcome of the action for which the lawyer was originally retained. 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, 528 So.2d at 285 (Prather, J., dissenting). Thus, aside from the breach of a fiduciary duty by his attorney, the plaintiff need only prove injury in order to prevail. Success of the underlying action is simply not relevant in situations where the attorney breaches his fiduciary duty. For instance, in Pierce, 992 So.2d 612, it matters little whether former counsel could have won the underlying case; the only considerations were whether counsel committed adultery with his client's wife and whether such adultery injured his client.

Inasmuch as requisite expert testimony, Lane and Pierce specifically hold that a plaintiff is not required to present expert testimony to prove a breach-of-fiduciary-duty claim. Obviously it is the lack of a corresponding "trial within a trial" standard that exempts this category from a per se rule regarding expert testimony. Clearly one would need to present expert testimony in most negligence-based legal malpractice cases in order to prove successful prosecution or defense in the underlying trial.[17] However, in a breach-of-fiduciary-duty claim, the jury is not usually placed into the position of rendering a decision based upon knowledge beyond the realm of the ordinary lay individual. Additionally, the damages resulting from a breach of fiduciary duty naturally flow from the breach itself and, thus, can easily be determined without specialized knowledge or skill set.

8. Application to the Instant Appeal

The lower court clearly applied an erroneous legal standard to this action inasmuch as the claim for breach of fiduciary duty and should, therefore, be reversed and remanded. Under Mississippi law, the Plaintiffs were not bound to prove negligence or that they would have succeeded at trial in their underlying claims against AHP. Because proof of underlying success

[17] Even in the negligence legal malpractice arena, expert testimony is not required when the attorney's conduct is negligent as a matter of law. Hickox, 502 So.2d at 635; see also Thompson v. Erving's Hatcheries, Inc., 186 So.2d 756 (Miss. 1966).

is not contemplated in the breach-of-fiduciary-duty arena, Plaintiffs were not required to provide expert testimony in order to prove proximate cause. The Plaintiffs need only prove that Loyacono & Verhine breached a fiduciary duty owed to them and that they were injured by such breach. The Plaintiffs made out multiple genuine issues of material fact as to the breaches of fiduciary duty and the resulting financial damages as set forth in the Statement of Facts section articulated supra. Certainly the lower court never addressed the materiality of these facts due to its finding that Plaintiffs' claims failed due to a lack of expert testimony as to the underlying AHP claims.

B. THAT THE TRIAL COURT ERRONEOUSLY EXCLUDED THE KEITH MORGAN MATRIX AND RELATED TESTIMONY THERETO FROM THIS CASE

Plaintiffs intended to call Plaintiffs' attorney-of-record Keith Morgan, who obviously had much first-hand knowledge of the affairs in dispute, as a witness and to offer Morgan's matrix, which was used in allocating a fair settlement amount to his clients and would have been utilized in settling these Plaintiffs' claims. The lower court abused its discretion in sustaining Defendants' Motion in Limine as to Morgan's matrices and related testimony. The lower court erroneously found that the matrix was inadmissible on grounds of hearsay, lack of supporting documentation, the failure to designate Morgan as a witness, and speculation. RE-3. The lower court apparently placed some significance on the fact that Morgan had used another individual's matrix as a "go by" in creating the matrix at issue. The lower court further held that "what he [Morgan], without any medical support, considered to be the existence of a claim, would be speculative, hearsay, and would only be admissible under Rule 702. RE-3.

Significantly, Morgan did in fact utilize this matrix in settling the claims of the clients who were forwarded by Loyacono & Verhine but refused to accept the settlements procured by Loyacono & Verhine. Though the Plaintiffs' claims are not solely based upon Morgan's matrix,

the matrix and testimony related thereto demonstrates the disparity between the settlement proceeds actually received and the proceeds that these Plaintiffs would have received but for Loyacono & Verhine's multiple breaches of fiduciary duty. Plaintiffs did not designate Morgan as an expert nor were they obligated to do so since his testimony was based on his first-hand knowledge and would have been limited to mere facts, not opinions.

The testimony to be elicited from Keith Mogan is based upon facts within Morgan's personal knowledge. Morgan would opine nothing. His matrix was used in settling the claims of his clients as a matter of fact – not opinion -- and would have been used in allocating these Plaintiffs' settlement monies. Morgan was the attorney of record for the Plaintiffs, Morgan personally represented these Plaintiffs, Morgan personally communicated with these Plaintiffs, Morgan personally dealt with Loyacono and Verhine, Morgan personally interacted with AHP attorneys, and Morgan personally settled claims for the group of clients within which Plaintiffs were situated. Thus, Morgan's matrix and testimony related thereto constitutes admissible evidence. Defendants cannot escape the fact that, had these Plaintiffs not been duped into accepting a rushed, backdoor, bottom-dollar settlement, Plaintiffs would have received settlements pursuant to their attorney-of-record's matrix. Again, those clients who remained with Morgan after the other clients were misled into accepting the Loyacono & Verhine settlements received their settlements pursuant to the Morgan matrix.

As to hearsay, Morgan created the matrix, which renders him the "declarant" for hearsay purposes; thus, the hearsay provisions are not triggered as these rules attach to someone other than the declarant who testifies. M.R.E. 801. It matters little what or who inspired Morgan to create the matrix he used to distribute settlement money to his clients. Plaintiffs can find no authority for the proposition that a lack of documentation prevents the introduction of the

Morgan matrix and testimony related thereto, and, indeed, would represent that no such authority exists.

However, should this Court deem some of the potential areas of Morgan's testimony as including opinions and inferences stemming from his personal knowledge, such testimony is equally admissible pursuant to Rule 701 of the Mississippi Rules of Evidence, 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.

Opinion testimony by a lay person is admissible even if typically presented through expert witness testimony where the witness has personally performed the services which are the subject of the testimony. See APAC Mississippi, Inc. v. Johnson, 15 So.3d 465, (¶ 12) (Miss. Crt. App. 2009); Scafidel v. Crawford, 486 So.2d 370 (Miss. 1986). In Scafidel, the Mississippi Supreme Court was confronted with opinion testimony from two doctors who had treated the individual at issue but were not designated as experts. Scafidel, 486 So.2d at 372. The court held that the doctors' opinion as to the individual's prognosis did not cross into impermissible expert testimony because their opinions were acquired through their care and treatment of that individual. Id. The mere fact that a lay witness *could* testify as an expert does not trigger a requirement that he indeed testify as an expert where he has personal knowledge of the facts. Sullivan v. Rowan Cos. Inc., 952 F.2d 141 (5th Cir. 1992).

Like the physician witnesses in Scafidel, Morgan could certainly qualify as an expert; however, in this action, Mr. Morgan is a factual witness possessing first-hand knowledge as to the circumstances at issue and his matrix would have been used in distributing these Plaintiffs' claims were it not for Loyacono & Verhine's breaches of fiduciary duty. Morgan's testimony

would be based upon his representation of the Plaintiffs in the underlying action, founded upon his personal knowledge, and necessary for jury to comprehend the facts giving rise to the Plaintiffs' claims. Consequently, should this Court find that certain areas of Morgan's testimony relating to the Morgan matrix may touch on opinion testimony, Morgan's potential testimony would entirely comply with Rule 701.

XI.

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 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 4th day of May, 2010.

RESPECTFULLY SUBMITTED,

PEGGY CRIST, et al, Plaintiffs

BY: _____

DAVID L. MINYARD, MS Bar No. [redacted]
Hill & Minyard, P.A.
Post Office Box 429
Oxford, Mississippi 38655
Telephone (662) 234-4315

T. KILPATRICK, MS Bar No[redacted]
The Kilpatrick Firm
1124 N. Lamar Blvd.
Oxford, Mississippi 38655
Telephone (662) 236-2007

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 above and foregoing via first class United States Mail, postage prepaid, on the following persons at these addresses:

Glenn Gates Taylor, Esq.
Christy M. Sparks, Esq.
Copeland, Cook, Taylor & Bush, P.A.
Post Office Box 6020
Ridgeland, Mississippi 39158

Special Judge Kosta N. Vlahos
5 Bayou Oaks Lane
Gulfport, Mississippi 39503

DATED this 4th day of May, 2010.

DAVID L. MINYARD, MS Bar No[redacted]