To the Clerk: THIS IS A FINAL APPEALABLE ORDER.
Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

2019 FEB 13 PM 12:09
COURT OF COMMON PLEAS
TOM ORLANDO

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date Feb. 13, 2019 Case No. 15CV185791

ANN ALONSO
Plaintiff

Brent English
Plaintiff's Attorney

VS

JOAN JACOB THOMAS, *et al.*
Defendants

Timothy Johnson
Defendant's Attorney

This matter is before the Court on the following Motions and Responses:

Defendant's Civ. R. 50(B) Motion For Judgment NOV; Alternative Motion For New Trial, filed November 14, 2018;
Plaintiff's Brief in Opposition, filed December 28, 2018;
Defendant's Reply Brief, filed January 11, 2019; and
Plaintiff's Supplemental Brief in Opposition, filed January 28, 2019.

Plaintiff's Motion For Prejudgment Interest, filed November 2, 2018;
Defendant's Brief in Opposition, filed November 14, 2018; and
Defendant's Supplemental Brief in Opposition, filed January 31, 2019.

Oral hearing had on all Motions on January 29, 2019.

THE COURT RULES AS FOLLOWS:

The Motion for Judgment NOV is not well-taken and hereby DENIED:

The Motion For A New Trial is provisionally stayed pending Plaintiff's decision to elect or refuse remittitur. If Plaintiff elects to accept the remitted amount of $210,240.00 from the original verdict of $550,000.00, resulting in a new verdict amount of $339,760.00, the Motion For New Trial will be Denied. If Plaintiff rejects remittitur, the Motion For New Trial will be Granted, but as to damages only. Plaintiff shall elect or reject remittitur no later than 14 days after journalization of this order. If Plaintiff does neither, the Court will consider remittitur rejected and a new trial on damages will be ordered.

The Motion For Prejudgment Interest is well-taken and hereby GRANTED, but only as to the new verdict amount of $339,760.00 (if remittitur is accepted), from February 27, 2015. If remittitur is rejected and a new trial on damages ordered, the Motion For PreJudgment Interest is moot. The Court has calculated the PJI amount through February 13, 2019 at $50,766.39, for a total new verdict amount of $390,526.39.

See Judgment Entry.

IT IS SO ORDERED. No Record.

JUDGE D. Chris Cook

THIS IS A FINAL APPEALABLE ORDER[1]

cc: English, Esq.
Johnson, Esq.

[1] An order that gives a verdict-winner the option of accepting a remittitur or submitting to a new trial on damages does not trigger finality under R.C. 2505.02(B)(3) until the verdict-winner makes that election or the time for doing so expires. *VIL Laser Sys., LLC v. Shiloh Indus, Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, 894 N.E. 2d 303 (2008).

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JUDGMENT ENTRY
Hon. D. Chris Cook, Judge

Date Feb. 13, 2019 Case No. 15CV185791

ANN ALONSO
Plaintiff

Brent English
Plaintiff's Attorney

VS.

JOAN JACOB THOMAS., *et al.*
sDefendant

Timothy Johnson
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INTRODUCTION

This matter is before the Court on the following Motions and Responses:

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PROCEDURAL HISTORY

This matter was tried to a jury over seven days in October, 2018. At the conclusion of the jury's deliberations, they returned a verdict in favor of Plaintiff, Ann Alonso ("Alonso") in the amount of $550,000.00.

On October 18, 2018, the Court journalized the verdict and designated that Entry as a final appealable order.

Pursuant to Civ. R 50(B) and Civ. R 59(A), Defendant, Joan Jacob Thomas ("Thomas"), timely filed post-judgment motions and Alonso has filed a motion for pre-judgment

interest. Accordingly, the appeal time in this matter will not begin to run until the trial court enters an order resolving the last of the post-judgment filings. App. R 4(B)(2).

ABBREVIATED STATEMENT OF FACTS

This case involves a claim of professional legal malpractice against Thomas stemming from her representation of Alonso in her divorce from her husband, Henry Alonso ("Henry").

Henry initiated divorce proceedings in the Lorain County Court of Common Pleas, Domestic Relations Division, in May, 2008 ("The Divorce Case").[2] The case pended for approximately 42 months until November, 2011, when on the sixth day of trial, the parties "settled" the case by way of an agreed entry. The agreed entry contained a separate judgment entry that provided for the continued exchange of documents and provided sanctions should those documents not be forthcoming.

Less than three-weeks later, in December, 2011, Henry filed to modify his child support obligation, which precipitated another 34 months of post-decree proceedings. During the pendency of the post-decree proceedings, in May, 2014, Attorney Brent English (and Attorney R.J. Budway) entered their appearance on behalf of Alonso. Four months later, in September, 2014, the post-decree issues were resolved by way of another agreed judgment entry.

The gravamen of Alonso's complaint against Thomas is that she failed to conduct proper discovery into Henry's assets; failed to carry-out Alonso's instructions; was dishonest in her dealings with Alonso; was unprepared for trial; failed to competently present evidence; failed to preserve the parties assets as Henry repeatedly violated court orders relative to those assets; drafted an unclear, prejudicial final judgment entry that exposed Alonso to continued litigation; and, that Thomas charged an excessive fee for her legal services.

Thomas denied all of these allegations and argued that she properly and competently represented Alonso; that Alonso was a difficult and unreasonable client; that Alonso benefited by Henry's violation of the court orders regarding assets; that Alonso agreed to and signed the final judgment entry that constituted a "global settlement;" and that her fees were reasonable.

As noted, at the conclusion of the trial, the jury awarded Alonso $550,000.00.

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[2] See Case No. 08DU069302.

STANDARD OF REVIEW

CIVIL R 50(B) MOTION FOR JUDGMENT NOV

A motion for directed verdict presents a question of law, [thus appellate] review is de novo. *Roberts v. Falls Family Practice, Inc.*, 9th Dist. Summit No. 27973, 2016-Ohio-7589, ¶ 11, citing *Spero v. Avny*, 9th Dist. Summit No. 27272, 2015-Ohio-4671, ¶ 17. "A trial court must grant a motion for directed verdict after the evidence has been presented if, 'after construing the evidence most strongly in favor of the party against whom the motion is directed, * * * reasonable minds could come to but one conclusion upon the evidence submitted[.]' " *Roberts* at ¶ 11, citing Civ.R. 50(A)(4) and *Parrish v. Jones*, 138 Ohio St.3d 23, 2013-Ohio-5224, ¶ 16. Nonetheless, "if there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied." *Hawkins v. Ivy*, 50 Ohio St.2d 114, 115 (1977). "A motion for a directed verdict assesses the sufficiency of the evidence, not the weight of the evidence or the credibility of the witnesses." *Jarvis v. Stone*, 9th Dist. Summit No. 23904, 2008-Ohio-3313, ¶ 7, citing *Strother v. Hutchinson*, 67 Ohio St.2d 282, 284 (1981). See: *Phoenix Lighting Group v. Genlyte Thomas Group,* 9th Dist. Summit No. 28082, 2018-Ohio-2393 at ¶ 15.

The Ninth District has held that a motion for judgment notwithstanding the verdict "is not the proper mechanism" to attack an excessive damage award. *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 25 (9th Dist.); *accord Magnum Steel & Trading, LLC v. Mink*, 9th Dist. Summit Nos. 26127 and 26231, 2013-Ohio-2431, 2013 WL 2713268, ¶ 44 **(noting that an argument that a damage award was inadequate is not appropriate under Civ.R. 50(B), but should instead be challenged under Civ.R. 59(A))**; *Catalanotto v. Byrd*, 9th Dist. Summit No. 27302, 2015-Ohio-277, 2015 WL 340860, ¶ 9; *but see Kane v. O'Day*, 9th Dist. Summit No. 23225, 2007-Ohio-702, 2007 WL 518376, ¶ 23–25 (reversing denial of a motion for judgment notwithstanding the verdict where damages were not contested at trial because the parties had stipulated as to the amount of damages). An argument that a jury award is not supported by the evidence "is not appropriate on a motion for [judgment notwithstanding the verdict] because **Civ.R. 50(B) provides the means to challenge the jury's verdict, not the jury's award of damages.** Republic's 'assertion that the evidence does not support the award of damages is better placed in its argument for * * * remittitur, and will be addressed by this Court therein.'" *Desai* at ¶ 25, quoting *Jemson v. Falls Village Retirement Community*, 9th Dist. Summit No. 20845, 2002-Ohio-4155, 2002 WL 1842483, ¶ 17. See: *Tesar Ind. v. Republic Steel,* 9th Dist. Lorain No. 16CA010960, 2018-Ohio-2089, at ¶ 30, emphasis added.

CIVIL R 59(A) MOTION FOR NEW TRIAL

"In Ohio, it has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice *or* a finding that the award is manifestly excessive." (Emphasis sic.) *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655 (1994). *Phoenix Lighting Group, supra,* at ¶ 60.

The grant or denial of a motion for a new trial on the ground of excessive damages rests in the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Pena v. Northeast Ohio Emergency Affiliates, Inc.*, 108 Ohio App. 3d 96, 103 (9th Dist. 19956). An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore*, 5 Ohio St.3d at 219. " 'An appellate court reviewing whether a trial court abused its discretion on a motion for a new trial pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, and (2) whether the jury considered improper evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury.' " *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 9th Dist. Wayne No. 09CA0073, 2010-Ohio-4657, ¶ 35, quoting *Pena* at 104. "To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities." *Prince v. Jordan*, 9th Dist. Lorain No. 04CA008423, 2004-Ohio-7184, at ¶ 20. Nonetheless, when applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Pons*, 66 Ohio St.3d 619 at 621. *Phoenix Lighting Group, supra,* at ¶ 61.

REMITTITUR

A trial court cannot order remittitur without the plaintiff's consent. *Wightman v. Consol. Rail Corp.* (1999), 86 Ohio St.3d 431, citing *Chester Park Co. v. Schulte* (1929), 120 Ohio St. 273, 290.

"An order that gives a verdict-winner the option of accepting a remittitur or submitting to a new trial on damages does not trigger finality under R.C. 2505.02(B)(3) until the verdict-winner makes that election or the time frame for doing so expires." *VIL Laser Sys., LLC v. Shiloh Indus, Inc.,* 119 Ohio St.3d 354, 2008-Ohio-3920, at ¶ 13.

The Ohio Supreme Court's seminal case on remittitur is *Wightman, supra.* In *Wightman,* the Supreme Court noted, "This case has given us an opportunity to consider the value of remittitur and to contemplate the policy that best and most fairly supports its purposes. Overall, this case presents a compelling example of the worth of remittitur." *Id.* at ¶ 17.

The Court continued,

> Remittitur plays an important role in judicial economy by encouraging an end to litigation rather than a new trial. The trial court sets forth persuasively the great value of a conclusion. There are times when an end has its own value, with justice delivered, and not further delayed. A final judgment brings closure, certainty, and possibly a commitment to changed future behavior. These are societal benefits as well as benefits to the parties. Wrongs are righted through judgments. Our justice system does not work without finality. Until then, the system's great value is in limbo. We take little from it, but we continually feed it with our energies, intellect, and emotions.
>
> The judge and both parties play a role in ending litigation. The law surrounding remittitur should reflect that. *Id.* at ¶ 18.

The Court further stated,

> A court has the inherent authority to remit an excessive award, assuming it is not tainted with passion or prejudice, to an amount supported by the weight of the evidence. In *Chester Park v. Schulte* (1929), 120 Ohio St. 273, 166 N.E. 186, paragraph three of the syllabus, this court set forth the specific criteria that must be met before a court may grant a remittitur: (1) unliquidated damages are assessed by a jury, (2) the verdict is not influenced by passion or prejudice, (3) the award is excessive, and (4) the plaintiff agrees to the reduction in damages. *Wightman,* at ¶ 20.

And finally,

> Thus, for reasons of fairness and judicial economy, we adopt what has become known as the "Wisconsin rule." Pursuant to the Wisconsin rule, first enunciated in *Plesko v. Milwaukee* (1963), 19 Wis.2d 210, 220–221, 120 N.W.2d 130, 135, a plaintiff who accepts a remittitur may appeal the trial court's determination of the damage issue if the opposing party appeals any issue. If the reviewing court finds no error as to the determination of damages, the plaintiff's prior acceptance of judgment for the reduced amount will be affirmed unless the result of the principal appeal requires otherwise. *Wightman* at ¶ 18.

PREJUDGMENT INTEREST

RC 1343.032(C) reads, in pertinent part,

> If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has

> rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows . . .

The Ninth District Court of Appeals addressed the propriety of prejudgment interest in the matter *Coon v. Technical Const. Spec., Inc.*, 9th Dist. Summit No. 24542, 2010-Ohio-417. The court held,

> We review a trial court's determination regarding whether a party made a 'good faith effort' to settle for an abuse of discretion. *Kane v. Saverko,* 9th Dist. No. 23908, 2008–Ohio–1382, at ¶ 9. Abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. As a threshold matter, however, we must first examine whether the components of R.C. 1343.03(C) have been satisfied. *Kane* at ¶ 9. Such a determination constitutes a question of law, which this Court reviews de novo. *Porter v. Porter,* 9th Dist. No. 21040, 2002–Ohio–6038, at ¶ 5. *Coon,* at ¶ 17.

The *Coon* decision continued,

> The Ohio Supreme Court has held that:
>
> "A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658–59, 635 N.E.2d 331, quoting *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 495 N.E.2d 572, syllabus.
>
> "[T]he question of whether [a party] possessed a good faith, objectively reasonable belief that [it] had no liability must focus on the belief as it existed prior to trial." (Emphasis omitted.) *Kohler v. Deel* (1997), 119 Ohio App.3d 710, 714–15, 696 N.E.2d 250. *Coon* at ¶ 26.

ANALYSIS

THOMAS' MOTION FOR JUDGMENT NOV

The gravamen of Thomas' motion is that this court should not have allowed the jury to consider Alonso's claim of alleged errors in the agreed upon spousal support reached in the underlying domestic relations suit because Alonso failed to offer admissible evidence of damages on this issue.

I agree. A judgment notwithstanding the verdict, however, is not the right vehicle to correct this error.

A review of the alleged error by the Court and the discussions surrounding same is in order.

Alonso's expert, David Badnell ("Badnell"), submitted an expert report that discussed a number of areas wherein he opined that Thomas breached the standard of care relative to her representation of Alonso, including an opinion that Thomas "breached her duties with regard to temporary and permanent spousal support." Nowhere, however, did Badnell discuss specific monetary damages due to this breach or assign a dollar amount for this element of Thomas' malpractice.

At trial, Alonso called Badnell who testified consistent with his report regarding his opinions that Thomas committed malpractice. But, inconsistent with the report, Alonso elicited testimony from Badnell as to the specific damages and financial analysis caused by this breach. Testimony in this regard of evidence outside of the contents of Badnell's expert report was violative of this Court's Local Rule 11(I)(B) that confines the testimony of an expert witness to the information contained in the expert's report.

As Badnell's testimony unfolded, Thomas objected but the objections were silent as to the reasons or basis.[3] As this Court had no familiarity with the content of Badnell's report, the Court had no way to ascertain the basis for the objections or to know that Badnell was positing testimony outside of the four-corners of his report.[4]

Eventually, after her fourth objection was overruled, Thomas objected again and (*finally*) requested a sidebar. At sidebar, Thomas stated the basis for her objection, the Court agreed, and there was no further testimony by Badnell on the issue. Ultimately, the

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[3] This Court assumed the silent objections went to foundation or form, neither which was a proper basis to sustain the objections.

[4] Thomas concedes this point in her Reply Brief, "That the Court may not have immediately appreciated that the objection was directed to Badnell's non-compliance with Loc. R. 11(B) is not surprising."

Court did not strike Bednell's improper testimony nor did the Court give Thomas' expert, James Skirbunt ("Skirbunt"), an opportunity to rebut Badnell's testimony.

Despite conceding this error and acknowledging that this Court should have stricken Badnell's damages calculations or, at a minimum, allowed Skirbunt an opportunity to rebut them, a judgment NOV is inapposite.

As noted *supra,* a trial court must grant a new trial only where there is insufficient evidence to support the jury's award. Here, the jury heard improper evidence in support of its award that it no-doubt relied upon in reaching its verdict. But, it also heard other, proper evidence in addition to Badnell's damages calculations that it relied upon as well.

The test is one of sufficiency, not weight. This Court cannot weigh the evidence but instead, must determine if any *proper* evidence, when considered in a light most favorable to Alonso, supported the jury's verdict.

Clearly, Alonso introduced substantial evidence of damages above-and-beyond Badnell's damages calculations. Alonso offered evidence of excessive legal fees ($117, 190.00); evidence of losses due to Henry's violation of the DR Court's restraining orders ($52,100.00); evidence of losses due to housing related expenses ($2,100.00); evidence of legal fees associated with hiring new counsel to handle and conclude the post-decree matters ($40,000.00); and (proper) evidence that Thomas miscalculated the child support and spousal support that Alonso should have received ($128,370.00)[5]. The total of this evidence is $339,760.00, well less than the jury verdict of $550,000.00, but still a substantial amount.

Accordingly, even without the improper evidence of damages testified to by Badnell, Alonso submitted sufficient evidence to justify a substantial jury verdict and it would be unconscionable to enter judgment in favor of Thomas simply because some, but nowhere near all of the damages evidence was tainted.

Moreover, the Ninth District has repeatedly held that a motion for judgment notwithstanding the verdict is not the proper mechanism to attack an excessive damage award. See: *LLC v. Mink, supra,* and its progeny.

Similarly, the Ninth District instructs that "Civ. R. 50(B) provides the means to challenge the jury's verdict, not the jury's award of damages." See: *Tesar Ind. v. Republic Steel, supra.*

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[5] This figure does not contain Badnell's improper damages calculations which total $210,240.00.

To that end, even though the specific claim for judgment NOV relates to the introduction of improper evidence, it really is an attack on the jury's award. As such, judgment NOV is inapposite.

THOMAS' MOTION FOR NEW TRIAL

Conversely, a Civ. R 59(A) motion is the appropriate vehicle in which to challenge an excessive damage award where the jury returned a verdict based upon an irregularity in the proceedings by the Court and prevailing party and where the Court abused its discretion by failing to strike Badnell's improper testimony or by giving Thomas' expert, Skirbunt, an opportunity to rebut it. Civ. R. 59(A)(1).

Moreover, Thomas did bring this error of law at the trial to the attention of the trial court when she objected four times before requesting a sidebar.[6] Civ. R. 59(A)(9).

In a recent opinion, the Ninth District addressed the propriety of the trial court's decision to grant a new trial pursuant to both Civ. R 59(A)(1) and (A)(9). In *Marquez v. Jackson,* 9th Dist. Lorain No. 16CA011049, 2018-Ohio-346, the Ninth District agreed that a new trial was proper where the plaintiff was prohibited from having a fair trial by the admission of defendant's expert report where the expert did not testify and plaintiff objected on hearsay grounds.

The Ninth District stated,

> "Among the reasons listed in Civ.R. 59(A), a new trial is warranted upon a finding of sufficient prejudicial error; that which prevents a fair trial." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit Nos. 22098, 22099, 2005-Ohio-4931, 2005 WL 2292800, ¶ 14. Civ.R. 59(A)(1) permits a new trial based on an "* * * abuse of discretion, by which an aggrieved party was prevented from having a fair trial[.]" We review a trial court's granting of a new trial pursuant to Civ.R. 59(A)(1) for an abuse of discretion. *Texlon Corp.* at ¶ 13. An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Under this standard of review, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993). *Marquez, supra,* at ¶ 24.

[6] As noted above, however, Thomas certainly could, and probably should have requested a sidebar immediately after the Court overruled her first objection to Badnell's improper testimony in order to advise the Court of the basis for the objection.

In the case at bar, similar to the facts in *Marquez,* this Court admitted improper evidence over the defendant's (Thomas) objection. Unlike *Marquez,* however, where the trial court admitted an entire hearsay report, this Court admitted only *some* improper evidence, to wit: the damages calculation testimony by Badnell. As noted above, other, proper evidence was admitted upon which the jury appropriately relied to reach a verdict in favor of Alonso.

As such, because the trial herein was only partially tainted, it would not be equitable or reasonable to outright grant Thomas a new trial without first giving Alonso the opportunity to accept remittitur.

REMITTITUR

As noted above by the Ohio Supreme Court in the *Wightman* case, certain cases present ". . . a compelling example of the worth of remittitur." *Id.* at ¶ 17.

The case at hand is just such a case.

Consistent with the mandates of *Chester Park, supra,* this Court finds as a matter of law that (1) the jury awarded unliquidated damages; (2) that the verdict is not influenced by passion or prejudice but instead, an irregularity and error of law in the Court's admission of Badnell's damages testimony; and (3) that as a result of the admission of that testimony, the verdict is excessive. Moreover, the remitted amount can be easily calculated and is supported by the weight of the evidence.

As to the fourth prong of the *Chester Park* test, acceptance by the plaintiff (Alonso) of the reduction in damages, we shall see.

Regardless, this Court can without much difficulty "back out" the improper evidence offered by Badnell relative to damages which amounts to $210,240.00 (the remitted amount) from the jury verdict of $550,000.00 to arrive at the new jury verdict amount of $339,760.00.

As noted by the *Wightman* decision, should Alonso accept remittitur, she may appeal this Court's determination of the damage issue ". . . if the opposing party [Thomas] appeals any issue." If the reviewing court finds no error as to the determination of damages, the plaintiff's (Alonso's) prior acceptance of judgment for the reduced amount will be affirmed unless the result of the principal appeal requires otherwise. *Id.* at ¶ 18.

Accordingly, Alonso is ordered to advise this Court no later than 14 days after journalization of this Entry if she accepts or rejects remittitur. If she makes no election, the Court will consider the remittitur rejected.

ALONSO'S MOTION FOR PREJUDGMENT INTEREST

Alonso has moved this Court to award her prejudgment interest on the jury verdict from the date of the filing of the complaint, February 27, 2015, at the statutory rate of interest in effect for 2015 through 2018.[7]

The basis for this Motion is twofold: (1) Thomas failed to rationally evaluate risks and potential liability; and (2) Thomas failed to make a good-faith monetary settlement offer or respond in good-faith to an offer from the other party. Alonso does not allege that Thomas "failed to cooperate in discovery" or "attempted to delay the proceedings unnecessarily." See: *Coon, supra,* citing *Moskovitz v. Mt. Sinai Med. Ctr., supra.*

According to Alonso, Thomas ". . . refused to enter into settlement discussions and further refused to even mediate this case." Thomas conceded these points at the oral hearing. She also confirmed that at no time during the entire pendency of this case did she ever seek a demand from Alonso or make any type of settlement offer.

Thomas disputes that she failed to rationally evaluate risks and potential liability and counsel at the oral hearing stated that he was "unsure" if Alonso's demand of $250,000.00 was ever conveyed to him. In her Supplemental Brief in Opposition to the Motion For PJI, Attorney Johnson[8] submits an Affidavit that references an email he sent to Thomas' liability carrier wherein he conveys to the carrier the status of negotiations relative to settlement.

This email is telling.

Initially, there is a discussion about attending mediation but this contradicts Thomas position at the oral hearing that she would not agree to mediation. Next, the email confirms that *some* settlement negotiations occurred ". . . in the neighborhood of $110,000 . . ." and that ". . . we would not likely be offering anything in that area." The email goes on to indicate that ". . . we would be open to possibly paying something in the area of the expense of trial."

Contrary to Thomas' intent, the Court finds that the presence of this email serves to bolster Alonso's demand for PJI.

[7] And presumably now, through 2019.
[8] Counsel for Thomas.

First, the email confirms that Thomas was aware of a monetary settlement demand[9] that was actually *less* than the demand Alonso argues was made ($250,000.00). Where it might be understandable if Thomas rejected out of hand a $250,000.00 demand, that position is weakened if the demand is only $110,000.00.

Second, the email indicates that Thomas might be open to paying something in the area of the expenses of trial, which is usually in the $25,000.00 range. However, no offer of even this amount was ever made or even discussed with Alonso.

When considering counsel's email and Thomas' position articulated at the evidentiary hearing, it is clear that Thomas had no intention of pursuing settlement discussions and never made any offer to Alonso to settle.

Clearly, Thomas violated the spirit and import of R.C. 1343.03(C) and the fourth prong of the *Moskovitz* test by failing to make a good-faith monetary settlement offer or respond in good faith to Alonso's demand, especially if that demand was only $110,000.00 (as urged by Thomas) but even if it was $250,000.00 as argued by Alonso.[10]

Finally, the Court must evaluate the second prong of the *Moskovitz* test, to wit: did Thomas "rationally evaluate her risks and potential liability?"

This Court finds, as a matter of law, that she did not.

Recognizing that there is no real test or bright line standard to apply when evaluating this issue, the Court is guided again by the *Coon* case where the Ninth District stated,

> [T]he question of whether [a party] possessed a good faith, objectively reasonable belief that [it] had no liability must focus on the belief as it existed prior to trial. *Id.* at ¶ 26, citing *Kohler v. Deel,* citation omitted.

There are a number of factors that support this Court's conclusion that Thomas failed to rationally evaluate her risks and potential liability to wit:

1) Thomas oversaw the litigation of a relatively simple divorce case that lasted six years! An outrageous amount of time to litigate a case with only two real contested issues – division of the parties' assets and child/spousal support;

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[9] That it was not in "written" form is of no import as long as the Court is persuaded that it was reasonably conveyed to the Defendant. See: *Ziegler v. Wendel Poulty Services,* citation omitted.

[10] While not a factor for direct consideration, it is not lost on the Court that even the $250,000.00 demand is almost $90,000.00 less than the remitted/corrected jury award ($339,760.00).

2) During that time-frame, Thomas charged Alonso close to $133,000.00 in legal fees (an exorbitant amount[11]) and Alonso incurred an additional $40,000.00 in legal fees to complete the litigation (which was done in four months) once she terminated Thomas' representation;

3) Thomas conducted almost no formal discovery; failed to definitively evaluate Henry's net worth or the parties' assets; and failed to properly calculate property division, child support, and spousal support;

4) Despite a (standard) restraining order to freeze the parties' assets during the pendency of The Divorce Case, Henry repeatedly violated the order. Thomas was aware of Henry's conduct but undertook no meaningful or effective efforts to stop it. By invading the parties (or his own) accounts and in violation of that order, Henry dissipated approximately $52,000.00 of the parties' marital assets;

5) When The Divorce Case finally settled in November, 2011, Thomas failed to completely resolve all of the issues and still did not have the necessary financial information or paperwork regarding Henry's assets. In order to "overcome" this problem, Thomas crafted an 'open-ended' Final Divorce Decree that provided for the continued exchange of documents (from Henry to Alonso) and sanctions for failing to cooperate. This highly irregular "Entry" arguably resulted in 34 months of additional litigation and tens of thousands of dollars in legal fees, including the $40,000.00 alluded to above;

6) When Alonso's new attorneys, Attorney English and Attorney Budway came on board, Thomas' files were in abject disarray. Alonso posited evidence that it took English, Budway, and herself "weeks" just to organize the files and put them in an intelligible order.

Every one of these factors was known to Thomas and her counsel during the time this lawsuit was pending. All of these matters were alleged in the complaint, inquired of by Alonso at Thomas' deposition, and are reflected, to some degree, in Alonso's expert reports.

Nevertheless, and despite a demand of $110,000.00 (according to Thomas), Thomas offered nothing, saw no realistic chance of an adverse verdict or liability, and would not even attend mediation or make a cost-of-trial offer.

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[11] See: ORPC 1.5(A)(1-8) and *Bittner v. Tri-County Toyota* (1991), 58 Ohio St.3d 143.

For all of the foregoing reasons, should Alonso accept remittitur, this Court believes that Thomas violated the spirit, mandate, and intent of R.C. 1343.03(C). By failing to rationally evaluate her risks and potential liability and by failing to make a good-faith monetary settlement offer in response to Alonso's settlement demand, especially if it was $110,000.00, but even if it was $250,000.00, PJI is appropriate.

THOMAS' REMAINING ARGUMENTS FOR JUDGMENT NOV OR NEW TRIAL

While the thrust of Thomas' Motions clearly relate to Badnell's improper testimony, Thomas raises the following additional irregularities in support:

1) BADNELL SHOULD NOT HAVE BEEN QUALIFIED AS AN EXPERT WITNESS BECAUSE HE WAS NOT FAMILIAR WITH THE STANDARD OF CARE IN LORAIN COUNTY

This argument lacks merit. Badnell was clearly qualified to give his opinions in this case (excepting the damages testimony already discussed.) First, Thomas never challenged Badnell's qualifications as an expert, thus, she clearly waived this argument. Second, Badnell was properly qualified as an expert pursuant to Evid. R. 702, has over 22 years experience as a domestic relations attorney, and was familiar with the standard of care throughout the State of Ohio.

2) PLAINTIFF'S COUNSEL MISREPRESENTED THE EVIDENCE IN HIS CLOSING ARGUMENT

This argument has some merit as it reflects Plaintiff's Counsel's arguments relative to Badnell's improper testimony. However, that error has been corrected by the offer of remittitur or potential for a new trial on damages. The balance of the argument is baseless.

3) THE JUDGE'S ADMONITIONS TO "HURRY UP" IN THE PRESENTATION OF THOMAS' CASE IN CHIEF CONSTITUTED AN 'IRREGULARITY IN THE PROCEEDINGS'

This argument places the Court in the difficult position of having to independently analyze its conduct relative to this accusation.

As a threshold matter, the Court concedes that towards the close of Thomas' case in chief, the Court held two or three sidebars where the pace of the trial, juror fatigue, redundancy of evidence, and lack of cohesive, cogent responses to questions on direct examination of Thomas were discussed.

This Court probably did convey its concerns relative to the above-noted issues to counsel and "recommended" that counsel for Thomas might want to consider "moving on" or "expediting" matters.

That said, all of these discussions were had outside of the presence of the jury. In addition, the Court in its final instructions of law admonished the jury that it was they who decided the disputed questions of fact and that "If you have an impression that the Court has indicated how any disputed fact should be decided, you must put aside such an impression because that decision must be made by you, based solely upon the facts presented to you in this courtroom."

Finally, as conceded by Thomas in her Brief, at no time was Thomas **". . . actually prevented, restricted or prohibited from presenting any evidence she desired to present . . ."** (Emphasis added.)

4) THE COURT FAILED TO ADMIT SOME OF THOMAS' TRIAL EXHIBITS

As in item No. 2 above, this argument has some merit as it reflects Plaintiff's Counsel's arguments relative to Badnell's improper testimony and damages calculations. However, that error has been corrected by the offer of remittitur or potential for a new trial on damages. The balance of the argument deals with two hearsay documents that the Court properly excluded.

5) THE COURT ALLOWED ALONSO TO "RETRY" HER DIVORCE CASE

This argument wholly lacks merit. The entire purpose of a malpractice case is to "retry," at least to some extent, the underlying action. The only way to demonstrate professional malpractice, or to defend against it, is to review, relive, and to some extent, re-litigate, the underlying case.

If this Court were to accept Thomas' waiver, estoppels, or *res judicata* arguments, no professional would be accountable for his or her actions since the issues would be "waived" or "already decided." A malpractice case goes to the very heart of the representation and whether or not an attorney breached the standard of care expected of that attorney. The only way to get to the truth of the matter, and prove or defend such a claim, is to explore what happened in the case from which malpractice is alleged.

CONCLUSION

For the numerous reasons articulated above, the Court does not find Plaintiff's Motion For Judgment NOV well-taken and that Motion is hereby DENIED.

The Motion For A New Trial is provisionally stayed pending Plaintiff's decision to elect or refuse remittitur. If Plaintiff elects to accept the remitted amount of $210,240.00 from the original verdict of $550,000.00, resulting in a new verdict amount of $339,760.00, the Motion For New Trial will be Denied. If Plaintiff rejects remittitur, the Motion For New Trial will be Granted, but as to damages only. Plaintiff shall elect or reject remittitur no later than 14 days after journalization of this order. If Plaintiff does neither, the Court will consider remittitur rejected and a new trial on damages will be ordered.

The Motion For Prejudgment Interest is well-taken and hereby GRANTED, but only as to the new verdict amount of $339,760.00 (if remittitur is accepted), from February 27, 2015. If remittitur is rejected and a new trial on damages ordered, the Motion For PreJudgment Interest is moot. The Court has calculated the PJI amount through February 13, 2019 at $50,766.39, for a total new verdict amount of $390,526.39.

JUDGE D. Chris Cook

THIS IS A FINAL APPEALABLE ORDER[12]

[12] An order that gives a verdict-winner the option of accepting a remittitur or submitting to a new trial on damages does not trigger finality under R.C. 2505.02(B)(3) until the verdict-winner makes that election or the time for doing so expires. *VIL Laser Sys., LLC v. Shiloh Indus, Inc.*, 119 Ohio St.3d 354, 2008-Ohio-3920, 894 N.E. 2d 303 (2008).