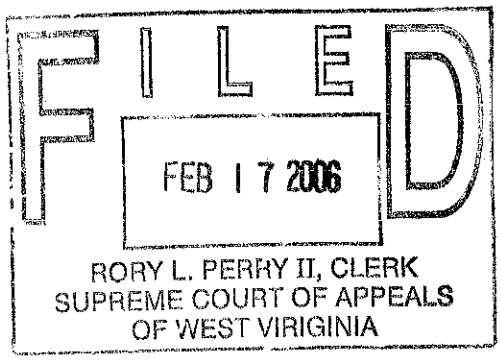
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. _____



SAMANTHA SELLS,
Plaintiffs Below, Appellant

v.

KENNETH E. CHITTUM,
Defendant Below, Appellee

APPELLANT'S BRIEF IN SUPPORT OF APPEAL

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I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

This a brief for appeal arising from an action filed by the plaintiff-appellant Samantha Sells against multiple defendants including defendant-appellee Kenneth Chittum ("Chittum"). The claim against Chittum sought damages resulting from professional negligence in his legal representation of Samantha Sells for his failure to investigate and determine whether Ms. Sells was eligible for underinsured motorist coverage under her parents' automobile policy with State Farm.

On February 4, 2005, the appellee filed a motion for summary judgment in the Circuit Court of Mercer County. On May 11, 2005, the Circuit Court entered an order ("Order") granting the motion. The Court found that any arguable negligence on the part of Chittum was not the proximate cause of loss to Samantha Sells. On September 2, 2005, Ms. Sells filed her timely Petition for Appeal. By Order dated January 11, 2006, this Court ordered that this action be heard, submitted and determined upon the original record, briefs, and oral argument. The appellant's counsel received this order on January 20, 2006.

II. STATEMENT OF FACTS

On April 21, 2000, the appellant, Samantha Sells, was a guest passenger on a motorcycle driven by Billy Ray Lewis, Jr., traveling on Route 102 in Mercer County. The motorcycle was involved in an accident with a Ford F-150, operated by Arnold Ray Thomas, when Thomas cut across and in front of the motorcycle. The appellant suffered multiple injuries, permanent in nature, that have left her with a limp. (Order at 1.)

Thereafter, Ms. Sells retained the appellee, Kenneth E. Chittum, Esquire, to represent her for her claims against Mr. Lewis and Mr. Thomas. The appellant settled

with Mr. Thomas' insurance carrier, Nationwide Insurance Company ("Nationwide") for $24,300.00, and two other claimants split the balance of the $50,000.00 aggregate coverage in the Nationwide policy. On July 6, 2000, Nationwide adjuster Terri Doddrill interviewed the appellant, with the appellee Chittum present. The appellant told Ms. Doddrill, "I'm on my dad's insurance." *Id.* at 2.

The appellee Chittum was also informed by Allegra Williams, claims representative for State Farm Insurance Company ("State Farm"), that Ms. Sells was covered for medical payments coverage under a policy issued to her parents. The appellee Chittum received a check from State Farm for med-pay benefits from a policy belonging to Ms. Sells' parents. *Id.*

The appellant completed the settlement with Thomas' insurer, Nationwide, on January 23, 2001. Thereafter, on February 6, 2002, Ms. Sells terminated her representation by Chittum and retained her current counsel, Frank Venezia, Esquire. On March, 14, 2002, the appellant filed her complaint. The statute of limitations on further claims had not run when this action was filed, and the appellant instituted an action against State Farm seeking underinsured coverage. *Id.*

The underinsured policy provides $75,000.00 in available coverage. Ms. Sells informed the Circuit Court at the summary judgment hearing that the claim against State Farm was settled for $50,000.00. The appellant had instituted the claim against Chittum for professional negligence in failing to investigate and determine whether the appellant was eligible for underinsured motorist benefits under her parent's policy. *Id.*

The appellee Chittum asserted that he was entitled to summary judgment because the appellant cannot prove the elements required to prevail in a legal malpractice claim.

Ms. Sells argued that material questions of fact existed that were sufficient to preclude summary judgment.

In the seminal case concerning legal malpractice, Syl. Pt. 1, *Keister v. Talbott*, 182 W. Va. 745, 391 S.E.2d 895 (1990), the Supreme Court of Appeals of West Virginia determined that, in a suit against an attorney for negligence, the plaintiff must prove three things in order to recover: (1) The attorney's employment; (2) his neglect of a reasonable duty; and (3) that such negligence resulted in and was the proximate cause of loss to the client. The Circuit Court first addressed the third element, that such negligence resulted in and was the proximate cause of loss to the client.

Chittum asserted that Ms. Sells could not show that his actions were the proximate cause of the loss because the appellant prevailed in her underinsured claim in this action.

The appellant asserted that she should have been able to collect the policy limits of $75,000.00, but due to the inaction of the appellee Chittum, she was forced to settle for $50,000.00. Therefore, Ms. Sells argued that summary judgment should be denied because it was a question of fact as to whether the appellee's inaction proximately caused her damages of not receiving the policy limits from the underinsured coverage.

The Supreme Court of Appeals of West Virginia set forth the law concerning the burden of proof on damages in a legal malpractice action as follows: "Damages arising from the negligence of an attorney are not presumed, and a plaintiff in a malpractice action has the burden of proving both his loss and its casual connection to the attorney's negligence." *Id.* at Syl. Pt. 3.

Although the Circuit Court's research did not reveal any Supreme Court of Appeals of West Virginia decisions on point, the Circuit Court found that decisions on this issue from the majority of jurisdictions suggested that Ms. Sells cannot show that the defendant's inaction was the proximate cause of her loss.

The Circuit Court found two cases which it stated were factually similar to the case at bar. According to the Circuit Court, in those cases, the courts found that plaintiffs in legal malpractice actions were unable to obtain relief in connection with the underlying claim because they recovered on the claims through their second counsel. *Mitchell v. Transamerica Ins. Co.*, 551 S.W.2d 586 (Ky. Ct. App. 1977).

In *Goff v. Justice*, 120 S.W.3d 716 (Ky. Ct. App. 2003), the court found that, due to the action of the first attorney, the plaintiffs were forced to settle the underlying medical malpractice action and a legal malpractice could be maintained because damages could be proved.

In the case at bar, the Circuit Court found that it was not disputed that the tortfeasor's policy limits were exhausted in the underlying action. Therefore, pursuant to the law set forth in *Kronjaeger v. Buckeye Union Ins. Co.*, 200 W. Va. 570, 490 S.E.2d 756 (1997), the Circuit Court found that the underinsured carrier would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage. *Id.* at Syl. Pt. 7. Accordingly, the Circuit Court found that it did not appear in the present case to be a situation where the appellant was forced to settle, and it was speculative as to whether the appellee proximately caused loss for Ms. Sells.

The Circuit Court also found the Michigan decision, *Bourke v. Warren*, 325 N.W.2d 541 (Mich. Ct. App. 1982), persuasive on this issue. In that case, the court found that the defendant was entitled to judgment as a matter of law because the plaintiff could not prove the existence and extent of the injury. *Id.*

The Circuit Court found that, although the existence and extent of injury is not the exact same language used in the elements of a legal malpractice action in West Virginia, the appellant in the case at bar was required to "prove her loss" beyond what the Circuit Court considered were the speculative assertions provided therein.

The Circuit Court found that the majority of jurisdictions hold that, in a legal malpractice action, the plaintiff has the burden of proving both his loss and its causal connection beyond speculation. In the case at bar, the appellant settled for $50,000.00 under a policy with a limit of $75,000.00

The Circuit Court found that it was beyond its province to speculate that a jury would have awarded the appellant the policy limits. Accordingly, the Circuit Court found that the appellee was entitled to judgment as a matter of law.

The Circuit Court found that, because Chittum was entitled to judgment as a matter of law based upon the third element, it was unnecessary to address the other elements.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

A. The Circuit Court erred when it found that the appellant was not forced to settle because it was not disputed that the tortfeasor's policy limits were exhausted in the underlying action; and that the underinsured carrier would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage.

B. The Circuit Court erred when it found that damages resulting from legal malpractice in this case were too speculative to establish a causal connection between the acts and omissions of the appellee and those damages.

C. The Circuit Court erred when it failed to allow adequate discovery to take place before it granted the appellee's motion for summary judgment.

IV. POINTS AND AUTHORITIES RELIED UPON, DISCUSSION OF THE LAW, AND THE RELIEF PRAYED FOR

A. POINTS AND AUTHORITIES RELIED UPON

CASES

Aetna Casualty and Surety Co. v. Federal Insurance Co, 148 W. Va. 160, 133 S.E.2d 770 (1963)

Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992)

Better Homes, Inc. v. Rodgers, 195 F. Supp. 93 (N.D. W. Va. 1961)

Board of Educ. Of the County of Ohio v. Van Buren and Firestone, Arch., Inc., 165 W. Va. 140, 267 S.E.2d 440 (1980)

Bourke v. Warren, 325 N.W.2d 541 (Mich. Ct. App. 1982)

Espinoza v. Thomas, 472 N.W.2d 16 (Mich. Ct. App. 1991)

Goff v. Justice, 120 S.W.3d 716 (Ky. Ct. App. 2003)

Keister v. Talbott, 182 W. Va. 745, 391 S.E.2d 895 (1990)

Kirk v. Watts, 62 S.W.3d 37 (Ky. Ct. App. 2001)

Kronjaeger v. Buckeye Union Ins. Co., 200 W. Va. 570, 490 S.E.2d 657 (1997)

Masinter v. Webco Co., et al., 164 W.Va. 241, 262 S.E.2d 433 (1980)

McCarthy v. Pedersen & Houpt, 621 N.E.2d 97, *appeal denied*, 624 N.E.2d 809 (Ill. App. Ct. 1993)

Mitchell v. Transamerica Ins. Co., 551 S.W.2d 586 (Ky. Ct. App. 1977

Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346, *cert. denied*, 502 U.S. 867 (Pa. 1991)

Unit Owners A'ssn. v. Highland Properties, Ltd., 192 W. Va. 692, 474 S.E.2d 872 (1996)

Wassall v. DeCaro, 91 F.3d 443 (3d Cir. 1996)

Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995)

LEGAL TREATISE

2 Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 20.3, at 1091-92 (2003)

B. DISCUSSION OF THE LAW

1. STANDARD OF REVIEW

This Court reviews a circuit court's grant of summary judgment *de novo*, and applies the same standard as the circuit court, reviewing all facts and reasonable inferences in the light most favorable to the non-moving party. *Unit Owners A'ssn v. Highland Properties, Ltd.*, 192 W. Va. 692, 474 S.E.2d 872 (1996).

Under Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is proper only where the moving party shows by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

In Syllabus Point 1 of *Andrick v. Town of Buckhannon*, 187 W. Va. 706, 421 S.E.2d 247 (1992), this Court reiterated the standard for granting summary judgment: "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law."

The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. In fact, in its landmark case on summary judgment, *Aetna Casualty and Surety Co. v. Federal Insurance Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963), this Court firmly established that a judge should hear evidence at trial even if the judge anticipates directing a verdict. Summary judgment is employed only when there are no genuine issues of material fact. Consequently, this Court has traditionally viewed summary judgment with reservations and has required that the facts of the case be viewed in a light most favorable to the nonmoving party.

In assessing the factual record, the court must grant the nonmoving party the benefit of all reasonable, favorable inferences because creditability determinations, the weighing of the evidence and the drawing of legitimate inference from the facts, are jury functions, not those of a judge. Summary judgment should be denied even when there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. *Williams v. Precision Coil, Inc.*, 194 W. Va; 52, 59, 459 S.E.2d 329, 336 (1995). Additionally, in *Williams*, this Court explained "both this Court and the United States Supreme Court apply the general principle that summary judgment is appropriate **only after the opposing party has had 'adequate time for discovery.'**" *Id.* at 338 (Citations omitted)(Emphasis added).

In fact, this Court has stated that, even after discovery is completed, the trial court should exercise caution in reaching a conclusion based on discovery. *See Masinter v. Webco Company, et al.*, 164 W.Va. 241, 262 S.E.2d 433 (1980). Thus, a decision for summary judgment before discovery has been completed must be viewed as precipitous.

Board of Educ. of the County of Ohio v. Van Buren and Firestone, Arch., Inc., 165 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980).

2. *ARGUMENT*

a. The Circuit Court erred when it found that the appellant was not forced to settle because it was not disputed that the tortfeasor's policy limits were exhausted in the underlying action; and that the underinsured carrier would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage.

It appears from cases in other jurisdictions that the critical issue in legal malpractice cases regarding the effect of a settlement in the underlying case is whether the plaintiff was prejudiced in some way from a fair adjudication in the underlying case. This is a question of fact that should not be resolved through summary judgment. In any event, the facts in the present case show prejudice to Samantha Sells. As the Circuit Court noted in the present case concerning *Goff v. Justice*, there is a difference between electing to settle and being forced to settle the underlying claim. (Order at 6.) Samantha Sells falls into the latter category. The deprivation of a fair hearing is precisely the situation in the case before this Court. Samantha Sells suffered lost opportunities and was forced to settle her case.

Examples abound in other jurisdictions illustrating the propositions that a plaintiff who has been "forced to settle" is entitled to proceed in a legal malpractice action notwithstanding settlement of the underlying case.

One such case is *Espinoza v. Thomas*, 472 N.W.2d 16 (Mich. Ct. App. 1991), which found that the pleadings and evidence were sufficient to at least raise an inference that the low settlement award and plaintiff's acceptance of the award were caused by defendant's malpractice.

The *Espinoza* court distinguished *Bourke v. Warren*, 325 N.W.2s 541 (Mich. Ct. App. 1982), a case relied upon by the Circuit Court (Order at 6, 7), holding inter alia:

> In that case, the plaintiffs' cause of action for the property damage to their building remained intact despite the alleged negligence of the defendant attorney in allowing the statutory limitation period to expire. Although the plaintiffs were precluded from obtaining recovery from the underlying defendant's insurer, they were able to fully litigate and recover on the same claim against their own insurer.
>
> By contrast, in the present case, plaintiff contends that defendants' negligence caused the loss of this only viable cause of action and, thus, precluded plaintiff from obtaining full recovery for his damages.

472 N.W.2d at 20-21.

In *Wassall v. DeCaro*, 91 F.3d 443 (3d Cir. 1996) (applying Pennsylvania law), the plaintiffs agreed to the dismissal of their underlying defamation action, which they asserted was made necessary by the negligent manner in which their attorneys, the malpractice defendants, had conducted the litigation. The *Wassall* court, in reversing a summary judgment for the defendants, distinguished the case of *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 526 Pa. 541, 587 A.2d 1346, *cert. denied*, 502 U.S. 867 (1991), which it summarized as holding "that a client who becomes dissatisfied with an *attorney's* settlement of an action, which the client had accepted, cannot then sue the attorney for malpractice." 91 F.3d at 446 (*Wassall* court's emphasis).[1] The *Wassall* court held, inter alia:

> The policies expressed in *Muhammad*, of preserving resources and allowing access to the courts by other litigants, are served by allowing the present action for malpractice. Plaintiff's allegations, if proven, show an enormous waste of the court's time by an unprepared attorney. Where the attorney's conduct in this regard "forces" a client to accept a dismissal of

[1] *Muhammad* represents a clear minority view nationally on that point. *See, e.g., Keramati v. Schackow*, 553 So.2d 741, 745-46 (Fla. Ct. App. 1989); *Thomas v. Bethea*, 718 A.2d 1187, 1190-95 (Md. 1998).

> the case, allowing a subsequent malpractice action serves as a systemic deterrent for this behavior and thus promotes the policies articulated in *Muhammad.* An attorney who has neglected his role as steward, hopelessly delaying, and perhaps prohibiting, the system from properly resolving his client's case, should not be able to seek safe haven in a dismissal that resulted because the client could not risk allowing the attorney further to neglect his role. Under these conditions, we are convinced that the Pennsylvania Supreme Court would not shield DeCaro from liability under the guide of encouraging settlements in general.

Id. at 449. The *Wassall* court further held that the plaintiffs had sufficiently alleged damage resulting from the defendants' negligence. *Id.* at 450.

In the present case, the Circuit Court found that Samantha Sells was not forced to settle her case because it was not disputed that the tortfeasor's policy limits were exhausted in the underlying action. Therefore, pursuant to the law set forth in *Kronjaeger*, the Circuit Court found that the underinsured carrier would have to show that the unauthorized settlement prejudiced it before it could rely on the consent to settle provision to deny underinsured coverage. Accordingly, the Circuit Court found that it did not appear to be a situation where the plaintiff was forced to settle, and it was speculative as to whether the defendant proximately caused loss for the plaintiff. (Order at 6). This finding is incorrect and not supported by the record.

The lawsuit in this case included a declaratory action against State Farm asking the Circuit Court to determine that this insurer was required to provide Ms. Sells with UIM coverage. State Farm filed a motion for summary judgment in which it argued that coverage was obviated due to plaintiff's breach of contract in settling her claim, by her violation of the policy exhaustion clause, and by her release of the tortfeasor thereby prejudicing State Farm's subrogation rights. (State Farm Summary Judgment Memorandum at pp. 3-4.)

State Farm argued that the plaintiff's breach of the consent to settle, violation of the policy exhaustion clause, and prejudice of State Farm's subrogation rights destroys coverage under Virginia law, whether there was any prejudice to the insurer or not. State Farm further argued that Virginia law and the unambiguous policy language should be given full faith and credit by the West Virginia court. State Farm asserted that West Virginia's choice of law rules mandate that it follow Virginia law, which is contrary to West Virginia law on these issues, because the State Farm policy was executed in Virginia, to be performed in Virginia, and the principal risk was garaged in Virginia.

Of course, appellant's present counsel strenuously argued that West Virginia law should apply given the facts of the case. At the hearing on State Farm's summary judgment motion, however, the judge originally assigned to this case stated, and counsel was compelled to concede, that State Farm's motion should be granted if Virginia law was to be applied in this case. The trial court deferred ruling on State Farm's summary judgment ruling until a further date. Ms. Sells settled with State Farm before the motion was ruled upon. As a result, Ms. Sells was indeed forced to settle her case. Otherwise, she ran the serious risk of an adverse ruling from the court on State Farm's summary judgment motion, resulting in no coverage for her injuries.

The record reflects that Ms. Sells suffered multiple injuries including back injuries, multiple contusions, a severely comminuted open knee laceration with disruption of the quadriceps and an intra-articular fracture of the right ankle. These injuries are severe and permanent in nature, and have left Samantha Sells with a limp. (Complaint at p.1.) Her medical damages from the car wreck in question total nearly $35,000.00. (Plaintiff's Response to Defendant State Farm Mutual Automobile Insurance Company's

Request for Written Answers to Interrogatories and Request for Production of Documents to Plaintiff, Exhibit A.)

Samantha Sells could have presented very compelling evidence to State Farm that her claim was easily worth the $75,000.00 in UIM coverage. At the very least, the value of the case and the sufficiency of the settlement are questions of fact for the jury's consideration. In the present case, an opportunity was lost and Ms. Sells was denied a fair adjudication by the appellee's negligent handling of her case – specifically his aforesaid breach of the consent to settle, exhaustion, and subrogation clauses.

b. The Circuit Court erred when it found that damages resulting from legal malpractice in this case were too speculative to establish a causal connection between the acts and omissions of the appellee and those damages.

The damages in this case are not too speculative for a jury's consideration. In *Better Homes, Inc. v. Rodgers*, 195 F. Supp. 93 (N.D. W. Va. 1961), the District Court, applying West Virginia law, discussed the compelling reasons why damages of this type are not speculative. *Better Homes* was an action against the plaintiff's former attorneys who lost a property damage negligence case brought by a customer and failed to appeal within the applicable time period. The attorneys argued that the plaintiff's loss was too speculative, and the court held, in rejecting this argument:

> If it should be the law that the necessity of undertaking the functions of the Supreme Court of Appeals, in the limited sense hereinbefore outlined, renders the proof of damages too remote, speculative and uncertain to receive cognizance, it is apparent that no lawyer can ever be held financially responsible for admitted negligence in failing to perfect an appeal from a judgment adverse to his client. I do not believe that this is or should be the law. The integrity of the Bar as an essential part of our judicial system is too important to permit its reputation to be impugned by a justifiable charge that its members are free of an obligation to respond in damages for breach of the ordinary standards of due care, simply because the damages are difficult of ascertainment.

> That the "speculative nature" of the damages is no defense to a negligent lawyer whose client has lost the opportunity to have his claim adjudicated by a court and jury because of his failure to file suit within the statutory period, or to take necessary steps properly to mature and present his suit, seems to be the majority rule. The better reasoned opinions hold that client is entitled to his day in court and to damages, which include the value of his lost claim, even though the ascertainment of those damages involved an adjudication, in the subsequent suit between client and lawyer, of the issues which would have been tried in the first suit, had it been properly filed and prosecuted. The courts recognize the difficulties inherent in trying these issues in a suit in which the claimed debtor is not a party, and in which the evidence which he might have presented may not be available to the lawyer as a defendant, but, on balancing the interests, place this burden on the defendant lawyer rather than leave the innocent client to bear the loss of his unlitigated claims.

Id. at 96.

While not dealing directly with the effects of a settlement, the reasoning in *Better Homes* supports the principle that allows plaintiffs the opportunity to litigate their claims against defendant attorneys given the appropriate facts and circumstances. Cases from other jurisdictions specific to settlements in the underlying suit reach the same conclusion.

In *McCarthy v. Pedersen & Houpt*, 621 N.E.2d 97, *appeal denied*, 624 N.E.2d 809 (Ill. App. Ct. 1993), the plaintiff settled the underlying commercial litigation and subsequently brought a malpractice action against his former attorney, alleging failure to file a timely claim under a specified federal statute and selection of an unqualified expert. In affirming denial of the attorney's motion for summary judgment, the *McCarthy* court cited a number of cases which it described as holding that a plaintiff may sue his attorney for malpractice despite the fact that the plaintiff signed a settlement agreement in the underlying suit. *Id.* at 99. The *McCarthy* court reasoned:

> We are faced with the limited question of whether, under the undisputed facts and circumstances of this case, plaintiff's legal malpractice case is

> barred due to the fact that plaintiff settled the underlying action. The undisputed facts in the instant case are that the underlying suit was settled and independent counsel reviewed the settlement agreement before it was signed by plaintiff. What remains disputed, however, is whether defendants were negligent in their handling of the underlying case and whether plaintiff was damaged by such negligence. Furthermore, the parties dispute the extent of independent counsel's involvement in the settlement. Certainly plaintiff should be permitted to develop these facts at trial. Although there is no Illinois case law on this issue, we are persuaded by those cases from outside this jurisdiction holding that only a trial on the merits can fully and fairly resolve the issue of whether an attorney is liable for malpractice despite the fact that the underlying case was settled. To hold otherwise could create ethical problems where an attorney, knowing that he mishandled a case, encourages his client to settle in order to shelter himself from a malpractice claim. The rule espoused here will avoid such conflicts of interest, and allow a malpractice claim to succeed or fail on its merits. Accordingly, we conclude that based on the facts and circumstances presented here, the trial court properly refused to grant summary judgment in favor of the defendants.

Id. at 101-02.

In its Order, the Circuit Court placed great emphasis on *Mitchell v. Transamerica Ins. Co.*, 551 S.W.2d 586 (Ky. Ct. App. 1977) to support its finding that damages in the present case are speculative. *Mitchell* was distinguished, however, in *Goff v. Justice*, 120 S.W.3d 716 (Ky. Ct. App. 2002). In *Goff*, the plaintiffs settled their underlying medical malpractice action after replacing their attorney, and the court held, in reversing a judgment for the former attorney in their legal malpractice action:

> As is clear from our holding in the *Kirk* case, the mere fact that Goff reached a settlement on her underlying medical malpractice claim against Dr. McCoy does not mean that she forfeited her right to pursue a legal malpractice claim against the appellees. As in the *Kirk* case, we must look beyond the fact that the underlying claim was settled and consider the position in which the Goffs had been placed by the appellees. Because of the alleged negligent actions of Justice, the Goffs were limited in the presentation of evidence against Dr. McCoy. In short, we conclude that the Goffs' legal malpractice claim against the appellees remained alive even after her settlement with Dr. McCoy.

120 S.W.3d at 723. The *Goff* court followed *Kirk v. Watts*, 62 S.W.3d 37 (Ky. Ct. App. 2001), and summarized the holding of that case as follows:

> The court noted the factual differences between Kirk's claim and the *Mitchell* case. The court noted that the Mitchells lost nothing as a result of their attorney's malpractice because they were able to maintain an action in federal court. The court distinguished Kirk's claim because Kirk lost the opportunity to maintain the case in her own name and to prosecute her own interests as a result of Watts' advice not to list the claim on the bankruptcy petition.

120 S.W.3d at 723.

Perhaps the best explanation of the nature of speculative damages in the legal malpractice arena is expressed as follows:

> In a legal malpractice action, a court may be tempted to characterize the plaintiff's damage claim as speculative, because of the difficulty in liquidating the claim. This is because legal malpractice litigation often involves hypothetical questions that have real consequences. For example, how much did the client lose, because a lawsuit was not prosecuted? Or, how much better off would the client have been had the suit been defended or been defended more competently?
>
> Often, no one can say precisely what the plaintiff lost or should have lost, but difficulty or imprecision in calculating damages does not exculpate an attorney. Although damages cannot be calculated precisely, depending on the circumstances, they can be estimated or resolved through the trial-within-a trial methodology. Otherwise, attorneys could avoid liability merely because damages are difficult to measure. The beneficiaries would be those attorneys whose errors were the greatest and whose conduct succeeded in complicating the issue of measuring the client's injury.
>
> Thus, damages are speculative only if the uncertainty concerns the fact of whether there is a compensable injury rather than uncertainty concerning the measure of the damages for an ascertainable injury.

2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 20.3, at 1091-92 (2005).

c. The Circuit Court erred when it failed to allow adequate discovery to take place before it granted the appellee's motion for summary judgment.

In *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), this Court explained "both this Court and the United States Supreme Court apply the general principle that summary judgment is appropriate **only after the opposing party has had 'adequate time for discovery.'** *Id.* at 338 (Citations omitted)(Emphasis added).

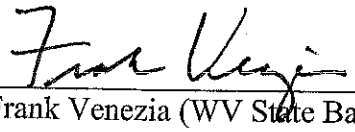
In fact, this Court has stated that, even after discovery is completed, the trial court should exercise caution in reaching a conclusion based on discovery. *See Masinter v. Webco Company, et al.*, 164 W.Va. 241, 262 S.E.2d 433 (1980). Thus, a decision for summary judgment before discovery has been completed must be viewed as precipitous. *Board of Educ. of the County of Ohio v. Van Buren and Firestone, Arch., Inc.*, 165 W.Va. 140, 144, 267 S.E.2d 440, 443 (1980)."

In the present case, on March 15, 2005, appellant designated William Watson as an attorney expert to testify on the negligence issues, including resulting damage questions. (Plaintiff's Designation of Expert Witnesses at p.1.) Defense counsel never expressed an interest in taking Mr. Watson's deposition. The discovery deadline was still three weeks away when the Circuit Court heard the appellee's motion for summary judgment, and had not expired when the Circuit Court issued its Order. Accordingly, the appellant was precluded from fully developing and illustrating all the necessary facts and expert opinion to support a conclusion that she was injured by Chittum's acts.

C. RELIEF PRAYED FOR

For all the above-stated reasons, this Court should reverse the Circuit Court's decision to grant summary judgment to the Defendant-Appellee and remand the case for a trial by jury.

SAMANTHA SELLS,
Plaintiff-Appellant
By Counsel.



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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

SAMANTHA SELLS,

Plaintiff-Appellant,

V. **Docket No.**

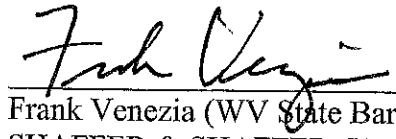
KENNETH E. CHITTUM

Defendant-Appellee.

CERTIFICATE OF SERVICE

I, Frank Venezia, do hereby certify that on this 17th day of February, 2006, I have placed a true and exact copy of the foregoing **Appellant's Brief in Support of Appeal** in the United States Mail, postage properly paid, in envelopes addressed as follows:

McGinnis E. Hatfield, Jr. Esquire
P. O. Box 649
Bluefield, WV 24701



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