

**OPINION SUMMARY**

**MISSOURI COURT OF APPEALS EASTERN DISTRICT**

SEMSA SELIMANOVIC,	)	
ALEN SELIMANOVIC,	)	No. ED94187
DERVIS SELIMANOVIC and	)	Appeal from the Circuit Court
JARVIS SELIMANOVIC,	)	of the City of St. Louis
Plaintiffs/Appellants,	)	Honorable David C. Mason
	)	Date: February 1, 2011
v.	)	
	)	
DANIEL P. FINNEY, JR., d/b/a DANIEL P.	)	
FINNEY, JR., ATTORNEY AT LAW,	)	
	)	
Defendant/Respondent.	)	

Plaintiffs filed a lawsuit against defendant attorney, which, as it was submitted to the jury, sought to recover damages for legal malpractice for failing to timely file a wrongful death lawsuit against two of the decedent's co-employees. The jury returned a \$2,000,000 verdict in plaintiffs' favor. The trial court granted defendant's motion for a new trial on the ground that it erred in allowing the jury to determine if there was insurance coverage for the claims against the co-employees by submitting the recoverability of damages in the wrongful death action as an element in the verdict director.

**REVERSED AND REMANDED FOR ENTRY OF JNOV IN DEFENDANT'S FAVOR.**

Division Two Holds:

1. If the prevailing plaintiff has appealed the trial court's grant of a new trial, a defendant may contest the submissibility of that plaintiff's case. If that plaintiff has failed to make a submissible case, then the order for new trial must be reversed, and the cause must be remanded for entry of a judgment notwithstanding the verdict.
2. To make a submissible case of legal malpractice, a plaintiff must show damages. When legal malpractice is based on a failure to timely file a lawsuit, damages represent the amount of money the plaintiff would have recovered and collected in the unfiled lawsuit "but for" the attorney's negligence.
3. Since the undisputed evidence was that the co-employees did not have any assets of their own to satisfy a judgment against them, plaintiffs could only establish damages if the employer's commercial general liability (CGL) policy or the commercial excess liability (umbrella) (ELU) policy would have covered plaintiffs' claims against the co-employees.
4. The plain language of the CGL policy provided that the co-employees were not insureds for plaintiff's wrongful death claim against them.

5. The plain language of the ELU policy provided that no person is an insured for bodily injury to a fellow employee unless insurance for that liability is provided by the underlying insurance. Because the co-employees were not insureds under the CGL policy for liability to plaintiffs, they were not insureds under the ELU policy.
6. The CGL policy and the ELU policy are not ambiguous with respect to the provisions challenged in this appeal. Neither policy would have covered the co-employees' liability if plaintiffs would have been awarded a judgment against them in a wrongful death lawsuit.
7. There was no substantial evidence to satisfy the element of recoverability in the legal malpractice action because the co-employees had no assets and, as a matter of law, they were not "insureds" under Brentwood Plastic's CGL or ELU policies for a wrongful death claim brought against them by the survivors of their co-employee. Plaintiffs therefore failed to make a submissible case of legal malpractice.

Opinion by: Kathianne Knaup Crane, J.  
Glenn A. Norton, P.J. and George W. Draper III, J., concur.

Attorney for Appellants: Ted F. Frapolli

Attorneys for Respondents: Michael A. Gross, R.C. Wuestling, and M. Adina Johnson

**THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.**