VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 1119-12-19 Cncv

Mansfield et al vs. Heilmann, Ekman, Cooley &

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff Mallets Bay Homeowner's Association, Inc. ("Association") and twenty-seven of its former members sue its former attorneys, Defendant Heilmann, Ekman, Cooley & Gagnon, Inc. for malpractice in failing to recommend and pursue settlement of an action brought against the Association on a ground lease. Defendant moves for summary judgment. The court grants the motion.

Background

The events that underlie this action date back 2011. The Association, Inc. was then a common interest residential community that had entered into a long-term agreement to lease land from Mongeon Bay Properties, LLC ("MBP"). The lease permitted the Association to sublease separate lots to its members. The lease required the Association to keep the land in good condition, and prohibited waste or impairment to the value or usefulness the land. The Association's failure to perform such obligations for a period of 45 days after receiving notice of such failure would constitute default, allowing MBP to terminate the Association's leasehold rights and take possession of the land.

There were more than twenty-five residential structures on the land—ten perched above a steep embankment on the shores of Lake Champlain. In the spring of 2011, due to widespread flooding and wave-related damage, a segment of the embankment suffered major erosion damage. In October 2011, MBP's manager, Bruce Mongeon, notified the Association that it was in default, primarily for failure to maintain the embankment and retaining walls located below a number of the shoreline camps. The notice emphasized that the erosion left one camp, owned by Anthony Sineni, unsecured and at significant risk of collapse.

In January 2012, dissatisfied with the Association's lack of response, and in receipt of a Town of Colchester violation notice pertaining to the unsafe condition of the Sineni camp, MBP filed an action against the Association and Sineni. The suit sought to void the ground lease and to compel the

Association to take immediate corrective action or allow MBP to enter the premises to take such action. The Association retained the Defendant to defend the action. By the end of 2013, the Association's contractors had performed stabilization measures on the Sineni lot sufficient to satisfy the Town in connection with its notice of zoning violations. That work did not entirely remediate the bank erosion issues, however, and by mid-2014, even that work was falling apart. MBP thus retained its own engineering consultant to prepare an alternative plan for more comprehensive embankment stabilization and improvements at the Sineni lot and five other neighboring lots.

In May of 2014, when Mr. Mongeon was asked during his deposition whether MBP was just "looking for" a termination of the lease, he responded as follows:

> At this point I think that's what we're looking for, is to – I don't believe they're able to – as stated in the past, that they're having a hard time even coming up with the funds to get the wall that they did fix. There are other walls there that they only fixed one small part of it. We don't see that that's happening and it's taken this effort and this cost on our part to get to this point, to get one little piece fixed and get the property somewhat cleaned up. The other efforts, I'm not sure there's been much made on it that I can see. So yes, I think we're looking to move forward with this.

Mongeon Dep. (May 2, 2014) 38:1–18. Shortly afterwards, David Aman, the attorney employed by Defendant and handling the case, sent a letter to the Association's President, observing that

> [t]he most compelling aspect of Mr. Mongeon's testimony was his statement that the [Association] can do nothing from a maintenance/repair perspective to satisfy his disfavor with the [Association]. He asserts that the termination of the lease is the only remedy since the [Association], historically, has done nothing in the way of maintenance unless prompted by a lawsuit. Put another way, Mr. Mongeon believes that the maintenance and repairs done by the [Association] were only done in response to this litigation and, if allowed to remain, the [Association] will simply allow the property to revert back to a state of disarray[,] prompting another lawsuit.

Def.'s Ex. M.

A few weeks later, in a letter to MBP's counsel, David Greenberg, Mr. Aman stated that he

> underst[ood] from Mr. Mongeon's deposition that he is not interested in any settlement short of terminating the Ground Lease. Please let me know if his opinion changes. As with any trial, there is significant costs and risks to each side. The [Association] is open to avoiding these costs and risks if possible. Please advise.

Def.'s Ex. N. This letter went unanswered. The closest the parties ever came to discussing settlement occurred during Mr. Mongeon's deposition, when Mr. Greenberg told Mr. Aman that Mr. Mongeon was open to discussing a settlement, but not during the deposition. Mr. Mongeon later explained that

he elected not to make any settlement offers because he believed it was the Association's burden to come to him with a proposal. Def.'s Ex. L, 59:1–17.

Separately, during a pre-trial conference, in response to the court's question why mediation had not been tried and whether it should be attempted, Mr. Aman stated that Mr. Mongeon had no interest in mediating the case. There is nothing in the recording showing that Mr. Greenberg objected to or sought to clarify Mr. Aman's statement. The court then stated that if the parties did not wish to mediate, it would not force them to do so.[1] Neither side ever sought an order to compel mediation.

In June 2015, following a two-day bench trial, the court found the Association in breach. It declined to award MBP a forfeiture, however. Instead, it concluded that an award of damages for projected remediation costs would be sufficient. It further found, based on the parties' estimates, that remediation costs would likely total $135,000. Accordingly, it awarded MBP judgment in that amount, so that it could perform the work itself.

MBP appealed, arguing that the trial court lacked discretion to decline to award the forfeiture remedy. In June 2016, the Supreme Court agreed and reversed. *See Mongeon Bay Props., LLC v. Mallets Bay Homeowner's Ass'n*, 2016 VT 64, ¶¶ 47–69, 202 Vt. 434. The Association's lease was then terminated and the individual members were forced to abandon their homes.

The individual members then sued the Association, alleging negligence in managing the lease obligations. That suit settled in September of 2018, on the following terms: (a) a stipulated judgment against the Association for $3 million, together with a stipulated order that plaintiffs not execute or otherwise collect on the judgment; (b) a payment from the Association's insurance carrier to the plaintiffs for damages above the $3 million judgment amount; and (c) an assignment of rights by the Association to the individual plaintiffs, to sue the Association's Defendant for legal malpractice. The Association dissolved later in 2018.

Thereafter, the former members of the Association entered into a confidential agreement with MBP under which MBP would receive ten percent of the members' recovery against Defendant, up to $183,633.99, in return for Mr. Mongeon's participation in and cooperation with the legal malpractice action. Def.'s Ex. S. The agreement specifically provided that Mr. Mongeon would sign a "truthful affidavit," drafted by the attorney representing the former members, stating that the initial lawsuit only went to trial because "the Association never expressed an interest in settlement," and that:

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[1] In their Statement of Disputed Material Facts, Plaintiffs disputed this statement, which Defendant had properly supported with reference to the record. Plaintiffs' dispute, however, finds no support in the portions of the record to which their Statement refers. Thus, the court deems this fact to be undisputed. V.R.C.P. 56(e)(2).

> [i]f the Association had engaged in settlement discussions with me, MBP would have agreed to resolve the matter for a payment of my then accrued attorney's fees and repair of the leased land consistent with the specifications identified by my engineer. MBP disclosed the engineer, Eric Goddard, P.E., in the litigation.

Def.'s Exs. R & T. Mr. Mongeon swore to that affidavit in May 2019. Later that year the former members, together with the Association, filed this suit.

In discovery in this case, Mr. Mongeon testified that for a settlement to have been acceptable to MBP, it would have had to include not merely the estimated costs that MBP's engineer had indicated—during the trial—was needed to repair the embankment areas below the Sineni camp proper, but also what an engineer would have estimated were the costs to repair embankments below the five camps immediately south of Sineni. As he explained:

> The, the problem was this, that there wasn't just the one bank, and I didn't want to be going through this again. The [Association] needed to come up with a, with a plan to fix the whole side of that, that piece of property that had washed away.

Def.'s Ex. L, 78:24–79:4. He testified further that MBP's engineer never actually prepared such a cost estimate; rather, around the time of the bench trial, a building contractor told him that such work would cost around $300,000 to $350,000. Def.'s Ex. W, 50:4–19. Mr. Mongeon explained that he obtained the estimate simply because he wanted to have a "rough idea," in the event the Association ever came to him with a settlement proposal, whether such a proposal was reasonable. *Id*. at 51:4–15. But, as Mr. Mongeon explained:

> We never got anywhere near that. [The Association] never came to us with a proposal so that we could, we could say what we, you know, look at their proposal and say okay, if it meets the requirements and then we'll get this other engineer involved to look at it so we could approve it and make sure it was going to solve the problem. That never happened; that's the problem here.

Def.'s Ex. L, 79:21–80:4.

Subsequently, Plaintiffs' attorney disclosed an unsworn "Supplemental Affidavit of Bruce Mongeon," ostensibly signed by Mr. Mongeon, indicating that MBP's engineer had estimated the costs of performing embankment remedial work beneath both the Sineni camp and three shoreline camps to the immediate south. Pls.' Ex. 6. The statement indicated that cost estimate was between $93,150 and $164,150, and that the court relied on those estimates to find that a mid-point ($128,650) was a reasonable cost of repair. The statement further provided that, in Mr. Mongeon's own opinion, two other seawalls further to the south—that MBP's engineer concluded would be due for repair in the intermediate future—could be adequately repaired or replaced for an aggregate cost below $50,000.

The unsworn statement concluded that Mr. Mongeon "would have been satisfied" and MBP would have settled the whole case, if the Association had made a settlement offer that: (a) accepted the trial court's award of $128,650 for the work beneath the Sineni camp and three others; (b) agreed to repair the two additional seawalls/embankment areas when they failed; and (c) covered MBP's then-accrued attorney's fees and costs. It bears emphasis, however, that Mr. Mongeon, MBP, or their attorneys conveyed neither these nor any other proposed settlement terms to Plaintiffs or Defendant.

Also in discovery in this case, Plaintiffs disclosed the opinions of Richard Cassidy, whom Defendant then deposed. Mr. Cassidy opined that the case likely would have settled, along the terms described by Mr. Mongeon, had Defendant only made reasonable settlement efforts. He was unable, however, to state with specificity the amount on which he believes the parties would have settled, or to describe the extent of the embankment repair work that would have satisfied Mr. Mongeon. Rather, he testified, "What we know is that Mongeon says that he would have agreed to a settlement along the lines we're talking about. It makes sense for him to make that settlement from my perspective, so I believe him." Cassidy Dep., 40:24–41:2.

Discussion

Against this background, Plaintiffs allege that Defendant breached its duty to them by failing, on their behalf, to pursue settlement. Defendant, while not conceding such a breach, argues that Plaintiffs cannot prove that any breach of duty proximately caused damages. More specifically, it asserts that because Plaintiffs cannot prove that there was a likely settlement, in specific terms, that was lost because of Defendant's breach, their claims must fail.[2] This assertion hits the target.

In Vermont, as elsewhere, to prove attorney malpractice, "a plaintiff must prove that (1) the attorney owed a professional duty of care to the client; (2) the attorney breached the duty; (3) the attorney's act was a proximate cause of the client's injury; (4) and that the client suffered damages as a result of the injury." *Sachs v. Downs Rachlin Martin PLLC*, 2017 VT 100, ¶ 17, 206 Vt. 157. "Proximate cause requires a plaintiff to prove it is more likely than not that, but for the attorney's negligent conduct, the plaintiff would not have been harmed." *Id.* ¶ 19 (citing *Knott v. Pratt*, 158 Vt. 334, 336 (1992), and *Restatement (Second) of Torts* § 433B cmt. a (1965)). Our Supreme Court has not addressed the question of what proof is required to meet this element when the negligence alleged

[2] Defendant also argues that the individual members lack standing. While this argument raises interesting questions concerning any duty owed to the individual members, as distinguished from the Association, and assignability of the Association's claims to the individual members, the court need not address the argument. Defendant has not challenged the Association's standing, and it is well established that standing for one plaintiff obviates the necessity of considering the standing of others who assert the same claims. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984).

occurs in the context of the conduct (or, as here, non-conduct) of settlement negotiations. There is nevertheless persuasive authority on this question, and good reason to predict that our Court would follow that authority.

To show proximate cause when alleging settlement malpractice, a former client must show that there was reasonable settlement offer, in ascertainable terms, actually communicated between the parties, that—but for the attorney's negligence—likely would have been agreed to and paid. *See* 4 R. Mallen, *Legal Malpractice* § 33:101 (2022 ed.) (citing *Whiteacre v. State*, 382 N.W. 2d 112 (Iowa 1986)); *Stinson v. Union Mut. Fire Ins. Co.*, No. 103-7-18 Oecv, 2019 WL 13061475, at *25 (Vt. Super. Ct. Apr. 1, 2019); *see also* 3 R. Mallen, *Legal Malpractice* § 24:5 (2022 ed.) ("not sufficient to show that the other party 'might have' agreed" to a concession or benefit, in the absence of attorney negligence). The *Whiteacre* decision remains a leading precedent. There, the plaintiff asserted that the State's consumer protection attorney cost him a favorable settlement with a vendor who had allegedly defrauded consumers, including plaintiff. The court recognized that, to satisfy the proximate cause element, the plaintiff "was obligated to establish by a preponderance of the evidence that a settlement probably would have occurred but for the negligence of the State attorney." 382 N.W. 2d at 116 (citing R. Mallen & V. Levit, *Legal Malpractice* § 580, at 729–31 (2d ed. 1981)). "An element of this cause of action is proof that the client and a party against whom a claim has been asserted would have reached agreement upon a settlement in an ascertainable amount." *Id*. (citing Mallen & Levit, *supra*). The court then found that plaintiff failed to meet that evidentiary standard because

> "[n]o firm offer of settlement was made by vendor through [vendor's attorney] which was communicated to [the State attorney]. . . . [Vendor's attorney] received a communication from the [vendor] in April, 1977, that considered or discussed the plausibility of cancellation of [plantiff's] debt to [vendor] in return for [plaintiff] dropping his claim against [vendor]. This was never transmitted in the form of an offer of settlement. There is no evidence, as of April, 1977, that [vendor] was willing to return any monies to [plaintiff]."

Id. (quoting trial court findings).

This court predicts that our Supreme Court would follow these teachings and require a plaintiff alleging settlement malpractice to prove not simply (1) that but for an attorney's negligence a settlement would have been achieved, but (2) the probable terms of that settlement. Two decisions in analogous contexts inform this prediction. First, in *Bourne v. Lajoie*, the plaintiff's original attorney negligently drafted a deed for sale by mistakenly omitting certain lots from a list of lands to be retained by the plaintiff-seller. 149 Vt. 45, 47 (1987). The plaintiff later sought and obtained an order reforming the mistaken deeds, and then sued for malpractice, claiming inability to recover profits from haying the

lands, and lost opportunity to sell the two parcels. The Supreme Court allowed the lost profits claim, but rejected plaintiff's

> contention that she suffered damages in the form of a lost opportunity to sell the two parcels omitted from the deed[, since it was] based only on her speculation that she would have been able to sell the property, rather than on evidence of an actual offer from a prospective purchaser which she was unable to pursue.

Id. at 53.

Later, in *Cannata v. Wiener*, the plaintiff was a partner in a partnership that sold real estate to an investor. 173 Vt. 528, 529 (2001) (mem.). The investor assumed a $50,000 note, secured by a mortgage on the property, but per a clause in the sale agreement, the note holder retained rights against the partners. Years later, when the investor declared bankruptcy and defaulted on both his first mortgage and the note assumed from the partnership, the first mortgage lender sought foreclosure. The partners sought advice from an attorney, who advised them "that hiring an attorney would be a waste of money, and that neither had any exposure." *Id*. After the foreclosure, the holder of the $50,000 note sued plaintiff and his partner on the note and won a judgment. The plaintiff paid the judgment, and then sued for malpractice. The trial court found no proximate cause. *Id.*

On appeal, the plaintiff argued "that because the advice he received was to do nothing, 'he is now unable to say what he could have done precisely because he accepted this advice.' " *Id.* at 530. In affirming the trial court, the Supreme Court reasoned that

> [w]hile it is true that by following advice, plaintiff did nothing, and did not pursue alternatives to protect himself at the time, the issue before us is what plaintiff *could* have done, not what plaintiff actually did. It was plaintiff's burden to produce evidence that would establish that under the financial realities of this case, there were avenues for plaintiff to explore that were left uncharted because of [the attorney's] advice.

Id.

Bourne and *Cannata* support the conclusion that plaintiffs suing for settlement malpractice must produce evidence that there was a reasonable settlement offer that they would likely have accepted. Indeed, *Cannata* fairly undercuts one of Plaintiffs' primary contentions: that a client's burden to show proximate cause should be relaxed where adherence to an attorney's advice effectively prevents the generation of settlement offers or other circumstantial evidence that a settlement opportunity existed and was lost. The *Cannata* Court dismissed, as "mere speculation or conjecture," the plaintiff's claims that if he had taken action in spite of his attorney's advice "maybe" he would have learned that the investor's obligations to plaintiff "were not dischargeable in bankruptcy," or that

the investor "had secreted assets and was not really bankrupt." 173 Vt. at 530. The Court was thus unsympathetic to loosening a malpractice claimant's evidentiary burden, even where the very nature of the attorney's negligence prevented the creation of evidence that might have shown proximate cause. Instead, the Court noted, "argument based on 'mere speculation or conjecture' is insufficient to carry plaintiff's burden." *Id.* (quoting W. Keaton, Prosser and Keaton on the Law of Torts § 41, at 269 (5th ed.1984)).

Alternatively, Plaintiffs argue that *Estate of Fleming v. Nicholson*, 168 Vt. 495 (1998), contains support for malpractice claims when an attorney's negligent advice prevents the client from making an informed decision on settlement chances (or trial risks). *Fleming*, however, did not involve a lost settlement opportunity. The attorney there failed to disclose his knowledge that the property that his client was considering purchasing was in violation of State subdivision requirements. At that time, the State was not enforcing the requirements, but a year later it reversed its posture, thus diminishing the property's value. The Court held that the attorney's nondisclosure of the violation proximately caused the client's financial loss because it "prevented his client from making an informed decision about whether to purchase the property." *Id*. at 499. That conclusion would not change, the Court further reasoned, even though a reasonable attorney might have also advised "his client to purchase the property even with the encumbrances." *Id.* at 499–500.

Fleming does not relax proximate cause standards applicable to settlement-related malpractice claims. As explained in *Stinson*, proximate cause was established in *Fleming* because the client "had the power and clearly shown ability to make an immediate decision to avoid injury if . . . properly advised." No. 103-7-18 Oecv, 2019 WL 13061475, at *25 (Vt. Super. Ct. Apr. 1, 2019). If properly advised, the client could have "declined to purchase the property with its cloud on title," *id.*, thus avoiding all financial harm. In the settlement context, in contrast, advice to the client on the chances of settlement or the risks of trial would not impact or control whether the adversary was also willing to settle on reasonable terms. At most, reasonable legal advice to a litigation client could only have affected that party's *efforts or attempts* to settle; the client would not have a probable chance of avoiding harm, because the client, even with proper advice, cannot control its destiny as relates to the resolution or compromise of legal claims or potential liabilities. *Fleming* thus does not support an alternative standard for proximate cause in the context of settlement malpractice.[3]

[3] Indeed, the *Stinson* court distinguished *Fleming* on exactly these grounds. The plaintiff in *Stinson* was unable to establish proximate cause, despite the attorney's negligent failure to apprise the plaintiff of actual settlement offers, because the decision whether to settle, and whether to commit funds toward a potential settlement that may have reduced plaintiff's liability had the matter settled, was controlled by a third party, plaintiff's insurer. *See id.*

Plaintiffs argue that even if the *Whiteacre* standard applies, they have evidence to meet their burden. They rely on Mr. Mongeon's and Mr. Cassidy's testimony that, had Defendant just pursued a settlement in a reasonable fashion, it was always right there for the taking. This evidence, however, is insufficient.

Mr. Mongeon's evidence, the reader will recall, is that he was always willing to settle for some reasonable amount of remediation costs, plus accrued legal fees and costs. Mr. Cassidy essentially parrots that testimony, now cloaked in the guise of expert opinion. Whether from Mr. Mongeon or Mr. Cassidy, this evidence suffers from the same fundamental defect: it is not based on or corroborated by any contemporaneous evidence. *See*, *e.g.*, *Whiteacre*, 382 N.W. 2d at 116 (no proximate cause because there was no firm settlement offer or other contemporaneous evidence showing that defendant in the underlying action would have settled on plaintiff's terms); *Powers v. Hayes*, 172 Vt. 535, 536–37 (2001) (mem.) (citing circumstantial evidence from the period prior to decedent's passing, showing that, but for his attorney's negligence, the decedent likely would have taken action before passing to avoid the financial harm suffered by an intended beneficiary); *Cannata*, 173 Vt. at 530 (dismissing post-hoc "speculation" on what plaintiff, if properly advised, might have discovered and done about the defaulting party's true finances, so as to avoid harm); *Sachs v. Downs Rachlin Martin PLLC*, 2017 VT 100, ¶¶ 21–27 (plaintiff's loan from family members to cover costs of raising her newborn daughter, obtained with understanding that loan would be repaid once father's child support obligation was determined, supported finding that—if properly informed that the father's child support obligations ran from the date of plaintiff's parentage action, rather than date of birth—plaintiff would not have delayed the parentage filing for one year following birth); *Bourne*, 149 Vt. at 53 (plaintiff's post-hoc contention of a lost sales opportunity must be supported by "evidence of an actual offer from a prospective purchaser").

The requirement of contemporaneous evidence reflects a sound policy choice, since it creates a standard that avoids impermissible hindsight speculation. It also avoids the risk of subsequent collusion or mischief between the original adversaries in the underlying litigation. As noted by a Missouri appellate court in a similar circumstance:

> The plaintiff holding the judgment is presumably indifferent about who pays the judgment and thus perfectly willing to shift liability to the [underlying] defendant's lawyers by speculating about what [the plaintiff] might have settled for. This would be especially so if the defendant was not solvent. In our view, this potential for mischief is ample reason to adhere to the established requirements.

Novich v. Husch & Eppenberger, 24 S.W. 3d 734, 736 (Mo. Ct. App. 2000).

Moreover, even Mr. Mongeon's *post hoc* evidence—and therefore Mr. Cassidy's, which does no more than accept as truthful Mr. Mongeon's testimony—falls short of establishing a competent basis for a determination, by anything other than speculation, of what he would have agreed to in a settlement. At least until he submitted his post-deposition "affidavit"—on which more momentarily—Plaintiffs have only his deposition testimony that at some point around the time of the July 2014 bench trial he had a "rough idea" that MBP would have agreed to settle its suit for: (a) the estimate of MBP's engineer of the cost of embankment remediation beneath the Sineni camp ($93,000 to $164,000); (b) a building contractor's "rough" verbal estimate of $300,000 to $350,000 to cover other embankment work to the south of Sineni (perhaps inclusive of engineering fees); and (c) then-accrued attorney's fees and costs. There is no contemporaneous evidence to support any of these numbers; nor, even if there were such evidence, is there any basis other than speculation for determining with any degree of probability what an acceptable settlement offer would have looked like.

Mr. Mongeon's subsequent "affidavit" does not cure this deficiency. First, it is unsworn, and therefore incompetent. *See Gross v. Turner*, 2018 VT 80, ¶ 8, 208 Vt. 112 ("Once a claim is challenged by a properly supported motion for summary judgment, the nonmoving party may not rest upon the allegations in the pleadings, but must come forward with admissible evidence to raise a dispute regarding the facts."). Second, it is clearly what courts have characterized as a "sham affidavit." *See Pena v. Honeywell Int'l, Inc.*, 923 F.3d 18, 30 (1st Cir. 2019); *Johnson v. Harwood*, 2008 VT 4, ¶ 5, 183 Vt. 157 (citing *Travelers Ins. Co. v. Demarle, Inc.*, 2005 VT 53, ¶ 9, 178 Vt. 570 (mem.)). The court need not detail all of the ways in which Mr. Mongeon's "affidavit" contradicts his prior sworn testimony, without any cogent explanation; it is clear that it is simply another attempt, after the fact and with no support from contemporaneous evidence, to hypothesize what he might have done if asked to respond to a settlement overture.

Moreover, even if the court could credit Mr. Mongeon's (and hence Mr. Cassidy's) hindsight reconstruction of what MBP might have agreed to, there is absolutely no evidence—contemporaneous or otherwise—of what the Association would have offered or what it actually had the wherewithal to pay or do to settle the case. At most, Plaintiffs have the testimony of the Association's former President, who testified that the Association was always interested in settling the case and that he "would have loved to have sat down with Mr. Mongeon." Pls.' Ex. 7, 57:16–17. This, of course, falls far short of proving what the Association might have felt was a reasonable settlement—much less what its resources would allow. Willingness to pay, even to pay "whatever it took" to avoid a trial, is insufficient to satisfy proximate cause because it does not equate to proof of ability to pay. *See*

Stinson, 2019 WL 13061475, at *25 (proximate cause lacking because plaintiff, who testified that he "would have settled far before trial if [properly informed of settlement offers]," nevertheless "lacked personal funds" to cover a settlement that would have avoided an adverse trial verdict); *Rogers v. Zanetti*, 518 S.W. 3d 394, 411 (Tex. 2017) (plaintiff failed to establish proximate cause because he "testified only that he would have tried to settle the case had he known about the settlement offer," and there was no "evidence that [plaintiff] could have paid either the $450,000 actually demanded or any lesser sum that [his adversaries] would have accepted"). As any settlement, of course, requires agreement by both sides, the inability to prove what the Association would have agreed to is fatal.

ORDER

The court grants the motion for summary judgment. All of Plaintiffs' claims fail for lack of competent proof of proximate cause. The separate judgment required by Rule 58 will issue forthwith.

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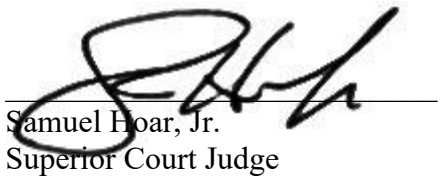

Samuel Hoar, Jr.
Superior Court Judge