[Cite as *van Sommeren v. Gibson*, 2013-Ohio-2602.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Gijbertus D.M. van Sommeren, et al.	Court of Appeals No. L-12-1144
Appellants	Trial Court No. CI0200905169
v.	
Thomas A. Gibson, et al.	**DECISION AND JUDGMENT**
Appellees	Decided: June 21, 2013

* * * * *

Harold M. Steinberg, C. William Bair, and Fan Zhang, for appellants.

Kenneth J. White and John F. Bodie, Jr., for appellees.

* * * * *

YARBROUGH, J.

{¶ 1} Appellants, Gijbertus D.M. van Sommeren, Elly van Sommeren and Noord Zuid Dairy LLC, are the plaintiffs in a legal malpractice action and have timely appealed

the summary judgment rendered against them by the trial court. Appellees are the defendant-attorney, Thomas A. Gibson, and his law firm, Robison, Curphey & O'Connell LLC ("RCO").

I. Record on Summary Judgment

{¶ 2} Gijbertus D.M. van Sommeren[1] is a Dutch dairy farmer who emigrated with his family from the Netherlands, first to Canada and then to the United States, to develop and run dairy farms. After purchasing a Canadian dairy farm in 1994 but encountering restrictions unique to Canada's "milk quota system," he came to Ohio in 2004, where he was introduced to the principals of Vrebra-Hoff Dairy Development ("VHDD"), all of whom are similarly of Dutch heritage. VHDD acquires, develops, and manages dairy farms and their assets in this region. Its corporate operations are located in Wauseon and its principal owner is W.M.H. van Bakel. Van Sommeren consulted van Bakel about dairy farming under a free-market system and the prospect of selling his dairy in Canada to start one here. Van Bakel, in turn, made the newcomer feel welcome, telling him "we can help you" and indicating that VHDD offered a "total package" for "people [coming] from Canada from the Netherlands." Assisted by another VHDD principal, Gerrit Kreugal, van Sommeren traveled to a number of VHDD-developed farms to meet the operators and to assess productivity. Much of the discussion on these visits centered on "good farms" and "happy cows" and "help with financing."

[1] For ease of reference, Gijbertus D.M. van Sommeren will be referred to herein as "van Sommeren" or "appellant."

{¶ 3} In August 2004, he entered into a multimillion dollar contract with VHDD for the construction of a dairy farm consisting of 2100 cows. It is not disputed that before entering this contract, van Sommeren did not seek the advice of an attorney nor had he yet met attorney Gibson. The contract required him to make a non-refundable security deposit of $398,750.00 to VHDD, which he did, also without benefit of an attorney's consultation or review. Various properties and sites in the area were then considered for the construction of the dairy farm, but after searching for almost a year van Sommeren found none that could be made suitable within a reasonable time.

{¶ 4} Meanwhile, another dairy farm operator, Koos den Ouden, was struggling financially and decided to leave the business. He approached VHDD about marketing his farm for sale. By then van Sommeren had sold his farm in Canada. Sensing an opportunity, van Bakel introduced the two men, and eventually they reached an agreement for van Sommeren to purchase den Ouden's farm, called Corey Dairy, which operated with 622 cows. Van Sommeren was attracted to Corey Dairy's smaller size, feeling that it would be easier to manage and enlarge, as funding permitted, than to incur the start-up costs and time involved in constructing a new farm. This transaction too occurred before van Sommeren met Gibson.

{¶ 5} The parties dispute whether VHDD was formally acting as the seller's (den Ouden's) agent for this transaction, or whether it merely introduced the parties from an expedient desire to see Corey Dairy kept operational because VHDD had originally built the farm and a farm sitting idle was significantly less marketable. This agreement

required VHDD to "assist" van Sommeren in taking over the operation of Corey Dairy. His long-term plan for Corey Dairy was to expand the farm into a 3,000-cow operation. Once the real-estate portion of the purchase was completed, he and VHDD would develop the 160-acre farm jointly, and this engendered the signing of another agreement with VHDD. [2]

{¶ 6} In early November 2005, van Sommeren met van Bakel in Wauseon where they signed the Corey Dairy development agreement for a total purchase price of approximately $12.3 million (including $8.8 million in improvements). Under its terms, and until he was able to purchase the real estate, van Sommeren would lease Corey Dairy from den Ouden with an option to purchase. Thereafter, in the joint development phase, VHDD would construct or add "buildings, fixtures, machinery and equipment" as needed to operate a 3000-cow farm. This agreement also was signed before van Sommeren met Gibson or others at RCO.

{¶ 7} In order to acquire the Corey Dairy real estate under the purchase option, the November 2005 development agreement called for van Sommeren to secure financing.

[2] While VHDD's precise status is disputed, there is no dispute that VHDD was neither the buyer nor the seller of Corey Dairy, even if it orchestrated the transaction. Van Sommeren testified that because of his pending immigration status in 2005, he was not able to buy real estate in the United States. Thus, for the transaction to occur, and in order to obtain a tax identification number, one of VHDD's other principals, John Vrebra-Hoff, had to be a ".001% member" of van Sommeren's company, Noord Zuid Dairy Farm (NZDF), a then as-yet-to-be-formed purchasing entity. It was agreed that after NZDF received a tax identification number Vrebra-Hoff would relinquish this .001% membership. Attorney Gibson later completed the formation of NZDF as a limited liability company for van Sommeren.

As an "ancillary service," the agreement provided that VHDD would "attempt to assist" him in "finding suitable financing." VHDD, however, would not be deemed "a third party, guarantor, or surety" to any lending agreement he entered, and liability was expressly disclaimed except for "gross recklessness or willful conduct." A different provision in this agreement excluded VHDD from liability to van Sommeren for "indirect damages or losses," such as lost profits, lost savings, or consequential damages.

{¶ 8} Although the parties disagree on the precise date of van Sommeren's first "contact" with attorney Gibson, the record references a meeting in late November 2005. It is not disputed that Gibson had a long-standing relationship with VHDD, nor that van Bakel referred van Sommeren to Gibson because of his past experience with similar transactions involving VHDD. At this meeting van Sommeren indicated that he wanted Gibson to represent him in the purchase of all the assets of Corey Dairy (cows, farming equipment, real estate, etc.). He told Gibson about the non-refundable security deposit from 2004, asking that it be withdrawn from escrow and applied toward the purchase. He also "told [Gibson] what the plan [for the farm] was" and "to go over the papers [i.e., the agreements], check them." According to van Sommeren, Gibson did not mentioned that he and RCO also represented VHDD.[3] Before this meeting, van Bakel had apparently

[3] Van Sommeren gave conflicting responses during his deposition as to when he first learned Gibson and RCO were simultaneously representing VHDD and its entities in the various transactions in which he became involved. He testified that it was not until May 2006 that he learned Gibson represented VHDD; yet, he acknowledged receiving (though

forwarded to Gibson the Corey Dairy purchase documents. These were already signed and contained the terms to which den Ouden and van Sommeren had agreed.

{¶ 9} Afterward, two separate closings took place at which van Sommeren signed agreements with den Ouden to acquire the Corey Dairy assets. He also agreed to assume, along with den Ouden, certain preexisting loans relating to farm assets, an obligation totaling about $5 million dollars. It appears that VHDD had no interest or commitment in these assets or the loans. Van Sommeren signed the first agreement on December 22, 2005, and took over management of the farm, now known as NZDF, while attempting to find a lender, an effort with which he claims Gibson was supposed to assist.

{¶ 10} Things began optimistically at Corey Dairy, but over several months of managing the farm van Sommeren encountered problems affecting the cows. Some of these involved sanitary conditions. Excess manure, which accumulated around the farm due to inadequate storage capacity, had to be removed. Then lagoons on the property were found to be clogged by manure. He paid $60,000 to have them drained and after the manure dried, to have it hauled away. Dirty sand bedding in the cow stalls had to be replaced with clean fill, a time-consuming process. Finally, it was discovered that about fifty percent of den Ouden's cows had contracted leptospirosis, a disease which affects the kidneys and liver and impairs conception. It caused a number of den Ouden's cows to abort and the pregnancy rate for the herd declined. Since the afflicted cows could not

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not remembering) an email from Gibson, dated December 21, 2005, which stated: "I must disclose that [VHDD] is a client for which I and others in my office have done and are doing work."

be milked before recovering fully from treatment, milk production decreased significantly. The veterinary bills were steep, the cows "weren't happy," and these and other problems eventually cost van Sommeren about $500,000 to remediate. Nonetheless, as he later testified, he believed the farm could still be made successful.

{¶ 11} On May 26, 2006, he signed the second agreement with den Ouden to assume the pre-existing loan obligations for the Corey Dairy cows, their feed grain, and the farm equipment. Den Ouden then received some of the previously escrowed funds as a down payment on the lease. Because van Sommeren now wanted to enlarge the cow population on the farm from the initial 3000 to 3,575, he decided to seek a greater level of financing than first envisioned.

{¶ 12} In October 2006, he applied with AgStar Financial Services, ACA ("AgStar"), which finances dairy farms throughout the United States and had financed others owned by VHDD. Benardus Huiskamp, the financial manager for VHDD, assisted him with the submission of his loan application. Huiskamp had experience with dairy farm transactions and the financing of large agribusiness projects. Van Sommeren's application now requested loans approaching 15 million dollars.

{¶ 13} On March 2, 2007, AgStar issued a commitment letter to van Sommeren for $5.4 million and one to VHDD for $11.4 million. Van Sommeren's commitment letter explicitly conditioned his loan on 19 "conditions precedent," one of which required VHDD "to be [a] co-maker on all loans" to him and NZDF. Another condition precedent required van Sommeren "to cause [VHDD] to execute documentation" subordinating any

indebtedness he then owed VHDD to AgStar's rights and interests in its loans. This letter had an acceptance deadline of March 12, 2007, and required VHDD to accept the conditions and sign it as well.

{¶ 14} Although van Sommeren signed his loan commitment letter, VHDD refused to sign either letter. He later testified that he did not know why the principals at VHDD refused to sign the letters, stating that he "never got a right answer." Nor did Huiskamp give him an explanation. According to van Sommeren, Huiskamp quit VHDD in disgust and returned to the Netherlands "because [of] the way they treated people, he [could] not accept that." Other sources of financing evaporated. Van Sommeren felt set up and "abused," abandoned to a cash-strapped dairy farm and mounting debt. Angry at his predicament, he looked to Gibson to explain VHDD's refusal, after attempting to reach van Bakel himself.

{¶ 15} Both in the trial court and on appeal, the parties have offered accounts which conflict about the events and the deteriorating relationships that ensued.

{¶ 16} Van Sommeren testified that he never received a response from Gibson or his concurrent client, van Bakel, who was "always in a meeting," on the phone, or otherwise unavailable. He named four Dutch families, and suggested there were as many as seventeen others, who, having "lost everything" in a similar fashion, all formed a certain tragic pattern: they had immigrated to Ohio to run a dairy farm, became involved with VHDD to get started, a beginning that was "all smiles" with much talk of "good farms," productive cows, and "help with financing." The carrot thus dangled, the

newcomer would sign on to a "package deal" of agreements for an existing farm, agreements that insulated VHDD, and when these farms were later discovered to have "problems" and could not be made profitable, VHDD would distance itself, insinuating the newcomer was a "bad manager." Financing would stall or loan defaults would occur, and inevitably the newcomer would "lose the farm." [4]

{¶ 17} Gibson, in contrast, claims he offered to find another lawyer for van Sommeren if he wanted to pursue a claim against VHDD for loss of the AgStar financing,

[4] Van Sommeren testified, in part: "If you see how [VHDD] is operating, they are bringing Dutch people over here from the Netherlands, from Canada. If you look in 2007 [to] 2011 now, I was one of the fewest ones who was screwed." After naming several other families, he continued: "One had a farm, the other three dairy farms [and] lost everything, too. * * * I can find 17, 20 [other] dairy farmers [who] were losing their farms. We are all 'bad managers' then. Oolman Dairy is in receivership, is empty." When asked specifically about VHDD's role, van Sommeren responded:

> They cannot realize what they are saying. 'We have a full package for Dutch people. We are looking for investors. We can do financing.' They cannot; they don't have the quality. * * * They are not learning. If they built new barns, [but] they are not learning from the mistakes they have done in the past to get better, to [make] a better dairy [farm].

As examples, he cited the undersized lagoons on VHDD farms, inadequate acreage of usable land, sick cows, shortages of cow medicine, and the need to keep feed grain and other supplies stocked. These problems created cash-flow issues that impinged on the farmer's ability to get financing. "It's just a snowball effect. We had [on] Corey Dairy [a] zero credit line. How you can run a dairy business? * * * The same thing with [VHDD]. 1200 cows, 1600 cows, 1800 cows. We have to post the money [for that]. They [VHDD] are using my money." While conceding that some debt was unavoidable, van Sommeren indicated that delays in receiving financing would erode the viability of the dairy farm, given the cash-flow necessities for day-to-day operation and other commitments.

but that he declined. Van Sommeren remembered no such offer, but rather told Gibson "to keep going with this [financing]" and "we were trying to find other [private] investors."

{¶ 18} But financing was not to be found, and by early 2008 den Ouden wanted his farm back. Van Sommeren still owed him more than $200,000, having fallen behind on the lease payments and his share of the loan repayments. Healthy cows bought to replace sick ones had added more debt, and now he was struggling to buy feed grain. At that point Gibson proposed a settlement with den Ouden. For a much smaller payment toward the lease debt, and letting den Ouden keep the cows and the equipment to pay off the loans, van Sommeren "could walk away." However, on the advice of a different attorney, he rejected that option. Gibson continued to advise him on Corey Dairy matters until March 2008 when their relationship ended.

{¶ 19} Appellants commenced their legal malpractice suit on June 26, 2009, and after extensive discovery and motion practice, the trial court granted Gibson and RCO's motion for summary judgment on April 24, 2012. In doing so the court ruled, first, that the proximate-cause element of appellants' legal malpractice claim was not so "obviously" apparent from the facts that expert testimony was unnecessary, and second, that the expert testimony appellants had offered on that element was insufficient to survive summary judgment.

{¶ 20} Specifically, the trial court ruled that even if it was assumed that van Sommeren and VHDD had conflicting interests in the Corey Dairy transaction, and that

Gibson (and his firm) had thereby departed from the applicable standard of care in representing both, the testimony of appellants' experts could not proximately connect that conflict, through some act or omission by Gibson, to appellants' claimed financial losses. In an earlier order, dated March 16, 2012, the court also granted Gibson's motion to strike the untimely disclosure of appellants' proximate-cause expert, thereby prohibiting his opinion testimony. This appeal followed.

II. Analysis

{¶ 21} Appellants have assigned three errors for our review, the third of which states:

> III. The trial court erred as a matter of law when it granted summary judgment to appellees because expert testimony is not *always* necessary to prove proximate cause in legal malpractice when the breach of duty is so obvious that a lay person could understand it.

A. General standard of review

{¶ 22} On appeal, a grant of summary judgment is reviewed de novo by this court. *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24. We apply the same standard as the trial court, viewing the facts in a light most favorable to the nonmoving party and resolving any doubts in favor of that party. *Viock v. Stowe–Woodward Co.*, 13 Ohio App.3d 7, 12, 467 N.E.2d 1378 (6thDist. 1983). Civ.R. 56 sets forth the standard for summary judgment and puts the initial burden on the moving party. It requires that no genuine issues of material fact exist, that

the moving party be entitled to judgment as a matter of law, and that reasonable minds be able to reach only one conclusion, which is adverse to the non-moving party. *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12.

B. Elements

{¶ 23} In Ohio, a claim for legal malpractice requires proof of the following elements: (1) the attorney owed a duty or obligation to the plaintiff, (2) there was a breach of that duty or obligation and the attorney failed to conform to the standard required by law, and (3) there is a causal connection between the conduct complained of and the resulting damage or loss. *Woodrow v. Heintschel*, 194 Ohio App.3d 391, 2011-Ohio-1840, 956 N.E.2d 855 ¶ 17 (6th Dist.). The plaintiff's failure to prove any one of these elements entitles the defendant-attorney to summary judgment. *Id.*; *Greene v. Barrett*, 102 Ohio App.3d 525, 531-533, 657 N.E.2d 553 (8th Dist.1995) (lack of proximate cause warrants summary judgment in legal-malpractice action).

1. Proximate cause

{¶ 24} The narrow issue of proximate cause on which summary judgment was granted to Gibson and RCO is also the dispositive issue in this appeal. In addressing this issue, we will assume, as did the trial court, that Gibson owed van Sommeren a duty that was breached by his concurrent representation of VHDD, thus establishing the first two

elements of appellants' legal malpractice claim.[5] We will also assume, and there appears little dispute, that appellants incurred some amount of provable damages from the failure to obtain the AgStar financing.

a. Is expert testimony required?

{¶ 25} In support of their third assigned error, appellants argue that expert testimony was unnecessary to establish the proximate-cause element of their claim. Appellants concede that "ordinarily" expert testimony is required to prove other elements, such as the professional standard of care applicable to the facts, but deny that legal malpractice suits require an expert for causation, in contrast to medical malpractice cases where one is required. Gibson's concurrent representation of two clients with adverse financial interests, they maintain, was a sufficiently "obvious conflict" and breach of professional duty that any lay jury could grasp it, and thus no expert was needed to trace the line of causation from that conflict to van Sommeren's losses.

{¶ 26} Generally in Ohio, expert testimony is required to establish the duty and breach elements of a legal malpractice claim, unless the alleged breach "is within the

[5] We note however, as did the trial court, that appellees have not conceded that an actual "conflict" existed in Gibson's representation of van Sommeren in the Corey Dairy transaction. Appellees point out that den Ouden, *not* VHDD, was the seller of the dairy farm, and therefore VHDD was not a "party" to the transaction whose interest would necessarily be *adverse* to van Sommeren's. Thus, they dispute whether appellants could factually establish the first two elements of the malpractice claim against Gibson and RCO. Indeed, it could be argued that, given the separate development agreement, VHDD's pecuniary interest as a developer of dairy farms was *consistent* with van Sommeren's interest in obtaining loans to expand Corey Dairy and make it profitable over the long term.

ordinary knowledge and experience of laymen." *Fincher v. Phillips*, 6th Dist. No. L-10-1330, 2011-Ohio-968, ¶ 12, citing *Bloom v. Dieckmann*, 11 Ohio App.3d 202, 203, 464 N.E.2d 187 (1st Dist. 1984). That the plaintiff must also establish a causal connection, with or without expert testimony, between the conduct cited as the act of malpractice and the resulting loss cannot seriously be disputed. *Paterek v. Petersen & Ibold*, 118 Ohio St.3d 503, 2008-Ohio-503, 890 N.E.2d 316, ¶ 29.

{¶ 27} In arguing this issue, both parties cite *Vahila v. Hall*, 77 Ohio St. 3d 421, 674 N.E.2d 1164 (1997) and *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173. Neither case, however, is factually on point with the representation here, and although both address the issue of proving causation in legal malpractice actions, they take divergent approaches.

{¶ 28} *Vahila* had suggested that "the *requirement of causation* often dictates that the merits of the malpractice action depend upon the merits of the underlying case [and] a plaintiff in a legal malpractice action may be required, depending on the situation, to provide *some evidence* of the merits of the underlying claim." (Emphasis added.) *Vahila* at 427-428. *Environmental Network*, in contrast, spoke to "the quantum of evidence" necessary "to establish *causation* in a legal-malpractice case *in which the sole theory advanced* is that the plaintiff would have received a better outcome if the underlying case had been tried to its conclusion rather than settled." (Emphasis added). *Environmental Network* at ¶ 1.

{¶ 29} The narrow settlement context of *Environmental Network*, however, has scant applicability to the facts of this case. *Vahila*, in dealing with claims of negligent representation and the failure to disclose the consequences of certain plea bargains, is also inapposite to the gravamen of appellants' claim that Gibson's conflicting loyalties in his dual representation "caused the financing application with AgStar to expire." Regardless, it is the quantum and nature of the proof necessary to establish the causation element that concerns us here.

{¶ 30} *Environmental Network* rejected *Vahila's* minimalist approach where "the plaintiff is claiming he would have been better off had the underlying matter been tried rather than settled [.]" In such cases, "*the standard for proving causation* requires more than just *some evidence* of the merits of the underlying suit." (Emphasis added.) *Id*. at ¶ 21. In developing this point, the Supreme Court focused on the need to *link* the attorney's action (or inaction) to the adverse result, stating:

> [T]he theory of this malpractice case places the merits of the underlying litigation directly at issue because it stands to reason that *in order to prove causation and damages, appellees must establish that [the attorney's] actions resulted* in settling the case for less than appellees would have received had the matter gone to trial.
>
> * * * To permit the plaintiff to present *merely some evidence* when the sole theory is that the plaintiff would have done better at trial *would allow the jury to speculate on the actual merits of the underlying claim.*

> Thus, in the case sub judice, appellees had the burden of proving by a preponderance of the evidence that *but for [the attorney's] conduct*, they would have received a more favorable outcome in the underlying matter." (Citations omitted; emphasis added). *Id*. at ¶ 18-19.

{¶ 31} In certain instances, the Supreme Court noted, the facts themselves will call for a heightened approach to causation to avoid the risk of jury speculation on the merits of the claim. *Id*. at ¶ 19. Not only would such cases trigger the use of the more stringent case-within-a-case doctrine, but also the need for experts - the issue here. *Id.* at ¶ 17-19. Indeed, the *Environmental Network* plaintiff had used an expert witness, but the Supreme Court found his testimony insufficient, stating:

> "The testimony [of the expert] revealed that he had not reviewed the pleadings in the underlying case but instead focused his review on the motions for summary judgment and responses thereto. Instead of objectively evaluating the viability of appellees' claims, he merely assumed them as fact. In doing so, he failed to evaluate the legitimacy of all the claims brought against appellees (and, in fact, was not even aware of some of those claims) *and how those claims necessarily affected* appellees' likelihood of receiving a better outcome at trial than was secured by the settlement.
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> * * *

> Because appellees *failed to prove* by a preponderance of the evidence that [the attorney's] malpractice *was the proximate cause of any loss*, appellant was entitled to a judgment notwithstanding the verdict. (Emphasis added.) *Id*. at ¶ 26-29.

b. Sometimes, but not always

{¶ 32} After *Environmental Network*, the demonstration of causality in legal malpractice cases requires more than just "some evidence" to proximately relate the specific act or omission that is held up as the attorney's breach of duty to the client's damages.[6] The standard of proof is now more exacting, although not every case of legal malpractice will require an expert for causation. Indeed, counsel have cited numerous cases deciding the issue both ways. Consistent with *Environmental Network*, these decisions merely say that while there is no *general* requirement for expert testimony on that element, certain factual circumstances, accruing from the complexity of the relationships or involving several transactions with multiple clients or attorneys, may

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[6] In rejecting *Vahila's* less stringent standard of "some evidence" as the evidentiary measure of proximate cause, the *Environmental Network* court stated:

> [I]f the broad language of *Vahila* were to apply here, *it would unfairly reduce appellees' burden for proving causation.* If we required only a showing of 'some evidence,' we would adopt a nebulous standard that provides no clarity or guidance to the bar and to the public. A 'some evidence' approach in these types of cases *would eviscerate the established rule that a plaintiff must establish by a preponderance of the evidence that defendant's actions were the proximate cause of plaintiff's losses*. (Emphasis added.) *Id*., at ¶ 20.

make such testimony necessary. *See, e.g., Nu-Trend Homes, Inc. v. Law Offices of Delibera, Lyons & Bibbo,* 10th Dist. No. 01AP1137, 2003-Ohio-1633, ¶ 35 ("Expert testimony is normally necessary to establish both that the attorney accused of malpractice has failed to conform with the standard required by law and that the *attorney's conduct was the proximate cause* of the damage or loss claimed[.]" Emphasis added); *Bloomberg v. Kronenberg,* N.D. Ohio No. 1:06-CV-0733, 2006 WL 3337467, (Nov. 16, 2006) (noting that "in some instances expert testimony regarding proximate cause may be necessary," but not always). *Compare Montgomery v. Gooding, Huffman, Kelly & Becker,* 163 F.Supp.2d 831, 837 (N.D. Ohio 2001) ("Ohio law does not require expert witness evidence to establish proximate cause in legal malpractice actions.") *with Robinson v. Calig & Handleman,* 119 Ohio App.3d 141, 144, 694 N.E.2d 557 (10th Dist.1997) (noting that "with appropriate foundation, an expert may opine concerning the proximate cause aspect of a legal malpractice case") *and Yates v. Brown,* 185 Ohio App.3d 742, 2010-Ohio-35, 925 N.E.2d 669, ¶ 24 (9th Dist.) (expert testimony necessary "[w]hen multiple attorneys were involved in the underlying representation, and when the plaintiffs have alleged negligent representation by more than one attorney," and because "expert testimony would be critical under these circumstances to determining causation and either parsing or eliminating liability.")

c. Was an expert needed here?

{¶ 33} In appropriate cases, expert testimony is necessary to keep the jury from speculating on how the client's loss or injury is *directly linked* to that which he claims was the breach of duty by the attorney. *Environmental Network, supra.* In our view, and for several reasons, that is the situation here.

{¶ 34} First, appellants have premised their lawsuit on Gibson's "divided loyalties" and alleged representational conflict, but van Sommeren's own testimony about what that conflict caused was plainly vague. Although van Sommeren believed he had a claim against *VHDD* for the failed financing - a claim he declined to purse - he could not identify exactly what Gibson did or failed to do in relation to VHDD's refusal to sign the AgStar loan commitment letters. Van Sommeren claimed that in May 2006, Gibson told him, "we have to wait for Willy [van Bakel]" at VHDD "to get something done," but could not recall what they were waiting for van Bakel to do, nor how Gibson's statement related to the financing issue, if at all. Yet, contradictorily, van Sommeren also testified that there were *no* delays in seeking financing through March 2007, that he dealt solely with Huiskamp (not Gibson) to obtain the AgStar loans, and that Huiskamp "worked very hard" to get them. In fact, Huiskamp was his authorized agent for that purpose.

{¶ 35} Van Sommeren did fault Gibson for failing to include in the VHDD agreements a provision that credited him for the costs of removing manure from the lagoons and another that protected him from environmental liability for the removal. But

that has nothing to do with the issue here. When asked specifically whether he could point to anything that Gibson or RCO did that caused VHDD to refuse to sign the AgStar loan commitment letters, he stated, "I do not know" and "I think he should have put more pressure on [VHDD]."

{¶ 36} Next, before ever consulting Gibson, van Sommeren had already entered the November 2005 agreement with VHDD that was the prologue to the later financing issue, and Gibson had not seen the agreement before van Sommeren signed it. Even had VHDD signed the letters, it is not so "obvious" that AgStar would have extended the loans without van Sommeren's completion of *all* the conditions precedent listed in his commitment letter. What these conditions entailed, some of which involved third parties and the satisfaction of legal criteria, whether van Sommeren could have, or would have, met them, and then whether AgStar would still have made the loans, all signal the need for expert testimony.

{¶ 37} Finally, VHDD's refusal would need to be assessed in light of the financing provision in the November 2005 agreement which stated that VHDD would "assist in finding suitable financing," but then withheld its participation in any lending agreement as a "guarantor or surety." It would seem doubtful that VHDD could be vigorously "advocated" into signing documents that would make it a *co-obligor* on AgStar loans to van Sommeren when the November 2005 agreement expressly permitted VHDD to decline that signatory status without penalty or recourse. Against these contractual

provisions, expert insight would certainly be needed to explain how an attorney in Gibson's position could have persuaded unwilling VHDD principals to co-sign for these loans, at least short of employing strong-arm measures.

{¶ 38} Given the timelines involved here, the number of different entities and their relationships (particularly, VHDD's asymmetrical relationship in the Corey Dairy transaction), the number of agreements van Sommeren entered, the fact that some of these pre-dated his relationship with Gibson, and, finally, van Sommeren's own uncertainty about Gibson's role (if any) in the loan application process, we must reject appellants' initial contention that expert testimony was not required to connect Gibson to the failed financing. Even assuming that a conflict in representation existed here, it is not "so obviously" the proximate source from which van Sommeren's losses flowed that no expert was needed to address it. None of this, without inviting rampant jury speculation, falls "within the ordinary knowledge and experience of laymen." *Fincher, supra,* 6th Dist. No. L-10-1330, 2011-Ohio-968, at ¶ 12. [7]

{¶ 39} Accordingly, the third assigned error is not well-taken.

2. Appellants' experts

{¶ 40} Appellants' second assigned error states:

> II. The trial court abused its discretion when it denied the disclosure and use of Steven Diller, Esq., who was proffered as an expert witness,

[7] Expressing the same concern over the dearth of expert testimony on the proximate-cause element, the trial court stated: "[A] jury would have no choice but to render a decision based on impermissible stacked inferences (at best) and wholesale speculation."

because his testimony was material to the issue of proximate cause, the disclosure did not result in unfair prejudice or surprise, and the ruling resulted in a *de facto* motion for summary judgment.

{¶ 41} Appellants employed three experts over the course of the litigation. A review of the timeline that led to the trial court's order excluding appellants' final expert, attorney Diller, along with a substantive review of the testimony of all the experts, is dispositive of the second assignment.

a. Timeline

{¶ 42} The November 9, 2009 pretrial order set March 19, 2010, as the deadline for appellants to disclose their experts and July 30, 2010, as the deadline for appellees to reveal their experts. Initially, on March 16, 2010, appellants disclosed their first expert witness, attorney William C. Mann, and indicated (without naming any) that "one or more economists" would testify "on the economic consequences of the Corey Dairy Farm transaction."

{¶ 43} About eight months later, and without obtaining leave of court or seeking an extension of their deadline for disclosure, appellants filed an "amended" disclosure to appellees' discovery requests. This disclosure named Michael Behr, Ph.D., a forensic economist, as their economic expert. Appellees did not object to Behr's belated disclosure. Mann and Behr, however, were not deposed until September 27 and November 30, 2011, respectively.

{¶ 44} On October 5, 2011, and again without obtaining leave of court or requesting an extension of the previous deadline, appellants filed an additional disclosure naming attorney Diller as their proximate-cause expert. To this disclosure appellees did object and they moved in limine to have Diller's identification stricken and to prohibit the use of his testimony. Cumulatively, appellants' legal malpractice suit had been pending for approximately 27 months, a period during which several trial dates were set and vacated and at least three pretrial conferences held. Not until nineteen months after the passing of the deadline for experts did appellants name Diller.

b. Standard of review - discovery.

{¶ 45} Discovery rulings, including rulings touching on the disclosure of experts and the use of expert-opinion testimony, are subject to the abuse-of-discretion standard. *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged*, 15 Ohio St.3d 44, 45-46, 472 N.E.2d 704 (1984). An appellate court must defer to the trial court's rulings on discovery matters, absent a demonstration that the lower court abused its discretion in deciding a particular issue. *State ex rel. The V. Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998).

{¶ 46} A trial court may exclude the presentation of an expert witness by a party who fails to comply with pretrial orders. *Paugh,* 15 Ohio St.3d at 46 (trial court "had discretion to set a deadline by which expert reports had to be filed, and to enforce its order by excluding all testimony relating to reports filed past the deadline."); *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985); *Roush v. Butera*, 8th Dist.

No. 97463, 2012-Ohio-2506, ¶ 34-38 (motion to strike expert report and affidavit upheld: "Appellants produced [the expert's] report for the first time to support their brief in opposition to National Union's motion for summary judgment. They never produced the expert report prior to [the expiration of] the discovery or expert report deadlines."); *Huffman v. Pioneer Basement Water Proofing Co., Inc*. 5th Dist. No. AP-08-0048, 2008-Ohio-7032, ¶ 41 (exclusion of expert upheld: "[Appellee] did not identify Stanley Kohelinger as its expert until September 13, 2006, which is six months after the March 13, 2006 deadline.").

c. Testimony of appellants' experts

(1) Dr. Michael Behr

{¶ 47} In reviewing Behr's deposition testimony, it becomes clear that his opinion was relevant only for supporting the financial losses appellants claimed, not for the issue of proximate cause. For that purpose it was plainly insufficient. Behr first conceded he was not qualified to opine on an attorney's representation of a client and thus speak to what an attorney should or should not do during the representation. Moreover, on the damages issue, Behr could identify no facts on which to base an unqualified opinion using the standard of probability, whereas he could, with *some degree of probability*, state that had appellants received the financing they sought from AgStar, Corey Dairy would have succeeded. Even then, however, this general statement does not connect any act by Gibson to VHDD's refusal to sign the loan commitment letters. On that point, Behr was asked directly whether he could cite any facts demonstrating that Gibson had

delayed the financing. He responded: "What I'm saying is it looks to me as though, when everything comes down, that *is likely the way it will turn out to be*. But to say that I can sit here and to a reasonable level of probability, [say] yes, that is the case based on what I know, at this point, *no, I can't do that.*" (Emphasis added.) Similarly, Behr also had no opinion as to *why* VHDD refused to sign the loan commitment letters, nor could he identify any fact indicating that Gibson had some part in that refusal.

(2) Attorney William C. Mann

{¶ 48} In responding to appellees' motion to strike Diller's disclosure, appellants acknowledged that their first expert, Mann, was named "several years ago," but conceded he could not testify on proximate causation. As the trial court determined, Mann initially offered not an opinion, but only an *anticipated* opinion on the merits of the malpractice claim, "reserv[ing] the right" to modify or change his opinion based on facts later developed during discovery. Specifically, he would not be able to opine on proximate cause until van Sommeren and Gibson had been deposed and the transcripts from those depositions reviewed at his leisure - depositions that were not taken until July 2011 and reviewed by Mann the following month; yet, when deposed in September 2011, Mann said he could not form an opinion on causation without seeing Gibson's deposition. Mann testified that he told appellants' counsel that merely reviewing the "voluminous" documents accumulated during discovery would be useless until he knew what facts Gibson's testimony would provide. In a memorandum to appellants' counsel, Mann indicated that while it was "probable" that the standard of care applicable to conflicting

interests had been breached, he could not say what damages proximately ensued from that breach. As with Behr, Mann never specified what Gibson did, or failed to do, that prompted VHDD not to execute the AgStar loan documents. In short, he did not have an opinion on proximate cause nor the facts from which to form one. [8]

(3) Attorney Steven L. Diller

{¶ 49} In opposing the motion to strike, appellants, referring to Diller, argued that they "should be allowed to nominate an additional expert witness *to review and render* an opinion, *if applicable*, in this lawsuit." Diller would be yet "another set of eyes [to] review this case to determine whether or not [he] could link the proximate cause issue." In response, appellees characterized this argument as akin to asking the trial court to sanction a "fishing expedition" for a proximate-cause expert to create a prima-facie case, something appellants had failed to do in the two years since filing the lawsuit. In its

[8] In its judgment entry granting the motion in limine regarding attorney Diller, the trial court noted that

> [t]his case was filed in June of 2009. The circumstances and course of events herein do not illustrate a situation in which [appellants'] expert unforeseeably *changed* his opinion or otherwise blind-sided counsel. To the contrary, and by Mann's own testimony, *he never had formed the opinion* that counsel was seeking from him. (Emphasis added.)

Indeed, in an affidavit dated October 20, 2011, which is attached to appellants' memorandum opposing appellees' motion to strike Diller's disclosure, Mann states he "would not be capable of rendering an expert opinion as to the proximate cause issue in the pending lawsuit."

summary-judgment ruling, the trial court, after noting that Diller was not timely disclosed, observed that when "Diller *was* offered as [an expert], he had apparently not yet formed an opinion as to proximate causation."

{¶ 50} We have reviewed Diller's affidavit and believe the trial court's assessment still holds true. Many of the statements in Diller's affidavit either do not speak to the proximate cause issue - in terms that specifically address why VHDD would not sign the loan letters and what part, if any, Gibson had in that refusal - or they refer to facts that *pre-dated* Gibson's representation of van Sommeren, such as the "non-refundable deposit" he made and the related agreement he signed with VHDD. This is apart from the issue of whether such opinions as Diller does provide are formed from a reasonable degree of probability as opposed to some lesser, more speculative basis. But to the extent that his affidavit purports to opine in support of appellants' burden on proximate causation, it is insufficient on that element.[9] Having reviewed the record on this issue, we conclude that the trial court did not abuse its discretion in granting the motion to strike appellants' untimely revelation of attorney Diller.

{¶ 51} Accordingly, the second assigned error is not well-taken.

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[9] Diller's affidavit was attached as an exhibit to appellants' memorandum opposing appellees' motion for summary judgment, filed February 23, 2012. Addressing the proximate-cause issue, appellants pointed to paragraph 10 of Diller's affidavit for the statement that "Gibson did not take action to protect Mr. van Sommeren when [VHDD] backed out of the AgStar financing transaction." That is, at best, an overly interpretive *conclusion* drawn from what is actually stated there. None of Diller's averments in paragraph 10 specify what Gibson did or did not do in relation to VHDD's refusal to sign the letters, nor do they point to facts suggesting that Gibson knew VHDD would refuse.

C. The Hague Evidence Convention

{¶ 52} Appellants' first assigned error states:

"I. The trial court erred as a matter of law when it precluded Bernardus Huiskamp, who is a material non-party witness, from testifying at a deposition, rather than proceeding pursuant to Article 9 of The Hague Convention on gathering evidence, as codified in 28 U.S.C.A. § 1781."

1. Background

{¶ 53} Huiskamp, the former financial agent for VHDD, had returned to the Netherlands following AgStar's rejection of van Sommeren's loan application. Van Sommeren testified that Huiskamp never told him why VHDD did not sign the loan commitment letters. Having been intimately involved in the application process, Huiskamp might be expected to shed light on this issue and whether, or to what extent, Gibson had any hand in it. Although an attempt was made to get Huiskamp to testify voluntarily, he would not return to the United States or testify without a court order. His testimony was thus sought pursuant to the procedures set forth in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, a multilateral treaty codified in 28 U.S.C. 1781 and more commonly called the "Hague Evidence Convention."

{¶ 54} On January 31, 2011, the trial court granted appellants' motion to issue a letter of request to the Hague Convention to obtain the deposition testimony of Huiskamp

from the Netherlands.[10] There would be a discovery deposition and a trial deposition, both to be taken through a live-stream video conference. Eventually, the District Court of The Hague granted the request and referred the matter to the District Court of Arnhem, Netherlands, where Huiskamp resided.

{¶ 55} As the parties went through the Hague process, however, appellees learned that the depositions would be conducted under Dutch law, which differs markedly in substance from the methods and procedures under Ohio law. Appellees questioned the mechanics of the Dutch procedure and were first advised, in a letter from the Court of Arnhem dated September 5, 2011, that the deposition would take place before a Dutch judge. He would ask the questions initially, with some questioning allowed afterward by counsel. The Dutch judge would then "dictate the answers the witness gives to the clerk of court," who would then type the answers as dictated, and such would constitute the witness' testimony. Once all questioning concluded, the testimony would be read back to the witness and the attorneys. The letter stated that the testimony may be "adapted if necessary and if allowed" by the Dutch judge, and that after the Ohio court reviewed the testimony, some further questioning of the witness was possible, but in a more limited

[10] A letter of request, under the Hague Convention, is also known as a rogatory letter. In substance:

> [it] is merely a request from one jurisdiction to a foreign jurisdiction asking the latter, while "acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice [.] *Kaplan v. Tuennerman-Kaplan*, 9th Dist. No. 11-CA-0011, 2012-Ohio-303, ¶ 8, quoting *Wooster Prod., Inc. v. Magna-Tek, Inc.*, 9th Dist. No. 2462, 1990 WL 51973 (Apr. 25, 1990).

way or on "any other points the U.S. Court may order." Still, the Dutch judge would "ask questions first," and then dictate the answers for the clerk to draft as the actual testimony of the witness.

{¶ 56} Appellees responded to this information by asking the Court of Arnhem to allow Huiskamp to be deposed under Ohio's procedure for discovery and trial depositions. On September 8, 2011, the court replied, by email from the clerk of court, stating that "Dutch procedural law" would apply to such depositions and suggesting that Dutch lawyers be retained to assist counsel. The court's email also stated that Huiskamp's testimony would have to be "drafted" in conformity with Dutch law and would be a Dutch legal document. [11] Following this email, appellees moved for a protective order to prohibit the taking of Huiskamp's deposition under the Dutch procedure. Their primary objections were that it would preclude the creation of a

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[11] In pertinent part, the September 8th email from the Court of Arnhem stated:

> Please note that *Dutch Procedural Law is applicable to the depositions*. It is not possible to apply foreign procedural law to this procedure, unless international treaties determine otherwise. We are, of course, willing to cooperate by granting you the opportunity to attend the hearing of the witness *and even ask questions*. Usually though, foreign attorneys appoint Dutch attorneys to represent them during this procedure. Your request is, although sympathetic, quite unusual. * * * With all respect to the Ohio court and law, *the testimony will have to be drafted in conformity with Dutch law. It will be a Dutch legal document* and needs to comply with Dutch law. I have no objection to the court reporter typing the testimony *but this cannot be the basis of the Dutch legal document. The testimony will be drafted or dictated by the Dutch judge.* As long as the witness will not cooperate to testify without a court order*, the procedure has to comply with Dutch law.* (Emphasis added.)

"verbatim transcript" by a court reporter, the opportunity for direct questioning, and unrestricted cross-examination. On September 23, 2011, the trial court granted the protective order, issuing it without further explanation.

2. The Hague Procedures: mandatory or permissive?

{¶ 57} Appellants contend that it was mandatory to use the procedures of the Hague Evidence Convention to obtain Huiskamp's deposition. They assert that the trial court "misinterpreted" the procedures under Article 9 of the Convention, but do not explicitly indicate how that misinterpretation occurred. Counsel for appellants seems to suggest that the court issued the protective order too quickly, instead of allowing "additional requests" to be made to the Court of Arnhem for some sort of special accommodation that would permit Huiskamp, a non-party witness, to be deposed under Ohio's rules and procedure.

{¶ 58} Initially, both parties debate the standard of review applicable to lower court rulings on letters of request and other issues of procedure under the Hague Evidence Convention. While appellees maintain that abuse-of-discretion is the standard, appellants insist that *de novo* review is required because the matter before us involves "the interpretation or application of a statute," i.e., 28 U.S.C. 1781. [12] While the issuance

[12] 28 U.S.C. 1781 is entitled "transmittal of letter rogatory or request." Chapter 1 thereunder concerns "Letters of Request," of which Article 9 states:

> The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. However, it will follow a request of the requesting authority that a special method or

of a letter of request to a foreign court, or afterward one or more special requests pursuant to Article 9, obviously involves the "application" of a federal statute in the sense embraced by *de novo* review, the circumstances here are not that simple. They invite an analysis more detailed than a mechanical jump to a rote conclusion.

{¶ 59} First, in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461 (1987), the United States Supreme Court "rejected [the] extreme position" that the Hague Evidence Convention "provides the exclusive and mandatory procedures for obtaining documents and information located within the territory of a foreign signatory." *Id.* at 522. The *Aerospatiale* petitioners had urged, alternatively, that 28 U.S.C. 1781 either required use of Convention procedures "*to the exclusion of any other discovery procedures* whenever evidence located abroad is sought for use in an American court," or "require[d] first, but not exclusive, use of its procedures." (Emphasis added.) *Id.* at 533. Rejecting both contentions, the Supreme Court instead held:

{¶ 60} "The preamble [of the Convention] does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices. * * * The text of the Evidence Convention itself *does not modify the law of any contracting state, require any*

> procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties. A letter of request shall be executed expeditiously.

contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures. (Citations omitted; emphasis added.) *Id.* at 534.[13]

{¶ 61} Second, at issue in this case is the nature of the challenged evidence-gathering procedure. In *Schindler Elevator Corp. v. Otis Elevator Co*, 657 F.Supp.2d 525 (D.N.J.2009), the district court identified the same concerns with the taking of a deposition in Switzerland that apply to the Dutch procedure by which Huiskamp would be "deposed":

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[13] Moreover, a mandatory view of Hague Convention procedures, whenever discovery is sought from a foreign national residing in a foreign jurisdiction, would threaten the authority of the American court in which the lawsuit is pending to control the litigation within the civil and evidentiary rules of its jurisdiction. As the *Aerospatiale* court stated:

> An interpretation of the Hague Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state *to the internal laws of that state*. Interrogatories and document requests are staples of international commercial litigation, no less than of other suits, yet *a rule of exclusivity would subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions* or, equally, to the inactions *of foreign judicial authorities.* (Emphasis added.) *Id.* at 538-539.

And despite appellants' emphasis that Huiskamp was "a non-party witness," that fact is an irrelevant consideration. *Aerospatiale* rejected the attempted distinction between parties and witnesses, stating:

> [T]he text of the Convention draws no distinction between evidence obtained from third parties and that obtained from the litigants themselves; nor does it purport to draw any sharp line between evidence that is 'abroad' and evidence that is within the control of a party subject to the jurisdiction of the requesting court. *Id.* at 541.

[A] "deposition" endorsed by the Hague Convention *would not comport with* the general procedures and practices of *a deposition recognized by the Federal Rules*. * * * A deposition in Switzerland would appear to involve a diplomatic officer, consular agent, and/or a person appointed by such authorities as a commissioner, who would take the deposition as a third-party. *See Triple Crown Am., Inc.* [*v. Biosynth AG*, E.D.Pa. No. 96-7476, 1998 WL 227886 (Apr. 30, 1998)] ("Defendant does not refute plaintiff's representations that any deposition in Switzerland in this case would be conducted in German by a judicial officer who would issue a report from handwritten notes, that the proceedings could not be transcribed by a party and that the ability of any Swiss attorney engaged by a party to pose questions to a deponent is not assured."). As the deposition might have to be taken by a third party, there is no guarantee that Otis would even be permitted to pose direct questions to the witness.* * *

The differences between the procedures applicable to a Convention deposition and those applicable to a general "question-and-answer" deposition under the Federal Rules *raise legitimate concerns about the sufficiency of a Hague deposition and the specter of prejudice to Otis. See, e.g., In re Honda,* 168 F.R.D. at 539 ("It would be patently unfair to constrain plaintiff's ability to discover facts necessary to make their case by

allowing Honda Japan's managing agents be deposed in Japan pursuant to Japanese Rules."). (Emphasis added.) *Id.* at 531.

{¶ 62} Here, the "deposition" of Huiskamp under the Dutch procedure would not have comported with Ohio's civil rules for deposing a witness in a lawsuit brought in this state. No American court is required by the Hague Evidence Convention to acquiesce in the evidence-gathering procedures of a foreign court that, if attempted here, would be anathema to the rules and procedures used in civil suits in the United States. *Aerospatiale, supra,* 482 U.S. 522, 107 S.Ct. 2542, 96 L.Ed.2d 461; *Schindler Elevator Corp., supra* 657 F.Supp.2d 52 .[14]

{¶ 63} Although appellants dispute the issue, the Court of Arnhem, though it *might* have done so after receiving further "special requests," was not *compelled* to follow the procedure for depositions, or indeed any of the rules of discovery, evidence, or

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[14] *Compare, Trusz v. UBS Realty Investors LLC,* D.Conn. No. 3:09CV268, 2011 WL 577331 (Feb. 8, 2011), in which a foreign witness was ordered to be deposed under the federal civil rules, not the Hague Evidence Convention, where:

> the letter of request must be transmitted through the central authority in London, is to be accompanied by a list of questions to be posed to the witness by the English court, and may request permission for the American attorney to ask questions directly of the witness, which request remains within the discretion of the English court, or alternatively, may seek permission from the English court for an English solicitor to take the testimony of the witness.

Interestingly, *Trusz* noted that "numerous federal courts have ordered foreign residents to appear for depositions in the U.S.," including non-party witnesses, citing *Tietz v. Textron, Inc.,* 94 F.R.D. 638 (E.D.Wis.1982) and *Sykes Int'l, Ltd. v. Pilch's Poultry Breeding Farms, Inc.,* 55 F.R.D. 138 (D.Conn.1972).

summary-judgment practice, that obtain in Ohio. On this point we need not speculate on what the Dutch court "might have" allowed. The text of the court's letter and its follow-up email speak for themselves. Both emphasized that Huiskamp's testimony would be taken under Dutch procedure, not under Ohio civil procedure, and what resulted would be a *Dutch* legal document. Consequently, the trial court did not "misinterpret" or misapply anything found in 28 U.S.C. 1781. The court was informed, by a clear statement from the Court of Arnhem, that Huiskamp would be questioned by the Dutch judge and his answers, as construed by the judge, dictated to the clerk who would then "draw up" the testimony, with or without some questioning by counsel. That alone would be the procedure and "the basis of the [resulting] Dutch legal document."

{¶ 64} Appellants' *de novo* argument is thus based on an erroneous premise: even the heightened scrutiny of *de novo* review would not alter the discretion inherent in the lower court to decline a letter of request, given the "optional" and "permissive" character of 28 U.S.C. 1781,[15] where it determines that such a request would invite the use of foreign judicial procedures that are substantively incompatible with Ohio's civil or evidentiary rules.

{¶ 65} For that reason, the trial court had discretion to grant appellees' motion for a protective order in light of the subsequent information forwarded by the Dutch court following its receipt of the letter of request. In the context of that development, although the protective order precluded Huiskamp's deposition, we see no abuse of discretion in

[15] *See Aerospatiale,* 482 U.S. at 536 and 540, 107 S.Ct. 2542, 96 L.Ed.2d 461.

the trial court's decision. *U.S. v. Rosen*, 240 F.R.D. 204, 215 (E.D.Va. 2007). ("Federal courts have both statutory and inherent authority to issue letters rogatory, regardless of whether the case is civil or criminal. * * * [I]t is also settled that the decision to issue letters rogatory lies within a court's sound discretion. *See United States v. Mason*, 919 F.2d 139 (4th Cir.1990) (citing *Leasco Data Processing Equip. Corp. v. Maxwell*, 63 F.R.D. 94 (S.D.N.Y.1973)). *Accord U.S. v. Liner*, 435 F.3d 920, 924 (8th Cir.2006) (denial of letters rogatory reviewed for abuse of discretion)."); *see also, Szollosy v. Hyatt Corp*., D.Conn No. 399CV870CFD, 2005 WL 3116095 (Nov. 15, 2005) ("The issuance of a letter rogatory is within the court's discretion.")

{¶ 66} Accordingly, the first assigned error is not well-taken.

III. Conclusion

{¶ 67} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Pursuant to App.R. 24(A)(4), costs are assessed against appellant.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE