

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

NO. 4-10-0467

Order Filed 4/19/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

RONALD VIEMONT,)	Appeal from
Plaintiff-Appellant,)	Circuit Court of
v.)	Champaign County
CAROL DISON, Individually, and BECKETT &)	No. 09L94
WEBBER, P.C., an Illinois Corporation,)	
Defendants-Appellees.)	Honorable
)	Michael Q. Jones,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

Held: If a debtor makes an offer to a creditor to settle a debt by paying part of it and if the creditor accepts the offer, no contract comes into existence, and the settlement agreement is unenforceable, because by performing a preexisting duty, the debtor suffers no detriment and hence provides no new consideration.

Fourteen days after imposing an unconditional sentence in a criminal case, a United States district court loses subject-matter jurisdiction to alter the sentence.

Although damages proximately caused by the attorney's negligence are always an element of a cause of action for legal malpractice, these damages need not be proved by a case within a case if the damages were incurred in a transaction instead of in underlying litigation.

The plaintiff is Ronald Viemont, and the defendants are Carol Dison and the law firm at which she was employed as an attorney, Beckett & Webber, P.C. Viemont sued defendants on a number of theories, all of which boil down to the allegation that Dison

committed legal malpractice while representing Viemont in negotiations to reduce his obligation to pay restitution to two pension funds. The trial court granted defendants' motion to dismiss the third amended complaint, with prejudice, pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2008)). Viemont appeals.

In our *de novo* review, we agree with the trial court's decision except for its dismissal of counts VII and VIII of the third amended complaint, the counts alleging negligent misrepresentation. Looking at those counts in a light most favorable to Viemont, resolving all reasonable inferences in his favor, we conclude that those counts state a cause of action, and we are aware of no affirmative matter that would defeat those counts. Therefore, we affirm the trial court's judgment in part and reverse it in part, and we remand this case for further proceedings.

I. BACKGROUND

A. The Order To Make Restitution, as Discussed in the Affirming Decision of the Seventh Circuit

Before examining the third amended complaint in this case, we will recount some of the highlights of *United States v. Viemont*, 91 F.3d 946, 948 (7th Cir. 1996), in which the Court of Appeals for the Seventh Circuit reviewed the restitution order that the district court had imposed on Viemont as part of his sentence for wire fraud. The Seventh Circuit's decision contains some background information, which helps to put the third amended complaint in context. See *People v. Mann*, 397 Ill. App. 3d 767, 770 (2010) (we may take judicial notice of judicial decisions from other jurisdictions); *Kirchner v. Greene*, 294 Ill. App. 3d 672, 677 (1988) ("[F]or purposes of a section 2-615 motion, the court

considers matters subject to judicial notice ***.").

We learn from the Seventh Circuit's decision that in the case of *United States v. Viemont*, No. 95-CR-20027, a criminal case in the United States District Court for the Central District of Illinois, a grand jury indicted Viemont on four counts of wire fraud. *Viemont*, 91 F.3d at 948. On August 7, 1995, pursuant to a plea agreement, Viemont pleaded guilty to one of the counts, and the remaining three counts were dismissed. *Id.* Basically, he pleaded guilty to stealing from two pension funds, which the city of Danville had entrusted to him as an investment consultant. The two pension funds were "the Policemen's Pension Fund for the City of Danville, Illinois," and "the Firefighters' Pension Fund for the City of Danville, Illinois." *Viemont*, 91 F.3d at 947, 948. After accepting Viemont's guilty plea, the district court ordered the preparation of a presentence investigation report.

According to the presentence investigation report, "\$200,000 in restitution was necessary to make the pension fund victims whole." *Viemont*, 91 F.3d at 948. On January 12, 1996, Judge Harold A. Baker adopted the findings contained in the presentence investigation report, and he sentenced Viemont to pay restitution in the amount of \$200,000 (\$100,000 apiece to the two pension funds) in addition to sentencing him to 15 months' imprisonment and a \$4,000 fine. *Viemont*, 91 F.3d at 949.

Viemont appealed to the Seventh Circuit, arguing that \$200,000 in restitution was excessive. *Viemont*, 91 F.3d at 949. The Seventh Circuit disagreed with that argument, and it affirmed the judgment of the district court--including the restitution order. *Viemont*, 91 F.3d at 953.

With that background in mind, we now turn to the third amended complaint

in the present case, the well-pleaded facts of which we take as true, along with reasonable inferences drawn in Viemont's favor. See *American Health Care Providers, Inc. v. County of Cook*, 265 Ill. App. 3d 919, 922 (1994). In the course of our discussion, we might also recount some of the conclusions set forth in the third amended complaint, just to make Viemont's position comprehensible--but we will not assume those conclusions are true. See *Sweis v. City of Chicago*, 142 Ill. App. 3d 643, 648-49 (1986).

B. The Third Amended Complaint

1. *Viemont Hires Dison To Negotiate a "Lump-Sum Settlement"*

In his third amended complaint, Viemont alleges that on July 31, 2006, he had a meeting with an attorney, Carol Dison of Beckett & Webber, P.C., in which they discussed the possibility of negotiating a "lump-sum settlement" of his obligation to pay restitution in the federal criminal case. (We are using quotation marks because, as we will explain later on, Viemont's use of the term "settlement," in this context, is problematic.) Dison represented to Viemont that Judge Baker would accept and approve a lump-sum settlement negotiated with the "Pension Boards" (by which Viemont means the persons in charge of the two pension funds).

Initially, through the use of statistics, the third amended complaint casts doubt on Dison's assurance to Viemont that Judge Baker would approve a lump-sum settlement. The third amended complaint alleges that "[s]ince 1987, Judge Baker has entertained 64 criminal cases (in addition to *USA v. Viemont*) that involved the issue of restitution." Despite Dison's representations to Viemont that Judge Baker would accept and approve a lump-sum settlement negotiated with the pension boards, in none of those 64 cases was a motion ever made to reduce restitution after Judge Baker's entry of the

restitution order. Thus, initially at least, the third amended complaint appears to suggest it was doubtful, or far from certain, that Judge Baker would approve an unprecedented request to reduce restitution, once he ordered restitution as part of the sentence, and that Dison's expressed optimism on that score was unjustified.

Believing Dison's representations to him that Judge Baker would look favorably upon a motion to reduce the amount of restitution provided that the pension boards agreed to a lump-sum settlement, Viemont hired her to negotiate with the pension boards, and he paid her a retainer fee of \$2,500. Their contract was purely oral, and throughout Dison's representation of him, Viemont received no invoices showing the amount of the retainer fee she had used up.

*2. Dison's Sporadic Negotiations With the Pension Boards
and Her Failure To Convey Viemont's Settlement Offers to Them*

In a telephone conversation on August 8, 2006, Viemont gave Dison authority to offer a lump-sum settlement of \$75,000 to the Financial Litigation Unit (FLU) of the United States Department of Justice. On August 22, 2006, however, Viemont and Dison learned from Elizabeth Collins, an attorney with FLU, that a settlement could not be negotiated with FLU. Instead, Collins explained, Viemont would have to negotiate with the pension boards. If he reached a settlement with the pension boards, the settlement agreement would have to be presented to the district court for approval, and if the district court amended its restitution order so as to reduce the amount of restitution in conformity with the settlement agreement, FLU thereafter would act in accordance with the amended restitution order.

On August 22, 2006, Viemont and Dison were in the first-floor lobby of FLU

offices when Dison told Viemont—purportedly on the basis of her many years' experience appearing before Judge Baker--that if Viemont and the pension boards agreed on a settlement of \$87,500, "Judge Baker would honor the wishes of the Pension Boards and Viemont by granting an Agreed Settlement Order." Evidently, \$87,500 was the figure the pension boards had in mind, and Dison's and Viemont's strategy was to allow themselves to be negotiated upward to that figure from an opening offer of \$75,000.

On December 29, 2006, Dison informed Viemont that when she conveyed to the pension boards his lump-sum settlement offer of \$75,000, they countered with an offer of \$100,000. Nevertheless, she told Viemont that counsel for the pension boards had let her know that if Viemont "met them in the middle" by counter-offering \$87,500, the pension boards would accept such a counteroffer. Viemont directed Dison to counter-offer not only \$87,500 but, as an added sweetener, the installment payments due on December 15, 2007, and January 15, 2007: a total of \$98,500, when factoring in the installment payments totaling \$8,000 that Viemont already had paid to date ($\$87,500 + \$1,500 + \$1,500 + \$8,000 = \$98,500$).

For whatever reason, Dison never made the counteroffer of \$98,500 to the pension boards, even though, as far as Viemont could see, the way was clear for reducing his restitution obligation by more than 50%. All Dison had to do was follow through and convey Viemont's counteroffer to the pension boards. He alleges in count I of his third amended complaint:

"24. Accordingly, based upon Defendant Dison's August 22, 2006 representations, Judge Baker, but for Dison's inattention to Plaintiff Viemont's settlement negotiations,

would have approved an \$87,500 lump sum settlement with the Pension Boards.

25. But for Defendant Dison's lack of attention to Plaintiff Viemont's settlement negotiations, Viemont's restitution obligation would have been extinguished in short order."

(We are focusing on count I because most of its paragraphs are incorporated into or repeated in succeeding counts of the third amended complaint.) By "Dison's lack of attention to [his] settlement negotiations," Viemont means that she never communicated his counteroffer of \$98,500 to the pension boards--even though he importuned her with phone calls. He left her numerous phone messages, to which she did not respond, and all the while, he was sending his monthly payments of \$1,500 to the district court.

Finally, on August 17, 2007, Dison telephoned Viemont and told him that in the previous two days, she had spoken twice with counsel for the pension boards. She told Viemont that counsel for the pension boards had intimated to her "that he could convince the Pension Boards to accept \$80,000." That sounded good to Viemont. According to the third amended complaint, he "gave Defendants authority to counter up to \$86,375, if necessary, said monies being equal to 50% of the remaining balance of the original \$200,000 restitution Order."

Again, in count I, Viemont paints a picture in which the only real obstacle standing between him and a radical reduction in his restitution obligation was Dison: all she had to do was pick up the phone and talk with counsel for the pension boards--all she had to do was make the counteroffer--and then it was all downhill from there. But she

never conveyed his counteroffer to the pension boards, and consequently the negotiations remained stalled. Viemont alleges in count I:

"32. Plaintiff Viemont thus reasonably believed in August 2007 that at a minimum, the Pension Boards would settle for an amount somewhere between the \$80,000 the Pension Board's attorney was proposing and the \$100,000 counteroffer tendered by the Pension Boards on December 30, 2006.

33. Plaintiff Viemont reasonably believed in August 2007 that a lump-sum settlement amount would be reached, so long as Defendant Dison diligently communicated with counsel for the Pension Boards and promptly completed a settlement agreement and Agreed Settlement Order for the expected approval of Judge Baker.

34. Because Plaintiff Viemont's ongoing payments to FLU kept the Pension Boards in the same relative financial position vis-à-vis any future lump-sum settlement, on information and belief, Judge Baker would have approved an agreed Settlement Order between Plaintiff Viemont and the Pension Boards.

35. At the close of the August 17, 2007 conference call, Defendant Dison committed to Plaintiff Viemont that she would contact counsel for the Pension Boards for Plaintiff

Viemont's specific direction and authority, and then promptly contact Plaintiff Viemont as to the status of the anticipated settlement.

36. Thus, as of August 17, 2007, an accepted lump-sum offer of \$80,000 would mean that Plaintiff Viemont had paid a total of \$107,750 of the original \$200,000 restitution amount."

So, in Viemont's view, if only Dison had done as she had promised--if only she had conveyed to the pension boards his offer of \$80,000 (with authority to increase it up to \$86,375), everything and everyone else, including Judge Baker, would have fallen into place, and Viemont would have saved \$92,950. Viemont believes that Judge Baker would have looked favorably upon the lump-sum settlement because Viemont was current in his monthly payments at that time.

When Viemont takes the position, however, that Judge Baker's approval would have been virtually assured, he appears to contradict what he said earlier in his third amended complaint. Earlier in count I, he seemed intent on demonstrating, by statistics, that Judge Baker's approval of a proposed reduction in his restitution obligation was far less certain that Dison had made it out to be, because the very motion for such a reduction would have been unprecedented. Then Viemont turns around and pleads, in paragraphs 33 through 35 of count I, that if only Dison had done her job as a negotiator and clinched the deal with the pension boards, Judge Baker would have approved the negotiated reduction.

But Dison let the matter slide. Viemont heard nothing further from her for

a long time, and each month from September 15, 2007, through February 15, 2008, he sent a certified check in the amount of \$1,500 to the district court in Peoria.

Then, on March 12, 2008, despite his faithful payment of installments, Viemont received a "Notice of Offset" from the office of the United States Attorney. See 28 C.F.R. §11.12(b) (2009). The notice demanded immediate payment of the then-remaining balance of \$162,250. Viemont faxed this notice to Dison, insisting that she inform him immediately of the status of the anticipated settlement.

On April 11, 2008, Dison e-mailed Viemont, informing him that "the new number on the table [was] \$80,000 plus attorneys' fees," which, according to the third amended complaint, "Defendants [*sic*] estimated to be \$2,500." Viemont responded immediately to Dison's e-mail, telling her that he accepted the pension boards' offer on two conditions: (1) that the United States Attorney stay the notice of offset and (2) that Dison notify FLU that the installment payment of March 15, 2008, would be the last payment that Viemont would make, in view of the anticipated lump-sum settlement.

Viemont assumed that FLU would have no objection to his discontinuing the monthly installment payments, since he and the pension boards were poised to reach a settlement and since, for the settlement to occur, all Dison had to do was convey Viemont's counteroffer to the pension boards. He alleges:

"43. Thus, as of April 11, 2008, it was not a matter of whether or not a settlement would be reached between Plaintiff Viemont and the Pension Boards, but only a matter of whether Defendant Dison could convince FLU to stay the Notice of Offset in lieu of an Agreed Settlement Order by Judge Baker.

As previously stated by FLU Attorney Elizabeth Collins at the aforementioned August 22, 2009 meeting, FLU would abide by any amended restitution Order entered by Judge Baker.

44. As a result of Plaintiff Viemont's reasonable reliance on Defendant Dison's duty to communicate with FLU, Plaintiff Viemont reasonably concluded that the staying of monthly payments after March 15, 2008 was acceptable to FLU and further monthly payments were not necessary.

45. Thus, as of April 11, 2008, a lump sum offer of \$80,000 plus \$2,500 in attorneys' fees would mean that Plaintiff Viemont would have paid a total of \$117,750 of the original \$200,000 restitution amount.

46. Once again, as in the case of the prior \$87,500 December 30, 2006 offer, because Plaintiff Viemont's ongoing payments to FLU kept the Pension Boards in the same relative financial position vis-à-vis any future lump sum settlement, on information and belief, Judge Baker would have approved an Agreed Settlement Order between Plaintiff Viemont and the Pension Boards.

47. Defendant Dison failed to communicate to FLU or the Pension Boards' counsel Plaintiff Viemont's acceptance of the \$80,000 demand and Viemont's two (2) conditions with FLU."

Consequently, at this point, there would have been three conditions to a settlement: (1) FLU's agreement to suspend action on the notice of offset, (2) the pension boards' agreement to the suspension of monthly payments, and (3) Judge Baker's agreement to amend the restitution order so as to make it conform to the settlement. As it turned out, these conditions never had a chance to be fulfilled, and the reason, according to count I, was that Dison never followed through with the negotiations.

3. The Replacement of Dison With Bequette

Viemont made no payments in April, May, June, and July 2008, and he alleges, on information and belief, that FLU contacted defendants during that period and asked why he was not paying. As his basis for this belief, Viemont cites exhibit E of the third amended complaint, which is an undated letter from Collins to Dison. In her letter, Collins tells Dison: "Any other issues regarding overdue payments, if any, will be addressed to you." That sentence appears in the midst of these two paragraphs of Collins's letter:

"Pursuant to our meeting today regarding Mr. Viemont's financial resources and payments, Mr. Viemont has agreed to pay \$6,250.00 by September 8, 2006 and \$1,500.00 a month thereafter to be paid by the 15th of each month beginning October 15, 2006. The monthly billing statement is generated by computer and will be mailed directly to Mr. Viemont. The computer generated billing statement may reflect an overdue amount if payment is not timely. Any other issues regarding overdue payments, if any, will be addressed through you.

The payment amount will be revisited in a meeting

scheduled in January 2007. The Government may at that time seek to raise the payment based on the income and benefits that Mr. Viemont is receiving."

Consequently, it appears that paying the \$200,000 in monthly installments was not the district court's idea. Rather, it was Viemont's and FLU's idea: they had agreed he would make installment payments in the amount of \$1,500 per month. And paying down his restitution in monthly installments of \$1,500 was not a vested right, either, as Collins made clear in her letter to Dison: FLU could raise the amount of the payments, depending on Viemont's current financial situation. But before FLU raised the payments, it would consult Dison, just as it would contact her about any missed payments. Hence, Viemont infers that FLU wrote Dison sometime during the period of April through July 2008, asking why he had stopped making payments.

Even though FLU presumably, theoretically, contacted Dison to ask her what was going on, Viemont heard nothing from either Dison or her firm, Beckett & Webber, P.C. On July 22, 2008, he left a telephone message for Dison, wanting to know the status of the settlement negotiations.

On July 31, 2008, Andrew Bequette, another attorney at Beckett & Webber, P.C., called Viemont back and told him the firm had assigned him to replace Dison as the attorney handling Viemont's case. Viemont followed up with a letter to Bequette on that date, memorializing the telephone call and demanding "that Beckett & Webber, P.C. perform what Defendant Dison agreed to do when Dison and Viemont entered into an oral contract on July 31, 2006, *i.e.*, complete the settlement negotiations and obtain an Agreed Settlement Order from Judge Baker."

On October 3, 2008, Bequette got back with Viemont and informed him that FLU had decided to seek full restitution and that it now opposed any settlement with the pension boards for a lesser amount. This was a change in position from what Collins had told Viemont and Dison on August 22, 2006. Viemont alleges, on information and belief, that "this change in position by FLU was due, at least in part, because Plaintiff Viemont had stopped making payments after March of 2008 in light of his reasonable belief that Defendant Dison had reached [*sic*] the aforementioned consent of FLU."

Bequette advised Viemont to become current on the restitution payments immediately, and Viemont did so. That same day, Viemont mailed the clerk of the district court a certified check in the amount of \$10,000, representing all past-due payments, and he continued to make monthly installment payments of \$1,500 until December 4, 2008.

Finally, on December 4, 2008, Viemont paid the full balance of the restitution in a lump sum of \$150,000. He also paid an additional \$6,494.53 to cover a fine and accrued interest.

It cost considerably more to pay later than it would have cost to pay earlier. The failure to reach a settlement prevented Viemont from taking advantage of "time sensitive financial arrangements," which he had made known to Dison. These "time sensitive financial arrangements" went away because of "declining market conditions." Consequently, to pay the balance of the restitution, "Viemont now needed a secured loan versus an unsecured loan and thereby suffered actual losses in excess of \$140,000 arising from the need to now raise both additional and collateral funds to make full restitution to FLU [*sic*]."

Specifically, in paragraph 63 of count I, Viemont alleges that he suffered the

following losses as a proximate result of Dison's negligent failure to negotiate a timely settlement:

"(a) Loss of an unsecured five year loan commitment of \$80,000 by Commerce Bank tendered to Plaintiff Viemont individually to fund the anticipated settlement amount due to Defendants' lack of diligence in advance of then known declining market conditions;

(b) Sale of long term personal assets of Plaintiff Viemont at substantial losses in the forms of penalties, taxes, and lost investment returns totaling \$140,961.82 in order to obtain the liquid collateral then required by lending institutions to obtain a \$100,000 secured loan to fund the full restitution demanded by FLU;

(c) Plaintiff Viemont had to borrow \$50,000 from a third party to raise the additional funds necessary to meet the \$150,000 demand of FLU; and

(d) The payment of full restitution immediately was \$101,500 higher than a proposed settlement offer of \$87,500 by Plaintiff Viemont in December 2006."

4. The Various Theories of Recovery in the Third Amended Complaint

The third amended complaint has eight counts, the first four of which Viemont pleaded only for purposes of appeal, after the trial court dismissed those counts, with prejudice, when he pleaded them in his second amended complaint.

Count I of the third amended complaint is directed against Dison and seeks damages from her for legal malpractice.

Count II is directed against Beckett & Webber and seeks damages from it for legal malpractice in that it failed to oversee Dison and to take timely action to correct her professional negligence.

Count III, an alternative to count I, seeks damages from Dison for breach of their oral contract, whereby she was supposed to negotiate a lump-sum settlement.

Count IV, an alternative to count II, seeks damages from Beckett & Webber for legal malpractice on a theory of *respondeat superior*.

Count V seeks damages from Dison for common-law fraud. Dison allegedly committed fraud by making unjustified predictions, *i.e.*, by telling Viemont, with unwarranted confidence, what FLU and Judge Baker would do in the future. Viemont alleges as follows in count V:

"145. In sum, Dison made the aforementioned statements to Viemont that she could negotiate a lump-sum settlement with the Pension Boards that: would be unopposed by FLU, acceptable to Judge Baker, and result in a substantially reduced lump-sum Restitution Order entered by Judge Baker.

146. Dison's aforementioned promises were not only material but the very essence of her contractual relationship with Viemont.

147. As an attorney, Dison had an affirmative duty to determine whether Judge Baker had jurisdiction to reduce

Viemont's Restitution Order before communicating the aforementioned statement to Viemont.

148. Dison knew, or in a reckless disregard for the truth, failed to inform Viemont that once the criminal matter giving rise to the Restitution Order was timely appealed to the Seventh Circuit Court of Appeals, Judge Baker was divested of jurisdiction and had no legal authority to modify thereafter the Restitution Order.

149. Dison, despite her statements to Viemont, knew, or in reckless disregard for the truth, failed to inform Viemont that Dison herself had never filed or presented to Judge Baker a 'motion to reduce restitution' in any matter.

150. Dison knew, or in reckless disregard for the truth, failed to inform Viemont that Judge Baker had never entertained or been presented a 'motion to reduce restitution.' "

So now, in count V of the third amended complaint, Viemont does an about-face from count I. He now takes the position that even if Dison had diligently communicated his counteroffers to the pension boards and even if the pension boards had accepted one of his counteroffers, the negotiations would have been futile because Judge Baker lacked the subject-matter jurisdiction to entertain a motion to reduce restitution-- which perhaps explains why no such motion had ever been presented to him in any of the 64 other cases. This position is difficult to square with the position that Viemont takes

earlier in the third amended complaint--in paragraph 34 of count I, for example, in which he pleads: "Because Viemont's ongoing payments to FLU kept the Pension Boards in the same relative position vis-à-vis any future lump-sum settlement, on information and belief, Judge Baker would have approved an Agreed Settlement Order between Plaintiff Viemont and the Pension Boards." Maybe the explanation lies in the fact that counts V through VIII of the third amended complaint were new counts, in which Viemont was casting about for an alternative theory of recovery, whereas counts I through IV were repleaded only for purposes of appeal, to prevent them from being considered as abandoned after the dismissal of the second amended complaint, in which they originally appeared.

Count VI of the third amended complaint seeks damages from Beckett & Webber for the same common-law fraud that Viemont purports to describe in count V.

Count VII seeks damages from Dison for negligent misrepresentation. The alleged misrepresentation was "that Judge Baker would enter a reduced lump-sum Restitution Order"--a jurisdictional impossibility. Viemont pleads that by relying on this misrepresentation, he suffered compensatory damages in excess of \$240,000.

Count VIII seeks damages in excess of \$240,000 from Beckett & Webber for the same alleged misrepresentation described in count VII.

C. The Motions for Dismissal

On March 18, 2010, defendants filed a combined motion to dismiss the third amended complaint pursuant to sections 2-615 and 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2008)). Under the heading of section 2-615, they argued that counts V and VI did not state a cause of action for common-law fraud and that counts VII and VIII did not state a cause of action for negligent misrepresentation. (Again, counts

I through IV of the third amended complaint had already been dismissed with prejudice in the second amended complaint and were repleaded in the third amended complaint merely for purposes of appeal.)

Under the heading of section 2-619, defendants argued that Viemont could not prove that but for their negligent acts or omissions, he would have obtained a reduction in the amount of restitution that he had to pay to the two pension funds. In support of that argument, defendants submitted a copy of the Seventh Circuit's decision in *Viemont* as well as a certified copy of the judgment in case No. 95-CR-20027, in which Judge Baker ordered Viemont to make restitution to the Danville Policemen's Pension Fund in the amount of \$100,000 and to the Danville Firefighters' Pension Fund in the amount of \$100,000.

Defendants also submitted some correspondence between Viemont's counsel and Judge Baker. On November 12, 2009, Viemont's counsel sent Judge Baker a letter asking him to sign an enclosed affidavit stating as follows:

"If Carol Dison, as counsel for Defendant Viemont, and counsel for the Pension Boards had appeared before my Court with an Agreed Settlement Order containing an Amended Restitution Order reflecting a lump sum payment by Defendant Viemont of \$87,500.00 to the Pension Boards, the Court would have honored the wishes of the Pension Boards and Defendant Viemont by entering an Agreed Settlement Order and/or Amended Restitution Order."

Judge Baker did not sign the proposed affidavit.

On December 14, 2009, Viemont's counsel sent a second letter to Judge

Baker, in which he again asked Judge Baker to sign an enclosed affidavit stating that Judge Baker would have approved a settlement between Viemont and the pension boards if Dison had presented such a settlement to him. On December 16, 2009, Judge Baker replied to Viemont's counsel with a letter stating as follows:

"I cannot sign and swear to the affidavit you enclosed. The hypothetical you ask me to swear to is just not possible for me to do. I have no recollection of the case and, moreover, the affidavit maligns Carol Dison, whom I always found to be an effective and competent lawyer when she appeared before me. I am informed that Ms. Dison's disability was a heart attack and that she is no longer practicing law."

In a hearing on May 24, 2010, the trial court dismissed counts V, VI, VII, and VIII of the third amended complaint with prejudice. In explaining its decision, the court remarked that Viemont had failed to plead proximate cause through a "case within a case." See *Orzel v. Szewczyk*, 391 Ill. App. 3d 283, 290 (2009) ("To establish proximate cause the plaintiff must essentially prove a 'case within a case,' which means but for the attorney's negligence, the plaintiff would have prevailed in the underlying action." (Internal quotation marks omitted.))

D. Defendants' Emergency Motion for a Protective Order Staying Discovery

Before filing his third amended complaint but after the dismissal of his second amended complaint, Viemont initiated discovery by taking the following actions: (1) on February 1, 2010, he served a notice to take Dison's discovery deposition on February 17, 2010; (2) on February 2, 2010, he served a subpoena on Judge Baker to take his deposition

on February 17, 2010; and (3) on February 3, 2010, he served a subpoena on James Dobrovolny (who represented the pension funds in negotiations with Dison) to take his deposition on February 17, 2010, and to bring with him all documents relating to his communications with Dison regarding the negotiation of a lump-sum settlement of the restitution order.

On February 4, 2010, defendants filed an emergency motion for a protective order staying discovery and quashing the notices of deposition and the subpoenas served by Viemont. In their motion, defendants asked the trial court to enter the protective order in part because there currently was no complaint on file and because the scope of discovery was unascertainable without a complaint. On February 9, 2010, the trial court granted defendants' motion and issued the requested protective order.

E. Viemont's Motion for Permission To File a Jury Demand *Instanter*

On March 18, 2010, Viemont filed a motion for leave to file a jury demand *instanter*. Defendants objected on the ground that Viemont had failed to file a timely jury demand and hence he had forfeited his right to a jury. In a hearing on March 18, 2010, the trial court denied Viemont's motion because he had shown no good cause for making a late jury demand.

This appeal followed.

II. ANALYSIS

A. Viemont's Problematic Use of the Word "Settlement"

Throughout his third amended complaint, Viemont speaks of the goal that he and Dison had of reaching a "lump-sum settlement" with the pension boards. What exactly does Viemont mean by "settlement"? The word has various shades of meaning, and among

these, two possibilities come to mind. "Settlement" can mean "[a]n agreement ending a dispute or lawsuit," or it can mean "[p]ayment, satisfaction, or final adjustment." Black's Law Dictionary 1405 (8th ed. 2004). A "settlement" with the pension boards in the first sense--as an agreement ending a lawsuit--would have been impossible, considering that (1) the lawsuit, *United States v. Viemont*, ended in a judgment against Viemont years ago and consequently there no longer was any pending lawsuit to be settled; and (2) the pension boards were not parties to *Viemont* and consequently could not have settled that lawsuit even if it were still pending.

There was no pending *dispute* to be "settled," either, in the first sense of the word "settlement." Viemont and the pension boards did not have a dispute with each other as to whether Viemont was indebted to the pension boards or as to the amount of the debt. The federal courts had made a final definitive determination that Viemont owed restitution to the pension boards in the amount of \$200,000. Thus, it was beyond gainsaying that Viemont owed the pension boards \$200,000 minus whatever he had already paid them. For Viemont to say he was going to settle a dispute with the pension boards would be comparable to saying he was going to put out a fire when all that was left were cold ashes.

That leaves the second meaning of "settlement": as payment, satisfaction, or final adjustment. Viemont could have "settled" with the pension boards in the second sense only by paying them what he owed them. And, again, the amount he owed them was definitively determined: \$200,000 minus whatever he had already paid them to date.

Could he have "settled" with the pension boards for less? Let us assume, hypothetically, that Viemont succeeded in reaching an agreement with the pension boards to pay them less than what he owed them. Let us assume, for example, that Dison conveyed

to the pension boards an offer to "settle" for half the remaining balance of what Viemont owed, and let us assume that the pension boards accepted the offer. It nevertheless is unclear how the pension boards thereafter would be contractually barred from collecting from Viemont the other half of the balance. Granted, by doing so, the pension boards would be going back on their agreement. But in order for an agreement to be a contract--that is, in order for an agreement to be judicially enforceable (Restatement (Second) of Contracts §1(1981))--both parties must provide consideration (*Moehling v. W.E. O'Neil Construction Co.*, 20 Ill. 2d 255, 265 (1960)), and the performance of a preexisting duty is not consideration (*Johnson v. Maki & Associates, Inc.*, 289 Ill. App. 3d 1023, 1028 (1997)). Under the restitution order, Viemont owed the pension boards a preexisting duty to pay the full balance of the restitution. He owed them that duty before he even began negotiating with them. And, obviously, if he owed the pension boards a duty to pay the full balance, he owed them a duty to pay each fraction of the full balance (*e.g.*, each half). By agreeing to do what he already was obliged to do on pain of contempt of court, Viemont would have suffered no detriment. By corollary, if he had agreed to do *less* than what he already was obliged to do, he would have suffered no detriment, either.

Williston explains:

"Since a debtor incurs no legal detriment by paying part or all of what he owes, and a creditor obtains no legal benefit in receiving it, such a payment if made at the place where the debt is due in the medium of payment which was due, and at or after maturity of the debt, is not sufficient consideration for any promise. The question most commonly arises when a debtor

pays part of a liquidated debt in return for the creditor's agreement that the debt shall be fully satisfied. Such agreement on the part of the creditor needs for its support other consideration besides the mere part payment." 1 W.

Jaeger, Williston on Contracts §120, at 496 (3d ed. 1957).

Paying what one owes is no new detriment, and without some detriment on Viemont's side, there would have been no consideration and, hence, no contract between himself and the pension boards. See *Ermold v. Bear*, 358 Ill. 233, 238 (1934) ("[W]here there is no proof of consideration for the forgiveness of a debt, an attempt to forgive a debt is ineffective either as a gift or as an executory contract."); *Johnson*, 289 Ill. App. 3d at 1028.

The situation might have been somewhat different if Viemont and the pension boards had a genuine good-faith dispute as to how much he owed them. But they had no such dispute: the debt was determined by judgment. The supreme court has said:

"The payment of a part of a fixed and certain demand which is due and not in dispute is no satisfaction of the whole debt even where the creditor agrees to receive a part for the whole and gives a receipt for the whole demand, [citation] but if there is a *bona fide* dispute as to how much is due, a payment of the amount claimed by the debtor to be due in full settlement, if accepted by the creditor, is a satisfaction of the claim. [Citation.] *** There must, of course, be an actual dispute between the parties in order to furnish a consideration for the agreement to discharge the obligation of the debtor for

an amount less than the creditor claims to be due ***." *In re Estate of Cunningham*, 311 Ill. 311, 315-16 (1924).

Absent a *bona fide* dispute between Viemont and the pension boards over his indebtedness, he would have incurred no detriment by paying half of what he owed them.

Viemont might argue, to the contrary, that he would indeed have suffered a detriment by paying half the remaining balance to the pension boards in a lump sum, because he thereby would have given up the time value of his money. In his brief, he suggests that the time value of money gave the pension boards an incentive to settle for half of what he owed them. Because of the time value of money, the present possession of a lump sum could have been more valuable to the pension boards than the payment of a greater sum in installments over a long period.

A time-value argument would presuppose, however, that *vis-à-vis* the pension boards, Viemont had a *right* to make restitution in monthly installments of \$1,500 instead of all at once. We are aware of no such right. The legal source of such a right has not been explained to us. Judge Baker's order, on its face, requires immediate payment of the full \$200,000 in restitution; it says nothing about installment payments. See 18 U.S.C. §3572(d)(1) (2006). Evidently, judging by exhibit E of the third amended complaint (the letter from Collins to Dison), installment payments were something FLU agreed to--for the time being. As far as we can see, nothing would have prevented the pension boards from putting a lien on Viemont's property for the full balance of the restitution, if they had desired to do so. See 18 U.S.C. §3664(m)(1)(B) (2006).

So, given the preexisting duty rule, it appears that the settlement negotiations with the pension boards were doomed to ineffectuality. Regardless of what Dison did or did

not do, the settlement negotiations were going nowhere--they led to nothing, or at least nothing that could have been enforced in a court. Therefore, inasmuch as Viemont pleads that Dison harmed him by failing to communicate his counteroffers to the pension boards, he fails to state a cause of action. By this alleged omission on Dison's part, she did not deprive Viemont of a more favorable legal relationship with the pension boards than he otherwise would have had. She could not have harmed him by neglecting to reach an agreement with the pension boards that would have been unenforceable due to the lack of consideration on his part.

It may be that this problem of a preexisting duty was not insuperable. Perhaps Dison and the pension boards could have gotten around the problem by agreeing on an additional, different performance on Viemont's part. Nevertheless, according to section 73 of the Restatement (Second) of Contracts (Restatement (Second) of Contracts §73 (1981)), the additional, different performance would have had to reflect a genuine bargain rather than a trivial formality to get around the preexisting-duty rule. Section 73 says: "Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain." Restatement (Second) of Contracts §73 (1981). According to comment b to section 71 of the Restatement (Second) of Contracts (Restatement (Second) of Contracts §71, comment b (1981)), "a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal." It is unclear what the additional consideration could have been on Viemont's side, but according to the Restatement, which is a highly respected treatise on contract law, sham

consideration would not have done the job.

In any event, as we will explain, the gravest obstacle to the settlement project was not the preexisting-duty rule but the district court's lack of subject-matter jurisdiction to reduce the amount of the restitution--notwithstanding any discharge of indebtedness that Dison and the pension boards might have privately negotiated, even in a valid contract.

B. The District Court's Lack of Subject-Matter Jurisdiction To Reduce the Restitution

The restitution order was part of Viemont's sentence, which Judge Baker imposed on January 12, 1996. A reduction of the amount of restitution would have been a reduction of Viemont's sentence more than 14 days after it was imposed. Under Federal Rule of Criminal Procedure 35(a), "[a] sentence becomes final 14 days after imposition, unless the trial court elects to reconsider and alter the judgment." 26 J. Moore, Moore's Federal Practice, *Federal Rules of Criminal Procedure* §635.03[1] (3rd ed. 2011). "The 14-day time limit is deemed jurisdictional and thus precludes a court from acting any time thereafter." *Id.* (citing numerous cases).

Granted, there are a couple of exceptions to this 14-day rule. A district court may reconsider and change a sentence (1) after an appellate court remands the case and directs the district court to reconsider or recalculate the sentence or (2) after a defendant gives postsentence cooperation and assistance in the investigation or prosecution of another person and in recognition of the defendant's help, the government makes a motion to reduce the defendant's sentence. 26 Moore's Federal Practice, ¶635.02. Neither of those exceptions, however, is relevant to Viemont's case. Consequently, at close of business on January 26, 1996, the district court lost subject-matter jurisdiction to alter the amount of restitution.

It is true that a district court has continuing jurisdiction to *enforce* a restitution order. See 18 U.S.C. §3664(m) (2006). Thus, in the docket sheet from *United States v. Viemont*, No. 95-CR-20027, one can see that on September 30, 2008, the district court issued a citation to discover assets. It likewise is true that the district court has continuing jurisdiction to "adjust the payment schedule" upon a showing of a "material change in the defendant's economic circumstances." 18 U.S.C. §3664(k) (2006). A district court lacks continuing jurisdiction, however, to change the amount of restitution.

This jurisdictional limitation, in addition to the preexisting-duty rule, is another reason why the settlement negotiations were a doomed enterprise, quite apart from whether Dison conveyed Viemont's offer to settle for a fraction of what he owed. According to the third amended complaint, Viemont and FLU considered any settlement to be conditional on Judge Baker's issuance of an amended restitution order--and rightly so, because a reduction in the amount of restitution depended ultimately on the district court, not the pension boards. "[B]ecause the victim does not have an independently enforceable right to receive criminal restitution, the victim cannot waive such a right in a civil settlement." *United States v. Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009). See also *United States v. Bearden*, 274 F.3d 1031, 1041 (6th Cir. 2001) ("[A] private settlement between a criminal wrongdoer and his victim releasing the wrongdoer from further liability does not preclude a district court from imposing a restitution order for the same underlying wrong."); *United States v. Parsons*, 141 F.3d 386, 393 (1st Cir. 1998) ("[A] release by the victim does not preclude or cap restitution of losses as part of criminal sentencing in a case where there is no double recovery."). Judge Baker, though, was just as powerless as the pension boards to reduce the amount of the restitution, because the district court lacked

subject-matter jurisdiction to do so. Therefore, even in the unlikely event that Dison persuaded Judge Baker to alter the amount of restitution that he awarded years ago, the alteration would have been void for lack of subject-matter jurisdiction. See *United States v. Diaz-Clark*, 292 F.3d 1310, 1317 (11th Cir. 2002).

Because the settlement negotiations with the pension boards were inherently futile for the reasons we have explained, Dison could not have caused Viemont to suffer financial loss by failing to convey his counteroffers to the pension boards. Causation is one of the elements of a cause of action for legal malpractice and breach of contract (*Land v. Auler*, 186 Ill. App. 3d 382, 384 (1989); see *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.*, 376 Ill. App. 3d 1006, 1014 (2007)), and Viemont has pleaded no causal connection between Dison's neglect to communicate his settlement offers and any financial harm to himself.

C. Defective Legal Advice, Leading to the Loss of the "Time-Sensitive Financial Arrangements"

Although Dison could not have harmed Viemont by neglecting to make a settlement that would have been meaningless anyway, we should consider whether she harmed him in some other manner by giving him defective legal advice. Essentially, she gave Viemont legal advice that his restitution obligation would be reduced if (1) the pension boards accepted his offer to pay a lesser amount of restitution than Judge Baker had ordered and (2) Judge Baker issued an amended restitution order reflecting the settlement between Viemont and the pension boards.

This legal advice was incorrect, as we have explained, but the third amended complaint affords no basis for reasonably inferring that the advice was *fraudulent*. The

worst one could say is that, in this case, Dison was not diligent enough in researching the law. Viemont, however, pleads no facts to justify an inference that she gave him advice that she knew or believed to be false. See *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 529 (1996). Therefore, we affirm the dismissal of the fraud counts (counts V and VI) with prejudice. It is arguable that the advice that Dison gave to Viemont breached the standard of care applicable to an attorney. (But we do not decide that question one way or the other; that is a factual question to be determined on the basis of expert testimony. See *Barth v. Reagan*, 139 Ill. 2d 399, 407 (1990).) It is not arguable, however, that the advice was fraudulent.

Did this arguably defective legal advice cause Viemont any harm, when all reasonable inferences are drawn in his favor? See *American Health*, 265 Ill. App. 3d at 922. One might infer that if Dison had advised Viemont, early on, that (1) entering into a "settlement" with the pension boards whereby Viemont agreed to pay them part of the restitution would not bar the pension boards from pursuing his assets for the balance of the restitution and (2) Judge Baker lacked jurisdiction to alter the amount of restitution, Viemont might have taken advantage of what he describes as the "time-sensitive financial arrangements" and paid the restitution in full while those advantageous arrangements were still available. By waiting around in the misguided belief that the "settlement" negotiations were worthwhile and that a judicial reduction of restitution was a real possibility, he let the "time-sensitive financial arrangements" slip away, and consequently, he incurred greater financial losses than he otherwise would have incurred in getting together the funds to pay the restitution--or so he seems to be saying in counts VII and VIII. The "time sensitive financial arrangements" were an unsecured loan. It cost Viemont more to get together the

collateral for a secured loan than it would have cost him to pay the balance of the restitution with the unsecured loan. (Viemont explains this lost financial advantage more fully in paragraph 63 of count I, which we quoted earlier.)

In summary, then, we affirm the dismissal of counts I through VI of the third amended complaint, with prejudice. Counts I through IV rely on the exploded theory that a "settlement" would have reduced Viemont's restitution obligation. Counts V and VI assert fraud without providing any facts that would reasonably support an inference of fraud. We reverse, however, the dismissal of counts VII and VIII, which allege negligent misrepresentation, because those counts acknowledge that Judge Baker would have lacked subject-matter jurisdiction to alter the restitution, and they appear to allege that, owing to the false legal information that Dison negligently gave him, Viemont suffered the loss of advantageous financial arrangements while waiting for a "settlement" that would have been meaningless, owing to the jurisdictional obstacle. See *Rozny v. Marnul*, 43 Ill. 2d 54, 66 (1969); Restatement (Second) of Torts §552(1) (1977).

D. The Case Within a Case

Defendants argue that because Viemont has failed to plead that but for Dison's alleged negligence, he would have prevailed in the "case within a case," he has failed to plead a cause of action for legal malpractice. The First District has held that "[t]o establish proximate cause [in an action for legal malpractice,] the plaintiff must essentially prove a 'case within a case,' which means 'but for the attorney's negligence, the plaintiff would have prevailed in the underlying action.'" *Orzel*, 391 Ill. App. 3d at 290 (quoting *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 196 (2007)). Strictly speaking, there no longer is an underlying action: *United States v. Viemont* is concluded,

and there only is an underlying judgment. Nevertheless, the concept of a case within a case is applicable by way of analogy. Viemont has failed to plead that but for Dison's alleged negligence, he would have been successful in the underlying *matters* (the "matters within the case," so to speak). That is, he has failed to plead that if Dison had diligently followed through with the settlement negotiations, he would have ended up with an enforceable agreement with the pension boards and a valid amended restitution order from Judge Baker.

Nonetheless, the Fifth District has held that in cases of transactional malpractice, the plaintiff need not prove a case within a case in order to recover damages. *Union Planters Bank, N.A. v. Thompson Coburn LLP*, 402 Ill. App. 3d 317, 343-44 (2010). "[P]roving a case-within-a-case is not always required in transaction-based legal malpractice cases where damages can otherwise be established." *Union Planters*, 402 Ill. App. 3d at 344. This case has a transactional aspect, in which (viewing the factual allegations in a light most favorable to him) Viemont lost his "time sensitive financial arrangements" by relying on Dison's defective legal advice. Thus, pleading a case within a case is not the only way Viemont can plead causally related damages.

E. The Liability of Beckett & Webber, P.C., on a Theory of *Respondeat Superior*

Defendants point out that in count VIII of the third amended complaint, which seeks to hold Beckett & Webber, P.C., liable for negligent misrepresentation, Viemont does not identify which attorneys at the firm knew or should have known that Dison was giving defective legal advice to Viemont and how they should have known this. It is true that in count VIII, Viemont alleges a failure on the firm's part to adequately oversee Dison, but subtracting the allegations of inadequate supervision would not eviscerate the cause of

action against Beckett & Webber, P.C., for negligent misrepresentation.

The firm still would be liable under the doctrine of *respondeat superior*. This doctrine provides that a corporation may be held liable for torts committed by their servants, agents, or employees in the course of their employment. *Collier v. Avis Rent A Car System, Inc.*, 248 Ill. App. 3d 1088, 1096 (1993); *Jeffers v. Weinger*, 132 Ill. App. 3d 877, 883-84 (1985); 805 ILCS 10/8 (West 2008) ("The corporation shall be liable up to the full value of its property for any negligence or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services."). Paragraph 84 of count V of the third amended complaint alleges that Dison was an attorney employed by Beckett & Webber, P.C. According to paragraph 89 of count V, Dison met with Viemont on July 31, 2006, "and represented that she was a partner at Defendant Beckett & Webber, P.C. and highly qualified to represent Viemont in negotiating a lump-sum settlement of a \$200,000 Restitution Order." Count VIII incorporates these two paragraphs of count V. The elements of *respondeat superior* are present.

F. The Untimely Jury Demand

"A plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. *** Otherwise, the party waives a jury." 735 ILCS 5/2-1105(a) (West 2008). Viemont did not file a jury demand at the time he commenced this action.

Nevertheless, "[o]n good cause shown, in the discretion of the court and on just terms, additional time may be granted for the doing of any act or the taking of any step or proceeding prior to judgment." 735 ILCS 5/2-1007 (West 2008). Viemont argues that

he showed good cause for being allowed to file a late jury demand. The good cause, according to him, was the trial court's perusal of the letter in which Judge Baker expressed a favorable opinion of Dison as an attorney. Viemont fears that by reading this letter, the trial court suffered a grievous blow to its capacity to be objective and that "under the circumstances of potential judicial bias," it is necessary for a jury, instead of the trial court, to be the trier of fact.

Because the trial court assured Viemont's counsel of its ability to evaluate the case on the basis of the evidence instead of "personal feelings" and because the court made clear that it considered Judge Baker's impressions regarding Dison to be irrelevant, we find no abuse of discretion in the denial of Viemont's motion to file a late jury demand. See *Brown v. Scotillo*, 104 Ill. 2d 54, 59-60 (1984).

G. The Protective Order

Because the protective order quashing the notices of deposition and the subpoenas was premised on Viemont's failure to state a cause of action in his third amended complaint (see *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 513-14 (2005)) and because we find that he has stated a cause of action for negligent misrepresentation, the protective order should be lifted.

III. CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment in part and reverse it in part. We affirm the dismissal, with prejudice, of counts I, II, III, IV, V, and VI of the third amended complaint, but we reverse the dismissal of counts VII and VIII of the third amended complaint. We remand this case for further proceedings.

Affirmed in part and reversed in part; cause remanded.