No. 07-0739

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 87782

ENVIRONMENTAL NETWORK CORPORATION, et al.
Appellees,

v.

GOODMAN WEISS MILLER LLP, et al.,
Appellants.

AMICUS CURIAE BRIEF OF DEFENSE RESEARCH INSTITUTE IN SUPPORT OF APPELLANTS

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I. INTEREST OF THE AMICUS

The Defense Research Institute ("DRI") is an international organization that includes more than 22,000 lawyers involved in the defense of civil litigation. Committed to enhancing the skills, effectiveness, and professionalism of defense lawyers, the DRI seeks to address issues germane to defense lawyers and the civil justice system, to promote appreciation of the role of the defense lawyer, and to improve the civil justice system. The DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. The DRI has a strong and abiding interest in clarifying the circumstances under which lawyers will be held liable for alleged malpractice resulting from the loss of a judgment in the underlying litigation.

II. STATEMENT OF THE CASE AND FACTS

This appeal arises out of a jury verdict of $2,419,616.81 in favor of Plaintiffs-Appellees Environmental Network Corp., Environmental Network & Management Corp., and John Wetterich (collectively, "Environmental Network") in a legal malpractice action against Defendant-Appellant Goodman Weiss Miller, L.L.P. ("Goodman Weiss"). The jury found that Goodman Weiss coerced Environmental Network to settle an underlying lawsuit. That underlying commercial lawsuit involved 1) numerous parties, several of which asserted intervening claims or counterclaims against Environmental Network that 2) exposed Environmental Network to potential judgments exceeding $3,700,000. A settlement on the second day of trial in the underlying lawsuit extinguished those

potential judgments and awarded Environmental Network $40,000 to be applied to Goodman Weiss's outstanding bills.

Throughout the legal malpractice trial, Environmental Network's sole damages theory was that the coerced settlement prevented it from achieving a *better* result had the case been tried to judgment. Environmental Network's hindsight speculation that that it would have avoided liability for the $3.7 million in claims asserted against it and obtained a verdict in its favor on its own claims is known as the "lost judgment" theory of damages. Addressing that theory, Goodman Weiss's expert witness, Marvin Karp, testified that Environmental Network *could not have* obtained a positive net recovery after trial in the underlying lawsuit. Significantly, Environmental Network presented no expert testimony or other evidence to the contrary. Instead, Environmental Network presented "some" evidence concerning its underlying claims, consisting primarily of: 1) testimony that Goodman Weiss attorneys told Environmental Network its claims had value; 2) demonstrative exhibits and charts prepared by Goodman Weiss for use at trial in the underlying case; and 3) expert testimony from an economist, Dr. Burke, who projected estimated "lost profits" of more than $8 million in the underlying case. Goodman Weiss moved for directed verdict and for judgment notwithstanding the verdict, arguing that it was entitled to judgment as a matter of law because Environmental Network failed to prove proximate causation and damages. The trial court denied Goodman Weiss's motions, and the Eighth District affirmed.

III. ARGUMENT

Proposition of Law No. 1:

> **When a plaintiff in a legal malpractice action seeks to recover as damages the damages that would have been recovered in the underlying action had the case been tried to judgment, to establish causation the plaintiff must prove by a preponderance of the evidence that, but for the lawyer's negligence, the plaintiff would have obtained a more favorable judgment in the underlying action. The plaintiff must thus prevail in a trial within a trial. (Restatement of the Law 3d, Law Governing Lawyers (2000) 389-91, Section 53, Comment *b* followed.)**

The Eighth District Court of Appeals held that Environmental Network was required to produce only "some" evidence on the merits of its underlying claim — even though its sole theory of damages at trial was the loss of a civil judgment. (Appellate Opinion ("App. Op."), Appendix ("Appx.") 9-11, at ¶ 16-17, 23.) That holding is inconsistent with ordinary principles of tort law and the prevailing rule of law across the United States, is not dictated by this Court's precedents, and is not supported by public policy. Consistent with Comment *b* to Section 53 of the Restatement, this Court should hold that a plaintiff seeking "lost judgment" damages in a legal malpractice case, must offer evidence sufficient for a reasonable juror to conclude that "but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action." Restatement of the Law 3d, Law Governing Lawyers (2000) 389-90, Section 53, Comment *b*. Such an inquiry requires the plaintiff to prevail in a trial-within-a-trial. Id. at 390.

A. The Overwhelming Majority of Jurisdictions Require a Plaintiff in a Litigation-Malpractice Action to Prevail in a Trial-Within-a-Trial.

1. Courts apply the same principles to legal-malpractice claims that apply to other negligence claims.

Courts across the United States have long recognized that "suits against attorneys for negligence are governed by the same principles as apply in other negligence actions." *Maryland Cas. Co. v. Price* (C.A.4, 1916), 231 F. 397, 402; see, e.g., *Aubin v. Barton* (Wash.Ct.App. 2004), 98 P.3d 126, 134 ("Usually, the principles of proof and causation in a legal malpractice action do not differ from an ordinary negligence case."). One of these principles is that negligence "in the air" is not actionable. Black-letter law requires a plaintiff to prove causation and damages as well as negligent conduct to establish a claim for negligence. See, e.g., Restatement of the Law 2d, Torts (1965), Section 430 ("In order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm."); Dobbs, The Law of Torts (2000) 405, Section 166 (explaining that "damages are not presumed as they are in the case of some intentional torts; the plaintiff who is not harmed by negligence cannot even recover nominal damages").

As is true of any other negligent act, negligence by a lawyer in prosecuting or defending an action may not cause any damages "because the judgment may be entirely just, and one that would have been rendered notwithstanding the efforts of the attorney to prevent it." *Maryland Cas. Co.*, 231 F. at 402. In legal-malpractice actions as in other

negligence actions, therefore, proof of causation is essential "to safeguard against speculative and conjectural claims," and to "ensur[e] that damages awarded for the attorney's malpractice actually have been caused by the malpractice." *Viner v. Sweet* (Cal. 2003), 70 P.3d 1046, 1052.

2. Ordinary negligence principles require proof of "but for" causation in a litigation-malpractice action.

Applying ordinary principles of negligence causation to a litigation-malpractice action requires a plaintiff to "establish that, 'but for' the attorney's negligence, the result of the underlying proceeding would have been different." *Mogley v. Fleming* (Mo.Ct.App. 1999), 11 S.W.3d 740, 747. Accord *Viner*, 70 P.3d at 1052 ("In a litigation malpractice action, the plaintiff must establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.") (emphasis in original). In practice, "[t]he malpractice judge or jury must decide a 'case within a case' and determine what the result would have been absent the alleged malpractice." *Rubens v. Mason* (C.A.2, 2004), 387 F.3d 183, 190. At least 41 jurisdictions outside of Ohio require proof of such "but for" causation in litigation malpractice actions. (See Appx. 19-24.)

3. The established method for determining "but for" causation in a litigation-malpractice action is a trial-within-a-trial.

The established mechanism for determining what the result would have been in the case-within-a-case is a trial-within-a-trial. A leading treatise on legal malpractice

describes the trial-within-a-trial as "the accepted and traditional means of resolving issues involved in the underlying proceedings in a legal malpractice action." 4 Mallen & Smith, Legal Malpractice (2006) 1017, Section 33.9. Such a trial-within-a-trial "requires calling and examining those persons who would have been witnesses and presenting the demonstrative and documentary evidence that would have been presented but for the attorney's negligence." Id.

As in other negligence cases, courts analyzing causation in litigation-malpractice actions apply "the objective, 'reasonable person' standard" when determining whether the attorney's negligence caused any damages. *Rubens*, 387 F.3d at 189. Applying an objective test to the trial-within-a-trial requires the fact-finder to "determine what the result *should have* been (an objective standard) not what the result *would have* been by a particular judge or jury (a subjective standard)." 4 Mallen & Smith, Legal Malpractice (2006) 1019, Section 33.9 (emphasis in original). Accord *Rubens*, 387 F.3d at 191-92 (trial court erred in relying on affidavit from "expert" arbitrator as to what should have happened in underlying arbitration, because it "would tend improperly to displace the fact-finder in the malpractice 'case within a case'"); *Hummer v. Pulley, Watson, King & Lischer, P.A.* (N.C.Ct.App. 2003), 577 S.E.2d 918, 923 (legal malpractice plaintiff not required to show what particular fact finder would have determined).[1]

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[1] See, also, *Machado-Miller v. Mersereau & Shannon, L.L.P.* (Or. 2002), 43 P.3d 1207, 1209 ("[W]e do not ask ourselves what the court *would* have decided or *could* have decided, but what it *should* have decided under a correct application of the law.") (emphasis in original); *Crestwood Cove Apts. Business Trust v. Turner* (Utah 2007), 164 P.3d 1247, 1254 (same); *Cook v. Continental Cas. Co.* (Wis. 1993), 509 N.W.2d 100, 105

B. A Trial-Within-a-Trial Is the Widely Used and Well Accepted Method for Proving "Lost Judgment" Damages.

The trial-within-a-trial method of establishing causation is not an anachronism. Courts in numerous jurisdictions have reaffirmed the continued validity of this doctrine in the last five years.[2] Strong confirmation of the entrenched status of the trial-within-a-trial in litigation malpractice actions is demonstrated by its adoption in the Restatement of the Law 3d, Law Governing Lawyers published in 2000.

Consistent with the prevailing rule of law, Section 53 of the Restatement adopts the overarching principle that "[a] lawyer is liable * * * only if the lawyer's breach of a duty of care * * * was a legal cause of injury, as determined under generally applicable

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(explaining that a case-within-a-case "does not require that the jury in the malpractice action determine what the *actual* jury in the underlying action would have done; rather, the second jury is to determine what a *reasonable* jury would have done if the case had been tried differently").

[2] E.g., *Rantz v. Kaufman* (Colo. 2005), 109 P.3d 132, 136 ("In order to demonstrate causation in a legal malpractice case, the client must prove the 'case within a case,' meaning he or she must show that the claim underlying the malpractice action should have been successful if the attorney had acted in accordance with his or her duties"); *Marrs v. Kelly* (Ky. 2003), 95 S.W.3d 856, 860 ("[A] legal malpractice case is the 'suit within a suit.'"); *Manzo v. Petrella* (Mich.Ct.App. 2004), 683 N.W.2d 699, 704 (recognizing the "'suit within a suit' requirement in legal malpractice cases"); *McIntire v. Lee* (N.H. 2003), 816 A.2d 993, 998 ("The jury will therefore substitute itself as the trier of fact and determine factual issues presented on the same evidence that should have been presented to the original trier of fact."); *Machado-Miller v. Mersereau & Shannon, L.L.P.* (Or. 2002), 43 P.3d 1207, 1209 ("To answer that question, we must decide what the outcome for plaintiff would have been in the earlier case if it had been properly tried, a process that has been described as a 'suit within a suit.'") (internal quotation omitted); *Crestwood Cove Apts. Business Trust v. Turner* (Utah 2007), 164 P.3d 1247, 1255 ("[T]he proximate cause issue is ordinarily handled by means of a 'suit within a suit' or 'trial within a trial.'" Internal quotation omitted.); *Aubin v. Barton* (Wash.Ct.App. 2004), 98 P.3d 126, 134 (noting that proof of causation "typically requires a trial within a trial'") (internal quotation omitted).

principles of causation and damages." Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53. The Restatement tethers the method of proving causation to the type of harm alleged by the malpractice plaintiff. See Restatement of the Law 3d, Law Governing Lawyers (2000) 389-91, Section 53, Comment *b*.

Proof of a trial-within-a-trial is particularly appropriate when the plaintiff seeks to recover a "lost judgment" as damages in a legal malpractice action – i.e., when the plaintiff "seeks to recover as damages the damages that would have been recovered in the previous action or the additional amount that would have been recovered but for the defendant's misconduct." See Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53, Comment *b*. In such cases, the Restatement directs that a "plaintiff must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action. The plaintiff must thus prevail in a 'trial within a trial.'" Id. at 389-90. Causation "normally is an issue for the factfinder," and "[a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the malpractice plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action." Id. at 390.

Consistent with the prevailing practice in most jurisdictions, the trial-within-a-trial contemplated by the Restatement is an objective look at what should have happened in the underlying action, not a subjective inquiry into what would have happened in any particular courtroom. See Restatement of the Law 3d, Law Governing Lawyers (2000)

390, Section 53, Comment *b*. The Restatement precludes testimony by a fact-finder from the underlying action in the malpractice action, stating that "judges or jurors who heard or would have heard the original trial or appeal may not be called as witnesses to testify as to how they would have ruled." Id. Any such testimony "would constitute an inappropriate burden on the judiciary and jurors and an unwise personalization of the issue of how a reasonable judge or jury would have ruled." Id.

C. This Court Should Adopt the Majority Rule of the Restatement.

This Court should adopt Section 53 of the Restatement of the Law 3d, Law Governing Lawyers and confirm that a trial-within-a-trial is required when, as in this case, the malpractice plaintiff seeks as damages the damages it alleges would have been recovered in the underlying action. The trial-within-a-trial is consistent not only with ordinary principles of tort law and the causation standard adopted by the vast majority of jurisdictions across the United States, but also with this Court's precedents and public policy. The Eighth District Court of Appeals erred in ruling that a plaintiff seeking damages for the loss of a civil judgment need establish only "some" evidence of the merits of their underlying claim.

1. *Krahn* did not alter the traditional elements of legal malpractice.

Any analysis of the current state of the law in Ohio must begin with this Court's rejection of the "exoneration rule" in *Krahn v. Kinney* (1989), 43 Ohio St.3d 103. The alleged malpractice in *Krahn* included the criminal defense counsel's failure to

communicate an initial plea offer to Krahn, which "forced [the plaintiff] into the situation of having to plead to a more serious charge." Id. at 106. The trial court granted the defendant attorney's summary judgment motion based on the exoneration rule, which provides that a plaintiff's failure to allege that her conviction had been vacated is fatal to a claim for legal malpractice. The court of appeals reversed and this Court affirmed.

Krahn did not purport to alter the traditional elements of a legal malpractice claim. Indeed, the syllabus law confirmed that "a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach." Id. at syllabus. *Krahn*'s conclusion rested on two pillars: 1) the exoneration rule adds an "additional element" to a legal malpractice claim,[3] id. at 105; and 2) rejection of that additional element was "consistent with the resolution of the issue by other jurisdictions, most of which require the same elements of proof for all legal malpractice actions, whether arising from criminal or from civil representation," id. (and cases cited therein).

Since *Krahn* issued, one of its pillars has crumbled. Far from being consistent with the resolution of the issue by other jurisdictions, the vast majority of state courts have rejected *Krahn*'s conclusion that a plaintiff need not allege a reversal of his or her

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[3] Prior to *Krahn*, at least one Ohio appellate court had held that a criminal malpractice plaintiff must allege "two additional facts to establish damage" beyond what is normally required in a malpractice case. See *Weaver v. Carson* (1979), 62 Ohio App.2d 99, 101. Those additional facts were: 1) that the plaintiff's conviction had been reversed based on ineffective assistance of counsel; and either 2) that on remand for new trial, the case was dismissed or resulted in acquittal, or 3) that the conviction could not have been achieved but for the ineptitude of counsel and was unassailable at re-trial for the same reason. Id.

conviction to state a claim for legal malpractice. E.g., *Stephens v. Denison* (Ky.Ct.App. 2004), 150 S.W.3d 80, 83; *Gibson v. Trant* (Tenn. 2001), 58 S.W.3d 103, 110 (and cases cited therein from Alaska, California, Florida, Georgia, Kentucky, Maryland, Massachusetts, Nebraska, Nevada, New York, New Hampshire, Pennsylvania, Texas, and Virginia). In cases not involving *Krahn*'s specific facts (malpractice based on counsel's failure to communicate a more favorable plea offer), these courts have concluded that exoneration is the only way to prove causation and damages in a legal malpractice action arising out of a criminal case. See *Gibson,* 58 S.W.3d at 111 (one of "the most persuasive reasons" for the exoneration rule "is the perplexing problem of how a criminal defendant could ever prove that his lawyer caused him any legally cognizable injury, and the related problem of how he could prove any damages. These are requirements of any tort action, including legal malpractice").

2. ***Vahila* did not alter the traditional elements of legal malpractice.**

Krahn was the primary precedent cited in this Court's later decision in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. Like *Krahn*, *Vahila* did not purport to alter the traditional elements of a legal malpractice claim, expressly confirming in its syllabus that "a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." Id. at syllabus.

The plaintiffs in *Vahila,* who had been represented by defendants in several civil and criminal matters, alleged that the defendants had committed malpractice by failing "to properly disclose all matters and/or legal consequences surrounding the various plea bargains entered into by Terry Vahila and the settlement agreements agreed to by [the plaintiffs] with respect to several civil matters." 77 Ohio St.3d at 427. This Court reversed the trial court's summary judgment in favor of the malpractice defendants because it concluded that the plaintiffs had "arguably sustained damage or loss *regardless of the fact* that they may be unable to prove that they would have been successful in the underlying matter(s) in question." Id. (emphasis added).

When viewed through the lens of its syllabus and its conclusion that the malpractice plaintiffs suffered damages regardless of their inability to demonstrate that they would have prevailed in the underlying action, this Court's opinion in *Vahila* is not a fundamental re-working of the law relating to causation, but instead, it is an application of *Krahn.* That is how *Vahila* has been viewed in jurisdictions outside of Ohio. While courts across the country continue to disagree with *Krahn*'s conclusion that a plaintiff need not allege a reversal of her conviction to state a malpractice claim, *Vahila* has rarely been cited outside of Ohio.

3. Public policy supports the Restatement rule.

The Eighth District erred when it concluded that requiring legal-malpractice plaintiffs "to merely provide some evidence of the merits of the underlying claim" (Appx. 13, at ¶ 30) is based on sound policy considerations. The policy considerations set forth

in a 1970s student note quoted in *Vahila* and the decision below[4] – to the extent they have any continuing validity – do not and should not apply to malpractice plaintiffs claiming a "lost judgment" as damages.

The note first states that a "but for" test does not account for settlement opportunities lost due to a lawyer's negligence. (App. Op., Appx. 12, at ¶ 27-28, quoting *Vahila*, 77 Ohio St.3d at 426.) That concern is irrelevant when, as here, the plaintiff complains that the settlement itself is the malpractice.[5]

The second concern is that a complete reconstruction of the underlying case would require speculative evidence about the size of jury verdicts. (App. Op., Appx. 12-13, at ¶ 29, quoting *Vahila*, 77 Ohio St.3d at 426-427). That "concern" misconstrues the trial-within-a-trial contemplated by the Restatement, which determines not what the result

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[4] App. Op., Appx. 12-13, at ¶ 27-29, quoting *Vahila*, 77 Ohio St.3d at 426. See Jensen, Note, *The Standard of Proof of Causation in Legal Malpractice Cases* (1978), 63 Cornell L.Rev. 666.

[5] Requiring a trial-within-a-trial would not make sense or be necessary when the alleged malpractice consists of the loss of an opportunity for a favorable settlement. See Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment *b* ("A plaintiff might contend that the defendant in the previous action made a settlement offer, that the plaintiff's then lawyer negligently failed to inform plaintiff of the offer (see § 20(3)), and that, if informed, plaintiff would have accepted the offer. If the plaintiff can prove this, the plaintiff can recover the difference between what the claimant would have received under the settlement offer and the amount, in fact, received through later settlement or judgment."); see, also, 4 Mallen & Smith, Legal Malpractice (2006), Section 30.47 ("When both the likelihood of settlement and the amount can be supported by evidence, then the fact of injury is no longer speculative. * * * The settlement value of the case does not become a measure of damages without proof that a compromise should have and could have been the result of the litigation. Otherwise, the case more likely would have gone to trial and the probable result of the trial-within-a-trial provides the basis for measuring the loss.").

would have actually been had the case been tried, but what "a reasonable judge or jury" would have found. Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment *b*. Testimony as to the size of jury verdicts is not relevant. *Rubens*, 387 F.3d at 191-92. Other policy concerns addressed in the student note quoted in *Vahila* are even more tenuous.[6]

Both *Krahn* and *Vahila* acknowledged that proof of what would have happened in the underlying litigation "but for" the attorney's alleged malpractice is a necessary element of proof in at least some cases. While *Krahn* "reject[ed] the suggestion that a proximate cause analysis can be eliminated and replaced by a rule of thumb based on whether the malpractice plaintiff has succeeded in overturning the underlying conviction," this Court also conceded "that in most cases the failure to secure a reversal

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[6] The note, for example, simply jettisons the fundamental requirement of "but for" causation in all negligence actions based on unfounded and unsupported speculation that a "but for" causation standard "in effect immunizes most negligent attorneys from liability." See *Vahila*, 77 Ohio St.3d at 426. As indicated, the "trial-within-a-trial" requirement applies when the damages sought are themselves inherently speculative – the judgment the plaintiff "would have" received had he gone to trial. The note offers no plausible alternative for avoiding speculative damages in such scenarios. Finally, the author worries that an attorney's failure to pursue discovery in the underlying action may prevent the malpractice plaintiff from establishing his or her claim. *Vahila*, 77 Ohio St.3d at 427. However, that concern is not an excuse for throwing out the entire but-for causation test in all legal malpractice claims. To the extent that a malpractice plaintiff can point to specific, material information that he or she cannot acquire because of an attorney's failure to properly pursue discovery, the Restatement recognizes that the fact-finder may draw an inference from the attorney's failure to pursue that information. See Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment *b* (noting that, in determining whether the plaintiff has met her burden of proof, "the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial").

of the underlying criminal conviction may bear upon and even destroy the plaintiff's ability to establish the element of proximate cause." 43 Ohio St.3d at 106. And while *Vahila* likewise "reject[ed] any finding that the element of causation in the context of a legal malpractice action can be replaced with a rule of thumb requiring that a plaintiff, in order to establish damage or loss, prove in every instance that he or she would have been successful in the underlying matter(s) giving rise to the complaint," 77 Ohio St.3d at 426, it also conceded "that the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case," id. at 427-28.

This is such a case. *Krahn* teaches that this Court should look to the practice in other jurisdictions when analyzing the quantum of proof necessary for establishing causation in legal-malpractice claims. See 43 Ohio St.3d at 105. Outside the realm of legal malpractice claims, this Court has frequently considered the standards for causation adopted by other jurisdictions and applicable Restatements. E.g., *Terry v. Caputo*, __ Ohio St.3d __, 2007-Ohio-5023, at ¶ 12-15 (adopting two-step process to determine admissibility of causation evidence in toxic-tort cases developed by federal courts); *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph six of the syllabus (overruling *Ryan v. Mackolin* (1968), 14 Ohio St.2d 213, and adopting Restatement of the Law 2d, Torts (1965), Section 433B). Here, those authorities uniformly point in one direction — a legal malpractice plaintiff seeking to recover as damages the damages that would have been recovered in the underlying action must prove by a preponderance of the evidence that, but for the defendant lawyer's misconduct, the plaintiff would have obtained a more

favorable judgment in the previous action. See Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53, Comment *b*; see, also, Appx. 19-24. The plaintiff must thus prevail in a trial-within-a-trial. Id.

Requiring proof of what would have happened but for the lawyer's misconduct in a malpractice action where a plaintiff seeks damages for a lost judgment requires no more of the plaintiff or the fact-finder than is required in all negligence cases. As the California Supreme Court recognized in *Viner v. Sweet*, "[d]etermining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. * * * This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (Cal. 2003), 70 P.3d 1046, 1052-53, citing Dobbs, The Law of Torts (2000) 411, Section 169.

Policy concerns also dictate that this Court reject the "some" evidence standard adopted by the Eighth District. Simply offering "some" evidence of the merits of an underlying claim proves nothing when the theory of damages is that the plaintiff would have received a better result had the case been tried to judgment — especially when, as here, the underlying case involved intervenor claims and counterclaims against the plaintiff. A judgment is not rendered on "some" evidence; instead, a jury weighs *all* of the evidence on *all* claims in reaching a verdict, and the court enters judgment as to *all* of those claims.

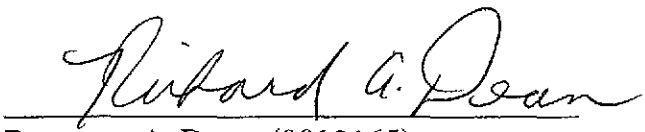
In essence, the rule of law adopted by the Eighth District makes lawyers guarantors of their clients' cases. See *Mattco Forge, Inc. v. Arthur Young & Co.* (Cal.Ct.App. 1997), 60 Cal.Rptr.2d 780, 794 (noting that "to enable a plaintiff merely to value a case renders professionals liable as guarantors, as almost all cases have some value"). Absent "some" evidence supporting it, the underlying case would never proceed to trial in the first place – it would be dismissed on a pretrial motion. Under the rule of law applied below, however, any client dissatisfied with the result of a settlement (or trial verdict) could recover "damages" in the amount of the client's self-assessed value of the claim, as long as the client can locate an expert to testify to some breach of the standard of care — regardless of whether any alleged breach of the standard of care had anything to do with the verdict that would have resulted (or did result).

IV. CONCLUSION

Applying the proper standard "but-for" causation standard to the facts of this case requires judgment as a matter of law in favor of Goodman Weiss. The only evidence of proximate cause presented was expert testimony that Environmental Network could not have obtained a net recovery had all of the claims and counterclaims been tried to verdict. In the absence of any evidence of proximately caused damages, the trial court erred when

it failed to grant the law firm's motions for directed verdict and judgment notwithstanding the verdict. For all of the above reasons, this Court should reverse the Court of Appeals and enter judgment as a matter of law in favor of Goodman Weiss.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing **Amicus Curiae Brief of Defense Research Institute in Support of Appellants** has been served this 9th day of November, 2007, by U.S. Mail, postage prepaid, upon the following:

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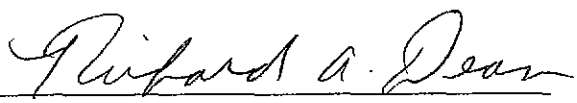

One of the Attorneys for Amicus Curiae Defense Research Institute

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APPENDIX

[Cite as *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2007-Ohio-831.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87782

ENVIRONMENTAL NETWORK CORP., ET AL.

PLAINTIFFS-APPELLEES

vs.

GOODMAN WEISS MILLER, L.L.P., ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-488462

BEFORE: Celebrezze, A.J., Kilbane, J., and McMonagle, J.

RELEASED: March 1, 2007

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., A.J.:

{¶ 1} Appellant, Goodman Weiss Miller, L.L.P. ("GWM"), appeals the jury verdict and the rulings of the trial court on trial and post-judgment motions in favor of appellees, Environmental Network Corp. ("ENC"), Environmental Network and Management Corp. ("ENMC"), and John Wetterich ("Wetterich"), (collectively "appellees"). After review of the record and the arguments of the parties, we affirm.

{¶ 2} On December 9, 2002, appellees filed a legal malpractice complaint against GWM.[1] The complaint stemmed from GWM's representation of appellees in a complex commercial lawsuit against Waste Management of Ohio ("WMO"), TNT Rubbish Disposal, Inc. ("TNT"), and others.[2] The underlying litigation dealt with breach of contract issues involving numerous parties, who were linked to agreements concerning operation of the San-Lan Landfill. The San-Lan Landfill is owned by Hocking Environmental Company ("Hocking"); however, ENMC became the operator of the facility in a 1995 agreement and was thereafter responsible for its functions. ENMC is owned by Wetterich, who also owns ENC. The underlying litigation ended in a settlement agreement in December 2001, after trial commenced.

{¶ 3} Appellees were dissatisfied with the resulting settlement and how it transpired. They filed a legal malpractice complaint against GWM claiming that

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[1]Case No. CV-02-488462. The complaint also named as defendants attorneys Steven Miller, Deborah Michelson, and James Wertheim; however, they were dismissed from the case and are not parties to this appeal.

[2]Case No. CV-98-351105, which was later consolidated with Case No. CV-98-

GWM had coerced them into settling and was negligent in its preparation and prosecution of the case. GWM timely answered appellees' complaint and filed several counterclaims, including breach of contract, misrepresentation, and abuse of process.[3]

{¶ 4} On September 19, 2005, a jury trial commenced. During the course of trial, GWM moved the court for a directed verdict, which was denied. The jury trial concluded on September 30, 2005, and on October 3, 2005 the jury returned its verdict, finding that GWM owed appellees a duty of professional care and had breached that duty, citing six instances of legal malpractice.[4] The jury further found that GWM's breach had caused appellees harm or damages and awarded appellees the sum of $2,419,616.81. The jury also found some merit in GWM's counterclaims and awarded it the sum of $15,540.

{¶ 5} On November 3, 2005, GWM filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for new trial. On January 30, 2006, in a 25-page order and decision, the trial court denied both post-judgment motions.

352363 and settled along with Case Nos. CV-98-372394, CV-99-389308, CV-01-443765.

[3]Appellant's abuse of process counterclaim was later dismissed.

[4]In answering the interrogatory inquiring as to the manner in which appellant breach its standard of care, the jury responded: "No engagement letter. Overall lack of [preparedness]. Case should have been continued, to allow for Mr. Steve Miller to participate. Plaintiff was coerced into signing settlement. Judge not recused. GWM council [sic] [alienated] the court." Interrogatories to the Jury, 10/3/05.

{¶ 6} GWM appeals, asserting four assignments of error. Since assignments of error I, III, and IV challenge the same rulings for differing reasons, we address them together.

{¶ 7} "I. The trial court erred in denying defendant-appellant's motion for directed verdict and later, its motion for judgment notwithstanding the verdict, because plaintiffs-appellees failed to prove that the alleged legal malpractice was the proximate cause of any damages.

{¶ 8} "III. The trial court erred in denying defendant-appellant's motion for directed verdict and later, its motion for judgment notwithstanding the verdict, because plaintiffs-appellees failed to present evidence to show what, if any, net recovery they should have achieved, had the underlying case been tried to conclusion.

{¶ 9} "IV. The trial court erred in denying defendant-appellant's motion for directed verdict and later, its motion for judgment notwithstanding the verdict, on the issue of lost profit damages - including claimed 'out-of-pocket' losses - under restatement of contracts § 351(2)(b), because plaintiffs-appellees failed to present evidence that the damages claimed would have been recoverable in the underlying case."

{¶ 10} GWM cites various reasons why the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. Our analysis is consolidated since "[t]he applicable standard of review to appellate challenges to

the overruling of motions for judgment notwithstanding the verdict is identical to that applicable to motions for a directed verdict." *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334; *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291.

{¶ 11} A motion for judgment notwithstanding the verdict under Civ.R. 50(B) tests the legal sufficiency of the evidence. *Brooks v. Brost Foundry Co.* (May 3, 1991), Cuyahoga App. No. 58065. "'A review of the trial court's denial of appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict requires a preliminary analysis of the components of the action ***.' *Shore, Shirley & Co. v. Kelley* (1988), 40 Ohio App.3d 10, 13, 531 N.E.2d 333, 337." *Star Bank Natl. Assn. v. Cirrocumulus Ltd. Partnership* (1997), 121 Ohio App.3d 731, 742-43, 700 N.E.2d 918, citing *McKenney v. Hillside Dairy Co.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 and *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511.

{¶ 12} The motions test the legal sufficiency of the evidence and present a question of law, which we review independently, i.e., de novo, upon appeal. See *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399; *Eldridge v. Firestone Tire & Rubber Co.* (1985), 24 Ohio App.3d 94, 493 N.E.2d 293. A motion for judgment notwithstanding the verdict should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. *Posin*, supra at 275. "Conversely, the motion

should be granted where the evidence is legally insufficient to support the verdict." Id.

{¶ 13} In *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 539 N.E.2d 1114, the court wrote in pertinent part: "The test for granting a directed verdict or [judgment notwithstanding the verdict] is whether the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the non-movant." Id. at 172.

{¶ 14} Here, appellees brought a claim of legal malpractice against GWM, alleging that negligent representation caused damages. "To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, syllabus, citing *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058.

{¶ 15} GWM does not challenge the sufficiency of the evidence raised by appellees concerning whether there was a duty owed or whether such a duty was breached. Rather, it challenges the sufficiency of the evidence concerning alleged damages and the causal connection between any negligent representation and

those alleged damages. GWM argues that appellees have not presented legally sufficient evidence establishing either causation or damages. We disagree.

{¶ 16} During the course of the jury trial, appellees presented testimony, documents, and exhibits demonstrating their understanding of the facts and circumstances surrounding the underlying complex commercial litigation. Through the presentation of this material, appellees were able to establish some of the merits to their underlying case.

{¶ 17} Wetterich testified to his understanding of the "Waste Disposal and Airspace Reservation Agreement" ("Agreement") between ENMC and WMO. Wetterich also testified to deals involving TNT and others in which those parties owed money to ENC. There was further testimony indicating that appellees had a strong case in the underlying litigation and that they could have received considerable compensation had they not settled as they did. Accordingly, appellees argued GWM's negligent representation cost them a better resolution to the underlying litigation than the settlement they received. Pursuant to the evidence presented by appellees at trial in this case, the jury agreed and found a causal connection between GWM's breach and appellees' damages.

{¶ 18} Furthermore, in its order denying GWM's motion for judgment notwithstanding the verdict, the trial court stated:

{¶ 19} "Based on the evidence and the arguments raised by the parties in their respective briefs, this Court finds that, under *Vahila*, [appellees] offered substantial

probative evidence to the trier of fact on proximate cause sufficient to sustain the jury verdict. ***

{¶ 20} "It is clear under *Vahila*, and its progeny that a legal malpractice plaintiff is not required to prove in every instance the 'case-within-the-case.' Rather, as argued by [appellees], *Vahila* stands for the rule of law that a plaintiff '*may* be required, depending on the situation, to prove *some* evidence of the merits of the underlying claim.' (Emphasis added.) *Vahila* at 428. The Supreme Court's holding was clearly based on the equitable concerns that a requirement for a legal malpractice plaintiff to prove the entire 'case-within-a-case' would likely deter a large number of plaintiffs from bringing suits of merit, which in effect would immunize negligent attorneys.

{¶ 21} "***

{¶ 22} "Based on the abundance of testimony and documentary evidence presented by [appellees] at trial, [appellees] clearly proved 'some evidence of the merits of the underlying claim' in satisfaction of *Vahila*. Therefore, [appellees] provided substantial probative evidence that [appellant's] negligence proximately caused [appellees'] damages.***" (Order and Decision pg. 12-14.)

{¶ 23} In its appeal, GWM takes exception to the trial court's interpretation of *Vahila*, supra, and in the trial court's use of that interpretation to require appellees to simply prove "some evidence of the merits of the underlying claim" in order to prevail

in this legal malpractice case. GWM argues that the law requires appellees to prove, by a preponderance of the evidence, that appellees should have succeeded at a trial on the merits of the underlying commercial litigation, and that appellees should have achieved a better net recovery at the end of a concluded trial than they obtained through their settlement. In other words, GWM contends that appellees were required to completely prove the "case-within-a-case" in order to prevail. We find no merit in this argument.

{¶ 24} In *Vahila*, supra, the Court clarified its position on a claimant's requirements to establish causation in a legal malpractice case, stating:

{¶ 25} "We are aware that the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case. Naturally, 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. [Citations omitted.] However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim." *Vahila*, supra.

{¶ 26} Consequently, the standard to prove causation in a legal malpractice case requires a claimant to "provide some evidence of the merits of the underlying claim." Id. GWM contends that, unless appellees can demonstrate that they would

have prevailed on the merits of a trial heard to its conclusion, and that they would have recovered a specific amount of damage award at the conclusion of that trial, they cannot prevail. GWM further argues that unless appellees can show that "but for" GWM's breach of duty, they would have prevailed at trial for a certain damage award, they cannot establish causation. The ruling in *Vahila*, supra, clearly rejects such an argument, stating:

{¶ 27} "A strict 'but for' test also ignores settlement opportunities lost due to the attorney's negligence. The test focuses on whether the client would have won in the original action. A high standard of proof of causation encourages courts' tendencies to exclude evidence about settlement as too remote and speculative. The standard therefore excludes consideration of the most common form of client

{¶ 28} recovery.

{¶ 29} "In addition, stringent standards of proving 'but for' require the plaintiff to conduct a 'trial within a trial' to show the validity of his underlying claim. A full, theoretically complete reconstruction of the original trial would require evidence about such matters as the size of jury verdicts in the original jurisdiction. *** But such evidence is too remote and speculative; the new factfinder must try the merits of both the malpractice suit and the underlying claim to make an independent determination of the damage award. The cost and complexity of such a proceeding may well discourage the few plaintiffs otherwise willing to pursue the slim chance of

success." *Vahila* at 426-427, quoting, *The Standard of Proof of Causation in Legal Malpractice Cases* (1978), 63 Cornell L.Rev. 666, 670-671.

{¶ 30} The trial court did not err in requiring appellees to merely provide some evidence of the merits of the underlying claim. Appellees clearly met that burden at trial, as seen in the record and succinctly articulated by the trial court as follows:

{¶ 31} "The jury's findings were based on the abundance of evidence presented at trial as to what the outcome of the underlying litigation would have been had [GWM] not breached the standard of care. The record shows that [appellees] submitted documents establishing the terms of the underlying [Agreement] ([appellees'] exhibit 2), engineering maps and memoranda showing how the relevant airspace was to be parceled and developed ([appellees'] exhibits 58, 59, 66), documents showing how airspace had been developed in the past, which were used to assist in calculations of unused airspace ([appellees'] exhibits 62-64), documents showing that Waste Management was required to and failed to pay state and local fees for dumping trash in the San-Lan Landfill ([appellees'] exhibit 43), and documents and exhibits showing [appellees'] alleged out-of-pocket damages (see [appellees'] exhibit 47) and lost profits (see [appellees'] exhibit 52)." (Order and Decision at 13-14.)

{¶ 32} Finding that appellees provided sufficient evidence at trial to legally establish causation, the remaining question is whether sufficient evidence was provided to establish recoverable damages. In its third and fourth assignments of

error, GWM argues that appellees failed to show what net recovery they would have received and that they failed to present evidence of any recoverable damages. GWM argues that if the proper standard of causation is simply "some evidence" of the merits, any damage award would be merely speculative, in violation of fundamental principals of damages awards. GWM further argues that appellees have not presented sufficient evidence for the jury to base an award on theories of lost profits or of "out-of-pocket" losses. None of these contentions have merit.

{¶ 33} First, the jury was explicitly instructed not to speculate on the damage award when the trial court instructed: "The damages recoverable in a legal malpractice action cannot be remote or speculative as to the existence of damages precluding recovery."

{¶ 34} In addition, the trial court charged:

{¶ 35} "Lost profits are calculated by deciding what the party was entitled to receive had the contract been performed. You should then add other damages, if any, by the party as a result of the breach. From this sum you should subtract the amounts, if any, that the parties saved by not having to fully perform the contract.

{¶ 36} "Lost profits may not be recovered by a plaintiff in a breach of contract action, unless they can demonstrate: one, profits were within the contemplation of the parties to the contract at the time the contract was made; two, the lost profits were the probable result of the breach of contract; and three, the profits are not remote and speculative and may be shown with reasonable certainty.

{¶ 37} "If a party fails to demonstrate with reasonable certainty the amount of lost profits as well as their existence, then they are not entitled to the lost profits. You may only award the damages that were the natural and probable result of the breach of the contract, or that were reasonably within the contemplation of the parties as the probable result of the breach of contract.

{¶ 38} "This does not require that the party actually be aware of the damages that will result from the breach of contract, so long as the damages were reasonably foreseeable at the time the parties entered into the contract as a probable result of the breach." (Tr. 2275-2276.)

{¶ 39} The jury charge clearly instructed the jurors not to speculate on any damage award, and it is completely in line with the pertinent case law requiring any award for lost profit to be based on losses foreseeable by the breaching party at the time they entered into the contract. See *Sherman R. Smoot Co. v. State of Ohio* (2000), 136 Ohio App.3d 166, 736 N.E.2d 69.

{¶ 40} After review of the record, it is clear that the jury award should be upheld. We note that the jury did not specify on which theory of recovery it based its award. Appellees presented evidence on different theories of damages, including lost profits and "out-of-pocket" loses. Both are legitimate theories of recovery, and both are supported by sufficient evidence to overrule GWM's assignments of error. Appellees' lost profits calculation was based on WMO's failure to loan ENMC an additional $800,000 for future development, as speculated in the original Agreement.

Appellees argued that this failure prohibited them from providing landfill space to third-party customers at $18 per ton. GWM attacks this calculation by arguing that WMO never contemplated such future sales to third-parties when it entered into the original agreement. Appellees presented an expert witness[5] who refuted such a contention that future sales were unforeseeable because GWM's articulated understanding of the Agreement would leave ENMC incapable of earning any profit. Thus, there is at least sufficient evidence to find that lost profits were recoverable in this case.

{¶ 41} In addition, the jury could have just as easily based its damage award on "out-of-pocket" losses suffered by appellees. In Plaintiff's Exhibit 47, appellees presented to the jury a calculation of losses totaling $2,490,395, which is very close to the ultimate jury award in this case.[6] This amount could have been the foundation of a legitimate jury award based on the evidence presented at trial.

{¶ 42} After review of the record in its totality, it is abundantly clear that there was sufficient evidence provided by appellees for the jury to have found and awarded the damages it did. Therefore, since the trial court applied the correct standard of proof as to causation in this case, and there is sufficient evidence to

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[5]Dr. John F. Burke.

[6]Plaintiff's Exhibit 47: [ENMC's] Damages (Out-Of-Pocket Losses) Due to WMO Breaches: $812,600 (Cost to develop unused landfill airspace *** + $412,444 (Monies lost prepaid to Hocking for Royalty) + $496,235 (Equipment) + $400,000 (State penalty for fees not paid by WMO) + $300,000 (Schiff) + $69,116 (Trust Fund) = $2,490,395 (TOTAL).

support the jury's award for damages, appellant's first, third and fourth assignments of error are found to be without merit.

{¶ 43} "II. The trial court erred in its jury instructions under *Vahila v. Hall*, regarding proximate cause and damages, by failing to require plaintiffs-appellees to prove what the result of a trial in the underlying case should have been, but for the alleged malpractice."

{¶ 44} GWM argues that the jury instructions issued by the trial court were in error. They specifically challenge the following instruction:

{¶ 45} "[Appellees] are claiming that as a result of [GWM's] alleged breach of standard of care, they had to settle the [underlying] litigation against their will.

{¶ 46} "[Appellees] claim [GWM] did not continue with the trial of the [underlying] case when specifically instructed to do so, and that if it had returned to court to continue to try the case, [appellees] would have achieved a better result than the settlement achieved.

{¶ 47} "[Appellees] must prove some evidence of the merits of the [underlying] case claims. [Appellees] must establish by a preponderance of the evidence that the defendants breached their duty of care to the [appellees].

{¶ 48} "Further, [appellees] must establish by a preponderance of the evidence that there is a causal connection between the conduct complained of and the resulting damage or loss. However, the requirement of a causal connection dictates that the merits of a legal malpractice action depends upon the merits of the

[underlying] case and you should take into account all evidence you have heard to determine whether there exists some evidence of the merits of [appellees'] claims in the [underlying] litigation." (Tr. 2272-2273.)

{¶ 49} GWM challenges the articulation of "some evidence of merits" as the applicable standard of causation in a legal malpractice case. As stated above, this standard of proof is entirely appropriate pursuant to *Vahila*, supra. Therefore, we find no error in the trial court's jury instruction, and this assignment of error is without merit.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
CHRISTINE T. McMONAGLE, J., CONCUR

JURISDICTIONS REQUIRING PROOF OF "BUT FOR" CAUSATION IN LITIGATION MALPRACTICE ACTIONS

- **Alabama**: *Kessler v. Gillis* (Ala.Civ.App. 2004), 911 So.2d 1072, 1082 ("[I]t is clear that a 'legal malpractice action must necessarily * * * be viewed as two actions,' * * * one action turning upon whether the lawyer was negligent and the other action turning upon whether, but for the lawyer's negligence, the plaintiff would have prevailed in the underlying lawsuit.");

- **Alaska**: *Shaw v. Alaska* (Alaska 1993), 861 P.2d 566, 573 ("In order to prove he would have been found innocent at trial on the original charges, Shaw, as most civil malpractice plaintiffs, will have to present a 'trial within a trial.'");

- **Arizona**: *Glaze v. Larsen* (Ariz. 2004), 83 P.3d 26, 31 n. 2 ("In a legal malpractice action, the plaintiff has the burden of demonstrating by a preponderance of the evidence that 'but for the attorney's negligence, he would have been successful in the prosecution or defense of the original suit.'") (internal citation omitted);

- **Arkansas**: *Callahan v. Clark* (Ark. 1995), 901 S.W.2d 842, 847 ("To show damages and proximate cause in a legal malpractice action, the plaintiff must show that but for the alleged negligence, the result would have been different in the underlying action.");

- **California**: *Viner v. Sweet* (Cal. 2003), 70 P.3d 1046, 1052 ("In a litigation malpractice action, the plaintiff must establish that *but for* the alleged negligence of the defendant attorney, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred.");

- **Colorado**: *Rantz v. Kaufman* (Colo. 2005), 109 P.3d 132, 136 ("In order to demonstrate causation in a legal malpractice case, the client must prove the 'case within a case,' meaning he or she must show that the claim underlying the malpractice action should have been successful if the attorney had acted in accordance with his or her duties");

- **Florida**: *Tarleton v. Arnstein & Lehr* (Fla.Dist.Ct.App. 1998), 719 So.2d 325, 330 ("Under the 'trial within a trial' standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, in this case the dissolution action, before determining whether the client would prevail in the malpractice action.");

- **Georgia**: *McDow v. Dixon* (Ga.Ct.App. 1976), 226 S.E.2d 145, 147 ("A client suing his attorney for malpractice not only must prove that his claim was valid and would have resulted in a judgment in his favor, but also that said judgment would have been collectible in some amount, for therein lies the measure of damages.");

- **Illinois**: *Adams v. Sussman & Hertzberg, Ltd.* (Ill.App.Ct. 1997), 684 N.E.2d 935, 938 ("[T]he malpractice plaintiff is required to prove a case-within-a-case, that is, the plaintiff is required to prove the underlying action and what his recovery would have been in that prior action absent the alleged malpractice.");

- **Indiana**: *Picadilly, Inc. v. Raikos* (Ind. 1991), 582 N.E.2d 338, 344 ("To prove causation and the extent of harm, the client must show that the outcome of the underlying litigation would have been more favorable but for the attorney's negligence. This proof typically requires a 'trial within a trial.'");

- **Iowa**: *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg* (Iowa 1988), 428 N.W.2d 288, 290 ("In an action based upon the negligent handling of a law suit, the plaintiff must prove that absent the lawyer's negligence, the underlying suit would have been successful.");

- **Kansas**: *Canaan v. Bartee* (Kan. 2003), 72 P.3d 911, 914 ("[T]o prove legal malpractice in the handling of litigation, a plaintiff must establish the validity of the underlying claim by showing that it would have resulted in a favorable judgment in the underlying lawsuit had it not been for the attorney's error.");

- **Kentucky**: *Marrs v. Kelly* (Ky. 2003), 95 S.W.3d 856, 860 ("[A] legal malpractice case is the 'suit within a suit.' To prove that the negligence of the attorney caused the plaintiff harm, the plaintiff must show that he/she would have fared better in the underlying claim; that is, but for the attorney's negligence, the plaintiff would have bee more likely successful.");

- **Maine**: *Corey v. Norman, Hanson & DeTroy* (Me. 1999), 742 A.2d 933, 940 ("Susan must show through expert testimony that the divorce judgment would have been more favorable to Susan if the value of the dental practice had been shown to be higher than the $37,000 agreed on by NH&D, *i.e.*, that NH&D's negligence resulted in the divorce judgment being less favorable to her.");

- **Maryland**: *Thomas v. Bethea* (Md. 1998), 713 A.2d 1187, 1197 ("The normal way in which that approach is implemented is through what has become known as a trial within a trial, or a suit within a suit, *i.e.*, litigating before the malpractice jury the underlying case that was never tried.");

- **Massachusetts**: *Fishman v. Brooks* (Mass. 1986), 487 N.E.2d 1377, 1380 ("The original or underlying action is presented to the trier of fact as a trial within a trial.");

- **Michigan**: *Manzo v. Petrella* (Mich.Ct.App. 2004), 683 N.W.2d 699, 704 ("[A] plaintiff must show that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the 'suit within a suit' requirement in legal malpractice cases.");

- **Minnesota**: *Togstad v. Vesely, Otto, Miller & Keefe* (Minn. 1980), 291 N.W.2d 686, 695 ("There is also sufficient evidence in the record establishing that, but for Miller's negligence, plaintiffs would have been successful in prosecuting their medical malpractice claim.");

- **Mississippi**: *Wilbourn v. Stennett, Wilkinson & Ward* (Miss. 1996), 687 So.2d 1205, 1215 ("[T]he plaintiff must show that, but for their attorney's negligence, he would have been successful in the prosecution or defense of the underlying action.");

- **Missouri**: *Mogley v. Fleming* (Mo.Ct.App. 1999), 11 S.W.3d 740, 747 ("To prove damages and causation, the plaintiff must establish that, 'but for' the attorney's negligence, the result in the underlying proceeding would have been different.");

- **Montana**: *Oar Lock Land & Cattle Co. v. Crowley, Haughey, Hanson, Toole & Dietrich* (Mont. 1992), 833 P.2d 146, 148 ("The plaintiff must show that 'but for' such negligence the client would have been successful in the prosecution or defense of the action.");

- **Nebraska**: *Bowers v. Dougherty* (Neb. 2000), 615 N.W.2d 449, 457 ("When a plaintiff asserts attorney malpractice at the trial level in a civil case, the plaintiff must show that he or she would have been successful in the underlying action but for the attorney's negligence.");

- **New Hampshire**: *McIntire v. Lee* (N.H. 2003), 816 A.2d 993, 998 ("The jury will therefore substitute itself as the trier of fact and determine factual issues presented on the same evidence that should have been presented to the original trier of fact.");

- **New Jersey**: *Garcia v. Kozlov, Seaton, Romanini & Brooks, P.C.* (N.J. 2004), 845 A.2d 602, 611-12 ("The most common way to prove the harm inflicted by such malpractice is to proceed by way of a 'suit within a suit' in which a plaintiff presents the evidence that would have been submitted at a trial had no malpractice occurred.");

- **New Mexico**: *George v. Caton* (N.M.Ct.App. 1979), 600 P.2d 822, 830 ("In a malpractice action charging that an attorney's negligence in prosecuting an action resulted in the loss of the client's claim, the measure of damages is the value of the lost claims, i.e., the amount that would have been recovered by the client except for the attorney's negligence.");

- **New York**: *Rubens v. Mason* (C.A.2, 2004), 387 F.3d 183, 190 ("The malpractice judge or jury must decide a 'case within a case' and determine what the result would have been absent the alleged malpractice.") (applying New York law);

- **North Carolina**: *Hummer v. Pulley, Watson, King & Lischer, P.A.* (N.C.Ct.App. 2003), 577 S.E.2d 918, 923 ("[A] legal malpractice plaintiff is required to prove the viability and likelihood of success of the underlying case as part of the present malpractice claim. This has been referred to as having to prove 'a case within a case.'") (internal quotation omitted);

- **North Dakota**: *Meyer v. Maus* (N.D. 2001), 626 N.W.2d 281, 287 ("The case-within-a-case doctrine requires that, but for the attorney's alleged negligence, litigation would have ended with a more favorable result for the client.");

- **Oklahoma**: *Manley v. Brown* (Okla. 1999), 989 P.2d 448, 452 ("The plaintiff in a legal negligence action must prove * * * [that] *but for the lawyer's conduct, the client would have succeeded in the action.*") (emphasis in original);

- **Oregon**: *Machado-Miller v. Mersereau & Shannon, L.L.P.* (Or. 2002), 43 P.3d 1207, 1209 ("To answer that question, we must decide 'what the outcome for plaintiff would have been in the earlier case if it had been properly tried, a process that has been described as a 'suit within a suit.'"), quoting *Chocktoot v. Smith* (Or. 1977), 571 P.2d 1255;

- **Pennsylvania**: *Kituskie v. Corbman* (Pa. 1998), 714 A.2d 1027, 1030 ("In essence, a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a 'case within a case')."");

- **Rhode Island**: *Scuncio Motors, Inc. v. Teverow* (R.I. 1993), 635 A.2d 268, 269 ("The plaintiffs have not established that *but for* the attorney's negligence or advice, the agreement would not have been cancelled.");

- **South Carolina**: *Summer v. Carpenter* (S.C. 1997), 492 S.E.2d 55, 58 ("In other words, a plaintiff must show she most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.");

- **South Dakota**: *Haberer v. Rice* (S.D. 1994), 511 N.W.2d 279, 285 ("The manner in which the plaintiff can establish what should have transpired in the underlying action is to recreate, i.e. litigate, an action which was never tried.");

- **Tennessee**: *Lazy Seven Coal Sales, Inc. v. Stone & Hinds, P.C.* (Tenn. 1991), 813 P.2d 400, 409 ("There is no evidence that 'but for' the conduct of Stone & Hinds the corporation would have survived and continued in business.");

- **Texas**: *Rangel v. Lapin* (Tex.App. 2005), 177 S.W.3d 17, 22 ("If a legal malpractice case arises from prior litigation, a plaintiff must prove that, 'but for' the attorney's breach of his duty, the plaintiff would have prevailed in the underlying case.");

- **Utah**: *Crestwood Cove Apartments Business Trust v. Turner* (Utah 2007), 164 P.3d 1247, 1255 ("[T]he proximate cause issue is ordinarily handled by means of a 'suit within a suit' or 'trial within a trial.'"), quoting *Harline v. Barker* (Utah 1996), 912 P.2d 433, 439;

- **Vermont**: *Houghton v. Leinwohl* (Vt. 1977), 376 A.2d 733 (affirming denial of motion for new trial arising out of jury verdict rendered in case-within-a-case concerning a railroad's liability under FELA);

- **Virginia**: *McClung v. Smith* (E.D. Va. 1994), 870 F. Supp. 1384, ("[T]he trier of fact in the malpractice action must consider the merits of the underlying action, and consequently the plaintiff must prove a 'case-within-a-case.'") (applying Virginia law);

- **Washington**: *Aubin v. Barton* (Wash.Ct.App. 2004), 98 P.3d 126, 134 ("[T]o prove causation, the 'client must show that the outcome of the underlying litigation would have been more favorable, but for the attorney's negligence. This proof typically requires a trial within a trial.'"), quoting *Kommavongsa v. Haskell* (Wash. 2003), 67 P.3d 1068; and

- **Wisconsin**: *Cook v. Continental Casualty Co.* (Wis. 1993), 509 N.W.2d 100, 105 ("If, however, the jury determines that the lawyer was negligent, the case moves on to the second phase, the so-called 'suit within a suit,' to determine whether the client was, in fact, damaged by that negligence.").