No.

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 IN SUPPORT OF JURISDICTION OF DEFENSE RESEARCH INSTITUTE

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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. THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The rule of law applied in this case requires lawyers to pay millions of dollars in speculative damages for supposed losses of civil judgments that would never have resulted had the underlying litigation been tried to verdict. Relying on snippets of this Court's opinion in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, and contrary to the rule followed by a notable majority of the jurisdictions in the country and set forth in the Restatement (Third) of Law Governing Lawyers (which issued after *Vahila*), the Eighth District Court of Appeals held that a prima facie case of legal malpractice requires only "some evidence" that a settled claim had merit — without establishing by *any* method

that the plaintiff *would have* received such a judgment if the case had been tried to conclusion.

By failing to require the plaintiff to prove that an allegedly "coerced" settlement of the underlying litigation proximately caused it damages, the Eighth District's decision:

- Makes lawyers guarantors of their client's case;
- Impairs the strong public policy favoring settlement by encouraging lawyers to try cases to judgment;
- Untethers a legal malpractice claim based on a lost civil judgment from the moorings of common law negligence causation standards; and
- Is not required by *Vahila* and removes Ohio from the prevailing rule of law for legal malpractice claims across the United States.

The issue presented by this case arises when clients claim that their attorney "coerced" them into settling a claim and seek, as damages for the alleged malpractice, the difference between the settlement and the judgment the client would or should have received if the case had gone to trial (a "lost judgment"). Here, the client was allegedly "coerced" to settle on the second day of a complex commercial trial in which the client was seeking millions of dollars from the defendant and an intervenor, and the defendant and the intervenor were seeking millions of dollars from the client. The settlement included a "walkaway" by all parties and defendant's contribution of $40,000 to the client's attorney fees. The client later sued its attorney and claimed "full value" of its claims as malpractice damages. Although the client presented no testimony from any expert that its claims would or should have resulted in any judgment (or that the counterclaim and intervenor claim would or should not have resulted in a judgment

exceeding any judgment in favor of the client), the trial court denied motions for directed verdict and judgment notwithstanding the verdict and instructed the jury that "some" evidence that the client's claim had value was sufficient to establish proximate cause. The Eighth District affirmed a judgment on a jury verdict of nearly $2.5 million against the law firm, on the grounds that the "some evidence" standard complied with this Court's decision in *Vahila*. (Appellate Opinion ("App. Op."), Appendix ("Appx.") 11-13, at ¶ 26-30.)

The court of appeals' decision merits Ohio Supreme Court review for at least four reasons. First, the holding is illogical, unfair and makes lawyers guarantors of their clients' cases. 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; 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.

Further, the minimal "some evidence" standard does not comport with tort law governing the underlying case. 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. But under the rule of law applied below, 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, so long as the client can retain an expert who will 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). 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").

Second, the rule of law applied below impairs the strong public policy favoring settlement by encouraging lawyers to try cases to judgment rather than risk a malpractice claim based on a settlement that, in hindsight, their client believes is inadequate. Courts are far more likely to require proof on the merits of the underlying case when the malpractice plaintiff actually tries the underlying lawsuit and loses. E.g., *Nu-Trend Homes, Inc. v. Law Offices of Delibera, Lyons & Bibbo*, No. 01AP-1137, 2003-Ohio-1633, at ¶ 63 (holding that "party must produce evidence that the underlying claims were meritorious in order to satisfy the *Vahila* test" where fraud claim in underlying case was disposed of by directed verdict). The decision below therefore creates a perverse incentive for lawyers to avoid resolving lawsuits short of a judgment on the merits of their client's claims. Indeed, under the lower court's ruling, since settlements are by definition compromises of disputed claims, *every* party to an allegedly "coerced" settlement could seek malpractice damages in the form of the incremental value of the case allegedly lost by failing to secure a judgment — even though only *one* of those parties actually would have prevailed at trial. This Court's review is necessary to

confirm that lawyers do not expose themselves to speculative liability by advising their clients to enter into settlement agreements.

Third, the appellate analysis departs from long-standing principles of tort law. Legal malpractice claims are simply a species of negligence. *Rubens v. Mason* (C.A.2, 2004), 387 F.3d 183, 189. As in all negligence claims, therefore, a lawyer should be liable for malpractice only if his or her actions were the legal cause of injury "as determined under generally applicable principles of causation and damages." Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53. When, as here, the client seeks damages based on the supposed value of a lost judgment, such generally applicable principles of causation and damages require the fact-finder to determine whether "but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action." Id. at 389-90, Comment *b*.

To determine whether a lawyer's conduct is the "but-for" cause of the plaintiff's lost judgment, the well-established principles of general tort law embodied in the Restatement require a "trial within a trial":

> The plaintiff must thus prevail in a "trial within a trial." All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have been fallen on the defendant in the original action. * * * Similar principles apply when a former civil defendant contends that, but for the misconduct of the defendant's former lawyer, the defendant would have secured a better result at trial.

Restatement of the Law 3d, Law Governing Lawyers (2000) 389-90, Section 53, Comment *b*. "The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims." *Viner v. Sweet* (Cal. 2003), 70 P.3d 1046, 1052. A rule of law holding that no such trial is required departs from these well-established principles of causation and damages, and obliterates necessary safeguards against speculative and conjectural claims.

Finally, not only is the decision below not required by *Vahila*, it is contrary to the prevailing rule of law for legal malpractice claims throughout the United States. *Vahila* did not hold that a malpractice plaintiff only has to produce "some" evidence of the merits of the underlying claim when the plaintiff's sole theory of damages is that he or she would have achieved a better result had the case been tried to judgment. *Vahila* applied familiar principles of law requiring a court to construe the evidence most favorably towards the plaintiff, and reversed a *summary judgment* in favor of the lawyer-defendant where the malpractice plaintiffs "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." 77 Ohio St.3d at 427. Indeed, the controlling syllabus law set forth in *Vahila* does not even address the proper standard for causation:[1]

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[1] Former S.Ct.R.Rep.Op. 1(B), provided that "[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." That is the rule applicable to determining the precedential value of *Vahila* in this case. See, e.g., *State v. Bush* (2002), 96 Ohio St.3d 235, 237, ¶ 10.

> 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. (*Krahn v. Kinney*, 43 Ohio St.3d 103, 583 N.E.2d 1058, followed.)

Vahila, syllabus.

In *Vahila*, therefore, this Court had no occasion to address whether a malpractice plaintiff would be required to show at trial that he or she would have obtained a more favorable judgment in the previous action when the only damages sought relate to the loss of a judgment. Nor did *Vahila* have the benefit of the Restatement's articulation of well-established principles of causation and damages in analyzing the standard of proof for legal malpractice claims, as the Restatement did not issue for another three years. The Restatement clarifies that even though a "plaintiff in a previous civil action may recover without proving the results of a trial [within a trial] if the party claims damages other than loss of a judgment," proof of a trial within a trial is required when "the plaintiff seeks to recover as damages the damages that would have been recovered in the previous action." Restatement of the Law 3d, Law Governing Lawyers (2000) 389-90, Section 53, Comment *b*. This "trial-within-a-trial" method of proof is "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 (and cases cited therein).[2]

For the foregoing reasons, this Court should accept jurisdiction and clarify that *Vahila* does not relieve malpractice plaintiffs seeking damages for a lost judgment of the burden of demonstrating that, but for the defendant lawyer's misconduct, they would have obtained a more favorable judgment in the previous action.

III. 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 over $3,700,000 in potential judgments. A settlement on the second day of trial in the underlying lawsuit extinguished the more than

[2] E.g., *Rubens v. Mason* (C.A.2, 2004), 387 F.3d 183, 189 (trial within a trial necessary where plaintiff contends she would have received a more favorable judgment absent the lawyer's negligence); *Tarleton v. Arnstein & Lehr* (Fla. Ct. App. 1998), 719 So.2d 325, 330 (same); *Bowers v. Dougherty* (Neb. 2000), 615 N.W.2d 449, 457-58 (same); *Machado-Miller v. Mersereau & Shannon, LLP* (Or. Ct. App. 2002), 43 P.3d 1207, 1209 (same); *Togstad v. Vesley, Otto, Miller & Keefe* (Minn. 1980), 291 N.W.2d 686, 695 (same).

$3,700,000 in potential judgments and awarded Appellees $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. But 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, and Environmental Network presented no expert testimony or other evidence to the contrary. Instead, Environmental Network presented "some" evidence concerning their 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.

IV. 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), Section 53, Comment *b* followed.)**

The Court of Appeals held that to prevail at trial under *Vahila*, Environmental Network was required to produce only "some" evidence on the merits of its underlying claim, even though its sole theory of damages was the loss of a civil judgment. As explained above, *Vahila* does not require that result. Nor does the dicta in *Vahila* relied on by the appellate panel support the proposition that a plaintiff need only produce "some" evidence on the merits of an underlying claim where the plaintiff's sole theory of damages is a lost judgment. Ohio should adopt Comment *b* to Section 53 of the Restatement and confirm that when a plaintiff seeks damages for a lost judgment, generally applicable principles of causation and damages require the fact-finder to determine whether, "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, Section 53.

The policy considerations set forth in a 1970s student note quoted in *Vahila* and the decision below – to the extent they have any validity at all – do not apply to

malpractice plaintiffs claiming loss of a judgment. 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 seeks a lost judgment allegedly caused by a settlement. Comment *b* of Section 53, Restatement (Third) of the Law Governing Lawyers, expressly addresses the claim for a lost judgment and properly requires proof of a "case within a case."

The second concern addressed in the student note 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 would have been had the case been tried to a particular judge or jury, but what "a reasonable judge or jury would have ruled." Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment *b*. Evidence concerning what a particular jury would have held, or how a particular judge would have ruled, is therefore irrelevant. Id.; see, also, 4 Mallen & Smith, Legal Malpractice (2006) 1019, Section 33.9 (noting that "the objective of a trial-within-a-trial is 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). The phrase 'would have' been, however, does have the same meaning as 'should have,' if the inquiry is what a

reasonable judge or jury 'would have' decided. * * * In any event, what 'could have' or 'might have' been decided is speculative and is not the standard.").

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 1 Dobbs, The Law of Torts (2000) 411, Section 169. This Court should clarify that Ohio legal malpractice law adheres to generally applicable principles of causation and damages. See Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53.

Applying the proper standard to the facts of this case required 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 jnov.

V. CONCLUSION

For all of the above reasons, this Court should accept jurisdiction, 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 in Support of Jurisdiction of Defense Research Institute** has been served this 25th day of April, 2007, by U.S. Mail, postage prepaid, upon the following:

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