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**In the Supreme Court of Ohio**

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***ENVIRONMENTAL NETWORK CORP., ET AL.,***

Plaintiffs-Appellees

v.

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

Defendant-Appellant.

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ON DISCRETIONARY APPEAL FROM THE  
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT  
CUYAHOGA COUNTY, OHIO  
CASE N<sup>o</sup> CA-06-087782

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
ON BEHALF OF GOODMAN WEISS MILLER LLP**

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**FILED**

APR 25 2007

MARCIA J MENGEL, CLERK  
SUPREME COURT OF OHIO

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## I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The leading national treatise on legal malpractice puts it unequivocally: "In Ohio, causation needs clarification by the state's supreme court." 4 *Mallen & Smith, Legal Malpractice* 688 (2007 ed.), Section 30:52 ("Mallen"). This case presents the ideal vehicle for this Court to provide the needed clarification regarding the appropriate standard of proof of causation and resulting damages in legal malpractice actions. Ever since this Court's decision in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, the lower courts have issued confused and contradictory decisions in this important area of law, resulting in decisions, including that in the court below, that defy common sense and logic and that could not be reached under the law of any other state. Recently, this Court agreed to review one aspect of this issue when it granted review in *Paterek v. Petersen & Ibold, et al.*, Case No. 06-1811, on appeal from the Eleventh Appellate District, which raises the issue of whether a legal malpractice plaintiff may recover damages that would not have been collectible in the underlying litigation in which the malpractice was committed.

This case presents the broader issue of whether, where a legal malpractice plaintiff contends that he would have achieved a better result in underlying litigation but for an attorney's alleged malpractice, the plaintiff must prove that in fact a better result would have been obtained in order to satisfy the proximate cause and resulting damages elements of the malpractice claim. Relying on a fundamental, but all too common, misunderstanding of *Vahila*, the trial court and Court of Appeals for the Eighth Appellate District held that a legal malpractice plaintiff may recover damages merely by providing "some evidence" that the underlying case had merit, without establishing *by any method* that he in fact would have achieved a better result if the case had been tried to a conclusion. This holding makes legal malpractice in Ohio unique in all of tort

law by permitting recovery based on proof of breach of duty alone, without requiring proof either that the breach proximately caused any harm, or the amount of that harm. The Eighth Appellate District's decision is contrary not only to decisions of other Courts of Appeals but also to decisions by other panels in that District. Furthermore, as misinterpreted by the lower courts, *Vahila* is completely at odds with legal malpractice law nationwide. Review by this Court is appropriate and necessary to clarify the confusion about *Vahila's* meaning, and to reverse the egregiously wrong and dangerous precedent set by the lower court's decision in this case.

Plaintiffs-Appellees brought this legal malpractice case, contending that their attorneys wrongfully coerced them into accepting a settlement on the second day of trial in the underlying case. They argued that, but for their attorneys' breach of duty, they would have tried their case to conclusion and obtained a better result through trial than the result they actually received through settlement. At issue is a fundamental principle of legal malpractice law and of tort law generally: what must a legal malpractice plaintiff prove to show a causal connection between his attorney's alleged negligence and the damages he claims?

On the facts of this case, where Plaintiffs-Appellees contend that they were coerced into accepting a settlement and that the underlying case should have been tried to a conclusion, logic and common sense compel only one conclusion: to prove their attorneys' negligence caused them harm, Plaintiffs-Appellees should have been required to prove that they would have prevailed at a full trial on the merits and that that trial would have produced a net recovery greater than the value of the settlement they in fact obtained. That premise was Plaintiffs-Appellees' sole damages theory, and, on these facts, proving it was the *only way* for them to demonstrate that their attorneys' alleged wrongful acts caused the harm of which they complained.

The courts below, however, did not agree. Citing this Court's decision in *Vahila*, both the trial court and the Eighth Appellate District concluded that Plaintiffs-Appellees did *not* need to show that they would have prevailed at a trial of the underlying case, or the amount of recovery they would have obtained, but rather merely needed to present "some evidence" of the merits of their position in the underlying case. Shockingly, the decision below permitted Plaintiffs-Appellees to recover more than \$2.4 million from their attorneys without ever having to prove that they would have recovered *anything at all* if they had tried the case to conclusion – let alone a net recovery greater than the settlement they obtained.<sup>1</sup> That result defies common sense and is contrary to basic principles of tort law. Nothing in *Vahila* required this irrational result; however, both courts below evidently felt bound to reach it based upon loose language in *Vahila* that has confused numerous courts ever since that case was decided.

*Vahila* reaffirmed the hornbook elements of a legal malpractice claim: the plaintiff must prove (i) that the attorney owed him a duty; (ii) that the attorney breached that duty; and (iii) that the conduct complained of caused the plaintiff's damage or loss. 77 Ohio St.3d at 427. At issue here is the standard of proof required for the third element. Based upon the unusual circumstances at issue there, the *Vahila* Court rejected the blanket proposition that a plaintiff must, *in every instance*, prove that he would have prevailed in the underlying case to prove causation. Unfortunately, however, in so holding, *Vahila* failed to delineate what a plaintiff

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<sup>1</sup> Settlement agreements between parties to litigation are highly favored in the law. E.g., *Continental W. Condominium Unit Owners Ass'n v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502, 660 N.E.2d 431. Here, the uncontroverted evidence showed that Plaintiffs-Appellees received the full fair settlement value of their claims, yet they were permitted to recover over \$2.4 million more from their attorneys by showing merely that there was "some evidence" that their claims had merit, with no proof that they would have done better at trial than they did in settlement. Of course, in every case that reaches trial, the claims and defenses of every party have "some merit," since otherwise the case would have been resolved on motion.

affirmatively *must* prove, and lower courts following it have diverged widely in their interpretations of what *Vahila* requires for proof of the causation element of a malpractice claim.

Some Ohio appellate courts, including several panels in the Eighth Appellate District, properly have understood *Vahila*'s holding and have ruled that, on various facts, the malpractice plaintiff must be required to show he would have prevailed in the underlying case to prove causation. Unfortunately, however, numerous other courts – including the *Paterek* court and the trial and appellate courts below – have seized upon expansive and ambiguous language (arguably dicta) in *Vahila* as a basis for holding that a legal malpractice plaintiff *never* has to prove he would have prevailed in the underlying case. This reading of *Vahila* is based not upon that Court's actual holding, which makes sense when limited to the unusual facts at issue there, but primarily upon *Vahila*'s liberal quotation from an outdated law review Note penned by a student from Cornell Law School.<sup>2</sup> This loose language in *Vahila*, however, has led the court below and other lower courts to work a sea change in Ohio's tort law. The wide range of conflicting lower court decisions since *Vahila* have left Ohio law hopelessly muddled and in desperate need of clarification by this Court. See *Mallen*, *supra*.

The lower court's decision also should be addressed because it violates public policy by effectively making attorneys the guarantors of their clients' claims.<sup>3</sup> After this decision, any client who wishes he had gotten a better settlement can sue his attorneys for malpractice and recover additional amounts from them, merely by showing "some evidence" that his underlying claim had merit. Indeed, following an arms' length reasonable settlement of litigation between A

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<sup>2</sup> See *Vahila*, 77 Ohio St.3d at 427 (citing Note, The Standard of Proof of Causation in Legal Malpractice Cases (1978), 68 Cornell L. Rev. 666, 670-671).

<sup>3</sup> This is, in part, the problem with the Eleventh Appellate District's decision in *Paterek*, which currently is under review by this Court.

and B, *both A and B* could sue their respective attorneys for malpractice in connection with the settlement, and *both A and B* could recover from the attorneys the value of all relief sought in the litigation, even though it is literally impossible that *both A and B* would have prevailed had the case been tried to a conclusion. This absurd result necessarily follows from the court's holding below, since in virtually every case that survives a motion for summary judgment *all parties* can present "some evidence" that their respective claims (or defenses) had merit.

Legal malpractice cases are rampant in our courts; according to Westlaw, *Vahila* has been cited in innumerable court decisions and over 30 treatises and articles. Accordingly, it is manifestly clear that this case raises an issue of great public and general interest, as both the bar and the public need and deserve clarification on this important issue. Because Plaintiffs-Appellees' *only* claim of damage here is that they would have gotten a better recovery by going to trial, this case presents the best possible vehicle for the Court to use to clarify this issue.

## **II. STATEMENT OF THE FACTS AND CASE**

### **A. The Underlying Case**

This malpractice case arose from representation provided in 2001 by Defendant-Appellant Goodman Weiss Miller LLP ("GWM") to Plaintiffs-Appellees Environmental Network Corp. ("ENC"), Environmental Network and Management Corp. ("ENMC"), and John J. Wetterich (collectively, Plaintiffs-Appellees) in a complex commercial lawsuit involving claims against and counterclaims by Waste Management of Ohio ("WMO"), TNT Rubbish Disposal, Inc. ("TNT"), and others for various breaches of contract involving a landfill in Ohio (the "Underlying Case"). In the complex mix of competing claims that comprised the Underlying Case, Plaintiffs-Appellees were exposed to over \$3,700,000 in potential judgments, and Mr. Wetterich faced a serious threat of personal liability for his companies' obligations. On the second day of trial, the judge called a recess and summoned counsel to his chambers,

expressing his view that Plaintiffs-Appellees would have a difficult time achieving a net recovery against WMO, and recommending that the parties work to settle the case. After negotiations back and forth, GWM brokered a settlement on Plaintiffs-Appellees' behalf that (i) extinguished more than \$3,000,000 in debt Plaintiffs-Appellees owed to WMO, with no out-of-pocket payment by Plaintiffs-Appellees; (ii) settled judgment creditors' bills against Plaintiffs-Appellees of more than \$700,000, with no out-of-pocket payment by Plaintiffs-Appellees; and (iii) awarded \$40,000 to Mr. Wetterich to be applied to GWM's outstanding legal bills. Mr. Wetterich participated in the settlement negotiations, consented to the settlement, and several months later signed an agreement documenting the settlement. Nonetheless, in a preemptive strike after GWM pressed for payment of its long overdue bills, Mr. Wetterich and his companies brought this legal malpractice claim, contending that GWM wrongfully had coerced Plaintiffs-Appellees into settling the case.

**B. The Malpractice Case**

At trial of the malpractice case, Plaintiffs-Appellees sole damages theory was that, if they had been permitted to try their case to conclusion, they would have won a better recovery than they obtained through the settlement they allegedly were coerced to accept. GWM denied any breach of the standard of care, and argued that, in any event, Plaintiffs-Appellees could not prove that any breach of duty caused the damages of which they complained. In support of its case, GWM produced uncontroverted expert testimony showing (i) that Plaintiffs-Appellees would not have obtained a positive net recovery after trial of all the competing claims in the Underlying Case; and (ii) that the settlement GWM negotiated was extremely advantageous to Plaintiffs-Appellees.

Plaintiffs-Appellees declined to put on any evidence rebutting GWM's expert testimony, or otherwise showing either that they would have prevailed on a trial of the Underlying Case or

what their net recovery would have been. Instead, citing *Vahila*, Plaintiffs-Appellees argued that to prevail in their malpractice case, they were required to produce only “some evidence” that their underlying claims had merit. Thus, Plaintiffs-Appellees did not prove the case-within-the-case, and their expert witness expressed no opinion about the likely outcome if the underlying case had been tried to a conclusion. In short, Plaintiffs-Appellees did not even attempt to prove, by any method or under any standard, that they in fact would have achieved a better result if the underlying litigation had been tried to its conclusion, as they alleged it should have been.

GWM argued that it was entitled to judgment as a matter of law because Plaintiffs-Appellees had failed to carry their burden of proving that any breach by GWM attorneys proximately caused the damages of which they complained. The trial court disagreed, however. In (i) denying GWM’s motion for directed verdict, (ii) issuing the jury’s instructions, and (iii) denying GWM’s motion for judgment notwithstanding the verdict, the trial court held that, under *Vahila*, Plaintiffs-Appellees need not show that they would have prevailed at trial, but rather need *only* present “some evidence” that their underlying claims had merit to satisfy the proximate cause and damages elements of their malpractice claim. The court charged the jury on causation as follows:

[P]laintiffs must prove 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 underl[y]ing case and you should take into account all evidence you have heard *to determine whether there exists some evidence of the merits of plaintiffs [sic] claims in the underl[y]ing litigation.*

Transcript, Vol. X at 2273 (emphasis added).<sup>4</sup> Likewise, in its decision on the JNOV Motion, the court ruled in pertinent part as follows:

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<sup>4</sup> This instruction is directly contrary to that given and approved in *Cunningham v. Hildebrand* (8th Dist. 2001), 142 Ohio App.3d 218, 755 N.E.2d 384 (O’Donnell, J.).

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 Plaintiffs, *Vahila* stands for the rule of law that a plaintiff “*may* be required, depending on the situation, to provide *some* evidence of the merits of the underlying claim.” *Vahila* at 428. (Emphasis added). \* \* \* Based on the abundance of testimony and documentary evidence presented by Plaintiffs at trial, Plaintiffs clearly provided “some evidence of the merits of the underlying claim” in satisfaction of *Vahila*. Therefore, Plaintiffs provided substantial probative evidence that GWM’s negligence proximately caused Plaintiff’s damages.

Order and Decision on JNOV Motion, at 12-14 (emphasis in original). See also Transcript, Vol. VI at 1332-61 (argument and ruling denying directed verdict). The trial court therefore entered judgment on the jury’s award of over \$2.4 million in compensatory damages, permitting Plaintiffs-Appellees to prevail on their malpractice claim without ever proving either (i) that they would have prevailed on a trial of the Underlying Case or (ii) that their net recovery would have exceeded the favorable settlement GWM had negotiated.

### C. The Appeal

GWM appealed the order entering judgment for Plaintiffs-Appellees, reiterating its argument that Plaintiffs-Appellees should have been required to prove they would have prevailed at a trial of the Underlying Case and what their net recovery would have been. The Eighth Appellate District affirmed the judgment below, ruling that “[t]he trial court did not err in requiring appellees to merely provide some evidence of the merits of the underlying claim” under *Vahila*. 2007-Ohio-831, at ¶ 30. It also rejected GWM’s argument that, if the proper standard of causation is simply “some evidence,” then any damages award would be speculative, in violation of fundamental principles relating to damages awards. The court ruled that the “trial court applied the correct standard of proof as to causation \* \* \* and there is sufficient evidence to support the jury’s award for damages,” either on a “lost profits” theory or an “out-of-pocket losses” theory. *Id.* ¶¶ 40-42. Finally, the court rejected GWM’s argument that the instructions to the jury on causation, based on the “some evidence” standard, were incorrect. The court held

that, “[a]s stated above, this standard of proof is entirely appropriate pursuant to *Vahila*, supra.”  
Id. ¶ 49. Accordingly, the appellate court affirmed the trial court’s judgment.<sup>5</sup>

### III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

#### Proposition of Law:

**In a legal malpractice case in which the plaintiff contends that he would have achieved a better result in underlying litigation but for his attorney’s malpractice, the plaintiff must prove he in fact would have obtained a better result, and what that result would have been, to establish the proximate cause and damages elements of the malpractice case; it is insufficient in such circumstances for the malpractice plaintiff merely to present “some evidence” of the merits of his position in the underlying litigation. *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, explained and applied.**

*Vahila* reaffirmed the hornbook principle that a legal malpractice plaintiff must prove a causal connection between the actions complained of by his attorney and the damages claimed. See *Vahila*, 77 Ohio St.3d at 427. The question presented here is what constitutes legally sufficient proof of causation in a malpractice claim under Ohio law after *Vahila*.

#### **A. On These Facts, the Only Way for Plaintiffs-Appellees to Prove Causation Is By Proving They Would Have Succeeded on the Merits of the Underlying Case**

Plaintiffs-Appellees consistently raised only one theory of damages: but for the allegedly coerced settlement, Plaintiffs-Appellees would have tried the Underlying Case to conclusion and

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<sup>5</sup> Any contention by Plaintiffs-Appellees at this late stage that they in fact proved the case-within-case would be both factually wrong (because the record conclusively shows they did not even attempt to do so) and legally irrelevant (because they induced the courts below to instruct the jury and decide the legal issues based on the erroneous “some evidence” standard). Regardless of the nature of the evidence presented at trial, which in fact did no more than show “some evidence” of the merits of the underlying case, the dispositive point is that in instructing the jury and deciding the critical legal issues the trial court adopted the erroneous “some evidence” standard, and the appellate court affirmed on that basis. The jury was asked to determine simply whether there was “some evidence” of the merits of Plaintiffs-Appellees claims; that is all the jury determined and that determination is insufficient as a matter of law to support the judgment against GWM.

would have won a better recovery than the settlement they actually obtained. As a matter of pure logic, on these facts, the *only* way for Plaintiffs-Appellees to prove that the alleged wrongful acts caused the damage of which they complain is for them to prove that they would have prevailed at a trial on the merits of the Underlying Case, and what their net recovery would have been. On these facts, Plaintiffs-Appellees' malpractice claim was wholly dependent on whether they would have succeeded on a trial of the Underlying Case. Accordingly, it defies logic – and reads the causation requirement right out of Ohio legal malpractice law – to hold, as the lower court did, that Plaintiffs-Appellees can prove causation by showing merely “some evidence” that their underlying claims had merit. Of course, there was “some evidence” of the merit of their underlying claims; the case would not have proceeded to trial, and GWM would not have been able to negotiate such a favorable settlement, if those claims had *not* had some merit. The uncontroverted evidence showed that Plaintiffs-Appellees got the *full value* of their claims in that settlement. But Plaintiffs-Appellees wanted more, so they sued GWM for malpractice; the “more” they wanted was the supposedly greater recovery they would have obtained had they been permitted to try the Underlying Case to conclusion. Under these circumstances, in order to prove that the alleged wrongful acts caused the damage of which they complained, Plaintiffs-Appellees must have been required to prove that they would have prevailed at such a trial and what their net recovery would have been. There is no other way for Plaintiffs-Appellees to prove causation on the facts of this case. Showing only “some evidence” that their claims had merit, as the lower courts required, showed only the *possibility* that GWM's actions caused the Plaintiffs-Appellees' damages. Such a meager showing does not satisfy well-settled Ohio law establishing the elements of a legal malpractice claim, and instead permits recovery based on speculation.

**B. *Vahila* Does Not Require the Result Reached by the Courts Below**

Properly read, this Court's decision in *Vahila* does *not* hold that a malpractice plaintiff

need *never* prove he would have prevailed in his underlying case in order to prove his attorney's negligence caused his damages. Rather, *Vahila* and its progeny have established a rule holding that whether a plaintiff must provide such proof depends on the nature of the malpractice alleged and the recovery the plaintiff seeks. E.g., *Ruble v. Kaufman*, 8th Dist. No. 81378, 2003-Ohio-5375, at ¶¶ 33, 37 (rejecting proposition that *Vahila* does not require a legal malpractice plaintiff to prove he would have prevailed in the underlying case and noting that "although [*Vahila*] held it may not be necessary to provide evidence of the merits of the underlying claim in all cases, it conceded in some cases it might be necessary"), appeal denied, 101 Ohio St.3d 1488, 2004-Ohio-1243, 805 N.E.2d 539. A close look at *Vahila* demonstrates why this is true.

The *Vahila* plaintiffs sued for legal malpractice, complaining of their attorney's representation with respect to various civil, criminal, and administrative matters. The lower court had granted summary judgment for the attorney, ruling that the plaintiffs could not prove causation because they had not shown that, but for the attorney's negligence, they would have prevailed in the underlying matters. This Court reversed, holding that, on the facts of the case, the plaintiffs need not prove they would have succeeded in the underlying matters to show causation. Instead, relying on *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 106, 538 N.E.2d 1058, the Court ruled that the plaintiffs had shown enough to survive summary judgment by producing sufficient evidence to show that they 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.*" 77 Ohio St.3d at 427 (emphasis added). The attorney in *Vahila* allegedly had failed to communicate essential matters about a plea bargain in the criminal matter at issue and also had failed to disclose settlement arrangements pertinent to the civil and administrative matters involved. The Court ruled that, as in *Krahn*, the plaintiffs had presented

sufficient evidence to get to the jury on whether their attorney's negligence had caused them some collateral injury *apart from* whether they ultimately would have prevailed on any of their claims. Accordingly, it was not necessary for the plaintiffs, under those circumstances, to prove they would have prevailed in the underlying matters in order to survive summary judgment on causation.

The holding of *Vahila* that is at issue here states as follows:

Accordingly, we hold that 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. *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.* See Note at 671; and *Krahn*, 43 Ohio St.3d at 106. \* \* \* *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.

*Id.* at 427-28 (citation omitted) (emphasis added). Fairly read in the context of the facts involved and in light of *Krahn*, the Court's holding simply provides that the evidence required to survive a motion for summary judgment with respect to the causation element of a legal malpractice claim varies depending on the situation, and will not be governed by a "blanket proposition that requires a plaintiff to prove, *in every instance*, that he or she would have been successful in the underlying matter." *Id.* at 428 (emphasis added).

Confined to its facts and procedural stance, *Vahila* was rightly decided. Unfortunately, however, numerous courts since then have seized upon expansive language (arguably dicta) in that decision as a basis for reaching a wide range of conflicting decisions about exactly what is required to prove causation in a legal malpractice claim under Ohio law. In particular, some

courts have relied upon *Vahila*'s lengthy quotation of a law review Note by a student – written 20 years before! – that expounds at length about the imagined danger of requiring plaintiffs to prove the case-within-the-case as a means of showing they would have succeeded on the merits of the case underlying a malpractice claim. The Note had little, if any, relevance to the facts presented by *Vahila*, and the Court's expansive quotation from it cannot reasonably be considered to be binding precedent. Nevertheless, many Ohio courts, including the trial and appellate courts below, have relied upon this dicta to conclude, in effect, that *Vahila* announced a new rule in Ohio law: malpractice plaintiffs are *never* required to prove success on the merits of their underlying case to prove their attorneys' negligence caused their harm.

Some Ohio appellate courts, including several Eighth Appellate District panels, properly have understood *Vahila*'s holding as providing that the level of proof of causation depends on the facts of any given case, including the type of malpractice alleged and the damages sought. Those courts have ruled that, in certain situations, the plaintiff must be required to show he would have prevailed in the underlying case, because the facts demand it in order to prove causation.<sup>6</sup> In cases such as those, the courts have recognized that the plaintiff *must* prove he would have succeeded on the merits of the underlying case, because to do otherwise would relieve him from proving the essential element of proximate causation. The instant case presents

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<sup>6</sup> See, e.g., *Lewis v. Keller*, 8th Dist. No. 84166, 2004-Ohio-5866, at ¶ 13 (“We recognize that *Vahila* does not always require this kind of showing, *but the circumstances here reasonably demand it.*”) (emphasis added); *Cunningham v. Hildebrand* (8th Dist. 2001), 142 Ohio App.3d 218, 225, 755 N.E.2d 384 (approving jury instructions under *Vahila* requiring the plaintiff to show both success on the merits of the underlying claim and what his net recovery probably would have been); *Ruble v. Kaufman*, 8th Dist. No. 81378, 2003-Ohio-5375 (on those facts, plaintiff required to prove he would have prevailed in the underlying action); *Talley v. John H. Rion & Assocs.* (Dec. 31, 1998), 2d Dist. No. 17135, 1998 Ohio App. LEXIS 6400, at \*11 (where plaintiff claimed he would not have pled guilty and would have obtained a more favorable result below if properly represented by counsel, “proof of [his] malpractice claim is \* \* \* inextricably intertwined with the merits of his underlying criminal case,” and absent expert proof of the merits of any defenses in that case, he failed to demonstrate the alleged malpractice caused his harm).

just such a situation, and therefore, the court below should have required Plaintiffs-Appellees to provide such proof. To do otherwise eliminates the essential causation and damages elements.

Courts that have refused to require a malpractice plaintiff to prove he would have prevailed in the underlying case have relied on the Note quoted in *Vahila* to raise the specter of unfairness in requiring the plaintiff to mount such proof. In most jurisdictions, however, the standard method for proving causation in a legal malpractice case is for the plaintiff to prove the so-called “case-within-the-case” – to introduce at the legal malpractice trial all of the evidence from the underlying case necessary to prove that, but for his attorney’s negligence, he would have been successful in that case and what his recovery would have been.<sup>7</sup> Alternatively, some courts have permitted the plaintiff to prove proximate cause by presenting mere expert testimony regarding what the result would have been but for the alleged malpractice. Courts generally permit this departure, however, only where specific circumstances, not present here, make it unfair to require the plaintiff to present the entire underlying case. Examples of such circumstances include where the attorney’s negligence resulted in the loss of evidence critical to proving the underlying case, or, as in *Krahn* and *Vahila*, where the plaintiff can show the attorney’s actions caused him harm, *apart from the loss of the underlying case*. Here, Plaintiffs-

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<sup>7</sup> E.g., *Jacobsen v. Oliver* (D.D.C.2006) 451 F.Supp.2d 181, 187; *Governmental Interinsurance Exch. v. Judge* (2006), 221 Ill.2d 195, 211-14, 850 N.E.2d 183; *Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.* (Minn.2006), 711 N.W.2d 811, 819; *Phillips v. Clancy* (Ariz.App.1986), 152 Ariz. 415, 418, 733 P.2d 300; *Rorrer v. Cooke* (1985), 313 N.C. 338, 361, 329 S.E.2d 355; *Thomas v. Bethea* (1998), 351 Md. 513, 533-34, 718 A.2d 1187; *Alexander v. Turtur & Assocs., Inc.* (Tex.2004), 146 S.W.3d 113, 118; *Mattco Forge, Inc. v. Arthur Young & Co.* (1997), 52 Cal.App.4th 820, 833-34, 60 Cal.Rptr.2d 780 (acknowledging some criticism of the method, but calling it the “most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually caused by a professional’s malfeasance.”) (emphasis sic). Accord, *Ruble*, supra. See also 4 Mallen 1046-48, Section 33.9 (“[Case-within-a-case] is the accepted and traditional means of resolving the issues involved in the underlying proceeding in a legal malpractice action \* \* \* [which] avoids speculation by requiring the plaintiff to bear the burden of producing evidence that would have been required in the underlying action.”) (footnote omitted).

Appellees neither proved the case-within-the-case *nor* offered expert opinion about what the likely outcome of the underlying case would have been.

Indeed, Plaintiffs-Appellees did not attempt to prove what the result of the Underlying Case would have been, *by any method*. Instead, they proffered only “some evidence” that their claims had merit, with no effort, either by proof of the case-within-the-case or by expert testimony, to show what result would have been obtained at a trial of the Underlying Case, against which the settlement could be compared to measure damages. In contrast, GWM’s expert testified, based on a careful review of the entire record, that Plaintiffs-Appellees *would not* have achieved a better result had the Underlying Case been tried to a conclusion, and that in fact GWM had negotiated an extraordinarily favorable settlement for them. Thus, the record was uncontradicted that Plaintiffs-Appellees obtained the full fair value of their claims on the merits, and suffered no harm whatsoever as a result of the settlement. Yet, the court below awarded Plaintiffs-Appellees more than \$2.4 million in compensatory damages on their malpractice claim. No other jurisdiction permits a malpractice recovery under facts such as those shown at trial in this case.

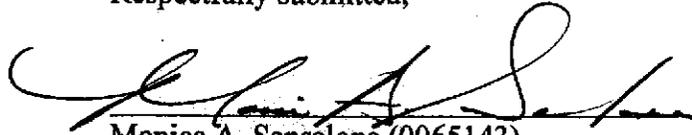
In sum, on the facts of this case, *Vahila* must be read to require Plaintiffs-Appellees to show that they would have prevailed in the underlying case, and what their net recovery would have been, because, on these facts, that is the *only* way they could have proven causation and damages. Anything less eviscerates the standard of proof of causation, awards Plaintiffs-Appellees a windfall recovery at their attorneys’ expense, and makes a legal malpractice claim in Ohio unique in all of tort law.

#### IV. CONCLUSION

For all of the foregoing reasons, Defendant-Appellant GWM requests this Court to exercise its discretionary jurisdiction to hear this appeal.

Respectfully submitted,

Dated: April 24, 2007



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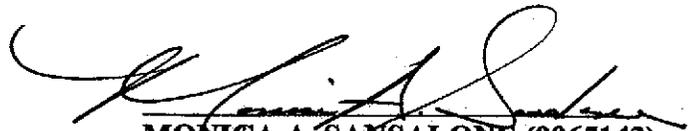
**PROOF OF SERVICE**

A copy of the foregoing *Memroandum in Support of Jurisdiction* was served by United States

Mail, postage prepaid, this 24<sup>th</sup> day of April, 2007, upon the following:

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**APPENDIX "A"**

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IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

EDP  
N.I.

ENVIRONMENTAL NETWORK CORPORATION, ET  
AL  
Plaintiff

Case No: CV-02-488462

Judge: MARY J BOYLE

GOODMAN WEISS MILLER LLP, ET AL  
Defendant

JOURNAL ENTRY

PURSUANT TO THE ATTACHED ORDER AND DECISION, DEFENDANT GOODMAN WEISS MILLER LLP'S 11/03/2005 MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OPPOSED BY PLAINTIFFS IN THEIR 11/14/2005 BRIEF IN OPPOSITION, AND SUPPORTED BY DEFENDANT IN ITS 11/28/2005 REPLY BRIEF IN SUPPORT, IS HEREBY DENIED BECAUSE, AFTER CONSTRUING THE EVIDENCE MOST STRONGLY IN FAVOR OF PLAINTIFFS, THE COURT FINDS THAT THERE IS SUFFICIENT PROBATIVE EVIDENCE TO PERMIT REASONABLE MINDS TO REACH DIFFERENT CONCLUSIONS AS TO PROXIMATE CAUSE AND THE DAMAGES AWARDED IN PLAINTIFFS' LEGAL MALPRACTICE ACTION. FURTHERMORE, DEFENDANT'S 11/03/2005 ALTERNATIVE MOTION FOR A NEW TRIAL IS HEREBY DENIED AS THE COURT FINDS THAT THE JURY AWARD WAS NOT EXCESSIVE, WAS NOT IN ERROR, WAS SUSTAINED BY THE WEIGHT OF THE EVIDENCE, AND THAT THE JUDGMENT WAS NOT CONTRARY TO LAW. OSI

Judge Signature \_\_\_\_\_ Date 1-31-06

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GERALD E. FUERST, CLERK OF COURT  
DEP.

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THE STATE OF OHIO }  
Cuyahoga County } SS. I, GERALD E. FUERST, CLERK OF  
THE COURT OF COMMON PLEAS  
WITHIN AND FOR SAID COUNTY,  
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY  
TAKEN AND COPIED FROM THE ORIGINAL 100391  
Vol 3483 Feb 31 2006  
NOW ON FILE IN MY OFFICE.  
WITNESS MY HAND AND SEAL OF SAID COURT THIS 23  
DAY OF April A.D. 20 07  
GERALD E. FUERST, Clerk  
By: [Signature] Deputy

Page 1 of 1



Miller LLP.<sup>2</sup> The grounds for the legal malpractice claims stemmed from underlying litigation where GWM represented Plaintiffs in a suit against Waste Management of Ohio ("Waste Management"), TNT Rubbish Disposal, Inc. ("TNT"), and others for various breaches of contract, namely Waste Management allegedly failed to loan Plaintiffs \$800,000 of \$2,000,000 promised to assist in developing land and airspace for potential garbage disposal (contract hereafter referred to as "Airspace Agreement").<sup>3</sup> Plaintiffs also claimed that TNT breached an agreement with Plaintiffs' by failing to pay \$800,000 to Plaintiffs for hauling and dumping of TNT's waste. The underlying litigation ended in a settlement on December 11, 2001 in the midst of a bench trial. Plaintiffs brought this legal malpractice alleging alleged a myriad of breaches of the standard of care on the part of Defendant. On October 3, 2005, the jury found in favor of Plaintiffs and against Defendant GWM with respect to the legal malpractice claims, and awarded compensatory damages in the amount of \$2,419,616.81. On October 20, 2005, the Court entered judgment on the jury verdicts. The delay of this Court reducing the jury verdict to a journal entry was a result of the parties joint request to do so.

The jury was given several interrogatories after rendering its verdict. In response to Interrogatory No.2 regarding the manner in which Defendant breached its standard of care, the jury found six different instances of malpractice: (1) no engagement letter; (2) overall lack of preparedness; (3) case should have been continued to allow Mr. Steve Miller (of Defendant GWM) to participate; (4) Plaintiff was coerced into signing agreement; (5) judge not recused; (6) GWM counsel alienated the court. In response to

<sup>2</sup> Defendants Steven Miller, Deborah J. Michelson, and James S. Wertheim were voluntarily dismissed by Plaintiffs without prejudice, on February 24, 2004.  
<sup>3</sup> Case No. CV-98-051105, in the Cuyahoga County Common Pleas Court, which was later consolidated with Case No. CV-98-052062.

Interrogatory No.3, the jury found that GWM's breaches of the standard of care proximately caused damage to Plaintiffs.

Defendant filed a Motion for Judgment Notwithstanding the Verdict ("JNOV") or in the Alternative, Motion for New Trial on November 3, 2005. The testimony and exhibits considered by the Court in ruling upon Defendant's November 3, 2005 motions are discussed in the Law and Argument section, *infra*.

## II. Law and Application

### A. JNOV MOTION

When ruling upon a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B), a court applies the same test as it would in ruling upon a motion for directed verdict. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275. Accordingly, a JNOV motion shall be granted only if, after construing the evidence most strongly in favor of the party against whom the motion is directed, "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to [the non-moving] party." *Id.*; *Goodyear Tire & Rubber Co. v. Actna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512, 514. The "reasonable minds" test requires the court to discern only whether there exists any evidence of substantive probative value that favors the position of the non-moving party. *Goodyear Tire & Rubber Co.*, 95 Ohio St.3d at 514.; *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69. Pursuant to a JNOV motion, a court "must assume the truth of the [non-moving party's] evidence as shown by the record, grant such evidence its most favorable interpretation, and consider established every material fact which the evidence tends to prove." *Miller v. Paulson* (1994), 97 Ohio App.3d 217, 221, 646 N.E.2d 521; quoting *McComis v. Baker* (1974), 40

Ohio App.2d 332, 335, 319 N.B.2d 391. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon such a motion. *Miller*, 97 Ohio App.3d at 221, quoting *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, 137. In all, a court has a duty to overrule a JNOV motion if there is sufficient probative evidence to permit reasonable minds to reach different conclusions. *McComis v. Baker*, 40 Ohio App.2d at 335, citing *O'Day v. Webb* (1972), 29 Ohio St.2d 215.

In its Motion for Judgment Notwithstanding the Verdict, Defendant contends that Plaintiffs failed to show (1) proximate cause and (2) damages with respect to the alleged breach of standard of care by the Defendants.

1. Proximate Cause

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* (1997), 77 Ohio St.3d 421, at syllabus. Plaintiffs argue that, in failing to move this Court for JNOV on duty owed and breach of duty, the only issues before this Court upon Defendant's JNOV motion are those concerning causation and damages. The Court agrees and finds that, since Defendant does not argue in its JNOV motion as to whether or not Plaintiffs sufficiently proved whether a duty was owed and whether there was a breach of duty, it is therefore undisputed for purposes of this JNOV motion that Defendant owed Plaintiffs a duty and that Defendant breached that duty. Thus, the only

issue to be determined under *Vahila* is whether there is a causal connection between Defendant's breach and Plaintiffs' damages.

Defendant argues that, since Plaintiffs contend that Goodman, Weis, and Miller ("GWM") should have tried the underlying case to its conclusion, and that such a trial would have produced a better result than the one they actually achieved in the allegedly coerced settlement, Plaintiffs must show what the result would have been had the case been litigated to a conclusion in a trial untainted by GWM's alleged negligence. In other words, Defendant argues that, in order to show proximate cause, Plaintiffs must fully try the merits of the underlying case as part of the legal malpractice, and must establish that their claim in the underlying case would have prevailed. Defendant asserts that this principle is commonly referred to as "case-within-the-case." Defendant relies heavily on a case from Texas in support of this argument. See *Alexander v. Turtur & Associates, Inc.* (2004), 146 S.W.3d 113. Apart from not being persuasive authority for this Court, this case does not explicitly stand for the "case-within-the-case" principle as argued by Defendant. Rather, the *Alexander* court held that, in the context of a legal malpractice action, expert testimony on proximate cause is required when the issue is not one that a layperson could determine. Therefore, this Court shall not rely upon *Alexander* as authoritative pursuant to Defendant's argument here.

Defendant goes on to argue that *Vahila* does not hold that a plaintiff is never required to prove the case-within-the-case; rather, it holds only that the plaintiff is not required to meet the standard "in every instance." Defendants quote the following passage from *Vahila*:

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 claims. 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.

*Vahila*, at 427-428 (citations omitted). Defendant argues that the central lesson of *Vahila* is that proximate cause must be evaluated on a case-by-case basis, focusing on the particular damages sought by the plaintiff. Defendant argues that, since Plaintiffs alleged that they would have received more after a trial than they did with the settlement, their damages theory was specifically tied to the question of what the outcome would have been at trial. Therefore, Defendant argues that the only way to connect GWM's alleged malpractice to any claimed damages is to know what the result would have been at a trial of the underlying case. Defendant contends that Plaintiffs failed to show this at the legal malpractice trial, and thus they are entitled to judgment as a matter of law notwithstanding the jury verdict.

Defendant goes on to argue that, even if *Vahila* is read not to require Plaintiffs to prove the full "case-within-the-case," they are still entitled to judgment as a matter of law because Plaintiffs wholly failed to prove proximate cause under any standard. Defendant concedes "some courts" have permitted legal malpractice plaintiffs to prove proximate cause by presenting expert testimony regarding what the outcome of the underlying litigation would have been but for the alleged malpractice. Cite to *Lewis v. Keller* (Nov. 4, 2004), 2004 WL 2495677 (Ohio App.8 Dist.), unreported; *Talley v. John H. Rion & Assoc.* (Dec. 31, 1998), 1998 WL 906682 (Ohio App.2d Dist.), unreported; *Leberman v. Employers Ins. of Wausau* (1980), 419 A.2d 417. However, Defendant

points out that Plaintiffs' liability expert, Edgar Boles, acknowledged that he had not evaluated the merits of all of the underlying claims and counterclaims, and he admitted that he could not offer any opinion on what the outcome of the underlying litigation would have been. Defendant argues that, because Boles' testimony provided no guidance to the jury about what better result Plaintiffs' would have obtained but for the alleged malpractice, the jury could only speculate on whether Plaintiffs would have achieved a larger recovery after trial. Defendant contends that such speculation cannot support a judgment.

Defendant further argues that, to the extent that Plaintiffs' interpret the statement in *Vahila* that a plaintiff "may be required, depending on the situation, to provide *some evidence* of the merits of the underlying claim" to mean that a plaintiff need only show that its underlying claims were "viable" or "valuable," Plaintiffs' evidence presented at trial was wholly insufficient to show proximate cause. Defendant focuses on three pieces of evidence presented by Plaintiffs: (1) the fact that GWM argued in support of its clients' claims at the underlying trial, (2) testimony of John J. Wetterich, and (3) the expert testimony of Edgar Boles.

Defendant first argues that the fact that an attorney argues in favor of his or her client's position says nothing about the merits of that position; rather, it only demonstrates that the attorney honored his or her ethical obligation to make every good faith argument on the client's behalf, regardless of its likelihood of success or the competing evidence against it. Second, Defendant argues that Mr. Wetterich's testimony that GWM told him that his companies' claims possessed some value shed no light on whether Mr. Wetterich and his companies likely would have achieved a net recovery at

trial. Further, Defendant claims that, even if Mr. Wetterich, as a lay person, had attempted to opine on that topic, his opinion would carry no probative value because only an expert could have validly opined on the likely outcome of the complex underlying litigation. Third, as discussed above, Defendant argues that plaintiffs' expert, Mr. Boles', did not opine on the merits of the underlying claims nor the likelihood that Plaintiffs would have obtained a net recovery but for Defendants' alleged negligence.

In all, Defendant argues that Plaintiffs did not prove, or even attempt to prove, what the result of a trial in the underlying case would have been, i.e. they did not attempt to prove the case-within-the-case nor did they attempt to show by expert testimony what the result would have been. Defendant contends that, under these circumstances, they jury could only speculate as to what the underlying result would have been. Accordingly, Defendant argues that, regardless of the standard applied, they are entitled to judgment as a matter of law notwithstanding the verdict because Plaintiffs presented no competent proof of a causal link between Defendant's alleged malpractice and the damages sought by Plaintiffs.

Plaintiffs argue that, under Civ.R. 50(B), while construing all evidence and inferences in favor of Plaintiffs, Defendant must meet the burden of showing that there exists no probative evidence that any or all of the six enumerated breaches proximately caused damages to Plaintiffs. Plaintiffs contend that Defendant has not met this high burden and, thus, its JNOV motion must be denied.

As an initial matter, Plaintiffs emphasize that the jury was provided with numerous exhibits and heard nine different witnesses, live or read in, testifying to every last relevant issue in this case. Plaintiffs point out that, after reviewing this evidence and

in response to an interrogatory regarding the manner in which Defendant breached its standard of care, the jury found six different instances of malpractice in the representation of Plaintiffs. "(1) no engagement letter; (2) overall lack of preparedness; (3) case should have been continued to allow Mr. Steve Miller to participate; (4) plaintiff was coerced into signing settlement; (5) judge not recused; and (6) GWM council alienated the court. Plaintiffs further point out that in response to another interrogatory, the jury found that GWM's breaches of the standard of care proximately caused damage to Plaintiffs.

Plaintiffs go on to argue that Defendant is incorrect to the extent that it argues that Plaintiffs must prove proximate cause by expert testimony. Plaintiffs cite to case law where it has been held, "although Ohio legal malpractice decisions require expert testimony to establish a breach of duty, expert testimony is not required to establish the issue of proximate cause." *Montgomery v. Gooding, Huffman, Kelly & Becker* (N.D. Ohio 2001), 163 F.Supp.2d 831, 837 (applying Ohio law); *Robinson v. Calig & Handelman* (1997), 119 Ohio App.3d 141, 144, 694 N.E.2d 557. Thus, Plaintiffs assert that a plaintiff may, but need not, establish proximate cause through expert testimony, as the Ohio courts have held in the context of a legal malpractice case that "the issue of proximate cause is generally a question of fact and is therefore a matter for the jury." *Morris v. Morris* (July 2, 2003), 2003 WL 21509023 (Ohio App.9 Dist.), unreported, at \*21.

Plaintiffs further argue that, despite Defendant's assertions, they have offered substantial probative evidence to the jury on proximate cause sufficient to sustain the verdict under *Vahla*, and thus Defendant's JNOV motion must be denied. Plaintiffs contend that, although they did prove the "case-within-the-case," they did not need to do

so, and thus exceeded their burden under *Vahila*. Plaintiffs contend that Defendant's interpretation of *Vahila* is incorrect, as the Ohio Supreme Court recognized specific equitable concerns about the "case-within-the-case" approach as articulated by prior "legal authority":

A standard of proof that requires a plaintiff to prove to a virtual certainty that, but for the defendant's negligence, the plaintiff would have prevailed in the underlying action, in effect immunizes most negligent attorneys from liability.

[S]tringent standards of proving 'but for' require the plaintiff to conduct a 'trial within a trial' to show the validity of the underlying claim ... But [the] evidence [necessary to sustain this] 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.

*Id.* at 426-427, quoting *The Standard of Proof of Causation in Legal Malpractice Cases* (1978), 63 Cornell L. Rev. 666, 670-671 ("Note"). Plaintiffs contend that, based on this reasoning, the *Vahila* Court held, "[w]e reject any finding that the element of causation in the context of a legal malpractice action can be replaced or supplemented 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]." Rather, to show causal connection, "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." *Id.* at 426, 428. Based on the *Vahila* Court's conclusions, Plaintiffs contend that there is nothing in the decision that supports Defendant's proposition that "the legal malpractice plaintiff must actually try the merits of the underlying case and obtain a jury

verdict and favorable findings on the underlying case." (Quoting from Defendant's JNOV Motion at page 9).

Plaintiffs argue that they clearly provided substantial probative evidence of the merits of the underlying case in satisfaction of *Vahila*. They argue that the evidence presented (1) on the terms of the underlying contract, (2) on Plaintiffs' performance of their obligations, (3) on Waste Management's breaches of contract, and (4) on Plaintiffs' damages flowing therefrom establishes that Plaintiffs would have prevailed in the underlying case. Plaintiffs assert that the evidence presented at trial, i.e. documents and testimony establishing the terms of the underlying deal, Plaintiffs' performance, Waste Management's breach, and contemplated damages in regards to Plaintiffs' out of pocket expenses and lost profits, proved their case in "excruciating detail."

In particular, Plaintiffs contend that the testimony of Mr. Wetterich, the owner of the Plaintiff businesses (ENMC and ENC), was proper and sufficient to sustain the jury verdict and damage award, despite Defendant's arguments to the contrary. Plaintiffs contend that, under *Vahila*, lay witness testimony is sufficient to establish proximate cause in a legal malpractice case since the *Vahila* Court instructs that proximate cause may be established with some evidence of the merits of the underlying case. Plaintiffs emphasize that Mr. Wetterich negotiated the Airspace Agreement with Waste Management and was responsible for Plaintiffs' performance under the agreement. Thus, he was the witness best situated to testify as to matters relevant to the merits of the underlying case, specifically Plaintiffs' performance, Waste Management's breach, and the damages sustained. Likewise, Plaintiffs contend that Mr. Wetterich was the best situated witness to testify as to Plaintiffs' dealings with TNT, for which Plaintiffs contend

he provided ample evidence of the breaches by TNT, specifically the monies owed but never paid to ENC for hauling and dumping TNT waste on ENC's credit. Plaintiffs further contend that Mr. Wetterich can testify to the value of his business. Cite to *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, at syllabus. Thus, Plaintiffs argue that Mr. Wetterich is competent and best suited to provide substantial probative testimony on all issues relative to the underlying case, and that he did so. Cite to trial transcript, September 20-21, 2005, pp. 16-21, 41-111, 117-118.

In all, Plaintiffs argue that the testimony, documents, and exhibits presented regarding (1) the workings of ENMC, (2) its obligations under the Airspace Agreement, (3) its performance of those obligations, (3) its profits sought, (4) its value gained and (5) its damages suffered is evidence showing the merits of the underlying litigation that meets *Vahila's* causal connection standard.

Based on the evidence and the arguments raised by the parties in their respective briefs, this Court finds that, under *Vahila*, Plaintiffs offered substantial probative evidence to the trier of fact on proximate cause sufficient to sustain the jury verdict. Therefore, Defendant's JNOV motion must be overruled.

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 Plaintiffs, *Vahila* stands for the rule of law that a plaintiff "may be required, depending on the situation, to provide *some* evidence of the merits of the underlying claim." *Vahila* at 428. (Emphasis added). The Supreme Court's holding was clearly based on the equitable concerns that a requirement for a legal malpractice plaintiff to prove the entire

"ease-within-a-case" would likely deter a large number of plaintiffs from bringing suits of merit, which in effect would immunize negligent attorneys.

Furthermore, Plaintiffs are correct in that Ohio law does not require proximate cause in legal malpractice cases to be proven by expert testimony. The courts are clear that, in the legal malpractice context, breach of duty must be shown by expert testimony, but proximate cause need not be. *Montgomery v. Gooding, Huffman, Kelly & Becker* (N.D. Ohio 2001), 163 F.Supp.2d 831, 837 (applying Ohio law); *Robinson v. Calig & Handelman* (1997), 119 Ohio App.3d 141, 144, 694 N.E.2d 557; *Morris v. Morris* (July 2, 2003), 2003 WL 21509023 (Ohio App.9 Dist.), unreported, at ¶21.

Under this law, Plaintiffs clearly provided substantial probative evidence at trial sufficient to show proximate cause under *Fahila*. Indeed, in response to an interrogatory, the jury provided six (6) separate and distinct breaches of the standard of care on the part of Defendant. Thus, the jury found six separate breaches that proximately caused Plaintiffs damages.

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 Defendant's not breached the standard of care. The record shows that Plaintiffs submitted documents establishing the terms of the underlying Airspace Agreement (Plaintiffs' exhibit 2), engineering maps and memoranda showing how the relevant airspace was to be parceled and developed (Plaintiffs exhibits 58,59,66), documents showing how airspace had been developed in the past, which were used to assist in calculations of unused airspace (Plaintiffs' 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

(Plaintiffs' exhibit 43), and documents and exhibits showing Plaintiffs' alleged out-of-pocket damages (see Plaintiffs' exhibit 47) and lost profits (see Plaintiffs' exhibit 52).

Furthermore, the record shows that Plaintiffs presented the testimony of several witnesses, particularly Edgar Boles and John Wetterich. Mr. Boles, Plaintiffs' liability expert, testified that Mr. Wetterich was advised by GWM that his claims were viable and that he, Mr. Boles, believed that the claims were in fact viable. He testified that GWM's actions in the underlying action and ultimate decision to not try the case on its merits constituted a breach of duty.

Mr. Wetterich, being the owner of ENMC and ENC, negotiated the Airspace Agreement and was responsible for Plaintiffs' performance under the Agreement. His testimony was therefore probative of the terms of the agreement, Plaintiffs' performance, Waste Management and TNT's alleged breaches, and damages Plaintiffs' allegedly incurred. As such, his testimony provided "some evidence of the merits of the underlying claim." Of course, his credibility and veracity were subject to cross-examination.

Based on the abundance of testimony and documentary evidence presented by Plaintiffs at trial, Plaintiffs clearly provided "some evidence of the merits of the underlying claim" in satisfaction of *Vahila*. Therefore, Plaintiffs provided substantial probative evidence that GWM's negligence proximately caused Plaintiffs' damages. Accordingly, Defendant's Motion for Judgment Notwithstanding the Verdict must be overruled on these grounds.

## 2. Damages

Defendant GWM also argues that its JNOV motion should be sustained because the jury's damage award, which Defendant claims is based entirely upon lost profits from

the Airspace Agreement, is premised on a legally incorrect measure of breach of contract damages as a matter of law. Defendant points to Ohio law on lost profits, where it has been established that lost profits may be recovered by a plaintiff in a breach of contract action only if the "(1) profits were within the contemplation of the parties at the time the contract was made, (2) the loss of profits is the probable result of the breach of contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty." *Charles v. Combs Trucking, Inc. v. International Harvester Co.* (1984), 12 Ohio St.3d 241, 244. Defendant argues that Plaintiffs set forth no evidence at trial that the Airspace Agreement (and the parties to it) contemplated lost profit damages other than whatever net profit could have been earned by ENMC under the terms of the Agreement. Defendant contends that Plaintiffs' only possible contract damage is for the net profit for the amount of airspace reserved to Waste Management to secure its loan to ENMC as set forth in a specific Bank/Yardage reservation provision of the Agreement.<sup>4</sup>

Defendant argues that Plaintiffs' lost profit damages were premised on prospective, future sales of airspace to other third-party customers of ENC at \$18/ton. Defendant contends that these are "collateral contracts" separate from the Airspace Agreement at issue, and thus any lost profits from these separate contracts are not recoverable here. Defendant cites to Ohio case law where it has been established that, in order to recover consequential damages suffered on an unrelated contract, the plaintiff must show that, at the time of entering into the primary contract, the defendant had

<sup>4</sup> Defendant claims that it was Plaintiffs' contention in the underlying litigation that Waste Management breached the Agreement by failing to advance an additional \$800,000 loan on top of the \$1,200,000 loan ENMC received. If true, Defendant argues that the only damage would be the profit ENMC would have earned on the Waste Management \$800,000 worth of airspace at \$5.00/ton after paying down the corresponding \$800,000 additional loan. Defendant argues that Plaintiffs' damages expert, Dr. Burke, testified that ENMC was not capable of earning any profit under the express terms of the Agreement because it had to pay back Waste Management's alleged \$2,000,000 loan at \$5.00/ton.

reason to foresee that a breach of the primary contract could cause the plain iff to suffer damages on a second, unrelated contract. *Sherman R. Smoot Co. v. State of Ohio* (2000), 136 Ohio App.3d 166, 182-183, 736 N.E.2d 69.<sup>5</sup> Defendant also cites to *Oliver v. Empire Equipment Co.* (April 11, 1985), 1985 WL 7950, unreported (upholding trial court's exclusion of evidence of lost profit damages relating to "consequential or special damages, such as loss of profits and expenses incurred in defaulting on [a] loan").<sup>6</sup>

Pursuant to this law, Defendant argues that it is entitled to judgment notwithstanding the jury award. It claims that there was no evidence presented at trial that Waste Management had "expressly been made aware of future sales of airspace to other customers at \$18 per ton (or at any price)." Hence, Defendant argues that the jury's award was based on nothing but speculation, and, therefore was improper as a matter of law. Moreover, Defendant contends that the testimony of Mr. Wetterich that his companies were entitled to lost profits is insufficient as a matter of law to support the jury's lost profits damage award.

Plaintiffs respond in their Brief in Opposition that there is no jury response to any interrogatory that specifies whether the compensatory damage award reflects lost profits or any other type of damages, *i.e.* out-of-pocket expenses. They contend that the jury received evidence on lost profits *and* on out-of-pocket losses. In particular, Plaintiffs presented to the jury an exhibit that was actually prepared by the Defendant in its representation of Plaintiffs in the underlying action showing the out-of-pocket expenses

<sup>5</sup> This rule of law is based on the bedrock principle of law that losses than an ordinary person could anticipate as a result of the breach are recoverable as general damages, but losses not foreseeable at the time of contracting into the contract constitute special damages and are only recoverable if the defendant is warned of their existence prior to the final agreement. See 5 Corbin on Contracts, Sections 1007, 1011, 1014; *Hudell v. Bascandole* (1854), 9 Exch. 341.

<sup>6</sup> Defendant also cites to numerous decision from other states and to federal law in support of this argument.

incurred by Plaintiffs as the result of Waste Management's breaches. (Plaintiffs' trial exhibit 47). Plaintiffs' stress that this exhibit details a set of losses reflecting only Plaintiffs' out-of-pocket expenses, not loss profits. Plaintiffs point out that the out-of-pocket expenses summarized in the exhibit (\$2,490,395) are nearly identical to the \$2,419,616.81 jury award. Plaintiffs argue that this award is not consistent with Plaintiffs' lost profit figure exceeding \$6 million, which reflected the profits that Plaintiffs would have achieved from the total airspace that they actually built before they were forced to leave the landfill, nor was the damage award consistent with the lost profit figure set forth by Plaintiffs' expert Dr. Burke in excess of \$50 million, which reflected lost profits over time reduced to present value. As such, Plaintiffs contend that it is apparent, without any indication to the contrary, that the jury awarded damages for the lowest amount, reflecting only out-of-pocket losses. Furthermore, Plaintiffs contend that significant evidence was presented showing that TNT owed, but failed to pay, ENC over \$800,000 for the hauling and dumping of TNT's waste. As such, Plaintiffs contend that, without any clear indication from the jury as to the basis of its award, there is evidence that \$800,000 of the \$2.4 million jury award can be attributed to the breaches of TNT.

Plaintiffs further point to the Restatement on Contracts, where it is stated that under a "reliance theory" of contract damages, a jury is entitled to award damages in such manner reimbursing an aggrieved party "for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made." Restatement Second of Contracts, Section 344. Plaintiffs' contend that the out-of-pocket expenses at issue here are compensable under this "reliance theory" of contract damages. Therefore, Plaintiffs argue that, since other grounds for the jury's award exist

apart from a lost profits theory, Defendant's JNOV motion is without merit to the extent Defendant argues that it is entitled to judgment because the jury award is improper as a matter of law.

Plaintiffs go on to argue that even if the jury's award was based on a lost profits theory, the award is still supported by Ohio law. They contend that Defendant's interpretation that the law requires actual subjective knowledge of a secondary contract from which future loss profits are claimed is unsupported by Ohio law. Plaintiffs argue that the standard pronounced in *Combs* is an objective one, and for support cites to Restatement of the Law Second, Contracts (Comment a), regarding foreseeability, where it is stated "it is enough however that the loss was foreseeable as a probable, as distinguished from a necessary, result of the breach ....Nor must [defendant] have had the loss in mind when making the contract, the test is an objective one based on what he had reason to foresee."

Pursuant to the three-step standard in *Combs*, Plaintiffs argue that, first, the asserted lost profits were within the contemplation of the parties. They argue that, objectively speaking and as shown by the evidence at trial, there would have been no reason for ENMC to enter into the Airspace Agreement with Waste Management because at \$5 per ton for the airspace reserved to Waste Management, Plaintiffs would not be able to achieve any profit. Therefore, according to Plaintiffs, it must have been within the contemplation of the parties that ENMC was to enter into secondary contracts in reliance on the Airspace Agreement. Second, Plaintiffs contend that their lost profits were the probable result of Waste Management's breaches, since Waste Management's failure to advance the subsequent \$800,000 rendered Plaintiffs unable to complete the airspace

development, forced them to lose out on profits from dumping the waste, placed them in default of its obligations with the landowner, and, ultimately, caused them to be ousted as operators of the landfill. Third, Plaintiffs contends that lost profits were shown with reasonable certainty through the Mr. Wetterich's testimony and documentary evidence, which showed how much garbage would be dumped in the airspace at a specific price per ton, less costs, and by the expert testimony of Dr. Burke, who testified as to lost profits over time reduced to present value.

Based on these arguments, Plaintiffs contend that each of the *Combs* prerequisites of lost profits were met at trial and, therefore, Defendant's JNOV motion must be overruled.

In its Reply Brief in Support, Defendant argues that, to the extent that Plaintiffs argue that the jury award was based on "out-of-pocket" losses, the award is still premised on a legally incorrect measure of breach of contract damages. Defendant refers to the Restatement of Contracts, Second, § 351, and argues that, under § 351(2)(b), "out-of-pocket" expenses are properly labeled "special" or "consequential" damages. As such, Defendant argues that Comment B is applicable, not Comment A. Defendant argues that, under Comment B, "special" damages require proof that the breaching party had knowledge that a breach would result in the specifically contemplated losses to the non-breaching party.

Defendant goes on to argue that the measure of "general" damages for breach of an obligation to lend money is limited to the amount that it would ordinarily cost to get a similar loan from another lender. Cites to Restatement on Contracts, Second, § 351 (Comment c), Dunn, "Recovery of Damages: Lost Profits" (6<sup>th</sup> Ed. 2005), § 2.53.

Defendant also cites to numerous cases from other states that it claims stands for this rule of law. See Defendant's Reply Brief, at page 10.

Defendant argues that the Plaintiffs' "out-of-pocket" losses of \$2,419,000 based on Plaintiffs' Exhibit 47 were not supported by the evidence at trial. Defendant contends that Plaintiffs introduced no evidence that a substitute loan could not be obtained in the marketplace. Further, Defendant argues that Plaintiffs did not attempt to introduce any evidence that the "out-of-pocket" expenses listed on Plaintiffs' Exhibit 47 were within the express contemplation of Waste Management.

Defendant further argues that several of the alleged expenses listed on Exhibit 47 related to Plaintiffs' dealings with the landowner of the area in question, Hocking Environmental, *i.e.* "Monies Lost Prepaid to Hocking for Royalty (\$412,444)." Defendant argues that Plaintiffs contracted with Hocking eighteen months prior to the Airspace Agreement between Plaintiffs and Waste Management. Therefore, Defendant contends that these "out-of-pocket" expenses cannot be considered "reliance" damages because these contractual obligations preexisted the Airspace Agreement, and thus the expenses were not undertaken in reliance upon Plaintiffs' obtaining the entire loan from Waste Management.

Based on the evidence presented at trial and the arguments raised by the parties in their respective briefs, the Court finds that the damages awarded by the jury were proper under Ohio law. First, Defendant's rely on case law from other states for the principle that the damage for a breach of a loan is the cost of obtaining a replacement. This authority is non-persuasive for the Court. Defendant did not provide the Court with Ohio

law standing for this principle. Thus, the Court will not factor this principle in its analysis.

Further, the Court finds it interesting that Defendant assails the damages awarded by the jury, considering they were based on the same information gathered and exhibits prepared by Defendant in support of Plaintiffs' arguments in the underlying litigation. See Plaintiffs' trial exhibits 47 and 52. Regardless, the award is proper under Ohio law. First, the jury did not specify, nor was it asked via interrogatories by either party, as to what damages theory the award was based upon. Therefore, pursuant to the evidence adduced at trial, several grounds exist for the award, *i.e.* reliance damages/out-of-pocket losses, lost profits. Indeed, the record shows that Plaintiffs presented an abundance of evidence in support of their alleged "out-of-pocket" losses and lost profits. In particular, Plaintiffs provided the testimony of Mr. Wetterich, the owner of the Plaintiff businesses and a party to the underlying Airspace Agreement, whom was in an ideal position to aver to what the businesses spent in reliance upon the contract ("out-of-pocket") and to what profits the businesses lost as the result of Waste Management's breach. Further, Plaintiffs provided the expert testimony of Dr. Burke, who gave his expert opinion as to what the lost profits would have been over time reduced to present value. In addition, Plaintiffs put forth evidence of damages arising from the contractual breaches, in which Plaintiffs alleged TNT owed, but failed to pay, ENC over \$800,000 for the hauling and dumping of TNT's waste. Therefore, there is evidence on the record that would support \$800,000 of the \$2.4 million jury award being attributed to the monies owed from TNT. Hence, without any knowledge of exactly what damage award the jury based it award on, the Court is without any basis to enter judgment in favor of Defendant notwithstanding

the verdict. As such, Defendant's Motion for Judgment Notwithstanding the Verdict must be overruled on these grounds.

Further, even if Defendant is correct in stating that foreseeability is an issue as to Plaintiffs' claimed "out-of-pocket" losses and lost profits because these damages theories are considered "special" or "consequential" damages under Ohio law, the record shows that substantial probative evidence was presented to support the jury award. "Special damages" are damages of such a nature that they do not follow as a necessary consequence of the injury complained of, though they may in fact naturally flow from that injury, as opposed to "general damages," which result from a breach in the ordinary course of events and are the natural and direct result of the breach. *Corsaro v. ARC Westlake Village, Inc.* (April 28, 2005), 2005 WL 984502 (Ohio App.8 Dist.), 2005-Ohio-1982, unreported, at \*21. . . citing to *Gemari v. Andres-Tucker Funeral Home, Inc.* (1986), 21 Ohio St.3d 102; *Combs v. Simkow* (Nov. 21, 1983), 1983 WL 6596 (Ohio App.12 Dist.), unreported. It is well established that special damages are not recoverable unless the defendant is warned of their existence prior to the final agreement. *Combs* at \*4; *Hadley v. Baxendale* (1854) 9 Exch. 341. However, under a proper reading of the foreseeability test under the Restatement of contracts, the determination of whether the defendant is "warned" of any damages is based on an objective, not subjective, test. Restatement (Second) of Contracts § 351 is clear that the foreseeability test is applicable to both general and special damages. Under Comment A ("Requirement of foreseeability"), "it is enough...that the loss was foreseeable as a probable, as distinguished from a necessary, result of the breach....Nor must [the breaching party] have had the loss in mind when making the contract, for the test is an objective one based

on what [the breaching party] had reason to foresee." (Emphasis added.) Of course foreseeability will be more of an issue with "special damages" as opposed to "general damages," but the same objective standard is used for both.

Based on this objective standard, the evidence presented at trial, as discussed thoroughly above, is sufficiently probative to support the jury award based on either an out-of-pocket loss theory or a loss profit theory. Based on the actual amount of the jury award, there is a chance that the jury based its award on the "out-of-pocket" theory as the exhibit presented by Plaintiffs (Exhibit 47) dealing with Plaintiffs' out-of-pocket expenses showed a total loss of \$2,490,395, which is almost identical to the \$2,419,000 awarded by the jury. If this was the case, Plaintiffs' presented substantial probative evidence showing that Waste Management had reason to foresee that, if it breached the Airspace Agreement by not loaning Plaintiffs' the amount agreed upon, Plaintiffs would not be able to adequately maintain the landfill, and thus would incur substantial losses in spending their own monies in developing the airspace.

Further, under the objective foreseeability test, probative evidence was presented at trial that would support the jury award if it were based on lost profits. Under the three-prong *Combs* test, the Court finds for the reasons enunciated by Plaintiffs above the jury was presented with sufficient probative evidence showing that (1) the lost profits were in the contemplation of Plaintiffs and Waste Management at the time of the contract because it would have been clear to an ordinary company that Plaintiffs were expecting profits from other contracts, considering the terms of the Airspace Agreement at issue actually resulted in a loss for Plaintiffs; (2) that the loss profits were the probable result of

Waste Management's breach; and (3) the loss profits were shown with a reasonable certainty.

Therefore, even if the jury award was based on out-of-pocket losses or lost profits, the record shows that probative evidence was presented supporting the jury award on either theory. As such, Defendant's JNOV motion must be overruled.

**B. MOTION FOR NEW TRIAL**

In the alternative, Defendant moves the Court for a new trial pursuant to Civ.R. 59(A) for the following grounds under the rule:

- (4) Excessive ... damages, appearing to have been given under the influence of passion or prejudice;
- (5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract ...;
- (6) The judgment is not sustained by the weight of the evidence ...;
- (7) The judgment is contrary to law;
- (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application

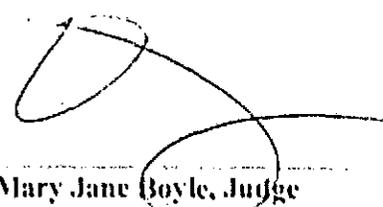
As discussed thoroughly in the sections concerning Defendant's JNOV motion, the Court finds that the jury award was not excessive, was not in error, was sustained by the weight of the evidence, and that the judgment was not contrary to law. Therefore, Defendant's alternative motion for a new trial is hereby denied, as Defendant has shown no grounds for a new trial.

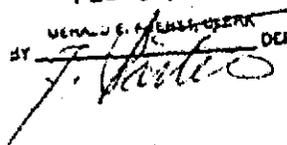
III. Conclusion

Based on the aforementioned reasons, Defendant's November 3, 2005 Motion for Judgment Notwithstanding the Verdict is hereby DENIED because, after construing the evidence most strongly in favor of Plaintiffs, the Court finds that there is sufficient probative evidence to permit reasonable minds to reach different conclusions as to proximate cause and the damages awarded in Plaintiffs' legal malpractice action. Furthermore, Defendant's November 3, 2005 alternative Motion for a New Trial is hereby DENIED as the Court finds that the jury award was not excessive, was not in error, was sustained by the weight of the evidence, and that the judgment was not contrary to law.

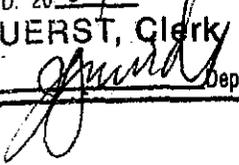
IT IS SO ORDERED. COSTS TO DEFENDANT.

1 20 06  
Date

  
Mary Jane Boyle, Judge

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FEB 01 2006  
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THE STATE OF OHIO }  
Cuyahoga County } SS. I. GERALD E. FUERST, CLERK OF  
THE COURT OF COMMON PLEAS  
WITHIN AND FOR SAID COUNTY.  
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY  
TAKEN AND COPIED FROM THE ORIGINAL  
NOW ON FILE IN MY OFFICE.  
WITNESS MY HAND AND SEAL OF SAID COURT THIS  
DAY OF April A.D. 2007  
25 GERALD E. FUERST, Clerk  
By  Deputy

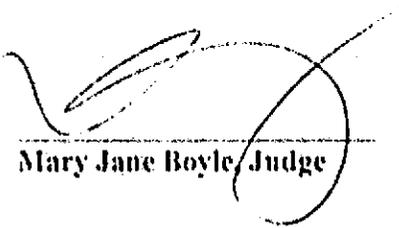
CERTIFICATE OF SERVICE

A copy of the foregoing Order and Decision was sent by regular United States

Mail to the following attorneys this 30 day of January, 2006:

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Mary Jane Boyle, Judge

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**APPENDIX "B"**

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# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 87782

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**ENVIRONMENTAL NETWORK CORP., ET AL.**

PLAINTIFFS-APPELLEES

vs.

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

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
AFFIRMED**

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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:** MAR 12 2007

CA06087782

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FILED AND JOURNALIZED  
PER APP. R. 22(E)

MAR 12 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED

MAR - 1 2007

GERALD E. FUERST  
CLERK OF THE COURT OF APPEALS  
BY [Signature] DEP.

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

YBL0631 00305

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES & COSTS TAXED

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

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.

On December 9, 2002, appellees filed a legal malpractice complaint against GWM.<sup>1</sup> 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.<sup>2</sup> 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.

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<sup>1</sup>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.

<sup>2</sup>Case No. CV-98-351105, which was later consolidated with Case No. CV-98-352363 and settled along with Case Nos. CV-98-372394, CV-99-389308, CV-01-443765.

The underlying litigation ended in a settlement agreement in December 2001, after trial commenced.

Appellees were dissatisfied with the resulting settlement and how it transpired. They filed a legal malpractice complaint against GWM claiming that 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.<sup>3</sup>

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.<sup>4</sup> 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.

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<sup>3</sup>Appellant's abuse of process counterclaim was later dismissed.

<sup>4</sup>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.

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.

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.

"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.

"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.

"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.”

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.

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.

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.*

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.

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.

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.

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.

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.

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

"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. \*\*\*

"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.

“\*\*\*

“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.)

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.

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

“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.

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:

"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 recovery.

"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.

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:

"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.)

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.

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."

In addition, the trial court charged:

"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.

"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.

"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.

"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.)

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.

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<sup>5</sup> 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.

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.<sup>6</sup> This amount could have been the foundation of a legitimate jury award based on the evidence presented at trial.

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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<sup>5</sup>Dr. John F. Burke.

<sup>6</sup>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.

"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."

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

"[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.

"[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.

"[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].

"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.)

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

The State of Ohio, }  
Cuyahoga County. } ss.

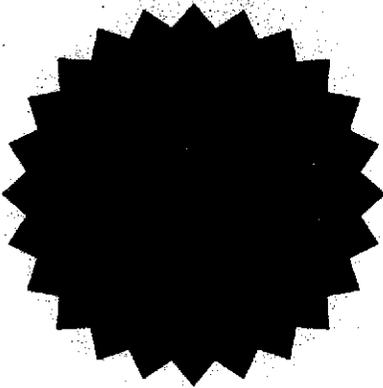
I, GERALD E. FUERST, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied

from the Journal Vol 631 Page 303 in CA 87782 Date Mar 12, 2007

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing

copy has been compared by me with the original entry on said Journal Vol 631 Page 303  
in CA 87782 and that the same is correct transcript thereof.



In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 20

day of April A.D. 20 07

GERALD E. FUERST, Clerk of Courts

By [Signature] Deputy Clerk