

IN THE SUPREME COURT OF OHIO

Case No. 2007-739

Environmental Network Corp., et al., )  
)  
Appellees, ) On Appeal from the Cuyahoga County  
) Court of Appeals, Eighth Appellate  
) District  
vs. )  
) Court of Appeals  
Goodman Weiss Miller L.L.P, et al., ) Case No. 087782  
)  
Appellants. )

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MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE  
OHIO BAR LIABILITY INSURANCE COMPANY AND  
PROASSURANCE CORPORATION

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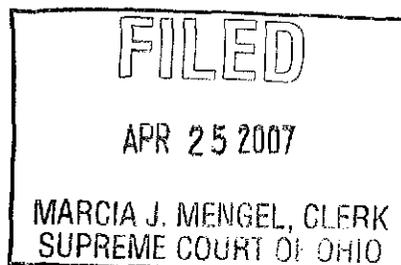
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## **Statement Of Interest Of Amici Curiae**

Ohio Bar Liability Insurance Company was formed and is owned by the Ohio State Bar Association. OBLIC has been writing legal malpractice insurance in Ohio since 1979. OBLIC insures thousands of attorneys in Ohio, primarily practicing in solo to mid-size firms.

ProAssurance Corporation is a publicly traded insurer concentrating primarily in professional liability risks. ProAssurance has been writing lawyers professional liability insurance in three Midwestern states, Ohio, Michigan, and Indiana, since the mid-1990s.

Although OBLIC and ProAssurance are competitors in the legal malpractice insurance marketplace in Ohio, both insurers have a vital interest in the issue raised by this appeal: the standard of proof of causation in legal malpractice cases. The standard of proof of causation directly affects the number and size of legal malpractice claims and recoveries in Ohio and the evaluation and resolution of such claims by insurers, such as OBLIC and ProAssurance. These factors in turn affect the underwriting risks for Ohio insurers and the malpractice premiums for Ohio lawyers. Clarification of the standard of proof of causation will better enable Ohio insurers, such as OBLIC and ProAssurance, to assess underwriting risks, determine appropriate insurance premiums, and evaluate and resolve legal malpractice claims in Ohio by removing or reducing the uncertainty and confusion that have arisen as a result of the lower court's interpretation of this Court's decision in *Vahila v. Hall*, 77 Ohio St.3d 421.

### **Why This Case Is Of Public Or Great General Interest**

In *Vahila*, this Court essentially created "a situation where it is determined on a case-by-case basis whether the plaintiff is required to prove a successful outcome within

the underlying case.” Baldwin’s Ohio Practice, Ohio Tort Law § 8:92. The decision of the Court of Appeals in this case has introduced further confusion and uncertainty into Ohio law regarding the standard of proof of causation in legal malpractice cases. This decision eliminated the traditional element of causation from claims for legal malpractice in Ohio and substituted in its place mere proof of “some evidence of the merits of the underlying claim.” If this decision is allowed to stand, claims for legal malpractice will likely soar—along with premiums for malpractice insurance. Higher premiums will affect both lawyers (the insureds) and consumers of legal services in Ohio.<sup>1</sup>

In addition, the decision will have a chilling effect on the settlement of cases because it opens the door to a succession of litigation. Ohio lawyers will hesitate to recommend settlement of cases because a plaintiff who, after agreeing to settle, does not believe his or her settlement was good enough will seek to obtain even more from his or her lawyer by alleging malpractice and merely providing “some evidence of the merits of the underlying claim.” As a result, more cases will be forced to trial and court dockets will become more congested.

How the Court of Appeals arrived at the astonishing result in this case requires a brief exposition of this Court’s 1997 decision in *Vahila*. There this Court held, both in the syllabus and the text: “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

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<sup>1</sup> The availability to Ohio lawyers of affordable professional liability insurance is important to consumers of legal services in Ohio. In order to protect clients and the public, the Court requires all lawyers to inform their clients if they do not maintain professional liability insurance in specified amounts (Prof. Cond. R. 1.4(c)), and requires legal professional associations to maintain professional liability insurance in specified amounts. Gov. Bar R. III, § 4.

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.” 77 Ohio St.3d at 421-22, syllabus, 427. Leading up to this holding, the Court in its discussion quoted from an earlier decision stressing the obligation of a malpractice plaintiff to prove that his injury was caused by the attorney’s negligence: “In other words, we do not relieve a malpractice plaintiff from the obligation to show that the injury was caused by the defendant’s negligence. But the analysis should be made in accordance with the tort law relating to proximate cause.” *Vahila*, 77 Ohio St.3d at 426, quoting *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 106.

Because, however, *Vahila* involved claims that the alleged malpractice deprived the plaintiffs of a better resolution of their underlying matters unrelated to their merits of those matters, this Court rejected the “rule of thumb requiring that a plaintiff, in order to establish damage or loss, prove *in every instance* that he or she would have been successful in the underlying matter(s) giving rise to the complaint.” *Vahila*, 77 Ohio St.3d at 426-27, 428 (emphasis added). Nonetheless, the Court acknowledged that “the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case,” and went on to say that “a plaintiff may be required, depending upon the situation, to provide some evidence of the merits of the underlying claim.” *Id.* at 427-28.

This case, however, presents the exact opposite situation in that the claim here was that the appellees would have achieved a better result by trying their case to conclusion rather than settling it. Yet the Court of Appeals failed to apply the holding in the syllabus and text of *Vahila*. Instead, the Appellate Court fastened upon the foregoing,

superfluous language in the Court's discussion in *Vahila*, and held that "the standard to prove causation in a legal malpractice case requires a claimant 'to provide some evidence of the merits of the underlying claim.'" *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2007-Ohio-831, ¶ 26, citing and quoting *Vahila*, 77 Ohio St.3d at 428. As a result, the Court of Appeals further held that "[t]he trial court did not err in requiring appellees to merely provide some evidence of the merits of the underlying claim." 2007-Ohio-831, ¶ 30. Finally, the Court of Appeals rejected the appellants' challenge to "the articulation of 'some evidence of merits' as the applicable standard of causation in a legal malpractice case," stating: "As stated above, this standard of proof is entirely appropriate pursuant to *Vahila*, supra." *Id.*, ¶ 49. The effect of the Court of Appeals' decision is to eliminate the element of causation in legal malpractice cases.

This Court should accept jurisdiction in this case in order to reaffirm its decision in *Vahila* that causation is an essential element of a claim for legal malpractice in Ohio and to clarify the standard of proof of causation in cases like this where the malpractice plaintiffs contend that they would have achieved a better result in the underlying case by trying the case to conclusion instead of entering into a settlement.

### **Statement Of The Case And The Facts<sup>2</sup>**

This legal malpractice action stemmed from appellants' representation of the appellees as plaintiffs in a commercial lawsuit involving breach of contract issues. After the trial had begun, the parties entered into a substantial settlement in favor of appellees. The appellees, however, were not satisfied with the settlement. As a result, they filed this

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<sup>2</sup> Amici's statement is drawn from the Court of Appeals opinion, appellants' Memorandum in Support of Jurisdiction, the briefs in the Court of Appeals, and the trial court docket.

malpractice action alleging that appellants had coerced them into settling and were negligent in preparing and prosecuting the underlying case.

This malpractice case was tried to a jury. During the trial, appellants moved for a directed verdict on the ground that appellees had failed to prove that appellants' alleged malpractice proximately caused the damages sought by the appellees. The trial court denied that motion, and the jury eventually returned a verdict for appellees in the amount of \$2,419,616.81. The jury found that appellants breached their standard of care in the following respects: "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. [Appellants] alienated the court." The trial court entered judgment on the jury verdict.

Thereafter, appellants moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, in part on the ground that appellees had failed to prove that appellants' alleged malpractice proximately caused the damages sought by the appellees. The trial court denied both motions, and appellants appealed.

On appeal, appellants argued that the appellees did not present legally sufficient evidence of causation or damages. The Court of Appeals disagreed and affirmed the judgment of the trial court. In affirming, the Court of Appeals held that "the standard to prove causation in a legal malpractice case requires a claimant to 'provide some evidence of the merits of the underlying claim,'" that "[t]he trial court did not err in requiring appellees to merely provide some evidence of the merits of the underlying claim," and that "[a]ppellees clearly met that burden at trial." 2007-Ohio-831, ¶¶ 26, 30. The Court of Appeals further held that "the trial court applied the correct standard of proof as to

causation in this case, and there is sufficient evidence to support the jury's award of damages." *Id.*, ¶ 42. Finally, the Court of Appeals rejected appellants' challenge to the jury instructions on the ground that the appellees should have been required to prove what the result of the underlying case should have been but for the alleged malpractice. The Appellate Court said that the standard of proof of causation by "some evidence of merits" "is entirely appropriate pursuant to *Vahila*." *Id.*, ¶ 49.

During the jury trial of their malpractice case, the appellees presented testimony, documents, and exhibits that established that their underlying case had "some merit." But appellees did not prove that they would have been successful in the underlying case—either by the case-within-a-case method or through expert testimony—despite the fact that their theory of the malpractice case was that they would have obtained a better result by trying the case to conclusion rather than by settling. Thus, there was no evidence before the jury that would have allowed it to conclude that appellees would have succeeded at trial on the merits of the underlying case were it not for the malpractice of appellants. As a result, there was no evidence of any "causal connection between the conduct complained of and the [appellees'] resulting damage or loss."

## Argument In Support Of Proposition Of Law

### Proposition of Law

**In a legal malpractice action based on negligent representation in which the plaintiff contends that he would have achieved a better result in the underlying case but for his attorney's malpractice, the plaintiff must prove that he in fact would have obtained a better result in order to establish the requisite causal connection between the conduct complained of and the resulting damage or loss; it is insufficient in such circumstances for the plaintiff merely to present some evidence of the merits of the underlying claim. (*Vahila v. Hall*, 77 Ohio St. 3d 421, 674 N.E.2d 1164, clarified and followed.)**

In *Vahila*, this Court held, both in the syllabus and the text: “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.” 77 Ohio St.3d at 421-22, syllabus, 427. Leading up to this holding, the Court in its discussion quoted from an earlier decision stressing the obligation of a malpractice plaintiff to prove that his injury was caused by the attorney’s negligence: “In other words, we do not relieve a malpractice plaintiff from the obligation to show that the injury was caused by the defendant’s negligence. But the analysis should be made in accordance with the tort law relating to proximate cause.” *Vahila*, 77 Ohio St.3d at 426, quoting *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 106. Thus, it is plain that this Court in *Vahila* did not eliminate the element of causation in legal malpractice cases.

The Court, however, declined to “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.” *Id.* at 428 (emphasis added). That declination was sensible under the facts of *Vahila*, where the plaintiffs’ claims were that their lawyers’ negligence deprived them of the opportunity to obtain a better result through plea bargains or settlements even though they might not have won the underlying matters. The ruling of the Court of Appeals in this case—that the plaintiffs need not prove that they would have been successful in the underlying case—makes no sense at all because the appellees’ claim here was that they would have obtained a better result if they had tried the case to conclusion instead of settling it.

Unlike *Vahila*, this case is one of those instances where the appellees’ were required to prove that they would have been successful in the underlying case because that is the only way appellees’ could have established the requisite causation. Appellees’ showing of merely “some evidence of the merits of the underlying claim” did not establish the requisite “causal connection between the conduct complained of and the [appellees’] resulting damage or loss” as required by *Vahila*, 77 Ohio St.3d at 421-22, syllabus, 427.

Nor is the appellees’ showing of merely “some evidence of the merits of the underlying claim” consistent with the tort law relating to proximate cause referred to by this Court in *Vahila*. 77 Ohio St.3d at 426. As stated in the Restatement (Second) of Torts:

the plaintiff is required to produce evidence that the conduct of the defendant has been a substantial factor in bringing about the harm he has suffered, and to sustain his burden of proof by a preponderance of the evidence. This means that he must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation and

conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

*Id.*, § 433B, Comment *a* (1965).

Finally, such mere showing would not even satisfy the standard of proof proposed by the author of the Cornell Law Review article quoted and cited by this Court in *Vahila*, 77 Ohio St.3d at 426-27. In that article, the author suggested the standard proof of causation in a negligent representation case should require “a showing of a ‘lost substantial possibility of recovery.’” Note, “The Standard of Proof of Causation in Legal Malpractice Cases” (1978), 63 Cornell L. Rev. 666, 679-80. Appellees’ proof here of merely “some evidence of the merits of the underlying claim” does not remotely establish a “substantial possibility of recovery.”

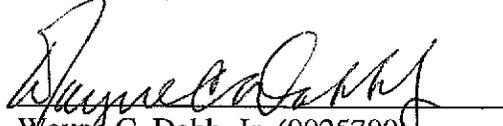
Accordingly, this Court should accept jurisdiction and reverse the judgment of the Court of Appeals.

### **Conclusion**

Causation is the essential nexus between negligence and the recovery of damages in tort cases. By substituting “some evidence of the merits of the underlying claim” for causation in this case, the Court of Appeals has allowed plaintiffs to recover substantial damages merely upon proof of negligence and damages regardless whether there is any link between the two. This is not and should not be the law of Ohio. Accordingly, the

Court should accept jurisdiction in this case to correct the error below and reaffirm that the law of Ohio requires proof of causation as an element of a claim for legal malpractice.

Respectfully submitted,



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## Certificate of Service

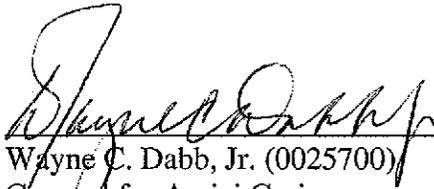
I certify that a copy of this Memorandum in Support of Jurisdiction was sent by first-class U.S. mail, postage prepaid, to the following counsel of record, on April 25 2007:

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