

IN THE SUPREME COURT OF OHIO

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On Appeal From The  
Court of Appeals Eighth Judicial District  
Cuyahoga County, Ohio  
Court of Appeals Case No. CA 06 87782

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ENVIRONMENTAL NETWORK CORP., *et al.*,

*Appellees,*

vs.

GOODMAN WEISS & MILLER L.L.P., *et al.*,

*Appellants.*

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**AMICUS CURIAE BRIEF OF ERIK M. JENSEN  
IN RESPONSE TO JURISDICTION**

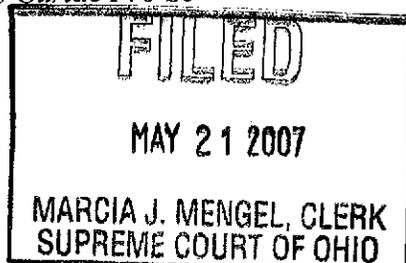
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**I. THIS CASE DOES NOT CONCERN A PUBLIC OR GREAT GENERAL INTEREST OR A SUBSTANTIAL CONSTITUTIONAL QUESTION.**

In its Memorandum in Support of Jurisdiction, appellant Goodman Weiss Miller LLP argues that the lower courts relied not on the actual holding of the Supreme Court of Ohio in *Vahila v. Hall*, 77 Ohio St.3d 421 (1997), but “primarily upon *Vahila*’s liberal quotation from an outdated law review Note penned by a student from Cornell Law School.” Memorandum at 4 (citing Note, The Standard of Proof of Causation in Legal Malpractice Cases, 68 Cornell L. Rev. 666, 670-71 (1978)). The inference the reader is supposed to draw is clear: the Supreme Court of Ohio in *Vahila*, and the lower courts in this case, unthinkingly relied on the prehistoric work of a neophyte.

As the author of the Cornell Law Review Note quoted in *Vahila*, I wish to defend the Note (and, indirectly, the honor of the courts that have quoted from it). The Cornell Note reflected the best legal reasoning on causation in 1978, and its argument has withstood the test of time. The Note is outdated only in the obvious sense that it could not have cited cases and commentary from the subsequent 19 years (the time until *Vahila* was decided) or 29 years (the time to date).

**II. STATEMENT OF THE CASE.**

The Cornell Note had its genesis in the author’s work as a summer associate at a personal injury law firm in the summer of 1977. It was motivated by the indisputable observation that plaintiffs in legal malpractice actions faced a much more difficult task in proving causation than did plaintiffs in other malpractice actions. No one expected a medical malpractice plaintiff, for example, to have to demonstrate with certainty that he would have been completely healthy but

for a medical practitioner's negligence, but the equivalent "but for" standard was routinely imposed in the legal malpractice context. Moreover, when the alleged malpractice arose in litigation, the "but for" standard led to the "trial within a trial" requirement: the injured plaintiff had to prove that he or she would have been successful in the underlying litigation had it not been for the attorney's malpractice.

With the "but for" standard, the problem of proving causation was often exacerbated by the malpractice. For example, a lawyer who neglected to secure information that would have bolstered his client's legal position effectively insulated himself from liability: without information about the merits of the underlying action, how could an aggrieved client demonstrate that he or she would have prevailed in that action? The burden of proving causation in legal malpractice cases was so high that, in most jurisdictions, injured clients were left with no effective legal remedy. That result was indefensible as a matter of law, and to non-lawyers it seemed as though lawyers had circled the wagons to protect their colleagues, to the detriment of clients.

### **III. LAW AND ARGUMENT.**

#### **A. This Court Should Not Adopt a "But For" Causation Requirement.**

The Cornell Note accordingly argued that, to prove causation, it should be enough for a plaintiff to demonstrate that he or she had suffered a "lost substantial possibility of recovery" because of an attorney's malpractice. To be sure, the proposed standard was not mandated by the law as it then existed – the Note was intended to be prescriptive as well as descriptive – but neither was the proposal made up out of whole cloth. It was derived from an analogous line of cases in the medical malpractice area, and it picked up on efforts that had begun in some states to

ease the burden of proving causation in legal malpractice actions. In short, the Note argued for nudging causation principles in one area of the law based on generally accepted principles in another area – a careful, limited, *incremental* position consistent with the development of the law generally.

The Note was characterized contemporaneously by a treatise writer as “one of the most exhaustive . . . articles on this subject.” David J. Meiselman, *Attorney Malpractice: Law and Procedure* § 3:11, at 50 (1980). After describing the Note’s proposal, Meiselman added that, “[w]hether one agrees or disagrees with [the Note’s] proposed standard . . . , the need for rethinking the ‘but for’ standard is obvious.” *Id.* at 51.

That rethinking has been going on for almost thirty years, and the Cornell Note has played a major role in that rethinking. In reported cases, its greatest effect has been in Ohio where, post-*Vahila*, it has been repeatedly cited by lower state courts and by the United States Court of Appeals for the Sixth Circuit in applying Ohio law. But many courts in other jurisdictions have also cited the Note respectfully. *See, e.g., Fishman v. Brooks*, 487 N.E.2d 1377, 1380 n.1 (Mass. 1986); *Lewandowski v. Continental Cas. Co.*, 276 N.W.2d 284, 187 n.2 (Wis. 1979); *Williams v. Bashman*, 457 F. Supp. 322, 326 n.1 (E.D. Pa. 1978). Other examples are legion. The Note has been taken seriously even in cases in which courts ultimately decided to adhere to a “but for” test. *See, e.g., Daugert v. Pappas*, 704 P.2d 600, 604 (Wash. 1995); *Mattco Forge v. Arthur Young & Co.*, 60 Cal. Rptr.2d 780, 788 (Cal. Ct. App. 1997). In one recent case, a New Jersey judge explicitly called for adoption of the Note’s proposal. *See Jerista v. Murray*, 842 A.2d 840, 848-49 (N.J. Super. Ct. App. Div. 2003) (Kestin, J., dissenting), *rev’d and remanded on other*

*grounds*, 883 A.2d 350 (N.J. 2005). One can reasonably disagree with aspects of the Cornell Note, but the Note was not, and is not, out of the judicial mainstream.

Commentators too have cited the Note often and with respect. *See, e.g.*, Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 U. Ill. L. Rev. 1181, 1193 n.52; Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions: Eradicating the Last Resort of Scoundrels*, 37 San Diego L. Rev. 401, 406 n.13 (2000); Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 Yale L.J. 1353, 1396 n.145 (1981); *Developments in the Law-Lawyers' Responsibilities and Lawyers' Responses*, 107 Harv. L. Rev. 1547, 1568 n.112 (1994). Not surprisingly, the prescriptive aspect of the Note has not commanded universal agreement – academics are not rewarded for agreeing with each other – but the Note's arguments have been deemed worthy of serious discussion, not summarily rejected as the “outdated” musings of a “student.”

**B. The Author of the Note.**

The Cornell Note was indeed written by a “student,” but this particular student earned degrees at MIT (S.B.) and the University of Chicago (M.A.) before receiving his law degree, *magna cum laude*, from the Cornell Law School in 1979. After graduation from law school, he clerked for the Honorable Monroe G. McKay on the United States Court of Appeals for the Tenth Circuit; practiced tax law at the New York firm of Sullivan & Cromwell for three years; and has taught (since 1983) at the Case Western Reserve University School of Law in Cleveland – the last nine years as the David L. Brennan Professor of Law.

The Cornell Note author has published dozens of articles, two books, and multiple pieces

of short commentary. The author has been elected to the American Law Institute and the American College of Tax Counsel. The author speaks regularly at American Bar Association Section of Taxation meetings, at Cleveland Tax Institute sessions, and at academic fora around the country. The author's work, including (but not limited to) the Cornell Note, has been cited by innumerable commentators and by many courts, both federal and state.

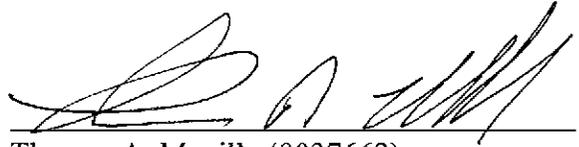
"Student" though the author was, the arguments of the Cornell Note should not be dismissed with the flick of a hand. And the author of the Note, a student no more, stands by the positions taken in the Note.

**C. Legal Scholarship in 1978.**

One final point is worth making about the utility of a "student" law review note written in 1978. Recent studies have described a decline in the extent to which the bar reads, and the judiciary cites, law review articles, and several prominent jurists, including the Honorable Harry Edwards of the United States Court of Appeals for the District of Columbia Circuit, have lamented what they see as an increasing separation between the legal academy and the practice of law. It is said that grand theoretical pieces, with only a tangential connection to *the law*, have replaced traditional, doctrinal articles in the law reviews. One is more likely to find an essay on literary criticism, say, in a top review than an article on the rule against perpetuities.

Whatever the merits of that criticism in 2007, it was decidedly not the case in 1978, when the Cornell Note was published. With few exceptions, law review associates at that time understood that their writing was to be doctrinal, focused, and connected to the real world. The Cornell Note was not a flighty piece of grand theory; it was a carefully crafted study intended to describe legal doctrine and to inform the development of that doctrine.

Respectfully submitted,

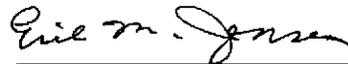


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A copy of the foregoing *Amicus Curiae* Brief of Erik M. Jensen in Response to Jurisdiction, has served by ordinary U. S. Mail on this 16<sup>th</sup> day of May, 2007, upon the following:

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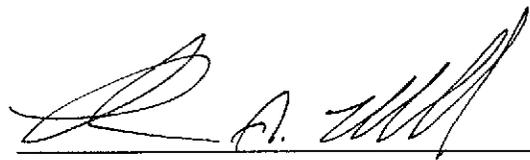
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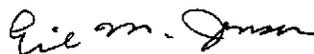
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