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Statement of Interest of Amici Curiae

Ohio Bar Liability Insurance Company, formed and owned by the Ohio State Bar Association, 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, a publicly traded insurer, has been writing lawyers professional liability insurance in Ohio, Michigan, and Indiana since the mid-1990s.

Although OBLIC and ProAssurance are competitors, both insurers have a vital interest in the issue raised by this appeal: the standard of proof of causation in legal malpractice cases. Such standard directly affects the number and size of legal malpractice claims in Ohio, the evaluation and resolution of such claims, and the settlement of or recoveries on such claims. These factors in turn affect both the underwriting risks for malpractice 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 by removing or reducing the uncertainty and confusion that have arisen as a result of some superfluous language in this Court's decision in *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164, and the lower courts' reliance on that language.

Statement of Facts

This legal malpractice action stemmed from defendant-appellant Goodman Weiss Miller L.L.P.'s representation of plaintiffs-appellees in a complex, commercial breach of contract action relating to the operation of a landfill. (R. 3, Complaint, ¶¶ 3-10; Opinion,

¶ 2.¹) After the trial of that action had begun, the parties entered into a substantial settlement in favor of plaintiffs. (Tr. VIII:1825-39, IX:1996; Pl. Ex. 29; Def. Ex. 66.)

Plaintiffs, however, were not satisfied with that settlement, and filed this legal malpractice action. In this action, plaintiffs alleged that Goodman Weiss was negligent in preparing and prosecuting the underlying contract case and forced plaintiffs into settling it. (R. 3, Complaint ¶¶ 3-10; Tr. X:2272, Jury Instruction; Opinion, ¶ 3.) Plaintiffs claimed that they would have obtained a better result if Goodman Weiss had tried the contract case instead of forcing plaintiffs to settle it. (Tr. X:2272, Jury Instruction; Opinion, ¶¶ 3, 17.)

This malpractice case was tried to a jury. (R. 257-269, 271, 272.) During the trial, Goodman Weiss moved for a directed verdict on the ground that plaintiffs had failed to prove that Goodman Weiss's alleged malpractice proximately caused the damages sought by plaintiffs, both at the close of plaintiffs' case and again at the close of all evidence. (Tr. VI:1331-43, 1359-61; Tr. IX:2094-96; R. 244, Mem. in Support.) The trial court denied both motions. (Tr. VI:1361; Tr. IX:2096.)

Thereafter the trial court submitted the case to the jury on an instruction that required the jury to find only that the plaintiffs had provided only "some evidence of the merits of plaintiffs' claims in the underlying litigation" in order to find causation. (Tr. X:2272-73.) Specifically, the trial court charged the jury as follows:

Plaintiffs must prove some evidence of the merits of the underling [sic: underlying] case claims. Plaintiffs must established [sic: establish] by a preponderance of the evidence, that the defendants breached his [sic: their] duty of care to the plaintiffs.

¹ This citation is to the court of appeals opinion in this case, which is posted on this Court's website at 2007-Ohio-831.

Further, plaintiffs 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 underlining [sic: underlying] case and you should take into account all evidence you have heard to determine whether there exists some evidence of the merits of plaintiffs claims in the underlining [sic: underlying] litigation.*

(Id.; emphasis added.)

The jury found that Goodman Weiss breached the standard of care (R. 271), and returned a verdict for plaintiffs in the amount of \$2,419,616.81. (R. 272.) The trial court entered judgment for plaintiffs accordingly. (R. 273.)

Thereafter, Goodman Weiss moved for judgment notwithstanding the verdict on the ground (among others) that plaintiffs had failed to prove that Goodman Weiss's alleged malpractice proximately caused the damages sought by the plaintiffs. (R. 274.) The trial court denied Goodman Weiss's motion, holding: "It is clear under *Vahila* [*v. Hall* (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164], 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.'" (R. 291, Order and Decision, p. 12.) The trial court further held that "Plaintiffs clearly provided 'some evidence of the merits of the underlying claim' in satisfaction of *Vahila*," and, therefore, that "Plaintiffs provided substantial probative evidence that [Goodman Weiss's] negligence proximately caused Plaintiffs' damages." (Id., p. 14.)

Goodman Weiss timely appealed. (R. 293.) On appeal, Goodman Weiss argued (among other things) that the trial court erred in denying Goodman Weiss a directed

verdict or judgment notwithstanding the verdict because plaintiffs-appellees failed to prove that the alleged legal malpractice was the proximate cause of any damages. (Brief of Defendant-Appellant in Court of Appeals, Assignment of Error #1; Opinion, ¶¶ 7, 23.) Goodman Weiss also argued that the trial court’s jury instruction regarding proximate cause was legally incorrect because it failed to require plaintiffs to prove what the result of a trial in the underlying case should have been but for the alleged malpractice. (Id., Assignment of Error #2; Opinion, ¶¶ 43-49.) The court of appeals, relying on some superfluous language in this Court’s decision in *Vahila*, disagreed and affirmed the judgment of the trial court. (Opinion, ¶¶ 26, 30, 42, 49.)

In affirming on proof of causation, 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,’” and that “[t]he trial court did not err in requiring plaintiffs to merely provide some evidence of the merits of the underlying claim.” (Id., ¶ 26.) The court then held that “[plaintiffs] clearly met *that* burden at trial.” (Id., ¶ 30; emphasis added.)

In so holding, the court of appeals found only that the plaintiffs had presented testimony, documents, and exhibits that established that their underlying case had “some merit.” (Id., ¶ 16.) Despite the fact that plaintiffs’ theory in their malpractice case was that they would have obtained a better result by trying the underlying contract case instead of settling it, the court of appeals did *not* find that plaintiffs had proven that “but for” Goodman Weiss’s negligence plaintiffs would have been successful in the underlying contract case. (Id. ¶¶17-22, 30.)

In affirming the propriety of the jury instruction, the court of appeals rejected Goodman Weiss's argument that the plaintiffs should have been required to prove what the result of the underlying case should have been "but for" the alleged malpractice. (Id., ¶ 49.) The court held instead that the standard of proof of causation by "some evidence of merits" "is entirely appropriate pursuant to *Vahila*." (Id.)

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* (1997), 77 Ohio St. 3d 421, 674 N.E.2d 1164, clarified and followed.)

Both the trial court and the court of appeals held that the plaintiffs were only required to provide "some evidence of the merits of the underlying claim" in order to recover for Goodman Weiss's alleged legal malpractice in not trying the underlying case to a judgment. (Tr. X:2272-73 (Jury Instruction); R. 291, Order and Decision, p. 12; Opinion ¶¶ 26, 42, 49). By so holding, the lower courts effectively eliminated the requirement of this Court's decision in *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 674 N.E.2d 1164, that in order to recover, the plaintiff in a legal malpractice action must prove a causal connection between the conduct complained of and the resulting damage or loss. 77 Ohio St. 421, at syllabus, 427, 674 N.E.2d 1164.

If the lower courts' decisions are allowed to stand, a malpractice plaintiff will not be required to prove causation in fact in order to recover damages from his attorney for legal malpractice. Instead, a plaintiff will only need to prove that the attorney was

negligent in some respect, that the underlying claim had “some merits,” and that the plaintiff recovered less than the plaintiff wanted in the underlying action. Such a result is contrary to the existing decisions of this Court and should not be allowed to stand.

A. This Court’s decision in *Vahila* did not eliminate the requirement that a plaintiff in a legal malpractice case based on negligent misrepresentation must prove causation in fact in order to recover.

“The principles and proof of causation in a legal malpractice action do not differ from those governing an ordinary negligence case.” 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* (2007 Ed.) § 8:5 (“Mallen & Smith”). “A basic tenet of any cause of action, no matter the legal theory, is that the alleged wrongful conduct of the attorney be a cause of the plaintiff’s injury.” *Id.*

“Analysis of causation involves two separate issues.” 4 Mallen & Smith § 30:6. “First, ‘causation in fact,’ also known as ‘but for’ causation, concerns whether the conduct was a factor in producing the injury that is the subject of the complaint.” *Id.* “If the link is not present, there need be no further inquiry and there is no liability.” *Id.* “If the causal link is present, the second issue, the concept of ‘proximate cause,’ injects a policy or legal consideration of whether legal responsibility ‘should’ attach.” *Id.*

In *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 674 N.E.2d 1164, 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 421, at syllabus, 427, 674 N.E.2d 1164.

Leading up to this holding in *Vahila*, the Court 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, 674 N.E.2d 1164, quoting *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 106, 538 N.E.2d 1058. Under the existing precedent of this Court at the time *Vahila* was decided, "[t]he standard test for establishing causation [was] the *sine qua non* or 'but for' test." See *Anderson v. St. Francis-St. George Hosp., Inc.* (Oct. 10, 1996), 77 Ohio St.3d 82, 84, 671 N.E.2d 225, citing Prosser & Keeton on the Law of Torts (5th Ed. 1984) 266. Thus, it is plain that this Court in *Vahila* did not eliminate the requirement that a plaintiff prove causation in fact in a legal malpractice case.

In *Vahila*, "[t]he majority of the allegations [of malpractice] stem[med] from the failure of [the defendant lawyers] to properly to disclose all matters and/or legal consequences surrounding the various plea bargains entered into by [one client] and the settlement arrangements agreed to by [all three clients] with respect to the several civil matters." 77 Ohio St. 3d at 427, 674 N.E.2d 1164. In addition, the plaintiffs "also asserted that [the defendant lawyers] failed to adequately protect their interests in many of the underlying matters and negligently failed to secure viable defenses on their (appellees') behalf." *Id.* This Court, therefore, rejected "a blanket proposition that requires a plaintiff to prove, *in every instance*, that he or she would have been successful in the underlying matter." 77 Ohio St.3d at 428, 674 N.E.2d 1164 (emphasis added). While the Court recognized that "the requirement of causation *often* dictates that the

merits of the malpractice action depend upon the merits of the underlying case,” the Court went on to say somewhat superfluously, that “a plaintiff may be required, *depending upon the situation*, to provide some evidence of the merits of the underlying claim.” 77 Ohio St.3d at 427-28, 674 N.E.2d 1164 (emphasis added). The Court in *Vahila*, however, did not define *when* the requirement of causation dictates that the merits of the malpractice action depend upon the merits of the underlying case.

As a result, *Vahila* has 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 lower courts in this case have gone even farther. In this case, where plaintiffs contend they would have obtained a better result in the underlying case if it had been tried instead of settled, the lower courts eliminated the traditional element of causation in claims for legal malpractice and substituted in its place mere proof of “some evidence of the merits of the underlying claim.” (Tr. X:2272-73 (Jury Instruction); R. 291, Order and Decision, p. 12; Opinion ¶¶ 26, 42, 49.)

While it may have been sensible not to require proof of “but for” causation under the facts of *Vahila*, the ruling of the lower courts in this case—that the plaintiffs need not prove that they would have been successful in their underlying case—makes no sense under the facts here. In *Vahila*, the plaintiffs’ claims were that their lawyers failed to properly disclose pertinent information about their plea bargains and settlement agreements and to adequately protect their interests in the underlying matters. 77 Ohio St. 3d at 427, 674 N.E.2d 1164. Accordingly, this Court said in *Vahila*: “given the facts of this case, appellants have arguably sustained damage or loss regardless of the fact that

they may be unable to prove that they would have been successful in the underlying matter(s) in question.” *Id.* Conversely, plaintiffs here claim that they would have won *and* obtained a better result *if they had tried this case* instead of settling it. Thus, this case presents a very different situation from *Vahila*; this case depends upon the ability of plaintiffs to prove not only that they would have been successful in trying the underlying case but also that they would have done better by trying the underlying case.

Nonetheless, the lower courts failed to apply the holding in the syllabus and text of *Vahila* and require plaintiffs to prove that they would have been successful and would have obtained a better result in the underlying case had it been tried. Instead, both the trial court and the court of appeals fastened upon the ambiguity 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.’” (R. 291, Order and Decision, p. 12; Opinion ¶ 26.)

Moreover, the court of appeals, in affirming the trial court’s judgment, further held that “[t]he trial court did not err in requiring plaintiffs to merely provide some evidence of the merits of the underlying claim.” (Opinion, ¶ 30.) In so doing, the court of appeals also rejected the Goodman Weiss’s challenge to “the articulation of ‘some evidence of merits’ as the applicable standard of causation in a legal malpractice case.” To the contrary, the court held: “As stated above, this standard of proof is entirely appropriate pursuant to *Vahila*, *supra*.” (*Id.*, ¶ 49.) The court of appeals’ decision thus eliminates the element of causation in fact in legal malpractice cases.

Plaintiffs’ showing of merely “some evidence of the merits of the underlying claim” did not establish that there was any “causal connection between the conduct

complained of and the [plaintiffs' alleged] damage or loss," as required by *Vahila*, 77 Ohio St.3d at 421-22, syllabus, 427, 674 N.E.2d 1164. "The standard test for establishing causation is the *sine qua non* or 'but for' test." *Anderson*, 77 Ohio St.3d at 84, 671 N.E.2d 225. Therefore, plaintiffs should have been required to show that "but for" Goodman Weiss's alleged malpractice they would have won the underlying case at trial and would have obtained a better recovery as a result.

Accordingly, this Court should reaffirm that its holding in *Vahila* requires proof of causation in fact in order to establish the requisite "causal connection between the conduct complained of and the resulting damage or loss." At the same time, this Court should also make clear that merely providing "some evidence of the merits of the underlying claim" will not suffice as proof of causation in an action for legal malpractice. Finally, this Court should reverse the judgment below and enter judgment for Goodman Weiss as a matter of law.

B. This Court should not adopt a lower standard of proof of causation in legal malpractice cases.

Because this case was not submitted to the jury or decided by the trial court or the court of appeals on the "but for" standard of causation required by this Court's decision in *Vahila*, plaintiffs may argue that the traditional standard of proof of causation is too burdensome and that some lower standard of causation should be adopted instead. (See, e.g., Appellees' Memorandum in Response to Jurisdiction, pp. 10-11, 13-15.) Any such argument should be rejected.

First, it does not appear that any state court outside of Ohio has adopted the "some evidence of the merits of the underlying claim" standard of causation adopted by the lower courts in this case. Second, although other lower standards of proof of causation

have been proposed by academic authors, they are inapplicable or inadequate and should also be rejected by this Court.

1. The “lost substantial possibility of recovery” standard from medical malpractice cases is inapplicable to legal malpractice cases.

In the 1978 Cornell student note cited by this Court in its opinion in *Vahila*, the author proposed an alternative standard for proof of causation; namely, requiring the plaintiff to prove a “lost substantial possibility of recovery.” Note, *The Standard of Proof of Causation in Legal Malpractice Cases* (1978), 63 Cornell L. Rev. 666, 667, 679-80. The author based this proposed standard on the “medical misdiagnosis cases” which allow recovery in certain medical malpractice cases upon proof of a “lost substantial possibility of survival.” *Id.* at 679. This Court did not adopt this proposed standard in *Vahila*, and the Court should not adopt it now for two, very good reasons: it is inapplicable to legal malpractice cases, and reliable statistical data required to apply the test in legal malpractice cases does not exist. *Daugert v. Pappas* (Wash. 1985), 704 P.2d 600, 605; see John C.P. Goldberg, *What Clients are Owed: Cautionary Observations on Lawyers and Loss of Chance* (2003), 52 Emory L.J. 1201 (“despite the intuitive appeal of loss of a chance doctrine on grounds of both fairness and deterrence, courts ought to be wary about transplanting it from the fringes of medical malpractice into the law of legal malpractice”).

As the Washington Supreme Court has explained, “there is no lost chance” where a client did not obtain a result more favorable to the client. *Daugert*, 704 P.2d at 605. Unlike a patient in a medical malpractice case, “[t]he client in a legal malpractice case can eventually have the case reviewed.” *Id.* “On the other hand, in the medical context, when a patient dies all chances of survival are lost.” *Id.*

As further explained by Professor Goldberg, “[i]n the medical malpractice context, we will likely never know if the decedent would have been one of the lucky thirty percent who lived or the unlucky seventy percent who died. By contrast, when one tries the ‘case within the case’ in a legal malpractice action, one asks a jury or judge precisely to determine whether or not the client would have ‘lived or died,’ i.e., won or lost the matter in which she was being represented by the attorney.” Goldberg, 52 Emory L.J. at 1211.

“In other words, part of what the jury does in a legal malpractice action is to determine if the plaintiff can plausibly claim that she probably would have prevailed in the underlying claim. To be sure, this may be a difficult showing for any given malpractice plaintiff, but at least the opportunity is there. No equivalent opportunity exists for the medical malpractice claimant.” *Id.* at 1212.

“Furthermore, unlike the medical malpractice claim wherein a doctor’s misdiagnosis of cancer causes a separate and distinguishable harm, i.e., diminished chance of survival, in a legal malpractice case there is no separate harm. Rather, the attorney will be liable for all of the client’s damages if . . . a more favorable decision [would] have been rendered.” *Daugert*, 704 P.2d at 605.

Finally “[t]he critical prerequisite for employment of loss of a chance in the medical context is the existence of reliable statistical information, gleaned from rigorous studies that are typically generated outside the context of litigation, as to the survival rates of patients who are classified by reference to various objective characteristics.” Goldberg, 52 Emory L.J. at 1212. “The presence of this sort of reliable statistical information, which is capable of being introduced to the jury at trial by a competent

expert witness, helps explain the concern behind, and perhaps the propriety of the adoption of loss of a chance in the medical setting.” Id. at 1212.

But there is no comparable base of reliable statistical information in legal malpractice cases. “Because we are dealing with outcomes determined entirely by human interactions, rather than events dominated by biological processes, there is now, and may always be, a dearth of controlled studies and meaningful statistical information that might permit a qualified expert justifiably to assign a percentage chance of success to a given type of legal claim.” Id. “Likewise, there is no well-defined body of expertise that purports to set standards for the drawing of sound inferences about the chances of prevailing on a given kind of legal claim.” Id. “In short, the jury in a legal malpractice claim is not being presented with sound statistical information as to whether, absent malpractice, this sort of client, in this sort of circumstance, has a three in ten chance of prevailing. Rather, the jury is necessarily required to consider the ‘case within the case’ as a one-off event.” Id.

Moreover, even if this standard were adopted it would not avail plaintiffs in this case. “Some evidence of the merits of the underlying claim” falls far short of proof of a “lost substantial possibility of recovery.”

- 2. The “substantial factor” standard, as proposed in one article does not require *any* causal connection between the alleged malpractice and the resulting damage or loss, and is inconsistent with the “substantial factor” standard of the Restatement (Second) of Torts.**

Another standard of proof of causation that has been proposed for legal malpractice cases in an academic article cited by plaintiffs is the “substantial factor” standard. Lawrence W. Kessler, *Alternative Liability in Litigation Malpractice Actions:*

Eradicating the Last Resort of Scoundrels (2000), 37 San Diego L. Rev. 401, 504-05.²

The “substantial factor” standard as proposed by Professor Kessler, however, does not itself establish *any* necessary connection between the alleged malpractice and the resulting damage or loss.

Thus, under Professor Kessler’s “substantial factor” test, “the client would be able to establish the prima facie case by proving malpractice and the loss of the litigation,” since proof of the malpractice “would simultaneously be direct proof of fault and circumstantial proof of causation.” 37 San Diego L. Rev. at 505. It would then be up to the attorney “to introduce evidence to rebut the circumstantial inference” of causation. *Id.*

The problem with Professor Kessler’s approach, like the one applied by the lower courts in this case, is that it does necessarily establish *any* causal connection between the malpractice and the loss of the case; mere proof of malpractice is not proof of causation. The “substantial factor” standard set forth in the Restatement (Second) of Torts, on the other hand, is very different. See Restatement (Second) of Torts (1965) §§ 431, 432(1), 433B.

First, under the Restatement, an “actor’s negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm.” Restatement, § 431(1). In this context, “[t]he word ‘substantial’ is used to denote the fact

² In reality, Professor Kessler’s proposed standards of alternative proof of causation in legal malpractice cases are nothing more than propositions for shifting the burden of proof in legal malpractice cases from the plaintiff client to the defendant attorney. See 37 San Diego L. Rev. at 503-19. As a result, the entire thrust of Professor Kessler’s article and proposals are contrary to the Restatement (Second) of Torts: “the burden of proof that the tortious conduct of the defendant has caused harm to the plaintiff is upon the plaintiff.” Restatement (Second) of Torts (1965) § 433B(1).

that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause." *Id.*, Comment *a*. Second, "the actor's negligent conduct is not a substantial factor in bringing about the harm to another if the harm would have been sustained even if the actor had not been negligent." *Id.*, § 432(1). Third, the "burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff," not the defendant as in Professor Kessler's "substantial factor" test. *Id.*, § 433B(1).

Assuming arguendo that the challenged conduct was malpractice, as every lawyer and judge knows, plaintiffs still could have lost the underlying case or recovered less than the settlement if they had gone to trial because they had a weak case, even if their claims had "some merit." As a result, proving merely that Goodman Weiss committed malpractice in some respect, that the plaintiff's claims had "some merit," and that plaintiffs were forced to settle their case does not establish that Goodman Weiss's conduct had "such an effect in producing the harm as to lead reasonable men" to conclude that plaintiffs would have won and obtained a better recovery in the absence of any malpractice. Plaintiffs' proof simply fails to establish any link between the alleged malpractice and any alleged harm from settling the case rather than trying it. Consequently, such evidence would not establish causation under the Restatement "substantial factor" standard.

Under the Restatement, only where, "as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists." *Id.*, § 433B(1), Comment *b*. In legal malpractice cases, like this one, it is not "a matter of

ordinary experience” of lay jurors—or even lawyers or judges—that some element of malpractice by the plaintiff’s attorney will cause the plaintiff to recover less through settlement than through trial. Compare *id.*, Illustrations 3 and 4. It simply is not “a matter of ordinary experience” of reasonable men that, absent any malpractice, a plaintiff will win a case and recover more through trial than through settlement, even where there is “some merit” to the plaintiff’s claims.

Moreover, application of the “substantial factor” test would be inappropriate under the circumstances of this case. “[T]he substantial factor test aids in disposition of three types of cases.” *Daugert*, 704 P.2d at 605, citing Prosser & Keeton on the Law of Torts (5th Ed. 1984) § 41. “First, the test is used where either one of two causes would have produced the identical harm, thus making it impossible for the plaintiff to prove the but for test. In such cases, it is quite clear that each cause has played so important a part in producing the result that responsibility should be imposed on it.” *Id.* “Second, the test is used where a similar, but not identical, result would have followed without the defendant’s act.” *Id.* “Third, the test is used where one defendant has made a clearly proven but quite insignificant contribution to the result, as where he throws a lighted match into a forest fire.” *Id.* This case is not one of these types of cases.

First, it is not impossible for plaintiff in this case to prove the “but for” test; through the case-within-a-case method the plaintiff has the ability to prove that it was the alleged malpractice—and not any weakness in their case—that caused the alleged damages. Second, this is also not a case where a similar, but not identical, result would follow absent the alleged malpractice: weakness in plaintiffs’ case alone could have resulted in plaintiffs losing or recovering less with or without the alleged malpractice.

Third, this is not a case where the defendant has made a quite insignificant contribution to the result: plaintiffs' claim here was that absent the alleged malpractice they would have obtained a better result. Thus, this is not the kind of case for which the substantial factor standard is appropriate.

Indeed, as stated in the section of the Prosser and Keeton treatise cited by the Washington Supreme Court: "no case has been found where the defendant's act could be called a substantial factor when the event would have occurred without it." Prosser & Keeton on the Law of Torts § 41, p. 268. Yet in this case, it is clear that plaintiffs could have lost their case or recovered less at trial due to weakness in their case absent any malpractice whatsoever.

Thus, even if the "substantial factor" test, as defined in the Restatement, were adopted it would not avail plaintiffs in this case. First, plaintiffs could have lost their case or recovered less at trial due to weakness in their case in the absence of any malpractice whatsoever. Second, "some evidence of the merits of the underlying claim" simply is not proof that the alleged malpractice was a "substantial factor" in causing plaintiffs' alleged harm. There is nothing in human experience that would lead a reasonable man to conclude that mere proof of "some evidence of the merits of the underlying claim" will lead to a better recovery by trial than through settlement.

Conclusion

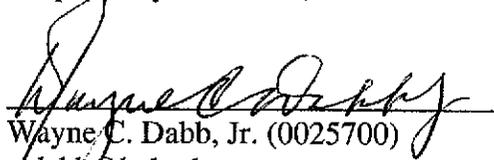
Causation is the essential nexus between negligence and the recovery of damages in tort cases. By substituting "some evidence of the merits of the underlying claim" for causation in this case, the court of appeals has allowed plaintiffs to recover substantial

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.

If the appeals court's decision is allowed to stand, it will have a chilling effect on the settlement of cases and will open the door to a succession of litigation. Ohio lawyers will hesitate to recommend settlement of cases because a plaintiff who, after agreeing to settle, believes his or her settlement was not 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.

Accordingly, the Court should reverse the judgment below and reaffirm that the law of Ohio requires proof of causation in fact 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 Merit Brief in Support of Appellant of Amici Ohio Bar Liability Insurance Company and ProAssurance Corporation was sent by first-class U.S. mail, postage prepaid, to the following counsel on November 13, 2007:

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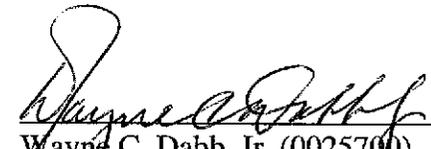
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