
In the Supreme Court of Ohio

ENVIRONMENTAL NETWORK CORPORATION, ET AL.,

Plaintiffs-Appellees,

v.

GOODMAN WEISS MILLER LLP,

Defendant-Appellant.

**ON DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. CA-06-087782**

MERIT BRIEF OF APPELLANT, GOODMAN WEISS MILLER LLP

Richard A. Simpson (admitted pro hac vice)
(Counsel of Record)
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006-1040
Telephone: (202) 662-2035
Facsimile: (202) 662-2190
rsimpson@rdblaw.com

Monica A. Sansalone (0065143)
GALLAGHER SHARP
Sixth Floor – Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Telephone: (216) 522-1154
Facsimile: (216) 241-1608
msansalone@gallaghersharp.com

Attorneys for Appellant,
Goodman Weiss Miller LLP

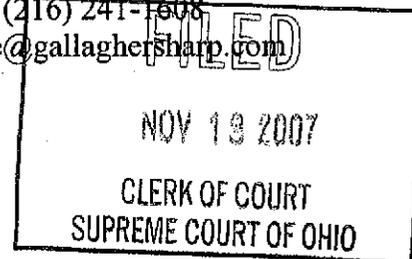


TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	4
A. Procedural History	4
B. The Underlying Case	6
C. The Malpractice Case	11
D. The Appeal	19
III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW	20

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. <i>Vahila v. Hall</i>, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, explained and applied.....	20
A. Standard of Review	20
B. <i>Vahila</i> Does Not Absolve a Legal Malpractice Plaintiff, In All Circumstances, From Proving by a Preponderance of the Evidence That He Would Have Achieved a Better Result at Trial but for the Alleged Malpractice.	21
1. <i>Vahila</i> and this Court’s prior decision in <i>Krahn</i> , on which <i>Vahila</i> relied, teach that the nature of the proof of proximate cause and damages required in a legal malpractice action depends on the nature of the damages allegedly sustained; proof of the merits of an underlying case is required where a plaintiff’s damages theory logically depends on such proof.	21
2. On these facts, the only way for plaintiffs to prove causation is by proving that they would have succeeded on the merits of the underlying case.	29
a) Plaintiffs Should Have Been Required to Prove They Would Have Been Successful At Trial of the Underlying Case.	31
b) Plaintiffs Should Have Been Required To Prove They Would Have Obtained a Net Recovery in the Underlying Case.	34

C. Summary.....	36
IV. CONCLUSION	39
CERTIFICATE OF SERVICE	40
APPENDIX	

Notice of Appeal to the Ohio Supreme Court (filed April 25, 2007).....	A-1
Journal Entry and Opinion of the Eighth District Court of Appeals, No. 87782 (March 12, 2007)	A-5
Order and Decision, No. CV-02-488462 (Cuyahoga C.P., dated Jan. 30, 2006)	A-23
Journal Entry of Jury Verdict and Judgment, No. CV-02-488462 (Cuyahoga C.P., dated Oct. 20, 2005)	A-49
Denial of Defendants’ Motions for Directed Verdict, No. CV-02-488462 (Bench Ruling Sept. 30, 2005)	A-52

UNREPORTED CASES

<i>Endicott v. Johrendt</i> (June 22, 2000), 10th Dist. No. 99AP-935, 2000 Ohio App. LEXIS 2697	A-54
<i>Pschesang v. Schaefer</i> (Aug. 11, 2000), 1st Dist. No. C-990702, 2000 Ohio App. LEXIS 3602	A-62
<i>Talley v. John H. Rion & Associates</i> (Dec. 31, 1998), 2nd Dist. No. 17135, 1998 Ohio App. LEXIS 6400	A-65

TABLE OF AUTHORITIES

CASES

<i>Alexander v. Turtur & Associates, Inc.</i> (Tex.2004), 146 S.W.3d 113	33, 34
<i>Cleveland Electric Illuminating Co. v. Public Utility Commission of Ohio</i> 76 Ohio St. 3d 521, 1996-Ohio-298, 668 N.E.2d 889	20
<i>Cunningham v. Hildebrand</i> (2001) 142 Ohio App. 3d 218, 755 N.E.2d 384	26
<i>Endicott v. Johrendt</i> (June 22, 2000), 10th Dist. No. 99AP-935, 2000 Ohio App. LEXIS 2697	35
<i>Goodyear Tire & Rubber Co. v. Aetna Casualty & Surety Co.</i> 95 Ohio St. 3d 512, 2002-Ohio-2842, 769 N.E.2d 835	20
<i>Jarrett v. Forbes, Fields & Associates Co., LPA</i> 8th Dist. No. 88867, 2007-Ohio-5072	28
<i>Krahm v. Kinney</i> (1989), 43 Ohio St. 3d 103, 538 N.E.2d 1058	passim
<i>Lewis v. Keller</i> 8th Dist. No. 84166, 2004-Ohio-5866	26, 27
<i>Lieberman v. Employers Insurance of Wausau</i> (1980), 84 N.J. 325, 419 A.2d 417	33
<i>Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons & Bibbo</i> 10th Dist. No. 01AP-1137, 2003-Ohio-1633	28
<i>Paterek v. Petersen & Ibold</i> 11th Dist. No. 2005-G-2624, 2006-Ohio-4179, review granted (Jan. 24, 2007), Case No. 2006-1811	4, 28
<i>Pschesang v. Schaefer</i> (Aug. 11, 2000), 1st Dist. No. C-990702, 2000 Ohio App. LEXIS 3602	32
<i>Ruble v. Kaufman</i> 8th Dist. No. 81378, 2003-Ohio-5375	27, 28

Talley v. John H. Rion & Associates
(Dec. 31, 1998), 2nd Dist. No. 17135, 1998 Ohio App. LEXIS 640027

Vahila v. Hall
77 Ohio St. 3d 421, 1997-Ohio-259, 674 N.E.2d 1164passim

TREATISES

Mallen & Smith, Legal Malpractice (2007 Ed.) Section 30.52 4

Mallen & Smith, Legal Malpractice (2007 Ed.) Section 33.9 2, 32, 33

Restatement of the Law 3d, Law Governing Lawyers (2000),
Section 53, Comment *b* 2, 32, 34

I. INTRODUCTION

Contrary to the decisions of the lower courts in this case, *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, did not hold that a plaintiff may satisfy the causation and damages elements of a legal malpractice claim merely by presenting “some evidence” of the merits of the underlying case in which the defendant attorney allegedly committed malpractice. The “some evidence” language in *Vahila* was dictum. The Court’s only holding reaffirmed that there are three essential elements to a legal malpractice claim: duty, breach of duty, and a causal connection between the conduct complained of and the allegedly resulting damage or loss. The core principle articulated in the *Vahila* opinion, and in this Court’s prior decision in *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058, is that the nature of the causal connection required depends upon the nature of the harm allegedly suffered as a result of attorney malpractice. In this regard, the lower courts in this case misinterpreted the “some evidence” dictum to mean that a legal malpractice plaintiff *never* is required to prove that he would have been successful in the underlying case. In fact, however, this case presents the classic circumstances under which, to establish causation and damages, a legal malpractice plaintiff *must* prove that he would have been successful in the underlying case, and what the amount of his net recovery would have been. The decision of the Eighth Appellate District Court, in reaching a contrary conclusion, departed from well-established, fundamental principles applicable to all tort claims, as well as from the holding and core principles of *Vahilia* and *Krahn*.

Plaintiffs in this case contended that they were coerced into settling an underlying case and said that they would have obtained a better result if the underlying case instead had been tried to a conclusion. They did not contend that they lost an opportunity to obtain a better settlement. In fact, undisputed evidence established that the settlement plaintiffs obtained was a

very favorable one for them, i.e. plaintiffs got the full value to which they were entitled based on the existence of “some evidence” that their claims had merit. They did not contend that they incurred additional legal fees or other expenses because of the alleged malpractice. And they did not contend that the alleged malpractice caused them to suffer any other detriment whatsoever. Rather, they contended *solely* that a full trial on the merits would have resulted in an outcome more favorable to them than the one that they obtained by virtue of the allegedly coerced settlement.

Under these circumstances, logic, common sense and established law all compel the conclusion that plaintiffs should have been required to prove by a preponderance of the evidence that, but for legal malpractice, they in fact would have won the underlying case, and what the net amount of their recovery would have been.¹ Yet, the trial court and the Eighth Appellate District Court allowed a recovery of over \$2.4 million speculative dollars based solely on a showing that there was “some evidence” of the merits of plaintiffs’ underlying case. The lower courts did not require plaintiffs to prove – and Plaintiffs did not even attempt to prove – that they would have won a trial of the underlying case. Plaintiffs did not present the full case-within-the-case, nor did they offer any expert testimony as to the likely outcome of the underlying case if it had been tried to a conclusion. Indeed, the only evidence as to the likely outcome of the underlying case was that the plaintiffs would have done worse if the case had been tried to a conclusion than they did as a result of the allegedly coerced settlement.

¹ Technically, the issue properly is framed as what the result in the underlying case “should” have been, not what the result “would” have been, since the function of the jury in the legal malpractice case is to decide whether the underlying case was meritorious, not to decide what a particular judge or jury would have done. 4 *Mallen & Smith, Legal Malpractice* (2007 Ed.) 1046-52, Section 33.9 (“Mallen”); *Restatement of the Law 3d, Law Governing Lawyers* (2000) 389, Section 53, Comment *b* (“Restatement”). In practice, the terms “would” and “should” often are used interchangeably. In any event, the legal malpractice plaintiff must prove the merits of the underlying case in order to establish causation and damages.

If the judgment below stands, then under Ohio law, any client who wishes after-the-fact that he had gotten a better settlement could recover additional amounts in a malpractice action against his attorneys, merely by showing “some evidence” that his underlying claims had merit. But that standard necessarily leads to unacceptable and irrational outcomes, which inherently demonstrate that the “some evidence” standard is inappropriate in a case like this one. For example, following an arm’s length reasonable settlement of litigation between adverse parties A 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 their respective 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 holding of the courts below, because in virtually every case that survives a motion for summary judgment (or perhaps even just a motion to dismiss) *all parties* can present “some evidence” that their respective claims or defenses had merit. Here, plaintiffs achieved in a favorable settlement the full value to which they were entitled based on the existence of “some evidence” of the merit of their claims.

The lower courts mistakenly believed that *Vahila* compelled them to apply this “some evidence” standard, and thus to permit recovery without requiring proof by a preponderance of the evidence of what the result of the underlying case would have been absent the alleged malpractice. As discussed below, other Ohio courts likewise have struggled with the “some evidence” language in *Vahila* in cases like this one. Some lower court decisions properly require the plaintiff to prove as an essential prerequisite to recovery that he would have prevailed in the underlying case. Other lower court decisions reach the right result despite applying the inappropriate “some evidence” standard because plaintiffs could not satisfy even that low

requirement. Finally, in at least one other case, as in this one, a lower court mistakenly relied on *Vahila*'s "some evidence" dictum to reach an irrational and indefensible result. See *Paterek v. Petersen & Ibold*, 11th Dist. No. 2005-G-2624, 2006-Ohio-4179, review granted (Jan. 24, 2007), Case No. 2006-1811.

On its facts, *Vahila* was correctly decided. There can be no doubt, however, that the "some evidence" dictum has created confusion that requires clarification by this Court. 4 *Mallen & Smith, Legal Malpractice* (2007 Ed.) 688, Section 30.52 ("[i]n Ohio, causation needs clarification by the state's supreme court").

II. STATEMENT OF FACTS

A. Procedural History

This case arises out of Appellant, Goodman Weiss Miller LLP's ("GWM"), representation in 2001 of Plaintiffs-Appellees, Environmental Network Corp. ("ENC"), Environmental Network and Management Corp. ("ENMC") and John J. Wetterich, the president of ENC and ENMC (collectively, "Plaintiffs"). Specifically, GWM represented Plaintiffs in consolidated commercial lawsuits involving multiple claims, counterclaims, and cross-claims among Plaintiffs, Waste Management of Ohio ("WMO"), TNT Rubbish Disposal, Inc. ("TNT"), and others involving a landfill in Ohio (the "Underlying Case"). In the complex mix of competing claims that comprised the Underlying Case, Plaintiffs were exposed to more than \$3,700,000 in potential judgments, and Mr. Wetterich faced the very real threat of personal liability for his companies' obligations. On the second day of trial, at the strong urging of a trial judge who was sitting as fact-finder, GWM negotiated a settlement on Plaintiffs' behalf that (i) extinguished more than \$3,000,000 in debt Plaintiffs concededly owed to WMO; (ii) settled judgment creditors' bills against Plaintiffs of more than \$700,000; and (iii) awarded \$40,000 to Mr. Wetterich to be applied to GWM's outstanding legal bills. Mr. Wetterich participated in the

settlement negotiations and approved the very favorable settlement terms, both that day and more than four months later when, after consulting with three attorneys who had not participated in the trial, he signed the settlement papers.²

In April of 2002, when Mr. Wetterich signed the settlement papers, the settlement closed. Yet, Mr. Wetterich did not pay GWM's outstanding bills for legal services and expenses.³ When GWM would not ignore Wetterich's non-payment, Plaintiffs brought this legal malpractice action on December 9, 2002 (two days before the one-year anniversary of the in-court settlement),⁴ for the first time alleging that GWM had failed to prepare properly for trial in the Underlying Case and, being either unwilling or unable to proceed through trial, had coerced Plaintiffs into settling the case on the second day of trial rather than trying it to a conclusion.⁵ Plaintiffs claimed that GWM's actions prejudiced their ability adequately to prosecute their claims in the Underlying Case, and they sought damages for the allegedly resulting impairment of their interest in those claims.⁶ GWM answered and counterclaimed for, among other things, breach of contract, misrepresentation, fraud and abuse of process, and sought recovery of more than \$222,000 in unpaid legal fees and costs for the services that GWM had rendered for Plaintiffs in the Underlying Case.⁷

² Transcript, Vol. VI at 1452 (Miller), Supp. at 384a.

³ Id., Vol. VII at 1505 (Miller), Supp. at 387a.

⁴ Given the timing of the filing of suit, immediately before arguable expiration of the statute of limitations, strongly suggests that the malpractice claim was a preemptive strike intended to deter GWM from seeking collection of its unpaid fees.

⁵ Complaint, ¶ 6, Supp. at 3.

⁶ Id., ¶ 10, Supp. at 3.

⁷ The abuse of process claim was dropped shortly before trial. Transcript, Vol. I at 46, Supp. at 140.

The malpractice case was tried to a jury from September 19, 2005, to September 30, 2005. At the close of Plaintiffs' case, GWM moved for a directed verdict as a matter of law on several grounds, including that Plaintiffs had failed to prove the better result that they claimed would have been achieved at a trial of the Underlying Case absent the alleged malpractice. The trial court denied the motion.⁸ On October 3, 2005, the jury found for Plaintiffs on the legal malpractice claim and awarded them compensatory damages of \$2,419,616.81. The allegedly coerced settlement was the only damage theory presented by Plaintiffs.⁹ On October 20, 2005, the trial court entered judgment on the jury verdicts.

GWM timely requested the trial court to set aside the jury verdict and enter final judgment for it, pursuant to Civ.R. 50(B), or, in the alternative, to order a new trial, pursuant to Civ.R. 50(A). The trial court denied GWM's motion on January 30, 2006, and the Court of Appeals affirmed the trial court's judgment.

B. The Underlying Case

The Underlying Case was anything but a garden variety breach of contract case. It comprised two consolidated complex commercial lawsuits involving multiple claims by and among many parties over several businesses and transactions in the waste transportation and disposal industry in connection with various alleged breaches of a secured loan contract known

⁸ Transcript, Vol. VI at 1361, Supp. at 368.

⁹ In response to interrogatories propounded by the trial court, the jury found the following six instances of legal malpractice: (i) no engagement letter; (ii) overall lack of preparedness; (iii) failure to seek a continuance so attorney Steven J. Miller could participate in the trial; (iv) Appellees were coerced into signing the settlement agreement; (v) failure to seek recusal of the trial judge; and (vi) counsel for Appellees alienated the trial judge. Transcript, Vol. X at 2342, Supp. at 489. Except for the alleged coercion of the settlement, none of these alleged instances of malpractice bears any rational relationship to Appellees' damage theory, and Appellees never attempted to submit any evidence establishing a causal link with respect to any of them. Appellees' only damage theory was that they were coerced into accepting the settlement, and that they otherwise would have tried the Underlying Case to a conclusion.

as the San-Lan Agreement. The agreement required Plaintiffs to build out a certain amount of airspace in a landfill in Ohio in return for (1) a loan by WMO to Plaintiffs to finance the build-out, and (2) repayment by Plaintiffs by crediting WMO for trash it dumped at the landfill.

In 1998, Plaintiffs filed lawsuits against TNT and its owners to recover on a note in the amount of \$550,000 and to obtain payment on trade debt worth approximately \$800,000.¹⁰ TNT filed counterclaims against Plaintiffs,¹¹ and WMO intervened, filing additional claims against Plaintiffs.¹² Mr. Wetterich admitted that his company ENMC owed WMO \$600,000-\$700,000 on a promissory note,¹³ and that his other company ENC otherwise owed WMO about \$2.2 million.¹⁴ Plaintiffs then asserted a breach of contract claim against WMO, contending that WMO had failed to pay them \$800,000 in addition to the \$1.2 million that ENMC already had received under the San-Lan Agreement for building out the second phase of the landfill's airspace.¹⁵ WMO and TNT also asserted claims against each other.¹⁶ Moreover, several judgment creditors of Mr. Wetterich's companies ENC and ENMC filed substantial creditors'

¹⁰ See Transcript, Vol. III at 698 (Wetterich), Supp. at 183.

¹¹ Id., Vol. IV at 845 (Wetterich), Supp. at 266.

¹² Id. at 842 (Wetterich), Supp. at 264; Vol. VII at 1597-1601 (Michelson), Supp. at 390-94.

¹³ Id., Vol. IV at 872-73 (Wetterich), Supp. at 276-77.

¹⁴ Id. at 927, Supp. at 303.

¹⁵ Under the December 1996 San-Lan Agreement, WMO agreed to lend ENMC up to \$2 million. The loan was secured by an amount of airspace required to be created by ENMC, the sale of which to WMO would pay off the loan. Supp. at 7. WMO disputed that EMC was entitled to the \$800,000, and alleged that ENMC and ENC in fact owed WMO about \$3 million. Transcript, Vol. IV at 844 (Wetterich), Supp. at 265.

¹⁶ Id., Vol. VII at 1626 (Michelson), Supp. at 398.

bills to prevent distribution to Plaintiffs of any judgment proceeds in the Underlying Case.¹⁷

These bills, which were consolidated with the Underlying Case, amounted to more than \$750,000, including interest.¹⁸ Further, Surety Title was named as a party to the litigation in its capacity as an escrow agent holding \$477,000 remaining after a 1997 purchase by WMO of TNT's assets, which funds were available under certain specified circumstances to satisfy TNT's liabilities.¹⁹

Plaintiffs thus faced serious challenges in the Underlying Case and a dim prospect of a net recovery. Indeed, Plaintiffs had not even asserted any claims against WMO until after WMO had first asserted claims against them. All the litigation parties had significant sums of money at stake, and each of the litigation parties had competing claims against other parties' potential recoveries. There was, at a minimum, a set-off of about \$3,700,000 potentially due *from* Plaintiffs before they could recover anything at trial.²⁰ A net recovery for Plaintiffs was a remote prospect, at best.

Although the Underlying Case was filed in 1998, Plaintiffs did not retain GWM as replacement counsel until the Spring of 2001, with only several months to go before an August 27 trial date.²¹ GWM attorneys worked diligently through the early summer to prepare

¹⁷ Id., Vol. IV at 846-47 (Wetterich), Supp. at 267-68; Vol. VII at 1601 (Michelson), Supp. at 394.

¹⁸ Id., Vol. IV at 847, Supp. at 268.

¹⁹ Id., Vol. IV at 845 (Wetterich), Supp. at 266; Vol. VII at 1604 (Michelson), Supp. at 397.

²⁰ See id., Vol. VIII at 1783 (Wertheim), Supp. at 430; see generally id., Vol. IX at 1982-96 (Karp), Supp. at 464-78.

²¹ Id., Vol. VI at 1378 (Miller), Supp. at 369; id., Vol. VII at 1578 (Michelson), Supp. at 388.

for the August trial,²² but at a hearing on summary judgment motions on August 17, the court reluctantly postponed the trial until December 10 at TNT's request.²³

In mid-October, Mr. Miller learned that his wife would need surgery during the week of trial, which would cause her to spend multiple weeks on bed rest and would require Mr. Miller to help her and their young children.²⁴ After Mr. Miller explained the situation, Mr. Wetterich agreed with Mr. Miller's recommendation that no postponement of the trial date should be sought and that Mr. Miller's partner, Jim Wertheim, an experienced trial attorney, should join the team in place of Mr. Miller.²⁵ Mr. Wertheim and Ms. Michelson worked assiduously to prepare for trial.²⁶ The bench trial commenced on December 10, 2001.

During the second day of trial, before Mr. Wetterich's testimony was completed, the trial judge called a recess and summoned counsel to his chambers to discuss settlement.²⁷ At that time, the judge expressed his view that Plaintiffs would have a very difficult time achieving a net recovery on their claims against WMO and he recessed the case, recommending that the parties work to settle it.²⁸ After negotiations back and forth, the parties settled the Underlying Case on

²² Id., Vol. VI at 1388-89, 1391 (Miller), Supp. at 370-72; see id., Vol. IV at 903, 914 (Wetterich), Supp. at 301-02.

²³ Id., Vol. VII at 1481 (Miller), Supp. at 386; id. at 1655-56 (Michelson), Supp. at 399-400.

²⁴ Id., Vol. VI at 1428-29, Supp. at 373-74.

²⁵ Id., at 1430-36, Supp. at 375-81; id., Vol. VII at 1486, Supp. at 387.

²⁶ Id., Vol. V at 1019 (Wetterich), Supp. at 308; Vol. VIII at 1770-72, 1778-79 (Wertheim), Supp. at 420-22, 425-26.

²⁷ Id., Vol. VII at 1676 (Michelson), Supp. at 401; id., Vol. VIII at 1823-25 (Wertheim), Supp. at 440-42.

²⁸ Id. at 1827, Supp. at 444. Earlier in the day, soon after Mr. Wetterich began testifying, the trial judge had questioned him about the corporate purposes and identities of his companies,

the following terms: (i) Plaintiffs' debt to WMO of more than \$3,000,000 was extinguished, with no out-of-pocket payment by Plaintiffs; (ii) Plaintiffs' judgment creditors' bills of more than \$700,000 were settled for \$225,000, with no out-of-pocket payment by Plaintiffs; and (iii) \$40,000 was transferred for the benefit of Mr. Wetterich to be applied directly against GWM's outstanding legal bills.²⁹ Both of the GWM attorneys who were involved in the negotiations testified that although Mr. Wetterich initially did not want to settle the case, he asked substantive questions about the ramifications of settling versus continuing with the trial and that Mr. Wetterich ultimately decided to settle.³⁰ GWM attorneys testified that before the negotiations ended, the other parties accepted Mr. Wetterich's final demand for a \$40,000 share from the escrow fund to be applied to his legal bills.³¹

All of the parties testified that after the settlement was reached, Mr. Wetterich was pleased with the result and did not express any dissatisfaction either with his attorneys or with the fact that the case had been settled.³² Indeed, one reason Mr. Wetterich agreed to the settlement was that during the day of negotiations, Jim Logsdon of WMO "kept telling [him to]

thereby signaling his awareness of the issue regarding Mr. Wetterich's potential personal liability for his companies' obligations. Transcript, Vol. VIII at 1806-09 (Wertheim), Supp. at 436-39.

²⁹ Id. at 1825-39 (Wertheim), Supp. at 442-56; see id., Vol. IX at 1996 (Karp), Supp. at 478. The settlement monies came from an escrow fund held by Surety Title, Transcript, Vol. VII at 1604 (Michelson), Supp. at 397, except for \$5000 of the amount paid for GWM's legal fees, which was contributed by counsel for TNT out of his own fees in order to facilitate settlement. Id., Vol. VIII at 1836-37 (Wertheim), Supp. at 453-54.

³⁰ Id., Vol. VIII at 1830-31 (Wertheim), Supp. at 447-48; id., Vol. VII at 1683-98 (Michelson), Supp. at 402-17.

³¹ Id., Vol. VII at 1692-97 (Michelson), Supp. at 411-16; Vol. VIII at 1835-38 (Wertheim), Supp. at 452-55.

³² Id., Vol. VIII at 1743 (Michelson), Supp. at 419; id., Vol. VIII at 1835-40 (Wertheim), Supp. at 452-57. Accord, id., Vol. VI at 1443-45 (Miller), Supp. at 382-84.

bite the bullet” and settle the case, so that Plaintiffs and WMO would be able to talk about doing more business together on an ongoing basis.³³ In fact, Mr. Wetterich called Mr. Miller that evening from the Blue Point restaurant in downtown Cleveland to say that he was with Mr. Logsdon, that they were talking about the settlement of earlier in the day, that he (Mr. Wetterich) was very happy and that he and Mr. Logsdon already were talking about new business between their companies.³⁴

The evidence further showed that Mr. Wetterich signed the settlement agreement in April 2002, after consulting three other attorneys who had not been involved in the case.³⁵ As recognized by the trial judge when he directed the parties to attempt to settle the case, Plaintiffs had faced substantial exposure from all of the various claims, including the possibility, for Mr. Wetterich, of personal liability for all of it. As discussed below, GWM’s expert opined, without contradiction, that the settlement represented a very favorable result for Plaintiffs that extinguished millions of dollars of debt in what was a very dangerous case for all of the Plaintiffs, including Mr. Wetterich personally.³⁶

C. The Malpractice Case

Despite accepting the benefits of the favorable settlement -- and only after GWM requested payment of its fees and immediately before a possible statute of limitations deadline -- plaintiffs brought this malpractice action against GWM. At trial, Plaintiffs did not contend that the settlement was somehow inadequate or that they could have achieved a better settlement

³³ Id., Vol. IV at 941, Supp. at 304; see id., Vol. VIII at 1834 (Wertheim), Supp. at 451.

³⁴ Id., Vol. VI at 1443-44 (Miller), Supp. at 382-83.

³⁵ Id., Vol. IV at 822-23 (Wetterich), Supp. at 262-63.

³⁶ Id., Vol. IX at 1982-96 (Karp), Supp. at 464-78.

absent attorney malpractice. Nor did Plaintiffs attempt to prove that they would have prevailed in a complete trial of the Underlying Case, either by presenting the case-within-the-case or by presenting expert testimony. In fact, Plaintiffs made no effort whatsoever to demonstrate what the net result would have been if all of the many competing claims, counterclaims and cross-claims had been tried to judgment.

Instead of attempting to show what the outcome of a trial would have been, Plaintiffs elected merely to present “some evidence” that Plaintiffs’ breach of contract claim against WMO had merit, ignoring that WMO not only had defenses to Plaintiffs’ claims but also that WMO had affirmative claims against Plaintiffs and that Plaintiffs’ breach of contract claim was but a small part of the multi-party litigation. Thus, Plaintiffs’ case-in-chief centered on testimony by Mr. Wetterich that GWM attorneys had told him before trial that he had valuable claims. He testified that GWM attorneys had advised him that the key to winning his case was (i) proving that Plaintiffs had built out the requisite amount of airspace in the landfill under the San-Lan Agreement with WMO; and (ii) proving that WMO had breached that Agreement. Mr. Wetterich claimed that GWM attorneys repeatedly had assured him before trial that they could prove these points,³⁷ although he admitted that the attorneys also had told him that he could lose the case.³⁸ Plaintiffs introduced demonstrative exhibits and charts, prepared by GWM for the Underlying Case and based upon information provided by Mr. Wetterich, which detailed the damages that Plaintiffs had sought on their affirmative claims.³⁹ They put on testimony by

³⁷ Transcript, Vol. IV at 808-09, Supp. at 258-59.

³⁸ Id., Vol. V at 1009-10, Supp. at 306-07.

³⁹ Id., Vol. IV at 755-84, Supp. at 226-55.

Mr. Wetterich about his companies and how they operated.⁴⁰ They presented testimony by Mr. Wetterich expressing his belief that Plaintiffs had complied with the San-Lan Agreement,⁴¹ and that WMO had breached it.⁴²

Plaintiffs also presented evidence that Mr. Wetterich did not want to settle the case on the second day of trial,⁴³ and they argued that the GWM attorneys had coerced him into settling because they were unprepared to finish trying the case. Notwithstanding the fact that GWM had achieved what the undisputed evidence established was a favorable settlement, which resolved significant debt without payment by Plaintiffs, Mr. Wetterich complained that the settlement did not put “even a dollar in [his] pocket.”⁴⁴

Plaintiffs’ own expert witness, Edgar Boles, testified that although he regarded the Underlying Case as a complex piece of commercial litigation, he did not review the pleadings in that case, other than to read the motions for summary judgment.⁴⁵ Mr. Boles acknowledged that the ultimate resolution at trial of the Underlying Case would have depended on the viability not only of Plaintiffs’ claims, but also of the claims made against them by other parties.⁴⁶ Yet, Mr. Boles admitted that he *assumed* the viability of Plaintiffs’ claims; acknowledged that he made *no evaluation* of those claims or the competing claims against Plaintiffs; and stated that he

⁴⁰ Id., Vol. III at 686-94, Supp. at 171-79.

⁴¹ Id. at 699, Supp. at 123.

⁴² Id. at 700-01, Supp. at 185-86.

⁴³ Id., Vol. IV at 813, Supp. at 261.

⁴⁴ Id., Vol. III at 720, Supp. at 194.

⁴⁵ Transcript, Vol. V at 1107, Supp. at 318.

⁴⁶ Transcript, Vol. V at 1164 (Boles), Supp. at 335.

had formed *no opinion* about the likely outcome of the case if it had been tried to conclusion.⁴⁷ He did not evaluate the claims made by WMO and TNT against Plaintiffs and, in fact, was not even aware that TNT had asserted any claims against Plaintiffs.⁴⁸ He did not review Mr. Wetterich's deposition in the Underlying Case, nor did he educate himself about what facts were disputed by GWM in the legal malpractice case.⁴⁹ Rather, Mr. Boles testified that he prepared mainly by talking to Mr. Wetterich and Plaintiffs' attorneys in the legal malpractice case, by reviewing GWM's billing records in the Underlying Case, and by reading the two-day trial transcript of that case.⁵⁰ He testified that he accepted as true the information provided by Mr. Wetterich and made no effort to confirm his credibility.⁵¹ He testified that he assumed that Plaintiffs' claims in the underlying suit had value,⁵² and that he did not know whether WMO's and TNT's claims were viable.⁵³

In contrast, GWM presented detailed testimony explaining the myriad parties, issues, and competing claims that comprised the complex Underlying Case.⁵⁴ For example, GWM demonstrated that Plaintiffs' ability to succeed on their claim under the San-Lan Agreement depended on oral modifications to that contract, which the trial judge had ruled would not be

⁴⁷ Id. at 1152-53, 1163-64, 1171-72, Supp. at 327-28, 334-37.

⁴⁸ Id. at 1152-53, Supp. at 327-28.

⁴⁹ Id. at 1140-43, Supp. at 320-23.

⁵⁰ Id. at 1072-74, Supp. at 309-311.

⁵¹ Id. at 1148-50, Supp. at 324-26.

⁵² Id. at 1152, Supp. at 327.

⁵³ Id. at 1171-72, Supp. at 336-37.

⁵⁴ See, e.g., id., Vol. VII at 1596-1604 (Michelson), Supp. at 389-97.

admissible at trial.⁵⁵ GWM also showed that Plaintiffs' ability to recover depended in part on the status of other contracts among the parties, including a management agreement Plaintiffs had with Hocking Environmental, the owner of the land beneath the landfill. In addition, Plaintiffs had breached that management agreement by failing timely to make payments, including royalties to Hocking and permit fees to various governmental regulatory agencies.⁵⁶ The evidence showed that, eventually, Hocking closed the landfill,⁵⁷ after which WMO filed its claims against Plaintiffs.

GWM also demonstrated that Plaintiffs' breach of the underlying management agreement with Hocking caused Plaintiffs – not WMO – to be the first side to breach the San-Lan Agreement, almost immediately upon signing it.⁵⁸ GWM further showed that Mr. Wetterich had admitted that Plaintiffs were in breach of that Agreement,⁵⁹ and that Plaintiffs continued to breach the San-Lan Agreement in a variety of ways.⁶⁰ In addition, GWM introduced evidence that by the express terms of the San-Lan Agreement, WMO retained sole power to decide whether it owed Plaintiffs the additional \$800,000 they claimed under that Agreement, depending in part on whether Plaintiffs had breached the Agreement.⁶¹ In sum, GWM produced

⁵⁵ Id., Vol. VIII at 1776-77 (Wertheim), Supp. at 423-24.

⁵⁶ Id., Vol. IV at 811 (Wetterich), Supp. at 260.

⁵⁷ Id. at 811, 886, Supp. at 260, 290.

⁵⁸ Id., Vol. VIII at 1780 (Wertheim), Supp. at 427; see id., Vol. IV at 871 (Wetterich), Supp. at 275.

⁵⁹ Id., Vol. VIII at 1790-91 (Wertheim), Supp. at 434-35; Vol. IV at 871 (Wetterich), Supp. at 275.

⁶⁰ See, e.g., id., Vol. IV at 866-68, 870-71, 872-93 (Wetterich), Supp. at 271-300.

⁶¹ Id., Vol. VIII at 1786-87 (Wertheim), Supp. at 431-32.

substantial evidence showing that Plaintiffs' ability to recover under the San-Lan Agreement was highly doubtful.⁶²

Finally, GWM demonstrated that the multiple claims between and among the many parties to the litigation made it extraordinarily difficult for Plaintiffs ever to win a net recovery. Plaintiffs and WMO had claims against TNT,⁶³ both of those companies had claims against Plaintiffs; there were multiple judgments outstanding against Plaintiffs; ENC and ENMC both owed money to other parties; and Mr. Wetterich had potential personal liability for all of his companies' debts. GWM's expert, Marvin Karp, noted that WMO had claims against the Plaintiffs totaling approximately \$3 million consisting of (1) \$1.8 million owed for breach of the San-Lan Agreement; (2) \$800,000 for waste deposits Plaintiffs made at WMO's landfill or transfer station; and (3) \$400,000 for waste deposits Plaintiffs had made into other landfills, for which WMO claimed repayment.⁶⁴ Mr. Karp also noted the existence of about \$750,000 in claims by Plaintiffs' judgment creditors, which would have to be paid first out of any recovery Plaintiffs won at trial.⁶⁵ These claims against Plaintiffs totaled approximately \$3.75 million.⁶⁶

Moreover, again unlike Plaintiffs' expert, Mr. Karp analyzed the claims Plaintiffs had against the other parties. Plaintiffs' first claim, against WMO, was for breaching the San-Lan Agreement and failing to advance Plaintiffs the additional \$800,000 for building out the second phase of the landfill's airspace. Mr. Karp opined that there was no likelihood Plaintiffs would

⁶² Id.

⁶³ Id. at 1781-82, Supp. at 428-29.

⁶⁴ Id. at 1984-86, Supp. at 466-68.

⁶⁵ Id. at 1986, Supp. at 468.

⁶⁶ Id.

have prevailed on this claim, because their entitlement to that sum was based on an oral modification to the Agreement, which the trial judge had ruled would not be admissible at trial.⁶⁷ Mr. Karp also noted that Plaintiffs had claimed in the Underlying Case that WMO had breached a contract to pay the governmental fees owed by Plaintiffs for the landfill; however, he stated that that claim would not have prevailed because Mr. Wetterich had admitted that that agreement had not been memorialized in written form.⁶⁸ Next, Mr. Karp noted that Plaintiffs had a claim for \$750,000 against TNT, but that TNT had disputed that amount and claimed to owe only \$370,000. In any event, Mr. Karp stated that because TNT was insolvent, this claim was worth, at most, the \$475,000 that was being held in escrow for TNT by Surety Title.⁶⁹ Mr. Karp opined, however, that even if Plaintiffs had been able to prevail and recover the full \$750,000 from TNT, the judgment creditors would have taken all of that money to satisfy their claims, so that the value of this claim to Plaintiffs in fact was zero.⁷⁰

Based upon his review of all of these competing claims, Mr. Karp concluded that Plaintiffs would have recovered nothing after a trial on the merits of the Underlying Case. He therefore stated: "There is no way [Plaintiffs are] going to get any money in their pocket."⁷¹ This was exactly the point the trial judge had made when he recessed the trial and urged

⁶⁷ Id. at 1987, 1990, Supp. at 469, 472.

⁶⁸ Id. at 1991-92, Supp. at 473-74.

⁶⁹ Id. at 1994-95, Supp. at 476-77.

⁷⁰ Id. at 1995-96, Supp. at 477-78.

⁷¹ Id. at 1996, Supp. at 478.

settlement talks during the second day of the trial of the Underlying Case.⁷² Mr. Karp summarized the value of the settlement to Plaintiffs as follows:

The settlement got them no money in their pocket other than \$40,000 to pay off part of their legal bill to the Goodman, Weiss firm, but what it did was it got rid of all of this.

The creditors signed a release. The judgment creditors [were] owed no more money by ENC. Got rid of all of the claims of Waste Management which added to up to \$3 million, or [\$2.90 million]. It's all gone. They walk out of the Courthouse and they are free and clear of any obligations.

That is why I say the settlement was a remarkable, beneficial one. If they had gone forward[] and not settled, they would have ended up walking out of the Courthouse, have to figure out how [are] they going to pay off all these judgments?⁷³

In sum, the uncontradicted evidence at trial established that the settlement obtained by Plaintiffs represented a far better outcome for them than they would have obtained if all of the many competing claims in the Underlying Action have been decided at trial. Accordingly, GWM argued that it was entitled to judgment as a matter of law because Plaintiffs had failed to carry their burden of proving that any breach of duty by GWM attorneys proximately caused the damages of which they complained. Embracing the “some evidence” language in *Vahila*, the trial court disagreed, however. In (i) denying GWM’s motion for directed verdict, (ii) issuing its instructions to the jury, and (iii) denying GWM’s motion for judgment notwithstanding the verdict, the trial court held that, to satisfy the causation and damages elements of their malpractice claim, Plaintiffs need not show that they would have prevailed at trial, but rather need present *only* “some evidence” that their underlying claims had merit. The trial court therefore entered judgment on the jury’s award of more than \$2.4 million in compensatory

⁷² Transcript, Vol. VII at 1676 (Michelson), Supp. at 401; *id.*, Vol. VIII at 1823-25 (Wertheim), Supp. at 440-42.

⁷³ *Id.*, Vol. IX at 1996 (Karp), Supp. at 478.

damages, permitting Plaintiffs 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.

D. The Appeal

GWM appealed from the judgment for Plaintiffs, reiterating its argument that Plaintiffs should have been required to prove that they would have prevailed at a trial of the Underlying Case and what their net recovery would have been. Without undertaking a careful examination of *Vahila* or subsequent cases applying *Vahila*, the Eighth Appellate District Court affirmed the trial court's judgment, ruling that it "did not err in requiring Plaintiffs to merely provide some evidence of the merits of the underlying claim." 2007-Ohio-831, at ¶ 30. The court did not consider that, in *Vahila*, plaintiffs alleged harm independent of the outcome of underlying proceedings, whereas here Plaintiffs' *only* damages theory was that they would have won at trial. On that erroneous basis, the court used the "some evidence" standard to hold that there was sufficient evidence to support the jury's award for damages in this case. *Id.* at ¶¶ 40-42. Finally, for the same reasons, the court rejected GWM's argument that the instructions to the jury on causation, which adopted the "some evidence" standard,⁷⁴ were incorrect. The court held that, "[a]s stated above, this standard of proof is entirely appropriate pursuant to *Vahila*, *supra*."⁷⁵ Accordingly, and without any meaningful discussion of the implications of reading *Vahila*'s "some evidence" dictum to permit recovery without requiring Plaintiffs to prove that they in fact were harmed by the alleged malpractice, the appellate court affirmed the trial court's judgment.

⁷⁴ Transcript, Vol. X at 2273, Supp. at 485.

⁷⁵ *Id.* at ¶ 49.

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 requirement that a legal malpractice plaintiff must prove a causal connection between the alleged malpractice and the claimed damages. See *Vahila*, 77 Ohio St.3d 421, 427, 1997-Ohio-259, 674 N.E.2d 1164. The important question presented here is what constitutes legally sufficient proof of causation and resulting damages in a malpractice claim when the plaintiff alleges that he would have obtained a better result in an underlying proceeding but for alleged attorney malpractice.

A. Standard of Review

Because this appeal from the Eighth Appellate District Court's affirmance of the trial court's rulings on the motion for directed verdict, the jury instructions, and the JNOV Motion presents a question of law, this Court applies a *de novo* standard of review. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996-Ohio-298, 668 N.E.2d 889. See *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, at ¶¶ 3-4.

B. Vahila Does Not Absolve a Legal Malpractice Plaintiff, In All Circumstances, From Proving by a Preponderance of the Evidence That He Would Have Achieved a Better Result at Trial but for the Alleged Malpractice.

- 1. *Vahila* and this Court's prior decision in *Krahn*, on which *Vahila* relied, teach that the nature of the proof of proximate cause and damages required in a legal malpractice action depends on the nature of the damages allegedly sustained; proof of the merits of an underlying case is required where a plaintiff's damages theory logically depends on such proof.**

This case presents a common fact pattern in legal malpractice cases, that of the purportedly disappointed litigant who contends that his attorney's malpractice resulted in a less favorable outcome in an underlying proceeding than otherwise would have been obtained. Often, as in this case, such a claim comes after a lawyer asks for payment of his bill. As noted above, the lower courts in this case interpreted *Vahila* as holding that a legal malpractice plaintiff *never* is required to prove that he would have succeeded in an underlying case. In the view of the lower courts, *Vahila* permits recovery in all circumstances upon proof of a breach of duty and "some evidence" of the merits of the underlying case. A careful reading of *Vahila* confirms, however, that this Court did not so hold, and instead recognized that the nature of the proof of causation and damages required in a legal malpractice case depends upon the nature of the damages allegedly suffered by the plaintiff. Here, because Plaintiffs' only damage theory was that they would have done better than the favorable settlement they in fact obtained if the many claims, counterclaims and cross-claims in the Underlying Case had been litigated to judgment, Plaintiffs should have been required to prove that they would have won the Underlying Case and what net amount they would have recovered.

As an initial matter, *Vahila* did not present the circumstance in which a plaintiff alleges that he would have obtained a more favorable outcome if his attorney had not committed malpractice. To the contrary, "[t]he majority of [the plaintiffs'] allegations [in *Vahila*]

stem[med] from the failure of [defendants] to properly disclose all matters and/or legal consequences surrounding the various plea bargains entered into by Terry Vahila [as the individual criminal defendant in one of the underlying matters] and the settlement arrangements agreed to by [the plaintiffs] with respect to the several civil matters.” 77 Ohio St.3d at 427. As this Court noted, “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.* In other words, and in contrast to Plaintiffs in this case, the *Vahila* plaintiffs alleged that they suffered harm as a result of their attorney’s malpractice separate and distinct from what the result of the underlying proceedings would have been absent that malpractice.

Consequently, the Court’s comments in *Vahila* concerning the situation in which “the requirement of causation *often* dictates that the merits of the malpractice action depend upon the merits of the underlying case” (77 Ohio St.3d at 427-28 (emphasis added)), including in particular the suggestion that in such a case a plaintiff “*may* be required, depending on the situation, to provide *some* evidence of the merits of the underlying claim” (77 Ohio St.3d at 428) (emphasis added), are only dictum. Indeed, the Court carefully identified the part of its opinion that constituted its holding: “[W]e 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.” 77 Ohio St.3d at 427. The Court’s syllabus likewise is limited to the three-part test for legal malpractice and to the notation that *Vahila* “followed” *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E. 2d

1058. The fact that the Supreme Court of Ohio Rules on Reporting Opinions limit the controlling points of law in an opinion issued before May 1, 2002, to those in its syllabus (former S.Ct.R.Rep.Op. 1(B)) confirms that the Court did not intend to work a fundamental change in Ohio law by its use in *Vahila* of the “some evidence” language or otherwise.

As the reference in the Court’s syllabus indicates, *Vahila* followed this Court’s decision in *Krahn*, which involved a claim of legal malpractice arising from representation in a criminal proceeding and related civil and administrative proceedings. Krahn managed a bar owned by High Spirits, Inc. and had hired Kinney to defend her against three misdemeanor gambling charges. Kinney failed, however, to convey to Krahn an offer of a plea bargain that would have dismissed the charges against her in return for her testimony against a supplier. Instead, Krahn followed Kinney’s advice on the day of trial to plead guilty to one of the charges. In ruling for the plaintiff in the subsequent malpractice case, this Court rejected as inequitable Kinney’s contention that Krahn first was required to obtain a reversal of her conviction in order to prevail on her legal malpractice claim; rather, the attorney’s negligence in not conveying the plea bargain offer had caused Krahn to be convicted, and Krahn was damaged by the loss of the opportunity to accept the plea agreement regardless of whether she was in fact guilty.⁷⁶ The Court ruled, however, that it did not intend thereby to rewrite tort principles or the law of legal malpractice:

[W]e note that *in most cases* the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy the plaintiff’s ability to establish the element of proximate cause. In other words *we do not relieve a*

⁷⁶ High Spirits also had sued Kinney for failure to appear at a hearing to defend it against a citation issued by the Department of Liquor Control. The Court ruled that High Spirits also had shown proximate cause without proving it would have succeeded on the merits of its underlying claim, because it proved it had incurred damage apart from the result in the underlying hearing – the costs of hiring a new attorney to rectify Kinney’s failure to appear. 43 Ohio St.3d at 106. Here again, the damages incurred were unrelated to the merits of the underlying claim.

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. The analysis should focus on the facts of the particular case. 43 Ohio St.3d at 106 (emphasis added) (footnote omitted).

Krahn thus demonstrates that legal malpractice cases require a fact-intensive analysis of proximate cause. *Vahila* followed *Krahn*, and borrowed heavily from the language of that decision to resolve a case that involved an attorney's alleged negligent representation of the plaintiffs in both criminal and civil law matters:

We believe that many of the principles set forth in *Krahn* are directly applicable to the situation here. In this regard, we 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) giving rise to the complaint. 77 Ohio St.3d at 426 (emphasis added).

In particular, the Court noted:

The majority of the allegations [against the plaintiffs] stem from the failure of the [attorneys] to properly disclose all matters and/or legal consequences surrounding the various plea bargains entered into by Terry Vahila and the settlement arrangements * * * with respect to the several civil matters. *Id.* at 427.

Just as in *Krahn*, the *Vahila* Court ruled that it would be inequitable to require the plaintiffs to prove that they would have been successful in the underlying matters in order to withstand summary judgment in the malpractice action, where their claim was that they had suffered damage from their attorneys' failure to disclose settlement information, regardless of whether they would have prevailed in the underlying matters. *Id.* The Court stated:

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 case may be required, depending on the situation, to provide some evidence of the merits of the underlying claim. See * * * *Krahn*, 43 Ohio St.3d at 106, 538 N.E.2d at 1062. 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. 77 Ohio St.3d at 427-28 (emphasis added).

Taken together, then, *Vahila* and *Krahn* stand for the common sense proposition that whether a legal malpractice plaintiff must prove the merits of the underlying case depends on the nature of the harm allegedly caused by the malpractice. Where the plaintiff in fact suffered harm *regardless* of what the outcome of the underlying case would have been, such proof is not required. Many examples come immediately to mind. If an attorney fails to convey a plea bargain offer from the government to a criminal defendant client, and the client shows both that the offer would have been accepted if it had been conveyed and that the ultimate outcome of the proceeding was less favorable than the plea offer, then the malpractice proximately caused harm regardless of whether the client is guilty or innocent. Likewise, where an attorney fails to convey a settlement offer in a civil case, and the client shows that he would have accepted the offer if it had been conveyed and that the ultimate outcome for the client was less favorable than the settlement offer, the malpractice proximately caused harm regardless of the merits of the client's case. Similarly, if a plaintiff can prove that he incurred additional attorney's fees or other expenses as a result of his attorney's malpractice, the malpractice is the proximate cause of harm regardless of the merits of the underlying proceedings. In contrast, however, where the plaintiff's damage theory is that he would have obtained a more favorable outcome in underlying litigation if his attorney had not committed malpractice, the plaintiff *must* prove what that more favorable outcome would have been in order to establish proximate cause and damages.⁷⁷

⁷⁷ In effect, adoption of the "some evidence" standard implicitly substitutes that standard for the universally-accepted "preponderance of the evidence" burden of proof. To say that a plaintiff must prove by a preponderance of the evidence that there is some evidence of the merits of an underlying case makes no sense; it is gobbledygook. Upon analysis, that formulation is no different from saying plaintiff must present some evidence of the merits of the underlying case, but need not *prove* anything. The proper formulation is that the plaintiff must prove by a preponderance of the evidence that, absent malpractice, he would have succeeded in obtaining a more favorable outcome in the underlying case, either by judgment or settlement. Here, Plaintiffs contended only that they would have obtained a more favorable judgment.

Lower appellate court decisions since *Vahila* fall into three broad categories. First, some lower courts have correctly recognized that the “some evidence” language in *Vahila* does not relieve the plaintiff from the burden of proving that he in fact would have been successful in the underlying proceeding, where the plaintiff’s damage theory requires such a showing. For example, in *Cunningham v. Hildebrand* (2001), 142 Ohio App.3d 218, 755 N.E.2d 384 (O’Donnell, J.), the court held that the following jury instructions complied with *Vahila*:

The [malpractice] plaintiff must prove *by a preponderance of the evidence* that if the bankruptcy court had considered his claim it would have awarded him some amount, or that he could have negotiated a settlement for some amount with the attorneys for Continental Airlines * * * Plaintiff must prove what the amount of his recovery probably would have been. *Id.* at 225 (emphasis added).

Cunningham may be the fairest and most logical application of the proximate cause analysis to a case of the type now before the Court since the *Vahila* decision. The jury instructions approved in that case demand that, before a court awards damages based on an attorney’s negligence, the plaintiff must prove that it is more likely than not that he would have obtained a better result but for that negligence. *Cunningham* properly did not sanction a recovery based on a mere showing of “some evidence” that the plaintiff’s underlying claim had merit; the plaintiff was required to prove that he in fact would have achieved a better result, either by settlement or after a decision on the merits, if the attorney had not committed malpractice.

Similarly, in *Lewis v. Keller*, 8th Dist. No. 84166, 2004-Ohio-5866, the Eighth District Appellate Court relied on *Vahila* to rule against a malpractice plaintiff who failed to prove she would have succeeded on the merits of her underlying claim. The issue on appeal there was whether the attorney had been negligent in failing to refile in federal court Lewis’s dismissed state court discrimination claim before the statute of limitations ran. Lewis had filed an expert’s report stating that the draft complaint Lewis had wanted the attorney to refile was so woefully

deficient that it could not have survived a motion to dismiss. After reviewing the facts of Lewis's underlying case and her malpractice claim, the court held:

Nowhere in the expert's report is there an indication of the likelihood of success on the merits had the claim been asserted in a timely manner. We recognize that *Vahila* does not *always* require this kind of showing, *but the circumstances here reasonably demand it*. Id. at ¶13 (emphasis added).

Accordingly, the Eighth Appellate District Court ruled in that case that "Lewis's failure to demonstrate a likelihood of success on the merits means that she did not establish the causation element of a legal malpractice claim." Id. at ¶16. See also *Talley v. John H. Rion & Assoc.* (Dec. 31, 1998), 2nd Dist. No. 17135, 1998 Ohio App. LEXIS 6400, at *11 (Appx. at 65-68), (where a criminal defendant, Talley, alleged malpractice in connection with a guilty plea, "proof of Talley's malpractice claim is * * * inextricably intertwined with the merits of his underlying criminal case. In the absence of expert proof concerning the merits of any defenses in the underlying case, Talley has failed to demonstrate that the alleged acts of malpractice actually caused his claimed injury or damages").

Second, some cases erroneously state that the plaintiff need present merely "some evidence" of the merits of the underlying proceeding, but nonetheless reach the right result because the plaintiffs in those cases could not meet even that low standard. For example, in *Ruble v. Kaufman*, 8th Dist. No. 81378, 2003-Ohio-5375, the plaintiff alleged that his attorney had wrongfully withdrawn as counsel shortly before trial in an underlying medical malpractice case. The court stated that, in order to show the requisite causal link between the malpractice and the damages allegedly sustained, plaintiff need show merely that there was "some merit" to the underlying case, not that he would have succeeded in obtaining a recovery in the underlying case absent malpractice. Nonetheless, the court affirmed a directed verdict for the attorney because there was no expert opinion supporting the medical malpractice claim, which therefore

had no merit whatsoever, including no settlement value. *Id.* at ¶¶ 41-44. Similarly, in *Nu-Trend Homes, Inc. v. Law Offices of DeLibera, Lyons & Bibbo*, 10th Dist. No. 01AP-1137, 2003-Ohio-1633, the court stated that plaintiffs were required to show that their underlying claims were “at least colorable” in order to prevail in a legal malpractice action. *Id.* at ¶ 19. Because plaintiffs’ claims had no merit whatsoever, the court affirmed summary judgment for the defendants lawyers. *Id.* at ¶¶ 62-63. See also *Jarrett v. Forbes, Fields & Assoc. Co., LPA*, 8th Dist. No. 88867, 2007-Ohio-5072 (applying the “some evidence” test, but holding that “on these facts, where no [underlying] viable negligence claim exists, there can be no damages for legal malpractice”).

Finally, some courts have reached an egregiously wrong result by erroneously reading *Vahila* as permitting recovery where a plaintiff presents merely “some evidence” of the merits of the underlying proceeding. This case provides a prime example. As explained above, the undisputed evidence established that Plaintiffs obtained the full settlement value of their claims on the merits; Plaintiffs never contended that they could have gotten a better settlement absent malpractice. Consequently, in order to show that they in fact were harmed by the allegedly coerced settlement, Plaintiffs needed to establish that they would have won a more favorable judgment after litigation of the many competing claims, counterclaims and cross-claims in the Underlying Case. By allowing Plaintiffs to recover without meeting this burden, the lower courts permitted a recovery without proof that Plaintiffs in fact suffered any harm whatsoever as a result of the alleged malpractice.

Another case accepted for review by this Court, *Paterek v. Petersen & Ibold*, 11th Dist. No. 2005-G-2624, 2006-Ohio-4179, review granted (Jan. 24, 2007), Case No. 2006-1811, reflects the same fundamental error in a narrower context. Specifically, in that case, the Eleventh

District Appellate Court held that a legal malpractice plaintiff could recover an amount greater than the maximum amount that the parties stipulated would have been collectible had the plaintiff prevailed in the underlying case. This holding resulted in a pure windfall to the plaintiff, who ended up much better off because his attorney committed malpractice than he would have been absent malpractice. Both this case and *Paterek* thus reach results that are wholly irreconcilable with well-established tort law, both nationally and in Ohio.⁷⁸

2. On these facts, the only way for plaintiffs to prove causation is by proving that they would have succeeded on the merits of the underlying case.

Plaintiffs consistently raised only one theory of damages: But for the allegedly coerced settlement, they would have tried the Underlying Case to conclusion and would have achieved a better result than the settlement that they actually obtained. They made no claim that, absent GWM's alleged malpractice, they would have negotiated a more favorable settlement, or that the alleged malpractice caused any harm other than the lost opportunity to complete the trial and obtain a result on the merits of the Underlying Case. Consequently, the *only* way for Plaintiffs 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 all of the competing claims in the Underlying Case, and what their net recovery would have been.

⁷⁸ As the discussion above demonstrates, various panels of the Eighth Appellate District Court have rendered decisions in all three categories: (1) *Cunningham* and *Lewis* adopt the correct analysis; (2) *Jarrett* appears to apply the erroneous "some evidence" standard but nonetheless reaches the correct result; and (3) this case applies the erroneous "some evidence" standard to reach a wrong and illogical result. The important inconsistencies among decisions even within the same Appellate District demonstrate the need for clarification by this Court.

Rather than undertaking this burden, Plaintiffs presented merely “some evidence” that their claims in the Underlying Case had merit.⁷⁹ 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 there were not *some evidence* that these claims had merit. In fact, the uncontroverted evidence showed that Plaintiffs got the *full value* of their claims in that settlement. But Plaintiffs wanted more, so they sued GWM for malpractice; the “more” that they wanted was the supposedly greater recovery they would have obtained had they been permitted to try all of the competing claims in the Underlying Case to conclusion.

On these facts, then, in order to establish the proximate cause and damages elements of their claim, Plaintiffs should have been required to prove, by a preponderance of the evidence, both (i) that they would have succeeded at a trial on the merits of the Underlying Case, and (ii) that they would have achieved a better net recovery after trial than they obtained through settlement. To do so, Plaintiffs needed to present far more than merely “some evidence” that their breach of contract claim against WMO had merit. Instead, Plaintiffs needed to prove by a

⁷⁹ Having convinced the trial court to permit them to try the Underlying Case and to obtain a favorable verdict on the erroneous premise that they were required to show nothing more than “some evidence” of the merit of their claims, Appellees contended for the first time in post-trial motions, and again in the Eighth Appellate District, that they in fact proved the case-within-the-case. This contention is 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 to decide the legal issues based on the erroneous “some evidence” standard). Indeed, even the lower courts implicitly recognized this basic point, as neither the trial court nor the Eighth Appellate District Court accepted Plaintiffs’ contention that they in fact proved the case-within-the-case. Rather, both courts upheld the jury verdict based on their conclusion that Plaintiffs were required merely to present “some evidence” of the merit of their claims, and were not required to prove that they would have prevailed after trial in the Underlying Case. In short, the jury was asked to determine simply whether there was “some evidence” of the merits of Plaintiffs’ claims; that is all the jury determined and that determination is insufficient as a matter of law to support the judgment against GWM.

preponderance of the evidence that the final decision on the merits of all the many claims, counterclaims and cross-claims in the Underlying Case would have been a judgment more favorable to them than the settlement they in fact obtained. Yet, Plaintiffs did not present competent evidence for the jury to have found they would have prevailed at trial and what their net recovery would have been. Because Plaintiffs induced the trial court to give jury instructions reflecting an incorrect legal standard regarding the element of proximate cause, the jury never was asked to make these ultimate findings. Moreover, had proper jury instructions been given, GWM would have been entitled to judgment as a matter of law because, applying the right legal standard, Plaintiffs simply did not present sufficient evidence to get a jury.

a) **Plaintiffs Should Have Been Required to Prove They Would Have Been Successful At Trial of the Underlying Case.**

The trial court, (i) in denying GWM's motion for directed verdict, (ii) in issuing the jury instructions, and (iii) in denying GWM's JNOV Motion, held that Plaintiffs were not required to show that they would have prevailed at trial. Instead, the court required Plaintiffs to present merely "some evidence" that their Underlying Case had merit in order to establish that GWM's negligence caused their damage. Specifically, the court charged the jury on causation as follows:

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 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 2272-73 (emphasis added), Supp. at 484-85.

Likewise, in its decision on the JNOV Motion, the court ruled in pertinent part as follows:

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 Plaintiffs’ damages. Order and Decision on JNOV Motion, at 12-14, Appx. at 34-36.

See also Transcript, Vol. VI at 1332-61, Supp. at 339-68 (argument and ruling denying directed verdict). Although the lower courts purported to rely on *Vahila*, and the trial court recited the “preponderance of the evidence” standard in its instructions to the jury, by their adoption of the “some evidence” standard, the lower courts in fact ignored this Court’s reasoning in *Krahn* and *Vahila* – that the nature of proof of causation that is required depends on the circumstances of the particular case. In so holding, the lower courts permitted Plaintiffs to prevail in this case without ever proving proximate cause and non-speculative damages.⁸⁰

Requiring a legal malpractice plaintiff who contends that he would have obtained a better result in an underlying proceeding but for his attorney’s malpractice *to prove* that he in fact would have obtained a better result it is hardly a novel concept. E.g., Restatement, Section 53, Comment *b* (plaintiff in such cases must prove that “but for the defendant lawyer’s misconduct, the plaintiff would have obtained a more favorable judgment in the previous action”). Indeed, if one accepts the lower courts’ erroneous interpretation of *Vahila* as abandoning that requirement, Ohio is a minority of one in that regard. As a general matter, “[case-within-a-case] is the accepted and traditional means of resolving the issues involved in the underlying proceeding in a legal malpractice action. This approach avoids speculation by requiring the plaintiff to bear the

⁸⁰ Other decisions, consistent with *Vahila* and *Krahn*, allow recovery without proof that the plaintiff would have succeeded in an underlying action because the plaintiff’s alleged damages did not depend on the merits of the underlying action. E.g., *Pschesang v. Schaefer* (Aug. 11, 2000), 1st Dist. No. C-990702, 2000 Ohio App. LEXIS 3602 (Appx. at 62-64) (plaintiff showed sufficient evidence to satisfy the elements of causation and loss based upon the additional attorneys’ fees he incurred in undoing his first attorney’s negligence regarding an error in a separation agreement).

burden of producing evidence that would have been required in the underlying action.” 4 Mallen (2007 Ed.) 1046-48, Section 33.9 (footnote omitted). The case-within-the-case approach requires the plaintiff to introduce at the legal malpractice trial all of the evidence from the underlying case that is necessary to prove that but for his attorney’s negligence, he would have been successful in that case and what the amount of his recovery should have been.⁸¹

A handful of jurisdictions have permitted a legal malpractice plaintiff to prove proximate cause by presenting expert testimony regarding what the result would have been but for the alleged malpractice without fully trying the case-within-the-case. As noted above, courts generally permit this approach where specific circumstances make it unfair to require the plaintiff to present the entire underlying claim – for example, where the attorney’s negligence resulted in the loss of evidence critical to proving that claim. E.g., *Lieberman v. Employers Ins. of Wausau* (1980), 84 N.J. 325, 343, 419 A.2d 417. In all events, however, courts require proof by a preponderance of the evidence that the malpractice plaintiff would have prevailed in the underlying case in order to satisfy the causation element of a legal malpractice claim where, as here, the plaintiff contends that he would have obtained a more favorable result in an underlying proceeding but for the attorney’s malpractice.

Indeed, in *Alexander v. Turtur & Associates, Inc.* (Tex.2004), 146 S.W.3d 113, a case involving facts remarkably similar to those at issue here, the Supreme Court of Texas ruled that

⁸¹ According to Mallen, 35 jurisdictions utilize the case-within-a-case method in legal malpractice actions, but only one, Ohio (in *Vahila*), may have rejected it. 4 Mallen (2007 Ed.) 1046-48, Section 33.9. As explained above, *Vahila*, properly understood, does not reject the case-within-the-case requirement in all circumstances. Put differently, nothing in the *Vahila* holding permits a legal malpractice plaintiff to recover in a case like this one without proving by a preponderance of the evidence that the plaintiff would have succeeded in the Underlying Case. Only the “some evidence” dicta creates confusion. Were *Vahila* read differently, it should be overruled as being contrary to the most fundamental principles of tort law in Ohio and every other state.

expert testimony was required *in addition to* the evidence of the case-within-the-case, in order to prove causation. In that case, the plaintiff had alleged that the experienced counsel he had retained failed to handle the trial himself; that the lead attorney who tried the case was inexperienced and ill-prepared; and that that counsel exercised bad judgment in deciding what discovery to take and what evidence to present. In the malpractice trial, the plaintiff put on the entire case-within-the-case, arguing that but for the attorneys' errors, he would have prevailed in the underlying case. The Court ruled, however, that the plaintiff had failed to prove that the attorneys' negligence had caused him harm because the alleged errors "in the preparation and trial of the admittedly complex, yet truncated, underlying proceeding" were not obviously tied to the adverse result. The Court therefore ruled that on the facts of that case, expert testimony was required, *in addition to* the evidence of the case-within-the-case, in order to prove causation. *Id.* at 120. Here, Appellees presented neither form of evidence.⁸²

b) Plaintiffs Should Have Been Required To Prove They Would Have Obtained a Net Recovery in the Underlying Case.

The lower court also erred by failing to require Plaintiffs to show what, if any, net recovery they would have achieved after a trial on the merits of the Underlying Case. Rather,

⁸² The Cornell Law Review Note that is cited in *Vahila* strongly criticizes a strict "but for" test that would require legal malpractice plaintiffs to prove to a "virtual certainty" that they should have won in the underlying case. Although Professor Jensen identified a potentially serious concern that attorneys not be immunized from valid claims of malpractice, that concern is addressed adequately by requiring proof of causation and damages by a preponderance of the evidence, not to a "virtual certainty." Legal malpractice plaintiffs face the same burden as plaintiffs in other tort cases: proving by a preponderance of the evidence that the defendant's negligence proximately caused the plaintiff's damages and the non-speculative amount of those damages. Moreover, as the case cited in the text show, courts recognize that reasonable adjustments may be made where an attorney's conduct substantially prejudices a client's ability to prove what the outcome of the underlying case would have been. See Restatement, Section 53, Comment *b* (in determining whether the plaintiff has met the burden of proof, "the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial").

by ruling that Plaintiffs need show only “some evidence” that their claims had merit, the trial court’s rulings violated the fundamental principle that “compensatory damages must be shown with certainty, and damages which are merely speculative will not give rise to recovery.” E.g., *Endicott v. Johrendt* (June 22, 2000), 10th Dist. No. 99AP-935, 2000 Ohio App. LEXIS 2697, at *26 (Appx. at 54-61) (holding causation element not satisfied where malpractice plaintiff failed to show she incurred any damage by defendants’ withdrawal as counsel in the underlying case). Indeed, in the context of this case, the trial court’s rulings did not merely permit the jury to award speculative damages, they actually *required* the jury to engage in utter speculation regarding the amount of damages sustained by Plaintiffs.

As explained above, Plaintiffs’ entire case was premised on the proposition that they would have tried the Underlying Case to conclusion and reached a better result than they obtained in settlement, but for the alleged malpractice. As a matter of simple logic and fundamental legal principles, therefore, the proper measure of damages is the difference between the net result Plaintiffs would have obtained at trial after resolution of all of the competing claims and counterclaims in the Underlying Case, and the result they actually obtained by settlement. The jury could not possibly determine whether Plaintiffs were damaged and, if so, by how much, without first determining the amount of the net recovery Plaintiffs would have obtained at trial. Yet, Plaintiffs failed to present the full case-within-the-case, *or* any expert opinion, *or* any other proof regarding what the likely net outcome of a full trial would have been.⁸³ Because the trial court did not require Plaintiffs to prove what the result of a trial of the

⁸³ Appellees argued below that, in fact, they needed no expert testimony because the testimony by Mr. Wetterich sufficed to prove their case, as he was an expert on the affairs of his own companies. This argument fails because Mr. Wetterich was not qualified as an expert to opine on the legal question of whether Appellees proved proximate cause on the complicated facts of this case. Moreover, as discussed above, his testimony was insufficient also because it

Underlying Case would have been, and did not instruct the jury to make that determination (or how to make it), the jury had no alternative but to speculate regarding the amount of the damages sustained by Plaintiffs. In other words, as a result of the trial court's rulings, the jury's compensatory damage award was based not on competent evidence of what the net value of Plaintiffs' claims would have been after trial, but on pure speculation about what Plaintiffs might have garnered after a trial of the competing complex claims. A damages award based on such uncertainty and speculation cannot stand.

C. Summary

By showing merely that their claims were "viable," see Order and Decision on JNOV Motion at 14, Appx. at 36, Plaintiffs demonstrated only what the settlement of their claims already had revealed: Plaintiffs *already had received* the value of those claims *before* trial was completed, through the settlement GWM negotiated.⁸⁴ To prove that they were entitled to more than that, Plaintiffs should have been required to establish by a preponderance of the evidence that *they would have won at trial, and that their net recovery at that point would have exceeded the negotiated value their claims held on day two of the trial.* To permit Plaintiffs, on the facts

failed to consider any of the competing claims Appellees faced in the Underlying Case, but essentially only summarized the claims Appellees had asserted on day one of the trial in that case.

⁸⁴ By definition, a reasonable settlement discounts the potential risk and reward for each party of going to trial, and therefore reflects the fair value of claims that are "viable" and for which there is "some evidence" of their merit. Here, GWM's expert testified that the settlement GWM achieved for Appellees was not merely reasonable but highly favorable to Appellees. This opinion was uncontradicted, as Appellees' expert offered no opinion concerning the reasonableness of the settlement, and in fact could not have done so because he admitted that he made no effort to evaluate the merits of the competing claims at issue in the Underlying Case. The undisputed evidence, therefore, establishes that Appellees obtained the fair value of their claims.

of this case, to recover a speculative amount of more than \$2.4 million merely by showing that there was “some evidence” that their claims had merit is to turn Ohio tort law on its head.

The standard adopted by the trial court leads to truly absurd results, makes lawyers the guarantors of their clients’ claims, and will encourage meritless malpractice litigation following settlements of underlying cases. Virtually every case that survives a motion for summary judgment (or perhaps just a motion to dismiss) is “viable” and has “some merit,” but only one side can prevail at a contested trial. Yet, by the lower courts’ logic, every one of the multiple parties to the Underlying Case could have sued its lawyers for allegedly coercing it into accepting the settlement instead of going to trial, and every one of those parties could have satisfied the meager requirement of showing that their claims were “viable” or that there was “some evidence” they had merit. Thus, under the lower courts’ rulings, *all* of the parties to the settlement could be awarded totally speculative damages, without regard to what the net result of an actual trial of the Underlying Case would have been, and without regard for the fact that it is logically impossible for *all* parties to have achieved a better result at trial than they did in the settlement.

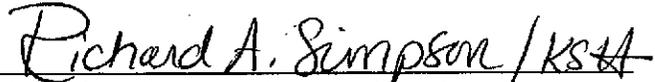
The causation requirement of well-established legal malpractice law (and tort law generally), when properly applied in a case like this one, prevents such an absurd result by requiring the plaintiff to prove not only breach of duty, but also that he would have achieved a better result but for the alleged malpractice. The Eighth Appellate District Court’s decision, however, opens the door to recovery by any litigant who can persuade a jury that his lawyer committed some negligent action before settlement, because it imposes no requirement that the plaintiff prove by a preponderance of the evidence that the negligence in fact caused him some damage.

In sum, the lower courts erred by permitting Plaintiffs to prevail, even though (i) they did not present evidence of the case-within-the-case; (ii) they did not provide expert testimony that purported to establish the causal connection between GWM's alleged negligence and the net recovery they allegedly would have obtained after trial; and (iii) they did not establish in any other way what the result of a full trial would have been. By requiring Plaintiffs to show only "some evidence" that their underlying claims had merit, not only did the Eighth Appellate District Court misconstrue *Vahila*, but also its decision results in the evisceration of Ohio law on legal malpractice and, by analogy, fundamental tort law. On the facts of this case, the lower court's ruling effectively required that Plaintiffs show only the *possibility* that the alleged negligence caused the harm of which they complain – not the affirmative causal connection that Ohio law always has required as an element of a legal malpractice claim and, indeed, of any tort claim. In a case such as this one, the *only* way Plaintiffs could satisfy the causation element was by showing that they would have prevailed after trial of the Underlying Case and what their net recovery, after resolution of *all* the competing claims of *all* the parties, would have been. Because Plaintiffs neither presented sufficient evidence to enable the jury to make this determination, nor requested instructions that would have required the jury to make that determination, they failed to prove causation. This is not just a matter of which parties' evidence the jury found to be more credible. Rather, it is a total failure of proof by Plaintiffs of the facts necessary to satisfy the applicable legal standard.

IV. CONCLUSION

For the reasons stated above, the Court should reverse the decision of the Eighth Appellate District Court and direct that judgment be entered for GWM that Plaintiffs recover nothing in this case.

Respectfully submitted,


Richard A. Simpson (admitted pro hac vice)
Counsel of Record
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006-1040
Telephone: (202) 662-2035
Facsimile: (202) 662-2190
rsimpson@rdblaw.com


Monica A. Sansalone (0065143)
GALLAGHER SHARP
Sixth Floor – Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115
Telephone: (216) 522-1154
Facsimile: (216) 241-1608
msansalone@gallaghersharp.com

Attorneys for Appellant,
Goodman Weiss Miller LLP

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing *Merit Brief of Appellant, Goodman Weiss*

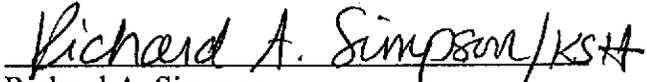
Miller LLP, was served via First Class Mail, postage prepaid, this 12th day of November, 2007

upon:

Joel L. Levin, Esq.
Levin & Associates Co., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, Ohio 44114-1800

and

James M. Wilsman, Esq.
Bonezzi, Switzer, Murphy, Polito & Hupp
1300 East 9th Street, Suite 1950
Cleveland, Ohio 44114-1501


Richard A. Simpson

360580v1

In the Supreme Court of Ohio

ENVIRONMENTAL NETWORK CORP., ET AL.,

Plaintiffs-Appellees

v.

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

Defendant-Appellant.

ON DISCRETIONARY APPEAL FROM THE
COURT OF APPEALS, EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE No CA-06-087782

NOTICE OF APPEAL

MONICA A. SANSALONE (0065143)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-Mail: msansalone@gallaghersharp.com
Attorney for Appellant Goodman Weiss Miller LLP

Of Counsel:
RICHARD A. SIMPSON (*PRO HAC VICE MOTION PENDING*)
ROSS, DIXON & BELL, LLP
2001 K Street, N.W.
Washington, D.C. 20006-1040
Tel: (202) 662-2000
Fax: (202) 662-2190
E-Mail: rsimpson@rdbl.com

FILED

APR 25 2007

MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

JOEL L. LEVIN (0010671)
APARESH PAUL (007719)
LEVIN & ASSOCIATES CO., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, OH 44114
Tel: (216) 928-0600
Fax: (216) 928-0016

JAMES M. WILSMAN
WILSMAN & SCHOONOVER, L.L.C.
The Tower at Erieview, Suite 1420
1301 East Ninth Street
Cleveland, OH 44114
Tel: (216) 589-9600
Fax: (216) 589-9800

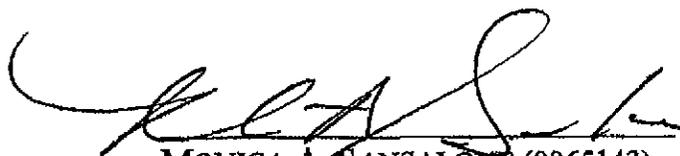
Attorneys for Plaintiffs-Appellees

Notice of Appeal of Appellant Goodman Weiss Miller, L.L.P., et al.

Appellant Goodman Weiss Miller, L.L.P. hereby gives notice of its appeal to the Supreme Court of Ohio from the judgment and order of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. CA-06-087782 filed for journalization on March 12, 2007.

This case raises issues of public and great general interest.

Respectfully submitted,



MONICA A. SANSALONE (0065143)

GALLAGHER SHARP

Bulkley Building, Sixth Floor

1501 Euclid Avenue

Cleveland, OH 44115-2108

Tel: (216) 241-5310

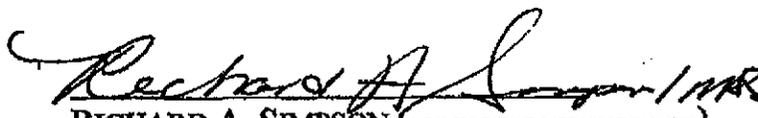
Fax: (216) 241-1608

E-Mail: msansalone@gallaghersharp.com

Attorney for Appellant

Goodman Weiss Miller LLP

OF COUNSEL:



RICHARD A. SIMPSON (*PRO HAC VICE MOTION PENDING*)

ROSS, DIXON & BELL, LLP

2001 K Street, N.W.

Washington, D.C. 20006-1040

Tel: (202) 662-2000

Fax: (202) 662-2190

E-Mail: rsimpson@rdblaw.com

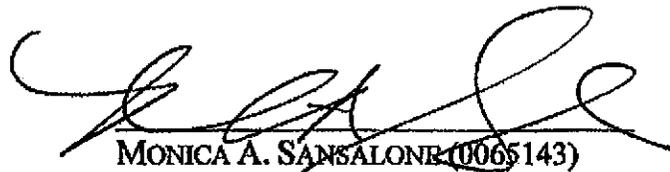
CERTIFICATE OF SERVICE

A true copy of the foregoing *Notice of Appeal* was sent by United States Mail, postage pre-paid, this 24th day of April, 2007 upon the following:

Joel Levin, Esq. (0010671)
Aparesh Paul, Esq. (0077119)
LEVIN & ASSOCIATES CO., L.P.A.
The Tower at Erieview, Suite 1100
1301 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 928-0600
Telefax: (216) 928-0016

James M. Wilsman, Esq. (0005848)
Wilsman & Schoonover, L.L.C.
The Tower at Erieview, Suite 1420
1301 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 589-9600
Telefax: (216) 589-9800

Attorneys for Plaintiffs-Appellees



MONICA A. SANSALONE (0065143)

[Cite as *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2007-Ohio-831.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87782

ENVIRONMENTAL NETWORK CORP., ET AL.

PLAINTIFFS-APPELLEES

vs.

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

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

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:

[Cite as *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2007-Ohio-831.]

ATTORNEYS FOR APPELLANTS

Alton L. Stephens
Lori E. Brown
Robert H. Eddy
Monica A. Sansalone
Gallagher, Sharp, Fulton & Norman
1501 Euclid Avenue
6th Floor Bulkley Building
Cleveland, Ohio 44115

Kelly V. Overman
Lynda Guild Simpson
Richard Simpson
Ross, Dixon & Bell, L.L.P.
2001 K Street, N.W.
Washington, D.C. 20006-1040

ATTORNEYS FOR APPELLEES

James M. Wilsman
Wilsman & Schoonover, L.L.C.
The Tower at Erieview
Suite 1420
1301 East 9th Street
Cleveland, Ohio 44114-1800

Joel L. Levin
Paul Aparesh
Levin & Associates Co., L.P.A.
The Tower at Erieview
Suite 1100
1301 East Ninth Street
Cleveland, Ohio 44114

-CONTINUED-

[Cite as *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2007-Ohio-831.]
ATTORNEY FOR COUNTER CLAIMANT

William G. Chris
Roderick Linton, L.L.P.
One Cascade Plaza
Fifteenth Floor
Akron, Ohio 44308-1108

[Cite as *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 2007-Ohio-831.]
FRANK D. CELEBREZZE, JR., A.J.:

{¶ 1} 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.

{¶ 2} On December 9, 2002, appellees filed a legal malpractice complaint against GWM.¹ 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.² 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. The underlying litigation ended in a settlement agreement in December 2001, after trial commenced.

{¶ 3} Appellees were dissatisfied with the resulting settlement and how it transpired. They filed a legal malpractice complaint against GWM claiming that

¹Case 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.

²Case No. CV-98-351105, which was later consolidated with Case No. CV-98-

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.³

{¶ 4} 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.⁴ 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.

{¶ 5} 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.

352363 and settled along with Case Nos. CV-98-372394, CV-99-389308, CV-01-443765.

³Appellant's abuse of process counterclaim was later dismissed.

⁴In 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.

{¶ 6} 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.

{¶ 7} “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.

{¶ 8} “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.

{¶ 9} “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.”

{¶ 10} 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.

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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.

{¶ 15} 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.

{¶ 16} 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.

{¶ 17} 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.

{¶ 18} Furthermore, in its order denying GWM’s motion for judgment notwithstanding the verdict, the trial court stated:

{¶ 19} “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. ***

{¶ 20} “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.

{¶ 21} “****

{¶ 22} “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.)

{¶ 23} 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.

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

{¶ 25} “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.

{¶ 26} 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:

{¶ 27} “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 {¶ 28} recovery.

{¶ 29} “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.

{¶ 30} 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:

{¶ 31} “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.)

{¶ 32} 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.

{¶ 33} 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.”

{¶ 34} In addition, the trial court charged:

{¶ 35} “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.

{¶ 36} “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.

{¶ 37} “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.

{¶ 38} “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.)

{¶ 39} 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.

{¶ 40} 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 witness⁵ 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.

{¶ 41} 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.⁶ This amount could have been the foundation of a legitimate jury award based on the evidence presented at trial.

{¶ 42} 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

⁵Dr. John F. Burke.

⁶Plaintiff'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.

{¶ 43} "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."

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

{¶ 45} "[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.

{¶ 46} "[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.

{¶ 47} "[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].

{¶ 48} "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.)

{¶ 49} 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

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Environmental Network Corp, et al.)	Case No. CV-02-488462
)	
Plaintiffs,)	Judge Mary Jane Boyle
)	
vs.)	
)	ORDER AND DECISION
Goodman Weiss Miller LLP, et al.)	
)	
Defendants.)	

This matter is before the Court upon Defendant Goodman Weis Miller, LLP's ("Defendant" and "GWM") timely November 3, 2005 Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial, opposed by Plaintiffs' Environmental Network Corp. ("ENC"), Environmental Network and Management Corp. ("ENMC") and John J. Wetterich's (collectively referred to as "Plaintiffs") in their November 14, 2005 Brief in Opposition, and supported by Defendant in its November 28, 2005 Reply Brief in Support. The Court hereby denies Defendant's request for an oral argument on this matter.¹ For the following reasons, Defendant's November 3, 2005 Motion for Judgment Notwithstanding the Verdict and November 3, 2005 Alternative Motion for a New Trial are hereby **DENIED**.

I. Facts and Procedural History

A jury trial was held from September 19, 2005 to September 30, 2005 upon Plaintiffs' Complaint alleging legal malpractice against Defendant Goodman Weiss

¹ Civil Rules 50(B) and 59 do not require an oral hearing on a motion for judgment notwithstanding the verdict or a motion for new trial, and Defendant does not direct Court to any authority requiring an oral hearing.

Miller LLP.² 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”).³ 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

² Defendants Steven Miller, Deborah J. Michelson, and James S. Wertheim were voluntarily dismissed by Plaintiffs, without prejudice, on February 24, 2004.

³ Case No. CV-98-351105, in the Cuyahoga County Common Pleas Court, which was later consolidated with Case No. CV-98-352362.

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. Aetna 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.E.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 OhioSt.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 & Assocs.* (Dec. 31, 1998), 1998 WL 906682 (Ohio App.2d Dist.), unreported; ~~*Lieberman v. Employers Ins. of Wasnau* (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 as 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 & Handleman* (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 *Vahila*, 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

“case-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 & Handleman* (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 *Vahila*. 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 r. 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.⁴

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

⁴ 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 selling Waste Management \$800,000 worth of airspace at \$5.00/ton after paying down the principal \$800,000 additional loan. Defendant argues that Plaintiffs' damages expert, Dr. Burke, testified that ENMC was incapable 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 plaintiff 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 69.⁵ 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").⁶

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

⁵ 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 entering 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; *Hadley v. Baxendale* (1854), 9 Exch. 341.

⁶ 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 \$300,000 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 e); Dunn, "Recovery of Damages/Lost Profits" (6th 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 *Gennari 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.

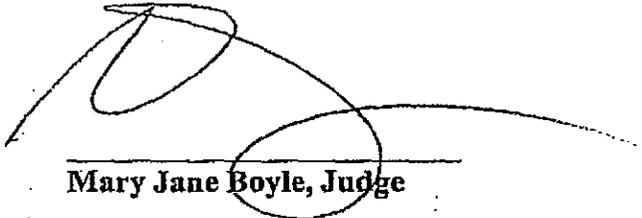
III. Conclusion

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.

1-30-06

Date



Mary Jane Boyle, Judge

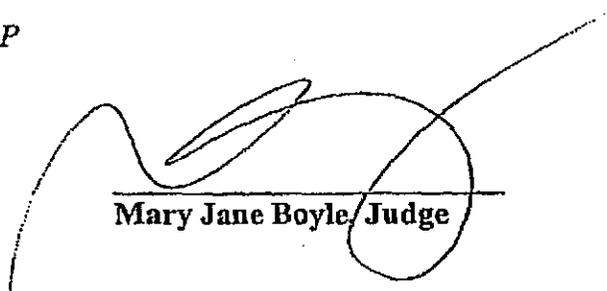
CERTIFICATE OF SERVICE

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:

Joel Levin, Esq.
Aparesh Paul, Esq.
LEVIN & ASSOCIATES CO., L.P.A.
1301 East 9th Street
Tower at Erieview, Suite 1100
Cleveland, OH 44114
Attorneys for Plaintiffs

Alton L. Stephens, Esq.
Robert H. Eddy, Esq.
Monica A. Sansalone, Esq.
Lori E. Brown, Esq.
GALLAGHER SHARP
Sixth Floor – Buckley Building
1501 Euclid Avenue
Cleveland, OH 44115
Attorneys for Defendant Goodman Weiss Miller LLP



Mary Jane Boyle, Judge



35920293

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ENVIRONMENTAL NETWORK CORPORATION, ET AL

Plaintiff

Case No: CV-02-488462

Judge: MARY J BOYLE

GOODMAN WEISS MILLER LLP, ET AL
Defendant

JOURNAL ENTRY

81 DISP. JURY TRIAL - FINAL

10-3-05 VERDICTS

WE, THE JURY, BEING DULY EMPANELLED, UPON THE CONCURRENCE OF THE UNDERSIGNED JURORS, BEING NOT LESS THAN THREE-FOURTHS OF THE WHOLE NUMBER THEREOF, DO HEREBY FIND IN FAVOR OF THE PLAINTIFFS, ENVIRONMENTAL NETWORK CORPORATION, ET AL., IN THE AMOUNT OF \$2,419,616.81 AND AGAINST DEFENDANT, GOODMAN WEISS MILLER.

WE THE JURY, BEING DULY EMPANELLED AND SWORN, WITH AT LEAST THREE-FOURTHS OF THE JURORS AGREEING, FIND IN FAVOR OF GOODMAN WEISS MILLER LLP AND AGAINST PLAINTIFFS ON THE COUNTERCLAIM FOR ACTION ON ACCOUNT AND AWARD DAMAGES IN THE AMOUNT OF \$15,540.00

WE THE JURY, BEING DULY EMPANELLED AND SWORN, WITH AT LEAST THREE FOURTHS OF THE JURORS AGREEING, FIND IN FAVOR OF GOODMAN WEISS MILLER LLP AND AGAINST PLAINTIFFS ON THE COUNTERCLAIM FOR BREACH OF CONTRACT AND AWARD DAMAGES IN THE AMOUNT OF \$0.00.

WE THE JURY, BEING DULY EMPANELLED AND SWORN, WITH AT LEAST THREE-FOURTHS OF THE JURORS AGREEING, FIND IN FAVOR OF PLAINTIFF'S AND AGAINST GOODMAN WEISS MILLER LLP ON THE COUNTERCLAIM FOR UNJUST ENRICHMENT.

WE THE JURY, BEING DULY EMPANELLED AND SWORN, WITH AT LEAST THREE-FOURTHS OF THE JURORS AGREEING, FIND IN FAVOR OF PLAINTIFF'S AND AGAINST GOODMAN WEISS MILLER LLP ON THE COUNTERCLAIM FOR NEGLIGENT MISREPRESENTATION.

WE THE JURY, BEING DULY EMPANELLED AND SWORN, WITH AT LEAST THREE-FOURTHS OF THE JURORS AGREEING, FIND IN FAVOR OF PLAINTIFF'S AND AGAINST GOODMAN WEISS MILLER LLP ON THE COUNTERCLAIM FOR FRAUD.

COURT COST ASSESSED TO THE DEFENDANT(S).

Judge Signature

Date

OCT 20 2005



35921244

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

ENVIRONMENTAL NETWORK CORPORATION, ET AL

Plaintiff

GOODMAN WEISS MILLER LLP, ET AL

Defendant

Case No: CV-02-488462

Judge: MARY J BOYLE

JOURNAL ENTRY

COURT ENTERS JUDGMENT IN FAVOR OF THE PLAINTIFFS, ENVIRONMENTAL NETWORK CORPORATION, ET AL., IN AMOUNT OF \$2,419,616.81 AND AGAINST DEFENDANT, GOODMAN WEISS MILLER, IN ACCORDANCE WITH THE JURY VERDICT.

COURT ENTERS JUDGMENT IN FAVOR OF GOODMAN WEISS MILLER LLP IN THE AMOUNT OF \$15,540.00 AND AGAINST AT ENVIRONMENTAL NETWORK ON THE COUNTERCLAIM FOR ACTION ON ACCOUNT, IN ACCORDANCE WITH THE JURY VERDICT.

COURT ENTERS JUDGMENT IN FAVOR OF GOODMAN WEISS MILLER LLP IN THE AMOUNT OF \$0.00 AND AGAINST PLAINTIFFS ON THE COUNTERCLAIM FOR BREACH OF CONTRACT, IN ACCORDANCE WITH THE JURY VERDICT.

COURT ENTERS JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST GOODMAN WEISS MILLER LLP ON THE COUNTERCLAIM FOR UNJUST ENRICHMENT, IN ACCORDANCE WITH THE JURY VERDICT.

COURT ENTERS JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST GOODMAN WEISS MILLER LLP ON THE COUNTERCLAIM FOR NEGLIGENT MISREPRESENTATION, IN ACCORDANCE WITH THE JURY VERDICT.

COURT ENTERS JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST GOODMAN WEISS MILLER LLP ON THE COUNTERCLAIM OF FRAUD, IN ACCORDANCE WITH THE JURY VERDICT.

Judge Signature

Date

OCT 20 2005

THE STATE OF OHIO,)
) SS MARY JANE BOYLE, J.
COUNTY OF CUYAHOGA:)

IN THE COURT OF COMMON PLEAS
(CIVIL DIVISION)

ENVIRONMENTAL NETWORK,)
CORPORATION, et al.,)
)
Plaintiffs,)
)
vs.) Case No. CV 488462
) CA 87782
)
GOODMAN WEISS MILLER LLP,)
et al.)
)
Defendants.)

--- o0o ---

DEFENDANTS' TRANSCRIPT OF PROCEEDINGS

--- o0o ---

APPEARANCES:

On Behalf of the Plaintiffs:

By: JOEL L. LEVIN, ESQ.
APARESH PAUL, ESQ.
JAMES M. WILSMAN, ESQ.

On Behalf of the Defendants:

By: ALTON L. STEPHENS, ESQ.
ROBERT H. EDDY, ESQ.
LORI E. BROWN, ESQ.
WILLIAM G. CHRIS, ESQ.

Sheila D. Walters
Thomas C. Walters
Official Court Reporters
Cuyahoga County, Ohio

Volume VI of

1 summary judgment brief, Keith Cunningham versus
2 John Hildebrand, 42 Ohio App. 3d. 218., a 2001
3 decision -- right in the overview of the case,
4 your Honor, the defendant -- this is the Court,
5 and the defendants had stipulated that they
6 were negligent, but plaintiff had to show that
7 this failure to recover was causally related to
8 their negligence. That's it.

9 THE COURT: But the standard
10 here is very -- I have to view the evidence in
11 the most favorable light of the non-moving
12 party, that being the plaintiff, and maybe I'm
13 over-complicating things.

14 Maybe the simplest way is by way of my
15 broken nose example. Even though I know this
16 is not a broken nose case, but when I hear
17 Mr. Wetterich's testimony and drawing an
18 inferences favorable to him as well to his
19 expert, they're saying, but for the settlement
20 he would have been in a different position.

21 And I guess that's the simplest way of
22 saying it. So drawing these favorable
23 inferences as I have to for the plaintiff, I'm
24 going to and overrule the defendants' motions
25 for directed verdicts.

LEXSEE 2000 OHIO APP. LEXIS 2697

Naomil Endicott, Plaintiff-Appellant, v. Michael J. Johrendt et al.,
Defendants-Appellees.

No. 99AP-935

COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN
COUNTY

2000 Ohio App. LEXIS 2697

June 22, 2000, Rendered

PRIOR HISTORY: [*1] APPEAL from the Franklin County Court of Common Pleas.

DISPOSITION: Affirmed.

COUNSEL: Arnebeck & Christensen, and Clifford O. Arnebeck, Jr., for appellant.

Zeiger & Carpenter, G. Michael Romanello and Stuart G. Parsell, for appellees Michael J. Johrendt and Johrendt, Cook & Eberhart.

JUDGES: DESHLER, J., BOWMAN, P.J., and BROWN, J., concur.

OPINION BY: DESHLER

OPINION

(ACCELERATED CALENDAR)

DECISION

DESHLER, J.

Plaintiff-appellant, Naomil Endicott, appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendants-appellees, Michael J. Johrendt and the law firm of Johrendt, Cook & Eberhart. The present action arises out of appellees' legal representation of appellant in a lawsuit brought by appellant against her former employer, World Harvest Church.

Appellant engaged attorney Donald Hallows and

the firm of Welch, Hallows & Miller Co., L.P.A., in 1992, to represent her in her employment action. Hallows later engaged appellees as co-counsel. Hallows and Johrendt obtained a settlement offer from the church and presented it to appellant, who rejected it as inadequate. The difference of opinion between appellant and her counsel over [*2] the value of the employment case eventually led to a termination of appellees' representation of appellant, and appellant engaged attorney Clifford O. Arnebeck, Jr., her counsel in the present malpractice action, to represent her in the employment action. In April 1995, attorney Arnebeck negotiated a settlement of the employment action against the church at a figure markedly higher than that which appellee Johrendt had advised appellant to accept in 1993.

Appellant subsequently filed the present malpractice action against Johrendt, Hallows, and their respective firms in late 1996. The original complaint couched her malpractice claims as stemming from breach of contract, breach of fiduciary duty, and intentional infliction of emotional distress. Appellant filed an amended complaint almost immediately thereafter, re-labeling her claims as breach of contract by fraud, breach of fiduciary duty by fraud, and intentional infliction of emotional distress. Appellant voluntarily dismissed this initial malpractice action without prejudice on June 25, 1997.

On October 27, 1997, appellant re-filed her malpractice action with the new complaint expressly alleging a legal malpractice claim, [*3] as well as claims for misrepresentation, breach of contract by fraud, breach of fiduciary duty by fraud, and intentional infliction of mental distress. This re-filed complaint, which forms the

basis for the present action, reprised the allegations of prior complaints that appellees had failed to make a reasonable effort to obtain a satisfactory settlement or verdict in appellant's employment action against the church, that appellees had attempted to coerce or influence appellant into accepting a lower settlement than she deserved or desired, and that appellees had further pressured her to accept a lower settlement by withdrawing as counsel a few weeks before the scheduled trial in November 1993. The re-filed complaint additionally alleged that appellees acted as co-counsel in June 1993 with the law firm of Chester, Hoffman, Willcox & Saxbe in an unrelated matter for an unrelated client, which created a conflict of interest in appellant's case because the Chester firm had entered an appearance as counsel on behalf of the defendant-employer in May 1993.

In a related action, appellant, attorney Arnebeck, and appellees have been engaged in parallel arbitration proceedings concerning [*4] division of the attorney fees from appellant's settlement with her former employer. Pursuant to the arbitration provisions of appellant's contingent fee agreement with Hallows and appellees, appellees sought a share of the contingent fees payable to Arnebeck from the settlement on the basis that they were entitled to reasonable attorney fees for services provided up to the date of their termination of representation by appellant. The primary issue in the arbitration proceeding was whether appellees and Hallows had voluntarily withdrawn as appellant's counsel in the employment action, or whether they had been constructively discharged by appellant.

The panel of three arbitrators heard testimony over two days from appellant, Arnebeck, Johrendt and Hallows. The gist of Johrendt and Hallows' testimony at the hearing was that they were compelled to withdraw as appellant's counsel in the employment action because they felt that appellant was impaired by medication and was in no condition to make objective decisions regarding the case, or to be an effective witness at trial. Former counsel further testified that appellant had refused to follow their advice to get help from a treating [*5] psychologist, and that appellant appeared to be motivated more by a desire to drag her former church employer through trial and the resultant bad publicity, and was also preoccupied by a desire to obtain revenge against members of her family involved in church administration, and by the possibility of obtaining a

lucrative book deal about her experiences.

Appellant, in contrast, testified before the arbitration panel that Hallows and Johrendt recommended that she settle her action for an unacceptably low amount, and that when she would not consent to do so, they withdrew from representation shortly before the November 15, 1993 trial date.

The arbitration panel, in its decision, found that "there was a constructive discharge of attorneys Johrendt and Hallows by their client, Naomil Endicott, and that they are entitled to their quantum meruit fees plus expenses. *** From the contingency fees, there shall be a payment from Mr. Arnebeck to Msrs. Johrendt and Hallows in the amount of \$ 36,500.*** " That finding by the arbitration panel was initially reversed by the court of common pleas, but subsequently reinstated by this court. *Endicott v. Johrendt*, 1998 Ohio App. LEXIS 1888 (Apr. 30, 1998), Franklin [*6] App. No. 97APE08-1122, unreported.

In the present action, appellees filed a motion for summary judgment, arguing that because appellant had voluntarily settled her underlying employment claims for a figure well in excess of any amount offered by the church during the period of appellees' representation, she could not show that she suffered damages from any of the alleged acts of malpractice or misconduct by appellees. The trial court relied upon *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App. 3d 89, 90, 446 N.E.2d 820, for the proposition that all counts of the complaint should be treated as arising from, and merging with, the alleged legal malpractice. Treating the action as one for malpractice only, the trial court ruled that appellant's claimed damages, in light of the settlement which she had reached in the employment case, were too speculative to sustain. The court further found that appellant had failed to submit evidence that the delay in the case caused by appellees' withdrawal from representation had caused her any damages. The trial court therefore granted summary judgment for all defendants. Hallows and his firm were later voluntarily dismissed and are not parties [*7] to this appeal. ¹ Appellant has timely appealed and brings the following assignments of error:

1. The trial court, citing *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App. 3d 89, 446 N.E.2d 820, erroneously treated all counts of plaintiff's complaint (legal malpractice, misrepresentation, fraudulent breach of contract, fraudulent breach of fiduciary duty and

intentional infliction of emotional distress) as being, in substance, for legal malpractice, whereas plaintiff met her pleading and evidentiary burden under this court's holding in *DiPaolo v. DeVictor* (1988), 51 Ohio App. 3d 166, 555 N.E.2d 969 for complaints of fraudulent conduct by an attorney.

2. The trial court, citing *Sawchyn v. Westerhaus* (1991), 72 Ohio App. 3d 25, 593 N.E.2d 420, erroneously ruled that, because Endicott had settled her underlying tort claims, as to which defendants had formerly represented her, her damages from defendants' malpractice and/or misconduct in representing her were inextricably intertwined with the settlement and, therefore, could not be proven.

3. The trial court erred in concluding that plaintiff had presented no evidence [*8] of damage to her as a direct and proximate result of the misconduct of defendants because, based upon the Ohio Supreme Court's holding in *Vahila v. Hall* (1997), 674 N.E.2d 1164, 77 Ohio St. 3d 421, plaintiff's loss of opportunity and delay, as to which she presented ample evidence as having been proximately caused by defendants' misconduct, is sufficient to meet plaintiff's burden as to malpractice and misconduct.

4. The trial court erred by inferring that the delay produced by defendants' misconduct did not damage plaintiff because she later obtained more in settlement after she obtained other counsel, because plaintiff, as the nonmoving party, is entitled pursuant to *Civ.R. 56(C)* to the inference that, had defendants not mistreated plaintiff, she could have obtained a more favorable settlement or verdict at an earlier time.

1 The trial court subsequently entered a *nunc pro tunc* entry noting that an abuse of process counterclaim brought by appellees against Endicott was still pending before it, and appending "no just reason for delay" language pursuant to *Civ.R. 54(B)* to permit the present appeal to be brought without waiting for resolution of the counterclaim.

[*9] The present case was decided on summary judgment. Pursuant to *Civ.R. 56(C)*, a motion for summary judgment will be granted if no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and the evidence demonstrates that reasonable minds can come to but one

conclusion, that conclusion being adverse to the non-moving party. *Bostic v. Connor* (1988), 37 Ohio St. 3d 144, 524 N.E.2d 881; *Davis v. Loopco Industries, Inc.* (1993), 66 Ohio St. 3d 64, 609 N.E.2d 144. Upon appeal from a grant of summary judgment by the trial court, an appellate court will *de novo* review the pleadings and evidentiary material submitted to the trial court and apply the same standard to determine whether the materials submitted establish a genuine issue of material fact. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App. 3d 127, 129, 572 N.E.2d 198. The appellate court will review the grant of summary judgment independently and will not defer to the trial court. *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App. 3d 6, 536 N.E.2d 411. Summary judgment will [*10] be granted where the non-moving party fails to produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St. 3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *State ex rel. Morley v. Lordi* (1995), 72 Ohio St. 3d 510, 513, 651 N.E.2d 937. Where a motion for summary judgment has been made and supported as provided in *Civ.R. 56*, a non-moving party may not rest on the mere allegations of his pleading, but his response, by affidavit or as otherwise provided in *Civ.R. 56*, must set forth specific facts showing that there is a genuine triable issue. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St. 3d 48, 52, 567 N.E.2d 1027. However, a moving party cannot discharge its burden under *Civ.R. 56* simply by making conclusory assertions that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293, 662 N.E.2d 264. Rather, the moving party must point to some evidence that affirmatively demonstrates that the non-moving party has no evidence to support his or her claims. *Id.*

[*11] Appellant's first assignment of error asserts that the trial court improperly treated all counts enumerated in appellant's complaint as representing, in substance, components of a single cause of action for legal malpractice. In *Muir, supra, at 90*, this court stated: "An action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of *R.C. 2305.11*, regardless of whether predicated upon contract or tort or whether for indemnification or direct damages." Our opinion in *Muir* went on to state, "malpractice by any other name still constitutes malpractice." *Id.* This language in *Muir*, as

well as in a multitude of cases which address the same issue, is prompted by frequent attempts by defendants in malpractice actions to avoid the one-year statute of limitations on such actions, and benefit from the longer statutes of limitations applicable to alternative theories of recovery. "The applicable statute of limitations is determined not from the form of the pleading or procedure, but from the gist of the complaint." *Hibbett v. Cincinnati* (1982), 4 Ohio App. 3d 128, 131, 446 N.E.2d 832 [*12] (treating fraud and various other claims in a complaint as a single legal malpractice claim.) In fact, appellees argue in this appeal, that summary judgment was not only appropriate on the grounds cited by the trial court, but that appellant's claims were all time-barred as well. Since the trial court did not rely upon the statute of limitations in rendering summary judgment, and our disposition of appellant's assignments of error make it unnecessary to reach issues not passed upon by the trial court, we will consider the question of which causes of action were properly pled only to establish the gist of appellant's claims in order to determine whether appellant has sustained her evidentiary burden in opposing summary judgment.

Appellant's complaint in the present matter contained a claim for legal malpractice and four additional claims for misrepresentation, breach of contract by fraud, breach of fiduciary duty by fraud, and intentional infliction of mental distress. The misrepresentation claim is based upon allegations that Johrendt deliberately mislead appellant about his willingness to go to trial in the employment action, and failed to disclose actual or potential conflicts of [*13] interest arising out of a concurrent co-counsel relationship with opposing counsel in the employment case. We agree with the trial court that this misrepresentation claim is part and parcel of the malpractice action, and should be subsumed thereto. "Allegations of fraudulent misrepresentation *** do not transmute or change the cause of action from one in malpractice to one in deceit." *Swankowski v. Diethelm* (1953), 98 Ohio App. 271, 275, 129 N.E.2d 182 (addressing medical malpractice claim, but often cited with approval in legal malpractice cases: *Strock v. Pressnell* (1988), 38 Ohio St. 3d 207, 527 N.E.2d 1235; *Ward v. Lynch*, 1995 Ohio App. LEXIS 5389 (Dec. 7, 1995), Cuyahoga App. No. 68554, unreported.) Similarly, appellant's breach of contract and breach of fiduciary duty claims, viewed independently of the "fraud" component appended thereto in the complaint, clearly "arise out of the manner in which [appellant] was

represented within the attorney/client relationship," *Spencer v. McGill* (1993), 87 Ohio App. 3d 267, 275, 622 N.E.2d 7, and are subsumed into the malpractice claim.

As to the fraud component of appellant's claims, we agree with appellant that [*14] this court has recognized that not all fraudulent conduct will always be brought back under the umbrella of a general malpractice claim. In *DiPaolo v. DeVictor* (1988), 51 Ohio App. 3d 166, 555 N.E.2d 969, we addressed facts in which plaintiffs alleged that the defendant attorneys had made fraudulent statements during the course of their representation. We noted the presumption that attorneys act in good faith in handling their client's affairs:

In order to rebut that presumption and sufficiently allege a cause of action for fraud against attorneys in a situation where the gist of the complaint involves legal malpractice *** plaintiffs must have specifically alleged that defendants committed the actions for their own personal gain. To hold otherwise would be to undermine the purpose and focus of the malpractice statute. Moreover, such [a] requirement is in keeping with the particularity generally necessary to have a well pleaded complaint in fraud. *Id.* at 173.

Appellant seeks to have the present matter fall within the exception stated in *DiPaolo* by pointing out that appellees' alleged fraudulent statements were made in furtherance of their [*15] desire to, firstly, obtain a settlement in the employment action (and resulting contingent fee) with as little effort and delay as possible, and secondly, to maintain a financially rewarding co-counsel relationship in an unrelated case with the Chester firm, opposing counsel in the employment action. We do not find that this is the type of personal profit contemplated when this court stated the exception set forth in *DiPaolo*, and accordingly find that appellant's claim for fraud may not be maintained separately from the underlying malpractice action.

As to appellant's claim for intentional infliction of mental distress, however, we reach a different outcome. Appellant's complaint alleges that appellees sought to exploit appellant's distress arising from her personal circumstances and the underlying employment action, for the purpose of compelling appellant to grant them authority to settle the case for a figure considerably below what she initially would accept. Appellant further alleges that, after she settled the employment case with

her new counsel, appellees sought to pressure her into agreeing to pay them legal fees by interfering with the consummation of the settlement and [*16] by falsely characterizing her as an abuser of prescription drugs. Appellant alleges that she suffered extreme mental and physical distress as a direct result of these actions by appellees, including nausea, vomiting, severe headaches, and depression.

The component of appellant's intentional infliction of mental distress claim which alleges that appellees exerted undue pressure upon her to settle her employment action clearly falls within the ambit of their representation of her in that case, and will be considered under the discussion of that malpractice claim generally. The second component of her intentional infliction of mental distress claim, however, is based upon actions and statements by appellees occurring well after their representation terminated, in connection with the arbitration proceeding undertaken to allocate fees from appellant's settlement with her former employer. This component of the claim clearly differs from the other aspects of appellant's complaint in that its factual allegations cover matters not necessarily within the scope of legal representation of appellant by appellees (although devolving therefrom), and in that it asserts damages in the form of physical [*17] injury which differ from the pecuniary damages resulting from the delay in settlement which appellant claims resulted from appellees' withdrawal of representation in the employment action. As such, we find that appellant's intentional infliction of mental distress claim does not fall entirely within the scope of *Muir*, and, unlike the balance of her complaint, constitutes a separate claim from the legal malpractice action.

Nonetheless, although we find that the trial court erroneously assimilated certain aspects of appellant's intentional infliction of mental distress claim with the legal malpractice aspect of the complaint, we find that the trial court did not err in granting summary judgment for appellees on this claim as well, because appellant has not sustained her burden of presenting evidence creating a material issue of fact on issues for which appellant bears the burden of presenting evidence at trial. The tort of intentional infliction of mental distress, more commonly referred to as intentional infliction of emotional distress, has been defined in Ohio as requiring the following elements:

(1) that the actor either intended to cause emotional distress or knew or should [*18] have known that actions taken would result in serious emotional distress to the plaintiff, (2) that the actor's conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was such that it can be considered as utterly intolerable in a civilized community, (3) that the actor's actions were the proximate cause of the plaintiff's psychic injury, and (4) that the mental anguish suffered by the plaintiff is serious and of a nature that no reasonable man could be expected to endure it. *** Serious emotional distress requires an emotional injury which is both severe and debilitating.

Burkes v. Stidham (1995), 107 Ohio App. 3d 363, 375, 668 N.E.2d 982. In addressing this tort, the Supreme Court of Ohio has relied upon the description of extreme and outrageous conduct found in the Restatement:

*** It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only [*19] where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Yeager v. Loc. Union 20 (1983), 6 Ohio St. 3d 369, 374-375, 453 N.E.2d 666, quoting *Restatement of the Law 2d, Torts* (1965) 71, Section 46.

In attempting to establish the conduct of appellees which amounted to such tort, the affidavit of appellant stated as follows:

25. On April 17, 1995 we filed a motion for release of the Johrendt/Hallowes notice of lien so I could receive my settlement. Former counsel Johrendt and Hallowes opposed my motion. In the course of a hearing on that matter Johrendt accused me of having been an abuser of drugs and irrational, among other things. Johrendt's characterization of me was similar to the attack the defendants had made upon me and that they typically

make against anyone who leaves the World Harvest Church after suffering abuse by them. While [*20] no record was made of this hearing, Mr. Johrendt's attack on me was similar to that he made on me at the arbitration hearing before the OSBA attached hereto as Exh. 6.

26. I suffered vomiting, depression, weight loss and extreme emotional distress as a result of this effort to sabotage my enjoyment of my settlement.

30. In the time preceding their motion to withdraw Mr. Johrendt and Hallowes did nothing but try to show I was a drug addict. They did nothing to show that there was no drug problem.

31. During 1993 I was coherent, rational, and felt confident regarding my case and representation except for the disagreement over the amount of settlement.

32. At no time in my life have I abused drugs. At no time while meeting with either Mr. Johrendt or Mr. Hallowes was I under the influence of drugs.

33. In 1993 I was seeing only one doctor, namely Doctor Pangalangan, a gynecologist. Dr. Pangalangan prescribed only a hormone Premarin and twice prescribed Tylenol 3 for severe headaches.

The pertinent sections of the arbitration hearing referred to in the affidavit contained testimony by Johrendt as follows: ²

We became concerned because the communications [*21] became strained and because her condition and her dealings with us became strained. I talked to Don about this. I had met with her; I'd talked to her on the phone. I said, "Don, why don't you talk to her and see what the problem is and what you can do." Don talked to her and didn't seem to be much help. We frankly thought - And Don, I think, will give you his view of it. We frankly thought that she was overmedicated and operating under a great deal of stress.

We were very, I think, polite and diplomatic with her in the sense we didn't accuse her of abusing drugs, but what we said to her was, "You need to understand defense counsel is going to raise these things; this is what they're focusing on in discovery; they're going to bring

this up." Frankly, she wasn't able to hold up in terms of a meeting with her own lawyers for an hour, hour-and-a-half, much less -- that's kind of the explanation that we were giving her -- much less stand a week or two in trial and be in court. I think she just really had a hard time with some of the baggage with the case.

She lost her home. I shouldn't say her home. She didn't have a home. She was living with a lady in a basement and [*22] was commiserating with us from time to time, and just had problems with her living arrangements, had problems with her health and her treatment, her overmedication.

After we started the case, she'd been arrested twice more for shoplifting and we were getting to the point where we had a client who was out of control. Don and I spoke and thought what do we do with her.

We called Bruce Campbell at the Bar Association and described the background to him and asked him what thoughts he had, and he sent us some literature that they had on dealing with incapacitated clients. We read that and looked at it. We considered going to the administrative judge for the Common Pleas Court. No, we don't want to do that, that may get back to the other side, and we don't want to let anything happen that would disclose, you know, confidences and something of the case. We had to maintain the integrity of that.

We thought, she's got a good case. We can't let the client harm herself. We've got to do something to -- She won't seek help. We've got to do something to get out of the situation in terms of going head long into a buzz saw of a trial here in two weeks, and so we thought, the [*23] smoothest thing -- We considered going to the administrative judge. We thought the smoothest thing was to file an innocuous motion to withdraw, that would buy her time, she could get new counsel, she could get the continuation, or maybe she could come to her senses. (Tr. 44, 45-46, 49.)

2 There is some indication that appellant believes the transcript from which the following is excerpted to have been sealed. The record reflects no order entered by the trial court to that effect, however, Appellant has, moreover, expressly moved to supplement the record on appeal with materials that include the quoted transcript

passages.

We find that the above-quoted statements by Johrendt do not demonstrate that he "either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff," *Burkes, supra*, the first element of the tort of intentional infliction of emotional distress. Nor do we find that the statements are "so extreme [*24] and outrageous as to go beyond all possible bounds of decency," under the second element of the tort. We base this conclusion both on the content of Johrendt's remarks themselves, and the forum in which they were uttered: a confidential arbitration proceeding, before a limited audience comprised of interested parties and factfinders, in which an attorney was attempting to describe, in rather restrained terms, difficulties he experienced with a client. Taking as true, for purposes of summary judgment, appellant's statements regarding the inaccuracy of Johrendt's description of her prescription drug use or mental state, there still remains no issue of material fact regarding the existence of sufficiently extreme conduct on the part of appellees to support a claim of intentional infliction of mental distress.

Based upon the forgoing, we find that with the exception of appellant's intentional infliction of mental distress claim, the trial court did not err in incorporating all of appellant's various claims into the legal malpractice claim. We further find that appellant's intentional infliction of mental distress claim was nonetheless subject to summary judgment, even if considered separately. [*25] Appellant's first assignment of error is accordingly overruled.

We now turn to appellant's three remaining assignments of error, which present interrelated issues regarding the existence of damages in the case and will be addressed together. To establish a cause of action for legal malpractice, appellant must show: (1) an attorney-client relationship giving rise to a duty; (2) breach of that duty; and (3) resulting damages caused by the breach. *Krahn v. Kinney (1989)*, 43 Ohio St. 3d 103, 538 N.E.2d 1058. The trial court, in granting summary judgment for appellees, found that, even accepting *arguendo*, that appellees had breached the standard of care in their representation of appellant, appellant's later settlement of her employment action rendered any damages purely speculative. The trial court further noted that appellant had produced no evidence of damages at

all.

We agree with appellant that, of itself, subsequent settlement of the underlying action is not always preclusive of damages in a malpractice case. *Vahila v. Hall (1997)*, 77 Ohio St. 3d 421, 674 N.E.2d 1164; *Monastra v. D'Amore (1996)*, 111 Ohio App. 3d 296, 676 N.E.2d 132; [*26] *Gibson v. Westfall*, 1999 Ohio App. LEXIS 4791 (Oct. 7, 1999), Cuyahoga App. No. 74628, unreported. But, see, *Sawchyn v. Westerhaus (1991)*, 72 Ohio App. 3d 25, 593 N.E.2d 420; *Estate of Callahan v. Allen (1994)*, 97 Ohio App. 3d 749, 647 N.E.2d 543.

It is unnecessary in the present case, however, to determine whether the settlement itself precluded any showing of damages, because on the present facts, appellant has not shown that she was damaged by appellees' withdrawal as counsel. "Before legal malpractice can occur, the client must have incurred damages that were directly and proximately caused by the attorney's malpractice." *Northwestern Life Ins. Co. v. Rogers (1989)*, 61 Ohio App. 3d 506, 512, 573 N.E.2d 159. It is axiomatic that compensatory damages must be shown with certainty, and damages which are merely speculative will not give rise to recovery. *Swartz v. Steele (1974)*, 42 Ohio App. 2d 1, 325 N.E.2d 910; *Ratliff v. Colasurd*, 1999 Ohio App. LEXIS 1985 (Apr. 27, 1999), Franklin App. No. 98AP-504, unreported. In the present case, the undisputed evidence before the trial court was that, after Johrendt had made a settlement counteroffer which was rejected by [*27] the defendant church, successor counsel presented a substantially similar offer which was again rejected. The matter was thereafter dismissed by successor counsel, and only upon re-filing some two years later was a settlement reached in an amount some two and a half times the highest offer previously presented by the church. Successor counsel, as with appellees, did not take the matter to trial even though after withdrawal of appellees as counsel a new trial date was set only two months from the original date. Appellant's response to a request for admissions was that she admitted that after appellees withdrew from representation, successor counsel was unable to secure a higher settlement offer than appellees had received. Appellant's admission also establishes that no higher settlement offer was received from the employer in 1994, and that it was not until 1995 that a substantially higher settlement offer was presented. Appellant has simply not presented any evidence beyond speculative inference that the actions of appellees during the period of

representation were the cause of the lower offers presented by the church in 1993 or 1994, since successor counsel was unable to obtain a [*28] better offer, and similarly, elected not to advance the matter to trial at that time. Appellant ultimately settled her employment action for roughly two-and-a-half times the highest offer received by either counsel in the earlier phase of the case. On these facts, it is simply not possible, even viewing the evidence in a light most favorable to appellant, to establish a showing that she was damaged by any alleged acts of malpractice on the part of appellees.

We therefore find that, since appellant has not sustained her evidentiary burden in opposing summary judgment of producing evidence on any element in which she was required to prove at trial and which was challenged by appellees in the summary judgment motion, pursuant to *Wing* and *Dresher*, we find that the

trial court did not err in granting summary judgment for appellees on appellant's malpractice claim. Appellant's second, third, and fourth assignments of error are accordingly overruled.

In summary, for the reasons set forth above, we find that the trial court did not err in granting summary judgment for appellees in all aspects of appellant's claim, although we find different grounds to do so with respect to appellant's [*29] claim for intentional infliction of mental distress. Appellant's first, second, third and fourth assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN, P.J., and BROWN, J., concur.

LEXSEE

**PAUL J. PSCHESANG, Plaintiff-Appellant, vs. CLAUDIA L. SCHAEFER And
FROST & JACOBS, Defendants-Appellees.**

APPEAL NO. C-990702

**COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON
COUNTY**

2000 Ohio App. LEXIS 3602

August 11, 2000, Date of Judgment Entry on Appeal

NOTICE:

[*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. A-9707050.

DISPOSITION: Judgment Appealed From Is: Reversed and Cause Remanded.

HEADNOTES

TORT MISCELLANEOUS

SYLLABUS

Where the plaintiff retained a second attorney and reached a settlement with his ex-wife concerning a discrepancy in their separation agreement with respect to the acreage of real property that was being transferred to the ex-wife, the settlement did not bar the plaintiff from later prevailing on a malpractice claim against his original attorney.

COUNSEL: Geoffrey P. Damon, for Plaintiff-Appellant.

Michael E. Maundrell and John W. Hust, for Defendants-Appellees.

JUDGES: DOAN, P.J., GORMAN and

SUNDERMANN, JJ.

OPINION

DECISION.

Per Curiam.

The plaintiff-appellant, Paul J. Pschesang, appeals from the order of the trial court granting summary judgment to Claudia Schaefer and the law firm of Frost & Jacobs on his claims for legal malpractice. Pschesang alleged that Schaefer, an attorney at Frost & Jacobs, was professionally negligent, breached their contract of representation, and violated a fiduciary [*2] duty arising from their lawyer-client relationship while representing him in a dissolution proceeding. To remedy the effect of the alleged malpractice, Pschesang employed the services of another lawyer before reaching a settlement with his ex-wife. In his two assignments of error, he now argues that the trial court erred by granting summary judgment to Schaefer and Frost & Jacobs. We agree and thus reverse.

Schaefer's alleged malpractice stemmed from a discrepancy that arose between language in the separation agreement and an attached survey of the property identified in the agreement. The separation agreement, prepared prior to the completion of the survey, provided that sixty-three acres of land and a seven-acre pond would be awarded to Pschesang's wife. However, the survey described the parcel of land as comprising 92.772 acres, in other words 22.772 acres more than that expressly awarded in the separation agreement. Although Pschesang signed the separation agreement, he claimed

that he failed to notice the discrepancy, and that Schaefer, if she noticed it, failed to draw it to his attention. A decree of dissolution that incorporated the fully executed separation agreement, including [*3] the survey, was entered on August 2, 1996.

On August 7, 1996, Pschesang executed a quit-claim deed to his ex-wife with the survey attached. Schaefer sent a copy of the decree of dissolution with the incorporated separation agreement and attached survey to Pschesang on August 8, 1996. Sometime in the next month, Pschesang became aware of the discrepancy between the 70 acres expressly granted by the separation agreement and the 92.772 acres described in the survey. In his view, the additional 22.772 acres that his ex-wife received should have been offset elsewhere in the division of the marital property. According to Pschesang, he called Schaefer to attempt to get her to engage in negotiations with his ex-wife to remedy the discrepancy, but was told by Schaefer that the domestic relations court would not provide relief and that she would not file any post-judgment motion on his behalf. At that point, Pschesang felt forced to hire a second attorney, who did file a *Civ.R. 60(B)(1)(5)* motion for relief from judgment. While the motion was pending, a settlement was reached between Pschesang and his ex-wife, the terms of which called for Pschesang to retain some shares of stock previously [*4] awarded to his ex-wife, and for Pschesang to then convey some of the shares, or a cash equivalent, to his three sons. Pschesang incurred fees of \$ 1,800 from the second attorney in filing the motion and effectuating the settlement.

Schaefer and Frost & Jacobs moved for summary judgment on three express grounds:

(1) the difference between [Pschesang's] estimate of the acreage and the actual survey acreage was not material to the separation agreement which was agreed to before the survey was received; (2) the mistake regarding the amount of acreage to be transferred to the wife was [Pschesang's] own and not counsel's; and (3) [Pschesang's] post-decree settlement of the dispute over the acreage with his ex-wife extinguished any claim for legal malpractice.

The order granting the motion does not specify which of these grounds the trial court found persuasive.

In his first assignment of error, Pschesang asserts that the trial court erred as a matter of law in granting

Schaefer and Frost & Jacobs summary judgment. We agree.

Our review of the grant of summary judgment is *de novo*. We must, therefore, consider each of the grounds for the motion. The first [*5] ground was that the precise acreage of the land granted to the ex-wife was never intended to be material since the parties intended to give Pschesang's ex-wife that portion of a 460-acre farm that was located "on the other side of the road" (Route 68 in Brown County), regardless of the actual acreage. Concededly, there is evidence to support the position that the parties' desire to divide the property in this geographical manner was not conditioned upon the actual acreage. It does not necessarily follow, however, that because the precise acreage was not crucial to the desired geographical division of the farm, it was also irrelevant to the overall division of the marital property. Obviously, when he ultimately discovered the discrepancy, Pschesang felt that the value of the additional 22.772 acres was significant enough to require an offset elsewhere.

Similarly, we find inapposite the argument that Pschesang was the one who committed the mistake by originally underestimating the acreage, and then failing to note the discrepancy when the survey was produced and the two documents were attached for him to sign. This argument sidesteps the real issue, which is not Pschesang's failure [*6] to protect himself, but Schaefer's duty to protect her client. Ultimately Schaefer had in her possession a separation agreement that listed the acreage at one figure and a survey that listed it at a substantially greater one. The question is whether Schaefer failed to exercise reasonable professional care on behalf of Pschesang by not detecting the discrepancy and drawing it to his attention in order for Pschesang to determine its effect on the other terms of the separation agreement.

Finally, based upon the Ohio Supreme Court's decision in *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 674 N.E.2d 1164, we hold that Pschesang's ultimate settlement of the underlying dispute with his ex-wife did not, as a matter of law, extinguish his claim of attorney malpractice. In *Vahila*, the Ohio Supreme Court eschewed a rule of thumb in legal malpractice actions "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 action giving rise to the complaint." *Id.* at 426, 674 N.E.2d 1168. Thus, it was not necessary for

Pschesang to demonstrate that his second attorney's [*7] Civ.R. 60(B) motion would have been granted, and the original separation agreement voided or modified, in order for him to succeed on his claim of attorney malpractice. Rather, it was only necessary for him to demonstrate that he had suffered a calculable measure of damage or loss as a result of Schaeffer's breach of a duty or obligation imposed by law. *Id.* at 427, 674 N.E.2d at 1169. That damage or loss may include the expense of rectifying an attorney's failure, even when that rectification is ultimately achieved through a settlement. 77 Ohio St. 3d at 425-426, 674 N.E.2d at 1168; see, also, *Gibson v. Westfall*, 1999 Ohio App. LEXIS 4791 (Oct. 7, 1999), Cuyahoga App. 74628, unreported.

Pschesang argues that he has submitted sufficient evidence to satisfy the elements of causation and loss based upon the additional attorney fees he incurred in an attempt to undo or modify the original separation agreement. We agree. Accord *Gibson, supra*; *Robinson v.*

Calig & Handleman (1997), 119 Ohio App. 3d 141, 694 N.E.2d 557; *Monastra v. D'Amore* (1996), 111 Ohio App. 3d 296, 676 N.E.2d 132.

In his second assignment of error, Pschesang [*8] argues that the trial court abused its discretion in granting the motion for summary judgment. Not only is this assignment moot due to our resolution of the first assignment of error, but it employs the wrong standard of review, since the trial court's decision to grant a motion for summary judgment is reviewed as a question of law.

Because Pschesang's first assignment of error is well taken, we reverse the order of the trial court granting summary judgment and remand this case for further proceedings consistent with this decision.

Judgment reversed and case remanded.

DOAN, P.J., GORMAN and SUNDERMANN, JJ.

LEXSEE 1998 OHIO APP. LEXIS 6400

**RONALD L. TALLEY, Plaintiff-Appellant v. JOHN H. RION & ASSOCIATES,
Defendant-Appellee**

C.A. CASE No. 17135

**COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT,
MONTGOMERY COUNTY**

1998 Ohio App. LEXIS 6400

December 31, 1998, Rendered

PRIOR HISTORY: [*1] T.C. CASE NO. 97-5769.

was sentenced to a term of imprisonment of seven to twenty-five years on the attempted murder charge.

DISPOSITION: Affirmed.**COUNSEL:** RONALD L. TALLEY, London, Ohio, Plaintiff-Appellant.

JOHN H. RION and KEVIN L. LENNEN, Dayton, Ohio, Attorneys for Defendant-Appellee.

JUDGES: FREDERICK N. YOUNG, P.J. WOLFF, J., and GRADY, J., concur.**OPINION BY:** FREDERICK N. YOUNG**OPINION****OPINION**

FREDERICK N. YOUNG, P.J.

Plaintiff, Ronald L. Talley, appeals from a summary judgment granted to defendant, John H. Rion & Associates, on Talley's complaint for alleged legal malpractice. For the reasons that follow, the judgment of the trial court will be affirmed.

Rion and Associates provided legal counsel to Talley in connection with criminal charges of attempted murder and felonious assault that had been brought against him. As a part of a plea agreement, Talley pled guilty to the attempted murder charge. The State agreed to not prosecute Talley on the felonious assault charge. Talley

Talley subsequently filed this action, alleging that Rion and Associates had committed malpractice in their representation of him in the criminal matter. In short, Talley alleged in his complaint that [*2] Rion and Associates failed to properly investigate the charges against him and failed to file proper pretrial and post trial motions, thereby depriving him of the effective assistance of counsel.

After filing an answer to the complaint, Rion and Associates filed a motion for summary judgment. The motion asserted, *inter alia*, that their representation of Talley was appropriate, that Talley voluntarily pled guilty to the attempted murder charge, and that in any event, Talley would be required to submit expert proof in order to support his claim of malpractice. The motion for summary judgment was accompanied by an affidavit from attorney John Rion. Mr. Rion stated in his affidavit, *inter alia*, that ". . . it is my opinion to a reasonable degree of certainty that the representation of Mr. Talley was reasonable, appropriate, and fully in accordance with the prevailing standard of care for practitioners in and about Montgomery County, Ohio." In addition, Rion attached copies of the transcripts from the proceedings concerning Talley's guilty plea and the court's subsequent sentence of him.

Talley opposed the motion for summary judgment. Talley attached his affidavit in which he [*3] set forth a number of claims concerning the representation provided him by Rion and Associates. In addition, Talley attached numerous documents concerning his underlying criminal

case. Talley provided no expert evidence in support of his claim that the actions of Rion and Associates constituted legal malpractice.

The trial court granted the motion for summary judgment. The court concluded that Rion and Associates had met its burden of presenting evidentiary materials demonstrating that no genuine issue of material fact remained for trial. The court further concluded that Talley failed to rebut that evidence as untrue, and that Talley had "failed to demonstrate through any evidence that the attorney's alleged misconduct was the cause of plaintiff's injury or that the defendant failed to provide competent legal services to the plaintiff while employed by the plaintiff."

Talley filed a timely notice of appeal and now presents six assignments of error for our review. Although the six assignments of error focus on different aspects of Talley's claim against Rion and Associates, we believe that all six of them must be overruled for the same reasons. Accordingly, we will consider them together.

[*4] ASSIGNMENT OF ERROR NO. I. THE TRIAL COURT ERRED TO THE PREJUDICE OF THE PLAINTIFF-APPELLANT WHEN THE COURT FOUND THAT THE APPELLANT MADE A KNOWINGLY INTELLIGENT, AND VOLUNTARY PLEA OF GUILTY TO ATTEMPTED MURDER PER PLEA AGREEMENT WHEN APPELLANT WAS INCOMPETENT TO DO SO. ASSIGNMENT OF ERROR NO. II. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FINDING THAT APPELLANT MADE AN INFORMED, VOLUNTARY DECISION TO ACCEPT THE PLEA AGREEMENT, WHEN THE PLEA AGREEMENT AS IT STANDS IS FRAUDULENT. ASSIGNMENT OF ERROR NO. III. THE TRIAL COURT JUDGE ERRED TO THE PREJUDICE OF APPELLANT BY NOT ADDRESSING THE ISSUE R.C. 2951.04(A) CONDITIONAL PROBATION. ASSIGNMENT OF ERROR NO. IV. THE TRIAL COURT JUDGE ERRED TO THE PREJUDICE OF APPELLANT WHEN IT DID NOT ADDRESS THE PHYSICAL ASSAULT UPON APPELLANT BY THE PURPORTED VICTIMS. ASSIGNMENT OF ERROR NO. V. THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY NOT ADDRESSING THE FACT THAT (270) DAYS SPEEDY TRIAL LIMITATION

WAS SURPASSED, NO WAIVER OF THIS RIGHT WAS SIGNED, NOR WAS APPELLANT INFORMED OF THIS RIGHT BY COUNSEL. ASSIGNMENT OF ERROR NO. VI. THE TRIAL COURT ERRED BY NOT CONSIDERING THE FACTS IN EVIDENCE WHICH SHOWS [*5] THE ELEMENTS REQUIRED TO SUPPORT THE CHARGE OF FELONIOUS ASSAULT WERE DEFICIENT AND THAT APPELLEES SHOULD HAVE MOVED FOR A BILL OF PARTICULARS.

The overriding focus of Talley's appeal is his argument that the trial court erred in granting summary judgment to Rion and Associates on Talley's claim of malpractice. The standards to be applied to motions for summary judgment are well-settled. As we have stated:

Summary judgment is proper under *Civ.R. 56* when the moving party establishes, first, that there is no genuine issue as to any material fact, second, that the moving party is entitled to judgment as a matter of law, and, third, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co., Inc.* (1978), 54 Ohio St. 2d 64, 66, 8 Ohio Op. 3d 73, 74, 375 N.E.2d 46, 47. In considering a motion for summary judgment, the trial court must also "look at the record in the light most favorable to the party opposing the motion", *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St. 3d 54, 58, 24 Ohio B. Rep. 135, [*6] 138, 493 N.E.2d 239, 242, and that all proper inferences drawn from any of the facts and evidence must be construed in favor of the party opposing the motion. *Hounshell v. Am. States Ins. Co.* (1981), 67 Ohio St. 2d 427, 433, 21 Ohio Op. 3d 267, 271, 424 N.E.2d 311, 315. Our review of the granting of a motion for summary judgment by a trial court is *de novo*. *Doner v. Snapp* (1994), 98 Ohio App. 3d 597, 600, 649 N.E.2d 42, 43-44.

Didier v. Johns (1996), 114 Ohio App. 3d 746, 750, 684 N.E.2d 337.

Talley's complaint asserts a claim for legal malpractice. "To state a cause of action for legal malpractice arising from criminal representation, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach." *Krahn v.*

Kinney (1989), 43 Ohio St. 3d 103, 538 N.E.2d 1058, syllabus. In order to establish a claim for legal malpractice, a plaintiff is not required to first obtain a reversal of his or her conviction on grounds of ineffective assistance of counsel. 43 Ohio St. 3d at 105-106. Nevertheless, a plaintiff claiming malpractice must still prove that his attorney's malpractice proximately [*7] caused injury. As the supreme court stated:

Having enunciated the elements of a claim sounding in malpractice and arising from criminal representation, we note that in most cases the failure to secure a reversal of the underlying criminal conviction may bear upon and even destroy the plaintiff's ability to establish the element of proximate cause. 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.

Id., at 106; See also, *Vahila v. Hall (1997)*, 77 Ohio St. 3d 421, 426-428, 674 N.E.2d 1164 (holding that a malpractice plaintiff need not prove that he would have been successful in the underlying case, but recognizing "that the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case" and that "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.").

"In order to establish a claim of legal malpractice based on an alleged failure to exercise the knowledge, skill, and ability ordinarily possessed and exercised [*8] by the legal profession similarly situated, expert testimony is necessary to establish such standards." *Holley v. Massie (1995)*, 100 Ohio App. 3d 760, 764, 654 N.E.2d 1293. Expert proof is not necessary, however, where an attorney's breach of duty is so obvious that it may be determined as a matter of law, or where it is within the ordinary knowledge and experience of laymen. *Bloom v. Dieckmann (1983)*, 11 Ohio App. 3d 202, 203, 464 N.E.2d 187.

We agree with the trial court that the evidentiary materials submitted by Rion and Associates were sufficient to demonstrate a right to summary judgment. In the face of that evidence, it was incumbent upon Talley to come forth with evidence that would demonstrate that a genuine issue of material fact remained to be tried on his claim of malpractice against Rion and Associates. Based upon our review of the record before us, we believe

Talley has failed to do that.

Contrary to Talley's argument, the matters he presents are not within the ordinary knowledge and experience of laymen, nor are they such obvious breaches of the standards required of an attorney representing a defendant in criminal proceedings that they can be determined as a matter of law. Concerning [*9] the particular matters alleged by Talley, the scope of the defendant's duty and whether the defendant failed to meet that duty in representing Talley cannot be determined in the absence of expert proof.¹

1 We also note that many of the allegations or claims advanced by Talley are not actually supported by his affidavit or the other evidentiary materials submitted below. Moreover, many of the statements contained in his affidavit are not matters of fact, but mere conclusions that Talley has drawn.

Although stated in the context of a malpractice action concerning an attorney's representation in an underlying divorce case, we believe that the following conclusion reached by the Cuyahoga County Court of Appeals applies with equal force here:

Plaintiff's "Statement of Facts," which covers eighteen pages of his brief, is a narrative recital of many allegations, arguments and his opinions addressed to how the divorce proceedings were mishandled by Ms. Johnson as well as other attorneys and court officials. If anything, [*10] this recital only emphasizes the necessity for an expert attorney schooled in the domestic relations practice to testify that the alleged transgressions fell below the standard of care ordinarily expected of such practitioners. Otherwise, any disappointed litigant can simply catalogue everything that transpired in the proceedings, declare his continuing dissatisfaction with the outcome and maintain a malpractice action.

Rice v. Johnson, 1993 Ohio App. LEXIS 4109 (Aug. 26, 1993), Cuyahoga App. No. 63648, unreported.

In addition, although Talley was not required to have first obtained a reversal of his conviction in order to establish his claim of malpractice, he was nevertheless required to demonstrate that the alleged malpractice proximately caused his injury. Talley asserts in his brief that he "is in prison due to fraud, deceit, misrepresentation and negligence committed" by Rion

and Associates. Brief of Plaintiff-Appellant, at p. 1. It appears that Talley's claim of injury is that had he been appropriately represented by counsel, he would not have pled guilty and would have obtained a disposition in the criminal case that was more beneficial to him than the result he obtained. In this instance, [*11] proof of Talley's malpractice claim is thus inextricably intertwined with the merits of his underlying criminal case. In the absence of expert proof concerning the merits of any defenses in the underlying case, Talley has failed to demonstrate that the alleged acts of malpractice actually caused his claimed injury or damages.

The trial court did not err in granting summary judgment to Rion and Associates. Talley's six assignments of error are overruled.

CONCLUSION

Having overruled all of Talley's assignments of error, the judgment of the trial court will be affirmed.

WOLFF, J., and GRADY, J., concur.