

IN THE SUPREME COURT OF OHIO

ENVIRONMENTAL NETWORK  
CORPORATION, *et al.*

Plaintiffs-Appellees

vs.

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

Defendants-Appellants

CASE NO. 07-0739

(Discretionary Appeal from the  
Cuyahoga County Court of Appeals  
Case No. CA-06-087782)

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BRIEF OF AMICUS CURIAE OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS  
IN SUPPORT OF DEFENDANT-APPELLANT GOODMAN WEISS MILLER L.L.P.

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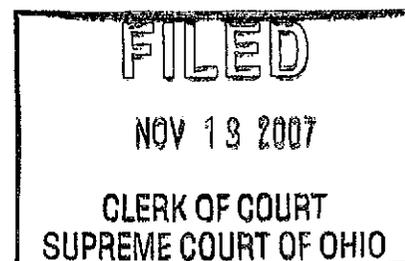
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**STATEMENT OF INTEREST OF AMICUS CURIAE,**  
**OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS**

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization with over 900 members. OACTA’s membership is primarily comprised of members of the Bar of Ohio, who engage in the practice of civil law and who devote a substantial portion of their time on the defense of civil damage suits, including cases alleging legal malpractice. OACTA’s mission is to provide a forum where Ohio attorneys we can work together and with others on common problems and promote and improve the administration of justice in Ohio. As an organization comprised primarily of Ohio attorneys, OACTA has a substantial interest in the legal standard applicable to establishing a legal malpractice.

**I. STATEMENT OF THE FACTS AND OF THE CASE**

**A. UNDERLYING CASE**

This legal malpractice action stems from underlying litigation in which Defendant-Appellant Goodman Weiss Miller LLP (“GWM”) represented Plaintiffs-Appellees Environmental Network Corp. (“ENC”), Environmental Network and Management Corporation (“ENMC”), and John J. Wetterich (collectively “ENC Plaintiffs”). The underlying litigation involved claims against and counterclaims by Waste Management of Ohio (“WMO”), TNT Rubbish Disposal, Inc. (“TNT”), and others for various breaches of contract involving a landfill in Ohio. This underlying complex litigation exposed the ENC Plaintiffs to potential judgments in excess of \$3,700,000 and exposed Mr. Wetterich to personal liability for ENC’s obligations.

The underlying litigation proceeded to trial in late 2001. During the second day of trial, the judge convened all counsel in chambers. The judge expressed concerns about achieving a net recovery against WMO and recommended that the parties consider settlement. Consistent with the judge’s instruction, GWM engaged in settlement negotiations with opposing counsel. Mr. Wetterich, president of ENC, participated in these settlement negotiations; consented to the ultimate settlement; and, several months later, executed a settlement agreement.

**B. LEGAL MALPRACTICE CASE**

In its representation of the ENC Plaintiffs, GWM accrued legal fees. The ENC Plaintiffs had failed to pay GWM’s legal bills for a significant period of time. In an effort to avoid payment of GWM’s legal bills, the ENC Plaintiffs filed a complaint against GWM. In this complaint, the ENC Plaintiffs alleged that GWM wrongfully coerced the ENC Plaintiffs into settling the underlying case.

The ENC Plaintiffs’ legal malpractice lawsuit against GWM proceeded to trial. At trial, the ENC Plaintiffs presented a singular theory for recovery of damages—if they had been

permitted to try the underlying case to conclusion, they would have been awarded a better recovery than that obtained through settlement.

GWM denied any breach of the standard of care and, in the alternative, argued that any breach did not proximately cause any damages to the ENC Plaintiffs. ENC presented uncontroverted expert testimony establishing that (1) the ENC Plaintiffs would not have obtained a positive net recovery after the trial in the underlying case and (2) GWM negotiated an extremely beneficial settlement. Rather than present evidence to rebut the expert testimony GWM presented regarding the likely outcome of the underlying lawsuit, the ENC Plaintiffs simply relied on this Court's decision in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, and maintaining that their only obligation was to present "some evidence" of the merit of their underlying claim.

As a result of the ENC Plaintiffs' failure to produce any evidence of their contention that they would have achieved a better result had the underlying case been tried to conclusion, GWM argued that it was entitled to judgment as a matter of law. GWM argued that the ENC Plaintiffs' failure to meet their burden to establish that any breach of the standard of care by any GWM attorney proximately caused them any damages. The trial court, however, refused to grant GWM judgment as a matter of law. Specifically, the trial judge denied GWM's Motion for Directed Verdict and GWM's post-trial Motion for Judgment Notwithstanding the Verdict. The trial judge also issued jury instructions presented by the ENC Plaintiffs. The trial judge based each of these decisions on the contention that *Vahila* only required the ENC Plaintiffs to produce "some evidence" that their underlying case had merit.

GWM appealed the trial court's order entering judgment for the ENC Plaintiff to the Ohio Court of Appeals for the Eighth Appellate District, Cuyahoga County. The Eighth

Appellate District affirmed the trial court judgment and held that the lower “court did not err in requiring appellees to merely provide some evidence of the merits of the underlying claim.” 2007-Ohio-831 at ¶ 30. The Court of Appeals also rejected GWM’s argument that the “some evidence” standard of causation renders any damage award speculative in violation of fundamental legal principles governing damage awards. Finally, the Court of Appeals rejected GWM’s argument that the trial court improperly charged the jury on causation when the trial court issued an instruction based on the “some evidence” standard. The Court of Appeals claimed that the “some evidence” “standard of proof is entirely appropriate pursuant to *Vahila*.” *Id.* at ¶ 49. On these grounds, the Court of Appeals affirmed the trial court’s order entering judgment for the ENC Plaintiffs.

GWM timely filed a Notice of Discretionary Appeal with this Court on April 25, 2007. This Court accepted discretionary jurisdiction on August 29, 2007.

## II. LAW AND ARGUMENT

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

Amicus Curiae Ohio Association of Trial Attorneys ("OACTA") respectfully urges this Court to reverse the decision of the Court of Appeals and adopt the Proposition of Law posited by Appellant Goodman Weiss Miller, LLP ("GWM"). The Proposition of Law clarifies the standard of proof for a plaintiff seeking to recover damages as a result of an attorney's alleged malpractice, which this Court most recently addressed in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164. Although the syllabus law of *Vahila* correctly set forth the applicable legal standard, Ohio's lower courts have since misapplied *Vahila* to permit a legal malpractice plaintiff to recover damages without any proof of causation. Indeed, the trial court and Court of Appeals decisions in this case exemplify the degree to which Ohio lower courts have skewed the legal malpractice standard. A review of Ohio and other state and federal case law reveals that the proximate cause element of a legal malpractice claim in a civil tort action must require the plaintiff to prove by some measure that the plaintiff would have achieved a more favorable result absent the alleged negligence. To the extent that *Vahila* permits such a result, this Court should clarify *Vahila* and hold, at least for purposes of a civil tort claim, that causation requires the plaintiff to prove that the plaintiff would have achieved a more favorable result absent the alleged malpractice.

**A. OVERVIEW OF OHIO PRECEDENT – *McINNIS, KRAHN, & VAHILA***

An overview of Ohio precedent addressing legal malpractice cases confirms that, indeed, a plaintiff-client must establish damages proximately caused by the attorney’s alleged breach of the standard of care and that this element, as in all tort action, should require more than simply proof of “some evidence of merit” of the underlying malpractice.

The Ohio Supreme Court decision in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164 relied on two earlier cases: (1) *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112 and (2) *Krahn v. Kinney* (1989), 43 Ohio St.3d 103.

**1. *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St. 3d 112**

In *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112, the Court addressed the alleged malpractice of an attorney handling a divorce proceeding. The client claimed that he made clear to the attorney that he did not want any of the divorce proceedings to appear in the newspaper. *Id.* at 112. The client claimed that the attorney promised that none of the proceedings would be published and claimed, in fact, that the attorney gave to the client written confirmation of this promise by providing the client with a paper that stated, “This will be in no paper.” *Id.* Information about the client’s divorce proceedings, however, did appear in the paper. *Id.* The client claimed community members stopped patronizing his barber shop and, as a result, he suffered decreased business income. *Id.* The client brought a legal malpractice lawsuit against the attorney. The client did not present any expert testimony. The attorney-defendant argued that the client could not establish his claim without expert testimony regarding breach of the standard of care. The Court acknowledged that expert testimony is generally required to address the standard of care. However, the Court noted that the facts of the case presented an exception to the general expert testimony requirement because the claimed breach was “well within the common understanding of the laymen on the jury.” *Id.* at 113.

Importantly, the Court recognized that the client had an obligation in addition to providing proof relative to standard of care. The Court acknowledged that the plaintiff-client bore an additional burden to establish damages proximately resulting for the attorney's breach. The Court explained: "Although the damages flowing from such alleged malpractice would seem to be nominal at best, it is conceivable that a jury, with appropriate instructions from the trial court, could find an amount of damages proximately caused by the attorney's actions." *Id.* Thus, the Court in this early case reiterated that a plaintiff-client had an obligation to establish damages proximately related to the alleged malpractice.

**2. *Krahn v. Kinney* (1989), 43 Ohio St. 3d 103**

In *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, Lynn Krahn was charged with three misdemeanor gambling offenses arising out of her having a gambling device in High Spirits Lounge, a bar Krahn owned and managed. *Id.* at 103. In addition to the misdemeanor charges, the Ohio Department of Liquor Control issued a violation notice to High Spirits and confiscated the machine. *Id.* Herschel Shaffer, whose company installed, serviced, and maintained the machine retained an attorney, Winfield Kinney, to represent Krahn and the bar. *Id.* Shortly thereafter, Shaffer withdrew his offer to cover the cost of Krahn's legal fees. *Id.* Krahn decided to keep Kinney on as counsel and independently retained him for her and High Spirits. *Id.* Kinney was also representing Shaffer's company in its efforts to recover the seized gambling device; however, Krahn and High Spirits had no knowledge of Kinney's representation of Shaffer. *Id.*

Prior to trial, the prosecutor offered to dismiss the charges against Krahn in exchange for her testifying against Shaffer. *Id.* Kinney never communicated that prosecutor's offer to Kinney and, instead, unilaterally withdrew Krahn's request for a jury trial. *Id.* at 104. Thereafter, on the day of trial, Kinney urged Krahn to withdraw her plea of not guilty and enter a plea of guilty to a

charge described by Kinney as “a minor misdemeanor.” *Id.* at 104. Krahn followed Kinney’s advice and took the plea. *Id.* However, Krahn soon discovered that she had pled guilty to a first degree misdemeanor and not to a minor misdemeanor. *Id.* This prompted Krahn to retain new counsel, who discovered Kinney’s failure to relate the prosecutor’s offer of dismissal for Krahn’s cooperation in testifying. *Id.* Krahn’s new counsel filed a motion to vacate the judgment entered on Krahn’s pleas; the trial court, however, denied the motion.

Moreover, during the course of Kinney’s representation of High Spirits, Kinney failed to appear at an Ohio Liquor Control Commission hearing and thereby failed to defend High Spirits. *Id.* The Commission entered a default order against High Spirits that required either a \$2,100 payment or a twenty-one day liquor license suspension. *Id.* High Spirits then retained new counsel who was successful in obtaining from the Commission a reduced penalty that required either a \$1,400 payment or a fourteen day liquor license suspension—the typical penalty for such offenses.

Krahn, on her own and High Spirits’ behalf, subsequently filed suit against Kinney. *Id.* Krahn alleged that she suffered the stigma of a criminal conviction, incurred damage to her reputation, and severe emotional distress as a result of her being convicted of a first degree misdemeanor. *Id.* Both Krahn and High Spirits alleged that Kinney’s conduct caused them to incur extra legal fees and expenses. The trial court entered judgment in favor of Kinney because it believed she failed to set forth a claim given Krahn’s failure to allege that the conviction had been vacated as a result of ineffective assistance of counsel. *Id.* The Court of Appeals reversed.

On appeal to the Ohio Supreme Court, the Court held that the standard for a claim alleging legal malpractice arising out of representation in a criminal matter is the same standard established for civil legal malpractice cases, which the Court reiterated was: “(1) an attorney-

client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach.” *Id.* at 106. Although the Court refused to require a plaintiff asserting legal malpractice arising out of an underlying criminal matter to establish any additional element to state a claim for legal malpractice, i.e., proof of actual innocence, the Court emphasized that “[t]he analysis should be made in accordance with the tort law relating to proximate cause.” *Id.* The Court made clear that proximate cause remains a key element to any legal malpractice claim: “We reject the suggestion that a proximate cause analysis can be eliminated and replaced by a rule of thumb based on whether the malpractice plaintiff has succeeded in overturning the underlying criminal conviction.” *Id.*

The Court explained that the criminal-plaintiff suffered a lost opportunity to minimize the plaintiff’s criminal record—not the opportunity for vindication. *Id.* at 106. However, the Court emphasized that whether Krahn stated any compensable damage was premature. *Id.* at n.6. Moreover, the Court acknowledged that Krahn’s inability to have her conviction set aside may thwart her ability to establish proximate cause, which remains a primary element of the *prima facie* case. *Id.* Thus, although the Court did not establish a rule that Krahn had to demonstrate that she would have obtained complete vindication in the criminal matter, the Court certainly intimated that she was required to establish that she would have achieved a better result. Thus, *Krahn* fully comported with the traditional “case-within-a-case” methodology. For purposes of a criminal case, the plaintiff-client could recover for malpractice provided she could show that she would have achieved a better result absent the alleged malpractice.

Consistent with the case-within-a-case doctrine as well, the Court held that High Spirits had stated a cause of action. High Spirits already achieved a result better than what the department of insurance originally imposed following Kinney’s failure to appear for the

administrative hearing. Thus, High Spirits stated a claim for increased attorneys' fees in having to obtain counsel to have the penalty reduced.

Thus, *McInnis* and *Krahn* suggest that a plaintiff-client has an obligation under Ohio law to prove, at a minimum, that he or she would have achieved a better result in the absence of the alleged negligence. With this backdrop in mind, the Court entertained the appeal in *Vahila*.

**3. *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259**

The Ohio Supreme Court followed *McInnis* and *Krahn* with its decision in *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997-Ohio-259. In *Vahila*, this Court reaffirmed in syllabus law the necessary elements of a legal malpractice claim:

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. (*Krahn v. Kinney* [1989], 43 Ohio St.3d 103, 538 N.E.2d 1058, followed.)

*Id.* at syllabus. The legal representation involved criminal, administrative, and civil matters. Although the syllabus law correctly articulated the standard for a legal malpractice claim, the balance of the Court's decision deviated from well-settled law and ignored age-old tort principles to permit a plaintiff-client to proceed with a malpractice claim without any showing that the plaintiff-client would have achieved a better result absent the alleged malpractice.

In *Vahila*, Attorneys Charles Hall, Ralph Dublikar, and the law firm of Baker, Meekison & Dublikar represented Terry Vahila against criminal charges brought against her as well as administrative charges brought by the Ohio Department of Insurance in an investigation. *Id.* at 422. The attorneys also represented the Vahila Insurance Agency in several civil matters. *Id.* Vahila and the Vahila Insurance Agency (collectively "the Vahilas") ultimately sued the

attorneys for alleged negligence in their representation in the civil, criminal, and administrative matters. *Id.*

The attorneys denied all negligence and also sought summary judgment on the ground that the Vahilas had failed to set for any evidence of damages proximately caused by the attorneys' alleged misconduct. *Id.* The attorneys contended "they were entitled to summary judgment because [the Vahilas] were required to, but could not, prove that they would have been successful in the underlying civil, criminal, and administrative matters in which the alleged malpractice had occurred." *Id.*

The Vahilas opposed the attorneys' summary judgment motion by submitting the affidavits of Terry and James Vahila. Although the Vahilas did not rely on them, the record contained the affidavits of two plaintiff expert witnesses. The Vahilas' affidavits averred that they had sustained at least \$200,000 in damages. The experts' affidavits stated that they had reviewed the events surrounding the underlying civil, criminal, and administrative actions circumstances and opined that the attorneys were negligent and that the attorneys' negligent acts were the direct and proximate cause of the Vahilas' damages. *Id.* at 422-423. The trial court granted summary judgment in favor of the attorneys, and the court of appeals affirmed. *Id.* at 423.

On appeal to the Ohio Supreme Court, this Court observed that both the trial court and court of appeals based their decisions on the fact that the Vahilas "failed to establish that, but for the negligence of their attorneys, [the Vahilas] would have been successful in the underlying actions and proceedings in which the alleged malpractice had occurred." *Id.* For example, the court of appeals held as follows:

"In their response to defendants' motion for summary judgment, the Vahilas did not point to 'specific facts showing that there [was] a genuine issue for trial'

regarding whether any of the matters in which defendants represented them would have resulted in a more favorable outcome to them but for defendants' alleged breaches of duty. They pointed to no evidence that any judgment entered against them in the civil matters would have been for a lesser amount, or that those civil matters would have been settled on a more favorable basis, but for defendants' mishandling of them; they pointed to no evidence that any cross-claim or counterclaim that defendants allegedly failed to assert would have been successful; they pointed to no evidence that the criminal prosecutions against Ms. Vahila would have been resolved more favorably to her but for defendants' alleged mishandling; and they pointed to no evidence that the investigation of Ms. Vahila by the Ohio Department of Insurance would have been resolved more favorably to her but for the alleged mishandling of that investigation by defendants."

*Id.* at 423-424 (quoting court of appeals decision).

The Supreme Court concluded that the lower courts erred in finding summary judgment proper because the Vahilas had met their burden to establish a material issue of fact existed on the claims set forth in their complaint.

In its analysis, the Court observed that many of the principles it previously outlined in *Krahn* applied to the Vahilas' situation. The Court further emphasized that it rejected "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." *Id.* at 426. Of course, this stems directly from *Krahn*, which like *Vahila*, involved alleged malpractice in representation of the client in criminal matters.

But *Vahila* also involved civil and administrative representation, and the Court went on to make the blanket statement that the standard applied regardless of the representation involved.

*Id.* The Court primarily relied on a 1978 Cornell Law Review Note, explaining:

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. No

matter how outrageous and morally reprehensible the attorney's behavior may have been, if minimal doubt exists as to the outcome in the original action, the plaintiff may not recover in the malpractice action. Except in those rare instances where the initial action was a "sure thing," the certainty requirement protects attorneys from liability for their negligence.

A strict "but for" test also ignores settlement opportunities lost due to the attorney's negligence. The test focuses on whether the client would have won in the original action. A high standard of proof of causation encourages courts' tendencies to exclude evidence about settlement as too remote and speculative. The standard therefore excludes consideration of the most common form of client recovery.

In addition, stringent standards of proving "but for" require the plaintiff to conduct a 'trial within a trial' to show the validity of his underlying claim. A full, theoretically complete reconstruction of the original trial would require evidence about such matters as the size of jury verdicts in the original jurisdiction. For example, an experienced attorney could testify that juries in that jurisdiction typically award verdicts of  $x$  dollars in similar cases. 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.

Other problems await those who do proceed with the "trial within a trial." For example, the attorney in the original action may have negligently failed to pursue the discovery that would have insured success. If the results of that same discovery are now necessary to prove the merit of the underlying claim—and the passage of time has precluded obtaining that information—the attorney by his own negligence will have protected himself from liability. In such a case, the more negligent the attorney, the more difficult is the plaintiff's task of proving causation. (Footnotes omitted.)

*Vahila*, 77 Ohio St.3d 421, 426-427 (quoting, Note, The Standard of Proof of Causation in Legal Malpractice Cases (1978), 63 Cornell L. Rev. 666). Adopting the commentator's arguments of inequity, the *Vahila* Court reversed the lower court and held that the plaintiffs could sustain a legal malpractice claim without proof of success in the underlying matters. *Id.* at 427. However, the decision failed to articulate with any clarity the *Vahilas'* burden of proof relative to each underlying matter—criminal, administrative, and civil. In so doing, Ohio departed from

generally accepted tort standards and became a minority in the country regarding the standard applicable in legal malpractice cases.

**B. OTHER STATES– THE MAJORITY RULE IS CASE-WITHIN-A-CASE.**

The *Vahila* decision represented a distinct departure from the majority American rule, which requires, at a minimum, a legal malpractice plaintiff to establish “but for” causation or to establish a “case-within-a-case.” In fact, nearly every state in the country follows the “but for” causation standard. Ohio stands alone in its thin causation requirement. Indeed, commentators often point out *Vahila* as an aberration within the general legal malpractice “case-within-a-case” jurisprudence. For example, commentators in one treatise discuss causation in legal malpractice cases by explaining that the trial-within-a-trial or case-within-a-case constitutes the methodology by which plaintiffs must demonstrate causation. Ronald E. Mallen & Jeffrey M. Smith, 4 Legal Malpractice § 33:9 (ed. 2007). The commentators, however, highlight Ohio, and the decision in *Vahila*, as the singular deviation from the norm:

Ohio courts appear to have rejected the trial-within-a-trial methodology, which rejection traces to the Supreme Court's decision in *Vahila v. Hall*. The court rejected the need to prove complete success. The issue in *Vahila* was whether the client should have obtained a better result. The court's opinion should be read in context of the factual claim, though the sweeping language has led subsequent decisions to believe that *Vahila* rejected the “but for” standard.

*Id.* (footnotes omitted).

In its Memorandum in Opposition to Jurisdiction, Appellees state that the “case-within-a-case” standard has been widely criticized. In direct contrast to Appellees’ generic assertion, however, the case-within-a -case standard is considered *the* standard of causation in the United States. Nearly every state has held that a plaintiff-client must prove, by some measure, that he would have achieved a better result absent the alleged malpractice. *See, e.g.*,

- Alaska *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 31 (Alaska 1998) (“When a legal claim is lost through professional negligence, actual damage occurs only if the claim is meritorious and has value; the plaintiff bears the burden of proving these elements of damage.”)
- Arizona *Western Corrections Group, Inc. v. Tierney*, 208 Ariz. 583, 586, 96 P.3d 1070, 1073 (Ariz. App. Div. 1 2004) (“To prevail on its legal malpractice claim, WCG was required to show that but for Tierney’s failure to timely file a notice of claim, WCG would have been successful in the ‘case within the case,’ which was WCG’s lawsuit against the County.”).
- Arkansas *Mack v. Sutter*, 366 Ark. 1, 5-6, 233 S.W.3d 140, 144 (Ark. 2006) (“To prevail in this case of attorney malpractice, Mack must show that, but for the alleged negligence of his attorney, the result in the underlying action would have been different. *Barnes v. Everett*, 351 Ark. 479, 95 S.W.3d 740 (2003). He must prove the discrimination case within the attorney-malpractice case. *Id.*”).
- California *Ambriz v. Kelegian*, 146 Cal. App. 4th 1519, 1531, 53 Cal.Rptr.3d 700, 708-709 (Cal. App. 4 Dist. 2007) (“In a legal malpractice claim, the method for proving the element of causation has been likened to a ‘trial within a trial’ or a ‘case within a case.’”).
- Colorado *Giron v. Koltavy*, 124 P.3d 821, 824 (Colo. App. 2005) (“To establish causation in a legal malpractice action, the plaintiff must prove a ‘case within a case.’”).
- Georgia *Blackwell v. Potts*, 266 Ga. App. 702, 705, 598 S.E.2d 1, 4 (Ga. App. 2004) (“The plaintiff must show that but for the attorney’s negligence in the underlying case, the plaintiff would have prevailed.”).
- Idaho *Nepanuseno v. Hansen*, 140 Idaho 942, 945, 104 P.3d 984, 987 (Idaho App. 2004) (“To prove proximate cause, the plaintiff needs to establish that there would have been ‘some chance of success’ in the underlying action but for the attorney’s malpractice.”).
- Illinois *Governmental Interinsurance Exchange v. Judge*, 221 Ill.2d 195, 200, 850 N.E.2d 183, 187, (Ill. 2006) (“Accordingly, the burden of pleading and proving actual damages requires establishing that ‘but for’ the attorney’s negligence, the client would have been successful in the underlying suit.”).

- Indiana      *Sanders v. Townsend*, 582 N.E.2d 355, 357-358 (Ind. 1991) (incorporating Court of Appeals' decision in *Sanders v. Townsend*, 509 N.E.2d 860, 863 -864 (Ind. App. 2 Dist. 1987), which held ("As for damages, the majority of recent cases requires a plaintiff, in proving attorney negligence in the context of challenging a settlement or jury award as inadequate, must show, had the attorney not been negligent, the settlement or verdict award would have been greater.")).
- Iowa          *Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997) ("When the alleged malpractice involves the handling of a lawsuit the plaintiff must establish the third element by proving that, but for the lawyer's negligence, the underlying suit would have been successful.").
- Kentucky     *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003) (holding legal malpractice claim is a "suit within a suit" because the plaintiff must "show that he/she would have fared better in the underlying claim").
- Maryland     *Thomas v. Bethea*, 351 Md. 513, 533, 718 A.2d 1187, 1197 (Md. 1998) ("The normal way in which that approach is implemented is through what has become known as a trial within a trial, or a suit within a suit, *i.e.*, litigating before the malpractice jury the underlying case that was never tried.").
- Massachusetts *St. Paul Fire and Marine Ins. Co. v. Birch, Stewart, Kolasch & Birch, LLP.*, 379 F. Supp.2d 183, 202 (D. Mass. 2005) ("Once the plaintiff has established negligence, the causation issue is decided by conducting a 'trial within a trial.'").
- Michigan      *Coble v. Green*, 271 Mich. App. 382, 387-388, 722 N.W.2d 898, 903 (Mich. App. 2006) ("In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that, but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit."
- Minnesota    *Pollock-Halvarson v. McGuire*, 576 N.W.2d 451, 454 (Minn. App. 1998) ("Since this is an attorney negligence action, we must also consider in our review the so-called case-within-a-case.").
- Mississippi   *Victory Lane Productions, LLC v. Paul, Hastings, Janofsky & Walker, LLP*, 409 F.Supp.2d 773, 778 (S.D. Miss. 2006) ("As to the third essential ingredient, the plaintiff must show that, but for their attorney's negligence, he would have been successful in the prosecution or defense of the underlying action.").

- Missouri *Day Advertising Inc. v. Devries And Associates, P.C.*, 217 S.W.3d 362, 367 (Mo. App. W.D. 2007) (holding that when damages are based on resolution of underlying action, plaintiff must prove “case-within a case”).
- New Hampshire *Carbone v. Tierney* 151 N.H. 521, 531-532, 864 A.2d 308,317-318 (N.H. 2004) (“As we have previously stated, a plaintiff who alleges that an attorney’s negligence caused the loss of a legal action can succeed only by proving that the action would have been successful but for the attorney’s misconduct.”)
- New Jersey *Jerista v. Murray*, 185 N.J. 175, 191, 883 A.2d 350, 359 (N.J. 2005) (“Plaintiffs in this malpractice action proceeded in the conventional way by attempting to prove the ‘suit within a suit.’ ... Under that approach, plaintiffs had the burden of proving by a preponderance of the evidence that they would have won a favorable verdict against Shop Rite.”).
- New York *Diamond v. Sokol*, 468 F. Supp. 2d 626, 633 (S.D.N.Y. 2006) (“Specifically, New York law requires that the plaintiff be able to meet the “ ‘case within the case’ requirement, demonstrating that ‘but for’ the attorney’s conduct the client would have prevailed in the underlying matter.” *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 780 N.Y.S.2d 593, 596 (1st Dep’t 2004).”).
- North Carolina *Wilkins v. Safran*, 649 S.E.2d 658, 662 (N.C. App. 2007) (“A plaintiff alleging a legal malpractice action must prove a case within a case, meaning a showing of the viability and likelihood of success of the underlying action.”).
- North Dakota *Meyer v. Maus*, 626 N.W.2d 281, 287-288 (N.D. 2001) (“The case-within-a-case doctrine requires that, but for the attorney’s alleged negligence, litigation would have ended with a more favorable result for the client.”)
- Oregon *Jeffries v. Mills*, 165 Or. App. 103, 122, 995 P.2d 1180, 1192 (Or. App. 2000) (“To show causation in a legal malpractice action, a plaintiff must demonstrate that she would have obtained a more favorable result in the earlier action if the attorney had not been negligent.”)

- Pennsylvania     *Kituskie v. Corbman*, 552 Pa. 275, 281, 714 A.2d 1027, 1029-1030 (Pa. 1998) (“In essence, a legal malpractice action in Pennsylvania requires the plaintiff to prove that he had a viable cause of action against the party he wished to sue in the underlying case and that the attorney he hired was negligent in prosecuting or defending that underlying case (often referred to as proving a ‘case within a case’).”).
- South Carolina     *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (S.C. App. 2005) (“As to damages, the plaintiff must show he or she ‘most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.’”).
- South Dakota     *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. App. S.D. 1988) (“Where the claim is that an attorney was hired to prosecute or defend a claim, it must be established that the claim or defense was meritorious and would have been successful but for the attorney’s misconduct.”).
- Tennessee     *Shearon v. Seaman*, 198 S.W.3d 209, 214 (Tenn. Ct. App. 2005) (“In order to prove damages in a legal malpractice action, a plaintiff must prove that he would have obtained relief in the underlying lawsuit, but for the attorney’s malpractice; consequently, the trial of a legal malpractice claim becomes, in effect, a ‘trial within a trial.’”).
- Texas     *Air Measurement Technologies, Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 2007 WL 2983660, 4 (C.A. Fed. Tex. 2007) (“Because the plaintiff must establish that the underlying suit would have been won ‘but for’ the attorney’s breach of duty, this ‘suit within a suit’ requirement is necessarily a component of the plaintiff’s burden on cause in fact.”).
- Utah     *Crestwood Cove Apartments Business Trust v. Turner*, 164 P.3d 1247, 1253-1254 (Utah 2007) (“Thus, the proximate cause issue is ordinarily handled by means of a ‘suit within a suit’ or ‘trial within a trial.’”).
- Virginia     *Brown v. Slenker*, 220 F.3d 411, 424 (5<sup>th</sup> Cir. 2000) (“Virginia requires a ‘trial within a trial’ to show proximate cause as to a legal malpractice claim. See *White v. Morano*, 249 Va. 27, 452 S.E.2d 856, 858 (1995).”).

- Washington     *Schmidt v. Timothy P.*, 135 Wash. App. 605, 610, 145 P.3d 1216, 1217-1218 (Wash. App. Div. 2 2006) (Under the ‘case within a case’ principle, the plaintiff in a legal malpractice claim must prove that, but for the attorney’s negligence, the plaintiff would probably have prevailed in the underlying claim.”)
- Wisconsin       *Acharya v. Carroll*, 152 Wis.2d 330, 339, 448 N.W.2d 275, 279-280 (Wis. App. 1989) (“Thus, a legal malpractice action often involves litigation of a case ‘within’ the malpractice case.”)

In contrast to Appellees’ assertion, courts and commentators uniformly acknowledge that the case-within-a-case standard remains the accepted standard for proving causation in the country for one simple reason—it works. Courts faced with a multitude of issues in the legal malpractice context have quite correctly recognized that the case-within-a-case standard strikes an appropriate balance between protecting aggrieved plaintiffs and making attorneys guarantors of their clients’ cases. Several specific examples illustrate the point.

Recently, the Utah Supreme Court was asked to adopt the abandonment doctrine in a legal malpractice case. In *Crestwood Cove Apartments Business Trust v. Turner*, 164 P.3d 1247 (Utah 2007), the client Shangri-La and its successor, Crestwood Cove Apartments Business Trust (collectively “Shangri-La”) alleged that attorney Shawn Turner and his law firm, Larsen, Kirkham & Turner (collectively, “Turner”), committed malpractice when representing Shangri-La in a redemption lawsuit. *Id.* at 1249.

The action underlying Shangri-La’s malpractice lawsuit resulted in a trial court decision that required Shangri-La to pay \$1,000,000 to redeem the subject property. *Id.* at 1249-1250. Turner filed a motion for new trial or an amended judgment, which the trial court denied. *Id.* at 1250. Thereafter, Shangri-La retained new counsel and appealed the trial court decision. *Id.* During the pendency of the appeal, Shangri-La decided to enter into a settlement agreement,

which required Shangri-La to dismiss its appeal with prejudice. *Id.* Shangri-La subsequently filed its malpractice lawsuit against Turner. *Id.*

In Shangri-La's malpractice action, the trial court granted Turner's motion for summary judgment because the trial court concluded that Shangri-La had abandoned its malpractice claim when it settled the underlying suit without permitting the appeal to proceed in order to correct the alleged judicial error that led to the decision that Shangri-La had to pay \$1,000,000 to redeem the property. *Id.* On appeal, the Utah Supreme Court acknowledged that the case presented an issue of first impression regarding the "abandonment doctrine." *Id.* In analyzing the issue, the Court concluded that it need not adopt a broad abandonment rule because well-settled issues of causation adequately protected the competing interests:

First, there is no reason to adopt the abandonment doctrine theory because the existing framework for legal malpractice actions in Utah adequately protects attorneys' rights, even when there has been a settlement. One of the primary concerns that spurred the establishment of the abandonment doctrine was the fear that attorneys would not be able to defend against negligence claims arising from their handling of a litigation matter if the underlying matter were settled before an unfavorable decision could be challenged on appeal. But in Utah, it generally does not matter whether an underlying matter is settled before appeal because courts and juries retain the ability to review the underlying matter and determine what should have happened. In other words, they can still determine whether it was attorney malpractice or judicial error that caused the plaintiff's damages.

We explained the process in *Harline v. Barker*, where we stated:

To prove proximate cause in legal malpractice cases ... the plaintiff must show that absent the attorney's negligence, the underlying suit would have been successful. Thus, the proximate cause issue is ordinarily handled by means of a "suit within a suit" or "trial within a trial." The objective is to establish what the result [of the underlying litigation] should have been (an objective standard), not what a particular judge or jury would have decided (a subjective standard).

This "trial within a trial" method allows an attorney to establish that judicial error, rather than attorney malpractice, caused an unfavorable result in an underlying case. Because issues of causation can be determined through this method even in

those cases where the underlying suit is settled, there is no reason to adopt the abandonment doctrine.

*Id.* at 1253-1254 (internal footnotes omitted). The Court further noted that serious policy considerations favoring settlement and mitigation militated against adopting a broad application of the abandonment doctrine. *Id.* at 1254. Importantly, the Utah Court reiterated that traditional causation principles were adequate to address settled cases in most circumstances.

The Utah Supreme Court's decision in *Crestwood Cove* makes sense because the applicable legal standard—requiring proof of a case-within-a-case—allowed the plaintiff-client to settle and mitigate potential losses while still preserving a cause of action for malpractice. The standard, on the other hand, protected the attorney-defendant because it required the plaintiff-client to establish damages via “but for” causation. The rule would not work, however, in the absence of insisting upon compliance with causation principles. In such circumstances, the plaintiff-client gains an unfair advantage and the attorney-defendant becomes the target of any displeased client. The balance only works if courts employ causation principles that require the plaintiff to demonstrate the plaintiff would have achieved a more favorable result absent the alleged malpractice.

As one Court aptly noted, the case-within-a case standard remains because it provides the most fair and meaningful measure:

Nonetheless, while some arguments of the critics have merit, the trial-within-a-trial burden persists. (*DiPalma v. Seldman, supra*, 27 Cal.App.4th at p. 1506-1507, 33 Cal.Rptr.2d 219, 4 Mallen & Smith, *Legal Malpractice* (1996) § 32.8, p. 168, et seq.; Rest.3d, *The Law Governing Lawyers* (April 7, 1994) Tent. Draft No. 7, § 75, com. b, p. 52.) This is so probably because it is the most effective safeguard yet devised against speculative and conjectural claims in this era of ever expanding litigation. It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance. Certainly to date, no other approach has been accepted by the courts.

*Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal. App. 4th 820, 834, 60 Cal.Rptr.2d 780, 788 (Cal. App. 2 Dist. 1997).

### C. STRIKING THE BALANCE WITH THE CASE-WITHIN-A-CASE STANDARD

This Court should adopt the Proposition of Law and clarify the standard in legal malpractice cases because it strikes an appropriate balance between litigants' rights in the legal malpractice context, observes traditional tort principles, and avoids speculative results. Appellees complain that requiring a legal malpractice plaintiff to prove a case-within-a-case unduly burdens the plaintiff. Appellees contend that "requiring a demonstration of what the result 'would have been,' creates a special, privileged class of defendants: attorneys prevail because their own negligence deprived their clients of the ability to meet the burden of proof. Negligence becomes its own reward." Appellees' Memo. Opp. Juris. at 15. Yet, Appellees' slippery slope argument does not withstand scrutiny in the general context and particularly in cases where the alleged malpractice involves a client-plaintiff's claim that the malpractice deprived the client-plaintiff of a more favorable result. To the contrary, the "some evidence" standard advocated by Appellees creates a special class of plaintiffs—plaintiffs who stand in a better position in light of alleged malpractice than had they had to prove the merits of their underlying case. The law should simply not hold an attorney to answer for damages the client never would have recovered.

In *Vahila*, Justice Douglas wrote that:

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. No matter how outrageous and morally reprehensible the attorney's behavior may have been, if minimal doubt exists as to the outcome in the original action, the plaintiff may not recover in the malpractice action. Except in those rare instances where the initial action was a "sure thing," the certainty requirement protects attorneys from liability for their negligence.

*Vahila*, 77 Ohio St.3d 421, 426.

Amicus Curiae respectfully submits that the burden of proof identified by Justice Douglas was a strawman, and not the actual burden of proof in a legal malpractice case. In a civil action, a plaintiff is required to prove each essential element of his case by a preponderance of the evidence. That standard—a quantum of just over 50% likelihood—can hardly be correctly characterized to require a plaintiff “to prove to a virtual certainty that, but for the defendant’s negligence, the plaintiff would have prevailed in the underlying action.” Yet it is this “rejection” by the *Vahila* court—of a standard which really was not the law at the time—that is at the core of the *Vahila* analysis. By failing to recognize that the “but for” test was still subject to a preponderance of the evidence standard, the language of *Vahila* in describing the proposed standard of proof was misleading. There was never a requirement that plaintiffs prove their case “to a virtual certainty,” but the resulting standard was clearly a reaction to a supposed state of unfairness, which never really existed.

This court can restore a traditional tort analysis to legal malpractice actions, by pointing out that a plaintiff must still prove success of the underlying case. If it assists the analysis to state what should have been obvious in *Vahila*, the Court can add that such proof, like any other civil action, must only be adduced by a standard equating to preponderance of the evidence. Nonetheless, that proof would still require evidence on all essential elements of the case, and would foreclose the type of speculation that led to the verdict herein.

The only viable way to ensure that an attorney-defendant answers for damages actually *caused* by the alleged negligence is to require the plaintiff to prove that to which he was entitled—to prove the case-within-a-case. The law is certainly flexible enough and trial courts astute enough to handle on a case-by-case basis evidentiary issues that may arise given the case-within-a-case paradigm. However, as with all areas of jurisprudence, trial courts should address

these concerns as they arise. Potential concerns about lost evidence, passage of time, or the like should not frame the standard. Otherwise, the legal malpractice standard invites speculation and potential windfalls. The Proposition of Law correctly adjusts the legal malpractice standard and makes clear that a plaintiff bears the burden to establish each element of his or her case by a preponderance of the evidence—certainly not to an absolute certainty.

### **III. CONCLUSION**

Amicus Curiae Ohio Association of Civil Trial Attorneys respectfully urges this Court to reverse the decision of the Court of Appeals and adopt the Proposition of Law posited by Appellant Goodman Weiss Miller, LLP. The Proposition of Law provides necessary clarity to the legal malpractice standard in Ohio and serves to balance the interests of the plaintiff-client with the lawyer-defendant. The Proposition of Law honors traditional tort principles and insures against speculative results without unduly burdening plaintiffs. Reversal of the lower court’s decision and adoption of the Proposition of Law is necessary to correct an obvious inequity that has grown out of the inappropriate “some evidence” standard.

**Respectfully submitted,**



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The undersigned certified that a true and accurate copy of this pleading was served via regular U.S. mail, postage paid, on **November 13, 2007** on the following:

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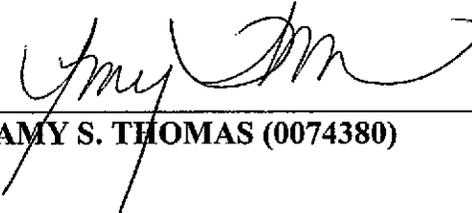
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