

Case No. 2007-739

IN THE SUPREME COURT OF OHIO

ENVIRONMENTAL NETWORK CORP., *et al.*,

Plaintiffs-Appellees,

vs.

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

Defendants-Appellants.

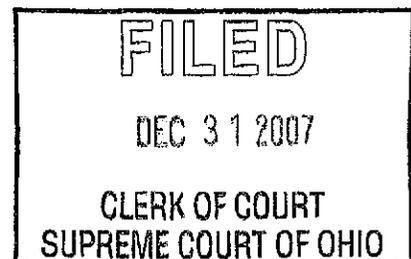
On Appeal From The
Court of Appeals Eighth Judicial District
Cuyahoga County, Ohio
Court of Appeals Case No. CA 06 87782

**MERIT BRIEF OF APPELLEES
ENVIRONMENTAL NETWORK CORPORATION,
ENVIRONMENTAL NETWORK AND MANAGEMENT CORP. AND
JOHN J. WETTERICH**

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I. INTRODUCTION

On October 3, 2005, eight ordinary citizens of Cuyahoga County, Ohio, after hearing, reviewing and deliberating on all the evidence presented in nearly a two-week long trial, found Appellant liable for legal malpractice and rendered a verdict in Appellees favor in the amount of \$2,419,616.81. (Appx., A-49). Appellant Goodman Weiss Miller LLP (“GWM” or the “Law Firm”) was counsel to Appellees Environmental Network Corp., Environmental Network & Management Corp., and John Wetterich (collectively, “ENC” or “Appellees”)¹ in a breach of contract action involving multiple parties in the waste hauling and disposal industry (“Underlying Case”). GWM’s negligent representation in the preparation and prosecution of ENC’s claims and defenses in the Underlying Case gave rise to the malpractice action below. ENC claimed that GWM’s failure to provide representation commensurate with the professional standard of care constituted legal malpractice causing significant losses, entitling it to an award of damages. The trier of fact agreed, finding six separate breaches of duty: (a) no engagement letter; (b) overall lack of preparedness; (c) case should have been continued to allow Mr. Steve Miller, Esq. to participate; (d) [ENC] was coerced into signing settlement; (e) judge not recused; and (f) GWM counsel alienated the Court. The Law Firm’s breaches remain uncontested. *Id.* The trier of fact expressly found that the breaches of the standard of care proximately caused damages to ENC and awarded it in excess of \$2.4 million in compensatory damages. *Id.*

¹ While Environmental Network Corp. and Environmental Network & Management Corp. were two separate and distinct corporations owned by Mr. Wetterich, for purposes of economy and clarity, in this brief they, along with Mr. Wetterich, will be referred to collectively as ENC or Appellees.

At issue in this appeal is whether there is any competent evidence in the record that supports the verdict and award of damages. There was and, therefore, this Court must permit the verdict to stand. The Law Firm maintains that the jury did not receive any evidence to support the jury verdict because the trial court failed to require that ENC demonstrate proximate cause by proving the Underlying Case. However, in *Vahila v. Hall* (1997), 77 Ohio St.3d 421, this Court resoundingly rejected the “case-within-the-case” method demanded by the Law Firm. In Ohio, in order to prevail in a legal malpractice action, a plaintiff must show a duty or obligation owed by the attorney to the plaintiff; a breach of that duty or obligation where the attorney failed to conform his or her conduct to the requisite professional standard of care; and a causal connection between the attorney’s breach(es) and the losses suffered by the plaintiffs. *Id.* at 427. The “causal connection” standard does not and should not, despite the Law Firm’s urging, require proving the case-within-the-case, but rather burdens the plaintiff with the obligation to produce “some evidence of the merits of the underlying claim.” *Id.* at 428.

II. STATEMENT OF FACTS

A. Procedural History

The matter before this Court is a discretionary appeal from a judgment and verdict in a legal malpractice case rendered in favor of ENC and against the Law Firm. ENC filed its Complaint on December 9, 2002. Supp. at 1. The case was tried from September 19, 2005 through September 30, 2005. On October 3, 2005, the jury, after nearly two weeks at trial, found the Law Firm liable for legal malpractice and rendered a verdict in ENC’s favor in the amount of \$2,419,616.81. (Appx., A-49). During trial, at the conclusion of ENC’s case in chief, the trial court denied the Law Firm’s Motion for Directed Verdict and, on January 30, 2006, denied its

Motion for Judgment Notwithstanding the Verdict. (Appx., A-23). The Law Firm appealed to the Eighth Appellate District asserting four separate assignments of error. On March 1, 2007, the Court found each of the four assignments of error devoid of merit and affirmed the judgment in ENC's favor. (Appx., A-5).

B. Underlying Case And Goodman Weiss Miller LLP's Breaches

This legal malpractice matter arises from the Law Firm's substandard representation of ENC in the Underlying Case captioned *Environmental Network Corporation v. TNT Rubbish Disposal, Inc., et al*, Case No. CV351105 (Cuyahoga C.P.) The relevant parties in the Underlying Case were ENC, Waste Management of Ohio ("Waste Management"), TNT Rubbish Disposal, Inc. ("TNT") and various creditors holding judgments against one or more of the Appellees. TNT, Waste Management and ENC were in the waste hauling and disposal business and executed various agreements, the alleged breaches of which gave rise to the Underlying Case.²

The Underlying Case concerned a set of competing contract and collections claims arising out of the operation of the San-Lan Landfill (the "Landfill"), a permitted sanitary landfill in Fostoria, Ohio. Transcript ("T."), Vol III at 689-90 (Wetterich), Supp. at 174-75. The Landfill was owned by Hocking Environmental, but as of 1995 was operated by ENC pursuant to an operating agreement with the owner. *Id.* In 1995, prior to Waste Management becoming a

² ENC asserted breach of contract and account claims against TNT. Waste Management was a third-party intervenor which filed a contract claim and sought a declaratory judgment on certain of ENC's accounts. ENC, in turn, filed a breach of contract action against Waste Management for, in part, damages resulting from Waste Management's failure to advance requisite monies to continue to develop landfill airspace. ENC's judgment creditors filed separate creditor's bill actions which were consolidated with the Underlying Case.

customer of ENC at the Landfill, ENC had between thirty and forty existing commercial customers who utilized the landfill. *Id.*, at 695, Supp. at 180. The Landfill received waste streams from numerous other customers from various locations in Ohio including Cleveland, Lima, Finley and Marion. Pl. Tr. Ex. 53, Michelson Statement, Supp. at 38-39.

In September 1996, ENC entered into a contract with TNT, an independent waste hauler. Per that agreement, ENC financed the costs of all TNT's waste hauling and dumping in order to, in part, build up the company. T. Vol. III at 696-97 (Wetterich), Supp. at 181-82. In exchange, ENC received an option to buy TNT. When the option never materialized and TNT failed to make ENC whole, ENC filed an account action against TNT for the amounts owing from its financing TNT's operation costs for the year. *Id.*, 698-97, Supp. at 183-84. In December 1996, ENC and Waste Management executed the Waste Disposal and Airspace Reservation Agreement (the "Contract") whereby ENC would receive financing to continue Landfill development in exchange for providing Waste Management severely discounted disposal rates. Both parties filed claims arising out of alleged breaches of each of their respective obligations under the Contract.

ENC retained GWM as counsel for the Underlying Case in the Spring of 2001 after its previous counsel was going to be disqualified for being a potential witness. T. Vol. III at 701-02, Supp. at 186-87. The GWM attorneys initially handling the case were associate Deborah Michelson and partner Steven Miller. Long before the trial of the case, Mr. Miller expressly told ENC that he would try the case. T., Vol III at 702 (Wetterich), Supp. at 187. When Mr. Miller determined that he would not attend trial due to personal matters, he failed to move for a continuance or seek a stipulation from opposing counsel for a continuance. Instead, he simply turned the case over to attorney Jim Wertheim in late October 2001, just over one month before

the December 10, 2001 trial date. Despite promising ENC and Mr. Wetterich that he would try the case, Mr. Miller failed to do so. The trial of the Underlying Case commenced on December 10, 2001. Mr. Wetterich was the first witness. T. Vol. III at 705. Mr. Wertheim made numerous mistakes in his questioning and introduction of exhibits which confused Mr. Wetterich on the stand. *Id.* Before Mr. Wetterich could finish his testimony, ENC's office manager was called to the stand. Mr. Wetterich never returned the stand because the case settled on December 11, 2001.

Prior to stopping the case, there existed significant problems with the documentary evidence. These problems began in late November 2001 when Mr. Wetterich brought to the Law Firm copies of document he had previously produced. *Id.*, at 709-712, Supp. at 189-91. He was using the copies to produce evidentiary summaries of large compilations of documents. *Id.* Mr. Wertheim, without reviewing the documents, simply produced them to opposing counsel. *Id.* At trial, Waste Management and TNT made a significant issue about the putative late production, when, in fact, the documents were duplicative of previously produced documents. *Id.* The disputes over the documents required Ms. Michelson, during lunch on the second (and soon to be final) day of trial, to search on hand-and-knee through Waste Management's many exhibits to determine that those documents were indeed previously produced. *Id.*, at 707, Supp. at 188.

When the trial continued that afternoon, albeit wholly truncated, the trial judge, upon yet another evidentiary dispute, threw an exhibit across his desk, stopped the trial, ordered a recess and demanded to see all counsel in chambers. *Id.* at 706-07 That was the end of the trial. When ENC's counsel reemerged, they refused to return to the courtroom to continue the case, despite Mr. Wetterich's insistence. They kept repeating to Mr. Wetterich that he was going to lose. *Id.*,

at 714-15, Supp. at 192-93. They told Mr. Wetterich *ad nauseam* that the judge was mad at him, that he did not like him, and that he would not let the exhibits into evidence. *Id.* However, the Law Firm never apprised Mr. Wetterich as to the reasons why the exhibits could not be admitted. *Id.* Mr. Wetterich wanted to have the judge “thrown off” since the Law Firm represented that the judge did not like him. *Id.* He believed the Law Firm’s representations and sought to have the judge removed. However, the Law Firm did not, despite Mr. Wetterich’s instruction, seek recusal.

Mr. Wetterich demanded that his attorneys return to Court and complete the case:

I told them at least 30, 40 times that afternoon. In fact, when we were in the little room, I told Jim Wertheim. I said, you know, Jim, I’m an ex-Marine and we believe when go past a certain point that we call the line of demarcation, you don’t turn back, and we’re past that point.

I said we’re not turning back. We’re going in. I’m entitled to my day in court. . .

T., Vol. III at 716. Mr. Wertheim responded that ENC was just hit with a “howitzer” and that the attorneys would not return to the court room. Despite Mr. Wetterich’s demands, GWM simply refused to return.

Mr. Wetterich even requested that Mr. Miller come to the courthouse, but he was apparently busy. *Id.* at 719. It was now late in the afternoon and Mr. Wetterich requested that the Law Firm attempt to secure an extra day to decide what course of action he should take. *Id.* The Law Firm again refused. The failures of his attorneys, among other things, to seek recusal of the judge, to continue to try the case as demanded by the client, and the coerced settlement constituted the basis from which the trier of fact found the Law Firm liable for malpractice.

C. Malpractice Case, Evidence of Underlying Claims and Damages Sustained By ENC

The trier of fact, isolating six separate breaches of duty, found GWM liable for legal malpractice. No where in the myriad of post-trial and appellate briefing has GWM contested the fact that it breached its duty as counsel owing to ENC. On appeal, the Eighth District found the same. Appx., A-12, ¶15. Accordingly, under *Vahila*, ENC has proven that GWM breached its duty of care. The Law Firm only maintains that the evidence adduced at trial was insufficient to support that its breaches caused ENC damages and, as such, its directed verdict and JNOV motions were denied in error. The evidence demonstrates that ENC established the causation and damages elements by proving the entirety of the Underlying Case against both TNT and Waste Management (notwithstanding the fact that *Vahila* does not require this higher standard of proof of causation). ENC met and exceeded its causation burden under *Vahila* thereby establishing, despite contrary assertions on appeal by the Law Firm, that its breaches caused ENC to suffer specific and certain damages, as proven during the trial of this case.

(1) Claims and Damages Proven – TNT

During the trial below, ENC proved its claims in the Underlying Case against TNT. ENC filed an account action against TNT. Mr. Wetterich provided detailed testimony concerning the agreement between TNT and ENC and how ENC had certain open unpaid receivables from TNT. T. Vol. III at 696-99, 732-33 (Wetterich), Supp. at 181-84, 206-07; Pl. Tr. Ex. 18, Supp. at 113. He testified that the amount owed to ENC, after certain deductions, exceeded \$1.3 million. *Id.* From that sum he subtracted \$550,000 for a separate promissory note in favor ENC (from TNT) that was assigned to Waste Management. *Id.* Therefore, the trier of fact had documents and

heard testimony establishing that TNT owed, but failed to pay, ENC exactly \$803,056.71. *Id.*

(2) Claims and Damages Proven – Waste Management

ENC proved its contract claims in the Underlying Case against Waste Management. Mr. Wetterich's testimony established the parties' respective duties and obligations under the Contract, the terms of the Contract, ENC's performance and Waste Management's breaches. He provided testimony which established how Waste Management's breaches of the Contract caused specific and certain damages to ENC and, further, calculated the amount of those damages to the penny. He also deducted from ENC's gross damage figure monies owed to Waste Management as well as to other judgment creditors resulting in total lost profit damages for ENC from Waste Management's breaches of exactly \$5,386,616.81. T. Vol. IV at 784 (Wetterich), Supp. at 255.

(a) ENC's Contract with Waste Management

On December 12, 1996, ENC and Waste Management entered into the Contract. T. Vol. III at 699, 720 (Wetterich), Supp. at 184, 194; Def. Tr. Ex. 6, Supp. at 5. The primary purpose of executing the Contract was for ENC to secure financing from Waste Management for Landfill development in exchange for favorable disposal rates and certain reservation of Landfill airspace. *Id.* The Contract permitted Waste Management to deposit its waste at the Landfill at a severely discounted rate of \$5.00 per ton. T. Vol. III at 723-26, Supp. at 197-200. This dumping fee is known as a 'tipping fee,' (the charge for dumping garbage). The \$5.00 per ton tipping fee was a prepaid disposal fee of \$1.2 million advanced upon meeting certain conditions precedent, including an engineer's certification of a specific volume of constructed and permitted Landfill airspace. Def. Tr. Ex. 6, Supp. at 9.

Further, ENC was obligated to reserve 608,000 bank yards (or 456,000 tons) of airspace for Waste Management over the four year term of the Contract, or 152,000 bank yards (114,000 tons) per year. *Id.*; T., Vol. III at 727, 763, Supp. at 201, 234. The \$1.2 million loan to ENC was to be repaid by allowing Waste Management to deliver waste to the Landfill and crediting the amount advanced against actual tipping or disposal fees at a rate of \$5.00 per ton. *Id.* at 721-23, Supp. at 195-97; Def. Tr. Ex. 6, Supp. at 7. After providing the initial \$1.2 million, the Contract required Waste Management to advance a subsequent \$800,000 to ENC after a minimum of 1.1 million cubic yards of Landfill airspace was permitted, constructed and available to Waste Management. T. Vol. III at 700, 734-35, Vol. IV at 762-63, Supp. at 185, 208-09, 233-34; Def. Tr. Ex. 6, Supp. at 18. Similar to the initial loan, ENC was required to repay the subsequent \$800,000 advance by reserving for Waste Management sufficient airspace and crediting the prepaid tipping fees against actual waste deposits. *Id.*

The \$5.00 per ton prepaid disposal fee comprised only tipping fees, not governmental fees. T. Vol. III at 700-01, 723-25, Supp. at 185-86, 197-99. §4.1 of the Contract provides: “Waste Management may deliver to the Facility, any and all Waste Management Waste Material. . .for the initial tipping fee (exclusive of governmentally imposed district and generation fees) of. . .\$5.00 per ton.” Governmental fees were required to be paid each month and were not included in the prepaid disposal amount. *Id.* at 721, Supp. at 195. Thus, aside from its draw-down from the advance credited against its tipping fees, Waste Management had a separate obligation to pay governmental fees.

(b) ENC’s Performance and Waste Management’s Breaches

ENC’s engineers certified to Waste Management that 550,000 cubic yards of Landfill

airspace was completed, thereby triggering the obligation to advance \$1.2 million in prepaid disposal fees. *Id.* at 727-29, Supp. at 201-03. The Contract confirmed ENC's completion of the requisite airspace by referencing and relying on the engineer's certification. Def. Tr. Ex. 6, Supp. at 18.

ENC also met and exceeded the airspace reservation requirement for Waste Management. Under the Contract, ENC was to reserve for Waste Management annually a minimum of 152,000 cubic yards (or sufficient airspace for 114,000 tons) of Landfill airspace. Ms. Michelson represented to the Court in the Underlying Case that ENC met and exceeded that requirement. Pl. Tr. Ex. 53, Supp. at 28. In 1997, Waste Management actually deposited 151,996 tons, exceeding the minimum requirement by nearly 38,000 tons. T., Vol IV at 763 (Wetterich), Supp. at 234.

Further, there was ample testimony in the trial below proving that ENC constructed and had permitted over 1.1 million cubic yards of Landfill airspace, meeting the condition precedent requiring Waste Management to advance the subsequent \$800,000. T. Vol. III at 700, 735, Supp. at 185, 209. Ms. Michelson represented the same in the Underlying Case; specifically, that ENC satisfied its obligation of building out the requisite airspace sufficient to collateralize Waste Management's subsequent advance. Pl. Tr. Ex. 53, Supp. at 19, 24. Mr. Wetterich reviewed and testified to volume calculations (Pl. Tr. Ex. 58, Supp. at 137), engineer/topographical maps (Pl. Tr. Ex. 59, Supp. at 139) and Ohio E.P.A. letters regarding total Landfill airspace developed (Pl. Tr. Ex. 60 and 61) confirming that over 1.1 million cubic yards of airspace was indeed developed and permitted. T., Vol III at 734-744, Supp. at 208-18. He testified that ENC built out 1,254,991 cubic yards of Landfill airspace. T. Vol. IV at 761-62, Supp. at 232-33. Despite completing the requisite airspace, Waste Management, in breach of the Contract, failed to advance the \$800,000.

T., Vol III at 699-700, 734-35, Supp. at 184-85, 208-09.

The Contract was executed in December 1996. Waste Management breached its obligations under the Contract when it failed to pay timely, if at all, certain state (Ohio EPA) and county (Ohio OSS) district and generation fees for the disposal of waste material. Pl. Tr. Ex. 53, Supp. at 44-45; T. Vol. III at 700-01, 725-26, Supp. at 185-86, 199-200. From the outset of the parties' relationship under the Contract, Waste Management was in arrears of its obligation to pay these governmental fees. In February 1997, Waste Management paid fees owing from 1996; the next fee check from Waste Management arrived in July 1997 to pay for past due fees as far back as six or seven months. T., Vol. IV at 764-66 (Wetterich), Supp. at 235-37. As the Contract was executed in December 1996, notwithstanding the fact that Waste Management was in arrears from fees owed earlier, during the parties' pre-written contract relationship, its failure to pay timely December and January fees rendered it in immediate breach. Pl. Tr. Ex. 53, Supp. at 44-45, 51. By December 1997, Waste Management was past due in an amount approaching \$300,000. T. Vol. IV at 759-60, Supp. at 230-31.

The penalties levied against ENC for Waste Management's delinquencies were draconian: Mr. Wetterich testified that the penalty was one-half the monthly amount that one was behind in paying the governmental fees. *Id.* When Waste Management was delinquent, if it paid at all, on the government fees, ENC had to pay the fees out of its own pocket. Often, ENC was forced to choose between paying the governmental fees or the royalty payments to the owner of the Landfill. T., Vol. III at 725-26, 759, Supp. at 199-200, 230. ENC had to use its own cash to pay Waste Management's governmental fees, forcing it to fall behind on its own bills for royalties to the Landfill owner and to different vendors. T., Vol. IV at 765 (Wetterich), Supp. at

236. Ultimately, Waste Management's failure to pay governmental fees caused significant cash flow problems, including problems with the Landfill owner, all of which caused ENC to lose the Landfill and all its financial investments therein. Pl. Tr. Ex. 53, Supp. at 26.

(c) Waste Management's Claims and Defenses

During trial, ENC demonstrated that Waste Management's claims and defenses lack merit. First, GWM argues that ENC's ability to recover against Waste Management was highly doubtful as a result of ENC's asserted failure to make timely royalty payments to the Landfill owner and fee payments to certain regulatory authorities which constituted a default under the Contract. This default, GWM maintains, rendered the balance of Waste Management's \$1.2 million note immediately payable. However, the evidence established that Waste Management's failure to provide payments to ENC for the regulatory fees caused the alleged payment issues with the Landfill owner and regulatory authorities. When Waste Management failed to provide timely fee payments, ENC was forced to use its own cash to attempt to cover Waste Management's fee payments and thus diverted funds earmarked for royalty payments to the Landfill owner. T. Vol. IV at 765, Supp. at 236. Waste Management's initial breaches of the Contract caused ENC's issues with the Landfill owner and regulatory agencies.

Second, the evidence demonstrates that there was no breach of ENC's repayment obligation to Waste Management on the initial \$1.2 million advance. Under the Contract, ENC's repayment was allowing Waste Management to deposit waste and credit the advance against the disposal fees at \$5.00 per ton. Waste Management was entitled to deposit 114,000 tons per year at the reduced rate. It disposed of over 180,000 tons of waste. *Id.* at 763, Supp. at 234. ENC's lost profit damage calculations also accounted for subsequent airspace reservation for Waste

Management as a deduction. *Id.* at 774-75, Supp. at 245-46. Moreover, as ENC established that Waste Management breached the Contract first by tardily paying the fees (which ultimately caused the alleged default claimed by Waste Management), the \$1.2 million note would not be due.

Finally, GWM claims that ENC would have owed Waste Management an additional \$1.2 million for waste deposits at various other landfills. ENC conceded that it owed monies to Waste Management and, in its damage calculations, deducted over \$1.9 million (nearly \$700,000 more than GWM claimed was owed) from its gross damage figure. *Id.* at 780-782, Supp. at 251-254. Similarly, ENC accounted for the monies it owed to various judgment creditors and accordingly deducted an additional \$750,000 from its damage award. *Id.* In sum, ENC deducted in excess of \$2.6 million from its damage calculations to account for various monies owed to Waste Management and other entities.

(d) ENC's Damages

Mr. Wetterich testified to the specific dollar amounts Appellees lost as a consequence of Waste Management's failure to advance the \$800,000. T., Vol IV at 761-63; 772-784, Supp. at 243-45. Mr. Wetterich provided the methodology for and calculated lost profit losses for unused landfill space. *Id.*³ When adding that sum to the previously established losses due and owing

³ In determining lost profits, Mr. Wetterich used an \$18 per ton price, which is the same number GWM intended to use in calculating ENC's lost profits in the underlying litigation. (Pl. Tr. Ex. 52, Supp. at 133, ENC lost profit demonstrative created at the direction of GWM for use in the Underlying Case). Ms. Michelson testified that this lost profit demonstrative, which used the same \$18 per ton price, demonstrated ENC's losses due to Waste Management's breaches and, further, the exhibit was to be used in the trial of the underlying case. T., Vol II at 468-70, Supp. at 143-45; *Id.*, Vol. IV at 767, Supp. at 238 (Mr. Wetterich explaining methodology behind lost profit figures determined with Ms. Michelson for the Underlying Case.) The lost profit figure on the Underlying Case Demonstrative exceeded \$6.9 million. That same demonstrative

from TNT, Mr. Wetterich testified that Appellees' total losses exceeded \$8 Million. T., Vol IV at 776-77. From that gross loss, Mr. Wetterich testified that it was necessary to subtract or offset from the gross damage number monies owed by ENC to Waste Management. *Id.* at 781-83, Supp. at 252-54. Moreover, in determining lost profits, Mr. Wetterich subtracted those monies that were owed (but extinguished as a consequence of the putative settlement in this case) to the parties holding creditor judgments, specifically \$750,000. *Id.* ENC provided evidence establishing that its final lost profit damages were \$5,386,616.81. *Id.*

With respect to the parties' claims and losses in the Underlying Case, ENC offered evidence regarding:

- Contract establishing the terms of the contract whereby ENC was required to build out and have permitted 1.1 million cubic yards of gross airspace in the San-Lan Landfill [contract terms];
- Engineering maps and memoranda (Pl. Tr. Ex. 58, 59, 66) showing how the relevant airspace was parceled, the cubic yardage of each subphase to be developed and when the development each subphase was to be completed [contract terms];
- Ohio E.P.A. documents from January and September 1997, respectively (Pl. Tr. Ex. 61), showing that each subphase was indeed built and approved [performance];
- Company certification documents to the Ohio E.P.A. (Plaintiffs' Trial Exhibits 62, 63, 64) certifying gross airspace developed and used from 1995-1997, numbers assisting in the calculations of unused airspace where sum-specific tonnages of garbage could have and would have been placed had the contract not been breached by Waste Management [performance and damages];

which GWM was to employ to prosecute ENC's underlying claim, also calculates operational costs at \$4 per ton, again the same figure used by Appellees in this case, whether by Mr. Wetterich or Dr. Burke. Moreover, Ms. Michelson assisted Mr. Wetterich in preparing this exhibit. *Id.*

- Testimony and demonstrative exhibits showing how certain available airspace translated into certain tonnages of garbage which, at a specific dollar per ton, generated gross lost profits, less developmental costs [damages];
- TNT and ENC documents (Pl. Tr. Ex. 18) reflecting monies owed from TNT for the hauling and dumping of garbage [damages];
- Appellant's own documents (which purportedly were to be used in support of Appellees claims in the underlying litigation) that established ENC's out-of-pocket damages, due to Waste Management's contract breach, in the amount of \$2.4 Million (Pl. Tr. Ex. 47), an amount nearly identical to the jury award in this case [damages];
- Appellant's own documents (which purportedly were to be used in support of Appellees claims in the underlying litigation) that established ENC's lost profits, due to Waste Management's contract breach, in the amount of \$6.9 Million (Pl. Tr. Ex. 52, App. 5) [damages];
- Offsets to Appellees damage figures, specifically monies owed to Waste Management as well as a sum certain amount owing to a set of judgment creditors [offset to damages];
- Appellant's own documents (which purportedly were to be used in support of Appellees claims in the underlying litigation) establishing the fact that Waste Management was required to and failed timely to pay state and local fees for dumping trash in the San-Lan Landfill before any alleged breach of agreement by Appellees. (Pl. Tr. Ex. 43) [breach];
- The fact that Waste Management failed to advance the subsequent \$800,000, after Appellees under the contract developed 1.1 million cubic yards of airspace, for the continued development of airspace at the San-Lan Landfill [breach]; and
- How Waste Management's failure to advance monies and pay governmental fees timely, if at all, caused significant cash flow problems for Appellees resulting in some delinquencies on obligations with the owners of the landfill property and ultimately the loss of the landfill [breach and damages];

The evidence set forth by ENC (a) on the terms of the contract; (b) on ENC's performance of its obligations; (c) on Waste Management's breaches of contract; and (d) on ENC's damages flowing therefrom, establishes that Appellees would have prevailed in the

underlying case, surpassing the “causal connection” requirement under *Vahila* and the jury charge on the underlying case. The evidence demonstrates that ENC’s underlying claims had significant merit, exceeding *Vahila*’s command of “some evidence of the merits of the underlying case.” The evidence goes to the heart of contract terms, performance, breach and damages governing the contract claims in the truncated trial below. These are precisely the matters, under *Vahila*, on which a legal malpractice plaintiff must present some evidence. Further, although not required to do so, ENC proved the “case-within-the-case,” thus, meeting and exceeding the *Vahila* causal connection burden.

III. ARGUMENT AGAINST APPELLANT’S PROPOSITION OF LAW

ENC alleged and proved that the Law Firm was negligent in its representation of Appellees in the Underlying Case. On appeal, the Law Firm asserts the Eighth District misinterpreted the causation requirements set forth in *Vahila v. Hall* (1997), 77 Ohio St.3d 421, thereby erring when it affirmed trial court’s denial of Appellant’s motion for directed verdict and JNOV motion. In *Vahila*, this Court was clear in its articulation of what constitutes a sufficient showing of causation and damages in a legal malpractice case arising out of an attorney’s negligent representation: “[W]e hold that to establish a cause of action of legal malpractice based on negligent representation, a plaintiff must show. . .(3) that there is a causal connection between the conduct complained of and the resulting damage or loss.” *Id.* at 427. The Court of Appeals correctly interpreted and applied *Vahila*’s mandate on causation and damages and, accordingly, this Court must affirm its ruling.

A. Standard of Review

When ruling on a JNOV motion, a court applies the same test as it would in ruling on a

directed verdict motion: “The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made. . .” *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275; *Cardinal v. Family Foot Care Ctrs., Inc.* (8th Dist. 1987), 40 Ohio App.3d 307, 309; *Kenny v. Metropolitan Life Ins. Co.* (1st Dist. 1948), 82 Ohio App. 51, 55. This means that a reviewing court **“must assume the truth of the plaintiffs’ 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*, 97 Ohio App.3d at 221, quoting *McComis v. Baker* (12th Dist. 1974), 40 Ohio App.2d 332, 335 (emphasis added). The Court does not consider the weight of the evidence or the credibility of the witnesses. *Posin*, 45 Ohio St.3d at 275. Rather, a JNOV motion “poses the question of the materiality of the evidence” and “does not raise any issue as to the competency of the evidence that has been received.” *Kenny*, 82 Ohio App. at 55-56.

A JNOV motion “calls upon the court to determine the one issue of whether there is any evidence of substantial probative value in support of the [non-movant’s] claim. . .” *Kenny*, 82 Ohio App. at 55; See also *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.* (2002), 95 Ohio St.3d 512, 514. After construing all the evidence and the inferences drawn therefrom in favor of the non-movant, a trial court may grant a motion for JNOV “only if there [is] insufficient evidence to permit reasonable minds to reach different conclusions. . . .” *Kenny* at 55. A motion for JNOV may be granted only where “there is no evidence tending to prove an essential element of plaintiff’s cause of action.” *Kubiszak v. Rini’s Supermarket* (8th Dist. 1991), 77 Ohio App.3d 679, 686. However, where there exists **any** evidence of substantive probative value that would

permit reasonable minds to reach different conclusions, a trial court is duty bound to overrule a motion for JNOV. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 69; *McComis*, 40 Ohio App.3d at 335, citing *O'Day v. Webb* (1972), 29 Ohio St.2d 215.

B. The Court of Appeals Correctly Interpreted and Applied *Vahila's* Holding on Causation and Damages; It Did Not Err in Affirming the Trial Court's Denial of the Law Firm's Directed Verdict and JNOV Motions.

The Law Firm alleges reversible error because the Court of Appeals did not require ENC to prove every element of the Underlying Case. More specifically, GWM contends that in order to prevail in the malpractice case, ENC was obligated to prove the "case-within-the-case," demonstrating that but for GWM's negligence, the trier of fact in the Underlying Case would have found in their favor. That is, the Law Firm claims error because the Court of Appeals followed that this Court's mandate on causation in *Vahila*, and did not create its own deficient test.

The putatively deficient jury instruction is:

Evidence of Merit of Underlining [sic] Claim. Plaintiffs are claiming that as a result of the defendant's alleged breach of standard of care, they had to settle the underlining [sic] litigation against their will.

Plaintiff claims the defendant did not continue with the trial of the underlining [sic] case when specifically instructed to do so, and that if it had returned to court to continue to trying the case, plaintiffs would have achieved a better result than the settlement achieved.

Plaintiffs must prove some evidence of the merits of the underlining [sic] case claims. Plaintiffs must established by a preponderance of the evidence that the defendants breached his duty of care to the plaintiffs.

Further, plaintiffs must establish by a preponderance of the evidence that there is a causal connection between the conduct complained of and the resulting damage or loss. However, the requirement of a causal connection dictates that the merits of a legal malpractice depends upon the merits of the underlining [sic] case and you should take into account all evidence you have heard to determine whether there exists some evidence of the merits of plaintiffs claims in the underling litigation.

T., Vol. X at 2272-73, Supp. at 484-85.

Analogously, Appellant alleges reversible error in the appellate's interpretation and application of *Vahila* when the denials of its JNOV and directed verdict motions were affirmed.

This is wrong. Appellant cries foul in the following portions of the trial court's Order and Decision which the Appellate Court affirmed:

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 larger number of plaintiffs from bringing suits of merit, which in effect would immunize negligent attorneys.

* * * *

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.

Appx, A-35. (Emphasis added).

It is well established in Ohio that in order to prevail on a claim for legal negligence, a plaintiff need only demonstrate by a preponderance of the evidence the following:

- that the attorney owed a duty or obligation to the plaintiff;
- that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law; and
- that there is a causal connection between the conduct complained of and the resulting damage or loss.

Vahila, 77 Ohio St.3d at 427.

Under no circumstances does *Vahila*, mandate that a legal malpractice plaintiff prove the "case-within-the-case." The Law Firm, however, asserts differently, specifically that the facts of ENC's particular claims compel them to prove the underlying case. In pertinent part, *Vahila* held that to establish causation in a legal malpractice case, a plaintiff must show a causal connection between the negligent conduct and the resultant loss. *Id.* at 427. Explicating the causal connection requirement, 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. . . may be required, depending on the situation, to provide some evidence of the merits of the underlying claim.

Id. at 427-28 (internal citations omitted).

Vahila is clear: proving causation requires, at most, **some evidence** of the merits of the underlying claim. The Law Firm would eviscerate this Court's holding on causation and change

this unambiguous “some evidence” requirement to a higher standard requiring that ENC prove that they would have been successful in the Underlying Case. This Court rejected any finding that the causation element could be replaced with a principle requiring a plaintiff to prove in every instance that he or she would have been successful in the underlying matter. *Vahila*, 77 Ohio St. 3d at 426. Appellant, armed only with the “in every instance” clause, understands this to mean that perhaps in some instances such proof is required. This is false. Rather, in some situations, only **some evidence** is required.

The plain language of *Vahila* is not susceptible to GWM’s tortured reading. In fact, this Court articulated a detailed rationale and significant policy reasons for the “some evidence” limit ensuring that a legal malpractice plaintiff is never saddled with the undue burden of proving the case-within-the-case. Quoting with approval the Note, *supra*, this Court reasoned:

A standard of proof that requires a plaintiff to prove to a virtual certainty that, but for that defendant’s negligence, the plaintiff would have prevailed in the underlying action, in effect immunizes most negligent attorneys from liability.

Vahila, 77 Ohio St.3d at 426. The “but for” standard requirement urged by the Law Firm, in effect, requires “the plaintiff to conduct a ‘trial within a trial’ to show the validity of his underlying claim.” *Id.* at 427. This standard would necessarily burden the trier of fact in the malpractice action to “try the merits of both the malpractice suit and the underlying claim to make an independent determination of the damage award.” *Id.* This would require a theoretical reconstruction of the underlying case where remote and speculative testimony, from experts or otherwise, would be needed, for example, on trial outcomes and potential damage awards.⁴ *Id.*

⁴ Would the plaintiff, under GWM’s new test, have to call all of the same fact witnesses? In the same order? Retain all of the same experts? Introduce all of the same documents? What

In other words, the “but for” causation standard would necessitate testimony, particularly here where the trial of the underlying case was wholly botched even prior to completing the testimony of even one witness, from sources alien to the original proceeding, nearly four years removed, of what exactly would have transpired had the underlying case moved forward apace. Alternatively, it would require the entire panoply of documents, witnesses, evidence, let alone the particular nuances individual to the original proceeding, to be forwarded and jump-started at the trial of the malpractice case. As this Court noted, “[t]he cost and complexity of such a proceeding may well discourage the few plaintiffs otherwise willing to pursue the slim chance of success.” *Id.*, quoting Note at 670-71.

Based on these and other policy reasons, *Vahila* requires no more than a “causal connection” between the alleged breach and damages, expressly rejecting the very “but for” or “case-within-the-case” requirement that the Law Firm demands. In fact, contrary to what is implied by Appellant, *Vahila* did not adopt whole cloth the causation standard from *Krahn v. Kinney* (1989), 43 Ohio St.3d 103. Though *Krahn* announced the elements of a legal malpractice action arising out of an underlying criminal matter, this Court noted that the same elements also apply in malpractice cases emerging from a civil case. *Id.* at 105; See also *Vahila*, 77 Ohio St. at

if the plaintiff in the legal malpractice action sought to introduce new evidence or witnesses? GWM’s new test is unworkable, particularly here when its own malpractice in coercing a settlement forced the trial to stop. GWM’s alternative, but infirm, unmanageable and contrary to common sense test, in fact, impedes the determination of whether the attorneys’ negligence proximately caused damages to the plaintiff. It creates, in effect, a standardless standard for legal negligence cases, providing a safe haven for wrongdoing attorneys and ratcheting up expenses for malpractice victims. Finally, the proposed “standard” would render appellate review a virtual nullity since a “case by case” inquiry as to what level of proof is required would be a factual determination necessitating a deferential standard of review. A successful appeal on proximate cause would be virtually impossible.

424 n.1. In pertinent part, *Krahn* required that to prevail in a malpractice case, the plaintiff must show that the “damages [were] proximately caused by the breach.” *Krahn*, 43 Ohio St at 106. However, when this Court decided *Vahila*, the causation element was changed to the prevailing “causal connection” language in effect today. *Vahila*, 77 Ohio St.3d at 427. This change, read in context of the *Vahila*’s extensive policy rationale, confirms this Court’s intention to disavow any requirement of compelling a plaintiff, under any circumstance, to demonstrate by specific proof what result a legal malpractice plaintiff should have obtained if the underlying case had been tried to completion.

Contrary to the Law Firm’s assertions, the lower court cases applying *Vahila*’s causal connection nexus are uniform in their endorsement of requiring some evidence of the merits of the underlying case to prove causation but never requiring a legal malpractice plaintiff to prove the case-within-the-case. In *Cunningham v. Hildebrand* (2001), 142 Ohio App.3d 218 cert. denied by 92 Ohio St.3d 1445, the court held that the trial court followed the standard set forth in *Vahila* in issuing its jury instruction on the causal connection requirement. *Id.* at 225. In referencing *Cunningham*, the Law Firm fails to apprise this Court that the subject jury instruction expressly informs the trier of fact that: “In a legal malpractice case, **plaintiffs need not prove they would have won the underlying case. . .**” *Id.* (emphasis added). Similarly, the court found that the trial court’s JNOV order conformed to *Vahila* when it “did not apply a strict but for test. Nevertheless, the court required **Cunningham to provide some evidence of the merits of the underlying claim.**” *Id.* (emphasis added). Moreover, the excerpted jury instruction cited by the Law Firm (Appellant’s brief at 26) is nearly identical to the Underlying Case instruction in this case where the trial court employed a preponderance standard for the breach of contract claim:

If you find by the greater weight of the evidence that Waste Management of Ohio in the underlining [sic] case breached the San-Lan Agreement and was not excused because [Plaintiff] breached the San-Lan Agreement, [Plaintiff] is entitled to damages in an amount to place it in the same position. . . [w]hich it would have been in if the contract had been fully performed by WMO to the extent that the damages are reasonably certain and reasonably foreseeable.

T., Vol. X at 2273-75, Supp. at 485-87.

Similarly, in *Lewis v. Keller*, 2004-Ohio-5866 (8th Dist), the appellate court did not require that the legal malpractice plaintiff to prove the case within the case. In *Lewis*, the plaintiff filed a legal malpractice action alleging that her former attorney failed timely to refile in Federal Court a voluntarily dismissed state court employment discrimination matter. *Id.* at ¶ 11. The court affirmed the Civ. R. 56 dismissal of the malpractice action because the plaintiff presented no evidence establishing a causal connection between the attorney's failure to refile the case and the running of the relevant statute of limitations. *Id.* at ¶ 12. Moreover, the evidence conclusively demonstrated that the plaintiff's claims lacked merit, including findings by the underlying trial court that there were legitimate business reasons for plaintiff's termination. *Id.* at 14. Thus, the court found that there was no evidence that the plaintiff's claims had merit; rather, there was substantial evidence that her claims lacked merit. Accordingly, summary judgment was warranted.

Clearly, the *Lewis* plaintiff was unable to meet the *Vahila* requirement of producing some evidence of the merits of the underlying claim. In spite of the myriad of shortcomings, the court found that had plaintiff's expert opined on the merits, "it might have dispelled doubts on the potential merits." *Id.* at ¶ 15. Thus, *Lewis* stands for the proposition, consistent with *Vahila*, that

a legal malpractice plaintiff, in certain situations, may be required to produce some evidence on the merits of the underlying claim. In light of the abundance of evidence against the meritorious nature of the claim, some demonstration of likelihood of success on the merits, whether by an expert or otherwise, was necessary to survive summary judgment. However, *Keller* does not hold that a plaintiff must prove the case-within-the- case.

In *Ruble v. Kaufman*, 2003-Ohio-5375 (8th Dist.), the court, following *Vahila*, found that “it was necessary to prove there was some merit to the [underlying] case in order for the [attorney’s conduct] to constitute malpractice.” *Id.* at ¶39. In *Nu-Trend Homes, Inc. v. Law Offices of DeLiberra, Lyons & Bibbo*, 2003-Ohio-1663 (10th Dist.), the court again confirmed the *Vahila* causal connection standard and disavowed the case-within-the-case standard of proof: “a party who asserts legal malpractice claims **does not need to prove that it would have prevailed in the underlying case** had the alleged negligent misrepresentation not occurred.” *Id.* at p. 18 (emphasis added). Clearly, *Vahila* and its progeny do not relieve a plaintiff from its burden of showing a causal connection: “If the [breaching] act or omission. . . does not relate to an underlying claim that is at least colorable, then it becomes difficult to conceive that damages or loss could be a proximate result of that act or omission.” *Id.* Showing a relation to a colorable claim, however, does not approach the requirement of proving the underlying case as urged by GWM. Accordingly, there are no inconsistencies among the cases employing the *Vahila* criteria; none requires a legal malpractice plaintiff to prove the case-within-the-case and each endorses the proposition that causal connection may be proven by establishing some evidence of the merits of the underlying case.

The Court of Appeals did not misinterpret nor misapply the causation requirement in *Vahila*. A legal malpractice plaintiff, under *Vahila*, must show that there is a causal connection between the attorney's breaches and the damages sustained. *Vahila* counsels that the causal connection component may be met by showing that there was some evidence of the merits of the Underlying Case. In this instance, ENC met and exceeded this burden and conclusively proved that it would have prevailed on the claims in the Underlying Case. The Court of Appeals applied the correct standard; the verdict and damage award should remain undisturbed.

C. **This Court's Holding and Supporting Rationale in *Vahila* is Applicable in All Legal Malpractice cases.**

The Law Firm is at pains to narrow severely the scope of *Vahila*. It argues that the "some evidence of the merits of the underlying case" standard is only applicable where "the alleged harm [sustained by the legal malpractice victim is] independent of the outcome of the underlying proceedings. . ." (Appellant's Brief at 19). The Law Firm maintains that proving the underlying case to meet the causation element is inapplicable only in situations where a plaintiff suffered harm regardless of what the outcome of the trial, but for the attorney's negligence, would have been. (Appellant's Brief at 25). It thus distinguishes those select cases from the case at bar because it asserts that ENC's only damage theory was that it would have obtained a better result had the litigation been taken to judgment. (Appellant's Brief at 29). This is false. Possibilities of settling a case are implicit in pursuing a trial. Settlement and continuing with trial are not mutually exclusive. Had ENC not been stripped of its ability to pursue trial, it would have continued to have the possibility of future voluntary settlement at any and all times prior to judgment.

This Court notes in *Vahila* that requiring proof of the Underlying Case necessarily fails to consider Appellees' lost settlement opportunities as a consequence of the uncontested findings of breach, a consideration central to *Vahila's* rejection of a "but for" test:

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 court's tendencies to exclude abort settlement as too remote and speculative. The standard therefore excludes consideration of the most common form of client recovery.

Vahila, 77 Ohio St.3d at 426 quoting, *The Standard of Proof of Causation in Legal Malpractice Cases* (1978), 63 Connell L.Rev. 666, 670-671. As such, a cognizable, indeed the most common form of recovery, is wholly ignored by GWM in its brief. Appellant's numerous breaches in the underlying case forced a premature conclusion by way of coerced settlement. This abrupt truncating of the case not only caused the matter not to be tried to conclusion, it also forced Appellees to forego a myriad of potential settlement opportunities had their right to try the case not been unilaterally extinguished. The Law Firm's malpractice in coercing a settlement barely two days into trial made unavailable any other voluntary settlement that could have been achieved. As a consequence of the Law Firm's malpractice, there is no way of knowing what other settlements would have, could have or should have come ENC's way.

Under the Law Firm's case-within-the-case paradigm, a legal malpractice plaintiff has a more difficult burden the greater the negligence of the attorney. Here, the uncontested breach was so egregious and so early in the trial, such that the trial lasted barely one day, ENC was robbed of the ability to claim that it could have negotiated a more favorable settlement. In such a scenario, requiring a legal malpractice plaintiff to prove both the malpractice case and underlying

case as the only vehicle to recovery rewards the negligent attorney as he will have effectively eviscerated any opportunity for the aggrieved party to claim and prove damages for loss of a settlement opportunity.

Moreover, the facts in *Vahila* are analogous to the instant case. The malpractice suit in *Vahila* was premised on multiple negligent acts and omissions committed by the attorneys, including their obtaining pleas and settlements under duress and coercion, not entered into voluntarily by the clients. *Vahila*, 77 Ohio St.3d at 427. Similarly, ENC has proven (and the Law Firm has not contested) that one of the Law Firm's breaches was coercing a settlement by refusing to return to the courtroom to continue litigating the Underlying Case, despite the insistence and directives of its clients. Accordingly, just as the causal connection was made by establishing some evidence of the merits of the underlying case in *Vahila*, that same standard should be applicable here.

The Law Firm seeks to manufacture a new standard wholecloth - "that the nature of proof of causation that is required depends on the circumstances of the particular case." (Appellant's Brief at 32). Under this standardless standard, a trial court is tasked to decide anew in each case what must be established in order to prove causation in a legal malpractice case. Under this formulation, in certain cases a legal malpractice plaintiff may have to prove the entirety of the underlying case, in others the plaintiff may only have to show a loss of chance, yet in others show that the attorney's breach was a substantial factor, and again in other cases that (such as *Vahila* which Appellant claims is correctly decided *on its facts*) there must be a showing of "some evidence of the merits of the underlying case." This would make appellate review a virtual nullity since, at every turn, the trial judge will have the discretion to determine, under each case's

particular and individualized facts, what standard to apply. Should this Court adopt the Law Firm's rationale and interpretation of *Vahila*, each legal malpractice case would have a different standard of causation.

D. The Trial Court's Jury Instructions Required and ENC Proved Causation and Damages with Certainty.

The Law Firm demands reversal on the grounds that the trier of fact was bound to speculate on damages. However, despite the fact that the Court of Appeals correctly applied the causal connection requirement in *Vahila*, the jury charge included an instruction, to which no objection was proffered, on the underlying contract case against Waste Management. In pertinent part, the trial court charged the jury with the following:

Plaintiff's Underlining [sic] Breach of Contract Claim.

Traditionally a plaintiff in a legal malpractice case is entitled to recover the value of the underlining [sic] claimed loss as a result of the lawyer's negligence.

If plaintiffs fail to prove they were entitled to lost profit in the underlining [sic] litigation, they are not entitled to lost profits in the present case.

A contract is breached when one party fails or refuses to perform its duty under the contract.

* * * *

If you find by the greater weight of the evidence that Waste Management of Ohio in the underlining [sic] case breached the San-Lan Agreement and was not excused because [Plaintiff] breached the San-Lan Agreement, [Plaintiff] is entitled to damages in an amount to place it in the same position. . . [w]hich it would have been in if the contract had been fully performed by WMO to the extent that the damages are reasonably certain and reasonably foreseeable.

T., Vol. X at 2273-76, Supp. at 485-88. The trial court also charged the jury with an instruction

on proximate cause:

Proximate Cause. Separate Issue. A party who seeks to recover for damage must prove not only that the other party was negligent, but also that such negligence was a proximate cause of damage.

Proximate cause is an act or failure to act which in the natural and continuous sequence directly produces the damage, without which it would not have occurred.

Proximate cause occurs when the injury is a natural and foreseeable result of the act or failure to act.

Id. Plainly, the trial court instructed the jury that ENC was entitled to damages so long as it could prove by the greater weight of the evidence that Waste Management breached the Contract. The trial court charged the jury that ENC must prove that the negligence of the Law Firm was a proximate cause of the damage. Thus, any alleged error based an assertion that the trial court did not require ENC to prove the merits of the underlying contract case is baseless. This set of instructions required ENC to show both that Waste Management breached the contract and that the damages flowed therefrom. Thus, ENC was required to prove the Underlying Case, a burden exceeding *Vahila*.

As set forth above (Section II.C.) ENC supplied the jury with ample testimony and documentary evidence establishing the existence and terms of the Contract with Waste Management, ENC's performance, Waste Management's breaches and how those breaches caused certain, specific, enumerated and definite damages. Further, the purported value of the coerced settlement, though not conceded by ENC, was nonetheless deducted or offset from ENC's damage calculations. ENC deducted from its damage figures monies owed to Waste Management and the judgment creditors. That deduction exceeded \$2.6 million. Moreover, the

value, if any, of Waste Management's affirmative claims against ENC was a matter of dispute on which both GWM and ENC provided evidence. Whereas, the Law Firm's expert testified that Waste Management's claims arising out of the Contract, specifically on the promissory note for an alleged default, would likely be successful, ENC provided evidence showing that had the Contract been performed and Waste Management not breached by failing to pay regulatory fees, the note would have been repaid by Landfill airspace reserved for Waste Management, not repayment in money. Further, ENC demonstrated that Waste Management's Contract claims were not meritorious as it was in breach immediately upon its execution. (Section, II.C, supra).

Therefore, not only does Appellant's alleged error with respect to the jury instruction and the appellate court's interpretation and application of *Vahila* lack merit, it is also moot since the Underlying Case instructions demanded that ENC produce evidence of the merits of the Underlying Case.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the Eighth Appellate District's decision affirming the trial court's denial of Appellees' directed verdict and JNOV motions.

Respectfully submitted,



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