No. 07-0739

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO
CASE NO. 87782

ENVIRONMENTAL NETWORK CORPORATION, et al.
Appellees,

v.

GOODMAN WEISS MILLER LLP, et al.,
Appellants.

AMICUS CURIAE BRIEF IN SUPPORT OF JURISDICTION OF DEFENSE RESEARCH INSTITUTE

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Proposition of Law No. 1: 10

> When a plaintiff in a legal malpractice action seeks to recover as damages the damages that would have been recovered in the underlying action had the case been tried to judgment, to establish causation the plaintiff must prove by a preponderance of the evidence that, but for the lawyer's negligence, the plaintiff would have obtained a more favorable judgment in the underlying action. The plaintiff must thus prevail in a trial within a trial. (Restatement of the Law 3d, Law Governing Lawyers (2000), Section 53, Comment *b* followed.) 10

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I. INTEREST OF THE AMICUS

The Defense Research Institute ("DRI") is an international organization that includes more than 22,000 lawyers involved in the defense of civil litigation. Committed to enhancing the skills, effectiveness and professionalism of defense lawyers, the DRI seeks to address issues germane to defense lawyers and the civil justice system, to promote appreciation of the role of the defense lawyer, and to improve the civil justice system. The DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. The DRI has a strong and abiding interest in clarifying the circumstances under which lawyers will be held liable for alleged malpractice resulting from the loss of a judgment in the underlying litigation.

II. THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

The rule of law applied in this case requires lawyers to pay millions of dollars in speculative damages for supposed losses of civil judgments that would never have resulted had the underlying litigation been tried to verdict. Relying on snippets of this Court's opinion in *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, and contrary to the rule followed by a notable majority of the jurisdictions in the country and set forth in the Restatement (Third) of Law Governing Lawyers (which issued after *Vahila*), the Eighth District Court of Appeals held that a prima facie case of legal malpractice requires only "some evidence" that a settled claim had merit — without establishing by *any* method

that the plaintiff *would have* received such a judgment if the case had been tried to conclusion.

By failing to require the plaintiff to prove that an allegedly "coerced" settlement of the underlying litigation proximately caused it damages, the Eighth District's decision:

- Makes lawyers guarantors of their client's case;
- Impairs the strong public policy favoring settlement by encouraging lawyers to try cases to judgment;
- Untethers a legal malpractice claim based on a lost civil judgment from the moorings of common law negligence causation standards; and
- Is not required by *Vahila* and removes Ohio from the prevailing rule of law for legal malpractice claims across the United States.

The issue presented by this case arises when clients claim that their attorney "coerced" them into settling a claim and seek, as damages for the alleged malpractice, the difference between the settlement and the judgment the client would or should have received if the case had gone to trial (a "lost judgment"). Here, the client was allegedly "coerced" to settle on the second day of a complex commercial trial in which the client was seeking millions of dollars from the defendant and an intervenor, and the defendant and the intervenor were seeking millions of dollars from the client. The settlement included a "walkaway" by all parties and defendant's contribution of $40,000 to the client's attorney fees. The client later sued its attorney and claimed "full value" of its claims as malpractice damages. Although the client presented no testimony from any expert that its claims would or should have resulted in any judgment (or that the counterclaim and intervenor claim would or should not have resulted in a judgment

exceeding any judgment in favor of the client), the trial court denied motions for directed verdict and judgment notwithstanding the verdict and instructed the jury that "some" evidence that the client's claim had value was sufficient to establish proximate cause. The Eighth District affirmed a judgment on a jury verdict of nearly $2.5 million against the law firm, on the grounds that the "some evidence" standard complied with this Court's decision in *Vahila*. (Appellate Opinion ("App. Op."), Appendix ("Appx.") 11-13, at ¶ 26-30.)

The court of appeals' decision merits Ohio Supreme Court review for at least four reasons. First, the holding is illogical, unfair and makes lawyers guarantors of their clients' cases. Simply offering "some" evidence of the merits of an underlying claim proves nothing when the theory of damages is that the plaintiff would have received a better result had the case been tried to judgment — especially when, as here, the underlying case involved intervenor claims and counterclaims against the plaintiff. A judgment is not rendered on "some" evidence; a jury weighs *all* of the evidence on *all* claims in reaching a verdict, and the court enters judgment as to *all* of those claims.

Further, the minimal "some evidence" standard does not comport with tort law governing the underlying case. Absent "some" evidence supporting it, the underlying case would never proceed to trial in the first place – it would be dismissed on a pretrial motion. But under the rule of law applied below, any client dissatisfied with the result of a settlement (or trial verdict) could recover "damages" in the amount of the client's self-assessed value of the claim, so long as the client can retain an expert who will testify to

some breach of the standard of care — regardless of whether any alleged breach of the standard of care had anything to do with the verdict that would have resulted (or did result). In essence, the rule of law adopted by the Eighth District makes lawyers guarantors of their clients' cases. See *Mattco Forge, Inc. v. Arthur Young & Co.* (Cal. Ct. App. 1997), 60 Cal. Rptr.2d 780, 794 (noting that "to enable a plaintiff merely to value a case renders professionals liable as guarantors, as almost all cases have some value").

Second, the rule of law applied below impairs the strong public policy favoring settlement by encouraging lawyers to try cases to judgment rather than risk a malpractice claim based on a settlement that, in hindsight, their client believes is inadequate. Courts are far more likely to require proof on the merits of the underlying case when the malpractice plaintiff actually tries the underlying lawsuit and loses. E.g., *Nu-Trend Homes, Inc. v. Law Offices of Delibera, Lyons & Bibbo*, No. 01AP-1137, 2003-Ohio-1633, at ¶ 63 (holding that "party must produce evidence that the underlying claims were meritorious in order to satisfy the *Vahila* test" where fraud claim in underlying case was disposed of by directed verdict). The decision below therefore creates a perverse incentive for lawyers to avoid resolving lawsuits short of a judgment on the merits of their client's claims. Indeed, under the lower court's ruling, since settlements are by definition compromises of disputed claims, *every* party to an allegedly "coerced" settlement could seek malpractice damages in the form of the incremental value of the case allegedly lost by failing to secure a judgment — even though only *one* of those parties actually would have prevailed at trial. This Court's review is necessary to

confirm that lawyers do not expose themselves to speculative liability by advising their clients to enter into settlement agreements.

Third, the appellate analysis departs from long-standing principles of tort law. Legal malpractice claims are simply a species of negligence. *Rubens v. Mason* (C.A.2, 2004), 387 F.3d 183, 189. As in all negligence claims, therefore, a lawyer should be liable for malpractice only if his or her actions were the legal cause of injury "as determined under generally applicable principles of causation and damages." Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53. When, as here, the client seeks damages based on the supposed value of a lost judgment, such generally applicable principles of causation and damages require the fact-finder to determine whether "but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action." Id. at 389-90, Comment *b*.

To determine whether a lawyer's conduct is the "but-for" cause of the plaintiff's lost judgment, the well-established principles of general tort law embodied in the Restatement require a "trial within a trial":

> The plaintiff must thus prevail in a "trial within a trial." All the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff's former lawyer, with the latter taking the place and bearing the burdens that properly would have been fallen on the defendant in the original action. * * * Similar principles apply when a former civil defendant contends that, but for the misconduct of the defendant's former lawyer, the defendant would have secured a better result at trial.

Restatement of the Law 3d, Law Governing Lawyers (2000) 389-90, Section 53, Comment *b*. "The purpose of this requirement, which has been in use for more than 120 years, is to safeguard against speculative and conjectural claims." *Viner v. Sweet* (Cal. 2003), 70 P.3d 1046, 1052. A rule of law holding that no such trial is required departs from these well-established principles of causation and damages, and obliterates necessary safeguards against speculative and conjectural claims.

Finally, not only is the decision below not required by *Vahila*, it is contrary to the prevailing rule of law for legal malpractice claims throughout the United States. *Vahila* did not hold that a malpractice plaintiff only has to produce "some" evidence of the merits of the underlying claim when the plaintiff's sole theory of damages is that he or she would have achieved a better result had the case been tried to judgment. *Vahila* applied familiar principles of law requiring a court to construe the evidence most favorably towards the plaintiff, and reversed a *summary judgment* in favor of the lawyer-defendant where the malpractice plaintiffs "arguably sustained damage or loss regardless of the fact that they may be unable to prove that they would have been successful in the underlying matter(s) in question." 77 Ohio St.3d at 427. Indeed, the controlling syllabus law set forth in *Vahila* does not even address the proper standard for causation:[1]

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[1] Former S.Ct.R.Rep.Op. 1(B), provided that "[t]he syllabus of a Supreme Court opinion states the controlling point or points of law decided in and necessarily arising from the facts of the specific case before the Court for adjudication." That is the rule applicable to determining the precedential value of *Vahila* in this case. See, e.g., *State v. Bush* (2002), 96 Ohio St.3d 235, 237, ¶ 10.

> 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*, 43 Ohio St.3d 103, 583 N.E.2d 1058, followed.)

Vahila, syllabus.

In *Vahila*, therefore, this Court had no occasion to address whether a malpractice plaintiff would be required to show at trial that he or she would have obtained a more favorable judgment in the previous action when the only damages sought relate to the loss of a judgment. Nor did *Vahila* have the benefit of the Restatement's articulation of well-established principles of causation and damages in analyzing the standard of proof for legal malpractice claims, as the Restatement did not issue for another three years. The Restatement clarifies that even though a "plaintiff in a previous civil action may recover without proving the results of a trial [within a trial] if the party claims damages other than loss of a judgment," proof of a trial within a trial is required when "the plaintiff seeks to recover as damages the damages that would have been recovered in the previous action." Restatement of the Law 3d, Law Governing Lawyers (2000) 389-90, Section 53, Comment *b*. This "trial-within-a-trial" method of proof is "the accepted and traditional means of resolving issues involved in the underlying proceedings in a legal

malpractice action." 4 Mallen & Smith, Legal Malpractice (2006) 1017, Section 33.9 (and cases cited therein).[2]

For the foregoing reasons, this Court should accept jurisdiction and clarify that *Vahila* does not relieve malpractice plaintiffs seeking damages for a lost judgment of the burden of demonstrating that, but for the defendant lawyer's misconduct, they would have obtained a more favorable judgment in the previous action.

III. STATEMENT OF THE CASE AND FACTS

This appeal arises out of a jury verdict of $2,419,616.81 in favor of Plaintiffs-Appellees Environmental Network Corp., Environmental Network & Management Corp., and John Wetterich (collectively, "Environmental Network") in a legal malpractice action against Defendant-Appellant Goodman Weiss Miller, L.L.P. ("Goodman Weiss"). The jury found that Goodman Weiss coerced Environmental Network to settle an underlying lawsuit. That underlying commercial lawsuit involved 1) numerous parties, several of which asserted intervening claims or counterclaims against Environmental Network that 2) exposed Environmental Network to over $3,700,000 in potential judgments. A settlement on the second day of trial in the underlying lawsuit extinguished the more than

[2] E.g., *Rubens v. Mason* (C.A.2, 2004), 387 F.3d 183, 189 (trial within a trial necessary where plaintiff contends she would have received a more favorable judgment absent the lawyer's negligence); *Tarleton v. Arnstein & Lehr* (Fla. Ct. App. 1998), 719 So.2d 325, 330 (same); *Bowers v. Dougherty* (Neb. 2000), 615 N.W.2d 449, 457-58 (same); *Machado-Miller v. Mersereau & Shannon, LLP* (Or. Ct. App. 2002), 43 P.3d 1207, 1209 (same); *Togstad v. Vesley, Otto, Miller & Keefe* (Minn. 1980), 291 N.W.2d 686, 695 (same).

$3,700,000 in potential judgments and awarded Appellees $40,000 to be applied to Goodman Weiss's outstanding bills.

Throughout the legal malpractice trial, Environmental Network's sole damages theory was that the coerced settlement prevented it from achieving a better result had the case been tried to judgment. But Goodman Weiss's expert witness, Marvin Karp, testified that Environmental Network *could not have* obtained a positive net recovery after trial in the underlying lawsuit, and Environmental Network presented no expert testimony or other evidence to the contrary. Instead, Environmental Network presented "some" evidence concerning their underlying claims, consisting primarily of: 1) testimony that Goodman Weiss attorneys told Environmental Network its claims had value; 2) demonstrative exhibits and charts prepared by Goodman Weiss for use at trial in the underlying case; and 3) expert testimony from an economist, Dr. Burke, who projected estimated "lost profits" of more than $8 million in the underlying case. Goodman Weiss moved for directed verdict and for judgment notwithstanding the verdict, arguing that it was entitled to judgment as a matter of law because Environmental Network failed to prove proximate causation and damages. The trial court denied Goodman Weiss's motions, and the Eighth District affirmed.

IV. ARGUMENT

Proposition of Law No. 1:

> **When a plaintiff in a legal malpractice action seeks to recover as damages the damages that would have been recovered in the underlying action had the case been tried to judgment, to establish causation the plaintiff must prove by a preponderance of the evidence that, but for the lawyer's negligence, the plaintiff would have obtained a more favorable judgment in the underlying action. The plaintiff must thus prevail in a trial within a trial. (Restatement of the Law 3d, Law Governing Lawyers (2000), Section 53, Comment *b* followed.)**

The Court of Appeals held that to prevail at trial under *Vahila*, Environmental Network was required to produce only "some" evidence on the merits of its underlying claim, even though its sole theory of damages was the loss of a civil judgment. As explained above, *Vahila* does not require that result. Nor does the dicta in *Vahila* relied on by the appellate panel support the proposition that a plaintiff need only produce "some" evidence on the merits of an underlying claim where the plaintiff's sole theory of damages is a lost judgment. Ohio should adopt Comment *b* to Section 53 of the Restatement and confirm that when a plaintiff seeks damages for a lost judgment, generally applicable principles of causation and damages require the fact-finder to determine whether, "but for the defendant lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action." Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53.

The policy considerations set forth in a 1970s student note quoted in *Vahila* and the decision below – to the extent they have any validity at all – do not apply to

malpractice plaintiffs claiming loss of a judgment. The note first states that a "but for" test does not account for settlement opportunities lost due to a lawyer's negligence. (App. Op., Appx. 12, at ¶ 27-28, quoting *Vahila*, 77 Ohio St.3d at 426.) That concern is irrelevant when, as here, the plaintiff seeks a lost judgment allegedly caused by a settlement. Comment *b* of Section 53, Restatement (Third) of the Law Governing Lawyers, expressly addresses the claim for a lost judgment and properly requires proof of a "case within a case."

The second concern addressed in the student note is that a complete reconstruction of the underlying case would require speculative evidence about the size of jury verdicts. (App. Op., Appx. 12-13, at ¶ 29, quoting *Vahila*, 77 Ohio St.3d at 426-427). That "concern" misconstrues the trial within a trial contemplated by the Restatement, which determines not what the result would have been had the case been tried to a particular judge or jury, but what "a reasonable judge or jury would have ruled." Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment *b*. Evidence concerning what a particular jury would have held, or how a particular judge would have ruled, is therefore irrelevant. Id.; see, also, 4 Mallen & Smith, Legal Malpractice (2006) 1019, Section 33.9 (noting that "the objective of a trial-within-a-trial is to determine what the result *should have* been (an objective standard) not what the result *would have* been by a particular judge or jury (a subjective standard). The phrase 'would have' been, however, does have the same meaning as 'should have,' if the inquiry is what a

reasonable judge or jury 'would have' decided. * * * In any event, what 'could have' or 'might have' been decided is speculative and is not the standard.").

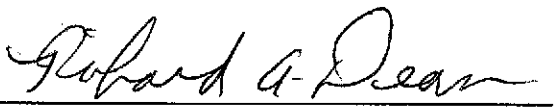
Requiring proof of what would have happened but for the lawyer's misconduct in a malpractice action where a plaintiff seeks damages for a lost judgment requires no more of the plaintiff or the fact-finder than is required in all negligence cases. As the California Supreme Court recognized in *Viner v. Sweet*, "[d]etermining causation always requires evaluation of hypothetical situations concerning what might have happened, but did not. * * * This is so because the very idea of causation necessarily involves comparing historical events to a hypothetical alternative." (Cal. 2003), 70 P.3d 1046, 1052-53, citing 1 Dobbs, The Law of Torts (2000) 411, Section 169. This Court should clarify that Ohio legal malpractice law adheres to generally applicable principles of causation and damages. See Restatement of the Law 3d, Law Governing Lawyers (2000) 389, Section 53.

Applying the proper standard to the facts of this case required judgment as a matter of law in favor of Goodman Weiss. The only evidence of proximate cause presented was expert testimony that Environmental Network could not have obtained a net recovery had all of the claims and counterclaims been tried to verdict. In the absence of any evidence of proximately caused damages, the trial court erred when it failed to grant the law firm's motions for directed verdict and jnov.

V. CONCLUSION

For all of the above reasons, this Court should accept jurisdiction, reverse the Court of Appeals, and enter judgment as a matter of law in favor of Goodman Weiss.

Respectfully submitted,



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A copy of the foregoing **Amicus Curiae Brief in Support of Jurisdiction of Defense Research Institute** has been served this 25th day of April, 2007, by U.S. Mail, postage prepaid, upon the following:

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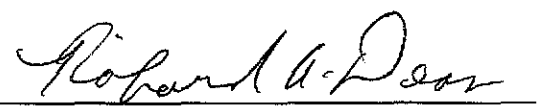

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APPENDIX

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

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87782

ENVIRONMENTAL NETWORK CORP., ET AL.

PLAINTIFFS-APPELLEES

vs.

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

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-488462

BEFORE: Celebrezze, A.J., Kilbane, J., and McMonagle, J.

RELEASED: March 1, 2007

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FRANK D. CELEBREZZE, JR., A.J.:

{¶ 1} Appellant, Goodman Weiss Miller, L.L.P. ("GWM"), appeals the jury verdict and the rulings of the trial court on trial and post-judgment motions in favor of appellees, Environmental Network Corp. ("ENC"), Environmental Network and Management Corp. ("ENMC"), and John Wetterich ("Wetterich"), (collectively "appellees"). After review of the record and the arguments of the parties, we affirm.

{¶ 2} On December 9, 2002, appellees filed a legal malpractice complaint against GWM.[1] The complaint stemmed from GWM's representation of appellees in a complex commercial lawsuit against Waste Management of Ohio ("WMO"), TNT Rubbish Disposal, Inc. ("TNT"), and others.[2] The underlying litigation dealt with breach of contract issues involving numerous parties, who were linked to agreements concerning operation of the San-Lan Landfill. The San-Lan Landfill is owned by Hocking Environmental Company ("Hocking"); however, ENMC became the operator of the facility in a 1995 agreement and was thereafter responsible for its functions. ENMC is owned by Wetterich, who also owns ENC. The underlying litigation ended in a settlement agreement in December 2001, after trial commenced.

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

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[1]Case No. CV-02-488462. The complaint also named as defendants attorneys Steven Miller, Deborah Michelson, and James Wertheim; however, they were dismissed from the case and are not parties to this appeal.

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

GWM had coerced them into settling and was negligent in its preparation and prosecution of the case. GWM timely answered appellees' complaint and filed several counterclaims, including breach of contract, misrepresentation, and abuse of process.[3]

{¶ 4} On September 19, 2005, a jury trial commenced. During the course of trial, GWM moved the court for a directed verdict, which was denied. The jury trial concluded on September 30, 2005, and on October 3, 2005 the jury returned its verdict, finding that GWM owed appellees a duty of professional care and had breached that duty, citing six instances of legal malpractice.[4] The jury further found that GWM's breach had caused appellees harm or damages and awarded appellees the sum of $2,419,616.81. The jury also found some merit in GWM's counterclaims and awarded it the sum of $15,540.

{¶ 5} On November 3, 2005, GWM filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for new trial. On January 30, 2006, in a 25-page order and decision, the trial court denied both post-judgment motions.

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

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

[4]In answering the interrogatory inquiring as to the manner in which appellant breach its standard of care, the jury responded: "No engagement letter. Overall lack of [preparedness]. Case should have been continued, to allow for Mr. Steve Miller to participate. Plaintiff was coerced into signing settlement. Judge not recused. GWM council [sic] [alienated] the court." Interrogatories to the Jury, 10/3/05.

{¶ 6} GWM appeals, asserting four assignments of error. Since assignments of error I, III, and IV challenge the same rulings for differing reasons, we address them together.

{¶ 7} "I. The trial court erred in denying defendant-appellant's motion for directed verdict and later, its motion for judgment notwithstanding the verdict, because plaintiffs-appellees failed to prove that the alleged legal malpractice was the proximate cause of any damages.

{¶ 8} "III. The trial court erred in denying defendant-appellant's motion for directed verdict and later, its motion for judgment notwithstanding the verdict, because plaintiffs-appellees failed to present evidence to show what, if any, net recovery they should have achieved, had the underlying case been tried to conclusion.

{¶ 9} "IV. The trial court erred in denying defendant-appellant's motion for directed verdict and later, its motion for judgment notwithstanding the verdict, on the issue of lost profit damages - including claimed 'out-of-pocket' losses - under restatement of contracts § 351(2)(b), because plaintiffs-appellees failed to present evidence that the damages claimed would have been recoverable in the underlying case."

{¶ 10} GWM cites various reasons why the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. Our analysis is consolidated since "[t]he applicable standard of review to appellate challenges to

the overruling of motions for judgment notwithstanding the verdict is identical to that applicable to motions for a directed verdict." *Posin v. ABC Motor Court Hotel* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334; *McKenney v. Hillside Dairy Corp.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291.

{¶ 11} A motion for judgment notwithstanding the verdict under Civ.R. 50(B) tests the legal sufficiency of the evidence. *Brooks v. Brost Foundry Co.* (May 3, 1991), Cuyahoga App. No. 58065. "'A review of the trial court's denial of appellant's motion for a directed verdict and motion for judgment notwithstanding the verdict requires a preliminary analysis of the components of the action ***.' *Shore, Shirley & Co. v. Kelley* (1988), 40 Ohio App.3d 10, 13, 531 N.E.2d 333, 337." *Star Bank Natl. Assn. v. Cirrocumulus Ltd. Partnership* (1997), 121 Ohio App.3d 731, 742-43, 700 N.E.2d 918, citing *McKenney v. Hillside Dairy Co.* (1996), 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 and *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511.

{¶ 12} The motions test the legal sufficiency of the evidence and present a question of law, which we review independently, i.e., de novo, upon appeal. See *Grau v. Kleinschmidt* (1987), 31 Ohio St.3d 84, 90, 509 N.E.2d 399; *Eldridge v. Firestone Tire & Rubber Co.* (1985), 24 Ohio App.3d 94, 493 N.E.2d 293. A motion for judgment notwithstanding the verdict should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim. *Posin*, supra at 275. "Conversely, the motion

should be granted where the evidence is legally insufficient to support the verdict." Id.

{¶ 13} In *Sanek v. Duracote Corp.* (1989), 43 Ohio St.3d 169, 539 N.E.2d 1114, the court wrote in pertinent part: "The test for granting a directed verdict or [judgment notwithstanding the verdict] is whether the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the non-movant." Id. at 172.

{¶ 14} Here, appellees brought a claim of legal malpractice against GWM, alleging that negligent representation caused damages. "To establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, syllabus, citing *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058.

{¶ 15} GWM does not challenge the sufficiency of the evidence raised by appellees concerning whether there was a duty owed or whether such a duty was breached. Rather, it challenges the sufficiency of the evidence concerning alleged damages and the causal connection between any negligent representation and

those alleged damages. GWM argues that appellees have not presented legally sufficient evidence establishing either causation or damages. We disagree.

{¶ 16} During the course of the jury trial, appellees presented testimony, documents, and exhibits demonstrating their understanding of the facts and circumstances surrounding the underlying complex commercial litigation. Through the presentation of this material, appellees were able to establish some of the merits to their underlying case.

{¶ 17} Wetterich testified to his understanding of the "Waste Disposal and Airspace Reservation Agreement" ("Agreement") between ENMC and WMO. Wetterich also testified to deals involving TNT and others in which those parties owed money to ENC. There was further testimony indicating that appellees had a strong case in the underlying litigation and that they could have received considerable compensation had they not settled as they did. Accordingly, appellees argued GWM's negligent representation cost them a better resolution to the underlying litigation than the settlement they received. Pursuant to the evidence presented by appellees at trial in this case, the jury agreed and found a causal connection between GWM's breach and appellees' damages.

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

{¶ 19} "Based on the evidence and the arguments raised by the parties in their respective briefs, this Court finds that, under *Vahila*, [appellees] offered substantial

probative evidence to the trier of fact on proximate cause sufficient to sustain the jury verdict. ***

{¶ 20} "It is clear under *Vahila*, and its progeny that a legal malpractice plaintiff is not required to prove in every instance the 'case-within-the-case.' Rather, as argued by [appellees], *Vahila* stands for the rule of law that a plaintiff '*may* be required, depending on the situation, to prove *some* evidence of the merits of the underlying claim.' (Emphasis added.) *Vahila* at 428. The Supreme Court's holding was clearly based on the equitable concerns that a requirement for a legal malpractice plaintiff to prove the entire 'case-within-a-case' would likely deter a large number of plaintiffs from bringing suits of merit, which in effect would immunize negligent attorneys.

{¶ 21} "***

{¶ 22} "Based on the abundance of testimony and documentary evidence presented by [appellees] at trial, [appellees] clearly proved 'some evidence of the merits of the underlying claim' in satisfaction of *Vahila*. Therefore, [appellees] provided substantial probative evidence that [appellant's] negligence proximately caused [appellees'] damages.***" (Order and Decision pg. 12-14.)

{¶ 23} In its appeal, GWM takes exception to the trial court's interpretation of *Vahila*, supra, and in the trial court's use of that interpretation to require appellees to simply prove "some evidence of the merits of the underlying claim" in order to prevail

in this legal malpractice case. GWM argues that the law requires appellees to prove, by a preponderance of the evidence, that appellees should have succeeded at a trial on the merits of the underlying commercial litigation, and that appellees should have achieved a better net recovery at the end of a concluded trial than they obtained through their settlement. In other words, GWM contends that appellees were required to completely prove the "case-within-a-case" in order to prevail. We find no merit in this argument.

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

{¶ 25} "We are aware that the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case. Naturally, a plaintiff in a legal malpractice action may be required, depending on the situation, to provide some evidence of the merits of the underlying claim. [Citations omitted.] However, we cannot endorse a blanket proposition that requires a plaintiff to prove, in every instance, that he or she would have been successful in the underlying matter. Such a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim." *Vahila*, supra.

{¶ 26} Consequently, the standard to prove causation in a legal malpractice case requires a claimant to "provide some evidence of the merits of the underlying claim." Id. GWM contends that, unless appellees can demonstrate that they would

have prevailed on the merits of a trial heard to its conclusion, and that they would have recovered a specific amount of damage award at the conclusion of that trial, they cannot prevail. GWM further argues that unless appellees can show that "but for" GWM's breach of duty, they would have prevailed at trial for a certain damage award, they cannot establish causation. The ruling in *Vahila*, supra, clearly rejects such an argument, stating:

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

{¶ 28} recovery.

{¶ 29} "In addition, stringent standards of proving 'but for' require the plaintiff to conduct a 'trial within a trial' to show the validity of his underlying claim. A full, theoretically complete reconstruction of the original trial would require evidence about such matters as the size of jury verdicts in the original jurisdiction. *** But such evidence is too remote and speculative; the new factfinder must try the merits of both the malpractice suit and the underlying claim to make an independent determination of the damage award. The cost and complexity of such a proceeding may well discourage the few plaintiffs otherwise willing to pursue the slim chance of

success." *Vahila* at 426-427, quoting, *The Standard of Proof of Causation in Legal Malpractice Cases* (1978), 63 Cornell L.Rev. 666, 670-671.

{¶ 30} The trial court did not err in requiring appellees to merely provide some evidence of the merits of the underlying claim. Appellees clearly met that burden at trial, as seen in the record and succinctly articulated by the trial court as follows:

{¶ 31} "The jury's findings were based on the abundance of evidence presented at trial as to what the outcome of the underlying litigation would have been had [GWM] not breached the standard of care. The record shows that [appellees] submitted documents establishing the terms of the underlying [Agreement] ([appellees'] exhibit 2), engineering maps and memoranda showing how the relevant airspace was to be parceled and developed ([appellees'] exhibits 58, 59, 66), documents showing how airspace had been developed in the past, which were used to assist in calculations of unused airspace ([appellees'] exhibits 62-64), documents showing that Waste Management was required to and failed to pay state and local fees for dumping trash in the San-Lan Landfill ([appellees'] exhibit 43), and documents and exhibits showing [appellees'] alleged out-of-pocket damages (see [appellees'] exhibit 47) and lost profits (see [appellees'] exhibit 52)." (Order and Decision at 13-14.)

{¶ 32} Finding that appellees provided sufficient evidence at trial to legally establish causation, the remaining question is whether sufficient evidence was provided to establish recoverable damages. In its third and fourth assignments of

error, GWM argues that appellees failed to show what net recovery they would have received and that they failed to present evidence of any recoverable damages. GWM argues that if the proper standard of causation is simply "some evidence" of the merits, any damage award would be merely speculative, in violation of fundamental principals of damages awards. GWM further argues that appellees have not presented sufficient evidence for the jury to base an award on theories of lost profits or of "out-of-pocket" losses. None of these contentions have merit.

{¶ 33} First, the jury was explicitly instructed not to speculate on the damage award when the trial court instructed: "The damages recoverable in a legal malpractice action cannot be remote or speculative as to the existence of damages precluding recovery."

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

{¶ 35} "Lost profits are calculated by deciding what the party was entitled to receive had the contract been performed. You should then add other damages, if any, by the party as a result of the breach. From this sum you should subtract the amounts, if any, that the parties saved by not having to fully perform the contract.

{¶ 36} "Lost profits may not be recovered by a plaintiff in a breach of contract action, unless they can demonstrate: one, profits were within the contemplation of the parties to the contract at the time the contract was made; two, the lost profits were the probable result of the breach of contract; and three, the profits are not remote and speculative and may be shown with reasonable certainty.

{¶ 37} "If a party fails to demonstrate with reasonable certainty the amount of lost profits as well as their existence, then they are not entitled to the lost profits. You may only award the damages that were the natural and probable result of the breach of the contract, or that were reasonably within the contemplation of the parties as the probable result of the breach of contract.

{¶ 38} "This does not require that the party actually be aware of the damages that will result from the breach of contract, so long as the damages were reasonably foreseeable at the time the parties entered into the contract as a probable result of the breach." (Tr. 2275-2276.)

{¶ 39} The jury charge clearly instructed the jurors not to speculate on any damage award, and it is completely in line with the pertinent case law requiring any award for lost profit to be based on losses foreseeable by the breaching party at the time they entered into the contract. See *Sherman R. Smoot Co. v. State of Ohio* (2000), 136 Ohio App.3d 166, 736 N.E.2d 69.

{¶ 40} After review of the record, it is clear that the jury award should be upheld. We note that the jury did not specify on which theory of recovery it based its award. Appellees presented evidence on different theories of damages, including lost profits and "out-of-pocket" loses. Both are legitimate theories of recovery, and both are supported by sufficient evidence to overrule GWM's assignments of error. Appellees' lost profits calculation was based on WMO's failure to loan ENMC an additional $800,000 for future development, as speculated in the original Agreement.

Appellees argued that this failure prohibited them from providing landfill space to third-party customers at $18 per ton. GWM attacks this calculation by arguing that WMO never contemplated such future sales to third-parties when it entered into the original agreement. Appellees presented an expert witness[5] who refuted such a contention that future sales were unforeseeable because GWM's articulated understanding of the Agreement would leave ENMC incapable of earning any profit. Thus, there is at least sufficient evidence to find that lost profits were recoverable in this case.

{¶ 41} In addition, the jury could have just as easily based its damage award on "out-of-pocket" losses suffered by appellees. In Plaintiff's Exhibit 47, appellees presented to the jury a calculation of losses totaling $2,490,395, which is very close to the ultimate jury award in this case.[6] This amount could have been the foundation of a legitimate jury award based on the evidence presented at trial.

{¶ 42} After review of the record in its totality, it is abundantly clear that there was sufficient evidence provided by appellees for the jury to have found and awarded the damages it did. Therefore, since the trial court applied the correct standard of proof as to causation in this case, and there is sufficient evidence to

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[5]Dr. John F. Burke.

[6]Plaintiff's Exhibit 47: [ENMC's] Damages (Out-Of-Pocket Losses) Due to WMO Breaches: $812,600 (Cost to develop unused landfill airspace *** + $412,444 (Monies lost prepaid to Hocking for Royalty) + $496,235 (Equipment) + $400,000 (State penalty for fees not paid by WMO) + $300,000 (Schiff) + $69,116 (Trust Fund) = $2,490,395 (TOTAL).

support the jury's award for damages, appellant's first, third and fourth assignments of error are found to be without merit.

{¶ 43} "II. The trial court erred in its jury instructions under *Vahila v. Hall*, regarding proximate cause and damages, by failing to require plaintiffs-appellees to prove what the result of a trial in the underlying case should have been, but for the alleged malpractice."

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

{¶ 45} "[Appellees] are claiming that as a result of [GWM's] alleged breach of standard of care, they had to settle the [underlying] litigation against their will.

{¶ 46} "[Appellees] claim [GWM] did not continue with the trial of the [underlying] case when specifically instructed to do so, and that if it had returned to court to continue to try the case, [appellees] would have achieved a better result than the settlement achieved.

{¶ 47} "[Appellees] must prove some evidence of the merits of the [underlying] case claims. [Appellees] must establish by a preponderance of the evidence that the defendants breached their duty of care to the [appellees].

{¶ 48} "Further, [appellees] must establish by a preponderance of the evidence that there is a causal connection between the conduct complained of and the resulting damage or loss. However, the requirement of a causal connection dictates that the merits of a legal malpractice action depends upon the merits of the

[underlying] case and you should take into account all evidence you have heard to determine whether there exists some evidence of the merits of [appellees'] claims in the [underlying] litigation." (Tr. 2272-2273.)

{¶ 49} GWM challenges the articulation of "some evidence of merits" as the applicable standard of causation in a legal malpractice case. As stated above, this standard of proof is entirely appropriate pursuant to *Vahila*, supra. Therefore, we find no error in the trial court's jury instruction, and this assignment of error is without merit.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
CHRISTINE T. McMONAGLE, J., CONCUR