IN THE SUPREME COURT OF OHIO

RevoLaze, LLC, Plaintiff-Appellee, v. Dentons US LLP, et al., Defendants-Appellants.	)))))))))	Supreme Court Case No. 2022-____ On Appeal From The Cuyahoga County Court of Appeals Eighth Appellate District Court of Appeals Case No. 109742

APPELLANTS DENTONS US LLP AND MARK HOGGE'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS CASE PRESENTS ISSUES OF PUBLIC AND GREAT GENERAL INTEREST

The legal profession needs further guidance on the standards for legal malpractice claims.

In *Vahila v. Hall*, 77 Ohio St.3d 421, 674 N.E.2d 1164 (1997), and *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, this Court defined the parameters for establishing legal malpractice claims. In *Vahila*, the Court confirmed that proximate cause and damages are essential malpractice elements, and in *Environmental Network*, the Court required plaintiffs whose damages theory turned on obtaining a better result in the underlying proceedings, but for their lawyer's malpractice, to establish proximate cause by proving a "case within a case." These decisions left unsettled, however, what evidence and manner of presenting it is needed to meet that burden and prove proximate cause and damages in a malpractice case.

The Eighth District's decision below created three distinct but interconnected legal rules that conflict with decisions of the Seventh, Fourth, and Second Districts and threaten to undermine the legal profession. At stake is the fundamental nature of the relationship between attorney and client and the need to protect lawyers and law firms of all types against speculative claims for losses they did not cause. As the profession's governing authority, this Court's intervention to establish guardrails on proximate cause and damages is sorely needed to effectuate the standards laid out in *Vahila* and *Environmental Network*.

The Eighth District's "case-within-a-case" rules undermine the proximate cause element.

In *Environmental Network*, this Court established the case-within-a-case standard, and in so doing, "clarified" the proximate cause element of malpractice claims recognized in *Vahila.* 2008-Ohio-3833, at syllabus. The Court did not, however, define what evidence a plaintiff must present to meet the case-within-a-case burden, or the manner in which juries should be instructed on the underlying law. This lack of definition allowed the Eighth District to dilute *Environmental*

Network by holding that a malpractice plaintiff can meet its case-within-a-case burden without presenting admissible evidence that would have been sufficient to prevail in the underlying action.

Specifically, the Eighth District held that a plaintiff can meet its burden solely with (1) evidence that the lawyer defendant (along with the plaintiff company's owner and a litigation funder) expressed confidence in the underlying claim and (2) a procedural expert's generalized opinion—concededly rendered without examining the required elements of the underlying case—that the malpractice plaintiff likely would have prevailed. The ruling thus interprets *Environmental Network* so as to create a standard that effectively transforms a malpractice defendant's expression of confidence in the underlying case into a guarantee of the outcome.

The Eighth District permits juries to find causation without evidence that would have been admissible in the underlying proceedings or instructions on the law governing those proceedings.

None of the evidence that the Eighth District permitted the plaintiff to rely upon would have been admissible, let alone sufficient, in the underlying proceeding here—a complicated patent litigation before the U.S. International Trade Commission ("ITC"). Worse, despite defendants' request, the trial court declined to instruct the jury on the legal elements the plaintiff would have needed to prove to succeed in that underlying ITC proceeding. The Eighth District's rule thus relieves malpractice plaintiffs of the legal and factual burden they would have borne in the underlying case, no matter how complex. In so holding, the Eighth District's rule conflicts with that of the Seventh District, which has held, in line with courts across the country, that malpractice plaintiffs must offer the same evidence required to establish their case in the underlying proceedings. *Pipino v. Norman*, 2017-Ohio-9048, 101 N.E.2d 597 ¶¶ 73-82 (7th Dist.).

Just as *Environmental Network* clarified *Vahila*, the Court should now clarify *Environmental Network* and establish that, to properly find the case-within-a-case burden met, a jury must have before it both (1) evidence that would have been admissible and

sufficient in the underlying proceedings; and (2) instructions on the law governing those proceedings. To let stand the Eighth District's rule would give the jury the keys to a plane without the instruments and instructions needed to land it.

Damages must relate to actual harm caused by the defendant and prevent double recoveries.

The Eighth District's decision also permits a malpractice plaintiff to recover damages for a supposedly lost underlying claim when the malpractice plaintiff itself made the decision leading to any loss or abandonment of that claim after the malpractice defendant no longer represented it. By contrast, and for good reason, the Fourth District and courts across the country hold that the proximate cause requirement forecloses malpractice plaintiffs from forcing their former lawyers to indemnify them for decisions the lawyers did not make and that occurred after the termination of the representation. The Court should establish this guardrail as well.

Moreover, the Eighth District has created a powerful incentive for speculative malpractice claims by opening the door to double recoveries. As the Second District and other jurisdictions have held, a malpractice plaintiff cannot establish damages for supposedly lost recoveries that it can still obtain in a subsequent lawsuit. For example, a claim dismissed without prejudice is not lost since the plaintiff can simply refile it—precisely the case here. Yet the Eighth District upheld damages that the plaintiff not only **could** pursue, but is in fact **still actively pursuing**—all without any means for the malpractice defendant to claw back damages representing supposedly lost recoveries that the plaintiff in fact later obtained. This guardrail, too, is needed.

Any of the Eighth District's three new rules of law would be bad enough standing alone. Together, they compel this Court's review and require new guardrails on the evidence needed to establish proximate cause and damages. Notably, the Eighth District's interpretation of the proximate cause and damages elements of malpractice claims applies equally to all lawyers and law firms, regardless of their structure, making this a case of great general interest and importance.

This Court should step in to establish the clear legal standards necessary to fully achieve the critical interests *Vahila* and *Environmental Network* sought to protect.

STATEMENT OF THE CASE AND FACTS

A. RevoLaze hires Dentons to represent it in complicated proceedings before the United States International Trade Commission.

Appellee RevoLaze, LLC ("RevoLaze") came to believe that numerous companies were infringing its patents for using lasers to create a faded appearance on denim jeans. Undisputed federal law gave RevoLaze a number of options: First, it could sue infringers in federal court. Second, it could file an ITC complaint and seek injunctive relief against particular infringers as well as a general exclusion order ("GEO"), an extraordinary remedy that is essentially a permanent injunction issued by the ITC to block non-parties from importing infringing products into the United States. RevoLaze could pursue these matters to judgment or settle with alleged infringers whether it had sued them or not.

RevoLaze hired Appellant Dentons US LLP ("Dentons")—including Appellant Mark Hogge, a Dentons partner—and two other law firms to pursue a GEO before the ITC. To obtain a GEO, a patent holder must prove, among other things, that its patents are being infringed by imported products and that it is not possible to name each infringer individually. Given these high standards, this rare form of extraordinary relief is awarded in fewer than 5% of ITC cases. Thus, in addition to the GEO, RevoLaze sought ITC injunctions against dozens of companies named in the ITC proceeding (the "ITC Respondents").

The ITC Respondents defended on various grounds, including that their denim jeans were not made using RevoLaze's patented process and thus did not infringe RevoLaze's patents. Six months into the ITC proceeding, one ITC Respondent, The Gap, asserted that a conflict of interest existed and moved to disqualify Dentons from representing RevoLaze against any of the ITC

Respondents. Relying on The Gap's prior written consent, Dentons believed the disqualification motion was baseless. The ALJ overseeing the case, however, ordered that Dentons be disqualified if The Gap remained in the case. RevoLaze's other counsel advised RevoLaze to voluntarily dismiss The Gap from the ITC proceeding so that Dentons could remain as counsel. RevoLaze rejected that advice and chose to replace Dentons with new counsel from a major law firm.[1]

B. RevoLaze continues to pursue the GEO for months after Dentons' disqualification and then makes its own business decision to abandon the case, while continuing to pursue alternative patent enforcement and licensing activity.

RevoLaze did not stop pursuing a GEO or its infringement claims when Dentons was disqualified. RevoLaze's other lawyers, as well as its newly-retained counsel, continued to work on the case. They obtained extensions of various deadlines and RevoLaze continued to pursue its claims, litigating against some ITC Respondents and settling with others, including The Gap.

Several months later, however, fearing that facts developed during the ITC proceedings could produce rulings from the ITC that would make its patents worthless by either invalidating them altogether or interpreting them so narrowly as to render them useless, RevoLaze decided to abandon its pursuit of a GEO. As RevoLaze's owner and CEO, Darryl Costin, testified, "I made the decision we're closing the [ITC] case down, period." Tr. 679. Dr. Costin was so eager to avoid adverse rulings and conclude settlements with the remaining ITC Respondents that he directed his lawyers to "[t]ell the idiots to sign [the settlement agreements] immediately so we

[1] With RevoLaze's support, Dentons pursued vacatur of the disqualification order. Notwithstanding that RevoLaze had by that time voluntarily dismissed the ITC proceeding (discussed further below), the full Commission issued an order vacating the disqualification and found that "the record lacks sufficient evidence" to support a disqualification. *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Notice of Commission Determination to Review Order No. 43, and on Review Vacating That Order As Moot, 2016 WL 10688905, at *2 (I.T.C.Apr. 12, 2016); *Certain Laser Abraded Denim Garments*, Inv. No. 337-TA-930, Commission Opinion, 2016 WL 11603662, at *5-6 (I.T.C.May 16, 2016).

have a fighting chan[c]e to end this before [the ALJ's ruling]." Ex. AU; Tr. 882-84. RevoLaze settled with all but one remaining ITC Respondent, which it voluntarily dismissed. It then voluntarily withdrew its GEO application, without prejudice to its right to bring the claim again. Ex. AN at 1; *see* Tr. 886-87.

RevoLaze's decision to voluntarily dismiss the ITC proceeding did not prevent it from enforcing and monetizing its patents. RevoLaze could (1) file a new ITC complaint and again seek a GEO; (2) sue additional infringers in federal court; and/or (3) settle with additional infringers whether it had sued them or not. Indeed, RevoLaze **did settle** with sixteen alleged infringers after the ITC proceeding ended. By the time of the malpractice trial, RevoLaze had settled with about 55% of the denim industry and received about $14 million (with the possibility of even more payments in the future under the settlement agreements). It also filed multiple federal lawsuits, some of which remained pending at the time of the malpractice trial, and it was still actively pursuing even more settlements with the goal of capturing "the whole industry." Tr. 479.

C. The Eighth District affirms RevoLaze's award of damages without requiring it to present the evidence needed to obtain a GEO from the ITC.

While pursuing its claims against other alleged infringers, RevoLaze sued Dentons in the Cuyahoga County Court of Common Pleas. It claimed that Dentons' disqualification resulted from malpractice, that the disqualification foreclosed RevoLaze from obtaining a GEO, and that, without a GEO, RevoLaze lacked leverage to settle with the remainder of the industry. Under *Environmental Network*, this damages theory triggered the case-within-a-case standard, requiring RevoLaze to prove that it would have obtained a GEO absent the alleged malpractice.

At the malpractice trial RevoLaze failed to offer evidence that would have been sufficient to obtain a GEO in the ITC. This was clearest on the element of patent infringement, where both sides' witnesses agreed the ITC would have required an independent expert to testify as to the

existence of actual infringement based on a review of the technology and products at issue. Yet RevoLaze's experts at the malpractice trial **did not** testify to the merits of RevoLaze's infringement case, but only to ITC procedures generally. Worse, the trial court rejected Dentons' request to instruct the jury on the elements of a patent infringement claim as well as the other patent law elements RevoLaze would have needed to prove to obtain a GEO. Nonetheless—and although RevoLaze continued to pursue the GEO without Dentons for months before deciding on its own to abandon its request, and has continued to reach additional settlements even after abandoning the ITC proceeding—the jury awarded RevoLaze $30,772,912.50 on this theory.

Dentons appealed to the Eighth District, arguing, as relevant here, that the trial court: (1) violated the case-within-a-case doctrine both by allowing a proximate cause finding absent the evidence that RevoLaze would have needed in the underlying proceedings and by refusing to instruct the jury on the underlying law; (2) improperly permitted a proximate cause finding even though RevoLaze made its own choice to discontinue underlying proceedings that remained legally viable; and (3) improperly awarded damages based on supposedly lost recoveries RevoLaze was still pursuing. The Eighth District's decision rejecting these arguments eviscerates the plaintiff's malpractice burden, conflicts with other districts' decisions, and presents serious threats to the legal profession. It illustrates the need for the Court to articulate clear legal standards governing the evidence required to establish proximate cause, the content of the necessary jury instructions, and the limitation of damages to those actually caused by the malpractice.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: The proximate causation element of the case-within-a-case doctrine requires a malpractice plaintiff to come forward with the same evidence necessary to prevail in the underlying matter, and requires the trial court to instruct the jury on the law governing the underlying case.

This Court has established when the case-within-a-case doctrine applies, but not how or with what evidence a plaintiff must prove the underlying case.

In *Vahila*, this Court confirmed that proximate cause is a necessary element of a malpractice claim. And in *Environmental Network*, this Court established that where, as here, the plaintiff's damages theory depends on the idea that malpractice prevented a better outcome in the underlying proceedings, the case-within-a-case doctrine requires the malpractice plaintiff to prove by a preponderance of the evidence that it actually would have achieved that better result absent malpractice. *Environmental Network* thus established **when** the doctrine applied. It further explained that "the burden of proof for establishing a case within a case is the same burden the plaintiff would have had to satisfy if the underlying case had gone to trial." 2008-Ohio-3833, at ¶ 19 (citing Restatement of the Law 3d, Law Governing Lawyers, Section 53, at 390, Comment b (2000)). This rule, which protects lawyers from being held as guarantors of their clients' claims, tracks those of other states. *Id.* at ¶ 19 fn.3 (collecting cases from ten other states). The *Environmental Network* Court left open, however, the critical questions of **how and with what evidence** the plaintiff must meet its case-within-a-case burden.

The Eighth District decision conflicts with other courts that have properly developed the case-within-a-case standard.

The Seventh District and courts across the country require a malpractice plaintiff to offer evidence that would have been admissible and sufficient to prevail in the underlying case. **Thus, a plaintiff cannot meet its case-within-a-case burden if it fails to offer evidence in the malpractice case that would have been necessary to prove the underlying case.** As the Seventh

District explained in *Pipino v. Norman*, if expert testimony would have been required to establish a complicated element of the claim in the underlying proceeding, expert testimony is also required to establish that element of the plaintiff's case within a case in the malpractice proceedings. 2017-Ohio-9048, 101 N.E.2d 597, at ¶¶ 73-82. Courts in other jurisdictions employ the same rule. *See, e.g.*, *Kelley & Witherspoon, LLP v. Hooper*, 401 S.W.3d 841, 849 (Tex.App.2013); *Power Control Devices, Inc. v. Lerner*, 56 Kan.App.2d 690, 702, 437 P.3d 66 (2019).

By contrast, in the decision below, the Eighth District answered the question of what evidence is needed with a resounding "very little." It held that RevoLaze met its case-within-a-case burden on the underlying element of patent infringement by presenting two types of "evidence." First, RevoLaze offered opinion testimony from non-experts involved in the underlying case—RevoLaze's ex-lawyer (the malpractice defendant), Dr. Costin (RevoLaze's owner and CEO), and a representative of RevoLaze's litigation funding company. Yet, as even the Eighth District noted, these three witnesses testified only to their subjective belief that RevoLaze had a strong case. Op. ¶¶ 70-94. Second, RevoLaze offered testimony from an expert on the ITC generally, but not on infringement specifically, that RevoLaze likely would have prevailed in the ITC, Op. ¶¶ 95-99—even though the expert admitted that he "didn't really study the [patent] claims or any of the technology because that wasn't what [he] was being hired to do." Tr. 1519. Of course, **none of this evidence would have been admissible in the ITC proceeding**, much less sufficient to support a finding of infringement. Indeed, at the malpractice trial, both sides' experts agreed that the testimony of an independent expert who—unlike RevoLaze's malpractice trial expert—had actually studied both the patent and the allegedly infringing products was necessary to establish infringement. RevoLaze presented no such expert.

The Eighth District's decision will chill attorney advice.

The consequences of the Eighth District's rule are far-reaching. To begin, the Eighth District approved the weaponization of attorneys' expressions of confidence in their litigation positions as explained to their clients or third-party litigation funders. If the decision below stands, attorneys who subjectively believe their clients have a good case will nonetheless be hesitant to communicate that advice to their clients since it could later be used against them to establish proximate cause in a malpractice trial. A malpractice rule that chills attorneys from providing frank, candid advice to their clients in this way runs directly contrary to the goals of the attorney-client relationship and serves the interest of neither attorney nor client. Moreover, the Eighth District's decision exposes attorneys to liability any time a dissatisfied client can find an expert willing to say—without having examined the details of the underlying case, regardless of its complexity—that the client could have done better.

The Eighth District even failed to provide the instructions needed to guide the jury.

The folly of the Eighth District's rule is also evident from the manner in which it addressed Dentons' jury instruction requests. Because *Environmental Network* requires the malpractice plaintiff to carry "the same burden the plaintiff would have had to satisfy [in] the underlying case," 2008-Ohio-3833, at ¶ 19, Dentons asked the trial court to give detailed instructions on each necessary element of the complicated underlying case, drawn from standard instructions assembled for patent cases by the Federal Circuit Bar Association. The court rejected that proposal, instead merely instructing the jury that it could award damages if it found "that RevoLaze proved by the greater weight of the evidence that it would have succeeded in obtaining a general exclusion order in the ITC action" absent the alleged malpractice and "that RevoLaze would have received additional revenue from new license agreements." Op. ¶ 103. Further demonstrating its conflict

with the Seventh District, the Eighth District held that this cursory instruction "comport[ed] with the relevant advisement necessary to satisfy the case-within-a-case doctrine outlined in *Environmental Network Corp.*" Op. ¶ 105.[2]

In reversing the Eighth District in *Environmental Network* as to whether and when to apply the case-within-a-case doctrine, this Court explained that the doctrine is critical to the profession because a looser standard requiring only "some evidence" of underlying claims would improperly "allow the jury to speculate on the actual merits of the underlying claim" and "would adopt a nebulous standard that provides no clarity or guidance to the bar and to the public." 2008-Ohio-3833, at ¶¶ 19-20; *see also* 4 Mallen, *Legal Malpractice*, Section 37:87 (2020). The Eighth District attempted to fill the void left by *Environmental Network* by creating new legal standards for **what evidence is sufficient and what instructions the jury must receive**, but its efforts present the exact same problems *Environmental Network* sought to avoid: "allow[ing]"—indeed requiring—"the jury to speculate on the actual merits of the underlying claim" and "provid[ing] no clarity or guidance to the bar and to the public." This Court should take this case to resolve the conflict between the Seventh District's holding and the Eighth District's poorly formulated rules, thereby completing the legal standard begun in *Vahila* and expanded in *Environmental Network*.

Proposition of Law No. 2: A malpractice plaintiff whose own choices cause it to lose or abandon the underlying case cannot establish proximate causation.

Other courts find no proximate cause when the underlying case remains legally viable.

The Eighth District's proximate cause holding also creates another conflict among the districts. Specifically, the Eighth District held that practical or financial concerns about pursuing

[2] RevoLaze argued before the Eighth District that Dentons had failed to preserve its jury instruction argument. *See* RevoLaze 8th Dist. Br. at 37-38. Dentons explained in reply why that forfeiture argument was meritless, *see* 8th Dist. Reply Br. at 5, and the Eighth District, which addressed the issue on the merits, apparently agreed with Dentons that the issue was preserved.

a legally unimpaired claim can support proximate cause. Although the Eighth District acknowledged that RevoLaze continued to seek a GEO in the ITC for several months after Dentons' disqualification before abandoning the proceeding while advised by other counsel, Op. ¶¶ 17-20, it nonetheless held that RevoLaze could establish proximate cause by arguing that it lacked the financial ability to continue to pursue its claims after Dentons' disqualification. Op. ¶¶ 106-112.

That holding conflicts with the Fourth District's decision in *Estate of Callahan v. Allen*, 97 Ohio App.3d 749, 647 N.E.2d 543 (4th Dist.1994). There, the court found that a malpractice suit was foreclosed as a matter of law when the plaintiff chose to settle its underlying claim rather than appealing an adverse decision. *Id.* at 752. Even though the malpractice plaintiff presented evidence that the appeal had only a small chance of success, and that settlement was an objectively reasonable course, the court found that the malpractice plaintiff's own choice—there, as here, while advised by other counsel—to settle or abandon the underlying claim foreclosed any malpractice recovery. *Id.* Courts in other jurisdictions reach the same common-sense result that a client's abandonment of a legally unimpaired claim forecloses any showing of proximate cause. *See, e.g.*, *Rocha v. Rudd*, 826 F.3d 905, 909 (7th Cir.2016); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn.App.1989); *Mitchell v. Schain, Fursel & Burney, Ltd.*, 332 Ill.App.3d 618, 619, 773 N.E.2d 1192 (2002); *Seltrecht v. Bremer*, 214 Wis.2d 110, 123-24, 571 N.W.2d 686 (Wis.App.1997). The Eighth District's decision, by contrast, places lawyers on the hook for decisions their former clients make long after they no longer represent them.

This aspect of the Eighth District's holding further undermines proximate cause protections.

In addition to conflicting with the Fourth District's rule, this aspect of the Eighth District's proximate cause holding interacts in particularly dangerous ways with its case-within-a-case conclusion. As explained above, under the proper standard, RevoLaze failed to establish proximate cause because it failed to establish that it would have obtained a GEO from the ITC

absent the alleged malpractice. *See supra* Proposition of Law No. 1. But even assuming that RevoLaze's limited presentation could have met its case-within-a-case burden, that only reinforces that it was **RevoLaze's own choice** while advised by other counsel—not anything Dentons did months earlier—that actually and proximately caused it not to obtain the GEO. After all, RevoLaze's claim was every bit as legally viable on the day after the disqualification as it was on the day before.

A proper rule governing the case-within-a-case doctrine would ensure that plaintiffs who make their own decisions to abandon cases cannot turn around and recover from their lawyers for supposedly lost recoveries that they would not have obtained regardless of any malpractice. By contrast, the Eighth District's unparalleled approach paves the way for clients to keep their lawyers on the hook while making their own business decisions—as RevoLaze did here—that a weak case is no longer worth pursuing. By finding the proximate cause burden satisfied in such circumstances, the Eighth District split from the Fourth District and further vitiated the important interests that *Vahila* and *Environmental Network* aimed to protect.

Proposition of Law No. 3: Because a malpractice plaintiff is entitled only to damages that are caused by the breach of duty, it cannot establish damages when its underlying claims remain legally viable.

Unlike other courts, the Eighth District now permits damages for "lost" claims that still exist.

The Eighth District's formulation of new law on the damages element of malpractice claims sets the stage for even more devastating consequences. In the Second District and other jurisdictions, the common-sense principle that a claim that can still be pursued has not been lost precludes plaintiffs from seeking malpractice damages for money that has not in fact been lost. Under the Eighth District's decision, that is not the case.

As the Second District explained in *Bogart v. Gutmann*, a malpractice suit is premature when "we simply do not know what would happen in [a subsequent] action." 2018-Ohio-2331,

115 N.E.3d 711, ¶ 18 (2d Dist.). The Second District holds that this is so even when *res judicata* might bar a subsequent suit, as the defendant might fail to respond to the complaint in the subsequent suit or otherwise waive the defense. *Id.* at ¶¶ 15, 18. Courts in other states follow the same approach. *See, e.g.*, *Arnold & Itkin, L.L.P. v. Dominguez*, 501 S.W.3d 214, 221 (Tex.App.2016); *Seltrecht*, 214 Wis.2d. at 123, 571 N.W.2d 686. **By contrast, the Eighth District upheld an award of damages based on money that RevoLaze could still pursue—and was in fact still pursuing.**

RevoLaze can continue to and has continued to pursue its licensing strategy.

By the time of trial, RevoLaze had licensed about 55% of the industry and received approximately $14 million. Its damages award of over $30 million against Dentons represented what it supposedly would have recovered from the rest of the denim industry—more than twice the amount it had obtained for the first 55%. But RevoLaze itself admitted that nothing prevented it from continuing to try to settle with "the whole industry." Tr. 479. And that is what it continued to do: After the ITC proceeding, RevoLaze sued Target and Kohl's for patent infringement, and then settled those cases for significant revenue. Tr. 489-90. And, wielding the threat of similar suits, RevoLaze settled with additional companies in the denim industry even without filing infringement cases. In short, Dentons' disqualification did not cause RevoLaze to lose the opportunity to settle with the whole denim industry.

The Eighth District inexplicably confused RevoLaze's claim that it was financially unable to pursue a GEO with the question of whether RevoLaze suffered an actual loss caused by Dentons' disqualification. Op. ¶ 117. Even if RevoLaze had established the former point, *but see supra* Proposition of Law No. 2, it did not suffer an actual loss since its claims remained—and remain—viable and it continues to pursue them.

Defendants cannot recoup damages for "lost" recoveries a plaintiff subsequently obtains.

Critically, there is no mechanism for Dentons or other malpractice defendants to claw back damages for supposedly lost recoveries that turn out not to have been lost at all. The Eighth District's new damages rule thus makes double recoveries likely and violates the bedrock principle that legal malpractice claims should not "give the client a windfall opportunity to fare better as a result of the lawyer's negligence than he would have fared if the lawyer had exercised reasonable care." *Paterek v. Petersen & Ibold*, 118 Ohio St.3d 503, 2008-Ohio-2790, 890 N.E.2d 316, ¶ 31 (quoting David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass.L.Rev. 74, 81-82 (1993)). "[I]t would be bizarre to say," as the Eighth District's rule does, "that the law permits a double recovery depending on the order of litigation of the plaintiff's claims." *Haynes v. Yale-New Haven Hosp.*, 243 Conn. 17, 30-31, 699 A.2d 964 (1997). This Court's attention is needed to avoid this "bizarre" and dangerous result.

CONCLUSION

RevoLaze would have lost this case had it been brought in the Seventh, Fourth, or Second Districts. The Eighth District's three new legal standards weaken the proximate cause and damages requirements emphasized in this Court's past cases. They allow plaintiffs to recover more than they would have in the original case. At a malpractice trial, freed of the burden of actually establishing their underlying claims, plaintiffs can present little more than the malpractice defendant's advice newly weaponized against it and an expert's general testimony that they would have won. All the while, they can reserve the right to pursue the underlying claims again after the malpractice claims end. The threat this poses to the legal profession makes this a case of great general interest and importance. This Court's intervention is urgently required.

June 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent on June 10, 2022 by ordinary mail and email to counsel for Appellee RevoLaze, LLC at the following addresses and email addresses:

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