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2d Civil No. B 138 149
LASC Case No. BC 192 006

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

MICHAEL VINER AND DEBORAH RAFFIN VINER,
Plaintiffs and Respondents,

vs.

CHARLES A. SWEET, an individual, and
WILLIAMS & CONNOLLY, a business entity,
Defendants and Appellants.

After a Decision of the Court of Appeal
Second District Court, Division Seven

Appeal from Los Angeles County Superior Court
Hon. David A. Workman, Judge Presiding

***AMICUS CURIAE* BRIEF ON BEHALF OF HALT, INC. – AN
ORGANIZATION OF AMERICANS FOR LEGAL REFORM
IN SUPPORT OF RESPONDENT VINER**

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INTRODUCTION AND SUMMARY OF ARGUMENT

The issue presented in this case is whether California is going to abandon the modern trend of authority by imposing a new burden on plaintiffs in transactional legal malpractice cases. *Amicus curiae* HALT, Inc. respectfully urges this Court to decline to take this radical step, to affirm the decision below, and to provide clear guidance that ameliorates the undue burdens imposed upon victims of legal malpractice by the “case within a case” approach and the “but for” causation requirement.

The “case within a case” approach unfairly limits malpractice victims to only damages resulting from the loss of their underlying claim and fails to accurately reflect the vast majority of legal claims, which result in settlement. This approach mistakenly assumes that we can accurately recreate a hypothetical trial; unfairly burdens malpractice victims by requiring them to demonstrate certainty in a context that can only be speculative; and is starkly at odds with this Court’s approach to other negligence issues. Applying the “case within a case” approach and “but for” causation (euphemistically termed “better deal” by appellants) to transactional legal malpractice cases would be a huge step backwards.

The modern trend of authority, both in California and other jurisdictions, is to employ “substantial factor” analysis to avoid the inequities that accompany the “case within a case” approach, the “but for” causation requirement, and derivative doctrines. Particularly in light of the

public interest in compensating victims and deterring attorney negligence and misconduct, this Court should clarify that “substantial factor” analysis applies in all legal malpractice claims and that all proximately caused damages are compensable.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Pursuant to Rule 13(a)(5) of the California Rules of Court, HALT adopts the statement of “Facts and Proceedings Below” from the Court of Appeal’s opinion in this case. Viner v. Sweet (2002) 92 Cal.App.4th 730.

STATEMENT OF AMICUS CURIAE HALT, INC.’S INTEREST IN THIS CASE

HALT is a national, non-profit, non-partisan public interest organization with 50,000 members nationwide and more than 10,000 in the State of California. For over two decades we have served as the one independent voice for American legal consumers in legislative, judicial and professional forums on issues of lawyer accountability. The nation’s oldest and largest legal reform organization, HALT pursues a set of legal reform initiatives to improve access to the civil justice system for citizens of limited means and to protect consumers of legal services by expanding protections against attorney negligence or incompetence. HALT’s *Lawyer Accountability Project* works to improve the existing attorney discipline system and to strengthen civil remedies for those victimized by dishonest, negligent or incompetent lawyers.

This Court's disposition of this appeal will establish a critical precedent in California and across the nation on the rules of causation applicable to the common law tort of legal malpractice. HALT has both a direct institutional interest in the resolution of this matter and an obligation to our members to present their views on this important public policy issue.

HALT has long advocated moderation of the rigid "case within a case" approach and the "but for" causation standard, and has closely monitored developments in legal malpractice law. In addition, over the past thirteen years, HALT's education program has distributed some 30,000 copies of If You Want to Sue a Lawyer: A Directory of Legal Malpractice Attorneys to its members and the public, and has responded to thousands of requests for referrals or information about pursuing legal malpractice claims. HALT is thus in a unique position to provide information about past experience in legal malpractice litigations, the modern trend in legal malpractice analysis and their policy implications.

Finally, civil liability for legal malpractice complements other judicially enforced attorney discipline mechanisms to deter lawyer negligence and misconduct. HALT regularly analyzes this combined system and tries to identify institutional, statutory and common law reforms that will enhance both lawyer accountability and public confidence in the legal profession.

The guidance issued by this Court on standards for legal malpractice will affect not only the parties to this litigation, but also more generally legal consumers who are protected by this combined discipline and civil liability system. HALT's participation as *amicus curiae* provides this Court with a broader perspective on the critical importance of true accountability for attorney negligence and misconduct, and gives voice to legal consumers nationwide.

ARGUMENT

I. THE "CASE WITHIN A CASE" APPROACH AND THE "BUT FOR" CAUSATION REQUIREMENT IMPOSE UNFAIR BURDENS ON VICTIMS OF LEGAL MALPRACTICE.

Under the "case within a case" approach, a plaintiff can prevail in a legal malpractice case only through proving, by a preponderance of evidence, that but for her lawyer's misconduct, she would have obtained a more favorable judgment in the previous action. See Temple Community Hospital v. Superior Court (1999) 20 Cal.4th 464, 488; see also Rest.3d Law Governing Lawyers (1998) § 53 (com. b). Under this approach, a successful legal malpractice plaintiff must prove seven distinct elements:

- (1) the plaintiff had an attorney-client relationship with the defendant;
- (2) the lawyer had a duty to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise;

- (3) the lawyer acted in a way that breached this duty;
- (4) the underlying claim was valid;
- (5) careful management of the case would have unquestionably resulted in a favorable judgment (“but for” causation);
- (6) there were quantifiable money damages to be won from the opposing party in the underlying case; and
- (7) the judgment would have been collectible.

Koffler, Legal Malpractice Damages in a Trial within a Trial – A Critical Analysis of Unique Concepts: Areas of Unconscionability (1989) 73 Marq. L. Rev. 40.

To prove the fourth, fifth, sixth and seventh of these elements, the “case within a case” approach attempts to recreate the trial that would have occurred had the attorney not been negligent. See Bauman, Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood (1988) 61 Temple L. Rev. 1127, 1131 (hereinafter “Bauman”).

This approach mistakenly assumes that the jury verdict on the underlying action is the precise and only measure of the client’s loss. Moreover, it effectively precludes consideration of damages other than those directly resulting from the loss of a claim. Further, it fails to accurately reflect the vast majority of outcomes in legal claims, which result in a settlement rather than a trial verdict.

In addition, the “case within a case” approach assumes that we can accurately recreate the trial that would have occurred despite the passage of time and the ancillary effects of the attorney’s negligence. This approach unfairly burdens malpractice victims by requiring them to demonstrate certainty in a context that can only be speculative, and stands in direct conflict to this Court’s approach to other negligence issues.

A. The “Case Within A Case” Approach Precludes Consideration Of The Full Spectrum Of Damages Suffered By A Legal Malpractice Plaintiff.

Courts have been forced to recognize the unsuitability of “case within a case” to purely transactional legal malpractice claims, yet continue to struggle under its constraints when considering malpractice claims that involve an actual litigation. See California State Auto. Ass’n Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey (2000) 84 Cal.App.4th 702, 711 (hereinafter “CSAA”). To a large degree, this ostensibly simple dichotomy does not reflect the reality of legal malpractice claims, for many legal malpractice claims do not neatly fall under either the strict “litigation” category or the strict “transactional” category. See, e.g., CSAA, 84 Cal.App.4th at 712; see also Karno v. Biddle (1995) 36 Cal.App.4th 622, 629. Therefore, *amicus curiae* HALT urges this Court to use this case to provide guidance concerning the appropriate methods of proof available to legal malpractice victims – regardless of the context in which the malpractice occurred.

Under the rigid framework of “case within a case,” if a plaintiff fails to show that a trial of the underlying action would have resulted in a favorable verdict, the attorney’s negligence is not actionable, and there can be no recovery for **any** damages. Lynch v. Warwick (2002) 95 Cal.App.4th 267, 272; see also Bauman, 61 Temple L. Rev. at 1142. However, a legal malpractice plaintiff’s actual damages are not limited to the loss of a trial; this is merely one of the multiple forms of damages commonly caused by an attorney’s negligence or incompetence. *Amicus curiae* HALT, Inc. urges this Court to recognize that the full range of damages, from attorney fees to the lost opportunity to have competent legal representation, are recoverable by legal malpractice victims.

In addition, the “case within a case” approach suggests that the only way to test the strength of one’s claim is to prevail in a hypothetical trial. This is contrary to the way in which the strength of most actual claims is demonstrated, for the vast majority of civil cases do not even reach trial; they end in settlement. See Galanter and Cahill, Most Cases Settle: Judicial Promotion and Regulation of Settlements (1994) 46 Stan. L. Rev. 1339, 1340. Of those claims that end in settlement, many would not be certain winners at trial. Yet they do have some intrinsic value. The “case within a case” approach ignores this value.

1. The “case within a case” approach fails to account for all of the damages suffered by a client when an attorney has represented a client in a negligent manner.

Requiring a legal malpractice victim to retry a “case within a case” as a condition precedent to any recovery is akin to the tail wagging the dog. Before a plaintiff is permitted to demonstrate that her lawyer’s negligence has caused various forms of harm, the “case within a case” approach requires that she first demonstrate that it was the lawyer’s negligence that cost a favorable trial verdict. See Bauman, 61 Temple L. Rev. at 1142. Once this particular damage – the loss of a favorable trial verdict – is established, it is only then that a plaintiff may continue to show other damages that she has suffered as a result of the lawyer’s misconduct. See id. If a plaintiff cannot show that she would have prevailed in the underlying trial, she is precluded from obtaining **any** other damages.

The “case within a case” approach thus requires proof that the underlying claim would ultimately have resulted in a verdict for the client in order to show **both** an actionable wrong and the value of what was lost. As such, the “case within a case” approach confuses a method of proof of causation with a measure of damages. See Bauman, supra, 61 Temple L. Rev. at 1130. A client should not have to prove that she would have prevailed in the underlying case before she is entitled to recover any damages, because many damages are suffered by a legal malpractice victim regardless of her chances of success in the underlying suit.

An attorney owes his client a set of fiduciary duties. One of these duties is to provide legal services on behalf of the client in an ethical and competent manner. See Cal Pak Delivery, Inc. v. United Parcel Serv., Inc. (1997) 52 Cal.App.4th 1, 15-16. When an attorney handles a client's case in a negligent manner, the attorney has breached this duty. The attorney should not be entitled to fees where he has breached the duty owed to his client, regardless of the merits of the client's underlying case.

A lawyer provides **services** to a client – not **outcomes** – and when a client has paid for services that were not provided or were provided in a slipshod manner, the attorney's breach has directly injured the client.

Thus, in a legal malpractice action, courts should separately consider each injury to plaintiff. The “case within a case” approach can still be used to measure one form of injury – the damages plaintiff would have received had she prevailed in the underlying case. But it should not be the **only** way of proving liability in a legal malpractice case.

Proof of legal malpractice damages should not be confined to the narrow methodology of the “case within a case” approach. Instead this Court should issue clear guidance that an attorney is liable for damages proximately caused by his negligence, including:

- (1) direct damages due to the economic loss of the opportunity to have obtained a successful settlement or a favorable trial verdict;

- (2) consequential damages resulting from a lost trial, including the full extent of the impairment;¹
- (3) consequential damages, including the cost of trying to correct, cope with or minimize the attorney's mistake;²
- (4) consequential damages in the form of interest lost;³
- (5) reliance damages in the form of attorney fees with interest;⁴
- (6) special damages resulting from the client's out-of-pocket costs and the loss of valuable time spent organizing the case with the negligent lawyer;
- (7) incidental damages under Uniform Commercial Code section 2-715, where the attorney has mishandled documents;
- (8) nominal damages where a plaintiff is unable to prove any injury, but defendant attorney was nevertheless negligent;⁵
- (9) general damages due to emotional distress suffered at the hands of a negligent attorney;⁶

¹ Consequential injury is not the loss of the intended benefit of the attorney's services, but rather, damages that occurred because the benefit was lost. Mallen & Levit, Legal Malpractice (2d ed. Supp. 1985) at p. 350.

² See e.g., Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal.App.4th 1457, 1470 (attorney fees paid to institute a new action that would correct a former attorney's mistakes are recoverable consequential damages).

³ See Petition of Remsen (N.Y. Sur. 1979) 415 N.Y.S.2d 370, 372 (upholding award for full amount of penalties and interest resulting from lawyer's malpractice).

⁴ See Perl v. St. Paul Fire & Marine Ins. Co. (Minn. 1984) 345 N.W.2d 209, 212 (where attorney has breached fiduciary duty, "client is entitled to recover, as damages, the compensation paid").

⁵ See Spence v. Hilliard (Ga. Ct. App. 1987) 353 S.E.2d 634 ("nominal damages are recoverable in legal malpractice action").

⁶ See Stanley v. Richmond (1995) 35 Cal.App.4th 1070, 1097 (affirming emotional distress damages award in legal malpractice case where plaintiff "experienced feelings of abandonment and betrayal by her attorney").

- (10) general damages encompassing the loss of the client's reputation due to her association with an unscrupulous attorney;⁷ and
- (11) exemplary or punitive damages in cases of attorney fraud or wanton misconduct, as a method of punishing the attorney or law firm and deterring future malpractice.⁸

As summarized in Merenda v. Superior Court (Diamond) (1992) 3 Cal.App.4th 1, 12, a client is entitled to be “made whole” for the value of the claim or property interest lost as a result of the attorney’s negligence.⁹ The above-enumerated damages represent the total loss borne by a client when her attorneys have misplaced vital evidence, neglected statutes of limitation, added frivolous claims, failed to educate themselves in an area of law, committed fraud, pursued a case in which they had a conflict of interest, failed to follow specific instructions of a client with reasonable care and skill, fallen asleep during trial, neglected to depose a crucial witness, or committed other acts of incompetence, neglect or unscrupulousness. Depending on the facts of a specific case, a plaintiff’s inability to recover any one of the above-enumerated damages means that she has not been made whole.

⁷ See Kirtland & Packard v. Superior Court (1976) 59 Cal.App.3d 140, 146 (client could recover for loss of reputation from malpracticing attorney).

⁸ See Ball v. Posey (1986) 176 Cal.App.3d 1209, 1216 (where attorney exercised undue influence over frail client, punitive damages appropriate).

⁹ An unrelated portion of Merenda was overruled by the Court of Appeal for the Fourth District in Piscitelli v. Friedenberg (2001) 87 Cal.App.4th 953, 981.

In this appeal, appellants Williams & Connolly and Sweet urge this Court to reject long-established transactional legal malpractice precedents in California, and instead adopt a radical new “case within a case” approach, which they euphemistically describe as “better deal.”¹⁰ As discussed in Section II of this Brief, California courts have been in the forefront of developing modern tort law and moderating the undue burdens imposed by the “case within a case” approach by crafting a more flexible approach for proving causation and damages in transactional legal malpractice cases. CSAA, supra, 84 Cal.App.4th at 702 (rejecting the “case within a case” approach and applying duty, breach, causation, damages, and “substantial factor” analysis).

Abandoning these analytics and imposing a new requirement derived from the “case within a case” approach would effectively preclude recovery of most of the damages enumerated above. In particular, this Court should consider its potential impact on consequential damages. In transactional representations, the deal is often only the beginning, for it sets the framework for future dealings between the parties. The impact of an attorney’s negligence and its potential damages therefore extend far beyond the four corners of the deal. While a legal malpractice plaintiff should

¹⁰Under appellants’ approach, a successful malpractice plaintiff must prove that but for her attorney’s negligence she would have obtained a more advantageous agreement, or she would not have entered into the transaction at all and thereby would have been better off. Appellants’ Brief at 15.

certainly have the option of presenting evidence that she could have obtained a “better deal,” there is simply no justification for **requiring** her to prove a different and novel kind of “case within a case” as a condition precedent to obtaining **any** relief.

2. A “settlement value” approach should be available to assess a claim’s value because the vast majority of civil cases end in settlement rather than trial verdict.

The “case within a case” approach implicitly assumes that the only way to value a claim is to hypothetically retry it. However, in the real world, even those clients who might lose at trial sometimes do not lose. This is because their cases do not go to trial; instead, they settle. More than ninety percent of all civil cases end in settlement. See Galanter and Cahill, supra, 46 Stan. L. Rev. at 1340. Therefore, the most common way of assessing a case’s worth is not through consideration of an underlying, hypothetical trial verdict, but rather through appraisal of the case’s settlement value. The “case within a case” approach fails to reflect the reality of civil litigation.

One of the fundamental tenets of civil litigation is that parties may choose whether they would prefer to settle a claim or accept the risk of proceeding to trial where a factfinder can determine the claim’s merit and worth. See Rachlinski, Gains, Losses and the Psychology of Litigation (1996) 70 S. Cal. L. Rev. 113, 118. Clearly, most plaintiffs would choose settlement where their claims are not certain to carry the day in court.

Legal malpractice plaintiffs whose claims are not necessarily clear winners are deprived of the chance of settling and “accepting half a loaf.” See Bauman, supra, 61 Temple L. Rev at 1134. Why should a plaintiff be denied this choice now, simply because she was unfortunate enough to have been victimized by a malpracticing lawyer?

A “settlement value” approach acknowledges that a claim may have merit – and hence value – even though it is not a certain winner at trial. See Koffler, supra, 73 Marq. L. Rev. at 70; see also Leubsdorf, Legal Malpractice and Professional Responsibility (1995) 48 Rutgers L. Rev. 101, 149. Under this approach, factfinders assess the value of the lost claim by relying on expert testimony as to settlements reached by similarly situated parties when resolving comparable lawsuits.¹¹ Such an approach would be a more accurate reflection of the way a case’s worth is assessed in the vast majority of cases.

¹¹ See Kessler, Alternative Liability in Litigation Malpractice: Eradicating the Last Resort of Scoundrels (2000) 37 San Diego L. Rev 401, 515:

As soon as a [personal injury] case is filed, the [defendant’s] insurance company analyzes it to predict its value The ability of a vast enterprise such as the insurance industry to rely upon assessments of case outcomes for their economic viability demonstrates that the determination of settlement value is not speculative. It is a task that is routinely done by experts in an industry that has an enormous financial commitment to the accuracy of the predictions.

B. The “But For” Standard Imposes A Virtually Insurmountable Burden Upon Victims Of Legal Malpractice And Conflicts With California’s Approach To Negligence Issues.

Application of the “but for” standard under the “case within a case” approach requires plaintiffs to prove that they would have prevailed in their underlying suits had their attorneys not committed misconduct. Sukoff v. Lemkin (1988) 202 Cal.App.3d 740, 744. Under this causation doctrine, a victim of legal malpractice may be barred from recovery even where her attorney concedes that his representation was deficient. See Kessler, supra, 37 San Diego L. Rev. at 492.

The “but for” standard has no place in proving legal malpractice actions because legal malpractice actions focus on what **probably** would have occurred, whereas “but for” calls for near certainty. In addition, the “but for” standard unfairly requires a plaintiff to retry a case already tainted by her attorney. Finally, this standard contradicts the negligence principles recognized by this Court for some three decades. Lysick v. Walsom (1968) 258 Cal.App.2d 136, 153; Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, 827.

The “but for” standard is in contrast with “substantial factor” analysis, which requires only that a plaintiff prove that the defendant’s negligence was a substantial factor in bringing about plaintiff’s injuries. CSAA, supra, 84 Cal.App.4th at 702; see also Prosser and Keeton, Torts (5th ed. 1984) Keeton, et al., Prosser and Keeton on the Law of Torts (5th

ed. 1984) p. 267. “Substantial factor” analysis levels the playing field by affording a plaintiff a fair opportunity to recover for the injuries caused by her attorney’s malpractice.

1. The “but for” standard unreasonably demands certainty in legal malpractice cases.

The “case within a case” approach requires plaintiffs to hypothetically retry their underlying suits. The hypothetical nature of the underlying trial requires a great deal of guesswork on the part of the legal malpractice factfinder. See Nolte, The Spoiliation Tort: An Approach to Underlying Principles (1995) 26 St. Mary’s L. J. 351, 394. In such a context, it is unjust to require proof of a virtual certainty that a plaintiff would have prevailed in the underlying case had the attorney not committed misconduct.

Compounding the difficulties inherent in proving the outcome of a hypothetical trial is the passage of time. By the time a legal malpractice case actually reaches trial, several years have inevitably passed since the events in the underlying case transpired. Under the “but for” standard, to be successful and obtain any recovery whatsoever, plaintiffs must nonetheless prove a favorable outcome with certainty — even where witnesses and litigation records have disappeared or become unavailable,

memories have faded, and the evidence trail has grown stone cold.¹²

Similar defects in employing the “but for” standard surface where an attorney’s negligence has compromised not only the underlying action, but also any chance of recreating the trial that “should have been.” Applying the “but for” standard to such a case has a perverse effect; it ultimately rewards the most negligent attorney, for the more evidence he mishandles in the underlying case, the more difficult it will be for his client to later prove that she would have prevailed in her underlying action.¹³

This is precisely the dilemma confronted three years ago by the Court of Appeal for the Fourth District in Galanek v. Wismar (1999) 68 Cal.App.4th 1417, 1426-1427, where an attorney negligently failed to take possession and preserve critical physical evidence which made it impossible to prosecute his client’s product liability suit. Recognizing the unsuitability of the “case within a case” approach and the “but for” standard under these circumstances, the Court of Appeal wisely ruled that the

¹² See Koffler, supra, 73 Marq. L. Rev. at 71 (“The legal profession cannot conscionably support the continued application of a rule that allows an attorney to negligently represent a client and thereby cause a lapse of time and change in circumstances that makes the client’s claim or defense more difficult to prove, and then place upon the client the burden to prove the very claim or defense that the attorney’s negligence has made more difficult to prove.”); see also Paul W. Vapnek, et. al, California Practice Guide: Professional Responsibility (1997-2001) Ch. 6-D, § 6.321.5.

¹³ See Kessler, supra, 37 San Diego L. Rev. at 492 (“causation defense is the best friend of the incompetent attorney”).

attorney should bear the burden of proving that his negligence did **not** cause his client to lose her case:

[W]hen the defendant’s negligence makes it impossible, as a practical matter, for plaintiff to prove “proximate causation” conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, **unless the defendant can prove that his negligence was not a cause of the injury.** *Id.* at 1425-1426 (emphasis supplied).¹⁴

As this example illustrates, the application of the “but for” standard in the context of the “case within a case” approach has proven to be fraught with problems and courts have struggled to moderate its rigidity. This Court should not revert to the approach urged by appellants in this case, as it shields and sometimes inadvertently rewards the worst kind of attorney malfeasance. Instead, *amicus curiae* HALT, Inc. urges this Court to issue clear guidance that legal malpractice cases are subject to the same principles of law applicable to other negligence claims.

2. Imposing the “but for” standard in legal malpractice cases is contrary to this Court’s negligence jurisprudence.

Legal malpractice cases should employ the same “substantial factor” analysis long applied by this Court to other questions of negligence. Under

¹⁴ The Louisiana Supreme Court has also confronted this issue, where an attorney’s prior negligence has made it difficult for a client to now prove her underlying case. *Jenkins v. St. Paul Fire & Marine Insurance Co.* (La. 1982) 422 So. 2d 1109, 1110 (client must first establish *prima facie* case that negligently breached duty of care and caused loss; attorney then has “the burden of going forward with the evidence to overcome the client’s *prima facie* case by proving that the client could not have succeeded on the original claim”).

“substantial factor” analysis, the lawyer’s negligence need not be the **only** cause of a client’s injury; but plaintiff must show “it was more likely than not that the conduct of the defendant was a substantial factor in the result.” Lysick, *supra*, 258 Cal.App at 153.¹⁵

“Substantial factor” analysis affords legal malpractice plaintiffs the flexibility needed to prove causation and moderates the rigidity of the “case within a case” approach. Under “substantial factor” analysis, unlike the “but for” standard, a plaintiff is not required to prove that her attorney’s negligence was the sole and certain cause of the adverse outcome in an earlier trial. Instead, a determination that the negligence was a “substantial factor” is sufficient to allow an award of damages based on the lost value of the case.¹⁶

Such a moderating interpretation of the “case within a case” approach is consistent not only with this Court’s treatment of other kinds of negligence claims but also with its long-standing principles of tort law, which apportion liability in direct proportion to fault. Li, *supra*, 13 Cal.3d at 827. In the forefront of tort jurisprudence, California’s “pure

¹⁵ see also Koffler, *supra*, 73 Marq. L. Rev. at 65.

¹⁶ Applying “substantial factor” analysis to all legal malpractice cases would also better deal with instances where there are multiple reasons for the loss of an underlying case (*i.e.*, where opposing counsel committed misconduct; the client inadvertently neglected a piece of information; or the client’s case may not have been a certain winner). In such cases, “substantial factor” analysis does not allow a negligent attorney to evade liability simply because he worked on a case that had other problems.

comparative negligence” approach even allows a plaintiff who is 51 percent to blame to still recover damages equal to 49 percent of her total injury.¹⁷ The California approach to apportioning negligence stands in contrast to “modified comparative negligence,” which bars recovery to a plaintiff who is at least 50 percent at fault, and to “contributory negligence,” which prevents recovery whenever defendant is anything less than 100 percent at fault.¹⁸

The same rationale that underlies this Court’s approach to affirmative defenses in negligence case — plaintiffs should not be foreclosed from recovery because there may be multiple causes for the injury suffered — applies with equal force to issues of cause-in-fact and proximate cause. Just as this Court recognized the unjust consequences of completely barring recovery under the “contributory negligence” approach and the arbitrary cutoff of damages under the “modified comparative negligence,” *amicus curiae* HALT, Inc. urges it to recognize the unfairness and arbitrariness of the “but for” standard, and to provide clear guidance that “substantial factor” analysis is the law in legal malpractice cases.

¹⁷ Not only does this Court embrace “pure comparative negligence,” most scholars also favor the principle. See, e.g., Prosser, Comparative Negligence (1953) 41 Cal. L. Rev. 1, 21-25.

¹⁸ The “pure comparative negligence” approach has won scholarly praise as “the only truly fair, fully accountable method of comparing fault.” Mutter, Moving to Comparative Negligence in an Era of Tort Reform (1990) 57 Tenn. L. Rev. 199, 245-246.

II. THE MODERN TREND IN LEGAL MALPRACTICE CASES IS TO MODERATE THE DRACONIAN “CASE WITHIN A CASE” APPROACH BY EMPLOYING “SUBSTANTIAL FACTOR” ANALYSIS RATHER THAN REQUIRING PLAINTIFFS TO PROVE “BUT FOR” CAUSATION.

In recent years, courts have shown a strong tendency in favor of “substantial factor” analysis and away from the rigid and burdensome requirements of proving “case within a case” and “but for” causation, and instead apply the well-established principles of negligence, including “substantial factor” analysis, to transactional malpractice cases.

A. California Has Rejected “But For” Causation In Favor Of An Approach That More Accurately And Fairly Establishes Causation And Damages.

Two years ago, in a case directly on point with the facts of this appeal, the First District determined that victims of transactional malpractice should be provided with a more flexible approach for proving causation and damages. CSAA, supra, 84 Cal.App.4th at 702. In making this determination, CSAA held that those standards applied to all other negligence cases – duty, breach, causation, damages and “substantial factor” analysis – should apply to transactional malpractice cases, and that the “case within a case” approach should be jettisoned.

In negligence actions, this Court has also concluded that the arcane and rigid “but for” standard should be replaced with more flexible “substantial factor” analysis, because it permits recovery in complex cases of causation. Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1049.

Courts in this state recognize the peril of extending a broken rule to a new area of law. In cases involving transactional malpractice, California's appellate courts have determined that causation and damages are established through "substantial factor" analysis, which applies long-recognized principles of negligence, and the "case within a case" approach need not be used. CSAA, supra, 84 Cal.App.4th at 702; see also 1 Witkin, Cal. Procedure (4th ed., 2002 supp.) Attorneys, § 334, p. 65. The test for transactional malpractice in California is: If a jury finds that malpractice did occur and that the plaintiff has proven damages, it can determine whether the malpractice was a proximate cause of those damages, and award damages accordingly. Enriquez v. Smyth (1985) 173 Cal.App.3d 691, 698.

Less than two years ago, CSAA held that the "case within a case" approach is entirely unworkable in the context of transactional malpractice. CSAA at 702. In CSAA, an insurer retained an attorney to represent an insured in a personal injury action and then sued the lawyer for malpractice. Id. at 704-708. The attorney had failed to provide information about the extent of the insured's injuries, causing the insurer to reject a \$50,000 settlement offer within the insured's policy limits. Id. In rejecting the offer, the insurer exposed itself to a claim of bad faith. Id. Ultimately, the insurer was forced to settle the case for \$850,000. Id. The trial court concluded that the insurer should not have to prove that it would have prevailed in the underlying case but for the attorney's negligence. Instead,

the trial court applied a more flexible approach to proof of causation and damages.

In affirming the decision of the trial court, the First District held:

[C]ausation and damages may be more simply established under rules generally applicable to negligence claims, and the case within a case procedure need not be used. As a general rule, an attorney's liability, as in other negligence cases, is for all damages directly and proximately caused by the attorney's negligence.

Id. at 711.

Therefore, the jury was not asked to decide whether the insurer would have gotten a better deal had the attorney not been negligent. Instead, the jury only considered whether the money paid by the insurer as an effort to mitigate damages caused by its attorney's negligence was "reasonable." Id. at 713. Since it was reasonable, the insurer was permitted to recoup its mitigation expenses. Id. at 714. CSAA, with facts clearly analogous to those in this case, points this Court in the appropriate direction for resolving the method of proof in transactional malpractice cases.

CSAA correctly builds on this Court's earlier precedents rejecting the "but for" standard in favor of "substantial factor" analysis in negligence actions. Mitchell, supra, 54 Cal.3d at 1044 ("a legal cause of damage is a cause which is a substantial factor in bringing about the injury").

In adopting "substantial factor" analysis, this Court observed that, unlike the "but for" standard, the "substantial factor" test has been "comparatively free of criticism and has even received praise." Id. at 1052.

In particular, this Court approved of “substantial factor” analysis because it applies to a variety of situations that “but for” causation can not adequately address, including the problem of concurrent causation. Id. at 1053.

Mitchell held that where “a similar, but not identical result would have followed [even] without the defendant’s act,” the “substantial factor” test does not allow a defendant to avoid liability simply because the harm would have occurred without his negligence. Id.

Mitchell’s “substantial factor” test is the law in this state, and has been reaffirmed not only by California trial and appellate courts, but also by this Court in opinion after opinion, as recently as last year. See, e.g., Saelzler v. Advanced Group 400 (2001) 25 Cal.4th 763, 774; Rutherford v. Owens-Illinois (1997) 16 Cal.4th 953, 968 (“California has definitively adopted the substantial factor test”); Soule v. General Motors Corp. (1994) 8 Cal.4th 965, 1025.

An abrupt reversion to “but for” causation would abrogate this Court’s negligence jurisprudence and return victims of malpractice to an era when proof of their attorneys’ malpractice was near impossible.

B. Other States Have Also Determined That Victims Of Legal Malpractice Are Not Required To Prove “But For” Causation.

California’s approach to transactional malpractice is also in accord with the modern trend nationwide. In recent years, state after state has rejected rigid “but for” causation analysis, adopting the modern “substantial

factor” approach. See Prosser and Keeton, Torts (5th ed. 1984) § 41.

This trend has now been extended to the legal malpractice arena, where some 9 other states have adopted the “substantial factor” approach:

- Connecticut, Beverly Hills Concepts, Inc. v. Schatz & Schatz, (Conn. Super. Ct., Jan. 27, 1997, No. CV89-0369864-5) 1997 Conn. Super. LEXIS 178;
- Hawaii, In re Hawaii Corp. (D. Hawaii 1983) 567 F. Supp. 609; Mitchell v. Branch & Hardy (Hawaii 1961) 363 P.2d 969;
- Illinois, Havaco of Am., Ltd. v. Freeman, Atkins & Coleman, Ltd. (N.D. Ill. 1994) 856 F. Supp. 466, rev’d on other grounds (7th Cir. 1995) 58 F.3d 303;
- Iowa, Dessel v. Dessel (Iowa 1988) 431 N.W.2d 359;
- Kentucky, McKay v. Dudley (6th Cir. Sept. 2, 1994, No. 92-6299) 1994 U.S. App. LEXIS 24345; Daugherty v. Runner (Ky. Ct. App. 1978) 581 S.W.2d 12;
- Louisiana, Bernard v. Nat’l Ass’n of Gov’t Employees (E.D. La., Feb. 18, 1996, No. 95-1591) 1996 U.S. Dist. LEXIS 2077; Meyers v. Imperial Cas. Indem. Co. (La. Ct. App. 1984) 451 So.2d 649;
- Maine, Butler v. Moores (Me. 2001) 771 A.2d 1034;
- Minnesota, Fiedler v. Adams (Minn. 1991) 466 N.W.2d 39;
- New Jersey, Conklin v. Hannoeh Weisman (N.J. 1996) 678 A.2d 1060;

Another 10 jurisdictions—District of Columbia, Idaho, Maryland, Massachusetts, Michigan, Ohio, Oregon, Rhode Island, South Carolina, and Vermont—have moderated the rigid requirements of “but for” causation in

legal malpractice cases.¹⁹

In particular, *amicus curiae* HALT, Inc. would direct this Court to the recent legal malpractice rulings in Ohio, Hawaii, Massachusetts, and Michigan.

The Ohio Supreme Court has affirmatively rejected a “but for” test as a barrier to finding negligent attorneys liable. Vahila v. Hall (Ohio

¹⁹ Mount v. Baron (D.D.C. 2001) 154 F. Supp.2d 3, 11-12 (“whether its allegations, if proven, would state an actionable dispute”); Niosi v. Aiello (D.C. Mun. App. 1949) 69 A.2d 57; Lamb v. Manweiler (Idaho 1996) 923 P.2d 976, 979 (“plaintiff must establish that he or she would have some chance of success in the underlying action”); Royal Ins. Co. of Am. v. Miles and Stockbridge, P.C. (D. Md. 2001) 138 F. Supp.2d 695, 699 (“depends on whether an appeal of the underlying action would have been successful”) Berringer v. Steele (Md. Ct. Spec. App. 2000) 758 A.2d 574; Cain v. Kramer (D. Mass., Feb. 4, 2002, No. 00-10341-DPW) 2002 U.S. Dist. LEXIS 1770 (“probably would have obtained a better result had the attorney exercised adequate skill and care”); Fishman v. Brooks (Mass. 1986) 487 N.E.2d 1377; McClarty v. Gudenau (E.D. Mich. 1994) 173 B.R. 586, 602 (“[i]f the attorney’s negligence results in a verdict against his client that is larger than what would have been returned in the absence of his negligence, then the attorney should be held liable for the increased amount of the judgment”); Basic Food, Inc. v. Grant (Mich. Ct. App. 1981) 310 N.W.2d 26; Vahila v. Hall (Ohio 1997) 674 N.E.2d 1164, 1170 (“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”); Roberts v. Fearey (Or. Ct. App. 1999) 986 P.2d 690, 692 (“the analysis examines only whether a defendant’s conduct unreasonably created a foreseeable risk to a protected interest of the kind that befell the plaintiff”); Clauson v. Kirshenbaum (Super. Ct. R.I., Jan. 19, 1996, No. 92-3140) 1996 R.I. Super. LEXIS 23 (“had the defendant exercised adequate skill and care, the plaintiff probably would have obtained a more successful result”); Hall v. Fedor (S.C. Ct. App. 2002) 561 S.E.2d 654, 657 (“the plaintiff must show he or she most probably would have been successful in the underlying suit”); Cannata v. Wiener (Vt. 2001) 789 A.2d 936, 939 (“plaintiff is not required to establish the fact of causation beyond a reasonable doubt”).

1997) 674 N.E.2d 1164, 1168. As the Ohio court stressed, the “but for” test is “unjust”:

[W]e 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...[S]uch a requirement would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim.”

Id. at 1170. (emphasis supplied) (following Krahn v. Kinney (Ohio 1989) 538 N.E.2d 1058, 1061-1062).

Hawaii has similarly rejected the rigid “but for” test in favor of “substantial factor” analysis.²⁰ In Hawaii, proximate cause is the same in attorney malpractice actions as it is in other negligence actions. See In re Hawaii Corp. (D. Hawaii 1983) 567 F. Supp 609, 630-631; Chun v. Park (Hawaii 1969) 462 P.2d 905, 907-8. Professional negligence exists when:

The actor’s negligent conduct is the a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

²⁰ The Hawaii Court explained that the key components of causation—both fact and policy concerns—must be weighed:

[A] realistic approach to problems of causation, an area which has long been complicated by a failure to distinguish between questions of fact and policy concerns...[t]he first arm of the test contemplates a factual determination that the negligence of the defendant was more likely than not a substantial factor in bringing about the result complained of...[t]he second arm of the Mitchell test contemplates an inquiry into whether there are policy concerns or rules of law that would prevent imposition of liability on the negligent party although his negligence was clearly a cause of the resultant injury.

McKenna v. Volkswagenwerk Aktiengesellschaft, (Hawaii 1977) 558 P.2d 1018, 1022.

Mitchell v. Branch & Hardy (Hawaii 1961) 363 P.2d 969, 973 (citing Restatement of Torts § 431 (1934); Prosser, Law of Torts § 47).

In Massachusetts, a successful plaintiff must demonstrate the attorney's negligence was the proximate cause of actual loss, but does not have to show absolute certainty that she would have won the underlying case "but for" the attorney's negligence. See, e.g., Cain v. Kramer (D. Mass., Feb. 4, 2002, No. 00-10341-DPW) 2002 U.S. LEXIS 1770. Instead, a plaintiff "must demonstrate that he probably would have obtained a better result had the attorney exercised adequate skill and care." Id. (citing Fishman v. Brooks (Mass. 1986) 487 N.E.2d 1377, 1380).²¹

Michigan describes proximate cause as "often the most difficult element to prove in a legal malpractice case." McClarty v. Gudenau (E.D. Mich. 1994) 173 B.R. 586, 602, and has limited the application of the "case within a case" approach to cases where:

- (1) the plaintiff had a winning claim but received an unfavorable decision because of attorney negligence;
- (2) the plaintiff was unable to bring a cause of action because of attorney negligence;
- (3) judgment was entered against the plaintiff because the attorney failed to appear; and

²¹ Massachusetts also recognizes the inherent unfairness of placing the burden of proof on the victimized client. Glidden v. Terranova (Mass. App. Ct. 1981) 427 N.E.2d 1169, 1171. If the client was a defendant in the underlying action, "the attorney should indeed bear the burden of proof . . . [the client] should not shoulder the burden of proving a defense in the malpractice action." Id. at 1171 (citing Nolan, Tort Law (1979) § 182, at 297).

(4) the plaintiff is unable to perfect an appeal because of attorney negligence.

Id. at 601-602.

The Michigan Court of Appeals stressed that the “case within a case” approach imposes a “harsh requirement that would preclude otherwise meritorious claims”:

We believe the “suit within a suit” requirement should, as a matter of sound policy, be limited to the types of cases we have described above. **Requiring the plaintiff in all cases to show that he would have prevailed completely in the former action as a condition precedent to recovery in a subsequent malpractice action is a harsh requirement that would preclude otherwise meritorious claims.** If the attorney’s negligence results in a verdict against his client that is larger than what would have been returned in the absence of his negligence, then the attorney should be held liable for the increased amount of the judgment.

Basic Food, Inc. v. Grant (Mich. Ct. App. 1981) 310 N.W.2d 26, 30 (emphasis supplied).

These leading authorities from other states confirm the wisdom of this Court’s approach to moderating the harsh requirements of the “case within a case” approach and the “but for” standard. As Ohio, Hawaii, Massachusetts and Michigan have concluded, the “but for” test is too rigid, too imprecise, and a roadblock to meritorious attorney malpractice claims. This Court’s pioneering recognition that “substantial factor” analysis is a superior approach to questions of causation in attorney malpractice actions is thus fully in accord with modern precedent.

III. PUBLIC POLICY DEMANDS AN END TO THE “CASE

WITHIN A CASE” APPROACH AND THE “BUT FOR” STANDARD IN LEGAL MALPRACTICE CASES.

As members of the legal profession are all too aware, the public’s opinion of lawyers ranks among the lowest of any profession, with surveys showing that the public holds lawyers in about the same esteem as politicians, car salesmen and advertising executives. Hodes, Truthfulness and Honesty Among American Lawyers: Perception, Reality, and the Professional Reform Initiative (2002) 53 S. Car. L. Rev. 527, 527-28.

Worse yet, the reputation of lawyers is in a period of decline that has lasted for several decades. Id. at 528. One step the profession can take to improve its reputation is to refrain from making it overly burdensome to simply hold lawyers to the same standards of conduct as other service professionals.

A. The Use Of Unfairly High Standards Of Proof In Legal Malpractice Cases Contributes To The Flagging Public Faith In The Legal Profession.

The self-regulating legal system faces a severe test when it is called upon to adjudicate the wrongdoing of one of its own. The high standards of proof required in legal malpractice cases justifiably give the appearance that lawyers are loath to punish other lawyers. This is to say nothing of the damage it does to the public’s faith in lawyers as advocates worthy of their complete trust.

Over two decades ago, Washington D.C. journalist and public

interest advocate Phillip M. Stern stated the problem very simply in his landmark exposé Lawyers On Trial, arguing that:

[T]he legal profession, in essence, is answerable to no one. It writes its own rules and enforces (or fails to enforce) them as it sees fit. [C]omplaints against... lawyer[s]...will be passed upon by your attorney's brethren in the profession. Hardly the most objective of judges.

Stern, Lawyers On Trial (1980) at xvii.

Just two years ago, Stanford University Professor Deborah Rhode noted of the same pervasive public concern about legal ethics, stating that:

[T]he public's ... principal complaints about attorneys' character involve integrity. Only a fifth of those surveyed by the American Bar Association felt that their lawyers could be described as "honest and ethical." ... On matters such as...unresponsive disciplinary structures...the public is not ambivalent, and its concerns are not unwarranted.

Rhode, In the Interests of Justice (2000) pp. 4-5.

Failing to establish an unbiased framework for resolving legal malpractice cases feeds the public's mistrust of the legal profession. If this Court adopts the high hurdles appellants suggest for proving legal malpractice, it will further exacerbate the public's already low regard for attorneys. Put simply, the public will correctly ask: Why do lawyers make it so hard to win a malpractice case against them unless there's a lot of malpractice they need to protect themselves against?

B. Because Of The Difficulty Of Bringing Malpractice Cases And The Paucity Of Alternative Relief, Victims Of Legal

Malpractice Cases Should Not Be Unfairly Handicapped By Excessive Burdens Of Proof.

The “case within a case” approach imposes an unfair burden on litigants and wastes the energies of the court system. In just one example of the unnecessary complexity of this approach, a California Superior Court was found to have abused its discretion for failing to provide a jury with a half-dozen rules of the National Association of Securities Dealers so that the jury could apply those rules in the same manner that an arbitration panel consisting of securities professionals would have applied them in the underlying case. Piscitelli v. Friedenberg (2001) 87 Cal.App.4th 953, 974-975. Requiring juries to undergo a crash course in securities is an unnecessary use of time and resources for the court system and for litigants, especially when other methods of adjudication are feasible.

The excessive burden of the “case within a case” approach is exacerbated by other failings of the attorney disciplinary system. Civil liability for legal malpractice complaints complements other attorney discipline mechanisms to deter attorney misconduct. The burden of proving “but for” causation within the “case within a case” framework would not be so onerous if legal malpractice victims had other recourse against incompetent or fraudulent attorneys. Sadly, such alternative relief is unavailable, which heightens the need for a workable framework for legal malpractice cases.

One potential but largely unavailing source of relief from the harm caused by attorney misconduct is disciplinary action by the bar. In California, of the 14,136 disciplinary complaints investigated by the state bar in 2000, less than eight percent resulted in any kind of disciplinary action against the investigated attorney. American Bar Association Center for Professional Responsibility, 2000 Survey on Lawyer Discipline Systems (2002) pp. 1, 5. The American Bar Association Survey indicates that of all the complaints of lawyer misconduct investigated in California in 2000, only 0.5 percent resulted in a private reprimand of an attorney, just 3.88 percent led to public sanctions against an attorney, merely 2.3 percent concluded in attorney suspension, and just 1.2 percent resulted in disbarment. Id. As these statistics demonstrate, disciplinary proceedings before the Bar can provide incomplete relief to victims of malpractice, especially since such relief does not include compensatory money damages.

Two other potential sources of relief for attorney malpractice victims – civil liability based on state consumer fraud statutes and relief through a state client security fund – are even less availing, as they can only be used in the case of intentional harm by an attorney. Furthermore, even in cases of intentional harm these roads toward compensation are riddled with potholes and wrong way signs that prevent most victims from being adequately compensated for the harm caused by their attorneys.

The first of these routes is a consumer fraud action against an

attorney by his defrauded client. Unfortunately, lawyers are exempted from suit under consumer fraud laws in many states, either explicitly by statute (See, e.g., MD. Code Ann., Commercial Law I § 13-104(1) (2001).), by court decisions including lawyers under a general description of exempted trades and professions (See, e.g., Rousseau v. Eshleman (N.H. 1986) 519 A.2d 243), or through the decision of the judicial branch that only it may regulate lawyers under the doctrine of separation of powers (See, e.g., Cripe v. Leiter (Ill. 1998) 703 N.E.2d 100; Vort v. Hollander (N.J. 1992) 607 A.2d 1339). Thus, except in the few states where consumer fraud laws specifically include attorneys, even an intentionally defrauded client has no viable cause of action against her lawyer except through a common-law legal malpractice action.

The other potential source of relief for victims of intentional attorney misconduct is through a state bar's client compensation fund. These funds, which exist to reimburse clients for misappropriation of funds by an attorney, are woefully underfunded and underpublicized. California's fund imposes a cap of \$50,000 per claim, which leaves those with greater damages uncompensated. Amon, An Empty Promise (August 21, 2000) National Law Journal at A9. Of course, these funds are of no help to victims of intentional misconduct other than theft, let alone to victims of attorney negligence.

To rebuild public confidence and to fill the void left by other

methods of compensatory legal malpractice victims, the common law must provide a simple and straightforward method of affording recompense.

CONCLUSION

This case presents this Court with an opportunity to address the unduly burdensome requirements a plaintiff must meet to successfully prosecute a common law tort claim for legal malpractice. Applying the rigid dictates of the “case within a case” approach, the “but for” causation standard, and derivative doctrines to legal malpractice suits is at odds with negligence jurisprudence that governs other tort claims and unfairly denies recompense to victims of legal malpractice. The public interest in compensating victims and deterring attorney negligence and misconduct demands a more equitable approach.

For the foregoing reasons, *amicus curiae* HALT, Inc. respectfully requests that this Court:

- affirm the decision of the Court of Appeal;
- clarify that the “case within a case” approach is only one of multiple methods (including settlement value) of proving damages that are available to legal malpractice victims; and
- provide clear guidance that "substantial factor" analysis applies to all legal malpractice claims and that all proximately caused damages are compensable.

Respectfully Submitted,

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