

**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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**COMPLETE TITLE OF CASE**

BRIAN NAIL,

Appellant,

v.

HUSCH BLACKWELL SANDERS, LLP,

Respondent.

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**DOCKET NUMBER WD75250**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** May 21, 2013

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**APPEAL FROM**

The Circuit Court of Jackson County, Missouri  
The Honorable Sandra C. Midkiff, Judge

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**JUDGES**

Division I: Witt, P.J., and Newton and Pfeiffer, JJ.

CONCURRING.

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**ATTORNEYS**

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**MISSOURI APPELLATE COURT OPINION SUMMARY**  
**MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

**BRIAN NAIL,** )  
 )  
 ) **Appellant,** )  
**v.** ) **OPINION FILED:**  
 ) **May 21, 2013**  
**HUSCH BLACKWELL SANDERS, LLP,** )  
 )  
 ) **Respondent.** )

**WD75250**

**Jackson County**

**Before Division I Judges:** Gary D. Witt, Presiding Judge, and Thomas H. Newton and Mark D. Pfeiffer, Judges

This is a legal malpractice case. Brian Nail (“Nail”) appeals the Circuit Court of Jackson County, Missouri’s (“circuit court”) grant of summary judgment to respondent Husch Blackwell Sanders, LLP (“Husch”) on Nail’s petition alleging legal malpractice. On appeal, Nail raises three claims of error: (1) that the circuit court used the wrong legal standard to address Nail’s burden of proof leading to its error in summarily granting judgment to Husch on Nail’s “negligent advice” claim; (2) that the circuit court erroneously concluded Nail had waived his “negligent advice” claim; and (3) that the circuit court erroneously ruled that, as a matter of law, Nail could not seek to enforce a liquidated damages clause against Husch that was part of a settlement agreement between Nail and a third party, which Nail claims Husch negligently drafted.

**AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

**Division I holds:**

The circuit court’s grant of summary judgment in favor of Husch noted that the record was “totally void of any indication that the voluntary settlement on [Nail’s] part was to mitigate damages caused by [Husch’s] negligence,” citing *Williams v. Preman*, 911 S.W.2d 288, 296 (Mo. App. W.D. 1995). However, this is the wrong lens for reviewing the submissibility of Nail’s legal malpractice claim because, unlike in *Williams*, in this case, Nail was still being represented by Husch at the time of settlement and settled his underlying claim upon Husch’s

advice. Instead, Nail was only required to show: (1) that the defendant lawyer was negligent by showing that he or she failed to exercise that degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession; (2) that plaintiff sustained some loss or injury; and (3) a causal connection between the negligence and the loss. Nail's expert testified that the Husch attorneys negligently advised Nail to settle instead of advising Nail to call his stock options at the earliest possible date, thus forcing a third party to either provide the options or breach the agreement, which would have allowed Nail to establish damages of millions of dollars in any subsequent lawsuit. Nail's allegations and expert testimony are sufficient to make a submissible case of legal malpractice for negligent advice. Further, Nail's election to pursue damages under the settlement agreement drafted by Husch in a lawsuit against a third party instead of electing to seek rescission of the settlement agreement and making a claim of breach of the underlying stock option agreement did not mean that Nail had abandoned any claim against Husch for negligently advising him to enter the settlement agreement.

The circuit court did not err, however, in granting Husch's motion for summary judgment on Nail's claim that he should be entitled to the liquidated damages enumerated in the settlement agreement that Husch allegedly negligently drafted. This is because Nail's argument as to the causal connection between the alleged negligent drafting and corresponding damages is built upon mere conjecture and speculation. Nail points to nothing that would support a conclusion that, had the settlement agreement been properly drafted, the other party to the agreement would have breached that agreement, triggering the liquidated damages clause.

**Opinion by: Mark D. Pfeiffer, Judge**

May 21, 2013

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