No. SC93543

IN THE MISSOURI SUPREME COURT

BRIAN NAIL

Plaintiff/Appellant,

v.

HUSCH BLACKWELL SANDERS, LLP

Defendant/Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Sandra C. Midkiff
Circuit Court No. 0916-CV15237

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

This appeal is from summary judgment entered in a legal malpractice case brought by Brian Nail against his former attorneys, defendant Husch Blackwell Sanders, LLP ("Husch Blackwell").[1] Plaintiff sought millions of dollars in damages from Husch Blackwell for alleged stock market losses he claims to have incurred when Richard Mueller (who owned the company that had employed Plaintiff) placed restrictions on the transfer of stock that Plaintiff held options to purchase. (LF 78-79, 734). The trial court, finding that Plaintiff had failed to produce expert testimony that any attorney negligence had caused his loss, granted Husch Blackwell's motion for summary judgment. (LF 733-35).

The dispute between Mr. Mueller and Plaintiff arose when Mueller sold his company and, as part of that sale, agreed with the buyer not to transfer any stock – including stock Plaintiff held options to purchase – for one year. (LF 79-80, 364). During that "lock-up period," when Mueller's agreement to sell had made it impossible for Plaintiff to exercise his options and realize any gains, the stock's value declined sharply. (LF 83, 366).

When he learned of the restriction Mueller had placed on his options, Plaintiff retained Husch Blackwell to explore his remedies and, after extensive consultation, decided to settle with Mueller rather than file suit. (LF 365). Plaintiff later became dissatisfied with his settlement, hired different counsel, and sued Mr. Mueller both for

[1] The official name of the firm is now Husch Blackwell LLP.

breach of the stock option agreements and for breach of the original Settlement Agreement. (LF 175). After losing at trial, Plaintiff eventually decided to settle that case, too. (LF 88, 369).

Well after the lock-up period, Plaintiff exercised most of his options, in part using $100,000 in credit he obtained in his two settlements with Mueller, and realized a $600,000 profit. (LF 89, 369). Only then did Plaintiff file the present suit against Husch Blackwell, seeking to recover millions more he claims to have lost by not being able to exercise his options and realize profits during the lock-up period.

A. Plaintiff's MTW stock options are converted to TiG stock options.

Plaintiff worked for Mr. Mueller at MTW Corporation for nearly ten years. (LF 78, 363). Part of his compensation package included two stock option agreements, which were amended at various times during his employment.[2] By the time he was terminated as the Chief Financial Officer, the agreements gave him the option to purchase a significant number of MTW shares during the eighteen-month period following March 15, 2001. (LF 79, 363-64).

Plaintiff chose not to immediately exercise his options. Then, some three months into Plaintiff's option period, MTW was acquired by a London-based corporation called The Innovation Group, plc ("TiG") in a stock-for-stock merger. *Id*. Plaintiff's options to

[2] The first agreement was executed in August 1996 (LF 121), and the second in June 2000 (LF 131).

shares of privately-held MTW stock were accordingly converted to options to shares of publicly-traded TiG stock. *Id*. After the merger, TiG's stock was trading at 285 Pence[3] per share on the London Stock Exchange. (LF 366).

As part of the merger, Mr. Mueller agreed with TiG to a one year "lock-up period," during which he promised not to transfer any of his TiG stock without the consent of TiG's board of directors. (LF 79, 363). This restriction – agreed to by Mueller and TiG – necessarily applied to the shares Plaintiff held options to purchase. *Id*.

Two weeks before the MTW-TiG merger, Plaintiff retained Steve Carman, a partner at Husch Blackwell,[4] for advice about the merger's impact on Plaintiff's stock options. (LF 79-80, 364). At the outset, Carman learned from Mr. Mueller's counsel that Mr. Mueller had already agreed not to transfer without consent from TiG's board of directors any of his TiG stock between July 2001 and July 2002. (LF 80, 106, 364).

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[3] Considering there are 100 Pence in one British Pound, and that the average exchange rate for the period at issue (July 2001 through August 2002) was 1.46 U.S. Dollars per British Pound, 285 Pence equates to approximately $4.16 per share. *See* http://www.oanda.com/currency/historical-rates/ (last accessed December 6, 2013). For the Court's convenience, references to pence will be converted to dollars throughout this brief.

[4] Both Carman and Jon Ploetz, a former associate at Husch Blackwell, were originally named as defendants in this lawsuit, but both have been dismissed, and those dismissals are not at issue on this appeal. (LF 723).

After the merger, Carman first tried to avoid the restriction by obtaining approval from TiG's board of directors for Plaintiff to exercise his options, but the board refused. (LF 80, 364). Carman and Plaintiff then explored the possibility of immediate litigation against Mueller and TiG. (LF 80, 98-99, 205, 364). They discussed the merits of a claim for breach of contract against Mueller, (LF 98-99, 205, 364), and they talked about filing a lawsuit on at least twenty separate occasions. (LF 364). Plaintiff acknowledges that he "clearly understood he always had the option to sue." (LF 364).

B. Plaintiff decides not to file a lawsuit and agrees to settle his dispute with Mr. Mueller.

Having discussed the merits of his claim and the consequences of settling, Plaintiff ultimately decided to settle with Mueller. (LF 86, 109, 364). The Settlement Agreement included all the terms Plaintiff requested. Mueller agreed to extend the option period by five years, to September 15, 2007, and to place the shares Plaintiff had options to purchase in an escrow account. (LF 82, 107-08, 365). Mueller also agreed to give Plaintiff a $50,000 credit toward the exercise of the options. (LF 81, 365). In return, Plaintiff expressly released Mueller from liability for agreeing to restrict Plaintiff's stock options in connection with the TiG merger. (LF 221).

The Settlement Agreement and Escrow Agreement established the procedure by which Plaintiff would ultimately be able to exercise his stock options. (LF 218-225, 227-232). At the end of the lock-up period, Mueller was to place 2,116,800 TiG shares in an escrow account at UMB Bank by delivering a specific Transfer Notice. (LF 81-82, 365). From the time the Transfer Notice was received until September 15, 2007, Plaintiff had

the option to purchase up to 1,852,200 shares of TiG stock at thirty-one cents per share. Plaintiff could also purchase the additional 264,600 shares in the escrow account at $1.43 per share. (LF 81-82, 184, 365-66).

The Escrow Agreement provided Mr. Mueller with a three-day, post-exercise period to object to the price terms of Plaintiff's exercise. (LF 228). And it required Plaintiff and Mr. Mueller to "execute and deliver, or cause to be executed and delivered, such documents as may be reasonably requested by the other in order to more effectively accomplish the purpose of this Escrow Agreement." (LF 230).

To ensure that Mueller would deliver the requisite Transfer Notice, the Settlement Agreement contained a liquidated damages provision, which provided:

> In the event that Mueller (his successors or assigns) fails to deliver the Transfer Notice to the Escrow Agent on or before July 31, 2002, Mueller shall pay Nail, by wire transfer on August 1, 2002, an amount (the "Damages") equal to the market value of the Escrowed Stock based on the highest closing sale price per share of TiG common stock as traded on the London Stock Exchange for the period beginning on the date of this Agreement and ending on July 31, 2002. For purposes of determining the Damages, the exercise price of the Options shall not be taken into account, or, if taken into account, shall be deemed to be $0.

(LF 220).

During the period Mr. Mueller had agreed to lock up Plaintiff's shares, the price of TiG's stock dropped. According to Plaintiff, TiG's stock was trading at $4.16 per share at the beginning of the lock-up period on July 17, 2001. (LF 366). The stock price rose to a closing price of $6.42 per share on August 6, 2001. *Id*. But the price began to fall from that point, closing at $1.12 per share on July 17, 2002, the end of the lock-up period. (LF 366). The price continued to fall after the lock-up period, reaching a low of $.05, and never rose above $.08 per share before the end of Plaintiff's extended option period.[5]

C. Plaintiff exercises his TiG options.

When the lock-up period expired, Mr. Mueller executed and delivered the Transfer Notice required by the Settlement Agreement. (LF 84, 366). And on August 30, 2002, over one month after the lock-up period had expired, Plaintiff used his $50,000 credit to purchase 159,795 shares of TiG stock. (LF 84, 366).

When UMB sent notification to the United Kingdom that Plaintiff had exercised his option to purchase 159,795 shares, a UK stock registrar explained to UMB – which then notified Husch Blackwell – that before the shares could be registered in Plaintiff's name, the applicable stamp duty needed to be paid and Mr. Mueller had to execute and deliver a UK-specific Stock Transfer Form. (LF 84, 366).

Approximately ten days later, Mr. Mueller executed and delivered the UK Stock Transfer Form. (LF 85, 367). But Plaintiff objected to the $285 stamp duty and refused

[5] As noted in footnote 3, these are estimates based on the average exchange rate during the time in question.

to pay it. (LF 85, 367). Plaintiff did not pay the stamp duty to complete the registration until July 2004, nearly two years later. (LF 84, 304-06).

D. Plaintiff sues Mr. Mueller and TiG.

In May 2003, Plaintiff hired different counsel and filed a lawsuit against both Mueller and TiG in Johnson County, Kansas. (LF 175). Plaintiff sought to rescind the Settlement Agreement and obtain damages for Mr. Mueller's alleged breach of the stock option agreements. (LF 194, 196-97, 369). While Plaintiff's petition only included a general prayer for damages, because he alleged the breach occurred when Mueller agreed to the lock-up period in July 2001, Plaintiff was seeking approximately $13 million in damages from Mueller. (LF 184, 344).

Plaintiff alternatively sought damages from Mr. Mueller for his alleged breach of the Settlement Agreement. (LF 194). Plaintiff alleged that Mr. Mueller's delivery of the Transfer Notice under the Settlement Agreement was ineffective to transfer ownership of Mueller's shares to the escrow agent because a UK Stock Transfer Form and a stamp duty were both required under UK law before the shares could be registered in Plaintiff's name. (LF 189-191). Plaintiff sought approximately $8.5 million in damages for Mueller's alleged breach of the Settlement Agreement. (LF 193).

The claims were tried to a jury during a ten-day trial. At the close of the evidence, Plaintiff abandoned the Settlement Agreement rescission remedy (and the corollary damages claim for Mueller's breach of the stock option agreements), electing instead to seek damages from Mueller for breach of the Settlement Agreement only. (LF 87, 368). But before the jury could render a verdict, the district court held as a matter of law that

Mr. Mueller had not breached the Settlement Agreement because his delivery of the Transfer Notice to UMB "effect[ed] full transfer of ownership of the stock pursuant to Missouri law," and that "[a]ccordingly, there is no breach of that agreement." (LF 324).

Plaintiff and Mr. Mueller reached a second settlement while the subsequent appeal was pending. (LF 311). As part of that settlement, Plaintiff expressly acknowledged that he had "elected to abandon his claim for breach of the Stock Option Agreements and to proceed to judgment solely with respect to his claim for breach of the Dispute Settlement Agreement and Escrow Agreement." (LF 311). For settling, Plaintiff received an additional $50,000 credit against the future exercise of his stock options. (LF 313).

In the years after his two settlements with Mr. Mueller, Plaintiff exercised most of his options and purchased 1,832,405 shares of TiG stock. (LF 89, 335-37, 369). In doing so, Plaintiff used both of the $50,000 credits he received in the two settlements with Mr. Mueller in addition to funds of his own. (LF 89, 369). By the time he filed this suit, Plaintiff had sold virtually all those shares, earning a profit in excess of $600,000. (LF 89, 369).

E. Plaintiff sues Husch Blackwell.

Plaintiff filed this lawsuit against Husch Blackwell in May 2009. His petition alleges legal malpractice under two basic theories. (LF 12-14). The first theory deals with the quality of the advice he received from Husch Blackwell regarding his potential remedies for Mueller's alleged breach of the stock option agreements. He specifically alleges Husch Blackwell was negligent in:

a. Failing adequately to assess and evaluate Nail's litigation remedies against Richard Mueller and others for breach of stock option agreements and related claims.

b. Giving Nail inadequate, inaccurate or incorrect legal advice about his rights and remedies against Richard Mueller, et al.

(LF 13). Plaintiffs alleged that "but for the negligence of [Husch Blackwell], Plaintiff would have prevailed on his underlying claims against Richard Mueller . . . ." (LF 14). As to the damages, the petition states that Plaintiff lost "monies due him under the stock option agreements and the dispute settlement agreement." (LF 14).

Plaintiff's second theory centers on the drafting of the Settlement Agreement, alleging that Husch Blackwell failed to require in either the Settlement Agreement or the Escrow Agreement that Mr. Mueller execute the U.K. Stock Transfer Form and pay the UK-mandated $285 stamp duty. (LF 12-14). The petition specifically states that Husch Blackwell was negligent in:

c. Drafting legal documents, including a dispute settlement agreement, which provided inadequate remedies for [Plaintiff].

d. Failing adequately to consult with Blackwell's London office regarding the transfer of stock traded on the London stock exchange.

e. Failing to conduct a sufficient investigation of the circumstances surrounding the transfer of stock traded on the London stock exchange.

(LF 13). Plaintiff's allegations of causation and damages mirrored those asserted under his first theory. (LF 14).

After months of discovery, Husch Blackwell filed a motion for summary judgment, arguing that Plaintiff could not satisfy the elements of legal malpractice under either of his theories of negligence.[6] (LF 23). Husch Blackwell maintained, among other things, that Plaintiff failed to provide the required evidence showing that any of his particular theories of negligence proximately caused the damages he sought. (LF 55, 60, 65).

Plaintiff defended his first theory of negligence (negligent advice) by arguing that the "basis of the claims in this action is the failure of Defendants to provide adequate, accurate, and correct legal advice upon which Brian Nail could properly base a decision on whether to settle." (LF 389). According to Plaintiff, there was a triable issue as to whether this negligence caused his damages because Husch Blackwell's allegedly deficient advice culminated in its failure to advise him to exercise his options before settling his claim against Mueller, which "diminish[ed] his claim against Mueller, and

[6] Husch Blackwell also moved for summary judgment because the statute of limitations barred Plaintiff's claims altogether. The Court denied the motion on that ground, finding factual issues as to whether Missouri or Kansas law applies. (LF 732).

result[ed] in a less favorable settlement or a potentially smaller recovery had litigation been pursued against Mueller." (LF 396).

Plaintiff relied on his expert, John Tollefsen, an attorney based in Seattle, Washington and licensed to practice law in Washington, New York, and Oregon. (LF 389). Tollefsen stated simply that "proper research, consultation and analysis" were not done. (LF 389). But as Husch Blackwell pointed out in its reply in support of summary judgment, Tollefsen never stated—in his deposition or affidavit—that Plaintiff would have prevailed in any claim against Mr. Mueller, much less that he would have arrived at a better result. In fact, he refused to say suit should have been filed at all: "[N]o, I'm not saying specifically that he should have filed the lawsuit." (LF 675-76). Nor did Tollefsen say that the settlement was diminished as a result of Husch Blackwell's alleged negligence. *Id.*

Plaintiff nevertheless argued that his damages against Husch Blackwell are measured the same way they would have been in a suit against Mr. Mueller, by determining the profit Plaintiff would have made if he had exercised his options and sold the acquired stock at the highest price TiG's stock attained during the lock-up period. (LF 369).

Plaintiff had a different theory of causation and damages under his negligent drafting theory. He alleged "Defendants negligently drafted the [Settlement Agreement] by failing to require that the transfer of the subject stock be effective under the law of the United Kingdom." (LF 398). According to Plaintiff, he "did not receive the intended benefit of the [Settlement Agreement]" because the agreement failed to require Mueller

to provide certain documents required for the stock to be transferred under the laws of the United Kingdom. (LF 407). Plaintiff argued that his damages against Husch Blackwell could thus be measured by the agreement's liquidated damages clause (LF 400), which is calculated based on the value of the escrowed stock at the "highest closing price per share of TiG common stock as traded on the London Stock Exchange for the period [between] . . . March 15, 2002 and July 31, 2002." (LF 369).

F. Summary judgment is granted in Husch Blackwell's favor.

The trial court granted summary judgment in Husch Blackwell's favor on both of Nail's theories of negligence. (LF 734). The court concluded there were no disputed facts that could support a finding of negligence under Plaintiff's negligent advice theory. (LF 733). Nor was there any evidence from Tollefsen about "what a court or jury would have decided if the case" against Mueller had gone to trial. (LF 733-34).

The court alternatively held that because Plaintiff had expressly abandoned his claim against Mr. Mueller for breach of the stock option agreements, Plaintiff had waived his right to use that theory as a basis for damages against Husch Blackwell. (*Id.*) Moreover, the court decided as a matter of law that Plaintiff's claim of harm failed for want of proximate cause, specifically because "the fluctuation in market price is an intervening cause and is not the appropriate measure of damages." (LF 734).

Finally, the trial court held as a matter of law that there was no causal connection between the alleged negligent drafting and the liquidated damages provision in the Settlement Agreement. (LF 735). The court explained that Plaintiff could only recover any actual damages he sustained during the two-week delay Plaintiff experienced in

exercising his stock options while Mr. Mueller delivered the UK-required paperwork. (LF 735).[7]

After judgment was entered, Plaintiff moved for reconsideration to "clarify" his arguments against summary judgment. (LF 738). Plaintiff argued that Husch Blackwell had misunderstood his negligent advice theory, which in reality was that Nail should have been told to exercise his options immediately after the TiG merger so that Nail "would have had a better negotiating position to reach a settlement" or "he would have proof of damages." (LF 741).

In support, Plaintiff provided a "supplemental report" drafted by Tollefsen after the judgment had been entered. (LF 741). Tollefsen wrote for the first time that Husch Blackwell's failure to advise Plaintiff to exercise his options harmed Plaintiff because Plaintiff "settled his claims against Mr. Mueller without being placed in the proper legal position and without proper legal advice . . . . The settlement should have taken place with Mr. Mueller in breach of the contract facing potential litigation which could have resulted in a judgment of millions of dollars." (LF 757). Still, Tollefsen did not testify that Plaintiff would have prevailed in any claim against Mueller or would have achieved a better result—he never specified what the alleged "better negotiating position" would have secured. *Id.* The trial court denied Plaintiff's motion for reconsideration.

[7] Plaintiff later stipulated he suffered no damages during that brief delay. (LF 808).

Plaintiff appealed. The Missouri Court of Appeals reversed the summary judgment as to Plaintiff's negligent-advice theory, and affirmed the judgment in Husch Blackwell's favor on Plaintiff's negligent drafting theory. This Court then granted Husch Blackwell's application for transfer.

SUMMARY OF THE ARGUMENT

The trial court correctly saw this case for what it was – a disgruntled plaintiff second-guessing his own earlier decisions to settle his claims, and now trying to hold his former lawyers responsible for investment losses caused by someone else. Plaintiff's dispute here is not with Husch Blackwell, but with Richard Mueller, the individual who actually locked up Plaintiff's TiG stock options, thereby causing whatever losses Plaintiff now claims. Because Plaintiff failed to show that anything Husch Blackwell did proximately caused his loss, the trial court's judgment should be affirmed.

Plaintiff's first point contends that summary judgment was improper because his expert's testimony created triable issues as to whether Husch Blackwell's settlement-related advice was negligent and caused his damages. But Plaintiff failed to supply a critical element of proof, one until now required in all Missouri legal malpractice cases. He never proved a "case within a case" by showing that had he tried his case rather than settled it, he would have achieved a more favorable result.

Absent this mandatory showing, Plaintiff's malpractice claim failed. Plaintiff's principal theory, outlined in his petition and in his first point on appeal, was that Husch Blackwell negligently advised him to settle rather than sue Mueller for breach of contract. But Plaintiff's expert, John Tollefsen, never testified that a breach-of-contract suit would have been successful, or – critically – that it would have produced a better result than the settlement Plaintiff chose to accept. In fact, Tollefsen said it "doesn't matter" to his analysis whether Plaintiff filed suit or not. But without this showing, Plaintiff had no malpractice claim.

Once Plaintiff lost on summary judgment, he filed for reconsideration and tried to expand his liability theory by providing a new, "supplemental" affidavit from his expert Tollefsen. But Plaintiff's modified theory – that his "negotiating position" or damages proof was somehow compromised by Husch Blackwell's supposed negligence – suffers from the same flaw as his original claim. Tollefsen never provided the required explanation of what more Plaintiff could have obtained in settlement. And Missouri law in any event generally disfavors malpractice claims based on the claimed inadequacy of negotiated settlements because of the inherent speculation involved in trying to determine whether the other side would have accepted different terms.

Plaintiff's claim separately fails because his losses are both speculative and the result of an intervening cause. His damages theory depends on market losses that occurred when Mueller restricted Plaintiff's access to his stock options. But Missouri law precludes damage theories tied to the uncertainty of investment performance. Because Plaintiff's damages are foreclosed by this intervening cause–one that is inherently speculative–point one separately fails.

Finally, point one fails on an even more fundamental ground. Plaintiff never established that Husch Blackwell's fundamental advice was actually wrong, or that his claims here are based on anything other than his own considered decision to settle with Richard Mueller. All these grounds support summary judgment for Husch Blackwell on Plaintiff's claimed legal malpractice.

Plaintiff's second point attacks the trial court's alternative basis for summary judgment, which was that Plaintiff waived any claim based on Mueller's alleged breach

of the stock option agreements by actually suing Mueller for breach of contract – twice – and either dismissing or settling his claim both times. This second point is moot if the Court rejects Plaintiff's first point. Even so, the trial court was correct – Plaintiff cannot recover from his attorneys the same damages he voluntarily relinquished against Mueller both at his trial and in two separate settlement agreements.

Plaintiff's third point challenges the trial court's finding that he could not use the liquidated damages provision in his first Settlement Agreement with Mueller to prove damages against Husch Blackwell. Plaintiff's argument is that if Husch Blackwell had included additional terms in the Settlement Agreement, *and* if Mueller had agreed to them, *and* if Mueller had then failed to comply with them, Plaintiff could have recovered millions of dollars in liquidated damages from Mueller, damages that Husch Blackwell should now pay instead. This point, too, is defeated by the lack of causation evidence. Plaintiff cannot show – as he must for causation – that Mueller would ever have agreed to any such terms, much less that he would then have breached them and subjected himself to huge liquidated damages by refusing to perform simple tasks like delivering a UK Stock Transfer Form or paying a small stamp duty.

The trial court correctly rejected Plaintiff's attempt to obtain a windfall from his attorneys for whatever speculative profits he lost when TiG's stock price fell during the lock-up period. Because Husch Blackwell's advice had nothing to do with either the lock-up period or the decline of TiG's stock price, because it was not negligent, and most essentially because Plaintiff failed to show that any of this advice deprived him of a more favorable outcome, summary judgment was proper.

ARGUMENT

I. Summary judgment was proper because the trial court correctly determined that Plaintiff would not be able to prove essential elements of his negligence claim. (Response to Point I)

Standard of Review

The trial court's summary judgment decision is reviewed de novo. *Rice v. Shelter Mut. Ins. Co.*, 301 S.W.3d 43, 46 (Mo. banc 2009). Because this Court exercises de novo review, "the trial court's judgment can be sustained on any ground as a matter of law, even if different than the one posited in the order granting summary judgment." *Id.* (quoting *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 387-88 (Mo. banc 1993)).

Summary judgment is appropriate where (1) the facts make it impossible for the plaintiff to prove any one element of his claim, or (2) "after an adequate period of discovery, [plaintiff] has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of his elements." *Pool v. Farm Bureau Town & Country Ins. Co. of Missouri*, 311 S.W.3d 895, 906 (Mo. App. 2010). While the record is viewed in the light most favorable to the non-moving party, *ITT Commercial Fin.*, 854 S.W.2d at 376, "this Court will affirm the grant of summary judgment under any appropriate theory." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 664 (Mo. banc 2010).

A. Plaintiff failed to prove he suffered harm attributable to Husch Blackwell's advice.

Plaintiff cannot prove that he suffered any harm because of advice Husch Blackwell gave him. Although he was required to show that, but for the allegedly negligent advice, he would have had a more favorable outcome than the settlement he achieved, his expert admittedly failed to make this showing. This alone was fatal to Plaintiff's principal claim.

Plaintiff's theories of harm and causation have shifted throughout this case. In his petition, and in his initial response to Husch Blackwell's summary judgment motion, Plaintiff alleged that he was harmed because Husch Blackwell advised him to enter into the Settlement Agreement instead of filing a breach of contract suit against Mr. Mueller. (LF 14). Plaintiff also asserted that he was harmed because of advice Husch Blackwell gave him before the settlement, particularly what he claims was a failure to advise him to exercise his options immediately after the TiG merger, something he theorizes would have "set" the damages available to him in any lawsuit against Mr. Mueller. (LF 756-57). Finally, Plaintiff modified his arguments in a reconsideration motion to suggest that, because Husch Blackwell did not advise him either to exercise his options or sue Mueller, Plaintiff somehow achieved less than he could have in the Settlement Agreement. *Id.*

As set forth below, Plaintiff's arguments all fail for similar reasons. There is no expert testimony supporting causation. And in fact there is no connection between any damages and Husch Blackwell's alleged conduct. The trial court correctly determined

that Plaintiff could not have satisfied the damages and causation elements of his negligence claim.

1. Plaintiff failed to prove causation with respect to his negligent settlement claim.

Missouri law requires legal malpractice plaintiffs to prove as part of their claim both proximate cause and damages. *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo. banc 1997). As part of this requirement, Missouri courts have long required legal malpractice plaintiffs to prove a "case within a case" – to show that, but for their attorneys' negligence, they would have received a more favorable outcome. *See Day Adv. Inc. v. deVries & Assoc., P.C.*, 217 S.W.3d 362, 367 (Mo. App. 2007) (stating that when the "alleged damages are based on the resolution of the underlying action . . . , the plaintiff must prove a 'case within a case'") (quoting *Williams v. Preman*, 911 S.W.2d 288, 294 (Mo. App. 1995)); *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 732 (Mo. App. 2005) ("To prove damages and causation, the [legal malpractice] plaintiff must prove that but for the attorney's negligence, the result of the underlying proceeding would have been different.") (citing *Rodgers v. Czamanske*, 862 S.W.2d 453, 458 (Mo. App. 1988)). Where, as here, a claim is made that a case should have been tried rather than settled, it is specifically necessary for a plaintiff to show that the lawsuit, had it been brought, would have succeeded at least beyond the settlement results achieved. *See Baldridge v. Lacks*, 883 S.W.2d 947, 954 (Mo. App. 1994) (requiring expert testimony showing that malpractice plaintiff would have been "successful" had case been tried rather than settled); *see also* Restatement (Third) of Law Governing Lawyers § 53 cmt. b (2000)

(stating that plaintiff seeking to recover for attorney's negligence "must . . . prevail in a 'trial within a trial'" by proving that "but for the defendant lawyer's misconduct, the plaintiff would have received a more favorable judgment in the previous action"). And, except in "clear and palpable" cases, expert testimony is necessary to make this showing. *Baldridge*, 883 S.W.2d at 954. (quoting *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. 1990)).

Judged under this standard, Plaintiff's first theory of how Husch Blackwell caused him damage is meritless. Plaintiff asserts in his petition that if he had sued Mr. Mueller for breach of the stock option agreements immediately after the TiG merger instead of settling, he would have not only prevailed at trial, but also gained more than he did from the settlement. (LF 14). But there is *no* evidence this is true, much less the required expert evidence. To support his claim that he was negligently advised to settle, Plaintiff in this complex case was required to provide expert testimony that prosecuting a breach-of-contract case to judgment against Mr. Mueller would have produced a more favorable result than the settlement Plaintiff negotiated, agreed to, and received. *Baldridge*, 883 S.W.2d at 954; *see also Thiel v. Miller*, 164 S.W.3d 76, 82 (Mo. App. 2005). This he failed to do.

Plaintiff summed his theory up at his deposition: "I believe that if Blackwell had advised me to pursue litigation, *that it is possible* that I would have prevailed against Mr. Mueller and collected the damages that Mr. Mueller caused me to suffer." (LF 90, 369) (emphasis added). But plaintiff's own speculation about his "possibilities" is not evidence of causation; he needs expert testimony to make a prima facie case in all but the

most obvious cases. *Thiel*, 164 S.W.3d at 82. But his expert, Mr. Tollefsen, refused to testify that, but for Husch Blackwell's advice, Plaintiff could – much less would – have prevailed on a breach of contract claim against Mr. Mueller. (LF 637, 675-676). When asked if he thought Husch Blackwell was negligent for not filing suit against Mr. Mueller, Tollefsen merely said "it doesn't matter." (LF 675). Indeed, Tollefsen rejected the entire premise:

> Q: [A]re you claiming that there is any kind of negligence or legal malpractice on Mr. Carman's part because [Plaintiff] did not file a lawsuit against Mr. Mueller at that time?
>
> A: Well, the way I – the way that I analyze the case is that it doesn't matter whether he filed the lawsuit or not. He threatened litigation and he settled the litigation. So, no, I'm not saying specifically that he should have filed the lawsuit. He settled the lawsuit, and I'm claiming that he – in my opinion, that he did that negligently.

(LF 637, 675-76). This undisputed testimony demonstrates conclusively that Tollefsen refused to supply the expert opinion required to support a settlement-based legal malpractice claim in Missouri. If Plaintiff's own expert says it "doesn't matter" whether suit was filed or not, how can he cogently support a malpractice claim based on a theory that a lawsuit was necessary?

Plaintiff seemingly agrees (Br. at 56-57) that, as a general matter, he had an obligation to prove by expert testimony that he would have received a better outcome

absent Husch Blackwell's advice. But he claims that expert testimony was unnecessary here because, in this "clear and palpable case" of causation, he obviously would have prevailed in any breach-of-contract suit. But if causation was so clear, why did the expert sidestep the issue, and disclaim any responsibility for showing it? And expert testimony about "prevailing," or simply obtaining a verdict, would not have been enough. Plaintiff instead had to provide expert support for the claim that he would have achieved a *better result* if he had sued rather than settled. *See, e.g.*, *Baldridge*, 883 S.W.2d at 854. Here Plaintiff's claims involve an international stock-for-stock merger, the conversion of stock options, fluctuating stock prices, lock-up periods, breach of contract claims, and not one, but two settlements. There is nothing "clear and palpable" about Plaintiff's own self-serving conclusion that, in hindsight, he could have obtained more by prosecuting a suit against Mueller to judgment.

Plaintiff does suggest in passing (Br. at 57) that his expert testified by affidavit in a reconsideration motion that the lawsuit was "obvious" and a "no-brainer." But even if this could be considered a competent expert opinion (or a timely one, since it was first raised on reconsideration), at most this was an opinion that a failure by Mr. Mueller to deliver TiG shares to Plaintiff of course would have breached an agreement to do so. But it was manifestly *not* an opinion that Plaintiff could have recovered and collected significant damages from Mueller, or that he would have been better off suing rather than accepting the clear benefits of the settlement he negotiated (a five-year extension of the option period, placement of shares in escrow, and a $50,000 credit to purchase shares).

The two cases Plaintiff cites in support of his arguments do not help him. Both *Baldridge* and *London v. Weitzman*, 884 S.W.2d 674 (Mo. App. 1994), were dissolution cases in which the plaintiffs alleged their lawyers negotiated unfavorable settlements governing the distribution of marital property. *Baldridge,* 883 S.W.2d at 950*; London,* 884 S.W.2d at 676-77. Given the predictability of outcomes in dissolution cases, though, it was relatively easy to show with some certainty what would have happened but for the flawed advice given by the defendant attorneys. And both the *Baldridge* and *London* plaintiffs in fact did so with expert testimony.

Plaintiff nevertheless contends that Tollefsen's meager testimony is enough to raise a triable issue, again citing *Baldridge* and *London*. But the expert testimony in both cases established what the plaintiffs would have been entitled to, either in settlement or in litigation, with respect to the marital property, and both experts testified that a better result would have been achieved but for the lawyers' conduct. In *Baldridge*, the plaintiff settled for approximately $1 million, even though her husband owned $15 million in property. 883 S.W.2d at 949-50. At the malpractice trial, an expert explained that the defendant attorney had failed to trace any assets or even to determine what portion of them might be marital property. *Id*. Critically, the *Baldridge* expert also stated that Plaintiff *would have been entitled* to 55% of the actual marital property even though she had been advised to settle for a small fraction of that sum. 883 S.W.2d at 953.

London is like *Baldridge*. There, in a similar marital dissolution case, the negligent lawyer advised the client to take what turned out to be a mere twenty percent of the marital property. And he did so without doing any investigation into the property at

issue or even advising the plaintiff about her rights under Missouri law. *London*, 884 S.W.2d at 677. As in *Baldridge*, the *London* plaintiff's expert provided direct evidence of causation, testifying that she *would have been entitled* to at least "a 50/50 split" of the marital property but for her lawyer's advice to settle. *Id*.

The present case is different. Without any evidence that he would have achieved more by suing Mr. Mueller than by settling with him, Plaintiff failed to prove he was damaged by his decision not to bring that suit. The trial court correctly granted summary judgment on this basis.

Plaintiff also suggests that, when cases are settled, particularly before negligence is suspected, the need to prove proximate cause is somehow relaxed. He specifically takes issue with the trial court's suggestion that, under *Preman*, he had a "substantial burden" to overcome because he had chosen to settle rather than litigate. Plaintiff contends the "substantial burden" test only applies in cases like *Preman* itself, where settlement occurred after the plaintiff learned of the alleged negligence.[8] But Plaintiff's suggestion that the trial court applied an overly strict burden of proof is misguided. This

[8] The trial court also stated that a plaintiff must show the settlement was necessary to mitigate the damages flowing from defendant's negligence. (LF 733). This rule is often cited in legal malpractice cases. *See, e.g.*, *Day*, 217 S.W.3d at 367 (citing the rule where the alleged negligence occurred in settlement negotiations). In practice, the rule is no different from the requirement that a plaintiff prove a given outcome would have been different but for the defendant's conduct. *See id*.

Court reviews the propriety of summary judgment de novo, which means it will be affirmed on any basis supported by the record and the law. *Rice*, 301 S.W.3d at 46. Because Plaintiff's claims fail even under the relaxed standard he proposes, any error the trial court made in holding Plaintiff to a higher standard was harmless. Plaintiff's case failed even the most basic "but-for" causation standard, and summary judgment was proper.

The trial court in any event did not err in recognizing Plaintiff's substantial burden. Plaintiff reads too much into the fact that *Preman* was settled after the supposed negligence was discovered and new lawyers were retained. Speculation in settlement-based malpractice suits is always present, whether the settlement comes before or after the plaintiff learns of his attorney's alleged negligence:

> Settlement of the underlying claim creates speculation as to what could have otherwise been clear: the true merit of the underlying litigation, as distilled in the crucible of the courtroom.

Preman, 911 S.W.2d at 294. Thus, because Plaintiff here chose to settle, speculation is necessary about what Plaintiff would have received had he tried a breach-of-contract case against Mueller. Plaintiff's expert, who said it "doesn't matter" whether that lawsuit was even filed, did nothing to dispel that speculation.

Plaintiff also argues – incredibly – that he has "additional evidence regarding the likelihood of success" on his breach of contract claim against Mueller, evidence that he failed to submit below because Husch Blackwell did not assert on summary judgment

that he had any need to address the issue of a "case within a case." Br. At 58. But a principal basis for Husch Blackwell's motion was the speculative nature of Plaintiff's claim, including specifically a lack of causation between Plaintiff's decision to settle and any damage he sustained. (LF 25, 54-57). Husch Blackwell specifically argued that Plaintiff had failed to produce expert testimony on causation and damages on his failure to litigate claim (LF 595-96). This was a ground relied on by the trial court in granting summary judgment (LF 733-34). Plaintiff never explains – nor could he – why he never brought forth "additional evidence," even on reconsideration, despite his effort there to supplement his expert's testimony. (LF 756-57).

The trial court correctly required Plaintiff to prove damages and causation with "cogent expert testimony which intelligently analyzes the pertinent considerations." *Preman*, 911 S.W.3d at 297. Plaintiff's failure to meet this straightforward test required summary judgment in Husch Blackwell's favor.

2. Plaintiff similarly failed to show that any of the allegedly negligent advice he received made any difference.

In an attempt to salvage his negligent-advice claim, Plaintiff sprinkles a series of complaints throughout his brief about Husch Blackwell's allegedly deficient advice. All of this advice, though, bears on the same question – whether to settle with or sue Richard Mueller. And because Plaintiff failed to show that any suit against Mueller would have produced a more favorable outcome, none of this additional, allegedly deficient "advice" can support a malpractice claim.

At various points throughout his brief, Plaintiff suggests Husch Blackwell was negligent in:

- "not analyzing and discussing damages with Plaintiff prior to advising him to settle the claim against Mr. Mueller" (Br. at 46).
- advising Plaintiff "how to protect his interest" or about "steps necessary to force Mueller to comply with the agreement or be in breach" (Br. at 36);
- telling Plaintiff that there were "poor prospects" for any lawsuit against Mueller (Br. at 34);
- failing to advise Plaintiff that there was "a legal need to exercise any of the options" (Br. at 47);
- telling Plaintiff that the "legend" affixed to the TiG stock would preclude its sale on the London stock exchange (Br. at 46-47).
- failing to tell Plaintiff to "consider exercising all his options immediately after the TiG merger" so as "to preserve the value of his damage claim" (Br. at 48, 55).

All of this claimed negligence ultimately relates to the decision whether to sue Mr. Mueller rather than settle with him. But without expert testimony that such a suit would have been "successful" – that it would have produced a better result than the settlement – Plaintiff cannot make a submissible case of legal malpractice. These allegations of additional "negligence" thus add nothing to his claim.

Plaintiff's repeated suggestion that the alleged failure to advise him to exercise his options somehow prevented him from establishing his "minimum" damages or otherwise preserving the "value of his damages claim" (Br. at 48) is particularly misplaced. Without competent evidence that Plaintiff would have achieved a better result against Mueller had he chosen to submit his claim to a fact-finder, the availability of a particular damages remedy in such a suit is irrelevant.

Not only is it irrelevant, but Plaintiff's theory about "fixing" a supposed "minimum" amount of damages is defeated by common sense. Plaintiff admits he eventually filed suit against Mr. Mueller, alleging that the very act of agreeing to the lock-up period was a breach of the stock option agreements that entitled him to the same damages he now seeks. (LF 86, 184, 196, 369). Husch Blackwell's advice did not prevent Plaintiff from "fixing" anything.

Nor did Plaintiff's expert ever explain how exercising options during the lock-up period could have produced a stronger damages argument in Plaintiff's case against Mueller. (LF 693). Tollefsen merely stated that: "If he did not exercise the option, [Plaintiff] *might* not be able to prove damages because they would have been speculative." (LF 757) (emphasis added). Neither Plaintiff nor his expert offered further support for this inadequate conclusion.

None of Husch Blackwell's advice prevented Plaintiff from arguing that Mueller was liable for the very damages Plaintiff now wants Husch Blackwell to pay. Summary judgment was proper for this reason as well.

3. Plaintiff's more recent speculation that the settlement terms might have been different cannot support a prima facie case of legal malpractice.

Plaintiff's final effort to show causation fares no better. Plaintiff claimed in his reconsideration motion below that he was placed in a weaker bargaining position during settlement negotiations with Mueller because of Husch Blackwell's advice, and particularly by the claimed failure to advise Plaintiff to exercise his options, a step Plaintiff says would have improved his ability to negotiate. But this type of conjecture-based argument is precisely why courts require reasoned expert testimony in settlement-based malpractice claims. *See Preman*, 911 S.W.2d at 297; *see also Novich v. Husch & Eppenberger*, 24 S.W.3d 734, 736-37 (Mo. App. 2000) (rejecting as a matter of law damages theory that, but for negligent advice, plaintiff would have settled underlying suit for less than the damages ultimately awarded against him); *Steward v. Goetz*, 945 S.W.2d 520, 533 (Mo. App. 1997) (holding that causation could not be shown without expert testimony explaining how the transaction would have been different but for the attorney's advice).

In *Novich*, the legal malpractice plaintiff lost at trial, where he was a defendant. He alleged that, but for his attorney's negligence, he could have settled the claim against him for less than the amount of that trial loss. The *Novich* court rejected that theory for two reasons. First, the malpractice plaintiff still had the obligation to show that he would have prevailed at trial—that the defense of his claim "would have been successful." 24 S.W.3d at 736-37. Importantly, though, the *Novich* court separately held that Novich's

proof that the adverse party in the underlying case would have accepted different terms – less than was actually owed – was "speculative and inconsistent." *Id.* at 737. Nail's claim here fails for the same reason – there is no evidence that Mueller would have accepted different settlement terms, or that Nail could have received anything more in the Settlement Agreement.

The decision in *Lange v. Marshall*, 622 S.W.2d 237 (Mo. App. 1981), is particularly instructive. There, as here, the plaintiff sued his attorney for failing to negotiate the settlement to which plaintiff felt entitled. The claimed negligence consisted of similar strategic decisions, like whether suit should have been filed and whether the attorney should have demanded better terms. But the court rejected this entire theory on causation grounds, succinctly noting that "[t]here is no evidence that [the underlying defendant] would have voluntarily agreed to a settlement acceptable to plaintiff had [the attorney] defendant done the things he admittedly did not do." 622 S.W.2d at 238. The same is true here. There is no evidence, expert or otherwise, that Plaintiff's "negotiating position" would have been improved so as to produce a more favorable settlement, even if Husch Blackwell had done everything Plaintiff now claims was necessary. In the words of the *Lange* court, it is the "rankest conjecture and speculation" to conclude that Mueller would ever have agreed to better terms than he did. *Id.*; *see also Bryant v. Bryan Cave, LLP*, 400 S.W.3d 325, 340 (Mo. App. 2013) (holding that a "plaintiff must show that an agreement more preferable to the plaintiff likely would have been consummated but for the negligence of the defendant attorney."); *Arnold v. Ingersoll-Rand Co.*, 908

S.W.2d 757, 763 (Mo. App. 1995) (affirming exclusion of evidence from plaintiff about what he "might have done under a hypothetical state of facts" as speculative).

Consider Plaintiff's deficient proof. Plaintiff has shed no light on the considerations at play in either his – or Mueller's – decision to settle. Nor did Tollefsen provide any opinion that Mueller would have paid more or given greater concessions if Husch Blackwell had given the advice Plaintiff now says was missing. There is nothing approaching the required "cogent expert testimony which intelligently analyzes the pertinent considerations." *See Preman*, 911 S.W.2d at 297; *see also Schweizer v. Mulvehill*, 93 F. Supp. 2d 376, 396 (S.D.N.Y 2000) (granting summary judgment in defendant's favor, holding that a "client-plaintiff will not prevail on a malpractice claim where the damages are too speculative and incapable of being proven with reasonable certainty" (internal quotations omitted)).

Here Plaintiff's evidence failed to provide the needed certainty. His expert never identified what more would have been accomplished in the Settlement Agreement absent Husch Blackwell's supposed negligence. Summary judgment was proper on this claim as well.

B. Plaintiff's malpractice claim separately fails because his claimed damages are based on fluctuations in the stock market, an independent cause that cannot be attributed to Husch Blackwell.

Plaintiff's claim for damages fails for yet another reason – as the trial court found (LF 734), he can show neither direct nor proximate cause because his damages theory is

based on fluctuations in stock prices that had nothing to do with Husch Blackwell's advice.

At its core, Plaintiff's entire suit is an effort to get *his attorneys* to pay for damages caused by *Mr. Mueller's* decision to agree to the lock-up period, which allegedly prevented Mueller from transferring any TiG stock to Plaintiff for one year. According to Plaintiff's perfect hindsight, if he could have sold his TiG stock at its highest per-share price during the one year lock-up period he would have earned millions more than the $600,000 in profit he ultimately made.

In legal malpractice cases a plaintiff must show both direct and proximate cause. *Mogley v. Fleming*, 11 S.W.3d 740, 747 (Mo. App. 1999). Judgment as a matter of law is proper "where the evidence connecting the injury to the negligence amounts to mere conjecture and speculation." *Steward*, 945 S.W.2d at 522; *Lange*, 622 S.W.2d at 238. Summary judgment is also proper where an intervening cause has broken the causal chain such that "the result is no longer the natural and probable consequence of the primary cause or one which ought to have been anticipated." *Collins*, 157 S.W.3d at 732 (quoting *Love v. Deere & Company*, 684 S.W.2d 70, 75 (Mo. App. 1985)); *Coin Acceptors, Inc. v. Haverstock, Garrett & Roberts, LLP*, 405 S.W.3d 19, 26 (Mo. App. 2013) (holding that judge's independent reasoning was intervening cause, breaking the link between the attorney's failure to timely cite particular authority and the client's loss).

Here, the unanticipated, sustained decline of TiG's stock price during, and following, the lock-up period is the independent intervening cause of Plaintiff's claimed damages. Missouri courts have long held that losses resulting from fluctuations in a

market, or from changing market conditions, are too speculative to support damages in a negligence action. *See, e.g., Reynolds v. W. Union Tel. Co.*, 81 Mo. App. 223 (1899) ("[p]rofits which depend upon the fluctuation of the markets and hazard and chances of business are considered too contingent and speculative to enter into a safe or reasonable estimate of damages."); *accord Gray v. Wabash Ry.*, 277 S.W. 64, 66 (Mo. App. 1925) (when profits depend on "the fluctuations of the market and such like, they are held not receivable because no definite proof can be obtained whereby the loss can be calculated").

Other jurisdictions have agreed: defendants in negligence and fraud cases are not liable for damages caused by market fluctuations. *See, e.g., Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (noting that a general fall in the stock prices could be an intervening cause of plaintiff's loss); *see also Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995) (plaintiff damaged by a decline in stock value due to recession); *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 772 (2d Cir. 1994) (investor's loss caused by market-wide real estate crash); *Movitz v. First Nat'l Bank of Chicago*, 148 F.3d 760 (7th Cir. 1998) (Posner, J.) (despite bank's negligent evaluation of a real estate investment, bank held not liable for loss in value of real estate caused by unanticipated and unforeseeable collapse of Houston real estate market); *In re Cantanella & E.F. Hutton & Co., Inc. Secs. Litig.*, 583 F. Supp. 1388, 1415-16 (E.D. Pa. 1984) (failure to disclose pending litigation to investors was not proximate cause of investor-plaintiffs' injuries for alleged fraudulent misrepresentation "where the ebbs and flows of the stock market intervened.").

Courts have applied this principle in professional negligence actions. In *Oregon Steel Mills Inc., v. Coopers & Lybrand, LLP*, 83 P.3d 322 (Or. 2004), the plaintiff steel company alleged that the defendant accounting firm delayed the public offering when it discovered an error in a previous audit. *Oregon Steel Mills*, 83 P.3d at 323-24, 333. During the delay, the company's market price fell and the steel company sued to recover damages for its lost profits. But the Oregon Supreme Court held that "[a]s a matter of law, the risk of a decline in plaintiff's stock price . . . was not a reasonably foreseeable consequence of defendant's negligent acts . . . ." *Id.* at 345. In affirming summary judgment, the Oregon Supreme Court adopted the trial court's reasoning:

> Every public stock issue involves the inherent risk of market fluctuations affecting securities price at the time of issue. Plaintiff's theory would shift the risk of that fluctuation to the professionals assisting in the offering wherever the negligence of the professional caused a delay in the sale, even though market factors wholly unrelated to the professional negligence were the sole cause of the drop in the issuing price. At the same time, the benefit of any market increase occurring during the delay would inure to the benefit of the issuing business.
>
> . . .
>
> While [defendant's] accounting errors caused [plaintiff's] delay in getting the security to market, these errors had

> nothing to do with the decline of the price of [plaintiff's] stock and the rise in interest rates."

Id. at 337. Faced with a similarly negligent defendant, the Seventh Circuit drew the same line, observing that: "[t]he legal system is busy enough without shouldering the burden of providing insurance against business risks." *Movitz*, 148 F.3d at 763.

Here, Plaintiff admits his damages are predicated on a comparison between the gains he actually realized on the exercise and sale of his TiG options and the value of TiG stock during the lock-up period – a measure unquestionably determined by market fluctuations. (Br. at 54). But as was true of the defendant in *Oregon Steel Mills*, Husch Blackwell's conduct did not cause the market-driven decline in TiG's stock price. The market fluctuations are an intervening cause, which severs any possible connection between Plaintiff's alleged loss and Husch Blackwell's alleged negligence.

Plaintiff nevertheless argues that the decrease in the stock price was foreseeable and that, because Husch Blackwell's actions allegedly caused a delay in the exercise of his options, causation was an issue for the jury. Foreseeability, while not present here, is beside the point because Plaintiff cannot show Husch Blackwell was the "but for" cause of *any* delay-related damages. *See Collins*, 157 S.W.3d at 731 (requiring both proximate and direct cause in malpractice case); *Mogley*, 11 S.W.3d at 747 (same). Plaintiff never alleges that Husch Blackwell could have done something to actually enable him to exercise his options and sell his shares during the lock-up period Mueller and TiG agreed

upon.[9] And, as explained above, Husch Blackwell's advice did not prevent Plaintiff from arguing that Mueller should pay for alleged losses caused by the decrease in TiG's stock price during the lock-up period.

Moreover, Plaintiff's causation argument separately fails because it is based on the assumption that he would have known what the highest stock price would be ($6.42) and that he would have decided to exercise his options and sell the acquired stock at that exact price. In short, Plaintiff's theory assumes he could have timed the market perfectly. This speculation has no support in the record and cannot support a prima facie case for causation. *See Steward*, 945 S.W.2d at 533; *Arnold*, 908 S.W.2d at 763. If the stock price had gone up instead of down during the lock-up period, Plaintiff would have suffered no damages, which again proves that market fluctuations are the intervening cause. *See Coin* Acceptors, 405 S.W.3d at 26.

Rather than accepting the risks that all other stock option-holders bear, Plaintiff wants to have Husch Blackwell insure him against market risks and guarantee him the absolute maximum value that his options ever attained. Husch Blackwell never undertook any such duty, nor does the law impose one. The trial court correctly held that this alternative ground barred Plaintiff's malpractice claim.

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[9] If Plaintiff is referring to the brief delay he experienced trying to exercise his options at the end of the lock-up period, his argument is meritless because Plaintiff stipulated that he suffered no damages during that time. (LF 808).

C. There is no evidence that Plaintiff's voluntary decision to settle was based on negligent advice.

Plaintiff's principal malpractice claim fails on an even more fundamental ground – he never showed that Husch Blackwell's fundamental advice was wrong, or that his decision to settle was based on anything other than his own voluntary choice.

When a decision to litigate or settle a case is at hand, an attorney has the responsibility to advise the client about the possible courses of action in light of the client's goals. The attorney must assess the dispute, including the risks and benefits of taking a case to trial or reaching a settlement, and communicate the assessment to the client. *See* Restatement (Third) of Law Governing Lawyers § 20 (2000) ("A lawyer must notify a client of decisions to be made by the client . . . and must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). But the actual decision to settle a claim or file suit always rests with the client, and it certainly did in this instance. *See, e.g., Leffler v. Bi-State Dev. Agency*, 612 S.W.2d 835, 836 (Mo. App. 1981); *S.W. Bell Tel. Co. v. Roussin*, 534 S.W.2d 273, 277 (Mo. App. 1976).

Faced with a choice to settle or file suit against Mueller, Plaintiff decided to settle. Plaintiff testified that he and Carman had more than twenty conversations about the possibility of suing Mr. Mueller. (LF 98-99, 608). As Plaintiff said, "I clearly understood I always had the option to sue." (LF 114). But he never told Husch Blackwell to file a lawsuit. *Id.* Plaintiff instead admits to voluntarily executing the Settlement Agreement and Escrow Agreement in March 2002, and receiving its benefits. (LF 732-33).

The terms of the Settlement Agreement were dictated by Plaintiff. The settlement expressly included the three things he sought from Mueller: (1) the stock was put in escrow, (2) Plaintiff's option period was extended to five years, and (3) the amount Plaintiff would have to pay to exercise his options was effectively reduced by the $50,000 credit he received to exercise his options. (LF 107, 679). These are clear, substantive benefits sought by Plaintiff and secured to him by the Settlement Agreement. As the trial court found, Plaintiff simply cannot prove Husch Blackwell's conduct fell below the standard of care when the settlement he voluntarily entered into actually achieved his stated goals.

Not only did Plaintiff voluntarily settle his claims on his terms, but he failed to produce evidence that the advice Husch Blackwell gave him was incorrect in any meaningful sense. As the court in *Thiel* explained, "[c]ommon sense dictates that counsel's failure to engage in a futile act would not fall below the required standard of care." *Thiel*, 164 S.W.3d at 85 (finding that there needed to be evidence establishing that a conservatorship, instead of a trust, would have accomplished the client's goals at the time). Put another way, a plaintiff at a minimum must show that the challenged advice was incorrect. *See Dixon Ticonderoga Co. v. Estate of O'Connor*, 248 F.3d 151, 172 (3d Cir. 2001) (finding that the failure to research the statute of limitations is irrelevant if the advice given regarding it is correct: "we fail to see how receiving correct legal advice could ever cause harm to a client").

Plaintiff failed to make this threshold showing. His principal theory – at least as it has evolved to date – is that Husch Blackwell did not properly analyze his potential

breach of contract claim, so that it should not have advised Plaintiff to settle before exercising his options or filing suit against Mueller. (Br. at 46-48; 55-56). But Plaintiff's expert did not give an opinion that Husch Blackwell was wrong to tell Plaintiff that he would have difficulty exercising his options in light of Mueller's agreeing with TiG to lock up the stock. (LF 562-71; 667-76; 756-57; 690-93). Tollefsen merely hinted that Plaintiff *might* have been able to sell his shares if he could have first somehow successfully exercised his options. (LF 566, 674). Similarly, Tollefsen did not testify that Husch Blackwell's evaluation of the merits of Plaintiff's breach-of-contract case against Mr. Mueller was wrong. In fact, he specifically refused to give an opinion that Plaintiff would have prevailed on that claim. (LF 637, 675-76).

In the end, all Tollefsen could do was speculate about whether issues were researched properly, and whether Husch Blackwell and Mr. Carman used a faulty process in determining what advice to give Plaintiff. (LF 693, 756-757). As one example, Plaintiff suggests that had Husch Blackwell consulted with its London office it might have determined that the restrictive legend on TiG's stock certificates would not prevent Plaintiff from "immediately monetizing his options." (Br. at 11). But as Husch Blackwell told Plaintiff, Mr. Mueller had already agreed with TiG not to transfer his stock to Plaintiff in the first place. That agreement, not the language on TiG's stock certificates, prevented Mueller from transferring any stock to Plaintiff during the lock-up period. Evidence about the legend on the stock certificates (LF 671, 674) thus does not cure Tollefsen's fundamental refusal to say that Husch Blackwell's advice regarding the impact of the lock-up agreement was wrong. Because Tollefsen was unwilling to take

that necessary step, his opinion cannot support a prima facie case that Husch Blackwell's advice was negligent. *See Thiel*, 164 S.W.3d at 85; *see also Dixon Ticonderoga*, 248 F.3d at 172.

Plaintiff tries to gloss over the gaps in his proof by once again comparing this case to *Baldridge*. But in *Baldridge*, as noted, the settlement concerned a marital estate. There an expert testified that plaintiff might reasonably have expected to receive half or more of that estate, and showed that the actual advice given was negligent because the defendant attorney advised the plaintiff to settle for a far lower specific sum without ever determining the estate's true value. *See Baldridge*, 883 S.W.2d at 950. Thus, unlike here, in *Baldridge* there was evidence that the attorney's advice was actually wrong.

Plaintiff makes no argument that Husch Blackwell failed to inform him about his right to exercise his options or about his right to sue for breach of the stock option agreements. He admits that he voluntarily entered into the Settlement Agreement and that he was directly involved in negotiating its terms. Plaintiff's expert refused to say that Husch Blackwell's ultimate analysis of any of these issues was wrong. He merely quibbles about the underlying process Husch Blackwell used to arrive at those unchallenged conclusions. *See* LF 693, 756-757. Plaintiff's evidence thus cannot even establish negligence in the first instance, so that his first point separately fails.

II. Plaintiff's abandonment of his breach of contract claim against Mr. Mueller at trial separately defeats any claim that Husch Blackwell's advice caused him any harm. (Response to Point II)

Standard of Review

The standard of review set out above in Point I also applies to Point II.

In his second point Plaintiff argues the trial court erred in making the alternate finding that he had waived any right to obtain damages based on a claim Plaintiff abandoned and has now twice settled. The point fails at the outset because it does not supply an independent basis for reversal should this Court deny Plaintiff's first point. Plaintiff's second point can thus be rejected as moot.

Mootness aside, Plaintiff is wrong when he contends that Husch Blackwell lost its waiver argument by not including it as an affirmative defensive in the answer. Husch Blackwell explicitly stated waiver as its very first affirmative defense:

> 1. Defendants advised Plaintiff of Plaintiff's legal options as they pertain to Mr. Mueller, including potential litigation against Mr. Mueller. Plaintiff knowingly opted not to pursue litigation when he entered into the Dispute Settlement Agreement, and, for some period thereafter, opted not to exercise his options under the Dispute Settlement Agreement. Accordingly, Plaintiff's claims are barred under the doctrines of estoppel, laches, and *waiver*.

(LF 18) (emphasis added). Moreover, Plaintiff failed to preserve this argument for appeal because it was not made in opposition to summary judgment. *See Schwartz v. Custom Printing Co.*, 926 S.W.2d 490, 493 (Mo. App. 1996) ("A party cannot raise an argument against a grant of summary judgment for the first time on appeal.").

As to the merits, the trial court correctly refused to let Plaintiff rely on Mueller's alleged breach of the stock option agreements to prove damages against Husch Blackwell. The principles of waiver and abandonment apply with full force here. "A waiver is an intentional relinquishment of a known right." *Austin v. Pickett*, 87 S.W.3d 343, 348 (Mo. App. 2002) (internal citation omitted); *see also State v. Bucklew*, 973 S.W.2d 83, 90 (Mo. banc 1998) (defining "waiver" as "an intentional relinquishment or abandonment of a known right or privilege."). To constitute waiver, "conduct must be so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible." *Austin*, 87 S.W.3d at 348 (internal citations omitted).

Plaintiff has twice abandoned any right to damages he could have been awarded for breach of the stock option agreements. Plaintiff first settled his claim against Mr. Mueller in the Settlement Agreement and received a $50,000 credit with which to exercise his options. But when he had trouble exercising his options in light of the United Kingdom's documentary requirements, Plaintiff filed suit against Mr. Mueller for breach of the Settlement Agreement. That lawsuit included the alternative count to rescind the Settlement Agreement and claim damages for Mueller's alleged breach of the stock option agreements. As Plaintiff admits, before his case was submitted to the jury,

he expressly relinquished this latter claim and elected instead to seek damages solely for breach of the Settlement Agreement. Judgment was entered against Plaintiff on that remaining claim. But while the case was on appeal, Plaintiff and Mueller reached *another* settlement agreement, which garnered Plaintiff *another* $50,000 option credit.

Now, though, Plaintiff wants to hold Husch Blackwell liable for the same damages he elected not to pursue in his trial against Mueller. He wants to act as if he had rescinded the Settlement Agreement (though he has actually benefitted from it by obtaining $100,000 in option credits), and to now recover damages from Husch Blackwell based on Mueller's breach of the stock option agreements, a claim the Settlement Agreement was meant to resolve and a claim Plaintiff later explicitly abandoned in his suit. To allow Plaintiff's claim to proceed would thus undermine Missouri's election of remedies and waiver law. *See, e.g.*, *Neiswonger v. Margulis*, 203 S.W.3d 754, 760 (Mo. App. 2006) (holding that, if a defendant has refused to comply with a settlement agreement, a plaintiff may either "enforce the settlement agreement *or* abandon the settlement and proceed under the original cause of action") (emphasis added); *see also Wiley v. Mitchell*, 106 Fed. Appx. 517, 521 (8th Cir. 2004) (applying Missouri law and holding that acceptance of benefits under a settlement agreement is "inconsistent with an intent to rescind or disaffirm the settlement agreement and amount[s] to a waiver of [the] right to rescind").

Allowing Plaintiff to pursue this abandoned claim could easily produce a windfall. As Plaintiff admits, he has obtained in the Mueller settlements $100,000 in credit toward exercising his options. Plaintiff has now used that credit, in addition to his own money, to

purchase some 1.8 million shares of TiG stock, the vast majority of which Plaintiff has sold for a $600,000 profit. Plaintiff should not now be heard to argue he is entitled to recover millions of dollars *more* against Husch Blackwell for damages that Plaintiff might have recovered on the breach of contract claim he abandoned and fully released.

Nor is there any evidence that Plaintiff was somehow forced by Husch Blackwell's alleged negligence to abandon any claims in his suit against Mueller. Indeed, Plaintiff makes no real effort to explain how Husch Blackwell's conduct had anything to do with Plaintiff's deliberate election of remedies.

In sum, the Court need not reach the merits of the waiver issue if Plaintiff's first point is denied. But Plaintiff's decision to accept the benefits of the Settlement Agreement, instead of submitting his claim for breach of the stock option agreements against Mr. Mueller, makes it impossible for Plaintiff to now recover damages from Husch Blackwell based on that latter claim. Plaintiff's second point should be denied for both of these reasons.

III. The trial court correctly held that Plaintiff's negligent drafting theory failed because there was no causal link between the negligence alleged and the damages sought. (Response to Point III)

Standard of Review

The standard of review set out above in Point I applies to Point III.

Plaintiff's third point contends that the trial court erred by rejecting his argument that he is entitled to millions of dollars in liquidated damages under the Mueller Settlement Agreement as a remedy for the supposedly negligent drafting of that same agreement. But the trial court was correct that the liquidated damages provision could apply only to the parties to the Settlement Agreement – Plaintiff and Mr. Mueller. *See Landstar Invs. II, Inc. v. Spears*, 257 S.W.3d 630, 632 (Mo. App. 2008) (finding a contract imposes no "obligation or liability on one not a party to it").

Plaintiff asserts, however, that but for Husch Blackwell's alleged drafting error, the liquidated damages provision would have been triggered, so that Plaintiff now claims he is entitled to recover the liquidated measure of damages not from Mueller, but from Husch Blackwell.

The specific negligence Plaintiff asserts in this third point is that Husch Blackwell should have added additional terms to the Settlement Agreement, terms that would have expressly required Mueller to complete and submit a U.K. Stock Transfer Form and pay a stamp duty of $285. (Br. at 70). According to Plaintiff, had the Settlement Agreement proposal included those terms, Mueller would not only have agreed to them, but then would have breached these simple terms, thus subjecting himself to some $8.5 million in

liquidated damages, the same amount Husch Blackwell should now pay. (Appellate Brief at 70).

This theory, like so much of Plaintiff's case, is grounded on pure speculation. There is nothing in the record to suggest Mueller would have agreed to the liquidated damages provision Plaintiff now proposes. *See Bryant*, 400 S.W.3d at 400; *Arnold*, 908 S.W.2d at 763. But even if he had, Mueller took care to comply with the Settlement Agreement at every turn. When informed that the additional step of submitting the U.K. Stock Transfer Form was necessary, even though the Settlement Agreement did not explicitly require it, he promptly complied. And if the Settlement Agreement had expressly required Mueller to pay the $285 stamp duty, and Mueller had agreed to do so, what evidence is there that Mueller would have failed to pay that small amount, and would have instead chosen to incur millions of dollars in liquidated damages? No evidence supports a finding that "but for" Husch Blackwell's so-called drafting error Plaintiff would have recovered millions of dollars in liquidated damages from Mueller.

Plaintiff tries to avoid the speculative nature of his theory by contending that the liquidated damages amount can be recovered from Husch Blackwell because the failure to require Mueller to deliver all the necessary documents could (and did) delay Plaintiff's ability to control the stock once he decided to exercise his options. (Appellant's Sub. Br. at 78). According to Plaintiff, it was impossible to quantify his damages from such a delay; hence the liquidated damages provision. But as the trial court found, only Plaintiff

and Mueller—the parties to the liquidated damages provision—can be bound by that pre-determined measure of damages.[10] (LF 735).

Plaintiff in any event is foreclosed from arguing he was harmed by any delay here. He cannot recover the amount provided for in the liquidated damages clause because he deliberately waited two years before actually paying the stamp duty to register the stock. Every plaintiff has a duty to take reasonable steps to mitigate his damages. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 391 (Mo. App. 1998). Plaintiff's failure to pay the $285 stamp duty for two years bars him from claiming any actual damages from that

[10] This argument separately fails because it runs afoul of Mo. R. Civ. P. 83.08, which states that a substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." Plaintiff's third point relied on in his initial Court of Appeals brief makes no mention of his new theory. He instead maintained in Point III that reversal is necessary because had the Settlement Agreement included the provisions he says were missing, Mueller would have been in breach and thus liable for the liquidated damages. (Br. at 65). To the extent Plaintiff's argument strays from the text of Point III of his Court of Appeals brief, this Court should decline to review it. *See Smith v. Brown & Williamson Tobacco Corp.*, 410 S.W.3d 623, 638 (Mo. banc 2013) (noting that "the questions for decision on appeal are those stated in the points relied on, and those not there presented will be considered to be abandoned" (internal quotations omitted)); *also Essex Contracting, Inc. v. Jefferson County*, 277 S.W.3d 647, 656 (Mo. banc 2009).

delay. And Plaintiff admits he suffered no damages during the two-week delay while Mueller executed the Transfer Form.

Point three fails for want of any causal link between the liquidated damages remedy and Husch Blackwell's alleged negligence. This Court should affirm the trial court's summary judgment on this issue and reject Plaintiff's third point on appeal.

CONCLUSION

The trial court's judgment in favor of Husch Blackwell should be affirmed.

CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(B)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function of Word by which it was prepared, contains 13,187 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, the signature block and the appendix.

The undersigned further certifies that the electronic copy of this brief filed with the Court is in PDF format and complies with Missouri Supreme Court Rules and is virus free.

Respectfully submitted,

POLSINELLI PC

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CERTIFICATE OF SERVICE

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