IN THE SUPREME COURT OF MISSOURI

Case No. SC93543

BRIAN NAIL,

Plaintiff/Appellant,

v.

HUSCH BLACKWELL SANDERS, LLP,

Defendant/Respondent.

Appeal from the Circuit Court of Jackson County, Missouri
Case No. 0916-CV15237

SUBSTITUTE BRIEF OF *AMICUS CURIAE* MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Missouri Organization of Defense Lawyers ("MODL") is an association of Missouri attorneys dedicated to promoting improvements in the administration of justice and optimizing the quality of the services that the legal profession renders to society. The attorneys who compose MODL's membership devote a substantial amount of their professional time to representing defendants in civil litigation, including individuals involved in legal malpractice claims. As an organization composed entirely of Missouri attorneys, MODL is concerned and interested in the establishment of fair and predictable laws affecting tort litigation involving individual and corporate clients that will maintain the integrity and fairness of civil litigation for both plaintiffs and defendants.

As discussed in this Amicus Brief, MODL supports Respondent's position that causation proven through expert testimony is a necessary element of a legal malpractice claim. Further, MODL supports Respondent's argument that alleged damages based on stock market fluctuations cannot sustain a legal malpractice claim.

CONSENT OF THE PARTIES

Counsel for Plaintiff objects to the filing of this *Amicus Curiae* Brief. MODL filed a Motion for Leave to File Amicus Curiae Brief this brief pursuant to Rule 84.05(f)(3). That Motion was sustained on December 5, 2013.

JURISDICTIONAL STATEMENT

MODL adopts the Jurisdictional Statement of Respondent.

STATEMENT OF FACTS

MODL adopts the Statement of Facts of Respondent.

ARGUMENT

I. Lack of Expert Testimony That Plaintiff/Appellant Would Have Obtained a Better Outcome from the Trial of His Case Versus the Settlement He Negotiated ("Case Within a Case") Is Fatal To His Claim. (Response to Point I).

A. Causation In Tort Cases.

In all tort cases, the plaintiff must prove that the defendant's conduct was an actual cause, or cause-in-fact, of plaintiff's injury. *See City of St. Louis v. Benjamin Moore & Company*, 226 S.W.3d 110, 113 (Mo.banc 2007). "Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictate that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought." *Id. at 113-14 (quoting Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. banc 1993)). At issue in this case is whether the above proposition remains true as to the legal profession.

B. Causation in Legal Malpractice Cases ("Case Within a Case").

Appellant failed to present evidence that, "but for" allegedly negligent legal advice, he would have had a more favorable outcome. This requirement, sometimes called proof of the "case within a case," is necessary to establish both proximate and "but for" causation in

a legal malpractice claim. *See Day Advertising, Inc. v. Devries and Associates, P.C.,* 217 S.W.3d 362, 367 (Mo. App. 2007). At its core, the "case within a case" requirement really just establishes basic causation in fact. A plaintiff who cannot meet this standard cannot establish the basic element of causation. *Id*. (*citing Mogley v. Fleming*, 11 S.W.3d 740, 747 (Mo. App. 1999)). Where a claim is made that a case should have been tried rather than settled, it is 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).

Causation in fact is an element of all professional liability torts. *See eg. Callahan*, 863 S.W.2d at 862 (health care providers); *Meyer v. Purcell*, 405 S.W.3d 572, 578 (Mo. App. 2013) (attorneys); *Rolls v. Ernst & Young*, 871 S.W.2d 632 (Mo. App. 1994) (accountants); *Duncan v. Missouri Bd. for Architects, Professional Engineers and Land Surveyors*, 744 S.W.2d 524 (Mo. App. 1988) (engineers). The nature of legal representation, by necessity, creates the "case within a case" requirement. However, this is no different than the causation requirement in a medical negligence case that a physician's care must actually cause the injury, or that an accountant's actions be the cause of additional tax liability. Exempting plaintiffs from proving this causation requirement in actions against attorneys would impose liabilities on this profession not imposed on, or contemplated against any other tortfeasors. Causation is a necessary element of every negligence case. There is no reason for applying a lesser causation standard to suits against attorneys.

Jurisdictions which have discussed the "case within the case" or "trial within a trial" have uniformly held that a plaintiff bears the burden of showing a better result would have been obtained in the underlying claim "but for" the defendant's negligence. *See eg. Warshaw Burstein Cohen Schlesinger & Kuh, LLC v. Longmire*, 106 A.D.3d 536, 537 (N.Y.App. Div. 1 2013); *Kelley v. Witherspoon, LLP*, 401 S.W.3d 841, 847 (Tex. App. 2013); *Leiblich v. Pruzan,* 104 A.D.3d 462, 462-63 (N.Y. App. Div. 1 2013); *C&K Industrial Services v. McIntyre, Kahn & Kruse Co*, 984 N.E.2d 45, 50 (Ohio Ct. App. 2012); *Caldeen Const, LLC v. Kemp*, 273 P.3d 174, 178 (Or. Ct. App. 2012); *Watson v. Meltzer,* 270 P.3d 289, 290-91 (Or. Ct. App. 2011)*; Evans v. Hamby*, 378 S.W.3d 723, 727 (Ark. 2011); *Sabella v. Estate of Milides*, 992 A.2d 180, 187-88 (Pa. Super. Ct. 2010); *Byrne v. Grasso, 985 A.2d 1064, 1066-67* (Conn. App. Ct. 2009)*; Schultz v. Boston Stanton*, 198 P.3d 1253, 1256 (Colo. App. 2008); *Haugenoe v. Workforce Safety and Ins.*, 748 N.W.2d 378, 383 (N.D. 2008); *Young v. Gum*, 649 S.E.2d 469, 473 (N.C. Ct. App. 2007); *Kranz v. Riger*, 914 A.2d 854, 864 (N.J. Super. Ct. App. Div. 2007); *Ambriz v. Kelegian*, 53 Cal.Rptr.3d 700, 708 (Cal. Ct. App. 4 Dist. 2007); *Giron v. Koktavy,* 124 P.3d 821, 824 (Colo. App. 2005); *Kituskie v. Corbman*, 714 A.2d 1027, 1030 (Pa. 1998); *Power Constructors, Inc. v. Taylor & Hintze*, 960 P.2d 20, 27-28 (Alaska 1998).

The concept is so universally accepted that the *Restatement (Third) of Law Governing Lawyers § 53 (2000)* states that a lawyer may be liable for malpractice "only if the lawyer's breach of a duty or breach of fiduciary duty was a legal cause of injury, as determined under

generally applicable principles of causation and damages." In order to recover, a plaintiff "must prove by a preponderance of the evidence that, but for the lawyer's misconduct, the plaintiff would have obtained a more favorable judgment in the previous action. The plaintiff must thus prevail in a 'trial within a trial.'" *Id. at Comment b.*

C. Appellant Cannot Meet the "Substantial Burden" Necessary to Maintain a Legal Malpractice Claim After Settlement.

When bringing a legal malpractice action after settling the underlying action, a plaintiff must prove the settlement was (1) necessary to mitigate damages caused by the attorney, or (2) she was driven to the necessity of settling because, if the case had not been settled, she would have been worse off taking the matter to trial because of the negligence of defendant. *See Day Advertising, Inc.*, 217 S.W.3d at 367 (*citing Collins v. Mo. Bar Plan*, 157 S.W.2d 726, 736 (Mo. App. 2005)).

Causation in fact is required in all legal negligence cases, even when the plaintiff's underlying claim is settled. *See Roberts v. Sokol*, 330 S.W.3d 576, 581 n4 (Mo. App. 2011). In addition, "the plaintiff must carry the significant burden of establishing that the settlement was necessary to mitigate the damages flowing from defendant's negligence. It is not sufficient to argue that the defendant's negligence created additional burdens or difficulties for the litigation." *Williams v. Preman*, 911 S.W.2d 288, 296 (Mo. App. 1995) (overruled on other grounds *Klemme v. Best*, 941 S.W.2d 493 (Mo. 1997) (*citing Heartland Stores, Inc. v. Royal Ins. Co.,* 815 S.W.2d 39 (Mo. App. 1991) (emphasis added)).

By imposing a "significant burden"after a case has been settled, *Preman* creates a higher hurdle for plaintiffs. Appellant argues that the "significant burden" standard of *Preman* should be relaxed when a claim is settled before learning of an attorney's alleged negligence, creating a lower, not higher standard. (App. Br. 36-38). *Preman* simply requires causation in fact. In any case where there is a settlement, whether before or after the alleged malpractice is discovered, a plaintiff must show that he would have done better had the matter been tried. This is true regardless of when the alleged negligence is discovered. "There must be evidence that extra burdens or difficulties caused by the negligence could not be overcome, and would have been fatal to the result the plaintiff could otherwise enjoy." *Preman*, 911 S.W.2d at 296. The point of discovery is irrelevant. Causation is still an element of a plaintiff's case. A legal malpractice case cannot proceed without evidence supporting that element. *Id.; see also Day,* 217 S.W.3d at 367.

D. Expert Testimony Is Necessary To Establish a Causal Connection.

Appellant did not present adequate expert testimony as to causation. Appellant would have this Court exempt him from the requirement of providing such testimony. Expert testimony on causation is required in legal malpractice claims except in cases where it is "clear and palpable" to laymen. *See Thiel v. Miller*, 164 S.W.3d 76, 82 (Mo. App. 2005) (conservatorship issues not "clear and palpable"); *Steward v. Goetz*, 945 S.W.2d 520, 533 (Mo. App. 1997); *Baldridge v. Lacks,* 883 S.W2d 947, 954 (Mo. App. 1994); *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. 1990); *Zweifel v. Zenge and Smith*, 778 S.W.2d 372, 374

(Mo. App. 1989). No Missouri cases have declared a situation so "clear and palpable" that expert testimony is unnecessary. *See id.*[1] There is nothing "clear and palpable" about stock options, international stock markets, lock-up periods, or breach of contract claims. Consequently, there is nothing "clear and palpable" about a legal malpractice claim involving these issues. A jury cannot be expected to understand and analyze the legal advice required for such matters without the assistance of expert testimony. Similarly, a jury cannot determine, without the assistance of an expert, that the plaintiff was damaged by the advice Respondent provided. Expert testimony is required to pursue such a claim against Respondent. Its absence is fatal to Appellant's case.

Missouri's general "clear and palpable" rule conforms with the vast number of other states which have held unequivocally that expert testimony is necessary except in the most simple and obvious legal malpractice matters. *See eg. Clayton v. Unsworth*, 8 A.3d 1066, 1072 (Vt. 2010); *Fontaine v. Steen*, 759 N.W.2d 672, 677 (Minn. Ct. App. 2009); *Dixon v. Bromson and Reiner*, 898 A.2d 193, 197 (Conn. App. Ct. 2006); *Carbone v. Tierney*, 864 A.2d 308, 315-16 (N.H. 2004); *Rose v. Welch*, 115 S.W.3d 478, 482-83 (Tenn. Ct. App. 2003); *Bowers v. Dougherty*, 615 N.W.2d 449, (Neb. 2000); *Meyer v. Mulligan*, 889 P.2d

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[1] In *Roberts v. Sokol*, 330 S.W.3d 576, 581 n4 (Mo. App. 2011) the Court of Appeals hypothesized that a statue of limitations case may be a "clear and palpable" situation with regard to standard of care. Even in this simplest of cases, expert testimony of causation may very well be required.

509, 516 (Wyo. 1995); *Lyon v. Aguilar*, 2011 WL 488749 (10th Cir. 2011) (applying New Mexico law); *Brown v. Slenker*, 220 F.3d 411, 423 (5th Cir. 2000) (applying Virginia law). Appellant's contention that expert testimony is not necessary is without legal support.

Here, Appellant submitted the testimony (and later affidavit) of John Tollefsen. Tollefsen refused to testify that Appellant could, or more importantly would have, prevailed on the breach of contract claim. (LF 637, 675-76). He did not testify that Respondent was negligent in not filing suit. *Id.* Tollefsen also refused to testify that, to a reasonable degree of legal certainty, Appellant's settlement would have been greater but for the negligence of Respondent or that he would have won a greater award had suit been filed. *Id*. As a result, Appellant failed to meet the standard of causation required to prove either of the required elements of a legal malpractice action in *Day*. To allow otherwise would create potential liability for the legal profession beyond that of any other group of professionals. Adopting the standard advocated by Appellant would allow a client to settle a case, take the "bird in the hand" and sue his counsel for a theoretical amount that might have been recovered had the matter gone to trial, all without providing expert testimony that the underlying case would be successful or generate a greater return in the first place. Retaining the established legal framework will allow plaintiffs to recover for negligent representation where a causal connection is established with expert testimony. To hold otherwise would be fundamentally unfair.

The requirements of causation in a legal malpractice case are well established in cases such as *Day, Collins, Roberts* and *Preman*. This case presents this Court with the opportunity to adopt those well defined principles and hold that a plaintiff must (1) prove causation as a necessary element of a legal malpractice case, (2) prove the "case within a case," (3) meet a "substantial burden" to maintain a legal malpractice claim after settlement and (4) present expert testimony of causation.

II. Summary Judgment was Proper as Appellant's Alleged Damages Are Based on Stock Market Fluctuations.

Appellant's claims must similarly fail as his damage theory is based on fluctuations in stock prices that were independent of Respondent's alleged actions. Only foreseeable damages are recoverable in tort actions. *See Hays v. Royer*, 384 S.W.3d 330, 335-36 (Mo.App. 2012); *Smith v. Brown & Williamson Tobacco Corp*., 275 S.W.3d 748, 801 (Mo.App. 2008) ("[T]he duty owed in negligence cases is based on the foreseeable or reasonable anticipation that harm or injury is a likely result of acts or omissions."); *Collins,* 157 S.W.3d at 733 ("An intervening cause is not foreseeable"). Further, it is well settled that damages cannot rest upon guesswork, conjecture, or speculation. *See eg Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting,* Inc., 279 S.W.3d 179, 186 (Mo. 2009); *McLean Irrevocable Trust ex rel. McLean v. Ponder*, 2013 WL 5761058, at *12 (Mo.App. 2013) (breach of fiduciary duty); *Federal Nat. Mortg. Ass'n v. Bostwick*, 2013 WL 4805800, at *3 (Mo.App. 2013) (promissory note); *Bailey v. Hawthorn Bank*, 382 S.W.3d 84 (Mo.App.

2012) (lost business profits may not be based on speculation but require "substantial basis"). With regard to legal malpractice specifically, damages must be proven to a reasonable certainty and the evidence must not leave the matter to speculation. *See Roberts*, 330 S.W.3d at 580; *Collins*, 157 S.W.3d at 735.

Again, to recover for settlement of an underlying lawsuit, the plaintiff must establish a causal link between the alleged negligence and any loss incurred. *Id*. (*citing Preman*, 911 S.W.2d at 298). Summary Judgment is proper where (1) the evidence connecting injury to negligence amounts to conjecture and speculation or (2) where an intervening cause has broken the causal chain. *See Id.; Collins*, 157 S.W.3d at 732; *Steward,* 945 S.W.2d.522.

In the instant case, Appellant wishes to recover the difference between the highest price of the stock during the lock up period and the gain he actually realized. (App. Br. 23, 64-66). Appellant is seeking no less than insurance from the legal profession for future market fluctuations. Courts have refused to impose such liability on other professions. *See Movitz v. First Nat. Bank of Chicago*, 148 F.3d 760 (7th Cir. 1998) (speculative nature of real estate market did not establish causal link). Such alleged damages are surely based on perfect hindsight. Moreover, the market itself is an intervening cause and breaks any causal connection to the alleged negligence of Respondent. *See Collins,* 157 S.W.3d 732. Investing in the stock market is always a risk and involves the hopeful speculation that the stock price will increase and that the investor will sell when the stock is at its peak. Plaintiff is attempting to transfer this risk to his attorney when it is his alone to bear. What Plaintiff

seeks is a form of insurance that no one investing in the market has provided. The market is by its very nature an unknown. Accordingly, this Court should not now extend the law to place attorneys in the position of insuring market fluctuations.

CONCLUSION

Plaintiffs in legal malpractice cases must show evidence of causation in fact. Given the nature of legal representation, this necessarily involves the "case within a case" and the necessity of expert testimony. A plaintiff who cannot establish that "but for" the defendant's negligence, he would have succeeded beyond the settlement results he achieved, cannot make a submissible case of legal malpractice. To hold otherwise subjects the legal profession to a strict liability standard faced by no other profession. Similarly, the legal profession should not be required to insure against future stock market fluctuations as an element of damages. For the foregoing reasons, the Court should not change the well developed case law in legal malpractice cases.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Amicus Brief complies with the limitations of Missouri Supreme Court Rule 84.06(b), and that the Brief contains 2,796 words of proportional font, excluding the cover, signature block, certificate of service and this certificate (as determined by WordPerfect X6 software). The original signed Brief will be maintained for a period of not less than the maximum allowable time to complete the appellate process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 5th day of December, 2013, I electronically filed the foregoing with the Clerk of the court and that I sent an electronic copy hereof by email to:

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The undersigned further certifies that the electronic file has been scanned for viruses and is virus-free.

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