Appeal No. SC93543

In The
SUPREME COURT OF MISSOURI

BRIAN NAIL

Plaintiff/Appellant

vs.

HUSCH BLACKWELL SANDERS, LLP

Defendant/Respondent

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

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case involves claims of legal malpractice. The trial court granted summary judgment in favor of Respondent, the sole remaining defendant. Plaintiff/Appellant filed a notice of appeal to the Missouri Court of Appeals, Western District, on May 21, 2012. The Court of Appeals issued its Opinion on May 21, 2013, affirming in part, reversing in part, and remanding for further proceedings. Respondent filed a motion for rehearing and an application for transfer with the Court of Appeals on June 5, 2013, which the Court denied and overruled on June 25, 2013. Respondent then filed an application for transfer with this Court on July 10, 2013. This Court sustained the application for transfer and ordered this matter transferred on October 1, 2013. This Court has jurisdiction pursuant to the Missouri Constitution, Article V, Section 10.

STATEMENT OF FACTS

A. Brian Nail's Stock Options

Plaintiff/Appellant Brian Nail was employed by MTW Corporation, hereinafter MTW, between 1992 and March 15, 2001, as Vice President of Operations and eventually Chief Financial Officer. (LF, Vol. III, p. 371, ¶ 103). MTW was a Kansas City-based information technology staffing company owned by Richard Mueller. (LF, Vol. I, p. 78, ¶ 2). Mr. Nail is a Certified Public Accountant, not an attorney, and has no legal experience or training in the laws

pertaining to stocks, corporate mergers, litigation, or settlement of legal claims. (LF, Vol. III, p. 371-72, ¶ 104).

Richard Mueller was the President of MTW and owned shares in MTW. (LF, Vol. III, p. 372, ¶ 105-08). Mr. Mueller and Mr. Nail entered into a Stock Option Agreement dated August 1, 1996, which granted Mr. Nail the option to purchase 180 shares of MTW from Mr. Mueller at an exercise price equal to the value of MTW as determine by an appraisal on December 31, 1995 divided by 1,000. (LF, Vol. III, p. 372, ¶ 105, p. 411). Mr. Mueller and Mr. Nail also entered into a Stock Option Agreement dated June 15, 2000, which granted Mr. Nail the option to purchase shares from Mr. Mueller up to two percent (2%) of the existing issued and outstanding shares of MTW at an exercise price of Two Dollars and Eleven Cents ($2.11) per share. (LF, Vol. III, p. 372, ¶ 106, p. 422). Mr. Mueller and Mr. Nail entered into an Amendment to Stock Option Agreement effective August 25, 2000, which amended the Stock Option Agreement dated August 1, 1996, to provide Mr. Nail an option to purchase 180 shares of MTW at a per-share price of Forty-six Cents ($0.46). (LF, Vol. III, p. 429). Mr. Mueller and Mr. Nail then entered into an Amendment to Stock Option Agreement in February, 2001, which amended the June 15, 2000, Stock Option Agreement to extend the exercise period. (LF, Vol. III, p. 433).

Mr. Nail and MTW entered into a Separation Agreement which terminated Mr. Nail's employment effective March 15, 2001. (LF, Vol. III, p. 373, ¶ 110, p. 436). The Separation Agreement stated that MTW "has amended its current Stock Option Agreement to provide that Nail may exercise vested stock options within the eighteen month period following March 15, 2001." (LF, Vol. III, p. 437, ¶ 3).

B. Husch Blackwell's Advice

Mr. Nail retained the law firm of Blackwell Sanders Peper Martin on or about July 2, 2001, upon learning of a potential merger of MTW into The Innovation Group, a corporation organized and existing pursuant to the laws of the United Kingdom, hereinafter TIG. (LF, Vol. III, p. 373, ¶ 111; see also LF, Vol. I, p. 79-80, ¶ 11-13). Blackwell Sanders Peper Martin later became known as Husch Blackwell Sanders LLP, the Defendant/Respondent in this action, as a result of a merger. (LF, Vol. III, p. 373, ¶ 111; see also LF, Vol. I, p. 79, ¶ 11). Husch Blackwell Sanders LLP changed its name to Husch Blackwell LLP effective September 1, 2010. (LF, Vol. I, p. 15). Defendant/Respondent will be referred to as Husch Blackwell, including when acting through the individual attorneys at Husch Blackwell.

Brian Nail specifically advised Husch Blackwell that his sole purpose for retaining representation was for protection of his interests in the Stock Option Agreements. (LF, Vol. III, p. 373, ¶ 112).

The merger between MTW and TIG closed on July 17, 2001. (LF, Vol. III, p. 373, ¶ 113). The acquisition of MTW by TIG resulted in Mr. Nail's options for the purchase of shares of MTW being converted to options for the purchase of shares of TIG. (LF, Vol. I, ¶ 79, ¶ 8). Prior to the closing, Mr. Nail advised Husch Blackwell that he had been told by Mr. Mueller that Mr. Nail would be required to agree to an 18 month lock up. (LF, Vol. III, p. 374, ¶ 114). Mr. Nail was not certain as to the nature of the restriction that was binding Mr. Mueller. (LV, Vol. III, p. 374, ¶ 114). Mr. Nail discussed with Husch Blackwell that Mr. Mueller had entered into an agreement that was inconsistent with Mr. Nail's contractual rights pursuant to the Stock Option Agreements. (LF, Vol. III, p. 374, ¶ 115). Husch Blackwell did not advise Mr. Nail, prior to March 2, 2002, that there was a legal need to exercise any of the options or any portion of the options. (LF, Vol. III, p. 374, ¶ 116).

Mr. Mueller agreed to a one year "lock-up period" as a term of the TIG merger that required Mr. Mueller to obtain consent from TIG's Board of Directors before transferring any of the TIG shares Mr. Mueller received through the merger. (LF, Vol. I, p. 79, ¶ 9). The lock-up period included Mr. Mueller's TIG shares to which Mr. Nail held options. (LF, Vol. I, p. 79, ¶ 10).

Brian Nail was consistently advised over the course of the representation by Husch Blackwell that he had poor prospects for success in any potential lawsuit

against Mr. Mueller for enforcement of his rights pursuant to the Stock Option Agreements. (LF, Vol. III, p. 374, ¶ 117).

> Initially, Brian Nail was advised that there was no breach by Mr. Mueller and that Mr. Mueller would only need to deliver locked up shares (like and kind). In short, Brian Nail was consistently advised that his chances of recovery were poor, that he had "no damages" and that by the time any lawsuit against Mr. Mueller could be commenced, litigated and concluded, the "lock up" period agreed to by Mr. Mueller with TIG would have expired and, as such, litigation would be ill-advised.

(LF, Vol. III, p. 374, ¶ 117). Husch Blackwell counseled Mr. Nail that there was nothing that could be legally done regarding the lock-up provisions agreed to by Mr. Mueller and TIG. (LF, Vol. III, p. 374, ¶ 118). Mr. Nail clearly understood that he always had the option to sue. (LF, Vol. I, p. 81, ¶ 23).

A legend was affixed to the shares of TIG owned by Mr. Mueller that purported to restrict the sale or transfer of such shares and Husch Blackwell advised Mr. Nail that the legend was valid and would prohibit his ability to resell or transfer any shares that he might obtain if Mr. Mueller agreed to transfer the shares pursuant to the Stock Option Agreements. (LF, Vol. III, p. 375, ¶ 119). Mr. Nail was advised that he should enter into a settlement agreement with Mr. Mueller in light of the poor prospects of any lawsuit. (LF, Vol. III, p. 375, ¶ 120). Upon

the advice of Husch Blackwell, Mr. Nail agreed to enter into a settlement agreement with Mr. Mueller. (LF, Vol. III, p. 375, ¶ 121).

The restrictive legend on the TIG shares owned by Mr. Mueller would not have prohibited Mr. Nail from immediately monetizing his options. (LF, Vol. III, p. 381, ¶ 155; LF, Vol. IV, p. 573 [Depo., p. 8, l. 21-25]). Husch Blackwell's advice to Mr. Nail that the restrictive legend place on the TIG shares owned by Mr. Mueller would preclude Mr. Nail from selling the shares to third parties on the London Stock Exchange was incorrect. (LF, Vol. III, p. 381, ¶ 156; LF, Vol. IV, p. 574 [Depo., p. 58, l. 25 thru p. 59, l. 6]).

Mr. Nail retained John Tollefsen as an expert witness in the litigation against Husch Blackwell. Mr. Tollefsen testified, in his deposition, that:

> the way that I analyze the case is that it doesn't matter whether [Steven Carman, a partner at Husch Blackwell] 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 that lawsuit, and I'm claiming that he – in my opinion, that he did that negligently.

(LF, Vol. IV, p. 568 [Depo., p. 99, l. 23 thru p. 100, l. 5], p. 675-76; LF, Vol. III, p. 380, ¶ 151; LF, Vol. I, p. 79-80, ¶ 12-13). Mr. Tollefsen expressed the opinion that Husch Blackwell was negligent because it did not consider Mr. Nail's reason for exercising his options important in providing advice. (LF, Vol. III, p. 380, ¶ 149;

LF, Vol. IV, p. 566 [Depo., p. 28, l. 2-16]). Mr. Tollefsen also testified that Husch Blackwell was negligent in not analyzing and discussing damages with Mr. Nail prior to advising him to settle the claim against Mr. Mueller. (LF, Vol. III, p. 380, ¶ 150; LF, Vol. IV, p. 567 [Depo., p. 54, l. 6 thru p. 55, l. 6]).

Mr. Tollefsen, by affidavit, supplemented his testimony and expressed his opinions that:

> 3. Mr. Thompson testified that the breach of contract case against Mr. Mueller was "obvious" and a "no-brainer" (8:23-9:3). He reached that conclusion because he assumed Mr. Mueller would not breach his contract with TIG and would therefore breach his contract with Mr. Nail (11:14-24; 32:3-4). I agree with Mr. Thompson's testimony on these points.
>
> 4. However, it is equally obvious and a "no brainer" at that time that Mr. Nail must exercise his options or there would be no breach by Mr. Mueller and therefore no breach of contract case. Therefore, it is my view that Mr. Nail should have been told to consider exercising all his options immediately after the TIG merger (July 18, 2001). If Mr. Mueller breached the contract by not delivering the stock, Mr. Nail would have a cause of action against him. In addition, he would be in a better negotiating position to reach a settlement. Furthermore, he would be able to prove damages. The amount of damages would have been determined by the highest value of

the stock during a reasonable period after the breach ([citations omitted]). If he did not exercise the option, Mr. Nail might not be able to prove damages because they would be speculative.

5. In their evaluation of Mr. Nail's case, his lawyers failed to recommend Mr. Nail exercise as soon as possible to preserve the value of his damage claim []. Mr. Nail should have been told that exercise of his options was virtually riskless. Exercise would create a breach and fix the damages at the time of exercise. If the share price rose, he would have been entitled to the gain under an unjust enrichment theory. Mr. Mueller would not be allowed to profit from his breach ([citation omitted]). By fixing the damages, Mr. Nail would have liquidated his claim and been entitled to prejudgment interest ([citation omitted]).

6. Therefore, I conclude that Mr. Nail settled his claims against Mr. Mueller without being placed in the proper legal position and without proper legal advice. I conclude that the conduct of the lawyers involved fell below the requisite standard of care. The settlement should have taken place with Mr. Mueller in breach of the contract facing potential litigation which could have resulted in a judgment for millions of dollars of actual damages. The settlement agreement should have reflected this reality through a proper liquidated damage clause, security, or some other device. Instead Mr. Nail

assumed market and other risks in a poorly drafted settlement agreement without being informed of his legal rights.

7. Mr. Robertson agrees that Mr. Mueller was potentially in breach of contract by signing the merger lock up agreement that conflicted with his option agreement with Mr. Nail []. Mr. Robertson also agrees that Mr. Nail needed to exercise the options in order to put Mr. Mueller in Breach []. I agree with this testimony.

(LF, Vol. V, p. 756-57) (footnote omitted).

C. The Dispute Settlement Agreement

Brian Nail was advised that he should enter into a settlement agreement with Mr. Mueller in light of the poor prospects of any lawsuit. (LF, Vol. III, p. 375, ¶ 120). Upon the advice of Husch Blackwell, Mr. Nail:

> agreed to enter into a settlement agreement that would include a mechanism for the future transfer of full ownership rights to him in the shares of stock pursuant to the original stock option agreements, including the immediate ability to sell shares acquired.

(LF, Vol. III, p. 375, ¶ 121). Husch Blackwell drafted the Dispute Settlement Agreement, hereinafter DSA. (LF, Vol. III, p. 375, ¶ 122; LF, Vol. I, p. 81, ¶ 28). The DSA was executed on March 15, 2002, by Mr. Nail and Mr. Mueller. (LF,

Vol. I, p. 81, ¶ 30; LF, Vol. III, p. 377, ¶ 130). Mr. Nail followed the advice of Husch Blackwell:

> as to the appropriate terms of the agreement and also as to what instruments and language was appropriate to accomplish his general direction to transfer full ownership rights in the stock that would permit him to resell the shares without further involvement or reliance on Mr. Mueller.

(LF, Vol. III, p. 375, ¶ 123).

The DSA, as drafted by Husch Blackwell, provided that the agreement would be construed in accordance with Missouri law. (LF, Vol. III, p. 376, ¶ 124). Mr. Nail relied on the advice of Husch Blackwell as to all documentation necessary to accomplish a transfer of full ownership rights with rights to sell or transfer any stock obtained upon exercise of the option agreements. (LF, Vol. III, p. 376, ¶ 125).

Husch Blackwell also drafted the Escrow Agreement that accompanied the DSA and Mr. Nail relied on Husch Blackwell to draft that agreement in a fashion to accomplish a transfer of full ownership rights in the stocks of Mr. Mueller upon exercise of all or any portion of the stock option agreements pursuant to the DSA. (LF, Vol. III, p. 376, ¶ 126). Paragraph 3(b) of the Escrow Agreement stated that "[s]imultaneous with the execution of this Escrow Agreement, Mueller has

delivered to the Escrow Agent stock powers that are executed to permit the Escrow Agent to effect transfer of the Escrowed Stock to Nail." (LF, Vol. III, p. 448).

Mr. Nail inquired of Husch Blackwell if a provision could be included "in the DSA that would allow him to recover and fix damages against Mr. Mueller in the event he again breached his contractual obligations to him." (LF, Vol. III, p. 376, ¶ 128).

> Among the terms of the DSA was what was explained to Brian Nail as a "liquidated damage" clause that would entitle him to damages against Mr. Mueller in the event he failed to honor the terms of the DSA and Escrow Agreements.

(LF, Vol. III, p. 376, ¶ 127). "The language of the liquidated damage clause, including the language expressing the conditions and terms upon which it would be invoked, were recommended and drafted by" Husch Blackwell. (LF, Vol. III, p. 376-77, ¶ 129). Husch Blackwell falsely represented that Mr. Mueller would no longer have any control over the escrowed stock. (LF, Vol. III, p. 377, ¶ 130).

The DSA prohibited Mr. Nail from exercising his options until July 18, 2002. (LF, Vol. II, p. 219, ¶ 1.06).

Brian Nail gave proper notice to Mr. Mueller on or about August 30, 2002, for exercise of a portion of the shares covered by the Stock Option Agreements and the DSA. (LF, Vol. III, p. 377, ¶ 131). Mr. Nail learned on or about September

16, 2002, that additional paperwork and procedures were required to accomplish a transfer of the shares covered by the exercise. (LF, Vol. III, p. 377, ¶ 132).

> On or about September 23, 2002, Mr. Mueller supplied a Stock Transfer Form for registration of the exercised shares in Brian Nail's name, which he learned at or about such time was required pursuant to the laws of the United Kingdom. There was no discussion, so far as Brian Nail was advised by his attorneys, as to how future exercises of any stock option rights pursuant to the stock option agreements and the DSA were to be accomplished.

(LF, Vol. III, p. 377, ¶ 133). Additional documentation would be required from Mr. Mueller upon each successive exercise of all or any portion of the stock option agreements. (LF, Vol. III, p. 377, ¶ 134). Mr. Nail also learned that he was obligated to pay a "Stamp Duty" upon each exercise of all or any portion of the option agreements. (LF, Vol. III, p. 378, ¶ 135). Husch Blackwell did not advise Mr. Nail regarding the "Stamp Duty" at the time the DSA was either drafted or executed. (LF, Vol. III, p. 378, ¶ 135).

Mr. Nail filed a lawsuit against Mr. Mueller on May 1, 2003, in the District Court of Johnson County, Kansas for enforcement of the Stock Option Agreements, the DSA, and on other theories related to his rights in the option agreements. (LF, Vol. III, p. 378, ¶ 136). The District Court granted Mr.

Mueller's motion for judgment as a matter of law, (LF, Vol. II, p. 324, l. 1-2), and Judgment was entered on June 24, 2005. (LF, Vol. III, p. 378, ¶ 137). The court found that the transfer documents provided were effective to transfer stock under Missouri law, (LF, Vol. II, p. 324, l. 6-21), and that "[a]ccordingly, there [was] no breach of that agreement." (LF, Vol. II, p. 325, l. 2-3). The Court then held that:

> In addition, the liquidated damages provision of Section 2.05 would not apply to the claim of breach that is before the Court. I agree with the defendants that the single sentence that would provide for a specific damages in the amount stated in Section 2.05 does not apply except in a very narrow circumstance that is not present here.

(LF, Vol. II, p. 325, l. 4-10).

Mr. Mueller did not provide, at any time during the litigation, documentation that would accomplish a transfer of full ownership rights in the stock with unrestricted rights to sell or transfer the stock. (LF, Vol. III, p. 378, ¶ 138). The case against Mr. Mueller was resolved while pending on appeal on or about February 10, 2006. (LF, Vol. III, p. 378, ¶ 139).

Mr. Tollefsen testified that Husch Blackwell "failed to understand how the transaction would need to be structured in order to comply with the requirements of UK law to properly transfer the stock." (LF, Vol. III, p. 379, ¶ 145; LF, Vol. IV, p. 562 [Depo., p. 7, l. 16-20]). He also testified that the DSA should have provided

that Mr. Mueller "ha[d] a responsibility to make sure that he is providing the documentation so that nothing more needs to be done in order to transfer it." (LF, Vol. IV, p. 563 [Depo., p. 15, l. 16-19]). Mr. Tollefsen explained that "transferring [the stock] under Missouri law has no effect on the London Stock Exchange." (LF, Vol. IV, p. 564 [Depo., p. 20, l. 6-7]; LF, Vol. III, p. 380, ¶ 147).

Mr. Tollefsen also testified:

> [M]y opinion is – my understanding is that the settlement agreement, as drafted, did not accomplish [Mr. Nail's] purpose. There was additional documentation that had to be done. There was a stamp tax and some other things that had to happen in order to accomplish it, things that had been overlooked.
>
> Now, that goes to damages. I think that that was designed to be an – that should have been a breach of the contract and that should have triggered the liquidated clause. That that was the intent, as I understand from Mr. Nail, that if there was further documentation needed in order to accomplish this, that gave Mr. Mueller control over the transaction, that that's a breach and that should have triggered liquidated damage. That's what I understand the facts.

(LF, Vol. IV, p. 565 [Depo., p. 24, l. 3-20]; LF, Vol. III, p. 380, ¶ 148).

> Q. Okay. Do you believe that there is any section of this Exhibit 40 which in its drafting was negligent on the part of the defendants in this case?
>
> A. Well, yeah. I mean, I – we looked at the 4.14, the governing law. It says it's to be performed entirely . . . within the State of Missouri, including all matters of enforcement, validity, and performance.
>
> Now, how can you draft a paragraph like that when you know that the stock has to transfer in UK?

(LF, Vol. IV, p. 569 [Depo., p. 109, l. 13-24]; LF, Vol. III, p. 380, ¶ 152). Mr. Tollefsen testified that it was negligent to direct that Mr. Mueller has to transfer property and ownership rights under Missouri law for a UK instrument. (LF, Vol. IV, p. 570 [Depo., p. 121, l. 19-24]; LF, Vol. III, p. 380, ¶ 153).

Mr. Tollefsen explained that:

> the purpose of an escrow agreement is to put in the hands of a third party some item so that neither party have control. It's to create a situation where you have a neutral third party that's controlling an item, and it's usually done in a situation where neither party trusts each other to hold the item for a number of various different reasons.

(LF, Vol. IV, p. 571 [Depo., p. 126, l. 22 thru p. 127, l. 4]). "Typically an escrow is to make sure that . . . the transfer of title occurs without any further documentation." (LF, Vol. IV, p. 571 [Depo., p. 129, l. 2-5]). "So if there is going

to have to be additional documents, that – the escrow then fails of its essential purpose." (LF, Vol. IV, p. 571 [Depo., p. 128, l. 24 thru p. 129, l. 1]; LF, Vol. III, p. 380, ¶ 154).

Fenner Moeran, an expert witness regarding English and Welsh law, (LF, Vol. IV, p. 573 [Depo., p. 8, l 3-6]), expressed the opinion that "[t]he documents employed in the dispute settlement agreement and escrow agreement were not adequate to allow Brian Nail to register the shares in his name and thereafter sell any shares acquired in the exercise of his option agreements on the London Stock Exchange." (LF, Vol. IV, p. 573 [Depo., p. 9, l. 1-9]; LF, Vol. III, p. 381, ¶ 157).

Mr. Moeran also testified to his "opinion that the documentation as provided under the dispute settlement agreement and the escrow agreement and documentation behind that was not in and of itself sufficient, no." (LF, Vol. IV, p. 574 [Depo., p. 59, l. 17-20]; LF, Vol. III, p. 381, ¶ 158). In the absence of the essential documents under English law, legal ownership of the shares remained with Mr. Mueller. (LF, Vol. IV, p. 575 [Depo., p. 64, l. 24 thru p. 65, l. 12]; LF, Vol. III, p. 381, ¶ 159). "[T]he escrow agreement and the dispute settlement agreement had no effect under the laws of the UK to transfer any title to Mr. Nail". (LF, Vol. IV, p. 576 [Depo., p. 69, l. 13-18]; LF, Vol. III, p. 381, ¶ 160).

D. Brian Nail's Damages

The TIG stock reached a peak trading value on or about August 6, 2001, of 4.4 Pounds per share. (LF, Vol. III, p. 379, ¶ 140). Mr. Nail would have been entitled to a gain on the exercise of his options of $17,209,599 at that price. (LF, Vol. III, p. 379, ¶ 140). Husch Blackwell represented Mr. Nail from July 2, 2001, until at least September, 2002. (LF, Vol. III, p. 373, ¶ 111, p. 379, ¶ 140; LF, Vol. I, p. 84, ¶ 52).

TIG stock had a trading value of 290 Pence (2.9 Pounds) per share on July 18, 2001. (LF, Vol. III, p. 456). For the period from July 18, 2001 through August 31, 2001, TIG stock had a high trading value of 440 Pence (4.4 Pounds) and a low trading value of 280 Pence (2.8 Pounds) per share. (LF, Vol. III, p. 456). TIG stock had a trading value of 240 Pence (2.4 Pounds) per share on March 15, 2002. (LF, Vol. III, p. 458). TIG stock had a trading value of 78 Pence (.78 Pounds) on July 18, 2002. (LF, Vol. III, p. 459). For the period from July 18, 2002 through August 31, 2002, TIG stock had a high trading value of 80 Pence (.8 Pounds) and a low trading value of 16.26 Pence (.1626 Pounds) per share. (LF, Vol. III, p. 459).

The DSA, drafted by Husch Blackwell, included a liquidated damages clause that provided:

> In the event that Mueller . . . fails to deliver the Transfer Notice to the Escrow Agent on or before July 31, 2002, Mueller shall pay to 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 the purpose 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, Vol. III, p. 442, ¶ 2.05). There were 2,116,800 shares of TIG stock that were the subject of the agreements, 1,852,200 shares pursuant to the first Stock Option Agreement and 264,600 shares pursuant to the second Stock Option Agreement. (LF, Vol. III, p. 441). The highest share price of TIG stock traded on the London Stock Exchange between the March 15, 2002 and July 31, 2002 occurred on March 19, 2002, with a share price of 244.50 pence per share. (LF, Vol. III, p. 458-59).

E. Procedural History

Mr. Nail filed his Petition in the Circuit Court of Jackson County, Missouri, at Kansas City on May 6, 2009. (LF, Vol. I, p. 12). The defendants originally named in the Petition were Husch Blackwell Sanders, LLP, Steven F. Carman, and Jon S. Ploetz. (LF, Vol. I, p. 12). Husch Blackwell Sanders, LLP subsequently changed its name to Husch Blackwell LLP. (LF, Vol. I, p. 15). The Defendants' Amended Answer was filed on November 15, 2010. (LF, Vol. I, p. 4, 17).

The Defendants filed their Motion for Summary Judgment, Suggestions in Support of Motion for Summary Judgment, and Statement of Uncontroverted Facts in Support of Defendants' Motion for Summary Judgment on January 14, 2011. (LF, Vol. I, p. 6, 23, 34, 78). The Motion for Summary Judgment and the Suggestions in Support raised several grounds upon which Defendants alleged entitlement to judgment as a matter of law. The Motion and Suggestions did *not* assert that Mr. Nail had failed to provide expert testimony of a "case within a case". (LF, Vol. I, p. 23-76).

Mr. Nail filed his Suggestions in Opposition to Defendants' Motion for Summary Judgment on March 2, 2011. (LF, Vol. I, p. 7; LF, Vol. III, p. 359). Defendants' Reply in Support of Motion for Summary Judgment was filed on March 18, 2011. (LF, Vol. I, p. 7; LF, Vol. IV, p. 577). Defendants also filed their Reply to Plaintiff's Response to Defendants' Statement of Uncontroverted Facts in Support of Motion for Summary Judgment, and Response to Plaintiff's Statement of Additional Facts on March 18, 2011. (LF, Vol. I, p. 7; LF, Vol. IV, p. 607).

Mr. Nail's claims against Defendants Steven F. Carman and Jon S. Ploetz were dismissed without prejudice upon the agreement of the parties on June 3, 2011. (LF, Vol. I, p. 9; LF, Vol. V, p. 723-24).

The trial court entered its Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment on June 13, 2011, hereinafter the June

13 Order. (LF, Vol. I, p. 9; LF, Vol. V, p. 726; Appendix, p. A1). The June 13 Order denied summary judgment based on the Defendants' assertion that the Kansas two year statute of limitations barred Mr. Nail's claims. (LF, Vol. V, p. 730-32, 736; Appendix, p. A5-A7, A11). The June 13 Order also denied summary judgment regarding Mr. Nail's claim that the DSA and Escrow Agreement were negligently drafted. (LF, Vol. V, p. 734-35, 736; Appendix, p. A9-A10, A11).

The June 13 Order granted summary judgment regarding the claim that Defendants' negligence caused Mr. Nail to settle his claim against Mr. Mueller, referred to by the court as the failure-to-litigate claim. (LF, Vol. V, p. 732-34, 736; Appendix, p. A7-A9, A11). The trial court also granted summary judgment regarding Mr. Nail's claim that the proper measure of damages for negligently drafting the DSA was based on the liquidated damages clause within the DSA. (LF, Vol. V, p. 735, 736; Appendix, p. A10, A11).

Mr. Nail filed a Motion for Reconsideration on August 4, 2011. (LF, Vol. I, p. 9; LF, Vol. V, p. 738). Defendant's Suggestions in Opposition to Plaintiff's Motion for Reconsideration were filed on August 31, 2011. (LF, Vol. I, p. 10; LF, Vol. V, p. 769). A hearing was held regarding the Motion for Reconsideration on September 26, 2011. (Trans., p. 1, 3; LF, Vol. I, p. 10). The court denied the Motion for Reconsideration on November 30, 2011. (LF, Vol. I, p. 10; LF, Vol. V, p. 782; Appendix, p. A13).

The parties then filed a Stipulation on March 14, 2012, which provided that "Plaintiff stipulates that he has no damages under the sole remaining category of damages ruled submissible by the Court pursuant to its order granting partial summary judgment in favor of Defendants". (LF, Vol. I, p. 11; LF, Vol. V, p. 783-84). Defendant Husch Blackwell then filed its Motion for Summary Judgment, Statement of Uncontroverted Facts in Support, and Memorandum in Support on March 30, 2012. (LF, Vol. I, p. 11; LF, Vol. V, p. 787, 790, 796).

The trial court entered its final Judgment and Order Granting Defendant Husch Blackwell Sanders LLP's Motion for Summary Judgment on April 9, 2012. (LF, Vol. I, p. 11; LF, Vol. V, p. 808-09; Appendix, p. A14-A15). Brian Nail filed his Notice of Appeal to the Court of Appeals, Western District, on May 21, 2012. (LF, Vol. I, p. 11; LF, Vol. V, p. 810). The Court of Appeals issued its Opinion on May 21, 2013, affirming in part, reversing in part, and remanding for further proceedings. Husch Blackwell filed a motion for rehearing and an application for transfer with the Court of Appeals on June 5, 2013, which the Court denied and overruled on June 25, 2013. Husch Blackwell then filed an application for transfer with this Court on July 10, 2013. This Court sustained the application for transfer and ordered this matter transferred on October 1, 2013.

POINTS RELIED ON

I. The trial court erred in granting summary judgment and denying reconsideration regarding Brian Nail's claim that Husch Blackwell negligently advised him regarding the protection of his interest in the Stock Option Agreements on the basis that Mr. Nail's evidence failed to show that Husch Blackwell's negligence proximately caused the loss, because the "significant burden" established by *Williams v. Preman* does not apply to Mr. Nail's claim and genuine issues of material fact exist regarding whether Husch Blackwell's negligence caused Mr. Nail damage, in that Mr. Nail entered into the DSA with Mr. Mueller before he was aware of Husch Blackwell's negligence and expert testimony indicated that Husch Blackwell negligently advised Mr. Nail regarding protection of his interest, Husch Blackwell negligently advised Mr. Nail to enter into the DSA, and the value of the options declined significantly during the delay resulting from Husch Blackwell's negligence.

Baldridge v. Lacks, 883 S.W.2d 947 (Mo.App.E.D. 1994)

Collins v. Missouri Bar Plan, 157 S.W.3d 726 (Mo.App.W.D. 2005)

London v. Weitzman, 884 S.W.2d 674 (Mo.App.E.D. 1994)

Williams v. Preman, 911 S.W.2d 288 (Mo.App.W.D. 1995)

II. The trial court erred in granting summary judgment and denying reconsideration regarding Brian Nail's claim that Husch Blackwell negligently advised him regarding the protection of his interest in the Stock Option Agreements on the basis that Mr. Nail waived his right to litigate the claim against Mr. Mueller, because the undisputed facts do not clearly and unequivocally show a purpose to relinquish a known right, in that Mr. Nail's attempt to mitigate the damages resulting from Husch Blackwell's negligence by pursuing claims against Mr. Mueller does not evidence any intention to relinquish his claims against Husch Blackwell.

Austin v. Pickett, 87 S.W.3d 343 (Mo.App.W.D. 2002)

Collins v. Missouri Bar Plan, 157 S.W.3d 726 (Mo.App.W.D. 2005)

Neiswonger v. Margulis, 203 S.W.3d 754 (Mo.App.E.D. 2006)

Shapiro v. Shapiro, 701 S.W.2d 205 (Mo.App.E.D. 1985)

III. The trial court erred in granting summary judgment and denying reconsideration regarding Brian Nail's claim that the proper measure of damages for Husch Blackwell's negligent drafting of the DSA was the amount specified in the liquidated damages clause on the basis that Husch Blackwell's negligence did not cause such damages, because genuine issues of material fact exist regarding whether Mr. Nail's damages resulting from the negligent drafting of the DSA were accurately estimated by the liquidated damages clause, in that the failure of Mr. Mueller to provide the necessary documents to transfer ownership of the TIG shares to Mr. Nail damaged Mr. Nail in the same amount regardless of whether such failure was the result of a breach of the DSA by Mr. Mueller or of the negligent drafting by Husch Blackwell.

Collins v. Missouri Bar Plan, 157 S.W.3d 726 (Mo.App.W.D. 2005)

Rogers v. Illinois Cent. R. Co., 833 S.W.2d 426 (Mo.App.E.D. 1992)

Williams v. Preman, 911 S.W.2d 288 (Mo.App.W.D. 1995)

ARGUMENT

I. The trial court erred in granting summary judgment and denying reconsideration regarding Brian Nail's claim that Husch Blackwell negligently advised him regarding the protection of his interest in the Stock Option Agreements on the basis that Mr. Nail's evidence failed to show that Husch Blackwell's negligence proximately caused the loss, because the "significant burden" established by *Williams v. Preman* does not apply to Mr. Nail's claim and genuine issues of material fact exist regarding whether Husch Blackwell's negligence caused Mr. Nail damage, in that Mr. Nail entered into the DSA with Mr. Mueller before he was aware of Husch Blackwell's negligence and expert testimony indicated that Husch Blackwell negligently advised Mr. Nail regarding protection of his interest, Husch Blackwell negligently advised Mr. Nail to enter into the DSA, and the value of the options declined significantly during the delay resulting from Husch Blackwell's negligence.

A. Standard of Review

On appeal from the granting of a motion for summary judgment, the record is viewed in the light most favorable to the nonmoving party, including affording that party the benefit of all reasonable inferences from the evidence. *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 730 (Mo.App.W.D. 2005); *FH Partners, LLC*

v. Complete Home Concepts, Inc., 378 S.W.3d 387, 393 (Mo.App.W.D. 2012). As this Court has explained:

> Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine dispute as to the facts" and that "the facts as admitted show a legal right to judgment for the movant." *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Id*. at 378. The propriety of summary judgment is purely an issue of law, and this Court's review is essentially *de novo*. *Id*. at 376. "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id*.

Bob DeGeorge Associates, Inc. v. Hawthorn Bank, 377 S.W.3d 592, 596 (Mo.banc 2012).

B. This Action

While this action involves some complicated factual and legal details, at its heart, this is a simple matter. Mr. Nail had a potential breach of contract claim worth millions of dollars against Mr. Mueller. Husch Blackwell negligently advised Mr. Nail regarding how to protect his interest, negligently advised him to

settle his claim, and negligently drafted the resulting Dispute Settlement Agreement. As a result, Mr. Nail received millions of dollars less than he was entitled to and would have been able to recover "but for" Husch Blackwell's negligence.

C. The Trial Court's Ruling

The trial court erroneously granted summary judgment in favor of Husch Blackwell on Brian Nail's claim that Husch Blackwell negligently advised him regarding the protection of his interests under the Stock Option Agreements, including advising him to settle with Mr. Mueller. First, the trial court erred because Husch Blackwell was not entitled to judgment as a matter of law as the court erroneously relied on the decision in *Williams v. Preman*, 911 S.W.2d 288 (Mo.App.W.D. 1995) (overruled on other grounds by *Klemme v. Best*, 941 S.W.2d 493, 496 (Mo.banc 1997)). Second, the testimony of Mr. Nail and his expert witness shows the existence of disputed issues of material fact regarding the claim that Husch Blackwell's negligence caused Mr. Nail's damages.

Mr. Nail specifically advised Husch Blackwell that his sole purpose for retaining representation was for protection of his interests in the Stock Option Agreements. (LF, Vol. III, p. 373, ¶ 112). Mr. Nail was consistently advised over the course of the representation by Husch Blackwell that he had poor prospects for success in any potential lawsuit against Mr. Mueller for enforcement of his rights

pursuant to the Stock Option Agreements. (LF, Vol. III, p. 374, ¶ 117). Mr. Nail was advised that he should enter into a settlement agreement with Mr. Mueller in light of the poor prospects of any lawsuit. (LF, Vol. III, p. 375, ¶ 120). Upon the advice of Husch Blackwell, Mr. Nail agreed to enter into a settlement agreement with Mr. Mueller. (LF, Vol. III, p. 375, ¶ 121). Husch Blackwell drafted the Dispute Settlement Agreement. (LF, Vol. III, p. 375, ¶ 122; LF, Vol. I, p. 81, ¶ 28). The DSA was executed on March 15, 2002, by Mr. Nail and Mr. Mueller. (LF, Vol. I, p. 81, ¶ 30).

Mr. Nail retained the services of Husch Blackwell on or about July 2, 2001. (LF, Vol. III, p. 373, ¶ 111). The merger between MTW and TIG closed on July 17, 2001. (LF, Vol. III, p. 373, ¶ 113). As a result of the DSA, Mr. Nail was required to wait until July 18, 2002, before exercising any of his options. (LF, Vol. II, p. 219). During the delay from July, 2001, to July, 2002, the value of the TIG stock plummeted, (LF, Vol. III, p. 456, 459), resulting in damages to Mr. Nail.

The trial court entered partial summary judgment in favor of Husch Blackwell on Mr. Nail's claim that Husch Blackwell negligently advised him regarding the protection of his interests in the Stock Option Agreements and that Husch Blackwell negligently advised him to settle his claim against Mr. Mueller. The court explained its ruling as follows:

Defendant, in its motion, asserts that Plaintiff does not meet the significant burden established by Missouri law, in claiming legal malpractice where the client's case was settled. Plaintiff must prove that the settlement was necessary "to mitigate the damages flowing from defendant's negligence." Williams v. Preman, 911 S.W.2d 288, 296 (Mo. App. 1995). Missouri case law requires more than the client's hindsight second-guessing on a claim of negligence in settling the Plaintiff's claim. Preman held "if . . . plaintiff fails to establish a prima facie case, by cogent expert testimony which intelligently analyzes the pertinent considerations, that the defendant's negligence proximately caused the loss, the issue should not be submitted." 911 S.W.2d at 297.

Plaintiff's opposition to the summary judgment motion on this point falls short of demonstrating the required showing of proof. The deposition testimony of John Tolefson [sic] submitted by Plaintiff falls short of the required intelligent analysis of the pertinent considerations to support a claim that Defendant's negligence proximately caused the loss. The record is void of any expert opinion on how Defendant's conduct was negligent, what information or analysis was missing in the Defendant's advice provided to its client, and what financial considerations played out in Plaintiff's *voluntary* decision to settle his claim against Mueller. The record

> is totally void of any indication that the voluntary settlement on Plaintiff's part was to mitigate damages caused by defendant's negligence. Id. Further, Tolefson's [sic] deposition testimony is inadequate in that it does not contain any careful or thoughtful consideration of what a court or jury "would have decided" if the case had proceeded to litigation. Id. Plaintiff has failed to meet his substantial burden on this claim.

(LF, Vol. V, p. 733-34; Appendix, p. A8-A9). The trial court erred in relying on the decision in *Williams v. Preman* and in ignoring the testimony of Mr. Nail and Mr. Nail's expert witness that Husch Blackwell acted negligently. First, the requirements set forth in *Williams v. Preman* apply when a client settles a claim *after* learning of the former attorney's negligence. In contrast, Mr. Nail settled his claim against Mr. Mueller on the advice of Husch Blackwell, *while* still being represented by Husch Blackwell, and *before* he knew of Husch Blackwell's negligence. Second, Husch Blackwell was negligent in failing to discuss damages with Mr. Nail and failing to advise him of the steps necessary to force Mr. Mueller to either comply with the agreements or be in breach. Husch Blackwell was negligent in advising Mr. Nail to settle his claims against Mr. Mueller and the trial court improperly granted summary judgment regarding this claim.

D. Husch Blackwell Was Not Entitled to Judgment as a Matter of Law

The elements necessary to prove a claim of legal malpractice are well established: "(1) an attorney-client relationship; (2) negligence or breach of contract by the defendant; (3) proximate causation of plaintiff's damages; (4) damages to the plaintiff." *Klemme v. Best*, 941 S.W.2d 493, 495 (Mo.banc 1997). "A legal malpractice action thus is founded on an attorney's duty to exercise due care or to honor express contract commitments." *Klemme*, 941 S.W.2d at 495. "A defendant's conduct is the proximate cause of a plaintiff's injury when the injury is the natural and probable consequence of the conduct." *Collins*, 157 S.W.3d at 732. "Proximate cause issues are generally (except in clear cases) issues of fact. When they are questions of fact, the plaintiff has a basic right to a trial of the issues by jury." *Williams v. Preman*, 911 S.W.2d at 295.

The trial court's primary error in this case was relying on *Williams v. Preman* in holding that Mr. Nail was required to "prove that the settlement was necessary 'to mitigate the damages flowing from defendant's negligence.'" (LF, Vol. V, p. 733; Appendix, p. A8) (quoting *Williams v. Preman*, 911 S.W.2d at 296). *Williams v. Preman* arose where the client learned of his attorney's alleged negligence *before* the client obtained new counsel and settled his case. As a result, the "significant burden" recognized in *Williams v. Preman* arises only in cases where the client voluntarily settles the matter *after* learning of the defendant

attorney's negligence. *Williams v. Preman*, 911 S.W.2d at 297. The "significant burden" discussed in *Williams v. Preman* does not apply to Mr. Nail's claim because the settlement with Mr. Mueller occurred *before* Mr. Nail learned of Husch Blackwell's negligence.

Speculation regarding the existence of damage to the client exists any time the underlying claim is settled because the settlement prevents determination of the actual merits of the claim through litigation. *Williams v. Preman*, 911 S.W.2d at 296. However, the type and extent of that speculation varies depending on when the underlying claim is settled. As a result, a different standard applies depending upon whether the claim is settled *before* or *after* the client is aware of the attorney's negligence. The Court in *Williams v. Preman* discussed cases where the claim was settled *before* the client knew of the attorney's negligence, explaining:

> 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. Of course, speculation is involved, to some extent, in many cases. [*297] For example, an attorney experienced in domestic relations practice has been permitted, in legal malpractice cases, to offer an opinion to the jury as to the range of a fair and equitable property distribution in a dissolution case, as evidence of what a court would have decided ***if the attorney for plaintiff in the underlying***

> ***matter had not negligently recommended an ill-advised settlement.*** *London v. Weitzman*, 884 S.W.2d 674, 677–78 (Mo.App.1994); *Baldridge v. Lacks*, 883 S.W.2d 947 (Mo.App.1994). Those cases are different in that there the underlying litigation was settled ***while*** the attorney who was allegedly negligent was still handling the case.

Williams v. Preman, 911 S.W.2d at 296-97 (emphasis added). An attorney that negligently advises a client to settle a matter cannot complain that such settlement creates speculation regarding the merits of the underlying claim. Any speculation results directly from the attorney's negligence and was *not voluntarily* created by the client.

In contrast, a settlement that occurs *after* the client learns of the attorney's negligence involves speculation *voluntarily* created by the client that does not arise as a direct result of attorney's negligence.

> In *Heartland* and *Lange* they were settled *after* dismissal of the allegedly negligent attorney, while the case was being handled by a new attorney. It thus appears that, in a case where the underlying claim has been voluntarily settled, the courts are going to require a strong showing that the settlement was justified before the court will be willing to pass the cost of the settlement on to the defendant.

> When a plaintiff has compromised an underlying claim, after having notice of the attorney's alleged negligence, and attributes the loss incurred thereby to the defendant lawyer's negligence, a factor of speculation has been *voluntarily* introduced by the plaintiff which requires justification. Because the attorney who is accused of negligence is allowed no voice in whether the underlying claim is settled, such attorney ought to be entitled to require that the plaintiff *prove* that the settlement was necessary to mitigate plaintiff's alleged damages.

Williams v. Preman, 911 S.W.2d at 297 (emphasis in original). The Court further explained:

> *In such a case*, then, the plaintiff must show what would have happened if the adversarial action had been tried rather than settled. *London v. Weitzman*, 884 S.W.2d 674, 677 (Mo.App.1994). Then, in light of that anticipated result, plaintiff must show that the settlement voluntarily entered into was necessary to mitigate damages, as assessed in the light of all of the circumstances known at the time of the settlement.

Williams v. Preman, 911 S.W.2d at 297 (emphasis added). Legal malpractice actions in which the client settles a claim *after* learning of the defendant attorney's negligence and while represented by another attorney are treated differently than actions in which the settlement occurs *while* the client is still being represented by

the attorney and *before* the client knows of the alleged negligence. In the latter situation, Missouri courts have not treated the legal malpractice claim any differently than actions in which the underlying claim was fully litigated by the allegedly negligent attorney. *See Baldridge v. Lacks*, 883 S.W.2d 947, 954 (Mo.App.E.D. 1994).

As the Court of Appeals recognized in the present case:

> In cases such as Nail's, where his counsel allegedly negligently *advised* him to settle his underlying dispute, it would be illogical to suggest that the attorney is in danger of having "no voice in whether the underlying claim is settled," or that the plaintiff would be "tempted to settle the underlying claim at any figure." Nail claims that Husch decidedly *did* have a voice in whether he settled his underlying claim, and indeed negotiated the figure for which it was ultimately settled. Therefore, the danger cautioned against in *Williams [v. Preman]* does not exist, and the *Williams [v. Preman]* standard does not apply.

(Opinion, Appeal No. WD75250, May 21, 2013, p. 7-8) (emphasis in original).

The Eastern District, in *Baldridge*, was faced with a legal malpractice action where the underlying claim was settled while the plaintiff was still represented by the allegedly negligent attorneys. In that case, the plaintiff presented evidence that the attorneys "failed to meet the standard of care in regard to the duty to ensure

that the client has facts necessary to make a decision as to whether a settlement proposal is acceptable, fair and equitable." *Baldridge*, 883 S.W.2d at 950. The defendant attorneys argued that the plaintiff should be required to present expert testimony that the settlement was unreasonable. *Baldridge*, 883 S.W.2d at 954. In response, the Court discussed *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo.App. 1990), which also involved a legal malpractice action arising from a settlement. The Court explained that "*Bross* did not differentiate between underlying actions which were settled and those which went to trial. In keeping with *Bross*, we find that it was not necessary for plaintiff to include expert testimony that the settlement was unreasonable." *Baldridge*, 883 S.W.2d at 954.

As a result, it is clear that a client asserting a claim for legal malpractice only faces the "significant burden" imposed by *Williams v. Preman* when the client settles the underlying claim *after* learning of the attorney's negligence. The trial court repeatedly relied on *Williams v. Preman* in placing a higher burden on Mr. Nail to establish his claim against Husch Blackwell, stating:

- "Plaintiff must prove that the settlement was necessary 'to *mitigate* the damages flowing from defendant's negligence.' Williams v. Preman, 911 S.W.2d 288, 296 (Mo. App. 1995)."
- "Preman held 'if . . . plaintiff fails to establish a prima facie case, by cogent expert testimony which intelligently analyzes the pertinent considerations,

that the defendant's negligence proximately caused the loss, the issue should not be submitted.' 911 S.W.2d at 297."

- "The record is totally void of any indication that the voluntary settlement on Plaintiff's part was to *mitigate* damages caused by defendant's negligence. Id."
- "Plaintiff has failed to meet his *substantial burden* on this claim."

(LF, Vol. V, p. 733-34; Appendix, p. A8-A9) (emphasis added). Mr. Nail's claim against Mr. Mueller was settled by means of the DSA *before* Mr. Nail was aware that Husch Blackwell had been negligent and *while* Husch Blackwell was still representing Mr. Nail. As a result, the trial court misapplied the law and improperly placed extra burdens on Mr. Nail when it evaluated the summary judgment motion.

The "significant burden" discussed in *Williams v. Preman* and relied upon by the trial court does not apply to Mr. Nail's claim against Husch Blackwell. Husch Blackwell is not entitled to judgment as a matter of law when the proper standard is applied to Mr. Nail's claim. Therefore, the trial court erred in granting summary judgment and this Court should reverse and remand for further proceedings.

E. Summary Judgment Improper Under the Correct Standard

It is clear that the trial court erred in granting summary judgment when the evidence is considered in the context of the correct legal standard.

> "The key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *ITT Commercial Finance Corp.*, 854 S.W.2d at 380.
>
> [A] "defending party" may establish a right to judgment by showing
>
> (1) facts that negate any one of the claimant's elements facts, ...

Id. at 381 (emphasis omitted). Because summary judgment is "an extreme and drastic remedy," we exercise great caution in affirming it because the procedure cuts off the opposing party's day in court.

Collins, 157 S.W.3d at 731.

The trial court erred in granting summary judgment on Mr. Nail's claim that Husch Blackwell negligently advised him regarding how to protect his interests under the Stock Option Agreements and to settle the matter with Mr. Mueller. The summary judgment pleadings, when viewed in the light most favorable to Mr. Nail, show that genuine issues of material fact exist regarding whether Husch Blackwell's advice was negligent and whether such negligence proximately caused Mr. Nail damage.

It is undisputed that an attorney-client relationship existed between Brian Nail and Husch Blackwell. (LF, Vol. IV, p. 620, ¶ 111) ("Defendants do not dispute that Nail retained Blackwell Sanders Peper Martin in July 2001".). As a result, the issue before this court involves the remaining three elements of a claim of legal malpractice: "(2) negligence or breach of contract by the defendant; (3) proximate causation of plaintiff's damages; (4) damages to the plaintiff." *Klemme*, 941 S.W.2d at 495. It appears from the June 13 Order that the court believed that Mr. Nail failed to establish all three of these elements. (LF, Vol. V, p. 732-34; Appendix, p. A7-A9). However, once the proper standard is applied, it is clear that Mr. Nail presented sufficient evidence to establish genuine issues of material fact regarding each of these elements.

F. Negligence

The Record on Appeal includes ample evidence to support Brian Nail's claim that Husch Blackwell negligently advised him regarding how to protect his interests under the Stock Option Agreements.

> "A lawyer is not liable in damages to his client for a mere error in judgment on a legal proposition concerning which enlightened legal minds may fairly differ. But the same degree of diligence is required of a lawyer that is required of other men employed to render services of a technical or scientific character; and if the error is such as to evince negligence he is liable."

Williams v. Preman, 911 S.W.2d at 304 (quoting *James Carr's Executrix v. Glover*, 70 Mo.App. 242, 247 (1897)).

In the present case, Brian Nail specifically advised Husch Blackwell that his sole purpose for retaining representation was for protection of his interests in the Stock Option Agreements. (LF, Vol. III, p. 373, ¶ 112). Mr. Tollefsen expressed the opinion that Husch Blackwell was negligent because it did not consider Mr. Nail's reason for exercising his options important in providing advice. (LF, Vol. III, p. 380, ¶ 149; LF, Vol. IV, p. 566 [Depo., p. 28, l. 2-16]).

Brian Nail was consistently advised over the course of the representation by Husch Blackwell that he had poor prospects for success in any potential lawsuit against Mr. Mueller for enforcement of his rights pursuant to the Stock Option Agreements. (LF, Vol. III, p. 374, ¶ 117). Mr. Nail was advised that he should enter into a settlement agreement with Mr. Mueller in light of the poor prospects of any lawsuit. (LF, Vol. III, p. 375, ¶ 120). Mr. Tollefsen testified that Husch Blackwell was negligent in not analyzing and discussing damages with Mr. Nail prior to advising him to settle the claim against Mr. Mueller. (LF, Vol. III, p. 380, ¶ 150; LF, Vol. IV, p. 567 [Depo., p. 54, l. 6 thru p. 55, l. 6]).

A legend was affixed to the shares of TIG owned by Mr. Mueller that purported to restrict the sale or transfer of such shares and Husch Blackwell advised Mr. Nail that the legend was valid and would prohibit his ability to resell

or transfer any shares that he might obtain if Mr. Mueller agreed to transfer the shares pursuant to the Stock Option Agreements. (LF, Vol. III, p. 375, ¶ 119). The restrictive legend on the TIG shares owned by Mr. Mueller would not have prohibited Mr. Nail from immediately monetizing his options. (LF, Vol. III, p. 381, ¶ 155). Husch Blackwell's advice to Mr. Nail that the restrictive legend place on the TIG shares owned by Mr. Mueller would preclude Mr. Nail from selling the shares to third parties on the London Stock Exchange was incorrect. (LF, Vol. III, p. 381, ¶ 156).

Husch Blackwell did not advise Mr. Nail, prior to March 2, 2002, that there was a legal need to exercise any of the options or any portion of the options. (LF, Vol. III, p. 374, ¶ 116). Mr. Tollefsen testified that this conduct fell below the required standard of care.

3. Mr. Thompson testified that the breach of contract case against Mr. Mueller was "obvious" and a "no-brainer" (8:23-9:3). He reached that conclusion because he assumed Mr. Mueller would not breach his contract with TIG and would therefore breach his contract with Mr. Nail (11:14-24; 32:3-4). I agree with Mr. Thompson's testimony on these points.

4. However, it is equally obvious and a "no brainer" at that time that Mr. Nail must exercise his options or there would be no breach by Mr. Mueller and therefore no breach of contract case. Therefore, it is my view

that Mr. Nail should have been told to consider exercising all his options immediately after the TIG merger (July 18, 2001). If Mr. Mueller breached the contract by not delivering the stock, Mr. Nail would have a cause of action against him. In addition, he would be in a better negotiating position to reach a settlement. Furthermore, he would be able to prove damages. The amount of damages would have been determined by the highest value of the stock during a reasonable period after the breach ([citation omitted]). If he did not exercise the option, Mr. Nail might not be able to prove damages because they would be speculative.

5. In their evaluation of Mr. Nail's case, his lawyers failed to recommend Mr. Nail exercise as soon as possible to preserve the value of his damage claim []. Mr. Nail should have been told that exercise of his options was virtually riskless. Exercise would create a breach and fix the damages at the time of exercise. If the share price rose, he would have been entitled to the gain under an unjust enrichment theory. Mr. Mueller would not be allowed to profit from his breach ([citation omitted]). By fixing the damages, Mr. Nail would have liquidated his claim and been entitled to prejudgment interest ([citation omitted]).

6. Therefore, I conclude that Mr. Nail settled his claims against Mr. Mueller without being placed in the proper legal position and without proper

> legal advice. I conclude that the conduct of the lawyers involved fell below the requisite standard of care. The settlement should have taken place with Mr. Mueller in breach of the contract facing potential litigation which could have resulted in a judgment for millions of dollars of actual damages. The settlement agreement should have reflected this reality through a proper liquidated damage clause, security, or some other device. Instead Mr. Nail assumed market and other risks in a poorly drafted settlement agreement without being informed of his legal rights.
>
> 7. Mr. Robertson agrees that Mr. Mueller was potentially in breach of contract by signing the merger lock up agreement that conflicted with his option agreement with Mr. Nail []. Mr. Robertson also agrees that Mr. Nail needed to exercise the options in order to put Mr. Mueller in Breach []. I agree with this testimony.

(LF, Vol. V, p. 756-57) (footnote omitted).

This evidence creates genuine issues of material fact regarding Husch Blackwell's negligence. Missouri courts have found that a plaintiff made a submissible case based on less evidence. The Eastern District, in *Baldridge*, found that sufficient evidence was presented to show that the attorney acted negligently because:

> plaintiff's expert testified that [the attorney] failed to meet the standard of care with regard to his duty to ensure that plaintiff had sufficient information to decide whether the settlement was fair and acceptable and plaintiff testified that [attorney] advised her to accept the proposed settlement[.]

Baldridge, 883 S.W.2d at 953. As a result, it is clear that Husch Blackwell failed to negate the element of negligence and the trial court erred in granting summary judgment on that basis.

G. Proximate Cause

Proximate cause exists and an attorney is liable when the attorney negligently advises a client to agree to a settlement. The trial court erred in holding that Brian Nail could not establish proximate cause in this case. "In legal malpractice cases, it is required that plaintiff plead and prove that but for the attorney's negligence, the result of the underlying proceeding would have been different." *Williams v. Preman*, 911 S.W.2d at 295. "A defendant's conduct is the proximate cause of a plaintiff's injury when the injury is the natural and probable consequence of the conduct." *Collins*, 157 S.W.3d at 732. "Proximate cause issues are generally (except in clear cases) issues of fact. When they are questions of fact, the plaintiff has a basic right to a trial of the issues by jury." *Williams v. Preman*, 911 S.W.2d at 295.

Missouri courts have recognized legal malpractice claims against attorneys that negligently advised their client to settle a claim. In *London v. Weitzman*, 884 S.W.2d 674 (Mo.App.E.D. 1994), the defendant attorney, an old friend of the plaintiff's husband, represented the plaintiff in her dissolution action based on the suggestion of the plaintiff's husband. *London*, 884 S.W.2d at 676. The plaintiff, without receiving any information regarding marital assets or her husband's income, agreed to a settlement. *London*, 884 S.W.2d at 676. The evidence indicated that the defendant had not provided any legal advice, but had "assured her that [the proposal] was more than fair." *London*, 884 S.W.2d at 676. The Court explained:

> Defendant admitted he never gave plaintiff any advice regarding her rights under the laws of Missouri. He knew . . . that she had been kept in the dark about financial matters and had requested that [her prior attorney] obtain tax returns and other financial information from her husband. . . . He never obtained any information concerning plaintiff's husband's income and, although required by local court rule, he did not file a statement of income and expenses for either party.

London, 884 S.W.2d at 676. The plaintiff offered expert testimony regarding the process by which a dissolution court divides marital property and the expert's opinion of what a fair and equitable distribution would have been under the facts in

evidence. *London*, 884 S.W.2d at 677-78. The expert also "testified that in advising plaintiff to accept a settlement of twenty percent of the marital assets defendant failed to exercise the appropriate standard of care that an attorney must meet." *London*, 884 S.W.2d at 677. The Court held that "[t]his evidence was sufficient to permit the jury to find the existence of identifiable damages *caused* by defendant's professional negligence". *London*, 884 S.W.2d at 677 (emphasis added).

The Eastern District again held that a client had made a submissible case against the client's former attorney and his partners in an action seeking damages for their allegedly negligent handling of her dissolution action in *Baldridge*. *Baldridge*, 883 S.W.2d at 950, 953. The Court explained:

> At trial, plaintiff's expert, attorney Allen Russell, testified that Lacks failed to meet the standard of care in regard to the duty to ensure that the client has facts necessary to make a decision as to whether a settlement proposal is acceptable, fair and equitable. Russell further testified that Lacks did not meet the standard of care concerning the proposed settlement because Lacks failed to engage in discovery, failed to trace assets and did not know the extent of the marital and nonmarital estates.

Baldridge, 883 S.W.2d at 950. The Court, after setting out the elements of a legal malpractice action, found that the plaintiff made a submissible case, stating, with regard to proximate cause, that:

> plaintiff's expert opined that Lacks' failure to ascertain the nature and extent of the Baldridges' marital property and proceeding to advise plaintiff to settle her divorce action without such knowledge was the proximate cause of plaintiff's loss[.]

Baldridge, 883 S.W.2d at 953.

The defendants in *Baldridge* argued that the plaintiff was collaterally estopped from asserting her claims as a result of the court-approved settlement and her testimony in the dissolution action agreeing to the settlement. *Baldridge*, 883 S.W.2d at 950. The Eastern District disagreed, explaining:

> Throughout their argument, defendants mischaracterize plaintiff's malpractice claim as an attempt to attack the reasonableness of the settlement. Plaintiff's claim, however, is that defendants failed to provide competent legal advice to her during the prosecution of her divorce action. She is suing to recover for economic loss allegedly sustained as a result. The issues in the present action are whether defendants were negligent in their representation of plaintiff and whether plaintiff was damaged as a result. Plaintiff claims defendants negligently advised her to enter into the

separation agreement without first having fully and adequately assessed the nature and extent of the marital estate.

Baldridge, 883 S.W.2d at 951 (footnote omitted).

The Western District of the Court of Appeals addressed similar arguments in *Collins v. Missouri Bar Plan*, 157 S.W.3d 726 (Mo.App.W.D. 2005). In that case, the plaintiffs alleged the defendant attorneys were guilty of malpractice in advising them that they could withdraw their consent to the adoption of their child anytime before the adoption became final. *Collins*, 157 S.W.3d at 730, 733. The Court reversed the summary judgment entered in favor of two of the defendant attorneys. *Collins*, 157 S.W.3d at 730. In addressing the issue of proximate cause, the Court explained:

> Viewing the evidence in a light most favorable to the Collinses, we discern unresolved, genuine issues of material fact as to the causation issue. The Collinses countered the lawyers' denials that they had misled the Collinses with bad legal advice by submitting affidavits that asserted that Krigel and Anderson had advised them that their consents could be withdrawn at any time before the adoption was final and that they relied on this advice. This created a fact issue to be determined by the fact finder and rendered summary judgment inappropriate.

Collins, 157 S.W.3d at 733.

The attorney defendants in *Collins* argued that the plaintiffs could not prevail because either judicial estoppel or collateral estoppel applied as a result of their consent in the original adoption action. *Collins*, 157 S.W.3d at 733-34. The Court held that judicial estoppel did not apply because the plaintiffs' claims did not contradict their consent in the original action. The Court explained that "the Collinses did [*734] consent to the adoption, but, according to their allegations, their consent was based on a mistaken belief that they could withdraw their consent later should they change their minds." *Collins*, 157 S.W.3d at 733-34. Similarly, collateral estoppel did not apply because "[t]he issue of whether or not [the attorneys] negligently advised the Collinses that they should consent to the adoption because they could withdraw their consent later has never been litigated." *Collins*, 157 S.W.3d at 734. "The issue of whether they consented voluntarily to the adoption is separate from whether or not they were misled or given negligent advice by their attorneys." *Collins*, 157 S.W.3d at 734.

In the present case, Husch Blackwell was negligent in failing to advise Mr. Nail to exercise his options immediately after the merger in July, 2001. (LF, Vol. V, p. 756-57). If Husch Blackwell had properly advised Mr. Nail to exercise his options, only two possible responses by Mr. Mueller existed. First, Mr. Mueller could have complied with his obligations under the Stock Option Agreements and delivered the shares to Mr. Nail. Mr. Moeran testified that the restrictive legend on

the TIG shares owned by Mr. Mueller would not have prohibited Mr. Nail from immediately monetizing his options. (LF, Vol. III, p. 381, ¶ 155; LF, Vol. IV, p. 573 [Depo., p. 8, l. 21-25]). As a result, Mr. Nail would have then owned shares worth at least 280 Pence each and had the ability to immediately sell the shares. In other words, Mr. Nail would have immediately received something of significant value.

The second possible response was that Mr. Mueller could have refused to deliver the shares to Mr. Nail, thus breaching the Stock Option Agreements. Mr. Nail's minimum damages would have been fixed upon breach by Mr. Mueller and Mr. Nail would have had a claim against Mr. Mueller based on a stock price of at least 280 Pence.

It is true that "[e]xcept in 'clear and palpable' cases, expert testimony is required to establish a claim of legal malpractice." *Thiel v. Miller*, 164 S.W.3d 76, 85 (Mo.App.W.D. 2005). However, a simple breach of contract claim is within the "clear and palpable" exception. Husch Blackwell has never asserted that Mr. Mueller had any defenses to Mr. Nail's claim once Mr. Nail exercised his options and Mr. Mueller actually breached the Stock Option Agreements. *Compare Day Advertising Inc. v. Devries and Associates, P.C.*, 217 S.W.3d 362, 367 (Mo.App.W.D. 2007) (Defendants/attorneys presented evidence regarding affirmative defenses "to negate an element of [plaintiff's] case . . . ."). In the

absence of any evidence that Mr. Mueller would have had some affirmative defense to Mr. Nail's claim, Mr. Nail was only required to show the existence of the Stock Options Agreements and breach by Mr. Mueller. Mr. Nail presented such evidence.

In addition, Mr. Nail did present expert testimony that he would have prevailed on his claims against Mr. Mueller. Mr. Tollefsen, in his affidavit, indicated that the breach of contract case against Mr. Mueller was "'obvious' and a 'no-brainer'". (LF, Vol. V, p. 756, ¶ 3). He also indicated that Mr. Nail, by exercising his options immediately after the merger, would have fixed the amount of his damages, liquidating his claim and making him entitled to prejudgment interest. (LF, Vol. V, p. 756-57, ¶ 4-5).

Steve Carman, one of Husch Blackwell's own attorneys, in discussing the merits of Mr. Nail's claim against Mr. Mueller "for the anticipatory breach of the Option Agreements", (LF, Vol. III, p. 542 [Depo., p. 99, l. 14-19]), testified that he advised Mr. Nail that he, Mr. Carman, "would much rather have [Mr. Nail's] side of the argument than Mueller's side of the argument." (LF, Vol. III, p. 542 [Depo., p. 99, l. 23-24]). Mr. Carman also testified that "I thought it was a winnable claim." (LF, Vol. III, p. 542 [Depo., p. 100, l. 8]).[1]

[1] The fact that the testimony discussed a claim for "anticipatory breach" and that Mr. Mueller could raise "defenses", (LF, Vol. III, p. 542 [Depo., p. 99, l. 4

It is also important to understand that additional evidence regarding the likelihood of success was available but Mr. Nail did not include it in the summary judgment record because the issue was not raised by the Motion for Summary Judgment. The Defendants filed their Motion for Summary Judgment, Suggestions in Support of Motion for Summary Judgment, and Statement of Uncontroverted Facts in Support of Defendants' Motion for Summary Judgment on January 14, 2011. (LF, Vol. I, p. 6, 23, 34, 78). The Motion for Summary Judgment and the Suggestions in Support raised several grounds upon which Defendants alleged entitlement to judgment as a matter of law. The Motion and Suggestions did *not* assert that Mr. Nail had failed to provide expert testimony of a "case within a case". (LF, Vol. I, p. 23-76). As a result, that issue was not fully briefed in the trial court and Mr. Nail did not supply all of the evidence available clearly indicating that he would have been able to prevail on a breach of contract claim against Mr. Mueller *if Husch Blackwell had properly advised him to exercise his options immediately after the merger*.

Further, logic indicates that Mr. Mueller did not actually breach the Stock Option Agreements simply by agreeing to the lock-up period. If Mr. Nail had not

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thru p. 100, l. 8]), highlights the negligence of Husch Blackwell in failing to advise Mr. Nail to immediately exercise his options after the merger to force Mr. Mueller to either deliver the shares or be in actual breach.

attempted to exercise his options until after the lock-up period, Mr. Mueller would have been able to comply with the Stock Option Agreements without breaching his agreement with TIG. As a result, the fact that Mr. Mueller agreed to the lock-up period, without more, does not appear to have constituted a breach of the Stock Option Agreements. As a result, it was necessary for Mr. Nail to exercise his options in order to force Mr. Mueller to either comply or breach. Husch Blackwell's negligent failure to advise Mr. Nail to exercise his options immediately after the merger did result in damages to Mr. Nail.

Mr. Nail clearly presented sufficient evidence of proximate cause to require that this matter be submitted to a jury for determination. Husch Blackwell negligently failed to advise Mr. Nail, prior to March 2, 2002, that there was a legal need to exercise any of the options. (LF, Vol. III, p. 374, ¶ 116; LF, Vol. V, p. 756-57). Husch Blackwell then negligently advised Brian Nail to settle his claim against Mr. Mueller. (LF, Vol. III, p. 375, ¶ 120; LF, Vol. III, p. 380, ¶ 150; LF, Vol. IV, p. 567 [Depo., p. 54, l. 6 thru p. 55, l. 6]). As a result, Mr. Nail agreed to the DSA, which was executed on March 15, 2002. (LF, Vol. I, p. 81, ¶ 30). The DSA prohibited Mr. Nail from exercising his options until July 18, 2002. (LF, Vol. II, p. 219, ¶ 1.06).

TIG stock had a trading value of 290 Pence (2.9 Pounds) per share on July 18, 2001. (LF, Vol. III, p. 456). For the period from July 18, 2001 through August

31, 2001, TIG stock had a high trading value of 440 Pence (4.4 Pounds) and a low trading value of 280 Pence (2.8 Pounds) per share. (LF, Vol. III, p. 456). As a result, if Husch Blackwell had advised Mr. Nail to exercise his options within a reasonable time after the merger, his damages upon breach by Mr. Mueller would have been based on a stock price of *at least* 280 Pence.

TIG stock had a trading value of 240 Pence (2.4 Pounds) per share on March 15, 2002. (LF, Vol. III, p. 458). During March, 2002, TIG stock had a high trading value of 250 Pence (2.5 Pounds) and a low trading value of 176.57 Pence (1.7657 Pounds) per share. (LF, Vol. III, p. 458). Husch Blackwell's failure to properly advise Mr. Nail to exercise his options earlier resulted in the DSA being executed at a time when the share prices had already fallen *at least* 30 Pence.

TIG stock had a trading value of 78 Pence (.78 Pounds) on July 18, 2002. (LF, Vol. III, p. 459). For the period from July 18, 2002 through August 31, 2002, TIG stock had a high trading value of 80 Pence (.8 Pounds) and a low trading value of 16.26 Pence (.1626 Pounds) per share. (LF, Vol. III, p. 459). As a result of the prohibition in the DSA, Mr. Nail was then not allowed to exercise his options until the stock trading value had fallen to less than a Pound.

Husch Blackwell failed to advise Mr. Nail to exercise his options in July, 2001. This negligence prevented Mr. Nail from establishing a minimum damage claim based on a share price of at least 280 Pence. Husch Blackwell's negligence

then prevented Mr. Nail from exercising his options until the share price was below 80 Pence. Husch Blackwell's negligence, therefore, proximately caused damages *of at least 2 Pounds per share.* The trial court erred in ruling that proximate cause did not exist and in granting summary judgment in favor of Husch Blackwell.

Additionally, the fact that Brian Nail voluntarily agreed to the settlement does not negate proximate cause. The issue of whether he agreed to the DSA is separate from the issue of whether Mr. Nail was negligently advised regarding whether the settlement was acceptable, fair, and equitable. *See Collins*, 157 S.W.3d at 734 ("The issue of whether they consented voluntarily to the adoption is separate from whether or not they were misled or given negligent advice by their attorneys."). The question for the trier of fact is whether Husch Blackwell's negligence *caused* Mr. Nail to imprudently agree to the DSA, not whether Mr. Nail actually agreed to the settlement.

The court also erroneously believed that "[a]s a matter of law, the fluctuation in market price is an intervening cause and is not the appropriate measure of damages on Plaintiff's failed claim." (LF, Vol. V, p. 734; Appendix, p. A9). However, market fluctuations are not an intervening cause when such fluctuations are foreseeable and are the precise danger from which Mr. Nail sought protection.

Missouri has long recognized that a plaintiff's damages are recoverable when the defendant improperly causes a delay in the plaintiff's ability to sell his property. The present case is:

> analogous to that where a shipper is delayed in getting his property to market until there is a decline in the price there and whereby he is compelled to sell for a less price than he would have obtained had the carrier kept his contract. [Citation omitted]. In such case the damages are certain and not speculative and contingent and are therefore properly allowed.

Reynolds v. Western Union Telegraph Co., 81 Mo.App. 223, 232 (1899).

Further, the possibility of the trading value of the shares declining if Husch Blackwell negligently caused a delay in Mr. Nail's ability to exercise his options was foreseeable.

> An intervening cause is a new and independent force which so interrupts the chain of events as to become the responsible, direct, proximate and immediate cause of the injury, rendering any prior negligence too remote to operate as the proximate cause. [Citation omitted]. It may not consist of an act of concurring or contributory negligence. [Citation omitted]. Moreover, *it may not be one which is itself a forseeable and natural result of the original negligence*.

Schaffer v. Bess, 822 S.W.2d 871, 877 (Mo.App.E.D. 1991) (emphasis added). The price of the shares declining was a clearly foreseeable possibility if Mr. Nail was delayed in exercising his options as a result of Husch Blackwell's negligence. Husch Blackwell alleged that Brian Nail "assumed the risk of a decrease in the price of shares for" TIG as an affirmative defense. (LF, Vol. I, p. 19, ¶ 3). Generally, only foreseeable risks can be assumed. As a result, a decrease in the trading price of TIG shares was foreseeable and, if Husch Blackwell negligently caused a delay in Mr. Nail's ability to exercise his options, a natural result of such negligence.

In addition, the decline in the trading value was not the sole cause of Mr. Nail's damages. Rather, the decline in the trading value combined with the delay caused by Husch Blackwell's negligence to cause Brian Nail damage. It is not necessary that Husch Blackwell's negligence be the sole cause of damage. "[A] party is liable if his negligence, combined with the negligence of others, results in injury". *Schaffer*, 822 S.W.2d at 877. Husch Blackwell's negligence is an efficient cause of the damages in this case. *Schaffer*, 822 S.W.2d at 877.

The trial court erred in granting summary judgment on the basis that proximate cause had not been established. The summary judgment facts showed that material issues of fact exist concerning proximate cause and summary judgment was improperly granted.

H. Damages

As discussed above, Husch Blackwell failed to advise Mr. Nail to exercise his options in July, 2001. This negligence prevented Mr. Nail from establishing a minimum damage claim based on a share price of *at least* 280 Pence. Husch Blackwell's negligence then prevented Mr. Nail from exercising his options until the share price was below 80 Pence. As a result, it is clear that Mr. Nail has been damaged as a result of Husch Blackwell's negligence. In fact, as soon as the price of the TIG stock fell after July 18, 2001, without Mr. Nail having taken the steps to establish a minimum amount of damages, he had been damaged. Further, Mr. Nail was damaged again when he signed the DSA, which did not adequately protect his interests under the Stock Option Agreements. *See Collins*, 157 S.W.3d at 732 ("As soon as the Collinses executed their consent based on Anderson's and Krigel's negligent advice, they stood to lose custody of their child.").

Further, Mr. Nail's damages are not speculative. In a legal malpractice action, "'[t]he measure of damage would be the amount a client would have received "but for" the attorney's negligence.'" *Thiel*, 164 S.W.3d at 82 (quoting *Steward v. Goetz*, 945 S.W.2d 520, 532 (Mo.App. 1997)). Therefore, the question is "what would Mr. Nail have received 'but for' Husch Blackwell's negligence?"

Mr. Tollefsen testified that Mr. Nail should have been advised to exercise his options immediately after the TIG merger and that Husch Blackwell was

negligent in failing to do so. (LF, Vol. V, p. 757, ¶ 4, 6). If Husch Blackwell had properly advised Mr. Nail and Mr. Mueller had refused to deliver the shares, Mr. Nail would have had a breach of contract claim against Mr. Mueller based on a stock price of at least 280 Pence. Mr. Mueller could not avoid this claim simply be waiting until after the lock-up period and tendering delivery of the shares, then valued at 78 Pence. At the least, Mr. Mueller would have been liable for the difference in the value of the shares when he was contractually obligated to deliver them, July, 2001, and the price when he actually delivered them, July, 2002, which involves damages of at least 2 Pounds per share. This is what Mr. Nail would have received "but for" Husch Blackwell's negligence. Such damages are not speculative. Instead, such damages are based on the claim against Mr. Mueller that was lost as a result of Husch Blackwell's negligence.

The trial court erred in granting summary judgment regarding Brian Nail's claim that Husch Blackwell negligently failed to advise him how to protect his interests under the Stock Options Agreements and negligently advised him to settle his claim against Mr. Mueller. The trial court misapplied the law when it imposed the "significant burden" set forth in *Williams v. Preman*. In addition, Husch Blackwell failed to show that it was entitled to judgment as a matter of law because the undisputed facts do not negate any of the elements of Mr. Nail's claim. Mr. Nail presented evidence that establishes that genuine issues of material fact exist

that preclude summary judgment and this Court should reverse the trial court's Judgment and remand for further proceedings.

II. The trial court erred in granting summary judgment and denying reconsideration regarding Brian Nail's claim that Husch Blackwell negligently advised him regarding the protection of his interest in the Stock Option Agreements on the basis that Mr. Nail waived his right to litigate the claim against Mr. Mueller, because the undisputed facts do not clearly and unequivocally show a purpose to relinquish a known right, in that Mr. Nail's attempt to mitigate the damages resulting from Husch Blackwell's negligence by pursuing claims against Mr. Mueller does not evidence any intention to relinquish his claims against Husch Blackwell.

A. Standard of Review

On appeal from the granting of a motion for summary judgment, the record is viewed in the light most favorable to the nonmoving party, including affording that party the benefit of all reasonable inferences from the evidence. *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 730 (Mo.App.W.D. 2005); *FH Partners, LLC v. Complete Home Concepts, Inc.*, 378 S.W.3d 387, 393 (Mo.App.W.D. 2012). As this Court has explained:

> Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine dispute as to the facts" and that "the

facts as admitted show a legal right to judgment for the movant." *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Id*. at 378. The propriety of summary judgment is purely an issue of law, and this Court's review is essentially *de novo*. *Id*. at 376. "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id*.

Bob DeGeorge Associates, Inc. v. Hawthorn Bank, 377 S.W.3d 592, 596 (Mo.banc 2012).

B. Brian Nail Did Not Waive Claim

The trial court also erroneously granted summary judgment on Brian Nail's claim against Husch Blackwell on the basis of an alleged waiver. The court stated:

> Plaintiff has also waived his right to litigate the claim concerning Mueller's alleged breach of the stock option agreements. The evidence is uncontroverted that Mr. Nail abandoned this claim in his lawsuit against Mueller. Nail elected to pursue damages for breach of the DSA, and to abandon his claim for rescission against Mueller.

(LF, Vol. V, p. 734; Appendix, p. A9). The trial court relied on the fact that Mr. Nail, at the close of the evidence in the Kansas litigation against Mr. Mueller, elected to abandon his claim for rescission of the DSA and instead seek damages from Mr. Mueller for breach of the DSA. (LF, Vol. I, p. 87, ¶ 69). However, that decision does not support the trial court's ruling. Mr. Nail's election of remedies in his action against Mr. Mueller does not evidence an intention to waive any claim he has against Husch Blackwell for the legal malpractice they committed.

As an initial matter, waiver is an affirmative defense that must be properly pled. Mo. Ct. Rule 55.08. Husch Blackwell did not plead waiver based on Mr. Nail's election of remedies in the Kansas action against Mr. Mueller. (LF, Vol. I, p. 18-20). As a result, Husch Blackwell is not entitled to rely on this affirmative defense.

Regardless of whether waiver was properly pled, it is clear that summary judgment based on waiver was not proper. "Waiver is the intentional relinquishment of a known right and if implied from conduct, the conduct must *clearly and unequivocally* show a purpose to relinquish the right." *Shapiro v. Shapiro*, 701 S.W.2d 205, 206 (Mo.App.E.D. 1985) (emphasis added); *see also Austin v. Pickett*, 87 S.W.3d 343, 348 (Mo.App.W.D. 2002) ("A waiver is an intentional relinquishment of a known right."). "'To rise to the level of waiver, the 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 (quoting *Investors Title Co. v. Chicago Title Ins. Co.*, 983 S.W.2d 533, 538 (Mo.App.E.D. 1998)).

The trial court based its finding of waiver on Mr. Nail's election of remedies in his action against Mr. Mueller. "Whether [Mr. Nail's] acts can be construed as an implied waiver is a question of fact." *Frisella v. RBV Corp.*, 979 S.W.2d 474, 477 (Mo.App.E.D. 1998). "The trial court is not the trier of fact in a summary judgment but must deny a motion for summary judgment if a factual issue exists." *Rogers v. Illinois Cent. R. Co.*, 833 S.W.2d 426, 429 (Mo.App.E.D. 1992). "If the evidence presented to support or oppose the motion is subject to conflicting interpretations, or reasonable people might differ as to its significance, summary judgment is improper." *Rogers*, 833 S.W.2d at 427. At most, Mr. Nail's election of remedies is subject to conflicting interpretations. As a result, summary judgment based on the implied waiver allegedly resulting from Mr. Nail's election of remedies was improper.

Finally, a plaintiff has two options when a defendant fails to comply with the terms of a settlement. "'[A]fter a settlement is made, if the defendant refuses to comply with its terms in whole or in part, the plaintiff may enforce the settlement agreement *or* abandon the settlement and proceed under the original cause of action.'" *Neiswonger v. Margulis*, 203 S.W.3d 754, 760 (Mo.App.E.D. 2006)

(emphasis added) (quoting *Estate of Knapp by and through Igoe v. Newhouse*, 894 S.W.2d 204, 206 (Mo.App.E.D. 1995)). The election of remedies in Mr. Nail's action against Mr. Mueller only involved a choice of which claim Mr. Nail wished to pursue against Mr. Mueller. Mr. Nail was placed in the position of having to make that choice as a result of Husch Blackwell's negligence. Mr. Nail's election of remedies in his action against Mr. Mueller should not, as a matter of law, constitute a waiver of any claim that Mr. Nail has against Husch Blackwell for its negligence that occurred before the action against Mr. Mueller was ever filed. As the Court of Appeals recognized:

> Nail's lawsuit against Mueller compared to his lawsuit against Husch involves different factual allegations and different parties in a different forum. It is untenable that abandonment of one could be perceived as an intentional relinquishment of the other.

(Opinion, Appeal No. WD75250, May 21, 2013, p. 11).

Similar argument were raised in *Collins v. Missouri Bar Plan*, 157 S.W.3d 726 (Mo.App.W.D. 2005). In that case, the defendant attorneys argued that negligent handling of a subsequent suit to revoke the plaintiffs' consent to an adoption was an intervening cause of the plaintiffs' damage. *Collins*, 157 S.W.3d at 732 ("The lawyers assert that Wake-Larison's failure to repair the damage cause by their negligent advice constituted an intervening cause."). The Court held that

"[a]n intervening attempt to fix a mistake caused by an earlier party is not necessarily an intervening [*733] cause, even when the attempted fix fails." *Collins*, 157 S.W.3d at 732-33. The Court explained:

> the Collinses received negligent advice, and Wake–Larison attempted to fix the mistake by filing a motion to revoke the Collinses' consents. Wake–Larison's attempted fix failed, but, assuming that she acted negligently, her negligence did not interrupt the chain of events triggered by Krigel's and Anderson's alleged negligence.

Collins, 157 S.W.3d at 733.

In the present case, Brian Nail received negligent advice from Husch Blackwell. He attempted to fix the mistake by filing suit against Mr. Mueller. Husch Blackwell had been negligent in failing to properly advise Mr. Nail on how to protect his interest in the Stock Option Agreements, advising him to settle his claim against Mr. Mueller, and drafting the DSA. Mr. Nail, in his action against Mr. Mueller, could not fix all of the problems created by Husch Blackwell's negligence as he could either "enforce the settlement agreement *or* abandon the settlement and proceed under the original cause of action." *Neiswonger*, 203 S.W.3d at 760 (internal quotes omitted) (emphasis added). As in *Collins*, the fact that Mr. Nail's attempted fix failed does not change the fact that Husch Blackwell

proximately caused his damages and does not constitute a waiver of Mr. Nail's claims against Husch Blackwell.

The trial court erred in granting summary judgment on the basis of the alleged waiver of Mr. Nail's claim. Husch Blackwell did not properly plead the affirmative defense of waiver and implied waiver involves questions of fact, not law, that are not appropriate for summary judgment. As a result, Husch Blackwell did not establish that they are entitled to judgment as a matter of law and summary judgment was improper. The trial court's Judgment should be reversed and this matter remanded for further proceedings.

III. The trial court erred in granting summary judgment and denying reconsideration regarding Brian Nail's claim that the proper measure of damages for Husch Blackwell's negligent drafting of the DSA was the amount specified in the liquidated damages clause on the basis that Husch Blackwell's negligence did not cause such damages, because genuine issues of material fact exist regarding whether Mr. Nail's damages resulting from the negligent drafting of the DSA were accurately estimated by the liquidated damages clause, in that the failure of Mr. Mueller to provide the necessary documents to transfer ownership of the TIG shares to Mr. Nail damaged Mr. Nail in the same amount regardless of whether such failure was the result of a breach of the DSA by Mr. Mueller or of the negligent drafting by Husch Blackwell.

A. Standard of Review

On appeal from the granting of a motion for summary judgment, the record is viewed in the light most favorable to the nonmoving party, including affording that party the benefit of all reasonable inferences from the evidence. *Collins v. Missouri Bar Plan*, 157 S.W.3d 726, 730 (Mo.App.W.D. 2005); *FH Partners, LLC v. Complete Home Concepts, Inc.*, 378 S.W.3d 387, 393 (Mo.App.W.D. 2012). As this Court has explained:

> Summary judgment is appropriate only when the moving party demonstrates that "there is no genuine dispute as to the facts" and that "the facts as admitted show a legal right to judgment for the movant." *ITT Commercial Fin. Corp. v. Mid–Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. *Id*. at 378. The propriety of summary judgment is purely an issue of law, and this Court's review is essentially *de novo*. *Id*. at 376. "As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." *Id*.

Bob DeGeorge Associates, Inc. v. Hawthorn Bank, 377 S.W.3d 592, 596 (Mo.banc 2012).

B. Husch Blackwell Proximately Caused Damages

The trial court overruled Husch Blackwell's motion for summary judgment on the claim that they negligently drafted the DSA. The court held:

> The deposition testimony of Plaintiff's expert witnesses adequately supports a claim of negligence in the drafting of the DSA and Escrow Agreement. Plaintiff has made a sufficient showing of material issues of fact remaining as to this claim. Defendant's motion fails to demonstrate a legal or undisputed factual basis for waiver or collateral estoppel on the issue of failing to provide for the UK documents within the four day turnaround period in the Escrow Agreement. Defendant's claim of collateral estoppel on this basis is **OVERRULED**.

(LF, Vol. V, p. 734-35; Appendix, p. A9-A10). However, the trial court granted summary judgment on the claim that the proper measure of damages for negligently drafting the DSA was based on the liquidated damages clause in the DSA. The trial court explained its ruling as follows:

> There are no material issues of fact remaining as to whether there is a causal connection between the liquidated damage calculation and the loss actually experienced by Mr. Nail for the delay that he experienced from the deliver[y] of the second UK transfer form. The delay in delivery of the UK stock transfer documents and the ultimate registration of the stock is not

> legally or causally related to the liquidated damages clause of the DSA. . . . There is no logical or causal connection between the liquidated damages clause damages claimed by Plaintiff and any resultant damage caused by the additional delay in obtaining execution of the UK stock transfer form. It is simply illogical to allow a claim for damages based upon liquidated damages on the highest closing point, for a negligent drafting of the settlement document(s).

(LF, Vol. V, p. 735; Appendix, p. A10). The trial court erroneously believed that proximate cause did not exist in relation to using the liquidated damages clause in the DSA as the measure of damages.

It is true that Husch Blackwell was not a party to the DSA. Therefore, Husch Blackwell could not breach the DSA and be directly liable for the damages specified in the liquidated damages clause in the DSA. However, that does not preclude Husch Blackwell's negligence from being the proximate cause of Brian Nail being damaged in the amount specified in that liquidated damages clause. "In legal malpractice cases, it is required that plaintiff plead and prove that but for the attorney's negligence, the result of the underlying proceeding would have been different." *Williams v. Preman*, 911 S.W.2d at 295. "A defendant's conduct is the proximate cause of a plaintiff's injury when the injury is the natural and probable consequence of the conduct." *Collins*, 157 S.W.3d at 732. "Proximate cause

issues are generally (except in clear cases) issues of fact. When they are questions of fact, the plaintiff has a basic right to a trial of the issues by jury." *Williams v. Preman*, 911 S.W.2d at 295.

The question for this Court is whether Mr. Nail presented sufficient facts to show that Husch Blackwell negligently caused Mr. Nail to suffer damages in the amount specified in the liquidated damages clause.

As an initial matter, the determination of proximate cause is generally a question of fact. *Williams v. Preman*, 911 S.W.2d at 295 ("Proximate cause issues are generally (except in clear cases) issues of fact. When they are questions of fact, the plaintiff has a basic right to a trial of the issues by jury."). "The trial court is not the trier of fact in a summary judgment but must deny a motion for summary judgment if a factual issue exists." *Rogers v. Illinois Cent. R. Co.*, 833 S.W.2d 426, 429 (Mo.App.E.D. 1992). "If the evidence presented to support or oppose the motion is subject to conflicting interpretations, or reasonable people might differ as to its significance, summary judgment is improper." *Rogers*, 833 S.W.2d at 427. At most, the evidence of whether Husch Blackwell caused Mr. Nail damages in the amount specified in the liquidated damages clause is subject to conflicting interpretations. As a result, the determination of proximate cause was not a proper subject for the trial court to decide on summary judgment.

This is true because Mr. Nail presented sufficient evidence, which if believed, would support a finding that Husch Blackwell proximately caused him damages in the amount specified in the liquidated damages clause of the DSA. It is undisputed that Husch Blackwell drafted the DSA. (LF, Vol. III, p. 375, ¶ 122; LF, Vol. I, p. 81, ¶ 28; LF, Vol. I, p. 81, ¶ 28). The purpose of the DSA and the Escrow Agreement was to ensure that Mr. Mueller did not have any control over the shares when Mr. Nail elected to exercise his options. (LF, Vol. IV, p. 571 [Depo., p. 126, l. 22 thru p. 127, l. 4], p. 571 [Depo., p. 129, l. 2-7]). The liquidated damages clause was intended to ensure compliance with the DSA.

> Among the terms of the DSA was what was explained to Brian Nail as a "liquidated damage" clause that would entitle him to damages against Mr. Mueller in the event he failed to honor the terms of the DSA and Escrow Agreements.

(LF, Vol. III, p. 376, ¶ 127).

However, Husch Blackwell negligently drafted the DSA. Mr. Tollefsen testified that Husch Blackwell "failed to understand how the transaction would need to be structured in order to comply with the requirements of UK law to properly transfer the stock." (LF, Vol. III, p. 379, ¶ 145; LF, Vol. IV, p. 562 [Depo., p. 7, l. 16-20]). He also testified that the DSA should have provided that Mr. Mueller "ha[d] a responsibility to make sure that he is providing the

documentation so that nothing more needs to be done in order to transfer it." (LF, Vol. IV, p. 563 [Depo., p. 15, l. 16-19]). Mr. Tollefsen and Mr. Moeran both testified that DSA and Escrow Agreements were not effective to transfer ownership under UK law. (LF, Vol. IV, p. 564 [Depo., p. 20, l. 6-7]; LF, Vol. III, p. 380, ¶ 147; LF, Vol. IV, p. 576 [Depo., p. 69, l. 13-18]; LF, Vol. III, p. 381, ¶ 160).

The failure of the DSA to require the documents necessary to effectuate the transfer pursuant to UK requirements allowed Mr. Mueller to retain control and ownership of the shares. This control subjected Mr. Nail to the possibility of delay any time he attempted to exercise any of the options because Mr. Mueller was required to provide additional documents. Any delay involved in the exercise of the options created difficulties for Mr. Nail because possible price fluctuations could make what would have been a profitable trade unprofitable. The requirement of additional documents from Mr. Mueller each time Mr. Nail exercised his options defeated the purpose of the DSA and Escrow Agreement. (LF, Vol. IV, p. 571 [Depo., p. 128, l. 24 thru p. 129, l. 1]; LF, Vol. III, p. 380, ¶ 154) ("So if there is going to have to be additional documents, that – the escrow then fails of its essential purpose.").

If the DSA had been drafted properly, Mr. Mueller would have been required to provide to the escrow agent all the documents necessary to effectuate

transfer of ownership to Mr. Nail. His failure to do so would have subjected him to liability under the liquidated damages clause of the DSA. As Mr. Tollefsen testified:

> [M]y opinion is – my understanding is that the settlement agreement, as drafted, did not accomplish [Mr. Nail's] purpose. There was additional documentation that had to be done. There was a stamp tax and some other things that had to happen in order to accomplish it, things that had been overlooked.
>
> Now, that goes to damages. I think that that was designed to be an – *that should have been a breach of the contract and that should have triggered the liquidated clause*. That that was the intent, as I understand from Mr. Nail, that if there was further documentation needed in order to accomplish this, that gave Mr. Mueller control over the transaction, that that's a breach and that should have triggered liquidated damage. That's what I understand the facts.

(LF, Vol. IV, p. 565 [Depo., p. 24, l. 3-20]; LF, Vol. III, p. 380, ¶ 148) (emphasis added). As a result, Husch Blackwell's negligent drafting allowed Mr. Mueller to escape liability under the liquidated damages clause even though he did not initially provide the documents necessary to effectuate the transfer pursuant to UK law.

Mr. Nail's failure to recover damages pursuant to the liquidated damages clause is the natural and probable consequence of Husch Blackwell's negligent drafting of the DSA. Therefore, Husch Blackwell's negligence is the proximate cause of Mr. Nail's damages *in the amount of the liquidated damages* provided for in the DSA. *Collins*, 157 S.W.3d at 732.

The purpose of the DSA was to ensure that *all* of the documents necessary to transfer the shares of TIG to Mr. Nail were in the possession of the escrow agent so that Mr. Nail could quickly exercise his options without any requirement for involvement by Mr. Mueller. A liquidated damages clause "determines in advance the measure of damages if a party breaches the agreement." Black's Law Dictionary, p. 949 (8th ed. 2004); *see also City of Richmond Heights v. Waite*, 280 S.W.3d 770, 776 (Mo.App.E.D. 2009) ("[L]iquidated damages are provided as a measure of compensation that, at the time of contracting, the parties agree will represent damages in the event of a breach."). Therefore, the liquidated damages provision in the DSA, drafted by Husch Blackwell, was intended to determine the measure of damages if Mr. Mueller did not provide *all* the documents necessary to transfer the TIG shares to Mr. Nail. Thus, the liquidated damages provision was an estimate of the actual damages suffered by Mr. Nail if Mr. Mueller did not provide those documents.

Mr. Nail suffered the same damages if those documents were not provided, regardless of the reason. It did not matter if the documents were not provided because Mr. Mueller breached the DSA or if the documents were not provided because Husch Blackwell failed to draft the DSA and Escrow Agreement to properly require delivery of the documents. In the first instance, Mr. Mueller is liable pursuant to the liquidated damages clause as a result of his breach. In the second instance, Mr. Mueller is not liable for anything because of Husch Blackwell's negligence. As a result, there is a clear causal connection between Husch Blackwell's negligence and the liquidated damages provided for in the DSA and the trial court erred in ruling that proximate cause did not exist.

Likewise, the Court of Appeals mistakenly believed that "there is no . . . causal connection between Nail's claim of negligent drafting of the settlement agreement and *any* identifiable damages." (Opinion, Appeal No. WD75250, May 21, 2013, p. 13) (emphasis in original). The Court believed that it was simply conjecture and speculation that if the DSA and Escrow Agreement had been properly drafted, that Mr. Mueller would have failed to deliver the required documents, thus subjecting himself to the damages provided for in the liquidated damages provision. (Opinion, Appeal No. WD75250, May 21, 2013, p. 15). However, that reasoning ignores the fact that the negligent drafting of the DSA directly caused Mr. Mueller to deliver only a portion of the necessary documents

initially and that the failure to deliver *all* of the necessary documents resulted in damage to Mr. Nail.

"For a damage clause to be valid as setting liquidated damages, the amount fixed as damages must be a reasonable prediction for the harm caused by the breach and the harms must be of a kind difficult to estimate accurately." *City of Richmond Heights*, 280 S.W.3d at 776; *Paragon Group, Inc. v. Ampleman*, 878 S.W.2d 878, 881 (Mo.App.E.D. 1994). In the present case, the failure of the DSA to require the documents necessary to effectuate the transfer pursuant to UK requirements allowed Mr. Mueller to retain control and ownership of the shares. This control subjected Mr. Nail to the possibility of delay any time he attempted to exercise any of the options because Mr. Mueller was required to provide additional documents. Any delay involved in the exercise of the options created difficulties for Mr. Nail because possible price fluctuations could make what would have been a profitable trade unprofitable. The requirement of additional documents from Mr. Mueller each time Mr. Nail exercised his options defeated the purpose of the DSA and Escrow Agreement. (LF, Vol. IV, p. 571 [Depo., p. 128, l. 24 thru p. 129, l. 1]; LF, Vol. III, p. 380, ¶ 154) ("So if there is going to have to be additional documents, that – the escrow then fails of its essential purpose."). The actual harm Mr. Nail would suffer as a result of these potential delays would be very difficult

to accurately estimate and Husch Blackwell drafted the liquidated damages provision as a reasonable prediction of the harm Mr. Nail would suffer.

Mr. Nail actually suffered those damages as a direct result of Husch Blackwell's negligent drafting of the DSA and Escrow Agreement. As a result, the trial court erred in ruling that proximate cause did not exist. Husch Blackwell failed to establish that it was entitled to judgment as a matter of law and this Court should reverse the trial court's Judgment and remand this matter for further proceedings.

CONCLUSION

The trial court erred in granting summary judgment regarding Brian Nail's claim that Husch Blackwell negligently advised him regarding protection of his interests under the Stock Option Agreements and negligently advised him to settle his claims against Mr. Mueller. The trial court also erred in granting summary judgment regarding Mr. Nail's claim that the proper measure of damages against Husch Blackwell for negligently drafting the Dispute Settlement Agreement could be based on the liquidated damages clause in that agreement. Therefore, this Court should reverse the trial court's Judgment and remand this matter for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Appellant's Substitute Brief and the Appendix to the Appellant's Substitute Brief were served this 1st day of November, 2013, through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

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RULE 84.06(c) CERTIFICATE

I certify that this Appellant's Substitute Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief contains 19,081 words.

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