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 REPLY BRIEF

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The arguments presented by Defendant/Respondent Husch Blackwell LLP and the *Amicus Curiae* unduly complicate the issues involved in this appeal. This action does involve some complicated factual and legal details. However, at its heart, this is a simple matter. Plaintiff/Appellant Brian Nail had a potential breach of contract claim worth millions of dollars against Richard 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. Evidence in the record supports every element of a legal malpractice claim, (1) an attorney-client relationship, (2) negligence, (3) proximate causation, and (4) damages, and the trial court erred in granting summary judgment in favor of Husch Blackwell.

Point I. Husch Blackwell's Negligent Advise Caused Mr. Nail's Damages.

A. Negligence

Husch Blackwell has not disputed that an attorney-client relationship existed between it and Mr. Nail. As a result, as indicated in the Appellant's Substitute Brief, the issue before this court involves the remaining three elements of a legal malpractice claim: "(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). Husch Blackwell asserts that it was not negligent, claiming that Mr. Nail "never showed that Husch Blackwell's fundamental advice was wrong, or that his decision to settle was based on anything other than his own voluntary choice." (Respondent's Substitute Brief, p. 38). Husch Blackwell continues to confuse the issue of whether a client voluntarily decided to settle a matter with the issue of whether the client made that decision based on negligent advice from his attorney.

Husch Blackwell recognizes that an attorney has a duty to "'explain a matter to the extent reasonably necessary to permit the client to make *informed decisions* regarding the representation.'" (Respondent's Substitute Brief, p. 38) (quoting Restatement (Third) of Law Governing Lawyers § 20 (2000)) (emphasis added). "'[T]he 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 288, 304 (Mo.App.W.D. 1995) (overruled on other grounds by *Klemme*, 941 S.W.2d at 496) (quoting *James Carr's Executrix v. Glover*, 70 Mo.App. 242, 247 (1897)). Mr. Nail presented extensive evidence that Husch Blackwell failed to meet this standard and was, therefore, negligent.

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]). Mr. Tollefsen also 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]).

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). As a result, Mr. Tollefsen "testified that [Husch Blackwell] breached the duty of an attorney in settlement discussions to ensure that the client is aware of the facts necessary to make a decision as to whether a settlement proposal [*956] is acceptable, fair and equitable." *Baldridge v. Lacks*, 883 S.W.2d 947, 955-56 (Mo.App.E.D. 1994). 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.

Husch Blackwell makes various arguments asserting that there was no showing that its advice was wrong and claiming that it was Mr. Nail's decision to settle. Such arguments ignore the fact that the settlement decision was based on Husch Blackwell's negligent advice and it is clear that Husch Blackwell's advice was improper.

Mr. Mueller had only two possible responses if Mr. Nail had been properly advised to exercise his options immediately after the merger. First, Mr. Mueller might have delivered the shares. Husch Blackwell appears to argue that Mr. Nail would still have difficulty selling the shares, stating that "Tollefsen merely hinted that Plaintiff *might* have been able to sell his shares if he could have first somehow successfully exercised his options." (Respondent's Substitute Brief, p. 40). However, Mr. Nail provided the expert testimony of Fenner Moeran 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, there was clear evidence that Mr. Nail would have been able to sell the shares if he had exercised his options and Mr. Mueller had delivered the shares.

Mr. Mueller's second possible response, and the more likely, is that he would have breached the agreement by refusing to deliver the shares. At that point, Mr. Nail would have had a breach of contract claim against Mr. Mueller, the minimum amount of his damages would have been established based on the price of the stock on or near the date of breach, and Mr. Nail would have been entitled to prejudgment interest. (LF, Vol. V, p. 756-57). As stated in the Appellant's Substitute Brief, 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 . . . ."). Mr. Nail would have prevailed on a breach of contract claim if he had exercised his options and Mr. Mueller breached the contract by failing to deliver the shares for the simple reason that Mr. Mueller did not have any defenses to Mr. Nail's claim. As a result, it is clear that Mr. Nail should have been advised to exercise his options so that he could establish his breach of contract claim, establish the minimum amount of his damages, and establish his right to prejudgment interest. Husch Blackwell was negligent in failing to provide that advice.

B. Proximate Cause

Large portions of the Respondent's Substitute Brief and the Substitute Brief of *Amicus Curiae* are spent attempting to negate the element of proximate cause. (Respondent's Substitute Brief, p. 19-32; Substitute Brief of *Amicus Curiae*, p. 2-5, 6-9). Husch Blackwell repeatedly argues about what it believes Mr. Nail has failed to prove. *Amicus Curiae* argues that Mr. Nail was required to provide expert testimony to establish the "case within a case." The problem with these arguments is that the evidence Mr. Nail presented would clearly allow a jury to find that Husch Blackwell's negligence proximately caused Mr. Nail's damages.

"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 v. Missouri Bar Plan*, 157 S.W.3d 726, 732 (Mo.App.W.D. 2005). "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.

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 and that Husch Blackwell's conduct fell below the required standard of care because Mr. Nail was not advised to exercise all of his options immediately after the merger. (LF, Vol. III, p. 380, ¶ 150; LF, Vol. IV, p. 567 [Depo., p. 54, l. 6 thru p. 55, l. 6]; LF, Vol. V, p. 756-57). Such negligence proximately caused Mr. Nail's damages because the amount he has been able to recover as a result of the ill-advised settlement is significantly less than he would have been able to recover if Husch Blackwell had properly advised him.

Based on Husch Blackwell's estimates, TIG shares were valued at $4.16 after the merger. (Respondent's Substitute Brief, p. 3 n. 3). Mr. Nail had options to purchase 1,852,200 shares of TIG stock at Thirty-one Cents ($0.31) per share and 264,600 shares at One Dollar and Forty-three Cents ($1.43) per share. (Respondent's Substitute Brief, p. 5). Therefore, Mr. Nail had the option to purchase shares worth Eight Million Eight Hundred Five Thousand Eight Hundred Eighty-eight Dollars ($8,805,888.00) (2,116,800 shares at $4.16 per share) at the option price of Nine Hundred Fifty-two Thousand Five Hundred Sixty Dollars ($952,560.00) (1,852,200 shares at $0.31 equals $574,182.00; 264,600 shares at $1.43 equals $378,378.00; for a total of 2,116,800 shares for $952,560.00).

Husch Blackwell should have discussed damages with Mr. Nail and advised him to exercise all of his options immediately after the merger. If they had done so, then there were only two possible results. First, Mr. Mueller might have complied with his contractual obligation and Mr. Nail would have been able to purchase shares worth over Eight Million Eight Hundred Thousand Dollars ($8,800,000.00) for less than One Million Dollars ($1,000,000.00) for net gain to Mr. Nail of over Seven Million Eight Hundred Thousand Dollars ($7,800,000.00). This result would have far exceeded what Mr. Nail has obtained through the settlement Husch Blackwell advised him to accept.

Second, Mr. Mueller could have refused to deliver the shares and been in breach of the Stock Option Agreements. Mr. Nail would then have had a claim for breach of contract against Mr. Mueller with his damages fixed at a minimum of Seven Million Eight Hundred Thousand Dollars ($7,800,000.00), together with prejudgment interest. Mr. Mueller would not have had any affirmative defenses to the breach of contract claim, as is clear from the failure of either Husch Blackwell or the *Amicus Curiae* to assert the existence of any such defenses. As Mr. Tollefsen stated, Mr. Nail's breach of contract action against Mr. Mueller was "'obvious' and a 'no-brainer'". (LF, Vol. V, p. 756, ¶ 3). The recovery in the breach of contract action would clearly have exceeded what Mr. Nail was able to obtain through the settlement advised and drafted by Husch Blackwell.

Instead of properly advising Mr. Nail to exercise his options, Husch Blackwell advised Mr. Nail to enter into a settlement that delayed his ability to exercise his options until after the value of the shares plummeted. As a result of that settlement, Mr. Nail has been able to realize only Six Hundred Thousand Dollars ($600,000.00), as Husch Blackwell repeatedly asserts. (Respondent's Substitute Brief, p. 2, 8, 45). Husch Blackwell's negligent advice resulted in Mr. Nail recovering over Seven Million Dollars *less* then he would have been able to but for Husch Blackwell's negligence. Stated another way, Mr. Nail's damages are a natural and probable consequence of Husch Blackwell's negligence and the trial court erred in granting summary judgment based on an alleged lack of proximate cause.

C. 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 against Mr. Mueller. Husch Blackwell's negligence in advising Mr. Nail to agree to the Dispute Settlement Agreement then prevented Mr. Nail from exercising his options until the share price had plummeted. 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.

D. Damages Based on Stock Price Are Recoverable

Husch Blackwell asserts several theories as to why it claims Mr. Nail cannot prove damages. First, it asserts that the damages were caused by Mr. Mueller's decision to agree to the lock-up period. (Respondent's Substitute Brief, p. 33). Second, Husch Blackwell argues that the decline in the price of TIG's stock is an intervening cause and "that losses resulting from fluctuations in a market . . are too speculative to support damages in a negligence action." (Respondent's Substitute Brief, p. 33-34; *see also* Substitute Brief of *Amicus Curiae*, p. 9-11). All of these arguments ignore the clear results of Husch Blackwell's negligent advice in this case.

Husch Blackwell's first argument ignores the fact that Mr. Mueller's decision is the exact reason Mr. Nail retained Husch Blackwell. If Husch Blackwell had provided proper legal advice, Mr. Nail would have been protected *despite* Mr. Mueller's decision. Instead, Husch Blackwell failed to advise Mr. Nail to exercise his options, forcing Mr. Mueller to either deliver the shares or breach the Stock Option Agreements, fixing Mr. Nail's minimum damages claim, and establishing a right to prejudgment interest.

Husch Blackwell's other arguments fail for similar reasons. 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 v. Miller*, 164 S.W.3d 76, 82 (Mo.App.W.D. 2005) (quoting *Steward v. Goetz*, 945 S.W.2d 520, 532 (Mo.App.E.D. 1997)). Husch Blackwell should have advised Mr. Nail to exercise his options immediately after the merger. It is probable, based on Mr. Mueller's breach when Mr. Nail later exercised a portion of his options, that Mr. Mueller would have refused to deliver the shares, thus breaching the Stock Option Agreements. "The measure of damages in a breach of contract case is the benefit of the bargain. Compensation is the value of the performance of the contract." *Kincaid Enterprises, Inc. v. Porter*, 812 S.W.2d 892, 900 (Mo.App.W.D. 1991). The value of Mr. Mueller's performance of the Stock Option Agreements was delivery of shares valued at over Eight Million Eight Hundred Thousand Dollars ($8,800,000.00) upon receiving Mr. Nail's payment in an amount that was less than One Million Dollars ($1,000,000.00). The benefit of the bargain to Mr. Nail would have been over Seven Million Eight Hundred Thousand Dollars ($7,800,000.00). These damages are neither speculative nor based on fluctuations in the market value of the TIG shares. Instead, these damages are based on the value of the breach of contract claim that Mr. Nail would have had *but for* Husch

Blackwell's negligent failure to advise him to exercise his options immediately after the merger.

The decline in the stock that occurred *after* Husch Blackwell's negligent advice simply affected the ability of Mr. Nail to mitigate his damages. He was able to obtain a profit of Six Hundred Thousand Dollars ($600,000.00), which will reduce the amount of damages recoverable from Husch Blackwell. If the stock price had not fallen, or had risen instead, Husch Blackwell would still have been negligent, but Mr. Nail would not have suffered any damages. However, the share price did fall and Mr. Nail was damaged. Therefore, Husch Blackwell's negligence was the proximate cause of damages to Mr. Nail and he does have a negligence claim against Husch Blackwell.

Husch Blackwell's assertion "that losses resulting from fluctuations in a market . . are too speculative to support damages in a *negligence* action", (Respondent's Substitute Brief, p. 33-34) (emphasis added), also fails. The measure of damages in this case is not based on a negligence claim. The measure of damages in this case is based on the benefit of the bargain; the measure of damages for breach of contract, not negligence. 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)). That amount is the value of the breach of contract claim that Mr. Nail should have had against Mr. Mueller, which would be the benefit of the bargain of the contract. In this case, the benefit of the bargain was over Seven Million Eight Hundred Thousand Dollars ($7,800,000.00). That amount is neither speculative nor based on the normal measure of damages in a negligence action.

E. Reliance on *Williams v. Preman* Improper

Husch Blackwell and the *Amicus Curiae* continue to rely on the "significant burden" established in *Williams v. Preman*. Husch Blackwell argues the requirement established in *Williams v. Preman* that a plaintiff show the settlement was necessary to mitigate the damages flowing from the attorney-defendant's negligence "is no different from the requirement that a plaintiff prove a given outcome would have been different but for the defendant's conduct." (Respondent's Substitute Brief, p. 25, n. 8). Husch Blackwell also argues that Mr. Nail "reads too much into the fact that *Preman* was settled after the supposed negligence was discovered and new lawyers were retained." (Respondent's Substitute Brief, p. 26). Husch Blackwell repeatedly argues that Mr. Nail was required to present "'cogent expert testimony which intelligently analyzes the pertinent considerations.'" (Respondent's Substitute Brief, p. 27, 32) (quoting *Williams v. Preman*, 911 S.W.2d at 297). Similarly, the *Amicus Curiae* argue that Mr. Nail must meet the "significant burden" established by *Williams v. Preman* and that "[t]he point of discovery [of the attorney-defendant's negligence] is irrelevant." (Substitute Brief of *Amicus Curiae*, p. 5-6).

Husch Blackwell and the *Amicus Curiae* ignore the very language of *Williams v. Preman* making clear that the "significant burden" and "cogent expert testimony" requirements apply only when a plaintiff settles a claim *after* learning of the attorney-defendant's negligence. The Court in *Williams v. Preman,* in the one place it mentions the phrase "significant burden", stated that the case of *Heartland Stores, Inc. v. Royal Ins. Co.*, 815 S.W.2d 39 (Mo.App. 1991), "illustrates that in cases where the underlying claim has been settled, the plaintiff must carry the *significant burden* of establishing that the settlement was necessary to mitigate the damages flowing from defendant's negligence." *Williams v. Preman*, 911 S.W.2d at 296 (emphasis added). The Court also recognized that *Heartland* was "settled *after* dismissal of the allegedly negligent attorney, while the case was being handled by an new attorney", *Williams v. Preman*, 911 S.W.2d at 297 (emphasis in original), and distinguished that case from cases where "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 297.

In addition, the Court in *Williams v. Preman* was careful to specify that the extra burdens it established applied only to cases settled after learning of the alleged legal malpractice.

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. A plaintiff may be tempted to settle the underlying claim at any figure, believing that the responsibility for the damage will be passed on to the defendant at whatever the settlement figure may be. In such a case, then, the plaintiff must show what would have happened if the adversarial action had been tried rather than settled. [Citation omitted]. 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. If, however, 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.

Williams v. Preman, 911 S.W.2d at 297 (italics in original, bold added). *Williams v. Preman* requires a plaintiff that settles a claim *after* learning of the attorney-defendant's negligence to meet additional requirements *because that plaintiff voluntarily created speculation regarding the validity of the underlying claim*. In contrast, a plaintiff that settles a claim *based on the negligent advice* of the attorney-defendant should not be faulted for following the negligent advice. Any speculation created in such a case is the result of the attorney's negligence, not the informed decision of the client-plaintiff.

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 reliance by Husch Blackwell and the *Amicus Curiae* on the "significant burden" established in *Williams v. Preman* is misplaced and the trial court erred in granting summary judgment based on the additional requirements discussed in that case.

F. Husch Blackwell's Additional Arguments

Husch Blackwell makes various additional arguments regarding Mr. Nail's Point Relied On I. First, Husch Blackwell claims that the failure to advise Mr. Nail to exercise his options is irrelevant because Mr. Nail later filed suit against Mr. Mueller alleging breach of contract and seeking the same damages now sought against Husch Blackwell. (Respondent's Substitute Brief, p. 29). The problem with this argument is that Mr. Nail was not able to prevail on that claim and eventually elected to proceed on the claim that Mr. Mueller breached the Dispute Settlement Agreement.

Mr. Mueller was not in breach of the Stock Option Agreements simply because of the merger or because he agreed to the lock-up period. As a result, Mr. Nail did not have a breach of contract claim against Mr. Mueller as a result of those actions. Instead, Husch Blackwell should have advised Mr. Nail to exercise his options immediately after the merger to force Mr. Mueller to either deliver the shares or actually breach the Stock Option Agreements. As the Court of Appeals recognized:

> Nail's separation agreement with Mueller and MTW did not prohibit a merger or even Mueller's agreeing to a lock up period for shares of stock that he presently owned; instead, the separation agreement only required immediate transfer of shares of stock to Nail if Nail exercised his options. But since stock options are nothing more than that—options—until Nail actually exercised the options under the separation agreement, no breach would have occurred. This may explain why, in subsequent litigation against Mueller, Nail abandoned his remedy seeking damages related to Mueller's alleged breach of the separation agreement.

(Opinion, Appeal No. WD75250, May 21, 2013, p. 3, n. 5).

The fact that Mr. Nail *argued* in his subsequent suit against Mr. Mueller that Mr. Mueller had breached the contract does not make it so. Mr. Tollefsen stated that it was obvious "that Mr. Nail must exercise his options or there would be no breach by Mr. Mueller and therefore no breach of contract case." (LF, Vol. V, p. 756-57, ¶ 4). As a result, it is very relevant that Husch Blackwell negligently failed to advise Mr. Nail to exercise his options. Such failure prevented Mr. Nail from forcing Mr. Mueller to either deliver the shares or be in breach, prevented Mr. Nail from establishing the minimum damage claim against Mr. Mueller of over Seven Million Eight Hundred Thousand Dollars ($7,800,000.00), and prevented Mr. Nail from establishing his right to prejudgment interest.

Husch Blackwell also argues that Mr. Nail's claim fails because "speculation that the settlement terms might have been different cannot support a prima facie case of legal malpractice." (Respondent's Substitute Brief, p. 30). Again, Husch Blackwell attempts to complicate the issues involved in this case. If Mr. Nail had been properly advised to exercise his options, then Mr. Mueller would either have agreed to a settlement that protected Mr. Nail's interests or faced a breach of contract claim in which Mr. Nail's damages were clearly established and liquidated.

As discussed above, Mr. Mueller had only two possible responses if Husch Blackwell had properly advised Mr. Nail to exercise his options immediately after the merger. Mr. Mueller could have delivered the shares or he could have breached the Stock Option Agreements. If he breached, there are again two possible options; either the parties would have reached a settlement or Mr. Nail would have pursued his breach of contract claim against Mr. Mueller. The breach of contract claim was "'obvious' and a 'no-brainer'", (LF, Vol. V, p. 756, ¶ 3), and Mr. Mueller's breach would have fixed Mr. Nail's minimum damage claim.

If the parties settled, a properly drafted settlement agreement would have protected Mr. Nail's interest. Mr. Tollefsen testified that:

> 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.

(LF, Vol. V, p. 757, ¶ 6). Husch Blackwell argues that "there is no evidence that Mueller would have accepted different settlement terms, or that Nail could have received anything more in the Settlement Agreement." (Respondent's Substitute Brief, p. 31). Such argument ignores the position Mr. Nail would have been in "but for" Husch Blackwell's negligent failure to advise him to exercise his options. If Mr. Mueller had not agreed to a settlement that properly protected Mr. Nail's interests, Mr. Nail should have been advised not to settle, but to instead pursue his breach of contract claim.

If Husch Blackwell had properly advised Mr. Nail to exercise his options immediately after the merger, Mr. Nail would have been in a situation where any of the three options provided him with a multi-million dollar profit. If Mr. Mueller had complied with the Stock Option Agreements and delivered the shares, then Mr. Nail would have the shares and be able to sell them at any time he chose. If Mr. Mueller did not comply, he would be in breach and facing millions of dollars in damages. If Mr. Mueller agreed to a settlement that properly protected Mr. Nail's interest "through a proper liquidated damage clause, security, or some other device", (LF, Vol. V, p. 757, ¶ 6), then Mr. Nail's interests would be protected. If

Mr. Mueller did not agree to such a settlement, then Mr. Nail could proceed with his breach of contract claim against Mr. Mueller with the damages established by the value of the shares shortly after the merger.

Instead, Husch Blackwell failed to advise Mr. Nail to exercise his options and then advised him to agree to a settlement that placed all of the risk of a decrease in price of the shares on Mr. Nail. As a result, when the price did fall, Mr. Nail lost millions of dollars and had no viable claim against Mr. Mueller, all because Husch Blackwell negligently advised Mr. Nail at every step of this matter.

Husch Blackwell's reliance on cases such as *Novich v. Husch & Eppenberger*, 24 S.W.3d 734 (Mo.App.E.D. 2000), *Steward v. Goetz*, 945 S.W.2d 520 (Mo.App.E.D. 1997), and *Lange v. Marshall*, 622 S.W.2d 237 (Mo.App.E.D. 1981), is misplaced. (Respondent's Substitute Brief, p. 30-32). In *Steward*, the parties were negotiating the sale of a business. *Steward*, 945 S.W.2d at 523. As a result, the plaintiff did not have a claim to pursue if the negotiations failed. As the Court explained, if the plaintiff had refused to provide the disputed guarantee, "the sale would not have gone through" and there was no evidence that another buyer could have been found at that price. *Steward*, 945 S.W.2d at 532.

In *Novich*, the other defendants in the underlying suit were able to settle the claims against them while Novich eventually had judgment entered against him. *Novich*, 24 S.W.3d at 735-36. Novich filed suit against Husch Eppenberger claiming their malpractice prevented him from negotiating the same settlement as the other defendants. *Novich*, 24 S.W.3d at 736. The Court held that Novich could not prove malpractice because he could not show that he would have been successful in the underlying litigation because he did not dispute his liability in that suit. *Novich*, 24 S.W.3d at 736-37.

In *Lange*, the plaintiff argued that it was "obvious" that "she would have received a far more beneficial settlement in a non-contested dissolution" if the attorney-defendant had properly represented her. *Lange*, 622 S.W.2d at 239. However, the Court disagreed, explaining:

> She points to no evidence to support this conclusion and its "obviousness" eludes us. The parties agreed that defendant was not representing plaintiff as an advocate but in a mediation position. The ten months of heated litigation (following plaintiff's repudiation of the settlement) after both parties had obtained counsel and were fully aware of their respective rights belies the "obviousness" of plaintiff's conclusion.

Lange, 622 S.W.2d at 239.

In contrast, the evidence in the present case indicates that Mr. Nail would have had a valid breach of contract claim against Mr. Mueller if Husch Blackwell had properly advised him to exercise his options immediately after the merger. As a result, Mr. Nail would have had the option of either negotiating a settlement that properly protected his interests or proceeding with the breach of contract claim. The valid breach of contract claim distinguishes Mr. Nail's position from that of the clients in *Steward*, *Novich*, and *Lange*.

Point II. Mr. Nail Did Not Waive Any Claim Against Husch Blackwell

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.

Husch Blackwell argues that it "explicitly stated waiver as its very first affirmative defense". (Respondent's Substitute Brief, p. 42). "A pleading that sets forth an affirmative defense or avoidance *shall* contain a short and plain statement of the facts showing that the pleader is entitled to the defense or avoidance." Mo. Crt. Rule 55.08 (emphasis added). The affirmative defense pled by Husch Blackwell asserts waiver based on Mr. Nail's decision to enter into the Dispute Settlement Agreement and to delay exercising his options. (LF, Vol. I, p. 18, ¶ 1). That affirmative defense does not allege waiver based on Mr. Nail's election of remedies in the Kansas action against Mr. Mueller. As a result, Husch Blackwell did not properly plead waiver based on that election of remedies and is not entitled to rely on that affirmative defense.

In addition, it is clear that Mr. Nail has not waived his claim against Husch Blackwell. Husch Blackwell argues that waiver exists based on the following facts: (1) Mr. Nail agreed to the Dispute Settlement Agreement; (2) Mr. Nail later filed suit against Mr. Mueller seeking in one count to rescind the Dispute Settlement Agreement and recover for breach of the Stock Option Agreements; (3) Mr. Nail elected to seek damages for breach of the Dispute Settlement Agreement rather than for breach of the Stock Option Agreements; and (4) Mr. Nail and Mr. Mueller entered into another settlement while the case was on appeal. (Respondent's Substitute Brief, p. 43-44). "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. Husch Blackwell has not explained how this issue can be decided on summary judgment when it involves a question of fact. At most, Mr. Nail's election of remedies is subject to conflicting interpretations and summary judgment based on implied waiver was improper.

Finally, none of the facts relied upon by Husch Blackwell support a finding that Mr. Nail waived any claim *against Husch Blackwell*. The fact that Mr. Nail agreed to the Dispute Settlement Agreement based on the negligent advice of Husch Blackwell cannot constitute a waiver of Mr. Nail's claim against Husch Blackwell for providing that negligent advice. Further, as discussed above, Mr. Nail did not have a viable breach of contract claim against Mr. Mueller as a result of Husch Blackwell's failure to advise him to exercise his options immediately after the merger. His abandonment of a non-viable claim against Mr. Mueller cannot, under the circumstances of this case, be considered a waiver of a claim against Husch Blackwell. 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). The trial court erred in granting summary judgment based on the alleged waiver of Mr. Nail's claims. This Court should reverse and remand for further proceedings.

Point III. Mr. Nail Was Damaged In the Amount of the Liquidated Damages Clause

The issue under this point is not whether Husch Blackwell negligently drafted the Dispute Settlement Agreement. The trial court overruled the motion for summary judgment on that issue, explaining that "[t]he deposition testimony of Plaintiff's expert witnesses adequately supports a claim of negligence in the drafting of the DSA and Escrow Agreement." (LF, Vol. V, p. 734; Appendix, p. A9). As a result, the only issue is the proper measure of damages for Husch Blackwell's negligent drafting.

Husch Blackwell's argument on this point is that Mr. Nail is not entitled to any damages because if Husch Blackwell had properly drafted the agreements, Mr. Mueller would have complied and, therefore, Mr. Nail would not have recovered the liquidated damages provided for in the agreement. (Respondent's Substitute Brief, p. 47). Under this theory, Mr. Nail is not entitled to any damages as a result of Husch Blackwell's failure to properly draft the Dispute Settlement Agreement. This argument ignores the purpose of the Dispute Settlement Agreement, the purpose of the liquidated damages clause within the Dispute Settlement Agreement, and the purpose of the Escrow Agreement, all of which were negligently drafted by Husch Blackwell.

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 Dispute Settlement Agreement. (LF, Vol. III, p. 376, ¶ 127). 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 Dispute Settlement Agreement, 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.

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 damages are the same if Mr. Mueller breached the Dispute Settlement Agreement as if the Dispute Settlement Agreement was negligently drafted so that Mr. Mueller was not required to deliver the necessary 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 Dispute Settlement Agreement, which was intended by Husch Blackwell as an estimate of Mr. Nail's actual damages in such situation.

It is also important to note that Husch Blackwell's negligence in drafting the Dispute Settlement Agreement combined with their negligence in advising Mr. Nail to settle. This combined negligence subjected Mr. Nail to all of the damages he suffered when the stock price fell. If Husch Blackwell had properly advised Mr. Nail to exercise his options immediately after the TIG merger, Mr. Nail would have had a breach of contract claim against Mr. Mueller based on a minimum share price of 280 Pence. If Husch Blackwell had then properly drafted the settlement agreement, it would have protected Mr. Nail's interest "through a proper liquidated damages 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." (LF, Vol. V, p. 757, ¶ 6). As it is, the liquidated damages clause in the Dispute Settlement Agreement is Husch Blackwell's poor attempt at protecting Mr. Nail's interest and it is disingenuous for Husch Blackwell to now claim that Mr. Nail has not been damaged in that amount when the Dispute Settlement Agreement did not accomplish its intended purpose.

Husch Blackwell also argues that Mr. Nail's argument in this Court "strays from the text of Point III of his Court of Appeals brief, [and] this Court should decline to review it." (Respondent's Substitute Brief, p. 48, n. 10). Mr. Nail's briefs in the Court of Appeals discussed the purpose of the liquidated damages clause in the Dispute Settlement Agreement and the fact that Mr. Nail suffered the same damages if all of the necessary documents were not provided, regardless of whether the documents were not provided because Mr. Mueller breached the Dispute Settlement Agreement or because Husch Blackwell negligently draft that agreement. (Appellant's Brief, p. 69-72; Appellant's Reply Brief, p. 21-22). The same argument has been presented to this Court. Mr. Nail has simply clarified the argument. Substitute briefs in this Court would be unnecessary if a party was required to present the exact same wording as included in the argument in the Court of Appeals.

Husch Blackwell's negligent draft of the Dispute Settlement Agreement caused Mr. Nail to suffer the damages which the liquidated damages clause was intended to determine. 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 copies of this Appellant's Substitute Reply Brief were served this 16th day of December, 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 Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and that the entire brief, except the cover, Certificate of Service, Rule 84.06(c) Certificate, and the signature block, contains 7,622 words.

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