2016 IL App (1st) 151622-U

FOURTH DIVISION
September 15, 2016

No. 1-15-1622

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HYATT JOHNSON USA 2004, LLC, HYATT JOHNSON USA 2005, LLC, HYATT JOHNSON T2 2005, LLC, HYATT JOHNSON UNITED 2005, LLC, HYATT JOHNSON A3 2003, LLC, HYATT JOHNSON A3D 2003 II, LLC, HYATT JOHNSON-BROWN HJ D26, LLC, HYATT JOHNSON 26, LLC, HYATT JOHNSON BA 2005, LLC, STRATEGIC AIRCRAFT INVESTORS 2005, LLC, and HYATT JOHNSON CONTINENTAL 2005, LLC, through the court appointed receiver of HYATT JOHNSON CAPITAL, LLC, ROBERT P. HANDLER, and HJC ASSET HOLDINGS, LLC, through its manager HJC ASSETS HOLDINGS MANAGER, INC., through the court appointed receiver ROBERT P. HANDLER,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 09 L 10766
MITCHELL D. GOLDSMITH and SHEFSKY & FROELICH, LTD.,	)	The Honorable John P. Callahan,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's entry of summary judgment for defendant is affirmed in part and reversed in part. We affirm the trial court's judgment finding plaintiffs failed to prove damages with respect to the claim that defendants were negligent in drafting offering documents for an investment fund; the investors recovered all of their investment and proof of anticipated profits was too speculative. We do not find damage claims to be speculative as a matter of law with regard to the allegations that defendants were negligent in negotiating a settlement agreement that allowed for an improper transfer of funds to a person who had no right to receive those funds, and we remand this matter to the trial court for further proceedings on that claim only.

¶ 2 Plaintiffs-appellants filed a lawsuit against defendants-appellees claiming that they committed legal malpractice when they drafted plaintiffs' investment documents in a way that offered little to no oversight over how investment funds were invested. As a result, plaintiffs argue that their investment funds were misappropriated resulting in the appointment of a receiver to recover the misappropriated funds. Although the receiver was successful in recovering those initial investment funds, plaintiffs seek damages for additional costs and expenses they claim are attributable to defendants' negligence in structuring the investment documents, specifically, the receiver's costs and fees. Plaintiffs also made allegations that defendants were negligent in later negotiating a settlement agreement that resulted in an improper transfer of funds, and that they incurred damages in the form of attorney fees and costs to recover those funds. Defendants filed a motion for summary judgment arguing that plaintiffs failed to prove their legal malpractice claim because any damages were caused by an intervening criminal act and plaintiffs were unable to prove damages because they recovered their initial investments and other damage claims were too speculative. The trial court granted defendants' motion for summary judgment

on those two grounds. Plaintiffs now appeal that ruling. For the reasons that follow, we affirm in part, reverse in part and remand this matter to the the trial court.

¶ 3 I. Background

¶ 4 Summary judgment was granted because: (1) the plaintiffs failed to prove damages and (2) plaintiffs' damages were caused by an intervening criminal act. Therefore, in this order we will presume negligence and focus on those facts relevant to damages and proximate cause. According to the record and pleadings on file, plaintiffs-appellants, Hyatt Johnson A3 2003, LLC, Hyatt Johnson A3D 2003, LLC, Hyatt Johnson USA 2004, LLC, Hyatt Johnson USA 2005, Hyatt Johnson T2 2005, LLC, Hyatt Johnson United 2005, LLC, Hyatt Johnson Continental 2005, LLC, Hyatt Johnson 26, LLC, Hyatt Johnson-Brown D26, LLC, and Hyatt Johnson BA 2005, LLC (collectively the LLCs) are limited liability companies established to invest in securities. The LLCs were formed by an affiliated company, or the Manager, Hyatt Johnson Capital, LLC (HJ Capital) to invest in aircraft owned by BCI Aircraft Leasing, LLC (BCI), a lessor of commercial aircraft.

¶ 5 HJ Capital, the Manager of the LLCs, was formed in 2002 and was comprised of Jason R. Hyatt (Hyatt) and Jay D. Johnson (Johnson) as its sole members. HJ Capital did not have in-house counsel, and the only professionals involved in the investment side of HJ Capital were Hyatt and Johnson, who both had prior experience in the sale of securities: Johnson had previously sold financial institution stock and had a network of high-net-worth individuals from whom to solicit, and Hyatt had previously worked for BCI. In arranging the LLCs' offerings, Hyatt primarily worked with BCI's principal, Brian Hollnagel, to allegedly negotiate the terms, and Johnson solicited investors from his client network.

¶ 6 Defendants-appellees are Shefsky & Froelich, n/k/a Taft Stettinius & Hollister LLP (the Firm), a law firm with offices in Chicago, and Mitchell D. Goldsmith, an attorney at the Firm (collectively defendants). Defendants held themselves out as experienced securities counsel with expertise in the legal, regulatory, and customary compliance aspects of the investments fund business.

¶ 7 In early 2004, HJ Capital sought out defendants to serve as securities counsel because the attorney who had acted as counsel for its first offering, Hyatt Johnson A3 2003, LLC (A3), had passed away. Defendants accepted the engagement. Between 2004 and 2006, each of the LLCs and HJ Capital as the Manager retained defendants to provide legal services in connection with their investment offerings.

¶ 8 Defendants' written engagement letters broadly characterized the engagement with the LLCs as a "general engagement," the scope of which was to "provide you with the legal services you require." Defendants stated that they were engaged to make sure the offering documents complied with the securities laws. Their client, HJ Capital, as Manager of the LLCs, understood that defendants were hired to protect the LLCs' investments.

¶ 9 Each of the LLCs' investment offerings was similarly structured: the LLC created by HJ Capital was to invest in a "mirror" special purpose entity created by BCI, which, in turn, purportedly owned and leased the aircraft to major domestic and foreign airlines. The BCI entity was to pay back the LLCs' capital investment and provide a return on the investment, if any. A portion of the funds from BCI were paid to the Manager of the LLCs, HJ Capital, as a fee to cover its expenses. The terms of each offering varied as to the amount of fees payable to the Manger. For this fee, HJ Capital would manage the LLCs as a fiduciary, which included the express authority to make all investment decisions on the LLCs' behalf. The LLCs' offerings

raised approximately $19.6 million that were purportedly contributed to BCI for these investments.

¶ 10 As part of the legal services provided by defendants to the LLCs, defendants prepared private placement memoranda (PPM) and associated offering documents that described the form of the transactions as outlined above. In doing so, defendants reviewed "the draft of the [PPM] that had originally been drafted by Jay Johnson and [made] edits to it and [prepared] the subscription agreement and operating agreement for the entity." Goldsmith determined what needed to be disclosed to investors and how to make the disclosures.

¶ 11 The LLCs claim that defendants made no effort to verify the accuracy of the representations made in the offering documents concerning BCI other than to recommend to Hyatt and Johnson that they verify the accuracy and truthfulness of the information themselves. Defendants relied on Hyatt and Johnson to "accurately depict what they were doing."

¶ 12 Defendants did not attend closings and did not otherwise verify that the investments were in fact made in the BCI entities. Goldsmith stated that Johnson told defendants "to stay away from" the closings because those were within Hyatt's purview. Defendants had no involvement in the investment transactions other than drafting the documents that governed those transactions. Defendants did not "have any definitive knowledge one way or the other" as to whether the funds raised by the LLCs were actually invested in BCI as described in the offering memoranda they had drafted. The structure of the offerings was such that the members of the LLCs were "passive investors," and, in most cases, the Manger had very board authority over the LLCs, and HJ Capital had exclusive control over all the LLCs. The LLCs had very limited access to the LLCs' books and records, and the LLCs had no role in managing the mirror BCI entities that were supposed to own the aircraft described in the PPMs. In short, the LLCs argued

that the offerings were structured so that there was no requirement of verification to ensure that the LLCs' funds were used for the purpose for which they were raised as described in the offering documents.

¶ 13 One of the LLCs' experts, Zane Cohen, testified that the deals were structured so that the LLCs were "simply investing into a black hole." Cohen testified that the standard of care for attorneys in this situation was to advise the client to change the way the offerings were structured, and defendants failed to do that here. Cohen further testified that the defects in the structure allowed Hyatt's misuse of the LLCs' funds for purposes other than as represented in the PPMs to go undetected.

¶ 14 Another LLC expert, Professor Daniel J.H. Greenwood, testified that the offerings' structure facilitated fraud and misuse of the investors' funds in a manner that should have been obvious to competent securities counsel. Greenwood opined that Hyatt's theft of investor funds required "inattentive gatekeepers," and "the fraud required Mr. Goldsmith's lack of attention, so the fraud would not have happened but for Mr. Goldsmith's negligence." Greenwood further stated that had defendants raised questions about why they were not to attend closings, that likely would have put Hyatt on notice that his activities were suspicious and dissuaded him from transferring the LLCs' funds to BCI without obtaining any security or from misappropriating the LLCs' funds. Greenwood testified that the standard of care required defendants to recommend better protection of the investors' funds.

¶ 15 The LLCs also presented an expert in the trial court, Harry Cendrowski. Cendrowski calculated the LLCs' damages based on the LLCs' invested capital plus their lost opportunity to earn a rate of return on an "alternative investment." In doing so, Cendrowski's calculations were based on Ibboston Associates' hypothetical figure for the median rate of return on leasing and

rental equipment generally. The calculations were not based on the aircraft industry, despite Cendrowski's recognition that aircraft investments are highly volatile, and his calculations did not take into consideration the collapse of the world economy in 2008 and the effect that had on the airline industry. Cendrowski concluded that the value of the LLCs' lost opportunity for a return on an "alternative investment" was $20,170,431.06. He further concluded that the LLCs' damages were $11,338,461.38 if the $7,100,000 in Alitalia reserves were not required to be used and $4,238,461.38 if the reserves were required to be used (and lost to investors).

¶ 16 Although the LLCs appeared to be functioning as represented through mid-2007, in reality, the LLCs' funds had not been used to purchase any interests in aircraft. Instead, Hyatt was able to misappropriate over $1 million of the LLCs' funds and he was able to take about $2 million from a different fund for which defendants also provided legal services. This misappropriation came to light in mid-2007 when the SEC launched an investigation into BCI's activities and the FBI began contacting the LLCs' investors. Following the initiation of the SEC investigation, Hyatt obtained a promissory note for $22.6 million from BCI, purportedly in exchange for an assignment of the LLCs' interests in the BCI entities and other consideration.

¶ 17 In August 2007, the SEC brought suit against BCI and its principal, Hollnagel, alleging that BCI was operating a Ponzi scheme. The SEC sought a preliminary injunction to stop BCI's operations. After an evidentiary hearing, the district court judge denied that request, but based on representations made by BCI as to its financial ability, required BCI repay its investors within 60 days.

¶ 18 In September 2007, HJ Capital, Hyatt and Johnson, with the assistance of defendants as counsel, negotiated a settlement agreement with BCI to repay the LLCs' investments. Under the terms of the agreement, HJ Capital exchanged a promissory note with BCI for six aircraft and

cash payments. Pursuant to the settlement agreement, an entity called HJC Assets Holdings, LLC, which was managed by another entity called HJC Assets Holdings, Inc, held the aircraft. A substantial portion of the cash payment was not distributed to the LLCs, but rather, was diverted to Robert Biedron, an investor in HJ Finance. HJ Finance did not have any interest in any BCI aircraft or any of the LLCs' alleged interest in any BCI aircraft for which the $22.6 million note had been given. According to the documents prepared by defendants, HJ Finance was formed to invest in a joint venture between it and Brian Hollnagel, not BCI. Nevertheless, the settlement agreement provided that, as part of the exchange, Biedron received $2.4 million in funds.

¶ 19 In April 2008, the SEC sued Hyatt, Johnson, and HJ Capital alleging violations of federal securities laws, and the district court judge issued an order freezing their assets. The judge also appointed Robert Handler of Commercial Recovery Associates as the receiver (receiver) over HJ Capital and the LLCs. Both Hyatt and Johnson consented to a partial judgment in that case. Hyatt was later indicted by a grand jury for his participation in the BCI Ponzi scheme and misconduct of the LLCs' funds, and he entered into a plea agreement accepting a ten-year sentence in a federal penitentiary.

¶ 20 The receiver administered HJ Capital's and the LLCs' assets for the next seven years and, among other things, was successful in maximizing the value of the six commercial aircraft under leases with major airlines, resulting in recovery of the LLCs' capital contributions in the amount of $19.6 million. Specifically, the receiver liquidated most of the receivership assets, selling five of the six aircraft obtained in the September 2007 settlement agreement between BCI and Hyatt. In 2014, the receiver had sold four of the aircraft for almost $58 million, with net proceeds of $17.2 million.

¶ 21 On July 22, 2014, the receiver filed an "Application for Authority to Make Ninth Distribution to Investors" wherein the receiver requested to pay $4,905,500 to the investors, which was "sufficient to pay the remaining balance of the investors' net investment so that all investors will now have recovered from the receivership estate funds equal to those they invested through Hyatt Johnson Capital LLC." This application was granted on August 5, 2014, making the total distributions to the investors at that point $16,612,007.01. The receiver is holding additional funds that, subject to order of the district court, may provide further distributions to the individual investors in the LLCs. Those include reserve funds for the following: (1) all unpaid contested claims of non-investors which totaled approximately $727,000, (2) approximately $1 million for anticipated operating and litigation expenses, (3) $7.1 million for potential liability for a preference claim on appeal in an Alitalia bankruptcy proceeding in Italy, and (4) $3.4 million for 2014 Irish taxes. The receiver also retains $5 million for continued operations of the business and for future disclosures, and one of the remaining aircraft with a net worth of approximately $5 million. Since summary judgment was granted in favor of defendants, the receiver has sold the last aircraft and made additional distributions to the investors.

¶ 22 During the receivership, the receiver hired the law firm of Barnes & Thornburg, which litigated and recovered: (1) over $2.4 million that was improperly negotiated to Robert Biedron, and (2) $2 million from the investors in Hyatt Johnson A3 2003, who had been improperly repaid in full prior to the receiver's appointment. The receiver's fees and costs, through May 2015, are $3,372,975.16, which has been vetted and approved by the district court.

¶ 23 On September 11, 2009, the LLCs filed this action against defendants alleging professional misconduct in that defendants were negligent in failing to take action to prevent the

fraud perpetrated by Hyatt, Johnson and HJ Capital and in failing to document the LLCs' investment activities in acquiring interests in the LLCs managed by BCI.

¶ 24 On April 1, 2015, both parties moved for summary judgment. The LLCs sought a finding that the PPM defendants prepared for the LLCs failed to satisfy the federal securities laws by failing to disclose material information. The trial court judge denied that motion, and the LLCs do not appeal that ruling.

¶ 25 Defendants moved for summary judgment on two separate issues. First, defendants claimed that the LLCs suffered no actual damages because they recovered all of their initial investment losses and misappropriation by Hyatt. Second, defendants claimed that, even if the LLCs had suffered actual damages, such damage was due to intervening criminal acts of a third party and, therefore, any alleged negligence on the part of defendants could not have proximately caused damages. On May 7, 2015, the trial court granted defendants' motion for summary judgment finding that any alleged harm or damage to the LLCs "was caused by an intervening and unforeseeable criminal act" and the LLCs "suffered no actual damage." The LLCs now appeal the trial court's ruling granting summary judgment in favor of defendants. For the reasons that follow, we affirm the trial court's grant of summary judgment in favor of defendants on the LLCs' claim that defendants were negligent in setting up the offering documents, but remand this matter to the trial court for further proceedings on the issue of defendants' alleged negligence in negotiating the September 2007 settlement agreement, which resulted in more than $2 million being transferred to an improper individual, which the LLCs claim caused them damage in attorney fees and costs.

¶ 26 II. Analysis

¶ 27 On appeal, the LLCs argue that defendants committed legal malpractice in two distinct ways: (1) in negligently structuring the offering documents, which they allege allowed Hyatt to fraudulently misappropriate their money, and (2) in negligently negotiating the September 2007 settlement agreement, which allowed more than $2 million to be improperly transferred to Biedron, an individual with no right in the money. We note the LLCs did not set out two separate acts of negligence in the fifth amended complaint. However, in the summary judgment proceedings below and in the briefs submitted by both parties in the appellate court, defendants' alleged negligence is treated as two separate acts of negligence, and we will address each one on the merits as such. Accordingly, because these are two distinct allegations of malpractice, we will discuss each separately below.

¶ 28 In this appeal, the LLCs have abandoned their claim for future profits. Indeed, with respect to the LLCs' claims for prospective profits made in the trial court, the record shows this was a start-up business with no prior operating record, therefore the plaintiff LLCs cannot prove prospective profits. "A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 248-49 (2006) (quoting *Barnett v. Caldwell Furniture Co.,* 277 Ill. 286, 289 (1917)). "In order to recover lost profits, it is not necessary that the amount of loss be proven with absolute certainty. [Citation.] Being merely prospective, such profits will, to some extent, be uncertain and incapable of calculation with mathematical precision." *Midland Hotel Corp. v. Reuben H. Donnelley Corp.,* 118 Ill. 2d 306, 315-16 (1987); *Tri-G*, 222 Ill. 2d at 226 ("The existence of actual damages is therefore essential to a viable cause of action for legal malpractice.").

¶ 29 Instead, in this appeal, the LLCs focus on recovering as damages the costs and fees associated with the appointment of a receivership due to the embezzlement, specifically $3,372,975.16, which includes the attorney fees and costs expended to recover money wrongfully paid to a third-party.

¶ 30 Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Forsythe v. Clark USA, Inc.,* 224 Ill. 2d 274, 280 (2007). The purpose of summary judgment is not to try an issue of fact, but to determine if one exists. *Id.* at 280. In reviewing a grant of summary judgment, the appellate court will construe the record strictly against the movant and liberally in favor of the nonmoving party. *Id.* Summary judgment should not be allowed unless the moving party's right to judgment is clear and free from doubt. *Id.* If the undisputed facts could lead reasonable observers to divergent inferences, or if there is a dispute as to a material fact, summary judgment should be denied. *Id.* We review a grant of summary judgment *de novo. Id.*

¶ 31 "It is well established that the elements of a legal malpractice action in Illinois are: (1) the existence of an attorney-client relationship that establishes a duty on the part of the attorney; (2) a negligent act or omission constituting a breach of that duty; (3) proximate cause; and (4) damages." *Lopez v. Clifford Law Offices, P.C.*, 362 Ill. App. 3d 969, 974-75 (2005). The trial court granted summary judgment in favor of defendants on the last two elements of a legal malpractice claim—proximate cause and damages. For purposes of this appeal, the parties do not contest the first two elements.

¶ 32 Damages Caused by the Alleged Negligent Structuring of the Offering Documents

¶ 33 In the underlying case at issue in this appeal, the LLCs allege that defendants committed legal malpractice when they structured the investment offerings so that "there was no verification that the LLCs' funds would be used for the purpose for which they were raised[,]" here, investments in BCI, a company that owned and leased aircraft to commercial airlines. The LLCs argued that this negligence allowed Hyatt to fraudulently misappropriate their funds, thereby proximately causing a reduction in the value of their investment as well as remedial, professional costs and expenses associated with a federal court placing the LLCs into a receivership.

¶ 34 The trial court granted summary judgment in favor of defendants in part because it found that the LLCs failed to prove actual damages. The LLCs argue that this finding was improper because: (1) the LLCs are entitled to recover its funds that were misappropriated by Hyatt as well as the receiver's fees, costs and legal fees that were caused by defendants' negligence; (2) the trial court improperly "netted out" the damages from defendants' misconduct against the investment returns the receiver was able to secure; (3) the receiver's fees are not equivalent to any fees that would have been paid to the Manager; and (4) the damages calculated by the LLCs were not speculative. Defendants, in turn, argue that the trial court was correct in finding that the LLCs suffered no actual loss where the receiver was able to return the LLCs' original investments and more.

¶ 35 To prevail on a claim for legal malpractice, a plaintiff must show that the alleged malpractice caused it actual damages. *Learning Curve International, Inc. v. Seyfarth Shaw, LLP*, 392 Ill. App. 3d 1068, 1079 (2009). "The legal malpractice action places the plaintiff in the same position he or she would have occupied but for the attorney's negligence. * * * The plaintiff can be in no better position by bringing suit against the attorney than if the underlying

action had been successfully prosecuted or defended." *Sterling Radio Stations, Inc. v. Weinstine,* 328 Ill. App. 3d 58, 64 (2002).

¶ 36 The existence of actual damages is essential to a cause of action for legal malpractice. *Tri-G, Inc.*, 222 Ill. 2d at 226. Actual damages in a legal malpractice case are not presumed; a plaintiff must plead and prove that she has suffered injuries resulting from the defendant attorney's alleged malpractice. *Sterling Radio Stations, Inc.,* 328 Ill. App. 3d at 63. Even if negligence on the part of the defendant attorney is proven, a plaintiff cannot recover for legal malpractice unless she also proves that the attorney's negligence proximately caused her damages. *Nettleton v. Stogsdill*, 387 Ill. App. 3d 743, 748 (2008); *Tri-G, Inc.,* 222 Ill. 2d at 226. "The existence of actual damages is therefore essential to a viable cause of action for legal malpractice." *Tri-G, Inc.,* 222 Ill. 2d at 226.

¶ 37 "The general rule of damages in a tort action is that 'the wrongdoer is liable for all injuries resulting directly from the wrongful acts * * *, provided the particular damages are the legal and natural consequences of the wrongful act imputed to the defendant, and are such as might reasonably have been anticipated.' " *Haudrich v. Howmedica, Inc.,* 169 Ill. 2d 525, 543 (1996) (quoting *Siemieniec v. Lutheran General Hospital,* 117 Ill. 2d 230, 259 (1987)). A plaintiff in a legal malpractice case may recover attorney fees when the fees constitute an ordinary loss resulting from the attorney's negligence. *Nettleton*, 387 Ill. App. 3d at 749.

¶ 38 In this case, it is undisputed that all the investors have recovered their entire initial investment as well as some return on those investments, and additional distributions of funds will take place in the future. Because plaintiffs have received their initial investment plus a profit, defendants alleged that plaintiffs have no damages as a result of the alleged faulty or negligent drafting of the offering documents. We cannot place the LLCs in a better position than what

they would have been in but for the negligence in setting up the offering documents. *Sterling Radio Stations, Inc.,* 328 Ill. App. 3d at 64 ("The plaintiff can be in no better position by bringing suit against the attorney than if the underlying action had been successfully prosecuted or defended.”); *Nettleton*, 387 Ill. App. 3d at 752 ("If the award the plaintiff actually received is the same as or greater than the award she would have received if the defendant had not been negligent, then the plaintiff cannot be said to have been injured in the manner she alleged and she is not entitled to any damages.").

¶ 39 Plaintiffs allege that they incurred more than $3 million as damages in receiver fees because the defendants' negligence required the appointment of a receiver. Plaintiffs argue that but for the negligent conduct of defendants, no receiver would have been appointed and they would not have incurred damages in the amount of the receiver's fees and costs. However, we emphasize that in legal malpractice actions we seek to place the plaintiffs in the same position they would of been if the negligence had not taken place. *Sterling Radio Stations,* 328 Ill. App. 3d at 64 (“The plaintiff can be in no better position by bringing suit against the attorney than if the underlying action had been successfully prosecuted or defended.”). In this case, the LLCs' theory of malpractice is that if defendants had not been negligent, the Manager would not have embezzled funds and instead would have performed under the contract and, therefore, been paid pursuant to the terms of the contract. However, defendants point out that the management fees that would have been paid to the Manager under their contract would have exceeded the fees charged by the receiver. Therefore, defendants argue that if there was no negligence in this case, under the terms of the contract, the Manager would have been paid far more than the $3 plus million that was paid to the receiver, and the LLCs would have received less money if there had been no negligence.

¶ 40 The LLCs do not dispute defendants' calculation of the Manager's fees or the conclusion that those fees would have been far greater than the receiver's fees.[1] Therefore, we conclude the LLCs did not suffer a loss as a result of the appointment of a receiver to manage the investment funds. As such, when a calculation of damages requires that "the plaintiff [be placed] in the same position he or she would have occupied but for the attorney's negligence" (*Sterling Radio Stations,* 328 Ill. App. 3d at 64), a calculation of what the Manager's fees and costs would have been absent the negligence and appointment of a receiver was a calculation that needed to be made in order to place the LLCs in the same position they would have been absent defendants' negligence. Based on the record before us, the Manager's fees would have exceeded the receiver's fees, and the LLCs do not dispute this. Thus, even if we assume defendants had not been negligent and the costs and fees associated with appointing a receiver had not been incurred, the LLCs offer no evidence and make no argument that the fees and cost of the receiver exceeded the fees that would have been paid to the Manager under the contract. Therefore, the LLCs have not demonstrated any damages as a result of the appointment of the receiver.

¶ 41 Intervening Criminal Act

¶ 42 Although we have determined the LLCs cannot prove damages associated with defendants' alleged negligence in drafting the offering documents, which is sufficient to affirm summary judgment in favor of defendants on that claim of negligence, it appears that they also cannot prove defendants' alleged negligence was a proximate cause of their losses due to an intervening criminal act. The trial court granted summary judgment in favor of defendants after finding any alleged harm or damage to the LLCs "was caused by an intervening and

[1] Instead, plaintiffs argue: "Since the Manager never invested Plaintiffs' funds as promised, the Manager did not fulfill his obligations under the PPMs and thus was not entitled to any management fee." However, this statement does not comport with the LLCs' argument that if defendants had structured the offerings properly, the funds would not have been misappropriated making the appointment of a receiver unnecessary.

unforeseeable criminal act." On appeal, the LLCs argue that this finding was in error because: (1) proximate cause is generally a question of fact that should be presented to a jury; (2) "criminal conduct is foreseeable in securities settings," and, as a result, such activity could not be an intervening act; (3) even if the criminal activity was a proximate cause of the injury, there can be more than one proximate cause and, in this case, that included defendants' negligence; and (4) the case law cited in support of defendants' motion for summary judgment in the lower court did not support their argument that any alleged negligence was not a proximate cause of the LLCs' alleged injury here. Defendants argue that the trial court was correct in finding that any alleged negligence on the part of the defendants could not be a proximate cause of the LLCs' alleged injury where the alleged injury was directly caused by Hyatt's fraudulent scheme, which was an unforeseeable criminal intervening act.

¶ 43 Proximate cause is ordinarily a question for the jury to decide. *Davis v. Marathon Oil Co.,* 64 Ill. 2d 380, 395 (1976); *Mack v. Ford Motor Co.*, 283 Ill. App. 3d 52, 57 (1996). The proximate cause of an injury can become a question of law only when the facts are not only undisputed but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn from them. *Mack*, 283 Ill. App. 3d at 57. There may be more than one proximate cause of an injury (*Bentley v. Saunemin Township,* 83 Ill. 2d 10, 17 (1980)), and a defendant may be held liable even if his negligence is not the sole proximate cause of the plaintiff's injuries, so long as his conduct contributed in whole or in part to the injury. *Mack*, 283 Ill. App. 3d at 57.

¶ 44 "It is the general rule in Illinois and other jurisdictions that a person has no duty to anticipate the criminal acts of third parties." *Bence v. Crawford Savings & Loan Ass'n*, 80 Ill. App. 3d 491, 493 (1980). An exception to this rule exists, however, when criminal acts should

reasonably have been foreseen. *Id*. (citing *Neering v. Illinois Central R.R. Co.*, 383 Ill. 366, 381 (1943)). Accordingly, the negligence of a defendant will not constitute a proximate cause of a plaintiff's injuries if some intervening act supersedes the defendant's negligence, but if the defendant could reasonably foresee the intervening act, that act will not relieve the defendant of liability. *Bentley,* 83 Ill. 2d at 15.

¶ 45 To escape liability, a defendant must demonstrate that the intervening event was unforeseeable as a matter of law. *Davis,* 64 Ill. 2d at 395. A foreseeable intervening force does not break the chain of legal causation. *Felty v. New Berlin Transit, Inc.,* 71 Ill. 2d 126, 131 (1978); *Mack*, 283 Ill. App. 3d at 57. A criminal act is an intervening, superseding cause of a plaintiff's injury and relieves the originally negligent defendant of liability, except where the defendant's acts or omissions create a condition conducive to a reasonably foreseeable intervening criminal act. *Rowe v. State Bank of Lombard,* 125 Ill. 2d 203, 224 (1988). When determining whether a criminal act is foreseeable, "our precedent instructs that '[t]he test that should be applied in all cases in determining the question of proximate cause is whether the first wrongdoer might have reasonably anticipated the intervening cause as a natural and probable result of the first party's own negligence.'" *Janowiak v. Tiesi*, 402 Ill. App. 3d 997, 1011 (2010) (citing *Merlo v. Public Services Co. of Northern Illinois*, 381 Ill. 300, 381 (1942)); see also *Kirschbaum v. Village of Homer Glen,* 365 Ill. App. 3d 486, 495 (2006). "Foreseeability is a subset of the proximate cause determination; the inquiry is whether the plaintiff's injury is of a type that a reasonable person in the defendant's situation would see as a likely result of his conduct." *Sobilo v. Manassa*, 479 F. Supp. 2d 805, 818 (N.D. Ill. 2007).

¶ 46 "[I]t is well established that if an alleged negligent act does nothing more than furnish a condition making the injury possible, and such condition, by the subsequent independent act of a

third party, causes the injury, the two acts are not concurrent and the condition will not be the proximate cause of the injury." *Boylan v. Martindale,* 103 Ill. App. 3d 335, 343 (1982) (affirming the trial court's granting of summary judgment because the alleged failure to clear trees and bushes from an area near an intersection "was not a contributing factor to the injury;" the city, as a matter of law, could not have foreseen the intervening negligence of drivers as a result thereof where a traffic signal was present and testimony established that the stoplight was not obstructed).

¶ 47 The LLCs argue that "[p]erhaps the most obvious and foreseeable risk in entrusting funds to Hyatt and Johnson was the risk that one or both of them would steal money from the LLCs." However, the LLCs have not offered any evidence to show that it was foreseeable that Hyatt would misappropriate the LLCs' funds in this case. In their response to defendants' motion for summary judgment, the LLCs argue that Hyatt's fraudulent misappropriation of funds was foreseeable because: (1) defendants' were attorneys hired to prevent such criminal activity, and (2) there can be more than one proximate cause to an injury. The LLCs also argue at the outset of that response that "the foreseeability of such misconduct is recognized by the federal securities laws, that were expressly created to combat such fraudulent and inequitable practices. See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-728 (U.S. 1975) (the Securities Exchange Act of 1933 enacted to prevent frauds in the sale of securities and Securities Exchange Act of 1934 enacted to prevent inequitable and unfair practices.)".

¶ 48 On appeal, the LLCs make an additional argument in their reply brief that there was evidence that "[d]efendant Goldsmith claims he was told to 'stay away' from the closings", that "Goldsmith was never able to verify that the investors' money went where it was supposed to go" and that "Professor Greenwood opined that these factors should have indicated the potential for

fraud and promoted action by defendants." This evidence presented on appeal was not presented during the summary judgment proceedings below and, therefore, should be deemed waived. *Village of Gilberts v. Holiday Park Corp.*, 150 Ill. App. 3d 932, 939 (1986) (issues not raised below are considered waived on appeal); *Johnson Press of America, Inc. v. Northern Insurance Co. of New York*, 339 Ill. App. 3d 864, 874 (2003) ("An argument not raised in the trial court and presented for the first time on appeal is waived, even in an appeal from a summary judgment."). Waiver aside, we cannot see how any of the evidence put forth by the LLCs, either in the trial court or on appeal, tends to show that the criminal act that occurred in this case—Hyatt misappropriating the funds—was foreseeable. The evidence submitted by the LLCs merely demonstrates that fraud was *possible*, not *foreseeable*. *Yager v. Illinois Bell Telephone Co.*, 281 Ill. App. 3d 903, 907 (1996) ("Foreseeability means that which it is objectively *reasonable* to expect, not merely what might conceivably occur.").

¶ 49 The LLCs offer no evidence that would have put defendants on notice that Hyatt might misappropriate their funds instead of investing the funds as described in the offering documents. Instead, the LLCs concede that Hyatt and Johnson had significant experience in the sale of securities, without questioning that experience at all: "Both Hyatt and Johnson had experience in the sale of securities. Johnson had previously sold financial institution stock, and he has a network of high-net-worth individuals from whom to solicit. Hyatt previously worked for BCI." There is no evidence that Hyatt or Johnson had any history of criminal activity and no evidence that defendants were advised in any way that Hyatt might engage in fraudulent or criminal activity.

¶ 50 The cases cited by the LLCs in support of their argument that Hyatt's misappropriation of their funds was foreseeable at the time of defendants' alleged negligence actually demonstrate

just the opposite. In *Sobilo v. Manassa*, the plaintiff filed a malpractice case against her attorneys in a divorce proceeding arguing that because of her attorneys' negligence, plaintiff's husband was able to dissipate the marital assets. While the defendant attorneys argued that the husband's criminal actions were unforeseeable, therefore entitling the attorneys to judgment as a matter of law, the court rejected this argument where evidence had been presented to show that the husband's criminal actions were foreseeable, thereby precluding summary judgment. Specifically, the court found that not only was it generally foreseeable "that a spouse would dissipate or abscond with marital assets during the course of a divorce proceeding" (*Sobilo*, 479 F. Supp. 2d at 819), but there was evidence that the attorneys should have foreseen that the husband would dissipate the assets because the "plaintiff testified that she informed both attorneys about her concerns [the husband] would dissipate the marital assets" and where the husband's "history of dissipating assets is also reflected in the pleadings drafted by Defendant Manassa in both the 2002 and 2003 cases (which would have been apparent to Defendant Gurewitz upon his review of the file), and in the petition for temporary relief filed by Defendant Gurewitz in the 2003 case." Further, plaintiff's expert opined that given the husband's history, the defendants should have recognized the risks and taken greater steps to independently investigate his finances and prevent his dissipation of the marital assets. *Sobilo*, 479 F. Supp. 2d at 819. Of importance here, the court went on to comment:

> "Foreseeability may be decided by the court as a matter of law where the issue is so clear that reasonable minds could not differ. *Id.* For instance, in *Pacelli v. Kloppenberg,* 65 Ill. App. 3d 150 (1978), relied on by Defendants, the court found that an attorney could not be held liable for failing to protect the plaintiff

> from the actions of a licensed real estate broker, who stole money the plaintiff had deposited into an escrow account. The court found 'nothing in the record to suggest that defendant had any reason to question the honesty' of the broker, who was himself the plaintiff's fiduciary. *Id.* at 571. In considering the foreseeability of the broker's actions, the court concluded, 'Duty is imposed not on the mere possibility of occurrence, but on what the reasonably prudent man would then have foreseen as likely to happen.' *Id.*" *Sobilo*, 479 F. Supp. 2d at 818.

Thus, in *Sobilo*, unlike here, there was evidence to show that the criminal act that in fact occurred was foreseeable—the husband had a known history of trying to hide money and that is exactly what he did. Here, the LLCs have offered no evidence to show that defendants had any knowledge that Hyatt would misappropriate the LLCs' funds.

¶ 51 In *Bourgonje v. Machev*, another case cited by the LLCs, a tenant brought a negligence action against her landlord seeking damages that resulted when the tenant was raped by a third party on the premises of her apartment building. *Bourgonje*, 362 Ill. App. 3d at 984. The tenant alleged that the landlord voluntarily undertook a duty to provide the tenant with security and failed to do so by having nonfunctioning door buzzers and lights. *Id.* The circuit court granted summary judgment in favor of the landlord, and the appellate court reversed, finding there was a genuine issue of material fact as to whether the rape of the tenant was a foreseeable result of the landlord's alleged failure to fulfill her voluntary undertaking to illuminate the outside of the tenant's apartment building, thus precluding summary judgment. *Bourgonje*, 362 Ill. App. 3d at 984. However, unlike the case at bar, in *Bourgonje*, the appellate court found there was "more

than enough evidence to create a question of fact as to whether the assault on Bourgonje was a foreseeable result of Machev's alleged failure to fulfill her voluntary undertaking to illuminate the premises." *Bourgonje*, 362 Ill. App. 3d at 1011. Specifically, there was "evidence in the record to support an inference that the area surrounding the mansion was dangerous enough so that Machev should have known that an attack such as that experienced by Bourgonje was likely" including a detective's testimony that "less than a mile south of the mansion there was a halfway house for newly released prison inmates, as well as a nearby transient hotel on Milwaukee Avenue, both of which 'add[ed] an element of risk to the area.' " *Id.* at 1008-09. Further, there was testimony from two witnesses to show "that there was a significant amount of violent crime in the vicinity of the mansion" (*Id*. at 1009) and "ample evidence [by way of testimony from several witnesses] of the causal relationship of lighting on property and criminal activity." *Id.* There is simply no such evidence in this case.

¶ 52 And, although the two New York bankruptcy cases cited by the LLCs, *In re Gouiran Holdings, Inc*. and *In re Bennett Funding Group*, applied New York law and were decided on the pleadings as opposed to the evidence at summary judgment, thus making them distinguishable on those grounds alone, even in those cases the court found that the plaintiffs had sufficiently pled knowledge of the risk of criminal activity that in fact occurred thereby making a dismissal on the pleadings inappropriate.

¶ 53 Absent any evidence of foreseeability, such as specific evidence that Hyatt or Johnson had engaged in fraudulent behavior in the past or evidence that Hyatt or Johnson indicated at any time that they would not use the LLCs' funds in the manner they were supposed to, we are left with an unforeseeable criminal activity that cuts the causal connection between the alleged negligence of improperly setting up the offering documents and the alleged injury. See *Bence*,

80 Ill. App. 3d at 493; *Thompson v. County of Cook*, 154 Ill. 2d 374, 383 (1993) ("Proximate cause is also absent where the independent acts of a third person break the causal connection between the alleged original wrong and the injury. When that occurs, the independent act itself becomes a proximate or immediate cause."). As such, we cannot find that Hyatt's criminal fraud in misappropriating funds was foreseeable such that the fraud was "a natural and probable result" (*Janowiak*, 402 Ill. App. 3d at 1011) of defendants' alleged negligence, and, accordingly, find that there are no issues of material fact and, as a matter of law, defendants' alleged negligence did not proximately cause the injury alleged by the LLCs here. *Forsythe,* 224 Ill. 2d at 280 (Summary judgment is appropriate when the pleadings, depositions, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.).

¶ 54 Damages Caused by Drafting the Settlement Agreement

¶ 55 The LLCs argued during the summary judgment proceedings and in this appeal that defendants were negligent in negotiating the September 2007 settlement agreement that allowed more than $2 million to be transferred to Biedron, an individual not entitled to receive that money. As a result, the LLCs also claim damages in the amount of attorney fees, specifically $779,692.57 of attorney fees charged to the receiver. While we assume negligence in this appeal, defendants argue that only a portion of the $779,692.57 in attorney fees and costs charged by the receiver were incurred in the effort to recover the funds improperly transferred to Biedron. Defendants further argue that if the LLCs wanted to recover those costs and expenses, they should have done so in the proceedings in federal court against Biedron and cite to *Hudson v. City of Chicago*, 228 Ill. 2d 462, 471 (2008), in support of their contention.

¶ 56 In *Hudson*, the court reasoned that "the principle that *res judicata* prohibits a party from seeking relief on the basis of issues that could have been resolved in a previous action serves to prevent parties from splitting their claims into multiple actions." *Hudson*, 228 Ill. 2d at 471-72. *Res judicta* applies when there is "(1) a final judgment on the merits rendered by a court of competent jurisdiction; (2) identity of cause of action; and (3) identity of parties or their privies." *Id*. at 470. Here, however, the federal action was filed by the receiver and against Biedron, neither of whom are parties in this action, and the federal action alleged that $2.4 million had been improperly transferred to Biedron and sought to recover that money, whereas this action alleges claims of legal malpractice and seeks attorney fees and costs incurred as a result of that alleged malpractice. As such, the LLCs are not barred on grounds of *res judicata* from seeking to recover attorney fees from defendants in this proceeding. See *id*. at 470-72. The LLCs argue that because defendants' negligence allowed $2.4 million to be transferred Biedron in the settlement negotiations, the attorney fees and costs that were expended to recover the money from Biedron were damages over and above the damage caused by the alleged faulty drafting.

¶ 57 We find that any negligence in drafting the settlement agreement is not due to an intervening act and further find that if defendants' negligence in drafting the settlement agreement resulted in the improper transfer of funds to a third party who was not entitled to the funds, the LLCs can prove specific and identifiable damages associated with efforts to recover those funds. *Lucey v. Law Offices of Pretzel & Stouffer, Chartered*, 301 Ill. App. 3d 349, 355 (1998) ("where an attorney's neglect is a direct cause of the legal expenses incurred by the plaintiff, the attorney fees incurred are recoverable as damages."); see also *National Wrecking Co. v. Coleman,* 139 Ill. App. 3d 979, 983-84 (1985); *Sorenson v. Fio Rito,* 90 Ill. App. 3d 368, 373-74 (1980). Again, our job is to place the LLCs in the position they would have been in but

for any negligence in drafting the settlement agreement. *Sterling Radio Stations, Inc.,* 328 Ill. App. 3d at 64 ("The plaintiff can be in no better position by bringing suit against the attorney than if the underlying action had been successfully prosecuted or defended."). Therefore, if the alleged negligent payment to Biedron had not taken place, the receiver's fees would have been reduced by the amount that the lawyers charged the receiver in order to recover those wrongfully paid transferred funds. As such, we remand this matter to the trial court for further proceedings on the LLCs' claim of negligence with respect to defendants' handing of the September 2007 settlement agreement: specifically, whether the LLCs can prove the elements of negligence on that claim and, if so, what damages, if any, were proximately caused by that negligence.

¶ 58 III. Conclusion

¶ 59 For the reasons above, we affirm the trial court's grant of summary judgment in favor of defendants on the LLCs' claim that defendants were negligent in setting up the offering documents, but we remand this matter to the trial court for further proceedings on the LLCs' claim that defendants were negligent in their negotiation of the September 2007 settlement agreement.

¶ 60 Affirmed in part, reversed in part and remanded.