AFFIRM; and Opinion Filed May 30, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01262-CV

ERIK L. NELSON, Appellant

V.

JACK SHEEDY, ROGER CRABB, AND SCHEEF & STONE, L.L.P., Appellees

On Appeal from the County Court at Law No. 2
Dallas County, Texas
Trial Court Cause No. CC-15-01798-B

MEMORANDUM OPINION

Before Justices Lang-Miers, Myers, and Boatright
Opinion by Justice Lang-Miers

Appellant Erik L. Nelson sued appellees Jack Sheedy, Roger Crabb, and Scheef & Stone, L.L.P. (the lawyers) for legal malpractice concerning advice they gave him about the meaning of language in an agreement. The trial court granted summary judgment in favor of the lawyers. In two issues, Nelson argues that the trial court erred in granting no-evidence and traditional summary judgment. We affirm.

BACKGROUND

Nelson owned 1,000 shares and Deepak Ahuja owned 429 shares of Nelson Architectural Engineers, Inc. (Company). Nelson and Ahuja entered into an Agreement of Shareholders that

included mandatory buy-sell provisions in article III.[1] In article VIII, it also stated the purchase price of shares and terms if certain events or conditions occurred.[2]

In January 2014, Ahuja made an "Initialed Offer" under section 3.3 of the shareholder agreement for Nelson to buy Ahuja's 429 shares at $10,800 per share. Ahuja stated that the price represented his assessment of the value of his shares as permitted under section 3.5 of the shareholder agreement.

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[1] Article III of the agreement included the following provisions:

> 3.3 . . . [A]ny Shareholder or several Shareholders as a group (the "Movant") may offer to any other Shareholder or several Shareholders as a group (the "Respondent") to sell to the Respondent all (but not less than all) of the Shares held by the Movant, or to buy from the Respondent all (but not less than all) of the Shares held by the Respondent, upon such terms (including the price) as the Movant may select (the "Initialed Offer"), subject, however, [to] 3.5 below. The Respondent shall have thirty days from the date notice of the Ini[]tialed Offer is given: (a) to accept the Initialed Offer[]; or (b) either:
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> (i) if the Initialed Offer is an offer to sell the Movant's Shares, to elect to sell the Respondent's Shares to the Movant upon the same terms con[]tained in the Initialed Offer, whereupon the Respondent shall be obligated to and shall sell to the Movant, and the Movant shall be obligated to and shall buy from the Respondent, the Respondent's Shares upon such terms; or
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> (ii) if the Initialed Offer is an offer to purchase the Respondent's Shares, to elect to purchase the Movant's Shares upon the same terms contained in the Initial[ed] Offer, whereupon the Respondent shall be obligated to and shall purchase from the Movant, and the Movant shall be obligated to and shall sell to the Respondent, the Movant's shares upon such terms.
>
> If the Respondent fails to timely elect to sell the Respondent's Shares [or] to buy the Movant's Shares as provided by paragraph (b)(i) and paragraph (b)(ii), as applicable, the Respondent shall be deemed to have accepted the Initialed Of[]fer.
>
> 3.4 If the Initialed Offer is not accepted, the price for the Shares in[]volved shall be appropriately adjusted, if necessary, to reflect the number of Shares held by the Movant and the Respondent.
>
> 3.5 The Initialed Offer, whether an offer to sell or an offer to buy, shall provide that not less than one-half of the purchase price for the Shares shall be paid in cash at the closing. The Initialed Offer may not contain provisions re[]lating to the non-competition of a person after the closing, the release of claims by any person or any matter other than the sale and purchase of the Share[s] and the price therof. However, the Initialed Offer may provide that the price of the Shares shall be calculated by reference to the fair market value of the Shares, the income of the Company or other matters.

[2] Article VIII provided:

> 8.1 The Shares purchasable pursuant to Articles III, V, VI and VII shall be purchased at the fair market value thereof, as such value exists: (a) immedi[]ately before the death or judicial determination of incapacity of a Shareholder, if pursuant to Article VI; or (b) at the end of the month immediately preceding the Shareholder's or the Company's notice of exercise of its option, if pursuant to Article V or Article VII. Each of such dates is referred to as the "Valuation Date." Such fair market value shall be determined by agreement of the pur[]chaser and seller or, if they have not so agreed within thirty days after the Valuation Date, the value shall be established by appraisal pursuant to para[]graph 8.2.
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> 8.2 For purposes of this Article, the fair market value of the Shares shall be equal to the amount of cash payable with respect to such Shares upon the liquidation of the Company if all assets of the Company were sold as a go[]ing concern to a third party for cash in the amount of the net fair market value thereof as of the Valuation Date and the Company were liquidated immediately thereafter. In addition, such value shall be determined as though no Shareholder agreed to be employed by the purchaser of the assets or agreed to re[]frain from competing with such purchaser. The purchaser and seller shall en[]deavor to designate a mutually acceptable appraiser to determine such value[.]

Nelson asked Crabb and Sheedy for their legal advice regarding Ahuja's demand. After a meeting, Nelson asked via e-mail for Crabb[3] to "confirm or advise" as to whether "[t]he response to the ['']initialed offer['] can accept Deepak's sale of all his shares but counter the value with a different or lower cost per share without it being 'flipped' back on [him], the respondent." Crabb replied that he and Sheedy confirmed that he could. Nelson asked further questions that assumed "we respond with an acceptance of his ['']initialed offer['] of all of his 429 shares but counter with a different price generally following Article 8[.]" Nelson asked Crabb if his response or counter would bind Ahuja to article 8 of the shareholder agreement, and Crabb replied that it would. Crabb stated, "OUR ANALYSIS IS THAT DEEPAK COULD MAKE AN OFFER WITH A PRICE THAT HE CHOSE – HENCE THE USE OF THE WORD "MAY" IN THE FIRST PARAGRAPH OF 3.3, AND IN 3.5. BUT THE INITIAL LANGUAGE OF 8.1 USES THE WORD "SHALL" – WHICH MAKES THE VALUATION MECHANISM IN THAT SECTION MANDATORY, AND TO REMOVE ANY AMBIGUITY, 8.1 ALSO REFERENCES ARTICLE III TRANSACTIONS AS FALLING WITHIN THE UNIVERSE OF TRANSACTIONS GOVERNED BY THAT SECTION." Nelson also asked:

> Can he argue Article 8 doesn't apply to the Article 3 put clause? He mentioned to me he thought the language was "binary", either I accept or I flip– no other options. This makes me think he doesn't believe Article 8 applies. Is he wrong? I am trying to get 100% confidence level that it does apply.

Crabb replied, "HE IS WRONG AND THE AGREEMENT CLEARLY MANDATES THAT ARTICLE VIII APPLIES."

On January 24, 2014, Nelson responded to Ahuja's offer by letter. Nelson stated that, as Ahuja mentioned in his letter, article III of the shareholder agreement "does indeed permit" Ahuja "to make a personal assessment of the value of [his] shares." But Nelson then stated, "I note that

[3] Sheedy was copied on the e-mail.

Article VIII of our Agreement, which you did not mention as having any bearing on share value, specifies that any shares which are to be purchased under Article III '*shall* be purchased at the fair market value thereof.'" And Nelson noted that article VIII specified how the fair market value of the shares was to be determined. Nelson then stated, "I accept your offer to sell all of your shares to me, and my valuation of your shares is $611,754.00, or $1426.00 per share."

On February 7, 2014, Ahuja responded by letter to Nelson:

> As your January 24, 2014 letter correctly points out, I am permitted to make an assessment of my shares' value, and I have done that in accord with Section 3.3 of the Agreement. Your valuation of the Initialed Offer and the fair market value process you have suggested are irrelevant to this process. The Initialed Offer gave you two choices, and you made neither of those. Therefore, you are deemed to have accepted the Initialed Offer I made.

Ahuja stated that closing of the share purchase would take place on March 4, 2014 and attached closing documents to his letter.[4]

The following week, Nelson and the Company sued Ahuja for breach of contract, breach of fiduciary duty, and other claims. They engaged different attorneys to file the lawsuit. Nelson and the Company alleged that Ahuja "insist[ed] on ignoring the fair market value determination" for his shares as required by the shareholder agreement and "has, and continues to, refuse to sell his shares to Erik Nelson for the fair market value as determined by the shareholder agreement." The case settled with Nelson agreeing to pay Ahuja $3,950,000[5] for all of Ahuja's shares in the Company.

Nelson then sued the appellee lawyers for negligence/negligent misrepresentation, legal malpractice, and breach of fiduciary duty. Nelson alleged that Sheedy "failed to draft the Agreement properly" and the lawyers "failed to properly advise" Nelson "regarding the application

[4] Also on February 7, 2014, Ahuja's counsel wrote to Crabb that "[t]he two means of determining the Valuation Date in 8.1 have nothing to do with Section 3.3[,]" the "entire fair market value process in Article VIII depends on a Valuation Date[,]" and the "fact that [they had] no Valuation Date further confirms the fair market value process [Crabb's] client wishes to pursue does not apply to an Initialed Offer."

[5] Ahuja's Initialed Offer price was $4,633,200.

of the Agreement to a transaction between" Nelson and Ahuja. The lawyers answered, asserting a general denial and affirmative defenses. The trial court granted the lawyers' motion for leave to designate responsible third parties. The trial court subsequently granted summary judgment to the responsible third parties on Nelson's claims against them and granted summary judgment to the lawyers on all of Nelson's claims except for a claim of professional negligence based on the advice the lawyers gave to Nelson in 2014.

The lawyers later moved for traditional and no-evidence summary judgment on the remaining professional negligence claim. The trial court granted the motion for summary judgment without specifying the grounds. Nelson then filed this appeal.

STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's grant of summary judgment de novo. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017). We review the summary-judgment evidence in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). Because the trial court's order does not specify the grounds for granting summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003). The party moving for traditional summary judgment must show that no genuine issue of material fact exists and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see Mann Frankfort*, 289 S.W.3d at 848. In a no-evidence motion for summary judgment, the nonmovant must present evidence that raises a genuine issue of material fact on the challenged elements of its claim. TEX. R. CIV. P. 166a(i); *see Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

To prevail on a claim for legal malpractice, "the client must establish that (1) the lawyer owed a duty of care to the client; (2) the lawyer breached that duty; and (3) the lawyer's breach proximately caused damage to the client." *Rogers v. Zanetti*, 518 S.W.3d 394, 400 (Tex. 2017); *see Stanfield v. Neubaum*, 494 S.W.3d 90, 96 (Tex. 2016). "In every case, the plaintiff must supply a causal link between the attorney's alleged negligence and the client's damages." *Rogers*, 518 S.W.3d at 404. "A lawyer can be negligent and yet cause no harm." *Id.* at 400. "And, if the breach of a duty of care does not cause harm, no valid claim for legal-malpractice exists." *Id.* "[A]lthough causation is typically a question of fact, it may be determined as a matter of law when reasonable minds could not arrive at a different conclusion." *Id.* at 401.

Proximate cause has two components: cause in fact and foreseeability. *Id.* at 402. "Cause in fact must be established by proof that (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred." *Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. Nat'l Dev. & Res. Corp.*, 299 S.W.3d 106, 122 (Tex. 2009); *Rogers*, 518 S.W.3d at 403 ("[O]ur cause-in-fact standard requires not only that the act or omission be a substantial factor but also that it be a but-for cause of the injury or occurrence."). Foreseeability "addresses the proper scope of a defendant's legal responsibility for negligent conduct that in fact caused harm" and "asks whether the harm incurred should have been anticipated and whether policy considerations should limit the consequences of a defendant's conduct." *Rogers*, 519 S.W.3d at 402. "Causation must be proved, and conjecture, guess, or speculation will not suffice as that proof." *Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 299 S.W.3d at 122.

CAUSATION

As part of his first issue, Nelson argues that the trial court erred in granting no-evidence summary judgment because he produced more than a scintilla of evidence of causation. Nelson

contends that he testified that—"had the lawyers advised him properly" and told him that "the Article VIII appraisal process did not apply"—he would have "flipped the deal" and, as a result, "pocketed $10.8 million,"[6] and opened a competing company. Nelson also argues that his expert witness on causation, Jeff Levinger, testified to proximate cause. He contends that, taken together, the testimony by Nelson and Levinger constitute more than a scintilla of evidence on causation. The lawyers argue that the trial court properly granted no-evidence summary judgment because Nelson did not submit competent summary judgment evidence to raise a fact issue on the element.

The parties disagree about two issues: (1) what testimony—expert or lay—the court could consider concerning causation and (2) whether Nelson submitted more than a scintilla of evidence of causation.

Expert and Lay Testimony

The lawyers contend that Nelson "does not dispute" that expert testimony was required to establish causation and that Nelson "relied solely" on the expert testimony of attorney Jeff Levinger to establish causation. In response, Nelson contends that the lawyers' "entire argument on proximate cause is flawed because no expert testimony is required."

"Generally in a legal malpractice case, expert witness testimony is required to rebut a defendant's motion for summary judgment challenging the causation element." *Swaim*, 530 S.W.3d at 679. "And when the causal link is beyond the jury's common understanding, expert testimony is necessary." *Alexander v. Turtur & Assocs., Inc.*, 146 S.W.3d 113, 119–20 (Tex. 2004). But "[i]n some cases the client's testimony may provide" the "causal link between the attorney's negligence and the client's harm." *Id.* at 119. Nelson argues that, if he proves a breach of the standard of care, "proximate cause becomes a factual matter (Nelson would have flipped the

[6] In his argument concerning damages, Nelson also argues that—had the lawyers advised him properly—he would have saved $3.95 million that he paid in settlement.

deal and Ahuja would have funded it) within the understanding of an average juror." And he contends that, because other expert testimony proves breach of the standard of care, "lay testimony from Nelson and Ahuja establishes causation[.]" Nelson cites *Streber v. Hunter*, 221 F.3d 701, 726–27 (5th Cir. 2000), as authority for this argument.

But *Streber* is distinguishable. In *Streber*, a jury found attorneys liable for legal malpractice and other claims based on attorneys' tax advice and advice not to settle litigation. *Id.* at 717. Considering the malpractice claim on appeal, the court agreed with the client's contention that "[a]ny rational juror, who could do simple math, could understand that [the client] was severely damaged as a direct result of [the attorneys' actions]." *Id.* at 726. The court concluded that, in that case, where an expert established negligence and breach of fiduciary duties, "lay testimony was sufficient to establish causation." *Id.* The court noted that several witnesses testified that the client would have paid the tax but did not pay it "based solely on her attorneys' advice[,]" the client testified that she would have settled but did not because of her attorneys' advice, and the client testified as to the "specific financial losses failing to settle caused her." *Id.* at 727. The court concluded that "[t]his testimony was sufficient to sustain the proximate cause finding on each type of damages awarded to" the client, "which constituted the direct economic loss from the attorneys' misconduct." *Id.*

In contrast, in this case, establishing proximate cause does not depend upon "simple math[.]" *Id.* at 726. But instead it involves "the wisdom and consequences" of the interpretation of the buy and sell provisions of the shareholder agreement, which "are generally matters beyond the ken of most jurors." *Alexander*, 146 S.W.3d at 119. These matters include—as Levinger expressed in his affidavit—whether the lawyers' advice prevented Nelson from "fully considering the only other option that was available to him if he did not wish to accept Ahuja's Initialed Offer" ("requiring Ahuja to purchase Nelson's shares at the same price of $10,800 per share"), whether,

"[b]ut for the counseling acts and omissions," Nelson "could have avoided paying Ahuja $4 million[,]" and whether, if Ahuja did not pay Nelson the required amount, Nelson could sue Ahuja and "would have obtained both a judgment and the right to execute upon Ahuja's shares in the Company to satisfy the judgment." Because "the[se] causal link[s]" are "beyond the jury's common understanding, expert testimony is necessary." *Id.* at 119–20.

Evidence of Causation

Nelson contends that he produced more than a scintilla of evidence of causation. He argues that he relies upon Levinger for his expert opinion, but that he also "relies factually on testimony from himself and others." Nelson argues that this evidence includes Nelson's affidavit testimony that, had the lawyers told him that the appraisal process in article VIII did not apply to Ahuja's Initialed Offer, Nelson "would have flipped the deal" and sold "his shares to Ahuja for $10.8 million." Nelson also states that expert testimony by Levinger provided evidence that the lawyer's advice proximately caused Nelson's damages. He points to Levinger's testimony that the lawyers' advice "prevented Nelson from fully considering the only other option that was available to him if he did not wish to accept Ahuja's Initialed Offer—namely, responding to Ahuja's Initialed Offer by requiring Ahuja to purchase Nelson's shares at the same price of $10,800 per share contained in the Initialed Offer." And Nelson contends Levinger addressed foreseeability through his testimony that "a reasonable attorney using ordinary care would have foreseen that Nelson might be exposed to significant damages if he made a response to the Initialed Offer that was not permitted under the [Shareholders] Agreement."

The lawyers argue that Levinger's affidavit—the only causation evidence that the lawyers argue was before the court—constitutes no evidence of causation because Levinger's statements concerning causation are conclusory and speculative. Nelson argues that Levinger's testimony is neither conclusory nor speculative but rather "follows logically—indeed, inexorably—from the

lawyers' concession" that the lawyers told Nelson that he could not "flip the deal without risking appraisal and a lower share price."[7] Nelson contends that Levinger "provides the basis for his testimony[.]" And he argues that Levinger's testimony is not speculative because the evidence supports Levinger's assumptions "that Nelson would have flipped the deal and Ahuja would have funded it." Nelson argues that this evidence includes Nelson's affidavit testimony that he would have "flipped the deal"—which Nelson claims is not conclusory—and Ahuja's deposition testimony that (according to Nelson) he "was prepared to buy Nelson's shares if Nelson flipped the deal and would have gotten the financing to do so."

Before we address whether Nelson's causation evidence is competent, we address two associated arguments by Nelson. Nelson argues, citing *Morgan v. Compugraphic Corp.*, 675 S.W.3d 729, 731–32 (Tex. 1984), that "a tort case involves two distinct causal links": the "link between the defendant's conduct and the event sued upon" and the "link between the event sued upon and the injury to the plaintiff." Nelson contends that Levinger's testimony only relates to, as stated in *Morgan*, the defendant's "legal responsibility for the event upon which suit is based[,]" *id.* at 732, and that other expert testimony concerns the "second causal link, whether Nelson sustained a net financial loss[.]" But the supreme court in *Morgan* discussed "two distinct aspects of causation which exist in a personal injury case such as" *Morgan* and whether a "party who secures a default judgment against a non-answering defendant" must "present evidence proving

[7] In his reply brief, Nelson also quotes the following additional passages from Levinger's affidavit to support his argument that Levinger's testimony concerning causation is competent and not conclusory or speculative:

1. "Because section 3.3 gave Nelson only two options in response to Ahuja's Initialed Offer, the advice given to Nelson—to respond to the Initialed Offer with a different option that the Agreement did not permit—resulted in Nelson being 'deemed' to have accepted the Initialed Offer at Ahuja's Price of $10,800 per share."

2. "[B]ut for the counseling acts and omissions, Nelson would have been able to give full and informed consideration to whether he should pursue the available option of responding to Ahuja's Initialed Offer by requiring Ahuja to purchase Nelson's shares at the same price of $10,800 contained in Ahuja's Initialed Offer."

3. Nelson "was not fully advised of the second (and only other) option of requiring Ahuja to purchase Nelson's shares at the same price per share that Ahuja had selected."

the cause of the damages." *Id.* at 731. The court answered affirmatively and stated that "[t]he causal nexus between the event sued upon and the plaintiff's injuries must be shown by competent evidence." *Id.* at 732. Similarly, the supreme court has expressed that, in a legal malpractice case, "the plaintiff must prove" that "the breach proximately caused the plaintiff's injury[.]" *Stanfield*, 494 S.W.3d at 96 (quoting *Akin, Gump, Strauss, Hauer & Feld, L.L.P.*, 299 S.W.3d at 112); *see Rogers*, 518 S.W.3d at 400 ("To prove a legal-malpractice claim, the client must establish that . . . (3) the lawyer's breach proximately caused damage to the client.").

In addition, Nelson argues—citing *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 832–33 (Tex. 2014)—that an "expert like Levinger can make material fact assumptions" as "long as those assumptions enjoy evidentiary support[,]" an expert's assumptions do not need to be uncontested or established as a matter of law, and an expert need not state every assumption. But the supreme court in *Houston Unlimited* stated, "if the record contains no evidence supporting an expert's material factual assumptions," "opinion testimony founded on those assumptions is not competent evidence." 443 S.W.3d at 833.

In summary, Nelson was required to raise an issue of fact regarding the causal link between the lawyers' negligence and his harm. *Rogers*, 518 S.W.3d at 404; *see Alexander*, 146 S.W.3d at 119. "Proximate cause cannot be established by mere guess or conjecture, but rather must be proved by evidence of probative force." *McClure v. Allied Stores of Tex., Inc.*, 608 S.W.2d 901, 903 (Tex. 1980); *see Pierre v. Steinbach*, 378 S.W.3d 529, 535 (Tex. App.—Dallas 2012, no pet.) (concluding there was no evidence of causation where the "only evidence on the issue of causation [was] speculative"); *Baker Botts, L.L.P. v. Cailloux*, 224 S.W.3d 723, 734 (Tex. App.—San Antonio 2007, pet. denied) (same). In addition, to defeat a motion for summary judgment challenging the causation element in a legal malpractice case, an expert affidavit must be probative and raise a fact issue. *Swaim*, 530 S.W.3d at 679. "Conclusory affidavits are not probative." *Id.*;

see McIntyre v. Ramirez, 109 S.W.3d 741, 749 (Tex. 2003) ("A conclusory statement of an expert witness is insufficient to create a question of fact to defeat summary judgment."). In order to avoid being conclusory, the affidavit must "explain how and why the negligence caused the injury." *Jelinek v. Casas*, 328 S.W.3d 526, 536 (Tex. 2010). "To that end, an expert's opinion must set out a 'demonstrable and reasoned basis on which to evaluate [the] opinion.'" *Swaim*, 530 S.W.3d at 679 (quoting *Elizando v. Krist*, 415 S.W.3d 259, 265 (Tex. 2013)).

Nelson's causation argument is that (1) the lawyers' incorrect advice regarding his options under the provisions of the shareholder agreement resulted in his not fully considering his options to either purchase Ahuja's shares at Ahuja's set price of $10,800 per share or to require Ahuja to purchase his shares at the same price of $10,800 per share, (2) had he been aware of his option to require Ahuja to purchase the shares, "Nelson would have flipped the deal" and required Ahuja to purchase his shares, (3) Ahuja would have purchased the shares and paid Nelson $10.8 million, (4) Nelson could then set up a competing company because he was not subject to a non-competition agreement under the shareholder agreement, and (5) if Ahuja did not purchase Nelson's shares as required by the shareholder agreement, Nelson could sue Ahuja for breaching the shareholder agreement, "obtain[] a judgment and foreclose[] on Ahuja's shares."

We conclude that the evidence that Nelson submitted to prove causation is conclusory and speculative. We focus on three aspects of Nelson's causation argument. First, the evidence that Nelson argues supports his argument that Nelson "would have flipped the deal" and successfully opened a competing company and lured away the Company's customers is conclusory and speculative. In his affidavit, Nelson testifies that, had he known that the appraisal process did not apply to Ahuja's Initialed Offer and that his only options were to purchase Ahuja's shares at the Initialed Offer price or to sell his shares to Ahuja for the same price, he "would have made Ahuja buy [his] shares for the same share price, which would have required Ahuja to pay [him]

$10,800,000.00." He testified that "this would be something of a windfall for" Nelson "because there was no non-compete under the Shareholder Agreement's terms." He testified, "That means I could have taken the $10.8 million from Ahuja, and then immediately opened a competing company and proceeded with soliciting NAE's customers." He opined, "Based on my experience and dealings with NAE customers, I am certain that many, and indeed probably most, of them would have chosen to stay with me rather than NAE in that scenario." On appeal, Nelson argues that his affidavit testimony avoids being conclusory because he explained "why he would have flipped the deal[,]" namely because he viewed the opportunity to receive $10.8 million from Ahuja for his shares to be "something [of] a windfall' and then he could open a competing company and he believed that "most customers would leave NAE if he did so."

"A conclusory statement is one that does not provide the underlying facts to support the conclusion." *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.—Dallas 2004, no pet.). An affidavit that is conclusory is not proper summary judgment evidence to be considered on appeal. *See id.* at 451; *see Stryker v. Broemer*, No. 01-09-00317-CV, 2010 WL 4484176, at *5 (Tex. App.—Houston [1st Dist.] Nov. 10, 2010, pet. denied) (mem. op.) (involving legal malpractice claims and stating "[a]ffidavits containing conclusory statements unsupported by facts are not competent summary-judgment evidence" and "[a]n affidavit opposing a summary judgment motion must be factual—conclusions of the affiant lack probative value").

Although the record reflects that Nelson would not be subject to a non-competition agreement if he sold his shares to Ahuja under the shareholder agreement, Nelson cites no evidence supporting his statement that, if he opened a competing company, "many, and indeed probably most" of the Company's customers would chose to "stay with" him rather than the Company. His contention "is simply speculation about what" the Company's customers "might have done" if Nelson's and Ahuja's actions had differed. *HMC Hotel Props. II Ltd. P'ship v. Keystone-Tex.*

Prop. Holding Corp., 439 S.W.3d 910, 913 (Tex. 2014). "Testimony based on nothing but speculation is evidence of nothing at all." *Id.*

Nelson also argues that Levinger's expert opinion that Ahuja would have purchased Nelson's shares for $10,800,000 if Nelson "flipped the deal" is not speculative and that there is more than a scintilla of evidence that Ahuja "could have completed the purchase." In his affidavit, Levinger testified that, if Nelson had been properly advised by the lawyers, he could have fully considered responding to Ahuja's Initialed Offer "by requiring Ahuja to purchase Nelson's shares" at Ahuja's Initialed Offer price of $10,800 per share. However, "[i]n order to be competent summary-judgment evidence, an expert's opinion must have a 'demonstrable and reasoned basis on which to evaluate his opinion.'" *Rogers*, 518 S.W.3d at 405 (quoting *Elizondo*, 415 S.W.3d at 265). "And '[e]ven when some basis is offered for an opinion, if that basis does not, on its face, support the opinion, the opinion is still conclusory.'" *Id.* (quoting *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009)).

Nelson argues that Levinger's opinion that Ahuja would have purchased Nelson's shares if Nelson "flipped the deal" is supported by "direct evidence" from Ahuja's deposition testimony and does not require inference stacking. Conversely, the lawyers argue that Levinger's affidavit does not indicate that he considered Ahuja's testimony and evidence that Ahuja could have and would have purchased Nelson's shares if Nelson flipped the deal is "speculative at best[.]"

We first note that Levinger does not indicate that he relied on the testimony of Ahuja as a basis for his opinion. *See Rogers*, 518 S.W.3d at 407 (stating "an expert must explain why he or she reaches a certain conclusion"). In addition, we conclude that, even if Levinger did rely on testimony by Ahuja, the testimony does not provide a "demonstrable" basis for Levinger's conclusion that Ahuja would have purchased Nelson's shares for $10,800 per share, or $10,800,000, if Nelson had flipped the deal. *See id.*at 405. Ahuja testified:

Q. The—were you prepared to buy Erik Nelson's shares if Erik Nelson had—had flipped that Exhibit 2 offer on you?

A. Yes, sir.

Q. And how were you going to do that?

A. I would have gotten financing.

Q. All right. So you had already worked through that, lined that out, and had financing available?

A. I mean, I explored that. I would have gone to the banks if the offer was accepted, yes.

Q. Did you feel confident that you could get that accomplished?

A. I think so; otherwise, I wouldn't have stated the offer, sir.

Q. All right. You knew that was a risk that Erik Nelson might put that share price back to you, and you needed to be prepared to handle that share price put back to you if that happened?

A. It was not a risk. It was a possibility which I was prepared for, sir.

Nelson also relies on Ahuja's testimony that Nelson "would have received $10.8 million" if he flipped the deal as evidence that Ahuja was "ready, willing, and able to pay" $10,800,000. Ahuja testified:

Q. The other option under your reading of the agreement was that Mr. Nelson could flip your put and sell you all of his shares for $10.8 million?

A. Yes, sir.

Q. And under that flip option, he would have received $10.8 million for his company?

A. Yes.

In addition, Ahuja's attorney Bryan Collins testified in a deposition:

Q. And under Mr. Ahuja's interpretation of the Shareholder Agreement, if Nelson flipped the offer, Mr. Ahuja would have had to buy out Mr. Nelson for the same $10,800 per share, correct?

A. Correct.

Q. And Mr. Nelson had 1,000 shares, so that would have been a $10.8 million buyout, correct?

A. Correct.

Q. Did Mr. Ahuja have the financial capability to buy out Mr. Nelson for $10.8 million in January of 2014?

[Attorney:] Objection, form.

A. I—it's my understanding that that could have been accomplished, yes.

Q. Did Mr. Ahuja have $5.4 million in cash available to buy out Mr. Nelson in January of 2014?

A. I don't think he had that amount of money at that point in time.

On appeal, Nelson argues that Ahuja's "testimony is not entirely clear" as to whether he would have "gone to the banks" to establish financing or to get money for financing that was already established. He contends that, viewing this testimony in the light most favorable to Nelson, the testimony "is more than a scintilla of evidence that Ahuja had financing." And Nelson argues that Ahuja's testimony—"that he had explored financing and had it available, that he would have paid Nelson on the flip, and that Nelson would have *received* $10.8 million—constitutes more than a scintilla of evidence supporting Levinger's assumption." We disagree.

Ahuja testified that he "would have gotten financing" if Nelson had "flipped" the deal. He described that he had "explored" financing and "would have gone to the banks if the offer was accepted[.]" He testified that he thought that he could "get that accomplished[.]" In addition, the testimony by Ahuja's attorney Bryan Collins does not provide a demonstrable basis for the opinion that Ahuja could and would have purchased Nelson's shares for $10,800,000 if Nelson had flipped the transaction. As a result, there is no demonstrable basis supporting Levinger's causation opinion that Nelson would have "require[d] Ahuja to purchase Nelson's shares at the same price of $10,800 per share" and, as a result, no evidence to support Nelson's argument that Ahuja "would

have paid Nelson on the flip." *See id.*; *Pierre*, 378 S.W.3d at 535 (concluding there was no evidence of causation and noting that, to reach client's desired conclusion on causation, the court "would have to engage[] in impermissible inference stacking"); *Baker Botts, LLP*, 224 S.W.3d at 734–35 (same).

Additionally, Nelson argues that, even if there is a lack of evidence as to whether Ahuja could or would have "funded the flip[,]" a fact issue exists concerning proximate cause because—as Levinger stated—Nelson could have sued Ahuja for breach of contract if Ahuja tried to invoke the appraisal process under article VIII or had been unable to pay $10.8 million to Nelson. Nelson contends that "Nelson could have sued Ahuja for breaching the Shareholder's Agreement, obtained a judgment, and foreclosed on Ahuja's shares." This statement is conclusory because it assumes that Nelson would have prevailed if Nelson sued Ahuja for breaching the shareholder agreement without providing any facts or analysis to support his opinion. *See Barnett v. Schiro*, No. 05-16-00999-CV, 2018 WL 329772, at *6–7 (Tex. App.—Dallas Jan. 9, 2018, pet. filed) (mem. op.) (concluding expert opinion that "simply assumes" that a party "would have prevailed" on an issue in litigation is conclusory).

We conclude that Nelson has not presented a scintilla of competent summary-judgment evidence raising a fact issue concerning the required element of causation. As a result, we conclude that the trial court did not err in granting the lawyers no-evidence summary judgment. We resolve Nelson's first issue concerning evidence of causation against him. Because Nelson's first issue regarding evidence of causation is dispositive, it is not necessary for us to resolve Nelson's other issues.

CONCLUSION

We resolve part of appellant's first issue against him and affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

ERIK L. NELSON, Appellant	On Appeal from the County Court at Law No. 2, Dallas County, Texas
No. 05-16-01262-CV V.	Trial Court Cause No. CC-15-01798-B.
JACK SHEEDY, ROGER CRABB, AND SCHEEF & STONE, L.L.P., Appellees	Opinion delivered by Justice Lang-Miers, Justices Myers and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees JACK SHEEDY, ROGER CRABB, AND SCHEEF & STONE, L.L.P. recover their costs of this appeal from appellant ERIK L. NELSON.

Judgment entered this 30th day of May, 2018.