



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**BRIAN NAIL,** )  
 )  
 ) **Appellant,** ) **WD75250**  
 )  
 **v.** ) **OPINION FILED:**  
 ) **May 21, 2013**  
 )  
 **HUSCH BLACKWELL SANDERS, LLP,** )  
 )  
 ) **Respondent.** )

**Appeal from the Circuit Court of Jackson County, Missouri  
The Honorable Sandra C. Midkiff, Judge**

**Before Division I:** Gary D. Witt, Presiding Judge, and  
Thomas H. Newton and Mark D. Pfeiffer, Judges

This is a legal malpractice case. Brian Nail (“Nail”) appeals the Circuit Court of Jackson County, Missouri’s (“circuit court”) grant of summary judgment to respondent Husch Blackwell Sanders, LLP (“Husch”) on Nail’s petition alleging legal malpractice. On appeal, Nail raises three claims of error: (1) that the circuit court used the wrong legal standard to address Nail’s burden of proof leading to its error in summarily granting judgment to Husch on Nail’s “negligent advice” claim; (2) that the circuit court erroneously concluded Nail had waived his “negligent advice” claim; and (3) that the circuit court erroneously ruled that, as a matter of law, Nail could not seek to enforce a liquidated damages clause against Husch that was part of a

settlement agreement between Nail and a third party, which Nail claims Husch negligently drafted. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

### **Factual and Procedural Background<sup>1</sup>**

Nail was employed as the Vice President of Operations, and later as the Chief Financial Officer, of MTW Corporation (“MTW”) from 1992 until his termination on March 15, 2001. During his employment with MTW, Nail acquired options to purchase MTW stock from Richard Mueller (“Mueller”), MTW’s sole shareholder. When Nail’s employment with MTW was terminated, he negotiated an agreement that included a new stock option agreement providing, among other things, that Nail retained his MTW stock options for eighteen months following his March 2001 termination (“separation agreement”). Further, relevant to this case, the separation agreement provided that in the event MTW were to merge with another corporation, Mueller was required to make an “appropriate and equitable adjustment in the number and kind of shares” as to which of the stock options or any unused portion thereof would be exercisable.

In July of 2001, Nail became aware that MTW was planning to merge with The Innovation Group (“TIG”), a company created and existing under the laws of the United Kingdom, in a stock-for-stock merger. The merger occurred on July 17, 2001. As a condition of the merger, Mueller agreed to a one-year “lock up period,” wherein Mueller could not sell or otherwise transfer any of the TIG stock he would acquire in exchange for relinquishment of the MTW stock without TIG board approval. The lock up period included Mueller’s TIG shares of stock to which Nail held options. Realizing that the lock up period would impact Nail’s stock

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<sup>1</sup> “In an appeal from a motion for summary judgment, we review the facts in the light most favorable to the non-moving party.” *Saxony Lutheran High Sch., Inc. v. Mo. Land Reclamation Comm’n*, 392 S.W.3d 52, 54 n.1 (Mo. App. W.D. 2013).

option rights under the separation agreement, Nail sought legal advice from Husch attorneys<sup>2</sup> as to how to protect his stock option interests.<sup>3</sup>

The Husch attorneys first approached the Board of Directors of TIG to see whether TIG would release Nail's optioned shares from the lock up period. TIG refused. The Husch attorneys and Nail then had several discussions about Nail's possible courses of action and the strategy to implement any such course of action. According to Nail, the Husch attorneys never advised him that he should exercise the stock options immediately, nor that doing so would establish Mueller's breach of the separation agreement, nor that Mueller's breach in response to Nail calling the stock options would establish a measure of damages—namely, the difference between the value of the TIG stock at the time the options were called (millions of dollars<sup>4</sup>) less the stock option purchase price of less than one million dollars. Instead, Nail claims that he was consistently told the opposite by Husch attorneys—that Mueller's (and MTW's) agreement to the lock up period did not constitute a breach of the separation agreement,<sup>5</sup> so that Nail had no damages and no prospect for doing much of anything besides threatening litigation in order to

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<sup>2</sup> Nail received advice from more than one attorney at Husch. Since Husch does not contest its legal responsibility for the conduct of any of its attorneys relevant to this case, we refer to these attorneys as "Husch attorneys" instead of by formal name.

<sup>3</sup> We recognize that the precise substance of the communications and corresponding advice by and between Husch and Nail may be in dispute. However, at this stage, we must review the facts in the light most favorable to the non-movant, Nail. Thus, with regard to the content of any discussions that Nail claims to have had with his Husch attorneys, we must view the facts consistent with Nail's recollection of those discussions.

<sup>4</sup> During the time frame that would have been relevant to calling the stock options, between July 2001 and August 2001, the value of the optioned TIG stock fluctuated between \$8.5 million to well in excess of \$10 million.

<sup>5</sup> In the present litigation, Nail's expert witness agrees that *until Nail exercised the options and Mueller failed to transfer the stock shares* (presumably because he was prohibited from doing so pursuant to the lock up period agreement he entered with TIG), *there was no breach of the separation agreement*. That, however, is the problem according to Nail's expert—that the Husch attorneys did *not* advise Nail to take the "virtually riskless" act of calling all the stock options as soon as possible, establishing Mueller's breach, and fixing the damages in July-August 2001 (including establishing a right to argue for pre-judgment interest). In other words, 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.

attempt to negotiate a settlement that would extend Nail's period of time for exercising his stock options and any other favorable terms that could be negotiated.

In March of 2002, Nail tendered a check to Mueller for a partial (approximately 2.5%) exercise of his stock options under the separation agreement. As anticipated, because of the lock up period, Mueller refused to transfer the stock to Nail and returned Nail's check to him. Thereafter, upon the advice of Husch attorneys, Nail entered into a dispute settlement agreement and contemporaneous escrow agreement (collectively, "settlement agreement") with Mueller on March 15, 2002. The settlement agreement extended the exercise period for Nail's stock options until September 15, 2007. In addition, Mueller gave Nail a \$50,000 "credit" to use toward any future exercise of the options and agreed to put the shares subject to Nail's options into an escrow account following the expiration of the lock up period so that Mueller would no longer have control over the shares. Immediately following the end of the lock up period, the settlement agreement required Mueller to deliver a transfer notice to the escrow agent to transfer ownership rights of the shares subject to Nail's option (upon Nail's exercise of his option rights). If Mueller failed to do this, the settlement agreement included a liquidated damages provision. The settlement agreement also required Nail and Mueller to "execute and deliver, or cause to be delivered, such documents as may be reasonably requested by the other in order to more effectively accomplish the purpose" of the settlement agreement.

On July 17, 2002, the lock up period ended. Mueller timely delivered the transfer notice called for in the settlement agreement to the escrow agent, at which point the escrow agent was directed to transfer the subject shares to Nail upon Nail's exercise of his options. On August 30, 2002, Nail used the \$50,000 credit that he received as part of the settlement agreement to purchase 559,795 shares of TIG stock. On September 16, 2002, Nail learned that, because the

TIG shares were traded on the London Stock Exchange, additional documents needed to be executed by Mueller before Nail could register the TIG shares under his own name and sell them on the London Stock Exchange. Nail requested that Mueller execute the additional documents, and Mueller did so on September 24, 2002.

Subsequently, Nail filed suit against Mueller.<sup>6</sup> He sought, alternatively: (1) rescission of the settlement agreement and reinstatement of his claim against Mueller for breach of the original separation agreement; or (2) damages under the terms of the settlement agreement's liquidated damages provision. Ultimately, Nail abandoned his attempt to seek the remedy of rescission of the settlement agreement and elected to pursue his remedy for liquidated damages pursuant to its terms. Nail's suit was ultimately unsuccessful, partially in light of the fact that Mueller had both timely delivered the transfer notice to the escrow agent and had later delivered "such documents as may be reasonably requested by the other in order to more effectively accomplish the purpose" of the settlement agreement (that is, the additional documents required by the London Stock Exchange).

Thereafter, Nail filed the present legal malpractice lawsuit against Husch claiming alternatively that: (1) Husch negligently failed to advise Nail to call his stock options at the time of the 2001 MTW-TIG merger so as to establish Mueller's breach and fix the damages, including pre-judgment interest, collectible against Mueller in a breach of contract claim; and (2) Husch negligently failed to draft the settlement agreement to protect Nail, by way of liquidated damages, from Mueller's initial failure to file all documents necessary for completion of transfer of share ownership in a fashion legally acceptable to the London Stock Exchange. Husch filed a motion for summary judgment, which was granted by the circuit court. Nail appeals.

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<sup>6</sup> Nail also sued TIG, both as MTW's successor, and in its own right for tortious interference with his stock option rights from the separation agreement. The claim against TIG as MTW's successor was disposed of via summary judgment, and a jury found in favor of TIG on the tortious interference claim.

### **Standard of Review**

“Summary judgment is appropriate only when the moving party demonstrates that there is no genuine dispute as to the facts and that the facts as admitted show a legal right to judgment for the movant.” *Bob DeGeorge Assocs., Inc. v. Hawthorn Bank*, 377 S.W.3d 592, 596 (Mo. banc 2012) (internal quotation omitted). “The propriety of a summary judgment is purely an issue of law, and [an appellate court’s] review is essentially *de novo*.” *Id.* “The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially.” *FH Partners, LLC v. Complete Home Concepts, Inc.*, 378 S.W.3d 387, 393 (Mo. App. W.D. 2012) (internal quotation omitted). However, if, as a matter of law, summary judgment is sustainable on any theory, even one entirely different from that addressed by the trial court, it should be sustained on appeal. *Saxony Lutheran High Sch., Inc. v. Mo. Land Reclamation Comm’n*, 392 S.W.3d 52, 56 (Mo. App. W.D. 2013).

### **Analysis**

Nail’s first point on appeal is that the circuit court erred in granting Husch’s motion for summary judgment on Nail’s claim that Husch negligently failed to advise him to exercise his stock options at the time of the 2001 MTW-TIG merger. Nail alleges that the circuit court used the wrong legal standard to address Nail’s burden of proof leading to its error in summarily granting judgment to Husch. We agree.

The circuit court’s judgment states that Nail’s “significant burden” requires him to “prove that the settlement was necessary ‘to mitigate the damages flowing from [Husch’s] negligence.’” The judgment states that the record was “totally void of any indication that the voluntary settlement on [Nail’s] part was to mitigate damages caused by [Husch’s] negligence,” citing

*Williams v. Preman*, 911 S.W.2d 288, 296 (Mo. App. W.D. 1995). However, this is the wrong lens for reviewing the submissibility of Nail's legal malpractice claim.

*Williams* involved a factual scenario where the client learned of his counsel's alleged negligence *before* he obtained new counsel and settled his case, making this standard inapposite to the present case, where Nail alleges that the negligence *was* the very recommendation upon which he relied in settling his underlying claims against Mueller. Even the *Williams* case itself acknowledges this difference, citing cases such as *London v. Weitzman*, 884 S.W.2d 674, 677-78 (Mo. App. E.D. 1994), and *Baldrige v. Lacks*, 883 S.W.2d 947 (Mo. App. E.D. 1994) and stating:

Those cases are different in that there the underlying litigation was settled while the attorney who was allegedly negligent was still handling the case. In *Heartland [Stores, Inc. v. Royal Insurance Co.]*, 815 S.W.2d 39 (Mo. App. W.D. 1991) and *Lange [v. Marshall]*, 622 S.W.2d 237 (Mo. App. E.D. 1981) they were settled *after* dismissal of the allegedly negligent attorney, while the case was being handled by a new attorney. It thus appears that, in a case where the underlying claim has been voluntarily settled, [after the client learns of the attorney's negligence,] the courts are going to require a strong showing that the settlement was justified before the court will be willing to pass the cost of the settlement on to [counsel].

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.

*Williams*, 911 S.W.2d at 297. 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* does not exist, and the *Williams* standard does not apply.

Instead, to withstand a motion for summary judgment, Nail was required to prove his case under the well-established standard for legal malpractice:

1) that the defendant lawyer was negligent by showing that he or she failed to exercise that degree of skill and diligence ordinarily used under the same or similar circumstances by members of the legal profession; 2) that plaintiff sustained some loss or injury; and 3) a causal connection between the negligence and the loss. To prove damages and causation, the plaintiff must establish that “but for” the attorney’s negligence the result of the underlying proceeding would have been different.

*London*, 884 S.W.2d at 677 (internal citations omitted). “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. Mo. Bar Plan*, 157 S.W.3d 726, 732 (Mo. App. W.D. 2005). Further, “[e]xpert testimony is required in legal malpractice claims except in a ‘clear and palpable’ case.” *Baldrige*, 883 S.W.2d at 954 (quoting *Bross v. Denny*, 791 S.W.2d 416, 421 (Mo. App. W.D. 1990)).

Viewing the facts in the light most favorable to the non-movant (Nail), as we must, the pertinent facts are: Nail’s expert, John Tollefsen (“Tollefsen”), testified that the Husch attorneys negligently failed to advise Nail to exercise all of his stock options immediately after the MTW-TIG merger and, by failing to do so, the Husch attorneys caused Nail to suffer an identifiable injury—namely, Nail’s lost opportunity to establish facts that would support a successful breach of separation agreement claim against Mueller. Tollefsen’s reasoning was twofold. First, unless and until Nail exercised his options and Mueller failed to transfer the TIG shares in response to

the stock option call (due to his restriction in his lock up agreement with TIG<sup>7</sup>), Mueller would not be in breach of the separation agreement. Second, upon establishing the breach at the time of the 2001 MTW-TIG merger, Nail would have been in the position of having fixed the measure of damages (difference between the value of the TIG shares at the time the options were exercised sometime in July-August 2001—many millions—less the total stock option purchase price—less than one million) along with having triggered pre-judgment interest for Mueller’s breach.

In summary, the gist of Nail’s expert’s opinion is that: (1) when the Husch attorneys failed to advise Nail to immediately exercise his stock options upon Mueller’s agreement (as the sole shareholder of MTW) to trade stock-for-stock in the MTW-TIG merger that included a one-year lock up provision, the Husch attorneys failed to exercise the degree of skill and diligence that a legal professional would ordinarily use under the same or similar circumstances; (2) Nail lost the ability to claim Mueller’s breach of the separation agreement (hence, the abandonment of the settlement agreement rescission remedy in the separate lawsuit against Mueller) and lost the ability to fix the multiple millions of dollars of damages that Mueller’s breach would have caused him; and (3) Nail’s inability to argue Mueller’s breach of the separation agreement is causally connected to the negligent advice provided to Nail by the Husch attorneys. Stated another way, Tollefson opined that “but for” the Husch attorneys’ negligence, an otherwise successful claim that Mueller had breached the separation agreement turned into no claim of

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<sup>7</sup> This is precisely what happened when Nail made a partial exercise of his stock options in March of 2002—due to the lock up period agreement with TIG, Mueller refused to transfer the exercised shares of stock to Nail, in contravention of the terms of Mueller’s separation agreement with Nail. Though Mueller’s refusal to transfer the exercised shares of stock in March 2002 may have constituted a breach of the separation agreement, the damages flowing from that breach were qualitatively different than those that Nail’s expert claims he could have established had 100% of Nail’s stock options been exercised in July-August 2001. First, Nail’s exercise of stock options in March 2002 was only for approximately 2.5% of the optioned shares of stock (and the current record on appeal is not clear on Nail’s impetus for making the partial exercise of his stock options in 2002). Second, by March 2002, the TIG stock price had dropped significantly from the July-August 2001 time frame. Thus, in the present appeal by Nail, the only real significance (to Nail) of the March 2002 tender by Nail and corresponding refusal by Mueller is to support Nail’s expert’s argument that Mueller would have similarly refused to transfer shares of TIG stock to Nail in July-August 2001, had Nail exercised 100% of the stock options at that time.

breach at all with regard to the separation agreement; hence, the natural and probable consequence in Nail's separate lawsuit against Mueller was an unsuccessful election of remedy that was focused on the settlement agreement instead of the separation agreement. Based upon these allegations, which are supported by expert testimony, Nail has presented material facts in dispute which, if proven, constitute a submissible case for legal malpractice,<sup>8</sup> and summary judgment on this claim was improper.

The circuit court also, without analysis, justified its grant of summary judgment to Husch on Nail's negligent advice claim by stating that Nail had "abandoned this claim in his lawsuit against Mueller," thereby waiving his right to litigate the claim in the present action. Nail claims that this is also error, which is his second point on appeal. Again, we agree with Nail on this point.

Waiver is "an intentional relinquishment of a known right." *Austin v. Pickett*, 87 S.W.3d 343, 348 (Mo. App. W.D. 2002). Nail previously brought a separate lawsuit against Mueller for breach of the settlement agreement. In his lawsuit against Mueller, he sought, alternatively: (1) rescission of the settlement agreement and reinstatement of his claim against Mueller for breach of the original separation agreement; or (2) damages under the terms of the settlement agreement's liquidated damages provision. See *Neiswonger v. Margulis*, 203 S.W.3d 754, 760 (Mo. App. E.D. 2006) (holding that, after an alleged breach of a settlement agreement, the injured party could *either* seek enforcement of the settlement agreement or seek rescission of the settlement agreement and proceed under its original cause of action). At some point during the trial, however, it must have become clear to Nail and his new attorneys that his chances for

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<sup>8</sup> While we understand that Husch is of the opinion that *any* claim of legal malpractice is factually unfounded and should be otherwise *unsuccessful*, our role today is not to judge the *merits* of Nail's expert's testimony but, rather, only to judge whether such testimony constitutes evidence justifying the *submissibility* of Nail's claim to a jury. It is the jury's role, not ours (nor the circuit judge's), to assess the credibility of Nail's factual evidence relating to the elements of his legal malpractice claim against Husch.

success on his breach of separation agreement claim—where he had not exercised his stock options immediately after the MTW-TIG merger and thus had not established Mueller’s breach of the separation agreement—were slim; this may explain Nail’s decision to elect the liquidated damages remedy over the settlement agreement rescission and breach of separation agreement remedy *against Mueller*.

Husch’s argument below—which was accepted by the circuit court—was, essentially, because Nail abandoned his remedy relating to a breach of the separation agreement *against Mueller*, he is not entitled to pursue a legal malpractice claim *against Husch* for negligently advising him *not* to take the steps that would have led to a viable breach of separation agreement argument *against Mueller*. To state the argument is to recognize its inconsistency with the legal concept of waiver. If anything, Nail’s belief that he had no choice but to abandon the remedy of rescission of the settlement agreement and reinstatement of his claim for breach of separation agreement *against Mueller* supports his argument that he has been damaged due to the negligent advice he claims to have received *from Husch* that placed him in the untenable situation of attempting to seek damages against Mueller relating to a breach of the separation agreement when he could not establish Mueller’s breach in the first place. 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. Therefore, the circuit court’s grant of partial summary judgment on this basis was erroneous.

Points I and II are granted.

Nail’s third point on appeal is that the circuit court erroneously ruled, as a matter of law, that Nail could not seek to enforce against Husch the liquidated damages clause that was part of

the settlement agreement, which Nail claims Husch negligently drafted, between Nail and Mueller.

As stated previously, instead of advising Nail to take actions that would have placed Mueller in the position of breaching the separation agreement, Nail claims that the Husch attorneys advised him that his litigation prospects against Mueller were poor and that he should authorize them to negotiate the terms of a compromise agreement with Mueller. Nail asserts that he accepted the advice of the Husch attorneys and, in March 2002, likewise accepted the advice of the Husch attorneys to enter into the settlement agreement with Mueller. Pursuant to the terms of the settlement agreement, immediately following the end of the lock up period, Mueller was required to deliver a transfer notice to the escrow agent to transfer ownership rights to Nail of the TIG shares that would then be subject to Nail's option rights. If Mueller had failed to timely perform this obligation, the settlement agreement included a provision that would have triggered Nail's entitlement to a substantial liquidated damages amount (approximately \$8.5 million). Mueller, however, did timely deliver the requisite transfer notice to the escrow agent and, thus, complied with the terms of the settlement agreement in that regard.

The settlement agreement also contained a provision requiring the parties to "execute and deliver, or cause to be delivered, such documents as may be reasonably requested by the other in order to more effectively accomplish the purpose" of the settlement agreement. This clause became relevant when it was determined that additional documentation would be required by the London Stock Exchange for Nail to be able to register in his own name any TIG shares for which he exercised his option to purchase from Mueller. Accordingly, this additional documentation was reasonably requested from Mueller, and Mueller provided the additional necessary documentation within a few weeks. Nail stipulated to the circuit court that he did not sustain any

new damages as a result of the delay in receiving the additional transfer documentation from Mueller.

But Nail now argues that the negligent drafting of the settlement agreement by the Husch attorneys prevented him from being able to successfully assert a liquidated damages claim against Mueller<sup>9</sup> and, thus, that Husch should be legally responsible to him for the amount of those liquidated damages.

Assuming for the moment that Nail has presented expert testimony sufficient to withstand summary judgment on the issue of whether the Husch attorneys negligently drafted the settlement agreement, “[n]egligence alone does not warrant a recovery for a plaintiff in a legal malpractice case; there must also be damages proximately resulting from an attorney’s malpractice.” *Mogley v. Fleming*, 11 S.W.3d 740, 747 (Mo. App. E.D. 1999). Unlike Nail’s claim that the Husch attorneys’ negligent failure to advise him to immediately exercise all of his stock options upon the 2001 MTW-TIG merger so as to establish Mueller’s breach and reasonably and rationally connect that event with his claimed damages, there is no such causal connection between Nail’s claim of negligent drafting of the settlement agreement and *any* identifiable damages. Instead, Nail’s argument as to the causal connection between the alleged negligent drafting and corresponding damages is built upon mere conjecture and speculation.

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<sup>9</sup> As stated previously, Nail’s separate and previous lawsuit against Mueller for breach of the settlement agreement (and his corresponding claim for liquidated damages) was ultimately unsuccessful. Much like Nail’s present claim against Husch for negligently failing to advise him to establish Mueller’s breach of the *separation agreement* leading to an abandonment of the remedy in the Mueller lawsuit relating to a claimed breach of the separation agreement, Nail also argues that Husch negligently drafted the *settlement agreement* between Nail and Mueller which led to the unsuccessful pursuit of liquidated damages pursuant to this agreement. The difference, however, is that Nail has concrete evidence to point to the likely breach of the *separation agreement* by Mueller had Nail exercised his options in July-August 2001, whereas there is no evidence in the record to suggest that Mueller would have been unable or unwilling to perform all necessary transfer paperwork obligations pursuant to the *settlement agreement*. In fact, just the opposite is true. Thus, Nail’s claim relating to the negligent drafting of the settlement agreement is built upon conjecture and speculation that is wholly unsupported by any facts or reasonable inferences therefrom in the record.

While we agree that proximate cause issues are generally issues of fact to be decided by the jury, *Williams*, 911 S.W.2d at 295, “[w]here the evidence connecting the injury to the negligence amounts to mere conjecture and speculation the court must not allow the case to be submitted to the jury and a contention that the evidence did not make a submissible case should be sustained.” *Id.* at 297.

In *London*, the court described the rule against speculative damages:

In a legal malpractice action, a court may be tempted to characterize the plaintiff’s damage claim as speculative because of the difficulty in liquidating the claim. This is because legal malpractice litigation often involves hypothetical questions which have real consequences. For example, how much did the client lose when the lawsuit was not prosecuted? Or, how much better off would the client have been had the suit been defended or been defended more competently?

No one can say precisely what the plaintiff lost or should have lost in such situations, but difficulty or imprecision in calculating damages does not exculpate the attorney. Even though damages cannot be calculated precisely, they can be estimated. Otherwise, attorneys could avoid liability merely because damages are difficult to measure. The beneficiaries would tend to be those attorneys whose errors were the greatest and whose conduct succeeded in complicating the issue of calculating the extent of the client’s injury.

**Thus, damages are speculative only if the uncertainty concerns the fact of whether there are *any* damages rather than the amount.**

*London*, 884 S.W.2d at 677 (emphasis added) (quoting I R.E. MALLEN & J.M. SMITH, LEGAL MALPRACTICE, § 16.3 (3d ed. 1989)).

In Nail’s previously discussed claim of negligence against Husch relating to allegedly negligent advice, we have concluded that the proximate cause issue is a submissible question of fact to be decided by a jury. In that claim, Nail’s expert makes an argument grounded in disputed, yet material, fact that had the Husch attorneys advised Nail to immediately exercise his stock options upon the 2001 MTW-TIG merger, Mueller’s hands were tied due to the merger agreement lock up period provision and Mueller would have likely breached the separation

agreement with Nail and refused to transfer the shares of stock to Nail (as he did when Nail made a subsequent partial exercise of his stock options in 2002). Conversely, with regard to Nail's argument on the negligent drafting claim, Nail's "connection" of the alleged negligence to his damages is, essentially, as follows:

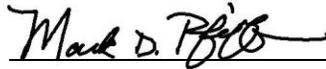
- *If* the Husch attorneys had drafted the transfer documentation section of the settlement agreement to be broad enough to include language obligating Mueller to provide transfer documents that included those required by the London Stock Exchange, Mueller and his attorneys would have agreed to such a clause.
- *If* the Husch attorneys had drafted the broader requirement for transfer documents, Mueller and his attorneys would not have attempted to negotiate a different time requirement for the production requirements of U.K. transfer documentation or any corresponding application of an \$8.5 million liquidated damages provision.
- *If* the Husch attorneys had drafted the more broadly worded transfer documentation requirements, which were subject to the liquidated damages provisions, and *if* Mueller and his attorneys had not responded with negotiations relating to a different timing for the production of the U.K. transfer documentation or any corresponding application of the liquidated damages provisions for a failure to timely produce the U.K. transfer documentation, and *if* instead Mueller had simply agreed to the more broadly worded transfer documentation requirement clause in the settlement agreement, Mueller would have ignored his obligations under the transfer document settlement provision and subjected himself to an \$8.5 million liquidated damages claim for the failure to timely produce U.K. transfer documents that, in reality, he *actually* promptly produced to Nail upon Nail's request in the *actual and undisputed* facts of this case.

Simply put, this is nothing but unreasonable conjecture and speculation that ignores the actual and undisputed material facts of this case and fails to call into question whether Nail has suffered *any* damages as a result of his "negligent drafting" claim against Husch. The trial court did not commit error in refusing to permit this claim to be presented to a jury and did not commit error in granting summary judgment on Nail's "negligent drafting" claim against Husch.

Point III is denied.

## Conclusion

Accordingly, we affirm the circuit court's grant of summary judgment in favor of Husch on Nail's claim for negligent drafting of the parties' settlement agreement (Point III is denied) and reverse the circuit court's grant of summary judgment with respect to Nail's claim that Husch negligently advised him in July-August 2001 regarding Nail's response to Mueller's entering into the MTW-TIG merger agreement, which included a lock up period provision (Points I and II are granted). We remand this case to the circuit court for trial on this issue and such other and further proceedings as are otherwise consistent with our ruling today.



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Mark D. Pfeiffer, Judge

Gary D. Witt, Presiding Judge, and  
Thomas H. Newton, Judge, concur.