



## Alerts

### Colorado Appellate Court Affirms Summary Judgment on Plaintiff's Claim of Defendants' Negligence in "Inadequate Settlement" Case for Lack of "But For" Causation

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#### Brief Summary

A Colorado Appellate Court upheld the trial court's grant of summary judgment in favor of the defendants in a legal malpractice action related to an underlying shareholder dispute. The plaintiff was unable to prove that the defendants' negligence in not timely disclosing a valuation expert was the "but for" cause of the plaintiff's damages from an inadequate settlement of the underlying case.

#### Complete Summary

The plaintiff and two co-founders started a shipping company in 2001, and each founder became an equal one-third shareholder. An agreement executed by the founders provided that if a shareholder were terminated, the company would purchase his shares at fair market value. The agreement also required the shareholders to agree on the fair market value of the company within thirty days of the end of each taxable year.

In 2018, the plaintiff was terminated. The company told the plaintiff it would value his shares for purchase using the most recent company valuation of \$4 million, which all three shareholders had agreed on in September 2017. The plaintiff disagreed with that valuation, and he thus filed an action against the company and its other two co-founders based on claims for breach of contract and breach of the implied duty of good faith and fair dealing. A jury trial was set for 2020, and the deadline for affirmative expert disclosures and reports was December 2, 2019.

Less than a month before the December 2 deadline, the plaintiff's attorneys withdrew and were replaced by the defendant attorneys. Soon after the defendant attorneys entered their appearance, they moved the district court to continue the trial and all the associated pretrial deadlines, including the rapidly approaching December 2 deadline for affirmative expert disclosures and reports.

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The trial court denied the motion, and the defendant attorneys failed to timely file a proper affirmative expert disclosure or report on the valuation of the company. Despite missing the affirmative expert deadline, the defendant attorneys filed a timely rebuttal expert disclosure and report for the plaintiff's valuation expert. The co-founders moved to exclude the plaintiff's valuation expert from his case-in-chief, and the court granted that motion. Ultimately, the plaintiff settled his claims against the company and two co-founders.

The plaintiff then filed a legal malpractice action against the defendants, alleging that the defendants were negligent in failing to file an affirmative expert disclosure or report that would have allowed the plaintiff's valuation expert to testify in his case-in-chief. According to the plaintiff, absent this alleged negligence, he would have proceeded to trial and won far more in damages than he received in the settlement.

The defendants moved for summary judgment and argued that the plaintiff could not prove causation. Ultimately, the trial court agreed, recognizing that in the underlying case, the defendants' actions prevented the plaintiff's valuation expert from testifying in the plaintiff's case-in-chief.

The trial court held, however, that had the plaintiff gone to trial in the underlying case, he would have survived a directed verdict motion from the co-founders, and the expert would have been able to testify as a rebuttal witness. Because the expert would have testified, albeit as a rebuttal witness, the trial court held as a matter of law that the defendants' alleged negligence did not cause the plaintiff's claimed injury. The trial court thus concluded that the plaintiff could not prove the "but for" causation element of the malpractice action.

The plaintiff appealed and argued that the trial court erred by holding that he could not prove causation as a matter of law. The appellate court initially noted that a legal malpractice case requires the plaintiff to prove that, but for the attorney's negligence, the underlying action would have been more successful.

This means that the plaintiff must prove that the alleged negligence "in a natural and continued sequence, unbroken by any efficient intervening cause, produce[d] the result complained of, and without which the result would not have occurred." *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶32.

Thus, the plaintiff had to prove that the valuation expert's exclusion from the case-in-chief was the natural but-for cause of the plaintiff settling the case for less than he could have won at trial had the alleged negligence not occurred (in other words, with the expert testifying in the case-in-chief). The appellate court concluded that the plaintiff could not prove this – even granting the plaintiff the benefit of every reasonable inference from the undisputed facts.

In his opening brief, the plaintiff did not challenge the trial court's ruling that despite the defendants' alleged negligence, the valuation expert would have been allowed to testify as a rebuttal witness at a trial in the underlying case. Therefore, for purposes of the appellate court's analysis, it was required to accept that the only consequence of the alleged negligence would have been that the valuation expert would have testified on rebuttal, not in the plaintiff's case-in-chief.

The court concluded that this would not have diminished the plaintiff's chance of succeeding at trial — no matter what, the jury would have heard the expert's valuation testimony. And because the alleged negligence did not harm the plaintiff's trial prospects, it could not have made settlement more attractive and pushed the plaintiff to settle. Therefore, the court concluded that the plaintiff could not prove that the alleged negligence caused the injury he complained of, and the trial properly granted the defendants' summary judgment motion.

## Significance of Decision

Although an unpublished decision, this case provides yet another good example of the critical necessity of a plaintiff being able to prove "but for" causation (or the "case within a case") requirement in order to prevail in a legal malpractice action.