



## Alerts

### A Defense Win in Texas on the Issue of "But For" Proximate Causation in a Legal Malpractice Case

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#### Brief Summary

The Texas Court of Appeals held that when a plaintiff's claim against her former attorney properly is grounded in professional negligence, the plaintiff cannot also bring a breach of fiduciary duty claim against the attorney.

Further, the court ruled that a legal malpractice plaintiff must prove that her lawyer's negligence was the proximate cause of cognizable damages and, in situations regarding contract formation, that the other contracting party would have agreed to the additional or changed contractual terms.

#### Complete Summary

This dispute arose from a 2014 transaction that merged certain real estate businesses. Plaintiff, Paula Forshee ("plaintiff") owned and operated a property management company. The defendant represented the plaintiff.

In June 2014, plaintiff entered into a series of contracts with Alan Schnur and David Anderson, who owned several apartment complexes for investment purposes. The series of contracts executed between plaintiff, Schnur and Anderson essentially merged their businesses and formed a new entity to solicit new investors to purchase additional properties. Plaintiff alleged that her attorney, the defendant, represented not only the plaintiff but also Schnur and Anderson during the contract negotiations and drafting.

Schnur and Anderson terminated the contracts effective in March 2015. Plaintiff sued Schnur, Anderson, the defendant, and several other entities, asserting a number of contract and tort claims. Plaintiff settled her claims against Schnur, Anderson, and their related entities, but she continued with her claims against defendant for breach of fiduciary duty and professional negligence.

Plaintiff alleged that defendant failed to exercise ordinary care and had various undisclosed conflicts of interest. Specifically, plaintiff alleged that the contracts were negligently drafted and allowed Schnur and Anderson to "circumvent" or "cut out" plaintiff from future deals.

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Plaintiff claimed that defendant did not draft the contracts herself but engaged another law firm to draft the contracts without plaintiff's consent. Plaintiff also alleged that defendant had financial interests in the apartment properties. If the defendant had disclosed her conflicts, plaintiff would have hired new counsel and benefited from more favorable contract terms.

Defendant moved for summary judgment and argued that she had no attorney-client relationship with plaintiff, that plaintiff was impermissibly splitting her professional negligence claim, and that the evidence established that defendant did not breach any duty. The trial court granted defendant's motion, and plaintiff appealed.

The appellate court first considered whether plaintiff's claims against Moulton properly sounded in negligence alone or whether plaintiff also alleged an independent claim for breach of fiduciary duty. In summary, Texas has a rule called the "anti-fracturing rule." The anti-fracturing rule bars a claim pled in the alternative to a negligence claim if the "crux of the alternative claim focuses on the quality or adequacy of the professional's representation."

Texas courts have generally held that a fiduciary duty claim focuses on "whether an attorney obtained an improper benefit from representing the client." In contrast, a negligence claim focuses on "whether an attorney representing a client with the requisite level of skill."

Plaintiff argued that she had an attorney-client relationship with defendant, and that defendant breached her fiduciary duty by undertaking the representation "fraught with conflicts of interest" and by hiring a separate law firm to draft the agreements.

The court held that Forshee's allegation that Moulton hired another law firm to draft the agreements sounded in negligence, not a breach of fiduciary duty. The court also held that simultaneous representation, without more, did not constitute a breach of fiduciary duty, noting that plaintiff failed to show that defendant obtained any improper benefit or placed her own financial interests over plaintiff's interests.

Next, the court noted that to prevail on a professional negligence (legal malpractice) claim, the plaintiff must prove:

- (1) duty;
- (2) breach of duty;
- (3) proximate cause; and
- (4) damages.

The components of proximate cause consist of cause-in-fact and foreseeability. Cause-in-fact requires a showing that the act or omission was a substantial factor in bringing about the injury and without which harm would not have occurred. Thus, the 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.

Plaintiff argued that the defendant's negligence put her at a significant disadvantage in the lawsuit and caused her to recover a lower settlement amount from Schnur, Anderson, and their companies. Defendant argued that plaintiff failed to show that plaintiff that the other contracting party would have agreed to the additional or changed contract terms, which would have been more favorable to plaintiff. The court agreed and affirmed summary judgment in defendant's favor.

## Significance of Decision

This decision once again demonstrates that a plaintiff in a legal malpractice action must establish that the attorney's alleged negligence is the proximate cause of the claimed damages. Also, in a transactional or contract setting, a plaintiff must show that, but for the defendant's alleged negligence, the other party would have agreed to different terms, which would have been more favorable for the plaintiff, a difficult burden.