



## Alerts

### California Court Holds Plaintiff Must Only Prove Attorney Was "Substantial Factor" of Loss, Not "But For" Causation

September 20, 2018

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*Knutson v. Foster*, 25 Cal. App. 5th 1075, 1077 (Aug. 8, 2018)

#### Brief Summary

A competitive swimmer was successful in reinstating a jury verdict against her lawyer for fraudulent concealment and intentional breach of fiduciary duty. The Court of Appeal determined the jury verdict was supported by the evidence because the swimmer need only prove that her attorney's conduct was a substantial factor in the result, not that she would have obtained a better result "but for" her attorney's alleged conduct.

#### Complete Summary

Plaintiff, a rising swimming star, agreed to forego swimming in college when the head coach of USA Swimming orally agreed to provide room, board, tuition, a stipend, and train her at the "Center for Excellence" in Fullerton, California, while she earned a college degree if she would swim professionally and competitively. The agreement was never reduced to writing, and shortly after she arrived in Fullerton, USA Swimming's head coach was fired. Plaintiff retained the defendant to get USA Swimming to honor the oral agreement. Defendant considered himself a high-level person in the aquatics industry, and had an ongoing relationship and close personal ties to people at USA Swimming. Defendant formerly represented USA Swimming's head coach in his employment contract, but declined to represent him in a wrongful termination suit because he did not want to have a negative relationship with USA Swimming in the future. Defendant specifically told the former USA Swimming head coach that he would have a conflict of interest in suing USA Swimming. Plaintiff testified she was never informed of these facts.

Defendant negotiated with USA Swimming and eventually helped plaintiff obtain an agreement for the support and training that included performance markers, which were not initially discussed with the former head coach. Plaintiff failed to meet the performance markers, entered treatment for an eating disorder, lost USA Swimming's support, and ultimately quit competitive swimming. Two years later, plaintiff learned about defendant's conflict. Feeling betrayed, she sued for fraudulent concealment and breach of fiduciary duty. The jury ruled in favor of plaintiff and awarded over \$600,000 in damages. The trial court granted defendant's motion for a new trial on the grounds plaintiff failed to demonstrate

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causation. Plaintiff appealed.

The appellate court determined the trial court erred by applying an incorrect causation standard in granting a new trial. The court noted the well-recognized standard from *Viner v. Sweet* in a legal malpractice action, a plaintiff must show that "but for the alleged malpractice, it is more likely than not that the plaintiff would have obtained a more favorable result," but noted that there is different causation for legal malpractice than there is for fraudulent concealment and intentional breach of fiduciary duty. The standard for causation in a fraud claim and an intentional breach of fiduciary duty is determined using the substantial factor test. The court determined the trial court recognized the different standards of causation, but incorrectly applied the legal malpractice standard to the fraudulent concealment claim.

In the fraud and intentional breach of fiduciary duty claims, the plaintiff must prove "it was *more likely than not* that the conduct of the defendant was a substantial factor in the result." The appellate court concluded that when the correct (and lower) standard was applied, there was enough evidence to support the jury's verdict. The court also allowed for recovery of emotional distress, veering from California precedent that only allowed recovery of non-economic damages where a liberty interest was involved.

### **Significance of Opinion**

This decision muddies the waters on the applicable causation standard when a lawyer is sued for fraud or intentional breach of fiduciary duty. It contains a confusing analysis of the difference between traditional "but for" causation and substantial factor causation and proving the standard case-within-the-case in legal malpractice actions. The decision may open the door for new claims against attorneys and a lesser burden for causation, but it should be noted the case involved claims for fraud and intentional breach of fiduciary duty, not professional negligence. A review by the California Supreme Court to clarify the applicable causation standard(s) may be warranted.

*For more information, please contact Terrence P. McAvoy or Alyssa Johnson.*

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At trial, plaintiff's expert testified that only 1% of top athletes would have met the performance markers.  
*Viner v. Sweet*, 30 Cal.4th 1232, 1244, 135 Cal. Rptr. 2d 629, 70 P.3d 1046 (2003).  
*Stanley v. Richmond*, 35 Cal.App.4th 1070 (1995).  
*Holliday v. Jones*, 215 Cal.App.3d 102 (1989).