



## Plaintiffs Failed to Establish Causation and Damages in “Settle & Sue” Type of Legal Malpractice Action

December 12, 2012

[Filbin v. Fitzgerald, \\_\\_\\_ Cal. Rptr. 3d \\_\\_\\_, 2012 WL 5857331 \(Cal. App. 1 Dist. Nov. 20, 2012\)](#)

### Brief Summary

The California Court of Appeal considered the causation element of a “settle and sue” type of a legal malpractice action. In the context of an eminent domain proceeding, the court concluded that plaintiff clients, although proving some evidence of negligence, failed to demonstrate that the settlement value eventually obtained was lower because of defendant lawyer’s alleged negligent acts.

### Complete Summary

The clients owned a piece of property that the city of San Luis Obispo wanted. Their relationship with the county was stormy, and when the county commenced eminent domain proceedings, the clients hired the lawyer to represent them. As the case neared trial, the parties were required to exchange offers. The clients differed strongly with the advice that the attorney provided to them, so much so that they terminated the representation, and obtained new counsel to proceed with the condemnation trial. The trial was underway (with new counsel) when the clients eventually accepted the county’s offer of about \$2.6 million, netting them approximately \$1.4 million.

Six months later, the clients sued the lawyer for legal malpractice, claiming that had he properly worked up the case, they could have settled for approximately \$3.2 million. The trial court agreed, finding that “but for the breaches of the standard of care by [the lawyer], Plaintiffs would have settled their case for the sum of [about \$3.2 million]. Reduced by the settlement amount of \$2,600,000.00, the Court finds Plaintiffs are entitled to damages on their Complaint against Defendant, Fitzgerald, in the amount of \$574,000.00.” The court justified its damage amount by reasoning that the attorney, an experienced condemnation attorney, typically obtained settlements of 70 percent of the value of the appraisal.

The court of appeals reversed, employing a mixed causation/speculative damages analysis. As to causation, the court noted: “Thus, a plaintiff who alleges an inadequate settlement in the underlying action must prove that, if not for the malpractice, she would *certainly have* received more money in settlement or at trial.” Moreover, the plaintiff’s burden to prove damages to a “legal certainty” was very difficult, particularly in “settle and sue” cases. Not only must the plaintiff prove that a better result would have been obtained, but he or she must prove what the result would have been. Where the settlement is a reasonable one, although not the best available, there is no causation. While there were some acts of negligence, the court characterized them using Justice Benjamin Cardozo’s “negligence in the air”



label from the famous case of *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928), which helped establish the concept of proximate cause.

Because the clients had retained new counsel, they were the masters of their own destiny: “Their decision to settle was theirs and theirs alone, made with the assistance of new counsel, with no input from [the lawyer]. The consequences of that decision are likewise theirs alone.”

As to the trial court’s use of the attorney’s history of condemnation success to set the standard of damages, the appellate court recognized the logical dilemma:

It is supremely ironic that, having fired [the lawyer], the [clients] attempt to use his history of success in condemnation cases against him by positing that history as establishing not only the likelihood of a higher settlement but also the amount, this based on the appraisal made by the appraiser that [the lawyer] had selected. Plainly, for the [the clients], the best weapon against [the lawyer] is [the lawyer] himself. There is nothing in the record which proves either that the County would have paid a dollar more than it did, or why the [clients’] new counsel did not secure the higher settlement the [clients] implicitly assume they would have pocketed had [the lawyer] remained as their counsel. Thus, and dispositively, the [clients] introduced no evidence that a greater settlement could have been negotiated from the County.

Accordingly, the California Court of Appeals reversed the award, and dismissed the legal malpractice action.

### **Significance of Opinion**

This decision emphasizes the logical inconsistencies in proving proximate cause and damages in “settle and sue” type legal malpractice actions. While the underlying case is a condemnation proceeding, the reasoning applies across the board.

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