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Is Judicial Error A Superseding Cause That Can Defeat A Lawyer Malpractice Claim?

by Bruce A. Campbell

Over the thirty years or so that I have represented lawyers, I have heard on many occasions that the trial judge made a mistake of law, and it was the judge's error that caused the harm which forms the basis of the former client's lawsuit against them. Texas, like many states, has remained quiet on this point, until recently. Fortunately, for the lawyers in Texas there is now more hope that we can potentially argue, in some situations, that the court's legal error was what caused the client's injury.

In *Stanfield v. Neubaum*,___S.W.3d___ (Tex. 2016), the Texas Supreme Court took up the issue of whether judicial error could constitute a superseding cause that broke any causal connection between the lawyers alleged negligence and the injury to the client. Typically in these cases the lawyer is being sued for the appellate costs incurred by the clients second set of lawyers who handled the appeal and set aside the trial court's complained of ruling. In *Neubaum,* the Texas Supreme Court found judicial error by the trial court could constitute superseding cause which could break the causal connection for a legal malpractice action when the judicial error was not reasonably foreseeable under all of the circumstances, and the negligence of the attorneys, if any, is unrelated to the judicial error.

In *Neubaum*, in the underlying case, the lawyers were defending a claim of usury against the client. The lawyers filed a motion for summary judgment asserting that a usury cure letter was a bar to liability to the claim for usurious lending. The trial court denied the motion. At trial the lawyers did not put on evidence to support the usury cure defense, but instead as a strategy, opted to defend on the basis that an alleged agent who created the usurious charge was not the agent of the client. During trial, at the charge conference the lawyers objected to an actual or apparent agency submission arguing that there was no evidence to support an agency claim. The trial court overruled the objection and included an agency question in the jury charge. The jury found against the client for almost $4 million in damages and penalties. The agency issue was challenged in a motion for new trial filed by the lawyers, which motion was denied. New counsel for the client then pursued an appeal, and on appeal, after spending $140,000 in fees, the court of appeals set aside the judgment against the client on the basis that the agency issue should not have been put before the jury.

Despite the win on appeal with new counsel, the client turned around and sued the original lawyers for malpractice. In the malpractice case, the client sued the lawyers to recover the appellate counsel's attorneys' fees incurred during the appeal. The client's theory was that the lawyers in the trial court should have pursued not only the agency defense during the trial, but also the usury cure defense. This approach to the practice of law is often referred to as a "belt and suspenders" approach. That is, if you have two defenses, you need to support two defenses on behalf of the client, even if the client should prevail on either defense.

In the malpractice case, the lawyers moved for a traditional motion for summary judgment on proximate cause and argued that the error of the trial court in allowing the agency issue to go to the jury was the superseding cause which broke the causal connection between any actions of the lawyers and the client's injury. Because the lawyers had only moved on causation, the Supreme Court declined to address directly the issue of whether the lawyers had a duty to put on evidence of both defenses. Thus, we do not directly know yet whether Texas law requires lawyers to be "belt and suspenders" lawyers, although the language of the Court about this "novel" theory fortunately suggests that is not the standard of care for lawyers practicing law in Texas.

Inasmuch as the Texas Supreme Court had not previously addressed whether judicial error could constitute superseding cause, the Court turned to established negligence principles and in particular, proximate-cause decisions for guidance.

The Court noted that for a breach of duty to proximately cause an injury, the breach must be a cause in fact of the harm, and the injury must be foreseeable. Cause-in-fact requires proof of two elements: (1) the negligent act or omission was a substantial factor in bringing about the harm at issue, and (2) absent the negligent act or omission ('but for' the act or omission), the harm would not have occurred." The Court pointed out that a negligent act or omission that "merely creates" the condition that makes the harm possible," is not a substantial factor in causing the harm as a matter of law.

The Court noted that a superseding, cause may intervene between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause," *Dew v. Crown Derrick Erectors, Inc.,* 208 S.W.3d 448, 450 (Tex.2006). A new and independent cause thus destroys any causal connection between the defendant's alleged negligence, and the plaintiff's harm, precluding the plaintiff from establishing the defendant's negligence as a proximate cause. *See Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 856 (Tex.2009) (explaining how a new and independent cause "destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question"); *Dew*, 208 S.W.3d at 450.

The Court also pointed out that in contrast to a superseding cause, a concurring cause "concurs with the continuing and co-operating original negligence in working the injury," leaving the causal connection between the defendant's negligence and the plaintiff's harm intact. *See Gulf, C. & S.F. Ry. Co. v. Ballew*, 66 S.W.2d 659, 661 (Tex. Comm'n App.1933, holding approved).

According to the Court, the critical questions that distinguish between a superseding cause and a concurring cause are: "… was there an unbroken connection? Would the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" The Court pointed out that if "nothing short of prophetic ken could have anticipated the happening of the combination of events" then the harm is not reasonably foreseeable and is a superseding cause.

In determining if the judicial error was a superseding cause, the Court noted that the question is not whether judicial error is generally foreseeable, but whether the trial court's error is a reasonably foreseeable *result* of the attorney's negligence in light *of all existing circumstances*. A judicial error is a reasonably foreseeable result of an attorney's negligence if "an unbroken connection" exists between the attorney's negligence and the judicial error, such as when the attorney's negligence directly contributed to and cooperated with the judicial error, rendering the error part of "a continuous succession of events" that foreseeably resulted in the harm. Citing *Bigham,* 38 S.W. at 164.

If the lawyers conduct merely furnished a condition that allowed a judicial error to occur then it does not establish the ensuing harm was a reasonably foreseeable result of the defendant's negligence. If an attorney does not contribute to the judicial error itself and the judicial error is not otherwise reasonably foreseeable in the particular circumstances of the case, the error is a new and independent cause of the plaintiff's injury if it "alters the natural sequence of events" and "produces results that would not otherwise have occurred." *See Hawley,* 284 S.W.3d at 857.

In *Neubaum*, the Court noted that at the time the lawyers made the strategic decisions that were challenged in the malpractice case, the record showed the lawyers were neither negligent nor incorrect in arguing there was no evidence of agency. The trial court erred in allowing the agency issue to go to the jury. Accordingly, the lawyers in their motion for summary judgment in the malpractice case had presented evidence that the judicial error was not reasonably foreseeable because they did not contribute to the error. The Supreme Court also pointed out that the appellate court's reversal of the adverse judgment conclusively established that taking all the lawyers' negligent and non-negligent acts omissions, and strategic decisions together no adverse judgment would have occurred if judicial error had not intervened. The lawyers' negligence may have created a condition that allowed the client's injury of having a judgment entered against them to occur, but the lawyers' negligence did not actively contribute in any way to the injuries involved in the suit.

The Court found, as a matter of law, the trial court's error of law on the agency issue was a superseding cause of the usury judgment and the ensuing appellate litigation costs. The Supreme Court also found that the trial court's legal error constituted a superseding cause as a matter of law, and therefore no expert testimony was necessary for the lawyers to negate causation.

Courts in California, Utah and Illinois appear to follow the same position as Texas. See *Kasem v. Dion–Kindem*, 230 Cal.App.4th 1395, 179 Cal.Rptr.3d 711, 716 (2014) (recognizing that "[j]udicial error by the underlying trial court can negate the elements of a legal malpractice claim"); *Crestwood Cove Apartments Bus. Tr. v. Turner*, 164 P.3d 1247, 1255 (Utah 2007) (agreeing "that a plaintiff cannot establish a claim for legal malpractice where judicial error was the proximate cause of the adverse result"); *Huang v. Brenson*, 379 Ill.Dec. 891, 7 N.E.3d 729, 737–38 (Ill.App. Ct.2014) (concluding judicial error acted as a superseding cause, rather than a concurring proximate cause, when there were no allegations the attorney contributed to the error, the attorney preserved the error, and the attorney was "vindicated on appeal").

How far the Courts will take the judicial error defense is hard to tell at this time. Often the issue of causation is a relatively fact driven evaluation. The decision in *Neubaum* suggests that if there is one legal defense that the client could prevail upon and the lawyer's conduct did not fall below the standard of care on that defense then the judicial error defense may work. An open question is how will a court in a malpractice case look at the judicial error defense if the client has not appealed the underlying action? Will expert testimony be required in order to try to evaluate the likelihood of success on appeal? There undoubtedly will be some questions whether the lawyers' conduct influenced the result on all of the defenses. In those the judicial error defense may not work. There will probably also be cases in which the defense, if it is successful, will only work on part of the case leaving the lawyer still exposed on other claims. For now, we will have to wait to see how the judicial error defense develops over time.