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## The Judicial Error Defense in Legal Malpractice Cases

By Ellen E. Oberwetter and Amy Mason Saharia – December 13, 2016

A law firm facing a litigation malpractice claim may be able to defend itself by demonstrating that the adverse outcome was the product of judicial error rather than of any negligence by the attorney. The recent Texas Supreme Court decision of *Stanfield v. Neubam*, 494 S.W.3d 90 (2016), highlights the viability of this important potential defense.

### The *Stanfield* Decision

In *Stanfield*, the plaintiffs brought a malpractice claim against the attorneys who had previously defended them in a usury action. In the underlying action, the attorneys had challenged the sufficiency of the evidence on an important agency issue, but the trial court had rejected that challenge. The judgment was reversed on appeal. Although the malpractice plaintiffs thus ultimately prevailed, they sued their previous attorneys to recover the fees they paid to get the judgment reversed. The malpractice plaintiffs contended that their attorneys should have presented other meritorious defenses at trial and that the trial court's erroneous ruling on the agency issue would not have mattered if they had done so. Importantly, the malpractice plaintiffs did not contend that their attorneys contributed to the trial court's erroneous ruling on the agency issue.

In the malpractice case, a divided intermediate appellate court held that the defendant attorneys were not entitled to summary judgment, rejecting the defendants' proffered theory that the underlying trial court's agency ruling had been erroneous. The Texas Supreme Court, however, reversed and rendered judgment in favor of the attorneys. The court held that a court's judicial error can break the causal chain between an attorney's negligence and a plaintiff's injury as long as the error is not a reasonably foreseeable result of the attorney's negligence. The court explained thus:

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.

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*Id.* at 14 (quoting *Tex. & Pac. Ry. Co. v. Bigham*, 38 S.W. 162, 164 (Tex. 1896)). Applying this test, the court held that even if the attorneys' failure to present other defenses created a condition that made the court's error possible, the error on the agency issue was not reasonably foreseeable and was thus a superseding cause of the adverse judgment. The court essentially assumed that the attorneys had been negligent, but it found that the trial court's error was not sufficiently connected to any failure in lawyering by the attorneys.

### Value of the Judicial Error Defense

The availability of a judicial error defense of this sort should not come as a great surprise given its consistency with the overall policies and frameworks that courts generally apply in legal malpractice cases about adverse litigation outcomes. From a policy standpoint, it is widely accepted that lawyers are not guarantors of particular outcomes for their clients. Just as the "case within the case" mechanism may serve as an objective test of whether an error by the lawyer was a "but for" cause of an unfavorable outcome in litigation, where the outcome in the underlying case was the product of an error of law by the court, such a ruling should appropriately "come under scrutiny in the malpractice case" and need not be accepted as a given with which the lawyer in the malpractice case is stuck. *Church v. Jamison*, 143 Cal. App. 4th 1568 (Cal. Ct. App. 2006).

Further, a judicial error defense may afford a legal malpractice defendant a chance to prevail upon a dispositive motion. After all, a judicial error is likely to be a matter of an erroneous determination of law by the court in the underlying case. The court hearing the subsequent legal malpractice case thus may conclude that it can decide, as a matter of law and through a motion to dismiss or for summary judgment, whether the underlying court erred in a manner that caused the claimed harm. The court in *Stanfield* did just that, holding that the trial court's error of law was a superseding cause of the plaintiffs' harm "as a matter of law." See also *Huang v. Brenson*, 7 N.E.3d 729 (Ill. App. Ct. 2014) (applying the judicial error defense at the motion-to-dismiss stage).

Of course, there may be cases in which courts find that the judicial error defense cannot be resolved as a matter of law. Such cases involve facts distinguishable from those in *Stanfield*. For example, where a default judgment was entered against a defendant due to claimed negligence by the attorneys, the U.S. Court of Appeals for the Second Circuit found a basis for a malpractice claim because the attorneys could be found to be a contributing cause of the default judgment, even if the court also had erred. *Skinner v. Stone, Raskin & Israel*, 724 F.2d 264 (2d Cir. 1983). Similarly, in *Lombardo v. Huysentruyt*, 91 Cal. App. 4th 656 (2001), the

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California Court of Appeal held that the trial court should not have granted nonsuit in a malpractice case when there was evidence that the erroneous court order was foreseeable to the attorneys. In *Stanfield*, by comparison, the court found that attorneys' alleged error was not directly related to the trial court's mistake of law—the argument was simply that had the attorneys presented additional arguments, the court's mistake would not have mattered.

### Variation in the Judicial Error Defense

Practitioners seeking to invoke a judicial error defense should be aware of some variation among courts of different states in how the defense is applied.

First, in cases in which a malpractice plaintiff did not appeal the underlying adverse judgment or settled the underlying case on appeal, courts have adopted different approaches to the question of judicial error. Some courts simply evaluate whether the trial court erred and, if so, whether the error was the proximate cause of the adverse result. *E.g.*, *Crestwood Cove Apartments Bus. Tr. v. Turner*, 164 P.3d 1247 (Utah 2007). Others may require the malpractice defendant to prove as an affirmative defense that the forgone appeal was likely to be successful. *See Hewitt v. Allen*, 43 P.3d 345 (Nev. 2002). Still others may apply abandonment-type principles, holding, for instance, that a plaintiff abandons his or her malpractice claim if a reasonably prudent person would have pursued an appeal from the underlying judgment. *E.g.*, *MB Indus., LLC v. CNA Ins. Co.*, 74 So. 3d 1173 (La. 2011). The court in *Stanfield* did not wade into these variations, as the malpractice plaintiffs there had appealed the underlying adverse decision, obtained a reversal, and then sought as damages the cost of pursuing the appeal.

Second, in cases such as *Stanfield* where a malpractice plaintiff claims that the attorney should have presented additional arguments, courts may analyze the question of judicial error through the lens of causation, breach of the standard of care, or both. Some courts have suggested that it simply is not a deviation from the standard of care for the lawyer not to present every possible argument as “belt and suspenders,” in the event the court erroneously rejects meritorious arguments. *E.g.*, *Simko v. Blake*, 532 N.W.2d 842 (Mich. 1995). Other courts (including the court in *Stanfield*) conceptualize the issue primarily as one of causation, where the court evaluates whether the eventual judicial error was *foreseeable* and thus could have been prevented by the attorney making different or additional arguments or whether the court's decision was independent of any claimed negligence and thus a superseding cause of the harm. In decisions considering a judicial error defense, the line between these framings is not always clear.

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## Conclusion

Judicial error can be a potent defense to legal malpractice claims that are premised on claimed malpractice in an underlying litigation. The Texas Supreme Court's decision in *Stanfield v. Neubaum* adds to the body of authority that may be used to support this defense and provides a useful road map to persuading a court that malpractice claims of this sort should be dismissed as a matter of law.

**Keywords:** professional services liability litigation, legal malpractice, causation, judicial error defense, *Stanfield v. Neubaum*

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