

Judicial Error as Superseding Intervening Cause

What happens when a lawyer has engaged in negligent conduct, but that conduct did not ultimately harm the client because the harm was caused by an error made by the court? Can judicial error act as a superseding intervening cause of a client's harm so as to preclude a malpractice claim against the client's lawyer? An appellate court in Illinois recently considered this issue in a legal malpractice action brought against an insurance defense lawyer.

Huang v. Brenson, ___ N.E.3d ___, 2014 Il. App. (1st) 123231, 2014 WL 888908, presents a legal malpractice action wherein the underlying matter was also a legal malpractice action and the underlying action to the underlying action was a deportation case. In the instant action, defendant lawyer had represented his client as a defendant in the underlying legal malpractice action brought by the lawyer's client, a Chinese citizen, who had been unsuccessfully defended in a deportation action brought by the Immigration and Naturalization Service (INS). As a result of the deportation action, the Chinese citizen was incarcerated for two years.

In the underlying legal malpractice action, the client contended that the defendant lawyer had acted negligently with respect to his representation in the INS proceeding, causing essentially noneconomic damages, such as those for emotional distress. The defendant lawyer's professional liability carrier appointed defense counsel, who would later become the defendant in the instant action, to represent its insured. Defense counsel moved for summary judgment on the basis, correct under Illinois law, that nonpecuniary damages cannot be recovered as part of a legal malpractice claim, which motion the court denied. The defense counsel then moved in limine to exclude evidence of noneconomic damages, which the trial judge also denied. During the course of a three-week trial, the Chinese citizen only introduced evidence of noneconomic damages, such as "for emotional distress, loss of normal life, psychological damages, and the cost of future psychological care." Defense counsel argued to the court that the jury should be instructed not to award any damages for noneconomic injury, but the court refused to give the instruction. The jury awarded \$4 million to the former client, although that was later subject to a remittitur.

The defendant lawyer in the underlying malpractice action thereafter terminated his lawyer and retained other counsel to represent him in post-trial practice, which was also unsuccessful. Not until the case was appealed was the verdict overturned because the appellate court recognized, as a matter of law, that a client cannot recover damages for emotional distress in a claim for legal malpractice.

The defendant lawyer thereafter brought the instant action against his defense lawyer in the underlying legal malpractice action. He accused his former defense counsel of committing several instances of negligent conduct involving, among other things, the manner in which he "conducted discovery, causing [defendant lawyer] to be unprepared for his deposition," and failure to procure an expert witness.

In response to the second amended complaint, defendant's defense counsel filed a motion to dismiss, contending, among other things, that the trial judge's refusal to follow the law and rule in favor of the defense in the underlying malpractice action constituted a superseding intervening cause. The trial judge granted the motion on this and other bases. The "judge reasoned that [defense counsel] could not be held responsible for a judicial mistake that required an appeal to correct."

The appellate court affirmed, recognizing that a malpractice claim requires that the client show that he or she has incurred "an injury in the form of actual damages" and that they "resulted as a proximate cause of the breach" of the lawyer's duty of care. The court observed that in litigation malpractice this is generally established by the "case within a case."

In the instant action, plaintiff could not make such a showing because his lawyer's negligence did not cause the court in the underlying malpractice action to deny his meritorious motions. To the contrary, defense counsel did make the correct arguments at the correct times in the proceedings, citing the correct law in support. The breakdown instead was the trial court's failure to follow the law.

To arrive at this conclusion, the court analyzed the concept of proximate cause, finding that there was an absence of proximate cause in this case. It noted that "[t]here are two tests of proximate cause. Under the traditional 'but for' test, a plaintiff must plead facts establishing that, but for the attorney's malpractice, plaintiff would have prevailed in the underlying action. ... Under the other test, the 'substantial factor' test, the plaintiff must show that the defendant's negligence was a material element and a substantial factor in bringing about the injury." In this case, plaintiff could not satisfy either requirement.

Avoiding Liability



By Jeffrey P. Lewis

Jeffrey P. Lewis is a member in the Philadelphia office of the law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.



The court also noted that "[p]roximate cause further requires a showing of legal cause, that is to say, foreseeability." Under this analysis, the legal cause of the injury can only be demonstrated in instances "where a reasonable person in the defendant's position could foresee the plaintiff's injury as a likely result of the defendant's conduct." In instances involving "successive negligent actors," whether the second actor is considered a superseding intervening cause, thus "break[ing] the chain of legal causation," depends on whether "the intervening event was unforeseeable as a matter of law." In this context, the court drew a distinction between whether "the court's mistake was a superseding rather than a contributing cause" of the harm.

Here the court did not view the judge's misapplication of the law as foreseeable and therefore superseding, notwithstanding that those of us who practice in the real world know that it can and does happen.

The lesson to be learned from this case is that a legal malpractice claim does not lie for one's failure to anticipate that the judge will not follow the law. But this is true only where the law in question is both clear and controlling.