

PROFESSIONAL LIABILITY UPDATE

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This newsletter is intended to summarize the most significant recent cases impacting non-medical professional liability litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Shannon, Gracey, Ratliff & Miller, L.L.P.

Henry S. Miller Commer. Co. v. Newsom, Terry & Newsom, L.L.P., No. 05-14-01188-CV; 2016 Tex. App. LEXIS 10136, (Tex. App.-Dallas, September 14, 2016).

Valid assignment of a legal malpractice action. Newsom, Terry & Newsom, L.L.P. (“Newsom”) represented Henry S. Miller Commerce Co, (“HSM”) in an underlying action, wherein a judgment was rendered against HSM in the amount of \$8.9 million. HSM’s insurance carrier denied coverage. HSM sued its carrier and its lawyer, Newsom. After filing suit, the judgment creditor of HSM filed an involuntary petition in bankruptcy against HSM. A reorganization plan was approved wherein a portion of HSM’s claims against its insurance carrier and Newsom was assigned to HSM’s judgment creditors.

HSM’s carrier settled before trial. The jury found negligence on behalf of Newsom. Newsom argued HSM illegally assigned its malpractice claim to the judgment creditors. Based upon the agreement between HSM and the judgment creditors, the judgment creditors took the lead in the action against Newsom. Newsom argued, the assignment was an illegal

assignment under Texas law, because when the judgment creditor’s attorney took control of the litigation against Newsom, such assignment was more than a partial assignment. The appellate court disagreed with Newsom, as the court refused to follow Newsom’s theory that because the Judgment creditor took control over the litigation, such control invalidated the partial assignment. The Court followed the logic in *Mallios v. Baker*, 11 S.W.3d 157, 164 (Tex. 2000), and *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 629 (Tex. App.-Dallas 2001, pet denied), that there is no illegal assignment when a Plaintiff brings a legal malpractice claim, even when the Plaintiff has made a partial assignment of such claims.

Stanfield v. Neubaum, No. 15-0387, 2016 Tex. LEXIS 578; 494 S.W.3d 90; 59 Tex. Sup. J. 1495 (Tex., March 30, 2016).

Affirmative defense, judicial error, a new and independent cause. In the underlying suit, Neubaum was found to have provided a usurious note to the Plaintiff resulting in a \$4 million dollar judgment against Neubaum. Neubaum appealed and the case was reversed based upon legally insufficient evidence.

Neubaum incurred \$140,000 in attorney's fees in defeating the lower court's judgment. As such Neubaum sued its trial counsel for negligently handling the underlying action. The attorney's filed summary judgment arguing, the trial court's error was the sole cause of Neubaum's injury, as substantiated by the reversal. Neubaum appealed to the Texas Supreme Court. The dispositive issues were (1) whether judicial error constitutes a superseding cause of the Neubaum's injuries in the absence of events the attorneys contributed to the error and 2) whether expert testimony was necessary to conclusively establish a lack of causation in these circumstances.

In effort to have a judicial error resulting in new and independent cause, there cannot be a break in the causal connection between an attorney's negligence and the Plaintiffs harm, and the judicial error must not be reasonably foreseeable. Neubaum argued there would not have been the necessity to have the Court rule, if its attorneys' had presented everything in the underlying action. The Court opined they could not just look at the attorney's alleged negligent actions and omission, the foreseeability analysis requires them looking at all the circumstance in existence "at the time". The record established the attorneys were neither negligent nor incorrect in arguing the case as they did and the trial court erred in ruling adversely and therefore, the judicial error was not reasonably foreseeable. Therefore, the trial court's error on the law was a new and independent cause of the adverse judgment and the ensuing appellate litigation cost.

***Linegar v. DLA Piper, LLP
Simmons v. Jackson, No. 14-0767, 2016
Tex. LEXIS 409; 2016 WL 3157363; 59 Tex.
Sup. J. 993, (Tex. May 27, 2016).***

Beneficiary of a trust has standing to bring legal malpractice action against attorney who advised on a loan.

The Court of Appeal's reversed the lower court's decision regarding Linegar having standing to bring a legal malpractice action against his trust that loaned money to a third party.

The Texas Supreme Court reversed the Court of Appeals judgment, as the issue of whether Linegar was a beneficiary of a trust or a shareholder of one of the corporations was a moot point, as Linegar met the threshold burden that the attorney's owed him a duty and that he was personally aggrieved by the firms' breach of their duty.

***Kite v. King, No. 07-15—00324-CV,
(Tex. App.-Amarillo, May 11, 2016, no writ).***

A potential legal malpractice action prior to a divorce can be barred by executing a Divorce Decree, that is approved by the Court as a "Just and Right division". Kite sued King for legal malpractice, for King's handling of the parties (Petitioner and ex-husband) transfer of real property prior to the divorce filing. Kite had asserted a claim against her ex-husband for fraud on the community related to the transfer of property. The claim of fraud on the community was resolved and a final Divorce Decree was entered into by Kite and her ex-husband and approved by the Court as a "just and right division of the parties' marital estate".

The Court of Appeals was guided by the Texas Supreme Court's opinion in *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999) to determine if Kite's cause of action against King is community or separate property. When determining the nature of one's injury, the nature of the injury is best exemplified by the averment describing the injury within the live pleadings. In the case at hand, Kite complains of "lost valuable rights and interest in community property and

seeks compensation for those losses”. Kite provides the court with a road map of what right she is seeking, that is the right and interest, of the community property. In following the Texas Supreme Court opinion in *Chu v. Hong*, 249 S.W.3d 441 (Tex. 2008), “waste, fraudulent transfer, or other damage to community property are claims belonging to the community itself, so they must be included in the trial court’s just and right division of community property upon divorce.” Consequently, the Court of Appeals held that any purported claim against King belonged to the community and to be included in the just and right division of the marital estate.