

IN THE SUPREME COURT OF TEXAS

=====
No. 15-0387
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BRENTON M. STANFIELD, THOMAS P. STONE, STONE & ASSOCIATES, LLP, AND
JIMMY VAN KNIGHTON, II, PETITIONERS,

v.

JON T. NEUBAUM AND BARBARA NEUBAUM, RESPONDENTS

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
=====

CHIEF JUSTICE HECHT, concurring.

I agree with the Court that the adverse judgment the Neubaums suffered in the trial court on Buck Glove's usury claim was not caused by any negligence of their Attorneys, but not because the trial court's error was a new and independent cause. The effect of judicial error on attorney error is a difficult issue, as the Court recognizes, and in my view, one that is easily avoided in the case. Accordingly, I concur in the judgment only.

The Neubaums owned a retail shopping center in which Buddy March and Buck Glove Co. were tenants. March did custom embroidery. Buck Glove, as its name suggests, sold gloves. The Neubaums advanced money to March to purchase raw materials to supply orders to his customers and shared in his profits. The Neubaums considered themselves investors in March's business. March and Buck Glove, one of his customers, began operating their businesses jointly, and they used

the Neubaums' advances in the joint operation. When those advances had grown to some \$800,000 more than March had paid the Neubaums, March had Buck Glove sign a note to the Neubaums for that amount. Buck Glove then sued the Neubaums for usury. The Neubaums discovered that March and Buck Glove had had the same arrangement with other "investors" and were using new advances not to supply customers, but to repay old advances. The Neubaums counterclaimed for fraud, alleging that March and Buck Glove were engaged in a Ponzi scheme. A jury found that March had defrauded the Neubaums but failed to find that Buck Glove had participated in the fraud. The jury also found that March was the Neubaums' agent in "loaning" advances for Buck Glove's orders and that the share of profits was usurious. The trial court rendered judgment on the verdict against the Neubaums, awarding Buck Glove about \$4 million in damages. The court of appeals reversed and rendered, holding that there was no evidence that March was the Neubaums' agent.¹

The Neubaums then brought this action against their Attorneys for malpractice, claiming that their negligence in the trial of the usury case caused the adverse trial court judgment and the resulting costs of appeal. The Neubaums allege that the Attorneys were negligent in failing to offer evidence of two usury defenses and failing to effectively present records showing that March and Buck Glove had engaged in a Ponzi scheme.

In defense of the usury claim, the Neubaums asserted that any usurious charge was an accidental and bona fide error for which they were not liable under Section 305.101 of the Finance Code, and in any event had been corrected by their "cure letter" under Section 305.103 of the Code.

¹ *Neubaum v. Buck Glove Co.*, 302 S.W.3d 912, 919–920 (Tex. App.—Beaumont 2009, pet. denied).

Both defenses were questions of law for the court,² and thus a presentation of evidence to the jury was unnecessary and improper. The cure letter was an absolute defense to the usury claim, and the Attorneys moved for summary judgment on it. The trial court incorrectly denied the motion.

Whether March and Buck Glove engaged in a Ponzi scheme was completely unrelated to whether the Neubaums committed usury. Even if the Attorneys' presentation of the evidence was not as effective as it should have been (it did convince the jury that March engaged in fraud), that could not have contributed to the jury's finding that March made a usurious loan to Buck Glove as the Neubaums' agent.

Moreover, the Attorneys' alleged negligence did not cause the appeal. Had the trial court rendered judgment for the Neubaums, Buck Glove could have appealed, just as it did to this Court from the court of appeals' adverse ruling.

The Neubaums suffered an adverse judgment on Buck Glove's usury claim because the trial court erred in denying summary judgment on their cure letter defense and in holding that there was evidence to support the jury's finding that March was their agent. The Attorneys did nothing to contribute to those errors; to the contrary, they vigorously argued against them. The Court indicates that that fact is enough to show that the Attorneys' negligence did not cause the adverse judgment.³

² See TEX. FIN. CODE § 305.101 ("A creditor is not subject to penalty under this chapter for any usurious interest that results from an accidental and bona fide error."); *id.* § 305.103 ("(a) A creditor is not liable to an obligor for a violation of this subtitle if: (1) not later than the 60th day after the date the creditor actually discovered the violation, the creditor corrects the violation as to that obligor by taking any necessary action and making any necessary adjustment, including the payment of interest on a refund, if any, at the applicable rate provided for in the contract of the parties; and (2) the creditor gives written notice to the obligor of the violation before the obligor gives written notice of the violation or files an action alleging the violation").

³ *Ante* at ____ ("The question then 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*.").

I disagree. An attorney's negligence might cause an adverse judgment even if it did not contribute to the judicial error. Here, however, any negligence by the Attorneys as alleged by the Neubaums could not have caused the adverse judgment.

Accordingly, I concur only in the judgment.

Nathan L. Hecht
Chief Justice

Opinion issued: June 24, 2016