No. 09-1390

In The
Supreme Court of the United States

RENEE S. HARTZ, M.D.,

Petitioner,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD, AND KUTCHER, LLP,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, when the United States Fifth Circuit Court of Appeals affirmed the decision dismissing Petitioner's legal malpractice claim, the Fifth Circuit Court of Appeals sanctioned such a departure from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power?

PARTIES

The Petitioner is Renee S. Hartz, M.D. ("Dr. Hartz").

The parties in the courts below were Dr. Hartz and her former attorneys, Robert A. Kutcher, Esq. ("Mr. Kutcher") and Nicole Tygier, Esq. ("Ms. Tygier") of Chopin, Wagar, Richard, and Kutcher, LLP.

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The opinion of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is unpublished. (App. 1-2). The district court Order And Reasons, *Hartz v. Farrugia, et al.*, is published at 2009 WL 901767 (E.D.La. 2009). (App. 3-18).

JURISDICTION

By a Petition for Writ of Certiorari pursuant to the jurisdiction conferred by 28 U.S.C. § 1254(1), Petitioner seeks this Court's review of the judgment entered on January 11, 2010 by the United States Circuit Court of Appeals for the Fifth Circuit. This Petition is timely filed because it was mailed within ninety days of February 9, 2010, the date a Petition for Rehearing was denied in the court below. United States Supreme Court Rules 13.3 and 29.2.

STATUTORY PROVISION INVOLVED

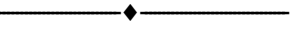
Fed. R. Civ. P. 56(c) in pertinent part provides:

. . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

REASON FOR GRANTING THE PETITION

The district court erred in granting summary judgment on Dr. Hartz's legal malpractice claim against Mr. Kutcher, Ms. Tygier and Chopin, Wagar, Richard, and Kutcher, LLP. The district court ignored specific facts in the record showing the existence of genuine issues of material fact for trial concerning Mr. Kutcher and Ms. Tygier's scope of the representation and their duty to her. The district court also misconstrued the facts and drew inferences in favor of Mr. Kutcher and Ms. Tygier.

The Fifth Circuit Court of Appeals affirmed without reasons. In so doing the Fifth Circuit sanctioned such a departure from the accepted course of judicial proceedings by the district court as to call for an exercise of this Court's supervisory power.



STATEMENT OF THE CASE
PROCEDURAL HISTORY

On June 16, 2006 Dr. Hartz filed suit against Mr. Victor Farrugia ("Mr. Farrugia"), Mr. Kutcher, Ms. Tygier, and Chopin, Wagar, Richard, and Kutcher, LLP (C.A. No. 06-4164) for legal malpractice. Jurisdiction in the Eastern District of Louisiana was based on diversity.

Dr. Hartz alleged Mr. Farrugia had failed to timely file a state law discrimination claim against Tulane University ("Tulane") and Tulane University

Hospital and Clinic ("TUHC").[1] The district court determined that Tulane, a non-profit educational institution, could not be sued under the state law discrimination statute and TUHC was not Dr. Hartz's "employer."[2] Dr. Hartz's sole claim against Mr. Farrugia that he had failed to timely file a state law discrimination claim against Tulane and TUHC was dismissed.[3] Dr. Hartz did *not* sue Mr. Farrugia for failure to timely file an EEOC charge[4] because such claim was perempted[5] as more than three years[6] elapsed before she learned of such failure.

Dr. Hartz alleged Mr. Kutcher and Ms. Tygier, of Chopin, Wagar, Richard, and Kutcher, LLP, failed to advise her of a legal malpractice claim against Mr. Farrugia and the time periods within which such a legal malpractice claim must be made. Dr. Hartz alleged that because of their failure, she did not learn

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[1] R.24, Complaint par.24. R.217-218.

[2] R.226, 289.

[3] R.226, 289, Order and Reasons, July 18, 2008, and October 3, 2008.

[4] R.25-27, Complaint par.29, 30, 31(2), 33, 36. Although Dr. Hartz had not sued Mr. Farrugia for legal malpractice for failing to advise her to timely file an EEOC charge, the district court in its March 31, 2009 Order and Reasons, page 3, stated that Dr. Hartz sued Mr. Farrugia for legal malpractice for failing to advise her to timely file an EEOC charge. App. 5, R.1660.

[5] Peremption is a period of time fixed by law within which a right must be exercised or be forever lost, La. Civil Code article 3458.

[6] La. Rev. Stat. Ann. § 9:5605(A)(2007).

of the legal malpractice claim within the time period allowed for bringing a legal malpractice claim against Mr. Farrugia, and lost the right to bring such claim.

The district court granted Mr. Kutcher and Ms. Tygier's motion for summary judgment on the legal malpractice claim. A final judgment was signed April 1, 2009. On April 24, 2009 Dr. Hartz filed a notice of appeal. An order taxing costs against Dr. Hartz was entered. The costs ($3,021.16) were paid.

The Fifth Circuit affirmed the district court's judgment and stated: "there is no reversible error." (App. 2). The Fifth Circuit denied Dr. Hartz's Petition for a Rehearing. (App. 21).

FACTS

By May 8, 1997 letter, Tulane University School of Medicine offered Dr. Hartz "a full-time tenure track faculty position with the rank of professor" and stated "an application for tenure will be submitted when you arrive, with the full support of the department of Surgery." From July 1997 until June 30, 2003, Dr. Hartz, a Board Certified Thoracic Surgeon, was employed at Tulane as a Professor of Surgery, Department of Surgery, Division of Thoracic Surgery. Dr. Hartz was denied tenure in May 1999.

After the tenure denial, Dr. Hartz, a female, filed a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC"). In

April 2001, Tulane President Scott Cowan proposed a settlement agreement – an additional probationary appointment guaranteeing that Dr. Hartz would receive tenure review during the additional probationary appointment.

Per the settlement agreement, Dr. Hartz was again considered for tenure May 20, 2002. The Tulane Medical School's Personnel and Honors ("P & H") Committee, the duly constituted faculty body charged with rendering a decision as to whether Dr. Hartz was qualified for an award of tenure, determined she was qualified for tenure, and voted in her favor 7-2 to recommend an award of tenure.

Despite the Tulane Medical School's P & H Committee's determination that Dr. Hartz was qualified for tenure and its recommendation to award her tenure, the Executive Faculty Committee ("EFC"), an administrative committee, rejected the recommendation. Dr. Hewitt, the Surgery Department Chairman, whom Dr. Hartz had alleged had discriminated and retaliated against her, was a participating member of the Executive Faculty Committee. Dr. Hewitt did not abstain from the vote taken by the EFC regarding Dr. Hartz's tenure.

On June 21, 2002 the Dean of the Tulane Medical School informed Dr. Hartz of the EFC's decision to reject the P & H Committee's recommendation to award tenure. Subsequently, the matter was returned to the P & H Committee. On July 15, 2002 the P & H

Committee voted again to recommend an award of tenure. However, the EFC rejected, a second time, the July 16, 2002 recommendation of the P & H Committee to award tenure. After the EFC voted on July 16, 2002, a male member of the EFC stated to Dr. Hartz, "You know the boys always vote together."

The Dean concurred with the EFC's decision and notified Dr. Hartz by letter dated July 16, 2002 of the tenure denial decision. The letter also reminded Dr. Hartz that, per the terms of the 2001 settlement agreement, the 2002-2003 academic year would be her terminal year at Tulane. Tulane terminated Dr. Hartz's employment on June 30, 2003.

The last discriminatory/retaliatory act concerning Dr. Hartz's denial of tenure occurred on July 16, 2002. On that date the EFC denied Dr. Hartz tenure, which a committee of her peers, senior medical school faculty – Tulane's School of Medicine's P & H Committee – had recommended. Similarly, the last discriminatory/retaliatory act concerning Dr. Hartz's hostile work environment also occurred on July 16, 2002 when her Department Chairman, Dr. Hewitt, participated in the EFC's decision to deny her tenure. Dr. Hewitt did not abstain from the vote taken by the EFC and infected the tenure decision with his discriminatory and retaliatory animus.

On March 26, 2003 Dr. Hartz paid Mr. Farrugia $10,000.00 to represent her in her dispute with Tulane regarding her denial of tenure. By April 17, 2003, 300 days had elapsed from the date Dr. Hartz

received notice of adverse employment action, i.e., the denial of tenure. By May 13, 2003, 300 days had elapsed from the date Dr. Hartz received the second notice of adverse employment action. Mr. Farrugia failed to timely file (and/or advise Dr. Hartz to timely file) an EEOC charge within 300 days of her notice of denial of tenure. Because of Mr. Farrugia's failure to advise Dr. Hartz of the EEOC charge filing deadline, she was unaware of the EEOC charge filing deadline and did not file a timely charge.

After Dr. Hartz paid Mr. Farrugia $10,000.00 to represent her, she was unable to contact him. Unbeknownst to Dr. Hartz, he was vacationing. Because Dr. Hartz was unable to communicate with Mr. Farrugia, she engaged Mr. Kutcher and Ms. Tygier to represent her in her dispute with Tulane. The EEOC charge filing period had elapsed by the time Mr. Kutcher and Ms. Tygier began their representation of Dr. Hartz in June 2003.

In their Answer to the legal malpractice Complaint, Mr. Kutcher and Ms. Tygier stated, "It is admitted that while plaintiff was continuing to be represented by defendant Victor Farrugia, plaintiff sought additional legal counsel from the law firm defendants concerning her dispute with Tulane."

At her deposition, Dr. Hartz testified:

> (R.982) p.262: I made it very clear to them [Mr. Kutcher and Ms. Tygier] that I came to them because I could not find my counsel [Mr. Farrugia], so I couldn't get him, he

> hadn't been useful to me. He hadn't been upfront with me and so I went to them for their help in remedying the issue of having an attorney who was – (R.982) p.265: . . . I'm asking them to tell me what my options are, what are deadlines, what dates do I have to look forward to? Am I barking up the wrong tree, do I have a real case, has Farrugia led me wrong? . . . I went to them for help. I went to them for help with my dispute against Tulane.
>
> (R.981) p.259: . . . I went to them asking for their help. I went to them begging to help me with this discriminatory dispute with Tulane. I felt that I had been extremely wronged, that I'm very qualified.

Dr. Hartz specifically asked Mr. Kutcher and Ms. Tygier "to tell me what my options are, what are deadlines, what dates do I have to look forward to? Am I barking up the wrong tree, do I have a real case, has Farrugia led me wrong?" Such an inquiry should have prompted Mr. Kutcher and Ms. Tygier to advise Dr. Hartz that the charge filing period had already elapsed, of the legal malpractice claim existing against Mr. Farrugia, and the time periods within which such a claim must be made.

During Mr. Kutcher and Ms. Tygier's representation of Dr. Hartz, she wrote three e-mails discussing their representation, dated 6/6/2003, 6/12/2003, and 6/30/2003. The 6/30/2003 e-mail states, "Bob Kutcher was on vacation in New York but he found time *to read my files and give me some good advice*." It states

Dr. Hartz was concerned during that timeframe about going to the EEOC to file a charge. It also states Dr. Hartz learned from Ms. Tygier that Tulane's In-house Counsel, Mr. John Beal, had stated, "*there is no bargaining . . . period*", i.e., tenure negotiations. The other two contemporaneous e-mails expressed Dr. Hartz's concern that she should go to the EEOC the following month, and should send a letter to Tulane's EEO/VP and Tulane University's Committee on Faculty Tenure, Freedom & Responsibility ("FTFR").

Ms. Tygier's billing statement refers to "EEOC letter" which she reviewed and revised. That letter was sent to 1) Mary Smith, Tulane EEO/VP, 2) Dr. Strong, Tulane FTFR Chair, and 3) delivered to the EEOC to document Dr. Hartz's charge of sex discrimination and retaliation. Ms. Tygier documents the multiple use of the letter in her 6/30/03 billing entry: "Phone call from client regarding letters." (R.470.)

That EEOC letter Ms. Tygier reviewed and revised was used for three purposes, which were the identical three concerns expressed in Dr. Hartz's contemporaneous e-mails, the same concerns which had prompted Dr. Hartz to seek advice from Mr. Kutcher and Ms. Tygier. That letter's first paragraph reads:

> This letter . . . serves as formal documentation to the FTFR regarding the same issues, concerning my complaints of gender discrimination and retaliation. . . . *I should not file a complaint with EEOC "until I received tenure*." Since the FTFR Committee denied me tenure, I am now adding that

> final denial of tenure to my claims of discrimination and retaliation (emphasis added).

Despite knowledge that Dr. Hartz had received notice of denial of tenure by Tulane letters dated June 21, 2002 and July 16, 2002, despite knowledge that Dr. Hartz was complaining of denial of tenure based on sex discrimination and retaliation, despite knowledge that Dr. Hartz was ill advised that she should not file *an EEOC charge* "until [she] received tenure," and despite Dr. Hartz having engaged Mr. Kutcher and Ms. Tygier to help her with her dispute with Tulane, Mr. Kutcher and Ms. Tygier never informed Dr. Hartz: 1) more than 300 days had elapsed from the time Tulane had notified Dr. Hartz she had been denied tenure; 2) the EEOC charge filing period for a denial of tenure claim had elapsed; 3) a legal malpractice claim against Mr. Farrugia existed; and 4) there existed prescriptive/peremptive dates of such legal malpractice claim.

The record shows Mr. Kutcher and/or Ms. Tygier did not provide Dr. Hartz with a written contract/ engagement letter setting forth the scope of their representation. The record also shows Mr. Kutcher and Ms. Tygier did not obtain Dr. Hartz's informed consent to limit the scope of their representation, pursuant to La. Rev. Stat. 37, Chap. 4, App. article 16, Rule 1.2 Louisiana Rules of Professional Conduct.

Dr. Hartz testified that Ms. Tygier eventually told her "just go back to him [Mr. Farrugia]." Dr.

Hartz followed Ms. Tygier's advice and returned to Mr. Farrugia for legal representation when she was told "just go back to him."

After she returned to Mr. Farrugia for legal representation, per Mr. Farrugia's counsel, on August 22, 2003, Dr. Hartz filed a charge with the EEOC. Her EEOC charge was filed 400 days after her notice of denial of tenure. Almost three years later, on March 15, 2006 the EEOC issued Dr. Hartz a "right to sue" letter.

Dr. Hartz, who had been represented in her dispute with Tulane by Mr. Farrugia, Mr. Kutcher, and Ms. Tygier, was unaware of the legal malpractice claims against her former attorneys until June 4, 2006 when she was so advised by undersigned counsel and also advised that Tulane would likely assert that her EEOC charge was untimely filed (Dr. Hartz contacted undersigned counsel on May 31, 2006 and retained undersigned counsel on June 1, 2006. R.1179, Timesheet. R.556, Defendants' "Statement of Undisputed Material Facts," No.XXI).

In related litigation, *Hartz v. Adm. of the Tulane Educational Fund; University Healthcare System, L.C.*, No. 07-30506 (unpublished opinion, p.5) (5th Cir. 2008), Dr. Hartz's denial of tenure claims alleging discrimination based on sex and retaliation for previous protected activity were dismissed by the United States Fifth Circuit Court of Appeals because her EEOC charge had not been timely filed. The untimeliness of the EEOC charge resulted in Dr.

Hartz's inability to challenge the alleged discriminatory and retaliatory conduct pursuant to 42 U.S.C. § 2000e-5(f)(1); *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___, 127 S.Ct. 2162, 2166-67, 167 L.Ed.2d 982 (2007).

Dr. Hartz's expert opined about whether Mr. Kutcher and Ms. Tygier breached the standard of care in the Louisiana legal community. The expert stated:

> Mr. Kutcher and Ms. Tygier of the law-firm Chopin, Wagar, Richard & Kutcher, LLP, consulted thereafter [when Dr. Hartz was unable to contact Mr. Farrugia] had an affirmative duty to advise Dr. Hartz of the potential malpractice claim existing against Mr. Farrugia, and the time periods within which such a claim must be made. These duties are essential components of competent representation, and the failure by counsel to so advise Dr. Hartz [was] a breach of the standard of care in the Louisiana legal community.

As a result of the negligence of Mr. Kutcher and Ms. Tygier, Dr. Hartz suffered injury – the loss of her right to proceed against Mr. Farrugia concerning his negligence in representing her in her Title VII claims. An economist performed an analysis of the value of that lost right.

Dr. Hartz did not fault Mr. Kutcher or Ms. Tygier for the loss of the opportunity to assert claims against

Tulane. Those claims were timebarred when she sought their representation. Dr. Hartz faulted Mr. Kutcher and Ms. Tygier for their failure to inform her that the EEOC charge filing period had elapsed, of the legal malpractice claim she had against Mr. Farrugia, and the time periods within which such a legal malpractice claim must be made.

But for Mr. Kutcher and Ms. Tygier's failure to inform her that the EEOC charge filing period had elapsed, of the legal malpractice claim she had against Mr. Farrugia, and the time periods within which such a claim must be made, Dr. Hartz's could have timely filed a legal malpractice action against Mr. Farrugia for the loss of her Title VII claims.

SUMMARY OF ARGUMENT

The district court ignored specific facts showing the existence of genuine issues of material fact concerning Mr. Kutcher and Ms. Tygier's scope of the representation, their duty to her, and whether they caused Dr. Hartz the loss of her claim against Mr. Farrugia (the underlying claim). The district court also misconstrued facts. Additionally, the district court construed facts in the light most favorable to the movants, Mr. Kutcher and Ms. Tygier, and drew inferences in their favor.

Mr. Kutcher and Ms. Tygier filed two separate Motions For Summary Judgment. In their first motion (Doc.65), Mr. Kutcher and Ms. Tygier contended

there was no legal malpractice. That motion concerning the legal malpractice claim was granted.

In a separate motion (Doc.63), Mr. Kutcher and Ms. Tygier argued there was no legal malpractice because Mr. Farrugia had not malpracticed because Dr. Hartz's Title VII claims lacked merit. That separate motion was denied.[7]

Dr. Hartz appealed the grant of summary judgment dismissing her legal malpractice claim against Mr. Kutcher and Ms. Tygier.

Mr. Kutcher and Ms. Tygier did not file a cross-appeal concerning their motion, which was denied, premised on the argument that Dr. Hartz's Title VII claims lacked merit.

In granting summary judgment dismissing the legal malpractice claim against Mr. Kutcher and Ms. Tygier, the district court stated "nothing in the record" suggests that:

> [Mr. Kutcher or Ms. Tygier] agreed to counsel Hartz regarding the filing of an EEOC charge, an undertaking that likely would have led the Chopin Defendants to discover that the filing deadline had lapsed, and

[7] Mr. Kutcher and Ms. Tygier offered no competent summary judgment evidence concerning the Title VII claims. Mr. Kutcher and Ms. Tygier did not offer a single affidavit or deposition testimony from anyone from Tulane. Tulane never articulated a reason, if any existed, for its adverse employment actions against Dr. Hartz.

> therefore would have triggered a duty to inform Hartz about a potential malpractice claim against Farrugia.

The district court stated an inquiry by Dr. Hartz about the EEOC charge "would have triggered a duty to inform [Dr.] Hartz about a potential malpractice claim against Farrugia."[8]

In affirming the district court's judgment, the Fifth Circuit Court of Appeals overlooked factual disputes concerning the scope of representation and duties owed to Dr. Hartz by Mr. Kutcher and Ms. Tygier and whether they caused Dr. Hartz to lose her legal malpractice claim against Mr. Farrugia. Although, on appeal, Dr. Hartz, demonstrated that the district court had ignored material facts, misconstrued material facts, had impermissibly construed the facts in the light most favorable to the movants, Mr. Kutcher and Ms. Tygier, and had drawn inferences in their favor, the Fifth Circuit affirmed dismissal of the legal malpractice claim asserted against Mr. Kutcher and Ms. Tygier without reasons for its decision.

This Court directs that the party seeking summary judgment must demonstrate its entitlement to judgment as a matter of law and that no genuine issue of material fact exists by showing that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317,

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[8] App. 15-16, R.1672 (Doc.114), p.15 n.6.

325, 106 S.Ct. 2548, 2553 (1986). This Court directs that when deciding a motion for summary judgment a court must draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). In its affirmance of the district court's summary judgment dismissing Dr. Hartz's legal malpractice claim the Fifth Circuit Court of Appeals sanctioned such a departure by the district court from the accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power.

ARGUMENT

A claim for legal malpractice is stated under Louisiana law, where there is: 1) an attorney-client relationship, 2) the attorney was negligent in his representation of the client, and 3) this negligence caused the client some loss. An attorney is negligent in handling a case if he fails "to exercise at least that degree of care, skill and diligence which is exercised by prudent practicing attorneys in his locality." *Ramp v. St. Paul Fire and Marine Ins. Co.*, 263 La. 774, 269 So.2d 239 (La. 1972). An attorney is negligent if he accepts employment and causes the loss of opportunity to assert a claim for recovery. *Jenkins v. St. Paul Fire and Marine Ins. Co.*, 422 So.2d 1109 (La. 1982).

I. There Are Factual Disputes Concerning The Scope Of Representation, And Duties Owed

The district court "ignored" material facts. Specifically, the district court ignored the denial of tenure letters from Tulane which Mr. Kutcher and Ms. Tygier reviewed, the EEOC letter which raised an inquiry about filing an EEOC charge, Dr. Hartz's deposition testimony, contemporaneous e-mails where Dr. Hartz discussed her concerns about filing an EEOC charge and Mr. Kutcher and Ms. Tygier's representation, and the fact that there was no express limitation on Mr. Kutcher and Ms. Tygier's representation of Dr. Hartz.

The district court stated, "The only email in the record is a transmittal of the Smith letter from Tygier to Hartz." The district court ignored Dr. Hartz's e-mails dated 6/6/2003, 6/12/2003, and 6/30/2003 which were in the record. The district court stated, "Hartz confirmed at her deposition that the only documents that she possessed regarding her representation by the Chopin Defendants were their bills (Hartz depo at 244)." The district court misconstrued this fact.

What Dr. Hartz's testimony at page 244 actually states is: she has no document *to or from the* [*Mr. Kutcher and Ms. Tygier*] *defendants* other than the bills they sent and the checks she wrote to them. However, at her deposition, she discussed the three contemporaneous e-mails written by her concerning

Mr. Kutcher and Ms. Tygier's representation. Her testimony and e-mails were contained in the record at 1371, 1513, 1701, 1703, 1705, and Dr. Hartz testified about them at her deposition, in the record at 962, 963. Dr. Hartz noted these facts in her opposition to summary judgment.

The district court misconstrued the representation of Dr. Hartz by Mr. Kutcher and Ms. Tygier as "Tenure Negotiations." Having ignored specific facts which show Mr. Kutcher and Ms. Tygier's broad scope of representation, the district court concluded that there was a limited scope of representation encompassing only "tenure negotiations" with Tulane and reviewing and revising a letter which had nothing to do with the EEOC. The district court ignored Dr. Hartz's deposition testimony. She testified,

> " . . . I want them for my help with my dispute with Tulane. I didn't go to them for tenure negotiations." (Deposition at page 254, 255.)

The district court also ignored the fact that there were never any "tenure negotiations." Dr. Hartz's 6/30/2003 e-mail corroborates this fact. That 6/30/2003 e-mail discusses that Ms. Tygier informed Dr. Hartz that Mr. Beal, Tulane School of Medicine's In-house Counsel, said "*there is no bargaining . . . period*", i.e., tenure negotiations.

The district court also stated that Mr. Tygier's reviewing and revising a letter had nothing to do with

the EEOC. The district court ignored Ms. Tygier's individual entries on her billing statement. Those billing entries are:

> 6/24/2003 revision of EEOC letter
>
> 6/25/2003 Review and revision of letter to EEOC
>
> 6/30/2003 Phone call from Client regarding letters.

Ms. Tygier's billing entries have nothing to do with tenure negotiations – and everything to do with preparing a letter for Dr. Hartz to assist her when she would file her EEOC charge.

On 7/16/2003 Ms. Tygier's billing record reflects Ms. Tygier and Dr. Hartz discussing the "status" of the dispute with Tulane. Dr. Hartz testified Ms. Tygier advised "just go back to [Mr. Farrugia]."[9] The last entry on the Chopin billing statement, 7/16/2003, states: hold off while other counsel, Farrugia negotiates. The entry reflects that the Chopin defendants did not know whether Dr. Hartz would follow their advice.

The district court drew an inference that Dr. Hartz returned to Mr. Farrugia for representation because of a money issue rather than because of advice she received from Ms. Tygier. Ignoring Dr. Hartz's testimony, the district court stated, "Hartz

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[9] R.913, 979-980 (Doc.74) Exh.A, Hartz Dep. pp.254, 255.

did in fact continue with Farrugia, in part because she had already paid him a significant retainer. (*Id.* [Hartz deposition] at 266)."[10] In fact, page 266 of Dr. Hartz's deposition testimony states:

> (R.983) p.266: [Q.] . . . did you make any other efforts to get any other attorneys?
>
> [A.] I did not at that point, no, I kept Mr. Farrugia. It was too –
>
> [Q.] Because you didn't want to spend additional money?
>
> [A.] Well, if I had to get the money, I would have taken out a loan.

Pages 254-255 of Dr. Hartz's testimony states:

> [Q.] Phone call from client regarding status, second call, hold off while other counsel Farrugia negotiates. . . .
>
> [A.] I did not tell them to hold off. They told me to hold off.
>
> [Q.] Did you pay this bill?
>
> [A.] Yes, I paid this bill, but it doesn't say I told them to hold off. Phone call from client regarding status, semi-colon, second call, hold off while other counsel – I didn't say that. They told me that.
>
> [Q.] You're saying that the law firm told you –

[10] App. 14, R.1670 (Doc.114), p.13.

> [A.] I didn't want to deal with Farrugia ever again.
>
> [Q.] So you're saying that the law firm told –
>
> [A.] Well, they didn't say we are not going to represent you. *They just said, hey, Farrugia is doing a fine job, just go back to him* . . . I want them for my help with my dispute with Tulane. I didn't go to them for tenure negotiations (emphasis added).

Contrary to what the district court stated, money played no part in the decision. Dr. Hartz relied on Ms. Tygier's advice and returned to Mr. Farrugia for legal representation, after all, Ms. Tygier told her "*Farrugia is doing a fine job, just go back to him.*" Thereafter, per Mr. Farrugia's counsel, on August 22, 2003, Dr. Hartz filed a charge with the EEOC. Her EEOC charge was filed 400 days after her notice of denial of tenure. The charge was reviewed by the EEOC until March 15, 2006 when the EEOC issued Dr. Hartz a "90 day right to sue" letter.[11]

In addition to ignoring the evidence that Dr. Hartz raised an issue about the EEOC with Ms. Tygier, the district court ignored and/or misconstrued material facts concerning the following: 1) Dr.

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[11] A related suit against Tulane was filed asserting the Title VII denial of tenure claims. The claims were dismissed as timebarred because the EEOC charge was untimely.

Hartz's deposition testimony; 2) Dr. Hartz's contemporaneous e-mails concerning Mr. Kutcher and Ms. Tygier representation; 3) Inconsistencies in Mr. Kutcher and Ms. Tygier's Billing Statements and their Affidavits; 4) Mr. Kutcher and Ms. Tygier's Admission in their Answer, par. 26, which states: "It is admitted that while plaintiff was continuing to be represented by defendant Victor Farrugia, plaintiff sought additional legal counsel from the law firm defendants concerning her dispute with Tulane"; 5) Dr. Hartz's testimony concerning her understanding of Mr. Kutcher and Ms. Tygier's representations – corroborated by the contemporaneous e-mails; 6) The lack of an engagement letter limiting the scope of representation; and 7) Ms. Tygier's review and revision of a letter which concerns: a) time to file EEOC charge, b) multiple uses of letter – sent to EEO, FTFR, EEOC, and c) the language concerning statutory remedies.

The district court also focused on the lack of an engagement letter and construed that fact against Dr. Hartz rather than Mr. Kutcher and Ms. Tygier. Similarly, the district court focused on the lack of a written contract and construed that fact against Dr. Hartz rather than Mr. Kutcher and Ms. Tygier.

The district court also ignored that Ms. Alston, Dr. Hartz's expert, testified that Mr. Kutcher and Ms. Tygier did not comply with the limiting of the scope of representation as required by Rule 1.2 of the Louisiana Rules of Professional Conduct.

The district court erred in granting summary judgment on Dr. Hartz's legal malpractice claim against Mr. Kutcher, Ms. Tygier and Chopin, Wagar, Richard, and Kutcher, LLP. In affirming the district court's judgment, the Fifth Circuit Court of Appeals overlooked that there are factual disputes concerning the scope of representation and duties owed to Dr. Hartz by the movants, Mr. Kutcher and Ms. Tygier.

II. There Are Factual Disputes Concerning Whether Mr. Kutcher And Ms. Tygier Caused A Loss

There were factual disputes about whether Mr. Kutcher and Ms. Tygier were negligent, and whether that negligence caused Dr. Hartz the loss of her claim against Mr. Farrugia.

At page 46 of Appellee's Brief, Mr. Kutcher and Ms. Tygier admitted that the district court "only addressed the Summary Judgment on the scope of representation and duties owed." *In dicta*, the district court discussed the third element of Dr. Hartz's legal malpractice claim in terms of the amount of time such claim remained viable citing *Oyefodun v. Spears*, 669 So.2d 1261 (La.App. 4th Cir. 1996).[12] Ms. Oyefodun was aware of the existence of her medical

[12] App. 17, R.1673. *Oyefodun* has nothing to do with the issue of peremption. The holding in *Oyefodun* addressed application of La. Civil Code article 3463 concerning the interruption of prescription. Unlike prescription, peremption may not be interrupted.

malpractice claim. Such claim was why she sought legal representation from Mr. Spears. After Mr. Spear's withdrawal, Ms. Oyefodun's medical malpractice claim prescribed.

In stark contrast, Dr. Hartz *was unaware* that the EEOC charge filing period had elapsed by June 2003 when she sought Mr. Kutcher and Ms. Tygier's legal advice. Because Dr. Hartz relied on their advice, *she did not learn and she remained unaware* that the EEOC charge filing period had elapsed by June 2003 when she sought Mr. Kutcher and Ms. Tygier's legal advice and of the existence of a legal malpractice claim against Mr. Farrugia (with prescriptive/peremptive dates).

Because Dr. Hartz *was unaware* of the existence of a claim against Mr. Farrugia, the focus should not be on how much time remained before the legal malpractice claim against Mr. Farrugia became prescribed/perempted, because between August 22, 2003 and March 15, 2006 the charge was under review by the EEOC. Whether Mr. Kutcher and Ms. Tygier's negligence was the cause-in-fact of the plaintiff's loss is not resolved simply by focusing on how long that claim against Mr. Farrugia remained viable.

This lack of knowledge of the existence of a legal malpractice claim against Mr. Farrugia distinguishes Dr. Hartz from the plaintiff in *Oyefodun,* and makes her situation analogous to the plaintiff's situation in *Federal Sav. v. McGinnis, Juban, Bevan et al.*, 808 F.Supp. 1263, 1269 (E.D. La. 1992). In that case the

FDIC, as receiver of a failed bank (Sun Belt), brought suit against Sun Belt's former attorney alleging legal malpractice in connection with closing on a loan. FDIC/Sun Belt alleged that the attorney's duty was more than merely performing title search, preparing documents, and closing the transaction. FDIC/Sun Belt alleged the attorney's professional duties extended further and required him to advise it concerning all relevant legal matters affecting the transaction and to otherwise protect the bank's interests in the deal. *Id.* at 1266. FDIC/Sun Belt contended that had the attorney not committed legal malpractice while acting as the closing attorney, the bank would have learned information that would have led it to take other action. *Id.* FDIC/Sun Belt alleged it relied on the attorney's advice, did not learn certain facts, and therefore suffered injury. *Id.* The scope of the representation was disputed as there was "no record evidence" that the client had expressly agreed to a contractually limited scope of representation. *Id.* at 1269. There were fact issues about whether defendant-attorneys were negligent, and if there was negligence, whether that negligence caused Sun Belt any injury. Because there was "no record evidence" that the parties agreed to a limited representation, there were factual disputes, and Judge Feldman denied summary judgment.

Similar to *Federal Savings*, here there was no express limitation on the representation. In the context of a denial of tenure based on complaints of sex discrimination and retaliation for previous Title

VII protected activity, Dr. Hartz relied on Mr. Kutcher and Ms. Tygier's advice. Although she relied on their advice, Dr. Hartz did not learn that the EEOC charge filing period had already elapsed when she sought Mr. Kutcher and Ms. Tygier's counsel and of the legal malpractice claim existing against Mr. Farrugia and the time periods within which such a claim must be made. This lack of knowledge caused Dr. Hartz to lose her opportunity to proceed with her claim of legal malpractice against Mr. Farrugia (for his failure to timely file (and/or advise Dr. Hartz to timely file) an EEOC charge within 300 days of her notice of denial of tenure).

In opposing summary judgment, Dr. Hartz posed the inquiry as to whether she lost her right to bring a legal malpractice claim against Mr. Farrugia because of Mr. Kutcher and Ms. Tygier's negligence or irrespective of their negligence. Dr. Hartz argued had they armed her with the knowledge of the existence of such a claim against Mr. Farrugia and the deadlines for filing such claim, their action would have prevented the loss of her legal malpractice claim against Mr. Farrugia. Mr. Kutcher and Ms. Tygier's negligence was therefore a "cause in fact" of the loss of the right to proceed against Mr. Farrugia.

In contrast, Dr. Hartz made no allegation that she lost her right to bring Title VII claims against Tulane because of Mr. Kutcher and Ms. Tygier's negligence as such claims were timebarred when Dr. Hartz engaged Mr. Kutcher and Ms. Tygier. Nonetheless, the district court stated that regarding

the claim of legal malpractice against Mr. Kutcher and Ms. Tygier the "underlying claim" was not merely Mr. Farrugia's legal malpractice but also Dr. Hartz's Title VII claims against Tulane.

The district court erred in determining that the "underlying claim" was both Mr. Farrugia's legal malpractice and also Dr. Hartz's Title VII claims against Tulane, which were timebarred before Dr. Hartz engaged Mr. Kutcher and Ms. Tygier to represent her in her dispute with Tulane. The district court ignored that Dr. Hartz made no allegation that she lost her right to bring Title VII claims against Tulane because of Mr. Kutcher and Ms. Tygier's negligence.

An attorney's negligence is a "cause in fact" of harm to a client if the harm would not have occurred except for that negligence. If the harm would have occurred irrespective of such negligence, then that negligence is not a cause in fact. *Meyers v. Imperial Cas. Idem. Co.*, 451 So.2d 649, 654 (La.App. 3rd Cir. 1984). The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the performance of that act would have prevented the damage. *Ault v. Bradley*, 564 So.2d 374, 376, 379 (La.App. 1st Cir. 1990), *writ denied*, 569 So.2d 967 (La.App. 1st Cir. 1990). *See Federal Sav. v. McGinnis, Juban, Bevan et al.*, *supra* at 1268-69.

The inquiry is whether Dr. Hartz lost her right to bring Title VII claims against Tulane and TUHC

because of Mr. Kutcher and Ms. Tygier's negligence or irrespective of their negligence. Mr. Kutcher and Ms. Tygier cannot be faulted for the loss of the right to proceed with the Title VII claims against Tulane because those claims were timebarred by the time Dr. Hartz sought their counsel. Mr. Kutcher and Ms. Tygier's negligence was not a "cause in fact" of Dr. Hartz's loss of her right to proceed against Tulane and TUHC with her Title VII claims. *Meyers*, *supra*, *Ault*, *supra*, and *Federal Sav.*, *supra*. Therefore the Title VII claims form no part of the "underlying claim" with respect to her legal malpractice claim against Mr. Kutcher and Ms. Tygier.

The other inquiry is whether Dr. Hartz lost her right to bring a legal malpractice claim against Mr. Farrugia because of Mr. Kutcher and Ms. Tygier's negligence or irrespective of their negligence. With respect to Dr. Hartz's legal malpractice claim against Mr. Kutcher and Ms. Tygier, she faults them for the loss of her right to proceed with a legal malpractice claim against Mr. Farrugia. Because Mr. Kutcher and Ms. Tygier's failure to inform Dr. Hartz of the legal malpractice claim she had against Mr. Farrugia, and the time periods within which such a claim must be made, she did not learn of Mr. Farrugia's negligence within the time period allowed for bringing a claim against him regarding the EEOC charge issue (Title

VII claims).[13] Thus had they armed her with the knowledge of such a claim against Mr. Farrugia and the deadlines for filing such claim, their action would have prevented the loss of her legal malpractice claim against Mr. Farrugia. Mr. Kutcher and Ms. Tygier's negligence was therefore a "cause in fact" of the loss of the right to proceed against Mr. Farrugia.

Because Mr. Kutcher and Ms. Tygier can only be faulted for the loss of the right to proceed with a claim against Mr. Farrugia, under the authorities cited above, with respect to her legal malpractice claim against Mr. Kutcher and Ms. Tygier, the "underlying claim" is limited to the loss of her right to proceed with a legal malpractice claim against Mr. Farrugia.

Additionally, *in dicta,* the district court stated Dr. Hartz could not have "proved" her Title VII claim by relying solely on a *prima facie* case of discrimination.[14] However, under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2106, 2009-12, 147 L.Ed.2d 105 (2000), calling into question the defendant's reason for its action, together with a *prima facie* case is sufficient to prove pretext. "[T]he inference of discrimination remains – unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for

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[13] R.25-28, Complaint par.29, 30, 31(2), 33, 36. R.913, 977, 979-984, 1005-06, Hartz Dep. pp.242-243, 251-252, 254, 255-266, 270-272, 356-359, 361.

[14] App. 7 n.4.

judgment as a matter of law . . . that discrimination could not have been the defendant's true motivation."

Moreover, Dr. Hartz did not solely rely on a *prima facie* case of discrimination. In fact, Dr. Hartz also provided evidence of pretext. In her Opposition Memorandum to Summary Judgment (Doc.74) she offered affidavits of Dr. Talano, Dr. Swain, and Dr. Hallett.

Dr. Talano, Cleveland Clinic (former Chair Tulane Cardiology Department), testified her surgical results were similar to the male surgeons, but Dr. Hartz, the only female surgeon, nationally recognized prior to joining Tulane faculty, "was singled out and made a scapegoat for the system problems at TUHC. She was singled out because she is a female. . . ."[15]

Dr. Swain, FDA cardiac surgeon consultant, testified, "There appeared to be unacceptable results in the Tulane system, and one person, Dr. Hartz, the only female, was singled out and blamed for the system problems."[16]

Dr. Hallett, former member Tulane Cardiology Department, testified Dr. Hartz, "was blamed or scapegoated for Tulane's longstanding problems. Male cardiac surgeons at Tulane had similar, or worse surgical results. None of the male surgeons with similar,

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[15] Dr. Talano's Affidavit (Doc.74), Exh.G, R.1154-1160.

[16] Dr. Swain's Affidavit, Exh.I, 1169-1173.

or worse surgical results, were asked to relinquish their cardiac privileges."[17]

In urging summary judgment, Mr. Kutcher and Ms. Tygier argued Dr. Hartz could not make out a *prima facie* case because she was not qualified for tenure at Tulane. However, that decision was not for Mr. Kutcher and Ms. Tygier to make. Tulane Medical School's P & H Committee had decided Dr. Hartz was qualified for tenure.[18]

Mr. Kutcher and Ms. Tygier did not assert she had no evidence of pretext until their Reply Memorandum. They waited until after the summary judgment deadline had elapsed when they raised such an issue. After defendants' asserted pretext with regard to discrimination in their Reply Memorandum, Dr. Hartz responded in her Objection and Surrebuttal Memoranda.[19] Whether the Fifth Circuit considered Mr. Kutcher and Ms. Tygier's arguments about the Title VII claims cannot be determined as their reasons for affirming the district court decision were not disclosed.

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[17] Dr. Hallett's Affidavit (Doc.74), Exh.H, R.1161-1168, R.1326 (Doc.87 & 89), R.1225 & 1327.

[18] P & H Member, Dr. Kadowitz's Affidavit (Doc.74), Exh.J, R.1174-1177.

[19] R.1429-1484, (3/9/09) Leave To File; Objection and Surrebuttal Memorandum to three (3) reply memoranda by Defendants. 3/12/09 leave to file (granted) R.1541, 1543, 1545. R.1733-1749 (Surrebuttal and Objection), R.1719-1731 (Surrebuttal), 1733-1749 (Surrebuttal).

Nonetheless, as no cross-appeal was filed, Mr. Kutcher and Ms. Tygier's arguments concerning Dr. Hartz's Title VII claims should not have been considered by the Fifth Circuit Court of Appeals because those issues were not properly before the Fifth Circuit Court. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 479, 119 S.Ct. 1430, 143 L.Ed.2d 635 (1999). *Positive Black Talk Inc. v. Cash Money Records*, 394 F.3d 357, 365 n.5 (5th Cir. 2004). Dr. Hartz objected to their raising such argument on appeal.[20]

Mr. Kutcher and Ms. Tygier's assertion that Dr. Hartz's time-barred Title VII discrimination and retaliation claims were meritless, was not asserted in support of their Motion For Summary Judgment on the legal malpractice claim (Doc.65). That purported "ground" was asserted solely in support of their separate Motion For Summary Judgment (Doc.63) concerning the Title VII claims, which was denied and which they did not appeal.

In addition to not appealing the denial of their separate Motion For Summary Judgment (Doc.63) concerning the Title VII claims, Mr. Kutcher and Ms. Tygier offered no competent summary judgment evidence concerning the Title VII claims. They offered no deposition testimony or affidavit from anyone who

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[20] Hartz Reply Brief pages 11-28, and without waiving such objection, addressed their arguments with the evidence of pretext she had offered the district court in opposing summary judgment.

represented Tulane. It is unknown what Tulane might have asserted. Because the EEOC charge was untimely, Tulane was never required and never provided a reason for its decision not to grant tenure to Dr. Hartz. Tulane never filed an answer and was dismissed on a 12(b)(6) after asserting Dr. Hartz's claims were timebarred because no timely EEOC charge was filed. When Tulane's EFC rejected the tenure recommendation, it gave *no* reason (R.1130-31).

Nonetheless, Mr. Kutcher and Ms. Tygier's speculations about what Tulane might have stated as its reasons for denying Dr. Hartz tenure are meritless and unsupported by summary judgment evidence. More importantly, Defendants were never Dr. Hartz's employer. It is ridiculous for them to state that they "speak" for Tulane. The employer's motivation is for the factfinder to decide. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2106, 2009-12. Tulane's motivation is unknown.

In contrast, Dr. Hartz's evidence was sufficient for a jury to have found that Tulane denied Dr. Hartz tenure based on her sex. The district court erred in stating Dr. Hartz had to show more than a *prima facie* case of tenure denial and also had to show pretext despite the fact that her employer, Tulane, had never articulated a reason. After establishing a *prima facie* case of tenure denial, Dr. Hartz's inference of discrimination remained and in this case was unrebutted as her employer, Tulane, never articulated a reason for its adverse employment decision.

More importantly, Dr. Hartz's Title VII claims were not the underlying claim for Mr. Kutcher and Ms. Tygier's legal malpractice. The underlying claim for Mr. Kutcher and Ms. Tygier's legal malpractice was Mr. Farrugia's legal malpractice about which they failed to advise her.

Finally, regarding the underlying claim, Louisiana has modified the "case within a case" standard of proof in a legal malpractice claim. *Jenkins v. St. Paul Fire and Marine Ins. Co.*, *supra*, at 1110. The legal malpractice plaintiff is not required to "prove" the underlying claim as that would impose "too great a standard of certainty of proof." *Id.* Where the attorney has been negligent, the burden is shifted to the attorney to show that the plaintiff could not possibly have prevailed in the underlying claim. *Id*. at 1109. Nonetheless, the district court further erred in stating that Louisiana law requires a "case within a case" proof of a legal malpractice claim.[21]

In affirming the district court's judgment, the Fifth Circuit Court of Appeals overlooked that there are factual disputes about whether Mr. Kutcher and Ms. Tygier caused Dr. Hartz to lose her legal malpractice claim against Mr. Farrugia.

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[21] App. 7, R.1662 (Doc.114) p.5 n.4.

CONCLUSION

The district court erred in granting Mr. Kutcher, Ms. Tygier, and Chopin, Wagar, Richard & Kutcher LLP's Motion For Summary Judgment dismissing Dr. Hartz's claim of legal malpractice against them. The district court further erred in deciding the "underlying claim" was not merely Mr. Farrugia's legal malpractice but also Dr. Hartz's timebarred Title VII claims asserted in related litigation.

The Fifth Circuit affirmed without reasons. In so doing the Fifth Circuit sanctioned such a departure from the accepted course of judicial proceedings by the district court as to call for an exercise of this Honorable Court's supervisory power.

The decisions below require an exercise of this Honorable Court's supervisory powers to remedy this sanctioned departure from the usual course of judicial proceedings. This Honorable Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30358

RENEE S. HARTZ, M.D.,

Plaintiff-Appellant,

versus

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD & KUTCHER, LLP,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:06-CV-3164

(Filed Jan. 11, 2010)

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

PER CURIAM:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Renee Hartz sues for legal malpractice stemming from the allegedly actionable failure of one of her attorneys to inform her of a potential claim against her former lawyer. The district court granted summary judgment for defendants and denied summary judgment for Hartz.

We have reviewed the briefs, the applicable law, and pertinent portions of the record and have heard the arguments of counsel. Because there is no reversible error, the judgment is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RENEE S. HARTZ, M.D.	CIVIL ACTION
VERSUS	NO: 06-3164
VICTOR R. FARRUGIA, ROBERT A. KUTCHER, NICOLE TYGIER, CHOPIN, WAGER, RICHARD & KUTCHER, LLP	SECTION: "A" (5)

ORDER AND REASONS

Before the Court are the following motions: **Motion for Summary Judgment (underlying claim) (Rec. Doc. 63), Motion for Summary Judgment (malpractice claim) (Rec. Doc. 65), Motion to Strike Plaintiff's Opposition to Defendants' Motions for Summary Judgment (Rec. Doc. 91)** filed by defendants Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP; **Motion for Summary Judgment (Rec. Doc. 68), Motion to Exclude the Testimony of Lelise J. Schiff (Rec. Doc. 69)** filed by plaintiff Renee S. Hartz, M.D. ("Hartz"). All motions are opposed. The motions, set for hearing on March 4, 2009, are before the Court on the briefs without oral argument.[1] For the reasons

[1] The motion to strike is set for hearing on the April 1, 2009, hearing date.

Defendants have requested oral argument but the Court is not persuaded that oral argument is necessary to resolve the issues presented.

that follow, the Motion for Summary Judgment (malpractice claim) is GRANTED and the remainder of the motions are DENIED.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 8, 2006, Hartz filed Civil Action 06-2977 in this Court against The Administrators of the Tulane Educational Fund ("Tulane"), and University Healthcare System, LC d/b/a Tulane University Hospital and Clinic ("TUHC") claiming sexual discrimination and retaliation. Hartz, a thoracic surgeon, had been employed at Tulane's School of Medicine as a Professor of Surgery until June 30, 2003, when she was terminated after twice being denied tenure. Hartz alleged that she had been the victim of sexual discrimination, including being subjected to a hostile work environment, that began within four months of her arrival at Tulane in July 1997. According to Hartz, the discrimination had culminated with the second denial of tenure that ultimately led to her termination. Civil Action 06-2977 was filed on behalf of Hartz by attorney Roger D. Phipps who began representing Hartz on or about June 1, 2006, and continues to represent her at present.

On March 26, 2003, Hartz had retained Victor R. Farrugia, an attorney at law, to represent her in conjunction with the second denial of tenure. (Rec. Doc. 63, Exh. 10, Representation Agreement). Plaintiff had first received notice that she was being

denied tenure on June 21, 2002, which means that she had 300 days from that date, or until April 17, 2003, to file her charge of discrimination with the EEOC, or possibly as late as May 12, 2003.[2] Hartz did not file an EEOC charge until August 22, 2003 and as a result her Title VII claims against Tulane (and TUHC) were ultimately found to be time-barred. *Hartz v. Admin. of Tulane Educ. Fund,* No. 07-30506, 2008 WL 1766886 (5th Cir. Apr. 16, 2008) (unpublished). As part of the case sub judice, Hartz sued Farrugia for legal malpractice alleging that he did not advise her to file the EEOC charge when she received notice of the denial of tenure and that it was due to his negligent representation that she waited until August 2003 – after she had actually been terminated – to file the charge. (Rec. Doc. 63, Exh. 11, EEOC charge). Unfortunately, Hartz did not learn of Farrugia's omission regarding the EEOC charge until after the strict permemptive [sic] periods imposed on claims for attorney malpractice under Louisiana law had already run. *See* La. R.S. § 9:5605. Consequently, the Court dismissed those claims on July 18, 2008, as

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[2] Hartz was first notified on June 21, 2002, of the adverse tenure decision but the matter was considered a second time and Hartz was notified on or about July 16, 2002, of the second adverse decision. When Civil Action 06-2977 was before the Fifth Circuit on interlocutory appeal, the court declined to decide whether the Title VII limitations period began running with the first notice or with the second notice because either way Hartz's EEOC charge was untimely. *Hartz v. Admin. of Tulane Educ. Fund,* No. 07-30506, 2008 WL 1766886, at *8 n.2 (5th Cir. Apr. 16, 2008) (unpublished).

being untimely. (Rec. Doc. 39). Hartz's malpractice claim against Farrugia based on his failure to file a state law discrimination claim, although timely, was dismissed on July 18, 2008, and October 3, 2008, because Tulane is not an "employer" for purposes of Louisiana's anti-discrimination law. (Rec. Docs. 39 & 53). Thus, Farrugia is no longer a party to this lawsuit.

As part of the case sub judice, Hartz also sued attorneys Robert A. Kutcher, Nicole Tygier, and the law firm of Chopin, Wagar, Richard & Kutcher, LLP (collectively "the Chopin Defendants") alleging that they failed to inform her that Farrugia might have been negligent regarding the timing of the EEOC charge. Hartz had consulted with these attorneys on July 16, 2003, and she blames them for losing her rights to proceed against Farrugia on the legal malpractice claim related to the untimely EEOC charge.[3] As the case now stands, the sole remaining claim to be tried is Hartz's claim that the Chopin Defendants are liable for failing to advise her of a potential legal

[3] Hartz had also sued the Chopin Defendants for failing to inform her about her rights under state law. This claim was dismissed on October 6, 2008, for the same reasons that the claim was dismissed against Farrugia, *i.e.,* that Hartz never had a claim under state law because Tulane does not satisfy the definition of an "employer." (Rec. Doc. 54). In that same ruling the Court noted that Hartz never had a claim against the Chopin Defendants for failing to file a timely EEOC charge because the filing deadline had already passed by the time that Hartz consulted with them. (Rec. Doc. 54).

malpractice claim against Farrugia for his failure to timely file an EEOC charge. This claim is set to be tried to the Court sitting without a jury on April 20, 2009.

The Chopin Defendants now move for summary judgment on the underlying claim and on the legal malpractice claim. As to the underlying claim, the Chopin Defendants argue that Hartz's discrimination claims against Tulane had no merit and therefore she could not have recovered against Farrugia for failing to pursue such a claim.[4] As to the legal malpractice claim, the Chopin Defendants argue that their representation of Hartz was very specific and limited

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[4] In legal malpractice cases Louisiana has traditionally employed a "case within a case" requirement such that the plaintiff must prove not only that the attorney was negligent in handling his client's claim but also that the underlying claim would have been successful but for the attorney's omission. *See Jenkins v. St. Paul Fire & Marine Insurance Co.,* 422 So. 2d 1109 (La. 1982).

Contrary to Hartz's contentions, the underlying claim in this case is not limited to the malpractice suit against Farrugia but rather additionally includes the discrimination claims against Tulane. The calculations for earning loss contained in Hartz's economist's report clearly indicate that the damages she seeks to recover in this case are directly related to her loss of tenure at Tulane, (Rec. Doc. 74, Exh. D, Dalton Report), and the only way that she can recover damages on that basis is if Tulane *unlawfully* denied her tenure. Likewise contrary to Hartz's contentions, she cannot carry her burden on the discrimination claims by relying solely on a prima facie case of discrimination, assuming *arguendo* that under these facts she has established a prima facie case.

in scope and that they had no duty to render any advice or opinion to Hartz regarding any potential legal malpractice by Farrugia.

Hartz also moves for summary judgment arguing that she is entitled to judgment as a matter of law on the legal malpractice claim against the Chopin Defendants.

II. DISCUSSION

The threshold question presented by all three motions for summary judgment, and in particular the Chopin Defendants' motion for summary judgment on the legal malpractice claim, is whether the Chopin Defendants had a duty to inform Hartz regarding any potential legal malpractice by Farrugia. In the absence of any such duty, Hartz has no legal malpractice claim against the Chopin Defendants.

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-movant, "show that there is no genuine issue as to any material fact." *TIG Ins. Co. v. Sedgwick James,* 276 F.3d 754, 759 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986)). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* (citing *Anderson,* 477 U.S. at 248). The court must draw all justifiable inferences in favor of the non-moving party. *Id.* (citing

Anderson, 477 U.S. at 255). Once the moving party has initially shown "that there is an absence of evidence to support the non-moving party's cause," *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986), the non-movant must come forward with "specific facts" showing a genuine factual issue for trial. *Id.* (citing Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986)). Conclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial. *Id.* (citing *SEC v. Recile,* 10 F.3d 1093, 1097 (5th Cir. 1993)).

In order to establish a claim for legal malpractice, a plaintiff must prove 1) the existence of an attorney-client relationship, 2) negligent representation by the attorney, and 3) loss caused by that negligence. *Teague v. St. Paul Fire & Marine Ins. Co.,* 974 So. 2d 1266, 1272 (La. 2008) (citing *Costello v. Hardy,* 864 So. 2d 129, 138 (La. 2004)). A failure to act will give rise to civil liability only if it occurs within the context of a duty to act. *Lifemark Hosp., Inc. v. Jones, Walker, Waechter, Poitevent, Carrere & Denegre,* No. 94-1258, 1997 WL 33473806, at *5 (E.D. La. Nov. 13, 1997) (Fallon, J.). In the case of legal malpractice duty is defined by the attorney-client relationship. *Id.* (citing *Grand Isle Campsites, Inc. v. Cheek,* 262 So. 2d 350 (La. 1972); *Delta Equip. & Constr. Co. v. Royal Indem. Co.,* 186 So. 2d 454 (La. App. 1st Cir. 1966)). The attorney-client relationship is "purely contractual" and results only from "the mutual agreement

and understanding of the parties concerned." *Id.* (quoting *Delta Equip.,* 186 So. 2d at 458). "Such a relationship is based only upon the clear and express agreement of the parties as to the nature of the work to be undertaken by the attorney and the compensation which the client agrees to pay therefore." *Id.* "Authorization to represent a client in connection with a specific legal matter does not imply authorization to handle all others, nor does the agreement or consent of an attorney to represent a [] client in a particular matter create an attorney-client relationship as regards other business or affairs of the client." *Id.*

The foregoing rules are elucidated by the outcome in *Buras v. Marx,* 892 So. 2d 83 (La. App. 5th Cir. 2004). In *Buras,* the plaintiff sued his former attorneys for failing to file a legal malpractice claim against the plaintiff's original attorney who had mishandled a matter. The defendant attorneys had continued to represent the plaintiff in other aspects of the case but they maintained that they had specifically told the plaintiff that they would not file a legal malpractice claim on his behalf. The defendant attorneys did not inform the plaintiff of the pending prescription dates and the legal malpractice claim against the original attorney prescribed. The trial court concluded, as did the appellate court, that there was no attorney-client relationship between the plaintiff and defendant as to the malpractice claim against the original attorney. *Id.* at 87. The appellate court also noted that an attorney is not required to

give notice of prescription dates when representation is refused. *Id.* However, the dissent pointed out that the duty to inform a client of pending prescription dates depends on the particular facts surrounding the attorney-client encounter. *Id.* at 87-88 (Daley, J., dissenting). The dissent believed that under the facts that defendant attorneys did in fact have a duty to advise the client of the imminent deadline to file a legal malpractice action. *Id.*

It is undisputed that an attorney-client relationship existed between Hartz and the Chopin Defendants as to at least some part of her dispute with Tulane because the firm provided legal services to Hartz between June 22, 2003, and July 16, 2003. (Rec. Doc. 65, Exh. 4, Billing records). However, cases like *Buras* and *Lifemark, supra,* demonstrate that the existence of an attorney-client relationship as to some aspect of the client's case does not necessarily imply that an attorney-client relationship exists as to all aspects of the case. The scope of the relationship is based only upon the clear and express agreement of the parties and whether the Chopin Defendants had a duty to inform Hartz about any malpractice by Farrugia will depend on the particular facts surrounding the attorney-client encounter in this case. The record establishes the following.

Hartz hired Farrugia on March 26, 2003, after months of attempting to navigate internal administrative tenure appeals at Tulane on her own. (Rec. Doc. 63, Exh. 10, Representation Agreement). Hartz became concerned around this time because the

university provost had sent her a letter on March 11, 2003, advising that she would not receive tenure, and her employment was due to terminate in June of that year. (Hartz depo. at 152-54). Hartz testified that she found Farrugia "difficult to get a hold of," and that he urged her to continue pursuing internal remedies at Tulane. (*Id.* at 159). Hartz testified that Farrugia had told her that he was extremely pressed for time, and Hartz felt that Farrugia did not seem to have time for her case. (*Id.* at 187).

Hartz explained that she contacted the Chopin Defendants at the recommendation of an attorney-neighbor who knew defendant Robert Kutcher. (*Id.* at 188). She testified that she sought out the Chopin Defendants because she could not find Farrugia, she had been denied tenure, she was panic stricken, and she needed help.[5] (*Id.* at 252). Hartz did not want to deal with Farrugia any more and she had hoped that the Chopin firm would take her case. *Id.* at 252, 255). On June 22, 2003, Kutcher spoke with Hartz on the phone regarding her ongoing tenure negotiations with Tulane and advised her that she could meet with Nicole Tygier, another partner with the firm, the next day if she wished. (Rec. Doc. 65, Exh. 11, Kutcher affid.). Kutcher had no further contact with Hartz after that conversation. (*Id.*; Hartz depo. at 265).

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[5] Hartz later learned that Farrugia had been out of town on vacation when she was unable to reach him.

On June 23, 2003, Hartz met with Tygier and reviewed some documents that she brought with her. (Rec. Doc. 65, Exh. 11, Tygier affid.). Tygier attests that they discussed Hartz's ongoing problems with tenure negotiations and that Hartz specifically requested assistance in preparing a letter to Ms. Mary Smith who was Tulane's EEO Compliance Officer. (*Id.*). According to Tygier, she revised the letter over the next few days and sent the final draft to Hartz on June 30, 2003, at which time Tygier discussed the letter with her. (*Id.*). Hartz sent the letter to Smith under her own signature and not that of any attorney with the Chopin firm. (Rec. Doc. 65, Exh. 34).

The Smith letter was eight pages of single-spaced text. (Rec. Doc. 65, Exh. 34). The entire representation by the Chopin Defendants, including Kutcher's phone conversation with Hartz, lasted 14.5 hours, the majority of which appears to be time devoted to working on the Smith letter. (Rec. Doc. 65, Exh. 4). The only email in the record is a transmittal of the Smith letter from Tygier to Hartz. (Rec. Doc. 65, Exh. 5).

After June 30, 2003, the date of the Smith letter, the next and final entry in the Chopin Defendants' billing records is dated July 16, 2003, and it states "[p]hone call from client regarding status; second call; hold off while other counsel, Farrugia, negotiates." Rec. Doc. 65, Exh. 4). According to Tygier, Hartz told her not to take any further action because Farrugia would be handling the continuing negotiations with Tulane." (Rec. Doc. 65, Exh. 11). However, Hartz

contends that she did not tell the Chopin Defendants to "hold off" in light of Farrugia but rather the Chopin Defendants told her that they were going to hold off so that Farruiga could continue with the negotiations with Tulane. (Hartz depo. at 254-55). Hartz knew at that point that the Chopin Defendants were refusing her case and that they did not want to represent her. (Hartz depo. at 255, 258, 259).

Hartz confirmed at her deposition that the only documents that she possessed regarding her representation by the Chopin Defendants were their bills. (Hartz depo. at 244). Hartz never gave the Chopin Defendants a retainer and there was never a written contract of representation. (*Id.* at 247, 252).

Hartz did in fact continue with Farrugia, in part because she had already paid him a significant retainer. (*Id.* at 266). In fact, on August 22, 2003, Farrugia accompanied Hartz to the EEOC office to file her charge. Hartz ultimately terminated Farrugia on June 1, 2006, nearly three years later. (*Id.* at 219). It is undisputed that Hartz had no contact whatsoever with the Chopin Defendants after July 16, 2003, when it became clear that they were refusing her case, until she filed this legal malpractice suit against them. (Hartz depo. at 278-79; Rec. Doc. 65, Exh. 11, Kutcher & Tygier affids.).

The Court is persuaded that the particular facts surrounding Hartz's engagement of the Chopin Defendants establishes that they had no duty to inform her of any omissions regarding Farrugia's representation,

and no facts *material* to this determination are in dispute. Although it might have been Hartz's intention and desire that the Chopin Defendants would take over her case when she became dissatisfied with Farrugia's services, there is nothing in the record that even remotely suggests that the Chopin Defendants agreed to such a broad engagement, or that Hartz even subjectively believed that they had taken her case. To the contrary, the record suggests a very narrow rendering of services with respect to the Smith letter, at a time when Hartz continued to be represented by Farrugia, and after the Smith letter was completed no other legal services were rendered. Hartz paid no retainer, instead paying on an hourly basis for legal services rendered, and she never signed a representation agreement as she had done with Farrugia. Hartz does not cite to anything that the Chopin Defendants did to mislead her with respect to the services they would render and her deposition makes clear that she knew that her case was being rejected. The undisputed facts establish that the Chopin Defendants' representation was a narrow one, notwithstanding Hartz's hopes to the contrary. Thus, while an attorney-client relationship undisputedly existed between Hartz and the Chopin Defendants from June 22, 2003, through July 16, 2003, the scope of that relationship clearly did not include all aspects of Hartz's case. As explained above, the scope of the relationship is governed by contract and by the agreement of the parties, and nothing in the record, including Hartz's deposition, suggests that the Chopin Defendants agreed to

counsel Hartz regarding the filing of an EEOC charge, an undertaking that likely would have led the Chopin Defendants to discover that the filing deadline had lapsed, and therefore would have triggered a duty to inform Hartz about a potential malpractice claim against Farrugia.[6] Likewise, nothing in the record suggests that Hartz ever specifically sought the Chopin Defendants' assistance with a legal malpractice claim.

Moreover, there is no evidence that the Chopin Defendants had actual knowledge of a potential legal malpractice claim against Farrugia and nothing on the face of the Smith letter suggests a problem. Hartz had no idea that Farrugia had missed the filing deadline and she made no suggestion to the Chopin Defendants that she suspected a problem with Farrugia's handling of her claim. Thus, in order for the Chopin Defendants to discover Farrugia's omission they would have had to unilaterally investigate a potential malpractice claim on Hartz's behalf. The timeliness of the EEOC charge was not an uncomplicated issue which is why this Court certified its prior ruling to the Fifth Circuit for interlocutory appeal. Given that the Chopin Defendants performed limited legal work for Hartz and declined to take her case they had no

[6] Each side retained an expert to opine on their behalf regarding whether the Chopin Defendants breached a duty owed to Hartz. (Rec. Doc. 65, Exh. 13 & Rec. Doc. 74, Exh. C). The legal issues presented in this case are well within the province of the Court to resolve without the need for expert assistance.

legal obligation to investigate Farrugia's handling of the case.

Finally, Hartz's claim against the Chopin Defendants suffers from the additional infirmity in that the legal malpractice claim against Farrugia did not prescribe until April 2006,[7] which is nearly 2 years and 9 months after the Chopin Defendants terminated their relationship with Hartz on July 16, 2003. In *Oyefodun v. Spears,* the Fourth Circuit upheld a trial court ruling that recognized that an attorney could not be liable for legal malpractice when he withdrew from the case almost a year before the case prescribed. 669 So. 2d 1261 (La. App. 4th Cir. 1996). Similarly, the Chopin Defendants are not responsible for the loss of a claim that prescribed nearly three years after their representation ended.

Accordingly, and for the foregoing reasons;

IT IS ORDERED that the **Motion for Summary Judgment (malpractice claim) (Rec. Doc. 65)** filed by defendants Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP is **GRANTED**. Plaintiff's complaint is **DISMISSED** with prejudice;

IT IS FURTHER ORDERED that the **Motion for Summary Judgment (underlying claim) (Rec. Doc. 63)** filed by filed by [sic] defendants

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[7] Three years after the EEOC charge should have been filed in April 2003.

Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP is **DENIED** as moot;

IT IS FURTHER ORDERED that the **Motion to Strike Plaintiff's Opposition to Defendants' Motions for Summary Judgment (Rec. Doc. 91)** filed by defendants Robert A. Kutcher, Nicole Tygier, & Chopin, Wagar, Richard & Kutcher LLP is **DENIED;**

IT IS FURTHER ORDERED that the **Motion for Summary Judgment (Rec. Doc. 68)** filed by plaintiff Renee S. Hartz, M.D. is **DENIED;**

IT IS FURTHER ORDERED that the **Motion to Exclude the Testimony of Lelise J. Schiff (Rec. Doc. 69)** filed by plaintiff Renee S. Hartz, M.D. is **DENIED** as moot.

March 31, 2009

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RENEE S. HARTZ	CIVIL ACTION
VERSUS	NO: 06-3164
VICTOR R. FARRUGIA, et al	SECTION: "A"

JUDGMENT

For the written reasons of the Court issued July 18, 2008 and October 3, 2008, **IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of defendant Victor R. Farrugia, and against plaintiff, Renee S. Hartz.

For the written reasons of the Court issued October 6, 2008 and March 31, 2009, **IT IS ORDERED, ADJUDGED AND DECREED** that there be judgment in favor of defendants Robert A. Kutcher, Nicole Tygier and Chopin, Wagar, Richard & Kutcher, LLP.

New Orleans, Louisiana, this 1st day of April 2009.

/s/ Jay C. Zainey
JAY C. ZAINEY
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 09-30358

RENEE S. HARTZ, M.D.,

Plaintiff-Appellant,

v.

VICTOR R. FARRUGIA; ROBERT A. KUTCHER; NICOLE TYGIER; CHOPIN, WAGAR, RICHARD & KUTCHER, LLP,

Defendants-Appellees.

Appeal from the United States Court for the Eastern District of Louisiana. New Orleans

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ON PETITION FOR REHEARING

(Filed Feb. 09, 2010)

Before JONES, Chief Judge, SMITH and ELROD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is [DENIED].

ENTERED FOR THE COURT:
/s/ Jay Smith
United States Circuit Judge