

Can Failure to Make the Effective Argument Sooner State a Malpractice Claim?

Judges often disagree with respect to the proper application of a point of law and dissents are a common occurrence, with appellate decisions sometimes being issued with multiple concurring and dissenting opinions. In such a world is it pure speculation to say that if counsel had made a more effective argument before the trial judge the time and expense of an appeal would have been avoided? A very curious case of this sort was recently decided in the Court of Appeal of Louisiana, an intermediate appellate court.

The legal history in *Thibodeaux v. Braud & Gallagher, LLC*, 109 So.3d 501 (La.App. 2013), began with a medical malpractice action where the plaintiff wife alleged that the defendant doctor negligently lacerated her bladder when he performed her cesarean section and hysterectomy. She and her husband engaged the lawyer and his law firm — later the defendants in the subsequent legal malpractice action — to prosecute the medical malpractice action. The lawyer timely filed a request for a medical review panel to review the claim that, under Louisiana law, tolls the statute of limitations. Because that request was made 16 days before the statute of limitations would have otherwise expired, plaintiff would have 90 days plus 16 days after the review panel matter concluded in which to commence the action in court. Expiration of the statute of limitations in Louisiana is referenced as “the expiration of the period for liberative prescription.” But the medical review panel never met and never issued an opinion. Because no extension was requested, the panel dissolved, but the parties were never notified of the dissolution.

Because plaintiff’s counsel did not receive notice of the dissolution, he failed to commence the medical malpractice action in court within the allowable 106 days. When the suit was finally commenced, the defendant doctor filed a motion in which he argued that the medical malpractice claim was time barred. The future defendant lawyer argued in opposition, but the trial court granted the motion and dismissed the medical malpractice action with prejudice.

Plaintiffs thereafter discharged their lawyer and retained replacement counsel, who handled the appeal they took from the dismissal. They also commenced a legal malpractice action against their former lawyer, contending that he was negligent for failure to timely commence the medical malpractice action.

In the appeal before an intermediate appellate court, replacement counsel argued that “the prescriptive period had not expired because [plaintiffs’ counsel] had not received notification by certified mail that the medical review panel had dissolved and thus the period of suspension had not yet begun to run when the malpractice lawsuit was filed.” In a 2-1 decision, the appellate court reversed and ordered remand. Apparently the waiver doctrine does not apply under Louisiana law under these circumstances because the dissenting judge, although he noted that this was a new argument on appeal, did not suggest waiver but disagreed with the majority based upon the merits.

The Supreme Court of Louisiana granted the defendant doctor’s application for writ of certiorari. The Supreme Court held that the commencement of the medical malpractice action was timely. But again that decision was rendered by a divided court. The defendant doctor’s application for rehearing was denied, rendering the judgment final.

In the eyes of the defendant lawyer, the finality of that judgment settled once and for all that he had timely commenced the medical malpractice action and, therefore, resolved the legal malpractice action in his favor because he could not have been negligent. The plaintiffs disagreed, contending that they were still harmed because the defendant lawyer had failed to raise the appropriate defenses to the statute of limitations. They characterized his arguments before the trial court in response to the defendant doctor’s motion to dismiss as “improper, inadequate, and unsound under the facts.” The court “infer[red] that the ensuing appeal and its expenses were necessitated solely by the failure of the attorneys to present the trial court with the same arguments [that] their replacement counsel successfully urged in the appellate courts.” The trial court embraced the defendant lawyer’s argument and granted his summary judgment motion.

Plaintiffs appealed to the Court of Appeals, which affirmed unanimously by a three-judge panel. The court did not suggest that it would require speculation to conclude that the trial court in the medical malpractice action would have ruled to the contrary if the defendant lawyer had made the correct argument. Instead it concluded that it would not have been a fair “inference that the trial judge would necessarily have accepted the merits of an argument [that] ultimately prevailed in the Supreme Court, especially in this case where there was considerable difference of opinion among the justices as to the merits of the argument. And thus we cannot accept the [plaintiffs’] predi-

Avoiding Liability



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cate that the ensuing appeal and expense would not have been occasioned but for their former attorneys’ failure to make a particular argument.” Because of “the vagaries inherent in litigation,” the court was unwilling to find that “a single ineffective (or even unsound) argument in the trial court can constitute actionable negligence when the party ultimately prevails on the very issue to which the ineffective argument was addressed.”

In a footnote the court suggested that this holding does not automatically mean that a legal malpractice claim cannot be pursued whenever replacement counsel (or even the original counsel) has successfully raised the winning argument later in the process. But it does seem to stand for the proposition that the correct argument made to the trial judge does not necessarily mean that he or she would have necessarily ruled consistent with the majority of appellate judges who later consider the same legal issue. Although the issue of whether a delay in raising the correct argument can be actionable cannot occur under Pennsylvania law in exactly the same way that it did in this Louisiana case — that is, the correct argument was not raised until the matter was on appeal — it can still occur. For example, there are sometimes arguments that can be raised in the context of a motion for summary judgment that are not waived until they are not raised in a motion for nonsuit at trial. This case would suggest that the failure to raise the winning argument as soon as possible may be actionable where the law is clear but not actionable if judges have disagreed on the law’s proper application. Therefore, this case teaches that a winning argument on an issue should be raised as soon as possible unless there is some conscious strategy to delay raising it.