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

REPLY TO BRIEF IN OPPOSITION

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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.

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ARGUMENT

I. The District Court Ignored Factual Disputes Concerning Scope Of Representation, Duties Owed, And Whether Mr. Kutcher And Ms. Tygier Caused A Loss

Mr. Kutcher and Ms. Tygier admitted to the Fifth Circuit the only issues the district court decided regarding the legal malpractice claim were: "the scope of representation and duties owed."[1] Here, they contend the district court also found they could not be held responsible for the loss of a legal malpractice claim that remained viable two years and nine months after their representation ended.

They also contend Dr. Hartz failed to offer any argument to the Fifth Circuit concerning that third element of her legal malpractice claim, i.e., their negligence caused her the loss of her legal malpractice claim against Mr. Farrugia. In at least 13 passages in her Appellant Original Brief at pages iv-v, 2-4, 5, 6, 19-21, 22-23, 24-25, 26-27, 29-30, 40-41, 43-47, 53, and 55, Dr. Hartz discussed the loss she suffered which was caused by Mr. Kutcher and Ms. Tygier's negligence.[2] Their contention Dr. Hartz "waived" argument about her loss is unavailing. The "waiver cases" they cite are not relevant.

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[1] Appellee Brief, p.46.

[2] Also in district court, R.864-1192; R.1695.

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).[3] The holding in *Oyefodun* addressed application of La. Civil Code article 3463 to the interruption or suspension of prescription, where Ms. Oyefodun was aware of the existence of her malpractice claim. (La. Rev. Stat. Ann. § 9:5605(A)(2007) provides a legal malpractice claim is not preempted until three years elapse.)

Dr. Hartz's lack of knowledge of the existence of a malpractice claim against Mr. Farrugia distinguishes her 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). (A full discussion about whether Mr. Kutcher and Ms. Tygier caused the loss of the legal malpractice claim against Mr. Farrugia is at Dr. Hartz's Petition For Writ Of Certiorari, pages 23-29.) In the four additional legal malpractice cases cited by Mr. Kutcher and Ms. Tygier, each malpractice plaintiff was fully aware of the existence of the underlying claim.[4]

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[3] Appendix 17.

[4] *Darbonne v. Guillory*, 649 So.2d 681 (La. App. 3rd Cir. 1994) (plaintiff aware of worker's compensation claim);

Steketee v. Lintz, et al., 694 P.2d 1153 (Ca. 1985) (plaintiff aware of medical malpractice claim);

(Continued on following page)

Mr. Kutcher and Ms. Tygier contend the district court determined they had no duty to advise Dr. Hartz about the existence of a claim against Mr. Farrugia. Actually, the district court stated an inquiry by Dr. Hartz about the EEOC charge "would have triggered a duty to inform Hartz about a potential malpractice claim against Farrugia."[5] Dr. Hartz made such inquiry to Mr. Kutcher and Ms. Tygier. However, the district court "ignored" this fact. (A full discussion of additional material facts which the district court ignored is at Dr. Hartz's Petition For Writ Of Certiorari, pages 17-23.)

Whether an attorney breached a duty imposed upon him and breached the standard of care in the Louisiana legal community, is a question of fact, not a question of law. *Federal Sav.*, *supra* at 1269, 1270; *Ramp v. St. Paul Fire and Marine Ins. Co.*, 269 So.2d 239, 244 (La. 1972). *Dixon v. Perlman*, 528 So.2d 637, 643 (La. App. 2nd Cir. 1988) (testimony regarding practice of prudent local attorneys important to resolution of case). Dr. Hartz offered expert testimony Mr. Kutcher and Ms. Tygier breached the standard of

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Harvey v. Mackay, 440 N.E.2d 1022 (Ill. 1982) (plaintiff aware of legal malpractice claim);

Shelly v. Hansen, 53 Cal. Rptr. 20 (Ca. 2nd Dis. 1966) (plaintiff aware of breach of contract/mechanic's lien claim).

[5] R.1672, Appendix 16, n.6.

care in the statewide legal community.[6] The district court ignored Dr. Hartz's expert's testimony regarding that question of fact.

Mr. Kutcher and Ms. Tygier fault Dr. Hartz for not providing them "an opportunity to render advice to her regarding the possible defenses or problems with [her claims against Tulane]." That is exactly what Dr. Hartz did when she engaged them to assist her with her "dispute with Tulane." They had ample opportunity to address the issues of which Dr. Hartz complains. They utterly failed to do so. Consequently, Dr. Hartz remained unaware of the existence of a legal malpractice claim against Mr. Farrugia until she contacted undersigned counsel by which time that claim was preempted.

Mr. Kutcher and Ms. Tygier cite *Grand Isle Campsites v. Cheek*, 62 So.2d 350 (La. 1972) arguing their representation was limited. *Cheek* involved a scope of representation "limited by the express agreement between [the lawyer] and the corporation's officers," *Federal Sav.*, *supra* at 1269. Here, the record evidence is to the contrary. There was no written contract, no engagement letter, and Dr. Hartz's deposition testimony was she sought their advice on what her options were and "has Farrugia led me wrong?"[7] Not only did the district court ignore

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[6] Purported "questions" about Ms. Alston's opinion were unfounded. R.1327, 1356-1363.

[7] R.982.

the facts, it faulted Dr. Hartz for failing to nail down the scope of representation.

Mr. Kutcher and Ms. Tygier cite *Buras v. Marx*, 892 So.2d 83 (La. App. 5th Cir. 2004), *cert. denied*, 896 So.2d 70 (La. App. 5th Cir. 2005). The *Buras* plaintiff *was aware* of the existence of a legal malpractice claim concerning an arbitration award for which defendant-attorneys had declined to represent Mr. Buras. Here, Dr. Hartz *was unaware* of the malpractice claim.

Duties associated with legal representation present issues of fact. *Cheek* and *Buras* do not provide "as a matter of law" what are an attorney's duties. The *Cheek* and *Buras* outcomes were dependent on the facts of each case. *Cheek* and *Buras* offer Mr. Kutcher and Ms. Tygier no support, and neither does *Oyefodun*.[8]

Mr. Kutcher and Ms. Tygier refer to Ms. Tygier's review and revision of the letter to Mary Smith as "tenure negotiations."

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[8] Nor is support found in:

Joe v. 239 Joint Venture, 145 S.W.3d 150 (Tx. 2004) no legal malpractice found where plaintiff claimed attorney breached fiduciary duty to plaintiff due to an alleged conflict of interest;

Dahlin v. Jenner & Block, 2001 WL 855419 (N.D. Ill. 2001), on 12(b)(6) motion legal malpractice claims dismissed as time-barred. *Id*. at *6.

Aside from the fact there were no "tenure negotiations,"[9] they imply one person, Mary Smith, EEO/VP, was empowered to "grant" tenure. They offer no evidence in support of that ludicrous assertion.

The letter to Ms. Smith addresses her as "Equal Employment Officer, Mary Smith" at Tulane.[10] The e-mails from Ms. Tygier which refer to Ms. Smith identify her as "EEO."[11] Neither the letter nor e-mails referring to Ms. Smith misstate Ms. Smith's title as "*EEOC* Affirmative Action Compliance Officer." Ms. Tygier always referred to Ms. Smith as the "Equal Employment Officer, Mary Smith" at Tulane, or "EEO."

In the district court billing references reflecting Ms. Tygier's work on an EEOC letter came under scrutiny. After it became necessary to "explain" those EEOC billing entries, Ms. Tygier began referring to Mary Smith by an incorrect title, "EEOC/Affirmative Action Compliance Officer."[12] The previous distinction Ms. Tygier made between "EEO" or "Equal Opportunity Officer" at Tulane and the "EEOC," a federal agency, vanished.

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[9] Tulane's In-house Counsel stated: no bargaining, i.e., tenure negotiations, and Dr. Hartz testified: "I didn't go to them for tenure negotiations." R.979-980.

[10] R.1025.

[11] R.1022-1024.

[12] R.533-535.

Mr. Kutcher and Ms. Tygier cite to a letter where Mr. Farrugia addressed Mary Smith. Mr. Farrugia addressed Mary Smith as "Associate Vice President, Equal Opportunity/Affirmative Action."[13] Mr. Farrugia's letter does not refer to Mary Smith as "EEOC/ Affirmative Action Compliance Officer," or EEOC as Mr. Kutcher and Ms. Tygier contend. *Id*.

Mr. Kutcher and Ms. Tygier filed affidavits to support their "explanation" the scope of their representation was limited. However, their affidavits are controverted by their billing records, the letter to Mary Smith, Dr. Hartz's deposition testimony, and contemporaneous e-mails.

According to Mr. Kutcher's Affidavit,[14] he merely spoke with Dr. Hartz; but, the invoices show he reviewed documents: "6/22/2003 RAK Called attorney; called client, Dr. Renee Hartz; *review of documents*" "Hours 1.50."[15] Thus Mr. Kutcher's affidavit is contradicted by the invoices. The 6/30/2003 e-mail from Dr. Hartz corroborates Mr. Kutcher reviewed documents. It states: "Bob Kutcher was on vacation in New York but he found time *to read my files and give me some good advice*."[16]

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[13] R.467.

[14] R.531-532.

[15] R.470.

[16] R.1701.

Ms. Tygier's Affidavit asserts she merely assisted Dr. Hartz in reviewing and revising "a letter to Mary Smith." The first paragraph of the Mary Smith letter states: Dr. Hartz "should not file a complaint with EEOC until [she] received tenure."[17] The first paragraph of the Mary Smith letter raises the issue about "the filing of an EEOC charge."

In reviewing and revising the Mary Smith letter, Ms. Tygier struck through numerous passages and suggested numerous additions.[18] Ms. Tygier did not strike the words "should not file a complaint with EEOC until [she] received tenure." That was advice to Dr. Hartz the statement was correct. Ms. Tygier's review and revision of the letter recommended a course of conduct to Dr. Hartz. Although the issue of when to file an EEOC charge was raised in the letter, and the charge filing period had elapsed, Ms. Tygier did not alert Dr. Hartz about that fact.

Ms. Tygier added the following language to the Mary Smith letter:

> I ask . . . remedial actions be taken, including . . . reinstatement, with full privileges, tenure, payment of lost wages, lost potential earnings, and *all rights afforded under all applicable laws and regulations*."[19]

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[17] R.1025.

[18] R.1025-1032.

[19] R.1032.

This language advised Dr. Hartz she had rights under applicable laws. Yet, her rights had been lost as the charge filing period had elapsed. Had Dr. Hartz been alerted to this fact, she would have realized she had a legal malpractice claim against Mr. Farrugia.

The district court ignored evidence showing the scope of the representation and the duty to Dr. Hartz was more comprehensive than merely providing editorial advice about a letter to Mary Smith.

II. Title VII Claims Time-barred

The Title VII litigation Dr. Hartz brought against Tulane University is not the underlying claim against Mr. Kutcher and Ms. Tygier. The "underlying claim" of Mr. Kutcher and Ms. Tygier's malpractice is Mr. Farrugia's malpractice.[20]

On March 15, 2006 the EEOC issued Dr. Hartz a "right to sue" letter. Dr. Hartz contacted undersigned counsel on May 31, 2006 with two weeks remaining to file suit, and retained undersigned counsel on June 1, 2006. On June 8, 2006 her Complaint (06-2977) against Tulane and its hospital, TUHC, was filed. On June 16, 2006 her Complaint (06-3164) against

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[20] Dr. Hartz's Complaint (06-4164) does not allege that Mr. Kutcher and Ms. Tygier were negligent in failing to advise her to *file* an EEOC charge. She alleges they were negligent in failing *to advise her that Mr. Farrugia had been negligent* in failing to advise her to timely file her EEOC charge to preserve her Title VII discrimination and retaliation claims.

Mr. Farrugia, Mr. Kutcher, and Ms. Tygier was filed. Before her Complaint against Tulane and TUHC was filed, Dr. Hartz was advised her Title VII claims would be time-barred if such an affirmative defense were raised under *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), i.e., the ultimate loss of her employment at Tulane was the adverse effect of the tenure denial of June/July 2002. Notice to Dr. Hartz of that discrete event triggered the 300 day limitation period which expired before Dr. Hartz filed her EEOC charge.

The Fifth Circuit dismissed Dr. Hartz's Title VII claims against Tulane as time-barred as the EEOC charge was filed more than 400 days after the last discriminatory/retaliatory act. TUHC was dismissed because it had not been named in the EEOC charge. At oral argument it appeared the Fifth Circuit assumed undersigned counsel was responsible for the failure to timely file the EEOC charge, and failure to name TUHC.

Regarding Dr. Hartz's hostile work environment claim, she alleged her Department Chair, Dr. Hewitt, created a hostile environment. She alleged Dr. Hewitt's last discriminatory/ retaliatory act occurred July 16, 2002 when as a member of the Executive Faculty Committee ("EFC"), which vetoed the favorable tenure decision of the Tulane Medical School's Personnel and Honors ("P & H") Committee, he did not abstain from the EFC vote.

The Fifth Circuit reversed the district court because it had erred in not recognizing the EEOC charge had not been timely filed. The failure to file a timely EEOC charge resulted in her inability to challenge the alleged discriminatory conduct in court pursuant to 42 U.S.C. § 2000e-5(f)(1); *Ricks*, *supra*; and *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. ___, 127 S.Ct. 2162, 167 L.Ed.2d 982 (2007).

III. Surrebuttals Admitted

Mr. Kutcher, and Ms. Tygier filed two Motions for Summary Judgment. Dr. Hartz opposed the motions with one Opposition Memorandum. Thereafter, Mr. Kutcher and Ms. Tygier filed three Reply Memoranda In Support of Motions for Summary Judgment – which raised new issues. Four days later, Dr. Hartz responded with one Surrebuttal Memorandum. The district court denied Dr. Hartz leave to file her Surrebuttal Memorandum because it exceeded the page limit.[21] The next day, Dr. Hartz filed three separate (10 page) Surrebuttal Memoranda.[22] Mr. Kutcher and Ms. Tygier filed a motion to strike all Dr. Hartz's memoranda opposing summary judgment, asserting they were untimely and/or not served

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[21] R.1539.

[22] 3/12/09 (Leave To File) R.1541, 1543, 1545. R.1733-1749 (Surrebuttal and Objection); R.1688-1717 (Surrebuttal); R.1719-1731 (Surrebuttal).

properly. After Dr. Hartz demonstrated all her memoranda were timely filed and properly served,[23] the district court denied the motion,[24] and granted leave to file Dr. Hartz's Surrebuttal Memoranda.[25]

IV. Tulane's Medical School's P & H Committee Determined Dr. Hartz Was "Qualified For Tenure"

In late 1997, Dr. Hartz voluntarily relinquished certain of her cardiac surgical privileges ("pump privileges") at TUHC pending a review of some surgical cases. 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."[26] Dr. Hartz maintained thoracic surgical privileges at TUHC, where she had an active thoracic practice, and full unrestricted cardiovascular surgical privileges at Charity Hospital, staffed by physicians at Tulane.[27]

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[23] R.1616-1628.

[24] R.1658, 1659; Hartz Appendix 3-4.

[25] 4/1/09 Order granting leave to file surrebuttals R.1687, 1718, 1732.

[26] Affidavit, Dr. Talano, former Chair Tulane Cardiology Department, R.1154-1160.

[27] Dr. Hartz traveled weekly to Houston, Texas, to work with Drs. Denton Cooley and O.H. Frazier, at the renowned Texas Heart Institute ("THI"). There she maintained her cardiac skills, had the benefit of independent evaluation by the THI

(Continued on following page)

Dr. Hartz was denied tenure in 1999. She appealed to the Tulane Faculty, Tenure, Freedom, and Responsibility Committee ("FTFR"). Mr. Kutcher and Tygier cite to the letter offer written by Dr. Flint and Dean Corrigan but ignore Dr. Flint's affidavit. Dr. Flint, Chairman, Department of Surgery, testified the offer of employment imposed no requirement that tenure would be dependent on any specific surgical privileges at TUHC.[28]

In 2001, in view of testimony and the FTFR recommendations, Tulane President Scott Cowen proposed a settlement agreement – an additional three year probationary appointment guaranteeing Dr. Hartz would receive tenure review during the second year of the period.[29] Accordingly, Dr. Hartz continued as a Professor of Surgery at Tulane.[30] On January 30, 2002, TUHC reinstated Dr. Hartz's full, unrestricted cardiovascular surgical privileges.[31]

Dr. Hartz was again considered for tenure May 20, 2002. Tulane Medical School's "P & H" Committee, under the provisions of Tulane's Faculty Handbook, the duly constituted faculty body charged

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group, and received outstanding evaluations. R.756-762, 1162-1168 Affidavit, Robert Hallett, M.D., Department of Cardiology, Tulane School of Medicine. R.913, 931.

[28] R.1109, 1113; R.1012-1013; 1020-1021 Flint, Affidavit.

[29] R.1120-1122.

[30] R.1123-1124.

[31] R.1747-1749.

with rendering a decision as to whether Dr. Hartz was qualified for an award of tenure, determined she was qualified for tenure at Tulane and voted in her favor 7-2 to recommend an award of tenure.[32] The EFC, an administrative committee,[33] rejected the recommendation of Tulane Medical School's P & H Committee.[34] The EFC did not determine the qualification for tenure and voted only to accept/reject recommendation. The EFC offered no reason for rejecting the P & H Committee's recommendation. The only explanation Dr. Hartz received was "the boys always vote together."[35]

Dr. Hartz appealed to the FTFR. The FTFR examined whether the EFC had the power to accept or reject the recommendation of the Medical School's P & H Committee to award tenure. The FTFR concluded, under the Medical School's Constitution, the EFC could accept or reject the recommendation. No other matters were considered by the FTFR.[36] The

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[32] Tulane's P & H Committee determined Dr. Hartz was qualified for tenure and recommended an award of tenure to her in disregard of the vigorous opposition of her Chairman, Dr. Hewitt. Affidavit of Philip Kadowitz, Ph.D., Member Tulane University School of Medicine, P & H Committee. R.1174-1177.

[33] R.1127-1128.

[34] R.1061.

[35] R.913, 966; R.1744-1746.

[36] R.382.

FTFR did not vote "against granting her tenure" as Mr. Kutcher and Ms. Tygier contend.

CONCLUSION

The district court erred in granting summary judgment on Dr. Hartz's legal malpractice claim against Mr. Kutcher and Ms. Tygier. The district court ignored genuine issues of material fact concerning Mr. Kutcher and Ms. Tygier's scope of the representation and duty to Dr. Hartz. The district court also misconstrued the facts and drew inferences in favor of Mr. Kutcher and Ms. Tygier.

The Fifth Circuit Court affirmed without reasons and 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.

This Court should grant Certiorari.

Respectfully submitted,

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