



## Lawyer Not Liable for Failure to Make a Better Argument to Avoid an Error by the Trial Court

April 26, 2013

[Thibodeaux v. Braud & Gallagher, L.L.C., \\_\\_\\_ So.3d \\_\\_\\_, 2013 WL 375572 \(La.App. 4 Cir. 2013\)](#)

### Brief Summary

Plaintiff clients filed a legal malpractice action against defendants, their former attorneys (the “Law Firm”), for the Law Firm’s alleged failure to timely file an underlying medical malpractice claim. The legal malpractice claim was filed while the medical malpractice claim was on appeal. The clients’ appeal of the medical malpractice claim was successful, and the case was remanded. Although the underlying case was found to have been timely filed, the clients argued that their legal malpractice claims were still proper because the Law Firm did not argue what was inevitably the successful argument the clients’ subsequent counsel made on appeal. The Law Firm was granted summary judgment because the clients could not prove that it failed to timely file the medical malpractice claim.

### Complete Summary

A physician performed a caesarian section and a hysterectomy on one of the clients (the patient). While the patient was still hospitalized, she retained the Law Firm to represent her because she believed that her physician had negligently lacerated her bladder during surgery. The Law Firm timely filed a request for medical review panel as there were 16 days remaining before the expiration period. The parties were notified that an attorney chairman had been selected for the medical review panel, but the panel did not meet and did not issue an opinion. No notice of the panel’s expiration was given.

The Law Firm then filed a medical malpractice action. The physicians objected and successfully argued in the trial court that the prescriptive period (90 days from the date the attorney chairman was selected plus the remaining 16 days) had expired before the lawsuit was filed, and that the claim was thus time-barred. Shortly thereafter, the clients discharged the Law Firm and hired another law firm to handle the appeal of the medical malpractice claim and to file a legal malpractice claim against the Law Firm. The appeal on the medical malpractice dismissal was successful, and the case was remanded.

Although the underlying case was in fact timely filed, the clients argued that there was still actionable negligence by the Law Firm. They contended that the Law Firm had failed to raise the appropriate defenses to the physician’s objections, and that the appeal and its expenses were necessitated solely by the failure of the Law Firm to present the trial court with the same arguments which subsequent counsel successfully argued on appeal. In upholding summary judgment for the Law Firm, the court held that the clients failed to establish that they would be able to satisfy their evidentiary burden of proof at trial that the Law Firm negligently allowed the medical malpractice claim to prescribe. The court



also noted that “we cannot suppose 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.”

### **Significance of Opinion**

This case is important because it reiterates the longstanding principle that a plaintiff must establish all elements of a legal malpractice claim. Here, the clients had no damages. Interestingly, the court stated that it was not suggesting that a lawyer “who engages in a course of substandard conduct by actively counseling his client to the client’s detriment can avoid liability for the client’s added expenses simply because his former client is able to recover through the employment of other counsel what would otherwise have been lost.”

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