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# Frivolous claims and legal malpractice: to what extent may an attorney reject an apparently hopeless lawsuit?

GRAF ISOLA Rechtsanwälte GmbH | Litigation - Austria



JAKOB WIDNER

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The Supreme Court<sup>(1)</sup> recently had to clarify whether an attorney is liable for damages if they refuse to bring an action after examining a factual and legal situation and considering it to be futile.

## Facts

The plaintiff was transgender, born male and had been seeking gender reassignment surgery since 2010. She got into a dispute with the hospital and the senior physician treating her regarding necessary preparatory measures. She filed numerous discrimination complaints with various ombuds in order to enforce her wish to have the operation. She also filed complaints against the physicians treating her. In one case brought by her an expert witness testified and concluded that the plaintiff suffered from a personality disorder.

At the end of 2015, she finally turned to a defendant lawyer who instructed her to pursue the desired gender reassignment surgery by legal means. The defendant lawyer did not know anything about the plaintiff's previous complaints and lawsuits or about the plaintiff's psychiatric report.

In May 2016, medical clearance for the operation was granted, but the attending doctor refused further treatment due to the lawyer's intervention, as did another doctor. The head of the medical department therefore referred the plaintiff to another hospital.

In Autumn 2016, the plaintiff, with the help of the defendant lawyer, wanted to sue the hospital for damages due to the delayed release for surgery and the refusal to continue treating the plaintiff. The defendant pointed out that damages require unlawful conduct and that the refusal of the surgery request, due to the lack of a trustful doctor-patient relationship and medical concerns, was not unlawful. Moreover, there was the possibility of treatment in another hospital. The plaintiff then also brought the Vienna Anti-Discrimination Act into play. According to this law, discrimination on the grounds of gender identity is prohibited. The defendant lawyer pointed out that she could not see any discrimination and that the law had not been created for cases like this. She was, therefore, not able to bring such a claim.

The plaintiff nevertheless insisted on the lawsuit. The defendant lawyer thus demanded further documents and a meeting. It was not until three months later that the plaintiff contacted the defendant lawyer and warned her of the impending limitation period. Nevertheless, the plaintiff did not provide the defendant with any new documents from which discrimination could be inferred. In view of the unclear factual and legal situation and the cost associated with frivolous litigation, the defendant lawyer refused further representation, terminated the professional relationship and suggested that the plaintiff retain other counsel.

Between 2018 and 2019, the gender reassignment surgery was finally performed on the plaintiff in another hospital. Represented by her new attorney, the plaintiff then sued the Vienna hospital for damages (compensation for pain and suffering and lost earnings). This claim was legally dismissed because the Vienna hospital's refusal to continue treating the plaintiff was not deemed unlawful by the courts in that other proceeding.

Therefore, the plaintiff went after the defendant lawyer, claiming approximately €265,000 in damages and repayment of attorney's fees due to legal malpractice.

## Decision

The lower courts dismissed the claim. The Supreme Court confirmed the legal opinion of the two lower courts.

Referring to its previous case law, the Court summarised the rights and duties of the lawyer as follows:

- The attorney/client-relationship is intended to help the client achieve or defend the law in the best possible way.
- This duty includes the avoidance of disadvantages that may be associated with the loss of the case.
- From this follows the obligation to inform the client about futile lawsuits.
- To this end, the attorney must counsel their client to reveal all relevant facts and question statements where contradictory.
- However, after conscientious examination of the factual and legal background of a case, the attorney cannot be obliged to file a lawsuit if they reasonably draw the conclusion that such a move would amount to a frivolous attempt of judicial recourse.

Based on these principles, the Supreme Court concluded that the defendant was correct in assuming the futility of the discrimination claims, because such a legal conclusion simply could not have been derived on the basis of the facts presented by the plaintiff. The relaxed standard of proof under the Vienna Anti-Discrimination Act does not change this. The plaintiff was not even able to show a prima facie case of discrimination. In addition, the plaintiff had withheld essential information and documents from her lawyer.

The Supreme Court also rejected another argument of the plaintiff as wrong. The plaintiff asserted that a lawsuit against the hospital would also have been promising and therefore should have been initiated by the defendant lawyer as, in every court case, there is also the possibility of a court settlement. To this the Supreme Court countered that the futility of a lawsuit would then never have to be considered by the advising lawyer which, however, contradicted the case law on the client/attorney relationship and the attorney's obligation to also avert negative legal consequences from her client.

## **Comment**

The decision clarifies that the litigator is not a mere puppet of the client in the enforcement of their claims, but that, to the contrary, the attorney has an independent duty of review, that enables them to reject apparently hopeless litigation without being exposed to damage claims by clients.

The professional code of conduct of Austrian lawyers goes one step further; an attorney who wilfully conducts such hopeless lawsuits is also acting in violation of the code.

*For further information on this topic please contact [Jakob Widner](#) at GRAF ISOLA by telephone (+43 1 401 170) or email ([j.widner@grafisola.at](mailto:j.widner@grafisola.at)). The GRAF ISOLA website can be accessed at [www.grafisola.at](http://www.grafisola.at).*

## **Endnotes**

(1) OGH 30 June 2022, 4 Ob 102/22m.