NR-2599

IN THE SUPREME COURT
OF FLORIDA

CASE NO. 95,000

ALAN H. SCHREIBER, Public Defender
of the 17th Judicial Circuit of Florida, and
RICHARD L. JORANDBY, Public Defender
of the 15th Judicial Circuit of Florida,

Petitioners,

-vs-

ROBERT R. ROWE,

_________________________/

ON REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

STATE OF FLORIDA

CROSS ANSWER BRIEF OF
PETITIONER ALAN H. SCHREIBER

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INTRODUCTION

The Petitioners, Alan H. Schreiber, Public Defender of the 17th Judicial Circuit of Florida, and Richard L. Jorandby, Public Defender of the 15th Judicial Circuit of Florida, were defendants in the trial court. Respondent, Robert R. Rowe, was the plaintiff in the trial court. In his brief, the parties will be referred to by name.

SUMMARY OF ARGUMENT

The fourth district court of appeal correctly ruled that a plaintiff in a legal malpractice action, as part of the causation element of the cause of action, must prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceedings. This ruling is consistent with public policy concerns addressed in various decisions, which consider that the law views the criminal conduct and not the attorney's malpractice as the legal cause of damages, unless a plaintiff can prove his innocence of the crimes with which he was charged.

The clear majority of courts have concluded that a civil malpractice plaintiff who has committed a crime should not be entitled to recover from his former defense counsel for the consequences of counsel's negligence. Otherwise, the criminal would be able to profit from his own wrong and acquire property by his own crime. The courts have required the malpractice claimant to prove at the civil trial his "actual innocence".

This distinction between "actual innocence" and the presumption of "legal innocence" inherent in a criminal trial makes sense. In the criminal trial, Rowe was presumed to be innocent of the criminal charges; but in this civil case he must, as part of the causation element of the cause of action, prove

by the greater weight of the evidence that he did not commit the crimes with which he was charged. This burden is necessary and proper in the context of a civil case. The fourth district ruling in this regard must be upheld.

<u>ARGUMENT</u>

A PLAINTIFF IN A LEGAL MALPRACTICE ACTION, AS PART OF THE CAUSATION ELEMENT OF THE CAUSE OF ACTION, MUST PROVE BY THE GREATER WEIGHT OF THE EVIDENCE THAT HE WAS INNOCENT OF THE CRIMES CHARGED IN THE UNDERLYING CRIMINAL PROCEEDINGS.

In its decision, the fourth district court below held that a plaintiff in a legal malpractice action, as part of the causation element of the cause of action, must prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceedings. The court reasoned that "[s]uch a rule comports with public policy concerns identified in various cases, which require that unless a plaintiff can establish his innocence of the underlying criminal charges, the law views the criminal conduct as the legal cause of damages, and not the attorney's malpractice." *Rowe v. Schreiber*, 725 So.2d 1245, 1251 (Fla. 4th DCA 1999).

The fourth district relied on cases like *Glenn v. Aiken*, 569 N.E.2d 783 (Mass. 1991) which explained that common law tort liability did not support a rule that allowed recovery to one who is guilty of the underlying criminal charge, and that a person who is guilty need not be compensated for what happened to him as a result of his former attorney's negligence. "Courts have

generally required that a former criminal defendant prove his innocence of the crime charged as an element of his claim that his former trial counsel was negligent in defending him." *Id.* at 785. These cases do not treat defense counsel's negligence as the cause of the former client's injury as a matter of law, unless the plaintiff proves that he did not commit the crime. *Id.* at 786.

Other courts have also reached the conclusion that a civil claimant who has committed a crime should not be entitled to recover from his former defense counsel for the consequences of counsel's negligence. For example, in *Carmel v. Lunney*, 70 N.Y.2d 169, 518 N.Y.S.2d 605, 511 N.E.2d 1126 (1987), the New York Court of Appeals held that the plaintiff's failure to successfully challenge his underlying conviction was fatal to his claim in the malpractice action. In *Carmel*, the court declared that the plaintiff must allege his innocence in the criminal proceeding in order to state a cause of action for legal malpractice arising from negligent representation in the criminal proceeding. Because the plaintiff's conviction had not been successfully challenged, the court ruled that he could neither assert, nor establish his innocence which precluded a malpractice action against his attorney. *Id.* at 173.

The *Carmel* court reasoned that because the claimant could not assert

his innocence, public policy prevents him from maintaining a malpractice action against his attorney. "This is so because criminal prosecutions involve constitutional and procedural safeguards designed to maintain the integrity of the judicial system and to protect criminal defendants from overreaching governmental actions. These aspects of criminal proceedings make criminal malpractice cases unique, and policy considerations require different pleading and substantive rules." *Id.* at 173.

In discussing these policy reasons, the supreme court of Texas stated:

> Permitting a convicted criminal to pursue a legal malpractice claim without requiring proof of innocence would allow the criminal to profit by his own fraud, or to take advantage of his own wrong, or to found a claim upon his iniquity, or to acquire property by his own crime. As such, it is against public policy for the suit to continue in that it would indeed shock the public conscience, engender disrespect for court and generally discredit the administration of justice.
>
> *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995) (quoting *State ex rel. O'Blennis v.* Adolf, 691 S.W.2d 498, 504 (Mo.Ct.App. 1985) (factual innocence is an indispensable element of malpractice cause of action).

As the court concluded in *Peeler*, if a person is unable to prove his innocence, he must accept his criminal conduct as the sole proximate cause of his conviction. *Id.* at 499.

In *Orr v. Black & Furci, P.A.*, 876 F.Supp. 1270 (M.D. Fla. 1995), the

court considered the issue of whether a plaintiff who could not prove his innocence has proximately caused whatever harm he suffered as a result of his conviction. The court determined that the policy announced in the supreme court's decision in *Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989) "against permitting criminal defendants two opportunities to prove that their representation was inadequate dovetails with the policies announced by states requiring innocence to bring a malpractice claim. In accordance with this policy, it is the criminal defendant's guilty conduct that foreseeably and substantially causes the injuries that occur as a result of his conviction. The court concludes that Florida courts would agree with the majority rule, and 'accept as the proximate cause . . . of all damages which occurred to [plaintiff] by reason of [the indictment], his guilt and his guilt alone.'" *Orr* at 1276. Although *Orr* limited it holding to situations where criminal defendants plead guilty to a crime, the court held that as malpractice plaintiffs they must prove their innocence in order to maintain a cause of action against their attorney.

In *Bailey v. Tucker*, 533 Pa. 237, 621 A.2d 108 (Penn. 1993), the Pennsylvania supreme court required that in a malpractice action against a former defense attorney, the defendant must prove that he is innocent of the crime or any lesser included offense. The court elaborated that the purpose

of criminal and civil trials is to discover the truth, and if the truth is that the defendant committed the acts which make up the charged crime, he will not be able to collect damages for the discovery of the truth. The court found that it would violate public policy to allow the possibility of a guilty plaintiff collecting damages. *Id.* at 248.

Rowe contends that the fourth district court has placed an insurmountable burden upon the criminal defendant who sues his attorney for malpractice. To the contrary, the burden is not insurmountable for all defendants who claim their defense lawyer committed malpractice. The burden is only insurmountable for those defendants who committed the unlawful acts which with they were charged. Therefore, if in fact Rowe committed capital sexual battery upon his daughter, then he will not be successful in this malpractice action against his former criminal attorney. On the other hand, if Rowe did not commit such a crime, then his burden is not insurmountable at all. He will have an opportunity at trial to prove by the greater weight of the evidence that he was innocent of the crimes charged.

In this respect, the fourth district did not as Rowe contends, confuse the distinctions between "actual innocence" and legal innocence". Unlike Rowe, the fourth district does recognize the distinctions regarding the burden of proof

in a criminal case and in a civil case. In the earlier criminal case, Rowe was presumed to be innocent of the criminal charges before his conviction and after his post conviction relief was granted. But Rowe confuses the state's burden in a criminal prosecution with his own burden as a plaintiff in a civil case for malpractice. In this civil case, Rowe is required, as part of the causation element of the cause of action, to prove by the greater weight of the evidence that he did not commit the crimes with which he was charged.

Rowe contends that "a criminal defendant seeking to sue his defense attorney for malpractice should have to prove legal innocence, through a showing of an invalidation of the conviction either on appeal or through post-conviction relief." (Rowe's Combined Answer and Initial Brief, p. 13). In his view, Rowe presumably would have an opportunity to prove the alleged malpractice at trial and then simply show that he obtained post conviction relief, without the necessity of any evidence as to whether he actually committed the crimes. Succinctly put, Rowe would like to be able to ignore the issue of whether he committed a crime, then waltz into a civil courtroom a decade a half later and have the judge instruct the jury that he is presumed innocent of the criminal charges. At the very least, Rowe would like have his former attorneys bear the burden to prove that he committed capital sexual

battery upon his daughter. This position is, of course, contrary to the majority of cases which have considered the issue.

The distinction in treating malpractice cases based on whether they arise from a criminal or civil underlying case is justified by the

> unique position which a client accused of a crime occupies vis a vis a civil client. Unlike in the civil litigation area, a client does not come before the criminal justice system under the care of his counsel alone; he comes with a full panoply of rights, powers, and privileges. These rights and privileges not only protect the client from abuses of the system but are designed to protect the client from a deficient representative. Thus, whereas in a civil matter a case once lost is lost forever, in a criminal matter a defendant is entitled to a second chance (perhaps even a third or fourth chance) to insure that an injustice has not been committed. For these reasons we are constrained to recognize that criminal malpractice trespass actions are distinct from civil legal malpractice trespass actions, and as a result the elements to sustain such a cause of action must likewise differ. *Bailey* at 248.

Rowe argues that for him to show his factual innocence of the criminal charges asserted against him places a higher burden upon him as a malpractice litigant than as a criminal defendant. This is true, but it is also proper. This is not a criminal case, and Rowe's former defense counsel are not prosecutors. Rather, it is Rowe who has elected to bring a civil malpractice action, and it is he who bears the burden to prove the proximate cause between any alleged malpractice of his lawyers and his conviction of the crimes. Rowe complains that he would not have had the burden of proof

at any retrial of his criminal charges. Although that is so, it is not relevant to his burden of proof as a civil litigant in this case. Clarifying Rowe's burden of proof in this civil case does not ignore the criminal law notion of "innocent until proven guilty"; it simply recognizes the valid distinction between the burdens of proof in a criminal and a civil case.

Rowe also contends that his successful motion for post conviction relief somehow alleviates his burden to meet his proximate causation requirements in the civil malpractice case. (Rowe's Combined Answer and Initial Brief, p. 14). However, as the *Peeler* court noted, "whether the plaintiff has been exonerated is merely the threshold inquiry. Once the bar is removed, plaintiffs must still meet their burden of proving all elements of legal malpractice. . . ." *Id.* at 498. Although Rowe may have met his threshold requirement of exoneration for this civil malpractice case, he cannot disregard the requirement that he prove his innocence of the criminal charges. The fourth district's ruling below that Rowe must prove his innocence at trial must therefore be upheld.

CONCLUSION

Based on the foregoing, Petitioner Alan H. Schreiber requests that this court enter its order affirming the fourth district court's ruling insofar as its holding that a plaintiff in a legal malpractice action, as part of the causation element of the cause of action, must prove by the greater weight of the evidence that he was innocent of the crimes charged in the underlying criminal proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail this 16th day of July, 1999, to: Diane H. Tutt, Esq., 7900 Peters Road, Suite B-100, Plantation FL 33324, counsel for Respondent Robert R. Rowe; Kenneth J. Kavanaugh, Esq., 400 S.E. 8th Street, Ft. Lauderdale FL 33316-5000, counsel for Respondent Robert R. Rowe; James C. Barry, Esq., Adams, Coogler, Watson & Merkel, P.A., Post Office Box 2069, 1555 Palm Beach Lakes Blvd., Suite 1600, West Palm Beach, FL 33402-2069, counsel for Petitioner, Richard L. Jorandby.

I HEREBY CERTIFY that this brief is produced in 14 point Arial font type, which is proportionately spaced.

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