IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,000

ALAN H. SCHREIBER, etc.
et al.,

Petitioners,

vs.

ROBERT R. ROWE,

Respondent.
_____/

AMENDED
RESPONDENT'S REPLY BRIEF ON CROSS-PETITION

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SUMMARY OF ARGUMENT

While Rowe acknowledges that there are a number of jurisdictions that have held that a criminal defendant suing his defense attorney for legal malpractice must prove his "actual innocence" as an element of the cause of action, the imposition of this additional requirement is unjustified and, in reality, nothing more than a policy decision to deny criminal defendants, even those who have had their convictions invalidated, the right to sue their defense counsel for malpractice.

The statute of limitations does not begin to run until a presumably valid conviction is set aside, at which time, the criminal defendant can legitimately make what has been referred to as "a colorable claim of innocence." As a matter of policy, this conclusion makes sense since it is inappropriate to allow a person sitting in jail convicted of a crime to collect damages from his attorney.

However, to hold a person who has had his conviction set aside presumptively guilty is not reasonable. Unlike the cases where a valid conviction stands or a person has admitted his guilt, in a situation such as that presented in the immediate case there is no justification to make this presumption.

To make a person prove a negative is extremely difficult, if not impossible. Such a showing by a malpractice plaintiff will likely consume the entire malpractice case. Moreover, there is no valid reason to treat a person like Rowe differently than a civil malpractice plaintiff.

REPLY ARGUMENT

Both Jorandby and Schreiber argue that the Fourth District was correct to hold that a criminal defendant, suing his defense attorney for malpractice, must prove his innocence of the underlying crime in order to prove the causation element of the legal malpractice cause of action. In support of their argument, they cite to a number of cases from other jurisdictions that have previously considered this issue. While acknowledging that there are a number of jurisdictions that have held that a criminal defendant suing his defense attorney for legal malpractice must prove his "actual innocence" as an element of the cause of action, it is nonetheless true that the imposition of this additional requirement is unjustified and, in reality, nothing more than a policy decision to deny criminal defendants, even those who have had their convictions invalidated, the right to sue their defense counsel for malpractice.

As argued in the initial brief, a criminal defendant that has a valid conviction against him cannot sue his criminal defense attorney for malpractice because he cannot prove the issue of causation. Until it is set aside, the defendant's conviction and subsequent imprisonment is caused by his guilt rather than any negligence on the part of counsel. As properly recognized by the Fourth District in this case, this is why the statute of limitations does not begin to run until the conviction is set aside, at which time, the criminal defendant can legitimately make what has been referred to

as "a colorable claim of innocence." *See* ***Carmel v. Lunney***, 518 N.Y.S.2d 605 (Ct. App.1987)(recognizing that to state a claim for malpractice arising from representation in a criminal proceeding, plaintiff must allege his innocence or a colorable claim of innocence). As a matter of policy, this conclusion makes sense since it is inappropriate to allow a person, sitting in jail convicted of a crime, to collect damages from his attorney.

However, to take the analysis one step further, as the Fourth District has done in this case, by holding that a person like Rowe, who has had his conviction set aside, will nonetheless be deemed guilty is not reasonable. Unlike the cases where a valid conviction stands or a person has admitted his guilt, in a situation such as that presented in the immediate case, there is absolutely no justification to presume Rowe is guilty of the charges brought against him.

Schreiber's comment beginning on page 9 of his answer brief that "Rowe would like to be able to ignore the issue of whether he committed the crime, then waltz into a civil courtroom a decade and a half later and have the judge instruct the jury that he is presumed innocent of the criminal charges. . ." is not a fair characterization of Rowe's position in this case. Nor, for that matter, is Jorandby's assertion on page 13 of his brief, that Rowe is advocating that he be provided with an unrebuttable presumption of innocence in the civil malpractice case. What Rowe is suggesting in

this case is that a rebuttable presumption of innocence, in favor of the criminal defendant, exist. Such a presumption is neither inappropriate nor unjustified in light of the fact that, by virtue of having succeeded in post-conviction relief, there is no longer a valid conviction outstanding. As argued in detail in the initial brief, Rowe, like any other person who has had his conviction set aside, is therefore not guilty of the charges brought against him. To advocate, as Schreiber and Jorandby do, that Rowe should nonetheless be presumed guilty unless and until he can prove himself innocent is unjustified and contrary to all notions of fairness known to our system of justice.

To the extent that a defense attorney chooses to defend a malpractice suit by arguing that it is the criminal defendant's guilt that has caused his damages, it should be plead as an affirmative defense and the burden should fall on the defense attorney to prove this issue during the malpractice case. As pointed out by Jorandby in his answer brief, the notion that the criminal defendant may, to some extent, be responsible for his damages is analogous to a comparative negligence concept. As such, like a comparative negligence defense, it should be pled and proven by the lawyer, the defendant in the malpractice case.

On page 12 of his answer brief, Jorandby attempts to justify the Fourth District's imposition of a higher burden of proof on criminal defendants by arguing

that public defenders are somehow different from other attorneys and therefore should be given special protections vis-a-vis legal malpractice lawsuits. This argument is misplaced since, regardless of the alleged constraints placed upon a public defender, he, just like any other attorney, has a constitutional obligation to represent his client in a manner that is, at the very least, not negligent. To the extent that a public defender's representation does not meet this minimal expectation, and causes the criminal defendant to suffer damages as a result thereof, he can and should be liable for malpractice.

Moreover, Jorandby claims on page 16 of his answer brief that the "mere endurance" of a criminal defendant's right to sue his counsel is of great value and thus, presumably, can justify the heightened "actual innocence" burden. This argument misses the mark since the right to pursue the lawsuit means nothing if the burden of proof is so high that it can never be met. While Schreiber suggests that this heightened burden will only be impossible for someone who is, in fact, guilty, of a crime, this claim is not correct. To make a person prove a negative, in this case that he did not commit a crime, is extremely difficult, if not impossible. Such a showing by a malpractice plaintiff will not only detract from the issue of defense counsel's malpractice, but likely consume the entire malpractice case. To accept the "actual innocence" showing as an element of a legal malpractice case in this context is, in

reality, to do away with this cause of action.

Schreiber also argues on pages 10 and 11 of his answer brief that Rowe believes that his success on his post-conviction relief motion alleviates his burden to prove proximate cause during the civil malpractice case. This is not correct. Rowe acknowledges that he, as the plaintiff in the civil malpractice case, has the burden to prove the cause of action. What Rowe disputes is that establishing "actual innocence" is, in fact, an element of proving proximate cause in a legal malpractice case. As argued in Rowe's initial brief, a civil defendant seeking to hold his attorney liable for malpractice does not have to show that he did not engage in the tortious conduct for which he is being sued, but rather merely that "but for" his attorney's malpractice, he would not have been found liable. A criminal defendant should not have to show anything different.

Furthermore, the issue of a criminal defendant's innocence will, in many cases, be irrelevant to the issue of malpractice . For example, in ***Peeler v. Hughes & Luce***, 909 S.W.2d 494 (Tex. 1995), the basis for the alleged malpractice was the failure of defense counsel to communicate an offer of immunity made by the prosecutor. In ***Peeler***, there was no question regarding the criminal defendant having committed a crime since she pled guilty to a number of the charges brought against her, and admitted in deposition that she had committed many of the acts for which she had

been indicted. ***Peeler*** at 498. Nonetheless, it was also true that had her attorney told her about the offer of immunity, regardless of the fact that she had committed the crime, she would not have been prosecuted nor convicted. Thus, in terms of proving a prima facie case of legal malpractice, Peeler could establish that her damage was caused by her attorney's negligence in failing to communicate the offer of immunity.

As evidenced by the above example, the issue of "actual innocence" is not really an element of proximate cause. To the contrary, it is separate and distinct from the element of proximate cause. In the event that this Court approves the decision of the Fourth District vis-a-vis this "actual innocence" requirement, it should, at the very least, acknowledge that this requirement cannot, in actuality, be justified in terms of proximate cause, but rather is a pure public policy decision to disallow criminal defendants from suing their defense counsel for malpractice.

As noted by both Schreiber and Jorandby in their answer briefs, a number of cases from other jurisdictions have based their holding that a criminal defendant prove his innocence as a prerequisite to a legal malpractice claim on the policy that a criminal should not directly or indirectly benefit as a result of committing a crime. While acknowledging the validity of this policy concern, Rowe would suggest the "actual innocence" requirement need not be implemented in order to advance this policy consideration. In fact, this policy concern is adequately addressed by requiring,

as this Court recently has in ***Steele v. Kehoe***, 24 F.L.W. S237 (Fla. May 27, 1999), that a criminal defendant obtain appellate or post-conviction relief as a precondition to maintaining a legal malpractice action. By implementing this condition, and thereby requiring that the criminal defendant be able to allege a colorable claim of innocence, the policy concern is acknowledged. Thus, without the "actual innocence" requirement, it is possible for this Court to allow Rowe to pursue his legal malpractice cause of action yet still feel comfortable that it has been faithful to the proposition that a criminal cannot benefit from his crime.

Furthermore, to the extent that this decision is based on public policy, it must be pointed out that the making of social policy is a matter within the purview of the legislature, not the courts. ***State v. Ashley***, 701 So. 2d 338 (Fla. 1997). Thus, to the extent that the Florida legislature wants to legislate regarding the inability of a criminal defendant to sue his defense attorney for malpractice, it is free to do so. However, for the Fourth District to attempt to accomplish this result by camouflaging the issue of one of proximate cause is improper.

CONCLUSION

Based on the arguments and authorities made both herein and in the initial brief, the decision of the Fourth District regarding the need for a criminal defendant in a legal malpractice case against his defense attorney to prove, as an element of his case, actual innocence of the underlying charges against him, should be reversed.

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WE HEREBY CERTIFY that a true and correct copy of the foregoing Amended Reply Brief was furnished by mail this 12th day of August, 1999 to NEIL ROSE, ESQUIRE, P. O. Box 223340, Hollywood, Florida 33022, JAMES C. BARRY, ESQUIRE, 1555 Palm Beach Lakes Boulevard, Suite 1600, West Palm Beach, Florida 33401 and KENNETH J. KAVANAUGH, ESQUIRE, 400 S.E. 8th Street, Fort Lauderdale, Florida 33316-5000.

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