IN THE

SUPREME COURT OF VIRGINIA

Record No. 141239

JUDY GAYLE DESETTI,
Appellant-Plaintiff,

v.

FRANCIS CHESTER, et al.,
Appellees-Defendants.

REPLY BRIEF OF APPELLANT

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA

Among all possible engagements, the role of an attorney is perhaps most important when he is engaged to defend his client's liberty and civil rights during felony criminal proceedings. Yet, the trial court's ruling in this matter precludes any civil recovery for those most harmed by legal malpractice while protecting those attorneys whose malpractice is most pernicious.

If a plea to a lesser offense after post-conviction relief necessarily bars a legal malpractice complaint, attorneys who fail in their professional and ethical obligations to inform clients of plea offers are immunized from malpractice. In this case, a court has already established that Chester's representation was so deficient that Desetti was deprived of her constitutional right to counsel.[1] Yet, your defendants insist that they be completely immunized from liability for the harms they caused Desetti.

The Appellees tender three desultory arguments in their Response to Appellant's Brief. First, Appellees contend that the post-conviction relief Desetti received—vacation of her conviction because of Chester's ineffective assistance of counsel—is "invalidated" because of her guilty

[1] Appellees are referred to collectively as "Chester" throughout this Brief.

plea to misdemeanor assault upon retrial. Second, Appellees question whether Desetti has a "right to a claim of innocence" because of her misdemeanor assault plea. Third, Chester argues that Desetti's own guilt of misdemeanor assault is the cause of the harms she suffered.

A. Chester's Position that Post-Conviction Relief May be "Invalidated" Is Nonsensical and Contrary to Virginia Law

Chester attempts to draw a parallel between the facts of this case and the facts of Adkins v. Dixon, 253 Va. 275 (1997) by focusing on post-conviction relief pleading requirements. Adkins establishes one general "rule" and one case-by-case consideration regarding post-conviction relief. As a general rule, "a post-conviction ruling adverse to the defendant will prevent a recovery for legal malpractice." Id. 253 Va. 275, 281-82 (1997). On a case-by-case basis, "we think that a plaintiff in a case like the present should have the burden of alleging and proving as a part of his cause of action that he has obtained post-conviction relief." Id.

The plaintiff in Adkins was denied post-conviction relief for six of his sixteen charges. This adverse post-conviction ruling prevented his recovery for legal malpractice. Additionally, the particular plaintiff in Adkins was required to allege that he obtained favorable post-conviction relief. There is no express basis provided for this case-by-case criteria. Adkins does not provide an example of a situation where a plaintiff would be

allowed to recover for legal malpractice during a criminal engagement without alleging that he obtained post-conviction relief.

This Court provides an example of such a situation in Taylor v. Davis, 265 Va. 187 (2003). The plaintiff therein was convicted of driving a moped with a suspended license—conduct which was not actually criminal. After his conviction, the plaintiff alerted the trial court that his conduct was not a crime. The trial court, with the endorsement of the Commonwealth's attorney, thereupon "reopened" the criminal case and entered an order that the plaintiff's conviction was "void *ab initio*." The trial court and Commonwealth's attorney rectified a misapplication of the law and provided relief for the aggrieved plaintiff without the necessity of formal post-conviction proceedings.

Although the plaintiff in Taylor did not obtain post-conviction relief as contemplated by Adkins, he was nevertheless allowed to state a claim for legal malpractice because the underlying policy rationale of Adkins did not apply. The plaintiff in Taylor was not required to assert that the successfully obtained post-conviction relief because the case-by-case consideration of Adkins did not apply to the facts of his case.

Applying this framework to the instant case, Desetti did not suffer an adverse post-conviction ruling. The general "rule" therefore does not bar

her recovery. In addition, Desetti successfully obtained post-conviction relief. Her sole conviction was vacated because of Chester's ineffective assistance of counsel. The case-by-case consideration is, therefore, also favorable for Desetti's claim. Both the conditions of the general rule and the case-by-case consideration are satisfied by the facts alleged in Desetti's Complaint.

If the ruling of this Court is a continuation of Adkins and Taylor, then Desetti's claim should not be barred because of the post-conviction relief pleading requirements for attorney malpractice claims. Chester's argument that a post-conviction ruling may be "invalidated" is not supported by any citation and is inconsistent with established law.

B. There is No "Actual Innocence" Requirement in Virginia

Neither Adkins nor Taylor provides a general "actual innocence" pleading requirement as Chester contends. The "actual guilt" of the particular plaintiff in Adkins was a "material consideration." Adkins v. Dixon, 253 Va. 275, 282 (1997). Guilt, however, is a case-by-case consideration.

Nowhere in Adkins does this Court mandate a general "rule" that a plaintiff must plead actual innocence to state a cause of action for legal malpractice. In interpreting Adkins and clarifying this area of law as explained *supra*, this Court had the opportunity in Taylor v. Davis to

establish a general rule that all plaintiffs must plead actual innocence to state a cause of action for legal malpractice committed during criminal representation. This Court did not elect to create such a rule. Instead, this Court reiterated that issues of guilt and innocence were relevant for the particular plaintiff in Adkins. "We also concluded in Adkins that the plaintiff in that case was required to plead that he was actually innocent, and we held that his guilt, not counsel's alleged failure to assert the speedy trial defense, was the proximate cause of his convictions. Taylor v. Davis, 265 Va. 187, 191 (2003)(*citing* Adkins v. Dixon, 253 Va. 275, 282 (1997)).

Chester's contention that Desetti must plead actual innocence of all criminal culpability to state a cause of action for legal malpractice is unsupported by extant Virginia law. Therefore, the legal foundation for Chester's argument that a guilty plea to misdemeanor assault is "equivalent" to a conviction for felony assault is flawed.

Chester's argument also suffers from a fallacy of the converse.[2] The elements of felony assault of a law enforcement officer encompass the

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[2] Every person convicted of felony assault of a law enforcement officer also committed misdemeanor assault. Chester's logic requires that every person convicted of misdemeanor assault also committed assault of a law enforcement officer.

elements of misdemeanor assault. These crimes are not, however, "equivalent" because felony assault of a law enforcement officer has different and additional elements of proof. A felony assault of a law enforcement officer conviction also has different penalties including the additional six months of incarceration and loss of civil rights Desetti suffered because of Chester's ineffective assistance.

Part of Chester's ineffective assistance was failure to convey a plea offer to a different and lesser offense to Desetti and refusal to allow a jury instruction for a lesser offense. Desetti's plea of guilty to that different and lesser offense after receiving her post-conviction relief should *vest* her malpractice cause of action. She is legally innocent of the crime of felony assault on a law enforcement officer, and she can never be charged with that offense, let alone convicted of it.

There is no general "rule" that a plaintiff must be "innocent" to state a claim for legal malpractice arising during criminal representation. It is a case-by-case consideration; and Desetti is legally innocent of felony assault of a law enforcement because her conviction was vacated and because she cannot now be found guilty of that offense at any time in the future.

C. Chester's Reliance on Adkins v. Dixon is Misplaced

Issues of "innocence" and "guilt" are related to proximate causation as stated in Appellant's Opening Brief and as stated in both Adkins v. Dixon, 253 Va. 275 (1997), and Link v. Jones, 493 F. Supp. 2d 765, 769 (E.D. Va. 2007)

Chester contends baldly that Adkins v. Dixon, 253 Va. 275 (1997), is "a case with similar facts to the case at hand." *Appellee's Brief* at 3. In reality, this Court's decision in Adkins should not be controlling because the relevant facts of Desetti's case are distinguishable.

First, the plaintiff in Adkins suffered an adverse post-conviction ruling. This result prevented his recovery for legal malpractice. Desetti did not suffer an adverse post-conviction ruling *and* she successfully obtained post-conviction relief.

Second, the established guilt and accompanying life sentence of incarceration for the plaintiff in Adkins logically precluded additional harm caused by malpractice. With a life sentence of incarceration regardless of malpractice, any legal malpractice could not have caused harm to the plaintiff in Adkins. The issue of proximate causation is entirely different for Desetti because the difference between the penalty she wrongfully suffered and her legally-warranted penalty is the difference between six months'

incarceration and probation. Desetti suffered six months' incarceration proximately caused by Chester's malpractice—not caused by criminal culpability.

In legal malpractice cases, the fact finder ordinarily decides whether a plaintiff has shown that the defendant's negligence was a proximate cause of the plaintiff's loss. Proximate causation is only decided summarily by trial courts when reasonable minds cannot differ as to the outcome. Hazel & Thomas, P.C. v. Yavari, 251 Va. 162, 166 (1996). A logically-similar legal standard should be applied when a trial court considers demurrer.

This is not a situation where Desetti cannot differentiate the harm of malpractice from the harm of any criminal conduct as in Adkins. Reasonable minds may differ on the issue of proximate causation in this case. To that point, the Augusta County Circuit Court has already established that Chester's ineffective assistance likely caused Desetti harm in granting her petition for writ of habeas corpus.

It was erroneous for the trial court to determine that Desetti is unable to prove legal malpractice and that her Complaint must be dismissed, without right to refile, by demurrer based on Adkins v. Dixon. That faulty logic is expanded as Chester continues to rely on Adkins v. Dixon as a shield from liability for his malpractice.

D. Barring Desetti's Claim Is Precisely the Unjust Outcome that the U.S. District Court for the Eastern District of Virginia Determined this Court Would Avoid When it Interpreted Virginia law in Jones v. Link

Desetti's case is the circumstance described in Jones v. Link, 493 F.Supp.2d 765 (2007), where strict interpretation of an actual innocence requirement is contrary to public policy. The plaintiff in Jones was sentenced to a legally-impermissible period of incarceration because of his attorney's negligence relating to sentencing guidelines. That plaintiff's sentence was corrected by post-conviction relief before he served any unwarranted period of incarceration. In interpreting Virginia law, Jones v. Link describes the circumstances present in Desetti's case as a basis for a pleading standard tied to proximate causation and not tied to a strict "innocence" requirement.

> To underscore the soundness of this conclusion [that a legally guilty plaintiff may pursue a malpractice claim against his former attorney] it is appropriate to examine the consequences of a contrary holding in a situation not presented here, namely where an attorney's negligence resulted in a legally impermissible sentence that is not corrected until after plaintiff has already served a longer sentence than legally warranted. In such a case, any available appellate, post-conviction, or habeas corpus remedies would not sufficiently redress plaintiff's injury, that is his unlawfully prolonged incarceration, and in these circumstances, plaintiff's 'case [would be] more akin to that of an innocent person wrongfully convicted than of a guilty person attempting to take advantage of his own wrongdoing.' It follows then that like the 'innocent person wrongfully convicted due to inadequate representation [he] has suffered a compensable

> injury [and] the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss.' Thus, the actual innocence requirement should not apply where plaintiff alleges that his attorney's negligence resulted in a sentencing error because to hold otherwise would deprive a plaintiff subjected to an unlawfully prolonged incarceration due to his attorney's negligence of redress for his injury.
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> Jones v. Link, 493 F. Supp. 2d 765, 770 (E.D. Va. 2007)(*quoting* Powell v. Associated Counsel for the Accused, 131 Wash.App. 810, 815, 129 P.3d 831 (2006); Wiley v. County of San Diego, 19 Cal.4th 532, 79 Cal.Rptr.2d 672, 966 P.2d 983, 987 (Ca.1998)).

The sentence legally warranted for Desetti's conduct was ten days incarceration—all suspended. The sentence Desetti would have served but-for her prior attorney's malpractice in failing to convey a plea offer to her was ten days incarceration—all suspended. After Desetti was afforded her constitutional right to counsel, Desetti received a misdemeanor conviction and suffered a sentence of ten days incarceration—all suspended.

Desetti, however, was actually incarcerated for six months. Her incarceration was caused by Chester's malpractice—not because of her own criminal culpability. She is afforded no remedy for her unwarranted sentence through her post-conviction relief, because she had already served the entire six-month sentence before her conviction was vacated.

Like the situation in Jones v. Link where an attorney's negligent use of the sentencing guidelines resulted in a legally unwarranted sentence, Chester's negligence resulted in Desetti being incarcerated for six months instead of receiving a suspended sentence and probation.

E. Conclusion

This Court should decline to adopt a "rule" requiring plaintiffs to plead "actual innocence" to assert a cause of action for legal malpractice committed during criminal representation. Questions of "actual innocence" or "legal innocence" are inferior benchmarks to a rule which succinctly adopts the logic behind the underlying policy rationale bracing the enhanced pleading standards in malpractice claims arising from criminal representation. "Guilt" and "innocence" considerations relate to proximate causation; and Desetti's criminal conduct did not cause her to be convicted of a felony and suffer six months incarceration. The legally-warranted penalty for her conduct was no greater than the misdemeanor conviction and suspended sentence she received once her constitutional right to counsel was satisfied.[3]

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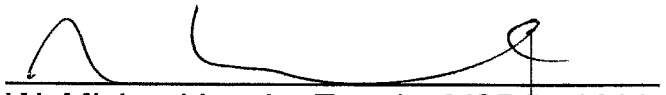
[3] Desetti may have been completely exonerated if she was initially afforded her right to counsel. This Court should infer that Desetti's guilty plea was based, at least in part, on continued prejudice to her upon retrial because

In the narrow circumstances (1) where a plaintiff's post-conviction relief is based on ineffective assistance of counsel, (2) where part of the ineffective assistance is failure to convey a plea offer to plaintiff, and (3) where the plaintiff accepts the plea offer upon retrial, the rationale underlying a strict and inflexible "actual innocence" requirement does not apply. Accordingly, this Court should reverse the Order of the Augusta County Circuit Court of May 18, 2014 sustaining Defendants' Demurrer, should overrule Defendants' Demurrer, and should remand this case for further proceedings.

Respectfully submitted,
JUDY GAYLE DESETTI
By Counsel



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of Chester's incompetent handling of her case. A portion of the established ineffective assistance in this case was Chester's incompetent decision to have Desetti testify as a witness in a case he was handling *for a different client* that she struck a police officer. (Complaint at ¶10; J.A. 3.) This prejudice was not vacated by post-conviction relief.

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CERTIFICATE OF SERVICE AND FILING

I certify compliance with Rule 5:26 as follows:

1. On March 9, 2015, one electronic version and fifteen printed copies of this Brief were filed by transmission, expense pre-paid, to the clerk of this Court by priority, express, registered, or certified mail via the United States Postal Service.

2. On March 9, 2015, one electronic version and three printed copies of this Brief were transmitted, expense pre-paid, to counsel of record for the Defendants in this matter by priority, express, registered, or certified mail via the United States Postal Service to:

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3. This Brief complies with Rule 5:26 and the portion subject to Rule 5:26(b) does not exceed 50 pages.

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