

Adams v. Baker: An Opinion Addressing the Innocence Requirement In Criminal Malpractice Cases

In these consolidated appeals involving three legal malpractice actions, we decide an issue of first impression: whether individuals convicted of a crime must prove their innocence in order to recover on a legal malpractice claim against the lawyers who represented them in the underlying criminal proceedings. The trial court granted the defendants' summary judgment motions in all three cases, concluding that the plaintiffs had no colorable claim of innocence. Because we agree that actual innocence is an element of the plaintiff's criminal malpractice claim, we affirm the trial court's grant of summary judgment in favor of two of the defendants. However, because we disagree with the trial court's extension of this principle to malpractice actions involving underlying civil fraud claims, we reverse the trial court's grant of summary judgment against the third defendant and remand that case to the trial court for further proceedings.

I. Background

Adams v. Baker

During a traffic stop, police found two pounds of heroin in Anthony Adams's car. Adams was convicted of possession of an illicit substance with intent to distribute, a felony. Adams sought a writ of habeas corpus in federal court, arguing that his conviction should be reversed for ineffective assistance of counsel—specifically, he asserted that the police officer who found the heroin had no probable cause to make the traffic stop, and that his attorney, Janice Baker, negligently failed to file a motion to suppress the evidence. The court agreed, and granted Adams's motion for a new trial. On retrial, the heroin was excluded from evidence and Adams was found not guilty. He

subsequently filed this civil action against Baker, seeking compensation for the six months he spent in prison before his ultimate acquittal.

Evans v. Fox; Evans v. George

Abigail Evans owned a majority stake in a privately held company that went bankrupt in 2002. During the bankruptcy proceedings, evidence emerged that Evans had secretly funneled company funds to her personal accounts immediately before filing the bankruptcy petition. Evans was prosecuted for criminal bankruptcy fraud under 18 U.S.C. § 152. She was also sued by the company's minority shareholders for civil fraud. Jeffrey Fox represented Evans in the criminal case, and John George represented her in the civil case. Neither was successful. Evans was convicted of criminal bankruptcy fraud and given the maximum sentence of five years; she was also held civilly liable for common-law fraud and ordered to pay the plaintiffs \$300,000 in actual damages and \$1,000,000 in punitive damages. She sued both Fox and George for legal malpractice, asserting that they failed to present mitigating evidence in both the civil and criminal proceedings that could have shortened her criminal sentence and reduced the amount of civil damages awarded.

II. The Innocence Requirement

Former clients who bring malpractice actions against the attorney who represented them in a civil action must prove that (1) the attorney owed them a duty, (2) the attorney breached that duty, (3) the clients suffered damages, and (4) the attorney's breach proximately caused those damages. *See, e.g., Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995). The plaintiffs in these cases contend that the same elements should apply to malpractice claims arising from criminal proceedings. The

defendants, however, urge this court to join the majority of states that also require proof of actual innocence.

A. Proximate Cause

Most supreme courts that have considered the issue have allowed only defendants who were actually innocent to bring subsequent malpractice actions against the attorneys who represented them in the criminal proceedings. *See Rodriguez v. Nielsen*, 609 N.W.2d 368 (Neb. 2000); *Mahoney v. Shaheen, Cappiello, Stein & Gordon*, 727 A.2d 996 (N.H. 1999); *Wiley v. County of San Diego*, 966 P.2d 983 (Cal. 1998); *Shaw v. State Dep't of Admin.*, 861 P.2d 566 (Alaska 1993); *Glenn v. Aiken*, 569 N.E.2d 783 (Mass. 1991); *Carmel v. Lunney*, 511 N.E.2d 1126 (N.Y. 1987); *but see Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989). Some of these courts have held that proof of innocence fits within the proximate cause element, and some have suggested it is an independent element added for reasons of public policy. We conclude that although the requirement is policy-based, it is nevertheless part of the issue of whether the attorney's breach was the proximate cause of the plaintiff's damages.

Proximate cause has two components: cause in fact and legal cause. *United States v. Rothwell*, 387 F.3d 579, 583 (6th Cir. 2004). Cause in fact is strict but-for causation; for example, an attorney's negligence is a cause in fact of the defendant's harm if the defendant would have obtained a more favorable outcome but for the attorney's negligence. *See, e.g., Wiley*, 966 P.2d at 988. Legal cause, however, encompasses broader policy considerations. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 41, at 264 (5th ed. 1984). As Prosser and Keeton have noted, "the legal limitation on the scope of liability is associated with policy—with our more or less

inadequately expressed ideas of what justice demands or of what is administratively possible and convenient.” *Id.*

Courts have limited the reach of legal cause when strict but-for causation would require a result that would be manifestly unjust or otherwise contrary to public policy. *See, e.g., Smith v. Gore*, 728 S.W.2d 738 (Tenn. 1987). In *Gore*, the plaintiff sued her doctors for malpractice, alleging that she became pregnant because they negligently performed her tubal ligation. *Id.* at 740. She sought damages for the expense of raising her child to majority. *Id.* The court held that the doctors’ negligence could be a cause in fact of the plaintiff’s child-rearing expenses—“scientific logic” dictated that if the doctors had performed the operation properly, the plaintiff would not have gotten pregnant. *Id.* at 749. However, because the Tennessee Legislature had “demonstrate[d] that the public policy of Tennessee is that the obligation for support of minor children is affirmatively placed on the parents of the children,” the court refused to hold that the doctors’ negligence was the legal cause of the child-rearing expenses. *Id.* at 751 (“Defendants’ negligence cannot be considered the legal or proximate cause of the damages incurred by Plaintiff for the support of her normal, healthy child in the circumstances of this case.”).

Courts have applied similar reasoning in legal malpractice cases, holding that a state’s public policy prevents an attorney’s negligence from being considered the legal cause of a guilty defendant’s incarceration. *See Peeler*, 909 S.W.2d at 498; *Wiley*, 966 P.2d at 986. We therefore examine whether there is a public policy in this state that would preclude an attorney’s negligence from being considered the legal cause of a guilty client’s incarceration.

B. The Innocence Requirement in Criminal Cases

In this case, Adams acknowledges that he in fact possessed heroin, but asserts that his acquittal on retrial is a sufficient showing of innocence to maintain a malpractice action. Evans acknowledges that she committed the crime of bankruptcy fraud, but asserts that she should be compensated for her attorney's failure to secure a shorter sentence. We disagree, and instead conclude that, because the plaintiffs cannot show actual innocence, their attorneys' alleged negligence was not the legal cause of their injuries as a matter of law.

Several different reasons persuade us that this limitation is proper. First, criminal defendants who are convicted due to their attorneys' negligence have a remedy not available in the civil system: they may challenge their convictions based on ineffective assistance of counsel. Ineffective assistance claims are available when the counsel's performance falls below an objective standard of reasonable competence and "there is a reasonable probability that the verdict would have been different" if the attorney had provided competent representation. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). A successful claim will result in relief, including the possibility of a new trial. *Strickland v. Wash.*, 466 U.S. 668, 697 (1984). Defendants can successfully assert an ineffective assistance claim regardless of whether they were innocent or guilty, as long as they can show that they would have obtained a different result but for that ineffective assistance. *Morrison*, 477 U.S. at 380.

Second, this state recognizes a fundamental principle that persons who have committed crimes should bear the consequences of those crimes. Due to the higher burden of proof and evidentiary restrictions in criminal cases, some defendants will obtain acquittals even when they actually committed the crimes they were charged with. We accept a result that errs on the side of acquittal in criminal trials, recognizing that it is worth “minimiz[ing] the chance of convicting an innocent person even at the price of increasing the chance that a guilty person may escape conviction.” *Shaw*, 861 P.2d at 571.

But escaping conviction does not mean that the defendant should escape all the consequences of the crime, and it does not mean that such a defendant should necessarily be able to recover in the civil system. A judgment of acquittal in a criminal proceeding is not binding in a civil proceeding. *Tomlinson v. Lefkowitz*, 334 F.2d 262, 264 (5th Cir. 1964). In the civil system, the burden of proof is typically set at “preponderance of the evidence,” and evidence of factual guilt that would be suppressible in the criminal trial may be admitted in a civil trial. *Shaw*, 861 P.2d at 571. Thus, unless we conclude by a preponderance of the evidence that a person was innocent of the crime charged, we may preclude recovery of civil damages in order to ensure that plaintiffs cannot profit from the commission of a crime.

Third, we note that approximately eighty percent of felony defendants are represented by appointed counsel, either public defenders or contract attorneys. *See* Caroline Wolf Harlow, Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases 2 (2000), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf>. Requiring court-appointed attorneys to pay malpractice damages places a significant

burden on public treasuries. The state would be required to pay for the increased cost of the attorneys' malpractice insurance—either directly, in the case of public defenders, or through increased hourly rates, in the case of court-appointed contract attorneys. Some states have avoided these costs by providing appointed counsel with complete immunity from malpractice claims. Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783, 784 (1996). In this state, we have not yet done so; complete immunity would mean that even innocent plaintiffs could not recover for malpractice in the vast majority of cases. However, while taxpayers may reasonably bear the burden of compensating innocent defendants for the harm caused by their attorneys' negligence, we do not believe that it is fair to require those taxpayers to bear the burden of compensating malpractice plaintiffs who actually committed the crimes with which they were charged.

The dissent suggests that such a limitation is inconsistent with the compensatory goals of tort law. It argues that defendants who face longer sentences due to their attorneys' malpractice have suffered harm whether they are guilty of the underlying offenses or not. The dissent states that the purpose of the tort law is to make such claimants whole when they are injured due to someone else's negligence; it is not to draw a moral distinction about which plaintiffs may recover and which may not. We disagree. Tort law has always recognized limitations on liability, even when an actor's negligence causes harm. For example, outside of the malpractice context, tort law distinguishes between negligence that causes emotional disturbance alone and negligence that causes both emotional disturbance and physical harm. See RESTATEMENT (SECOND) OF TORTS, § 463A (1965). Generally the latter is compensable, while the former is not. *Id.* The

reasons for this rule are both practical and moral: “[o]ne is that emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial,” and another is that “where the defendant has been merely negligent, without any element of intent to do harm, his fault is not so great that he should be required to make good a purely mental disturbance.” *Id.* at cmt. b. Given tort law’s history of considering both the practical and moral ramifications of compensation, we believe it is appropriate to consider such matters in legal malpractice cases.

The dissent also suggests that limiting criminal malpractice liability to innocent claimants may reduce the quality of legal services rendered, threatening criminal defendants’ ability to obtain their Sixth Amendment right to effective assistance of counsel. We do not agree that the limitation is likely to have such an impact. First, malpractice actions are intended to compensate individuals who have been harmed; they are not intended to provide a general standard of conduct for attorneys in the state. The disciplinary system and rules of professional conduct, by contrast, are intended to ensure that attorneys generally meet reasonable standards of diligence, competence, and ethical representation. *See, e.g.*, MODEL R. PROF’L CONDUCT 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). We believe that attorneys will generally comply with ethical standards; those who do not may face loss of licensure or other sanctions. Given the gravity of the possible consequences, we do not believe that attorneys will choose to provide substandard representation merely because some clients may be unable to pursue a malpractice claim.

Based on these considerations, we conclude that any plaintiff who seeks to recover damages for incarceration or other criminal penalties must prove innocence as part of the proximate cause element of a legal malpractice action. We apply this rule regardless of whether the underlying crime was a misdemeanor or a felony, as defendants convicted of any crime that carries a sentence of imprisonment have the right to effective assistance of counsel—and therefore also have the alternative remedy of an ineffective assistance of counsel claim if their attorneys’ negligence deprives them of that right. *See Scott v. Illinois*, 440 U.S. 367, 374 (1979).

C. The Innocence Requirement in Civil Cases

We must also consider whether to extend the innocence requirement to civil malpractice claims, particularly when the underlying case involves punitive damages. In this case, Evans was convicted of bankruptcy fraud and held liable for civil fraud, both based largely on the same underlying conduct. George, who represented her in the civil proceedings, argued that Evans should have to prove that she did not engage in the fraud in order to recover on a malpractice claim, regardless of whether that malpractice claim arose out of the civil proceedings or the criminal proceedings. The trial court agreed, and granted summary judgment on her claim.

We agree that civil fraud actions involve many of the same considerations as criminal proceedings, especially when they may result in punitive damages. Punitive damage actions are considered “quasi-criminal,” and, like criminal sanctions, are intended to punish the defendant for wrongdoing. *Pac. Mut. Life Ins. Co. v. Haslip*, 499

U.S. 1, 19 (1991). Punitive damage claims also entail a higher standard of proof than most civil cases—like 31 other states, this state requires that punitive damages be proven by clear and convincing evidence. *See White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 823-25 (6th Cir. 2004).

In spite of these similarities, however, we decline to extend the innocence requirement to civil cases involving punitive damages. Unlike criminal defendants, civil defendants do not have the opportunity to seek redress through a claim for ineffective assistance of counsel. We find this to be persuasive. Evans has not sought post-conviction relief, but it may yet be available to her in the criminal action. Her civil liability, however, is established and cannot be reduced regardless of the quality of counsel she received. We believe that the absence of other remedies weighs in favor of allowing a civil defendant—even one who was found liable for punitive damages—to pursue a legal malpractice action against her attorney.

The dissent points out that drawing such a bright line results in the anomaly that “a person who engages in specific conduct is treated very differently if charged with a crime, compared to a person who engages in the same conduct, but is not charged with a crime.” *Shaw*, 861 P.2d at 577 (Compton, J., dissenting). While true, this statement ignores the differences that already inhere in the criminal and civil justice systems, especially the availability of post-conviction relief in the criminal system. As mentioned, Evans has an alternate remedy in the criminal system; in the civil system, she has none except the possibility of this malpractice action.

Based on these considerations, we adopt a bright-line rule: Criminal defendants must allege innocence in order to state a claim in a subsequent malpractice action, but

civil defendants need not do so, even if they engaged in the same acts. We note, however, that innocence will not be entirely irrelevant even in civil claims: In order to prevail in their malpractice claims, plaintiffs will still have to show that they would have obtained a better result in the underlying action but for the negligence of their attorneys. *Wiley*, 966 P.2d at 988. The plaintiff's culpability in the underlying case may still be relevant to this determination.

III. Conclusion

Because Adams and Evans concede that they engaged in the conduct for which they were charged, we hold that they cannot state a claim for legal malpractice arising from the criminal proceedings. However, because we decline to extend a requirement of actual innocence to civil claims, we conclude that Evans can state a claim for legal malpractice arising from her civil case. We therefore affirm the trial court's summary judgment as to Adams and affirm trial court's summary judgment as to Evans's claim against Fox. We remand Evans's malpractice claim against George for further proceedings consistent with this opinion.

TOTAL WORD COUNT: 2987