

**COURT OF APPEALS  
STATE OF WISCONSIN  
DISTRICT 4  
APPEAL CASE NO. 2019AP000629**

**RECEIVED**

**06-17-2019**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

---

Jama I. Jama,  
Plaintiff-Appellant,

**v.**

Jason C. Gonzalez and Wisconsin Lawyers  
Mutual Insurance Company,  
Defendants-Respondents.

**Date:** June 14, 2019

**District:** 4

**Appeal No.** 2019AP000629

**Circuit Court Case No.** 2018CV001478

Three-Judge Appeal

---

Appeal from the Circuit Court of Dane County  
Honorable Valerie Bailey-Rihn  
Case No. 2018CV001478

---

**BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT JAMA I. JAMA**

---

David J. Lang, WI Bar No. 1001218  
Kevin G. Raasch, WI Bar No. 1100196  
JUDGE LANG & KATERS, LLC  
8112 W. Bluemound Rd. Ste. 101  
Wauwatosa, WI 53213  
414-777-0778  
FAX: 414-777-0776  
Attorneys for Plaintiff-Appellant

## Table of Contents

Table of Contents.....	ii
Table of Authorities.....	iii
<u>INTRODUCTION</u> .....	1
<u>STATEMENT OF ISSUES</u> .....	2
<u>STATEMENT ON ORAL ARGUMENT</u> .....	3
<u>STATEMENT ON PUBLICATION</u> .....	3
<u>STATEMENT OF THE CASE</u> .....	3
<u>Procedural History</u> .....	3
<u>Factual Background</u> .....	3
State of Wisconsin v. Jama.....	4
Jama v. Gonzalez.....	5
<u>STANDARD OF REVIEW</u> .....	6
<u>ARGUMENT</u> .....	7
I.    The Circuit Court’s interpretation of Hicks and Tallmadge is wrong.....	7
A.    Analysis of the Hicks Decision.....	8
B.    Analysis of the Tallmadge Decision.....	9
II.    Wisconsin case law demands that a proof of innocence determination should be reserved for a jury and does not require proof of innocence as to every underlying charge in a criminal case .....	12
III.   Jama has sufficiently pleaded a claim for legal malpractice against Gonzalez and the Circuit Court’s dismissal was in error.....	17
<u>CONCLUSION</u> .....	18
<u>FORM AND LENGTH CERTIFICATION</u> .....	20
<u>CERTIFICATION OF COMPLIANCE WITH SECTION 809.19(12)</u> .....	21
<u>APPENDIX</u>	

## Table of Authorities

### CASES

<i>Bartz v. Edmonds</i> , 2010 WI App 33, 323 Wis. 2d 822, 781 N.W.2d 550.....	14, 15
<i>City of Muskego v. Godec</i> , 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992).....	6
<i>Data Key Partners v.</i> <i>Permira Advisors, LLC</i> , 2014 WI 86, ¶31 (July 23, 2014).....	17
<i>Doe v. Archdiocese of Milwaukee</i> , 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997).....	6
<i>In re Disciplinary Proceedings against Jacobson</i> , 2005 WI 76, Par. 16, 281 Wis.2d 619, 626, 697 N.W.2d 831.....	6
<i>Hicks v. Nunnery</i> , 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809.....	1, 6-10, 12, 14, 16-18
<i>State of Wisconsin v. Jama</i> , Case No. 12-CF-1759.....	4
<i>State v. Jama</i> , 2016 WI App 26, 367 Wis. 2d 748, 877 N.W.2d 650.....	4
<i>Tallmadge v. Boyle</i> , 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173.....	7, 10-12
<i>Trevino v. Ladd &amp; Milaeger</i> , 2002 WI App 165, 256 Wis. 2d 693, 647 N.W.2d 467.....	14-15
<i>Walberg v. St. Francis Home, Inc.</i> , 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36.....	7

### CONSTITUTIONS, STATUTES, AND REGULATIONS

Wis. Stat. § (Rule) 809.23(1)(a).....	3
Wis. Stat. Ann. § 940.225(2)(cm).....	13
Wis. Stat. Ann. § 943.20(1)(a).....	13

## INTRODUCTION

“[A]s matter of public policy, persons who *actually commit the criminal offenses for which they are convicted* should not be permitted to recover damages for legal malpractice from their former defense attorneys.” *Hicks v. Nunnery*, 253 Wis. 2d 721, 755 (Ct. App. 2002). This public policy element established by *Hicks* and its progeny serves as the entire basis of this appeal. The interpretation of the scope of this element will have a lasting impact on Wisconsin case law for decades to come. Not only will it affect legal malpractice in Wisconsin, but it could reshape how criminal defense attorneys view their practice and advocate for their clients.

At the very heart of this public policy is a plea for reason and accountability, requiring proof of innocence in order to recover in a legal malpractice action. Jama I. Jama has countlessly alleged his innocence of the two felony sexual assault charges that sentenced him to probation, required him to register as a sex offender, and eventually placed him in prison for over two years. Now, after his attorney was found ineffective, his convictions overturned, and his release from prison granted, Jama is somehow precluded from recovering malpractice damages based solely on his plea to a completely separate and distinct crime, albeit a crime that was a part of a singular criminal case. Such a conclusion runs afoul of the ruling and underlying public policy in *Hicks* and attempts to foreclose civil recovery of well-pled legal malpractice claims.

## **STATEMENT OF ISSUES**

Issue 1: Must Jama allege that he is innocent of all charges in an underlying criminal action in order to adequately plead malpractice claims against his former defense attorney?

Circuit Court Decision: The Circuit Court held that Jama must plead that he is innocent as to every single criminal charge of an underlying criminal case in order to adequately plead the proof of innocence requirement for malpractice claims against Gonzalez.

Issue 2: Did the Circuit Court err in dismissing Jama's Complaint ruling he was estopped from pleading his innocence of two sexual assault claims because he pled guilty to a separate charge of theft?

Circuit Court Decision: The Circuit Court held that even though Jama has pled his innocence as to the sexual assault charges, he cannot meet the proof of innocence element for a legal malpractice claim due to a theft plea and dismissed the lawsuit with prejudice.

### **STATEMENT ON ORAL ARGUMENT**

The Court should hear oral argument in this case. Each of the issues involves questions of first impression in Wisconsin. The Circuit Court recognized this issue as an area of first impression and anticipated further proceedings. (R. 23:2). Oral argument is necessary to address any questions regarding the parties' arguments on case law that is largely unsettled.

### **STATEMENT ON PUBLICATION**

The Court should publish the decision in this matter under the considerations of Wis. Stat. § (Rule) 809.23(1)(a). There is very little published case law in Wisconsin dealing with the scope of the public policy element for legal malpractice. The decision in this case will clarify the law and impact not only the practice of legal malpractice but how criminal defense cases consisting of multiple charges are viewed and defended.

### **STATEMENT OF THE CASE**

#### **Procedural History**

Plaintiff-Appellant Jama I. Jama ("Jama") filed his Complaint in the Circuit Court of Dane County on June 7, 2018. (R. 1). An Amended Complaint was subsequently filed on November 16, 2018. (R. 13). Appellee-Defendant Jason C. Gonzalez ("Gonzalez") and his insurance provider, Wisconsin Lawyers Mutual Insurance Company, filed a renewed motion to dismiss the Amended Complaint. (R. 14). The circuit court issued its decision and order dismissing Jama's complaint with prejudice on February 13, 2019. (R. 19). Jama then filed his notice of appeal to the Wisconsin Court of Appeals. (R. 21).

#### **Factual Background**

### *State of Wisconsin v. Jama*

Jama's malpractice action stems from the underlying criminal case, *State of Wisconsin v. Jama*, Case No. 12-CF-1759. (See R. 13:2-3). Gonzalez represented Jama during this criminal proceeding in 2012. *Id.* In total, Jama was charged with five counts of criminal conduct: Count 1 – second degree sexual assault, Count 2 – third degree sexual assault, Count 3 – Burglary, Count 4 – Burglary, and Count 5 – theft. (*Id.* at 5). On September 5, 2014, Jama's five-day trial resulted in verdicts of guilty on all five counts and he was taken into custody until his sentencing on December 4, 2014. *Id.* That same day, the presiding judge made a decision and order on the verdict finding that Gonzalez lacked a constant theory of defense or even a basic understanding of the rules of evidence. *Id.* Judge Berz set aside the verdicts for third degree sexual assault (Count 2) and both Burglary charges (Counts 3 & 4). *Id.* Judge Berz entered guilty verdicts for second degree sexual assault (Count 1) and theft (Count 5). (*Id.* at 5-6). On February 25, 2016, the Court of Appeals reversed Judge Berz's dismissal of the third degree sexual assault charge and remanded the case to Circuit Court to reinstate the verdict on the sexual assault (Count 2). (*Id.* at 5); *see State v. Jama*, 2016 WI App 26, 367 Wis. 2d 748, 877 N.W.2d 650. The alleged criminal actions of sexual assault and theft were against a singular victim, but the conduct allegedly occurred hours apart and consists of distinct and entirely separate acts. (R. 23:4).

After conviction, Jama was held for 284 days prior to sentencing. At sentencing Jama was sentenced to nine months (203 days) for his theft which the court ordered as time served and 6 years probation for his second degree sexual assault. (R. 13:5-6). The

additional 81 days served was credited to his felony convictions as good time. *Id.* Jama was ordered to register as a sex offender, probation, absolute sobriety, and eventually sat in prison for approximately two-and-a-half years as a result of the two sexual assault convictions for violating his probation. *Id.*

Through different counsel, Jama filed a post-conviction motion for a new trial based upon ineffective assistance of counsel, and a Machner hearing was scheduled. *Id.* On February 10, 2017, all five of Jama's convictions were vacated due to ineffective assistance of counsel and a new trial was granted. (*Id.* at 7). The court went so far as to say that Jama did not have anyone to advocate for him or present his facts, and admonished Gonzalez for failing to have a grasp of even cursory rules of evidence. *Id.* Jama was released from prison and on September 20, 2017, Count's 1 thorough 4 were dismissed on the Prosecutor's motion. *Id.* Jama pled guilty to only Count 5 (theft) of the original charges and resisting or obstructing an officer, a new count that Gonzalez never represented him on. *Id.* Jama's sentence for theft had no bearing on his probation sentence, the additional 81 days credit towards the sexual assault, or the 40 year sentence he was serving for parole violations, of which he served two-and-a-half years. Further, Jama was required to register as a sex offender, was not allowed to consume alcohol and was banned from State Street in Madison, Wisconsin for a crime he did not commit and has asserted his innocence. (R. 23:4).

### **Jama v. Gonzalez**

Jama's Complaint and subsequent Amended Complaint brought in the Circuit Court of Dane County alleged six claims for relief for legal malpractice against Gonzalez



and his insurance provider, expressly identifying negligent actions and inactions in Gonzalez' representation. (R. 1, 13). Gonzalez moved for a motion to dismiss that was granted by the Circuit Court. (R. 14). The Circuit Court in its oral decision summarized the legal argument behind the motion to dismiss as follows: "[s]o then the question is under the current state of the law, is pleading guilty to one charge sufficient to prevent a legal malpractice in this situation?" (R. 23:4). The Court further assumed for purposes of the motion to dismiss that the first four elements of a legal malpractice claim could be met by the pleadings. (*Id.* at 6-7). The Court rightly focused on the fifth and final element, proof of innocence. This element was established for criminal legal malpractice suits as public policy in *Hicks*. The Circuit Court identified and interpreted two cases in its decision, *Hicks* and *Tallmadge*, and ultimately determined that Jama must be able to prove his innocence on all charges in the underlying criminal suit in order to survive a motion to dismiss. (*Id.* at 5-7).

### **STANDARD OF REVIEW**

Appellate courts review conclusions of law de novo. "An appellate court is not bound by a trial court's conclusions of law and decides the matter de novo." *City of Muskego v. Godec*, 167 Wis. 2d 536, 545, 482 N.W.2d 79 (1992). *In re Disciplinary Proceedings against Jacobson*, 2005 WI 76, Par. 16, 281 Wis.2d 619, 626, 697 N.W.2d 831. The case before the Court is in the context of a motion to dismiss. A motion to dismiss tests the legal sufficiency of the plaintiff's complaint. *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 331, 565 N.W.2d 94 (1997). When reviewing such a motion, the court of appeals will accept the alleged facts and the reasonable inferences as

true, but will draw all legal conclusions independently. *Walberg v. St. Francis Home, Inc.*, 2005 WI 64, ¶6, 281 Wis. 2d 99, 697 N.W.2d 36. The court of appeals independently analyzes legal issues without deference to the trial court and should do so here.

## **ARGUMENT**

The primary legal issue that must be determined is whether or not the public policy element established in *Hicks*, requires Jama to plead his innocence as to every single criminal charge in the underling criminal suit in order to prevail on his legal malpractice claim against Gonzalez. Based upon that determination, this Court must conclude whether or not the Circuit Court erred in granting the Defendant-Appellee's motion to dismiss Jama's legal malpractice suit.

### **I. The Circuit Court's interpretation of *Hicks* and *Tallmadge* is wrong.**

In the Circuit Court's oral decision the court analyzed two cases *Hicks v. Nunnery*, 253 Wis.2d 721 (Ct. App. 2002), and *Tallmadge v. Boyle*, 300 Wis.2d 510 (Ct. App. 2007). (R. 23:5). The court did not offer detailed analysis of these cases but stated:

I grant you that both of these cases are not perhaps directly on point, but I do believe that the public policy provisions set forth in these cases are pretty strong in favor of not finding legal malpractice in a criminal case unless the defendant can prove that they are innocent of all charges. *Id.*

Proof of innocence of *all charges* is not a requirement in legal malpractice actions and is not supported by either of these cases or any current case law in Wisconsin. Jama does not seek recovery or to prove causation for damages as it relates to his conviction of theft. Jama merely asserts that as result of Gonzalez' negligent representation, he suffered

recoverable injury due to the wrongful, and now vacated, convictions of Second and Third Degree Sexual assault which he has asserted his innocence. The essential distinction the Circuit court and Gonzalez fail to recognize is the difference between the separate underlying criminal conduct at issue.

**A. Analysis of the *Hicks* Decision**

In *Hicks*, the plaintiff, Hicks, filed a legal malpractice claim against his former defense attorney, Nunnery, regarding his representation in an underlying criminal matter. *Hicks v. Nunnery*, 2002 WI App 87, 253 Wis. 2d 721, 730, 643 N.W.2d 809. Much like Jama, Hicks was convicted of multiple charges, robbery, burglary and sexual assault. *Id.* at 731. Hicks' convictions were eventually vacated and overturned due to ineffective assistance of counsel and he was released from prison prompting his legal malpractice claim. *Id.* A jury found Nunnery's representation negligent and awarded damages to Hicks. *Id.* Nunnery appealed and argued that Hicks failed to prove that he was innocent of the underlying criminal charges. *Id.* at 735. The court of appeals was tasked with determining whether or not the circuit court erred in its jury instructions by failing to instruct the jury of a proof of innocence requirement. *Id.* at 746. The court of appeals persuaded by case law determined that Hicks must prove to a jury he is "innocent of the charges of which he was convicted in order to prevail on a claim of legal malpractice..." *Id.* at 753. The court instructed that Nunnery was entitled to a new trial in which Hicks must "convince five-sixths of the civil jurors, by a preponderance of the evidence, that he did not commit the offenses of which he was convicted." *Id.* at 753-54. Additionally, the

Appellate Court’s analysis was made in the context of summary judgment. This decision established the public policy element before us today.

The *Hicks* court refrained from using the “innocent of all charges” qualifier adopted by the Circuit Court in this case. In fact, the *Hicks* court reserved the finding of guilt or innocence in malpractice actions for a jury. *Id.* at 755. A jury would be tasked with determining whether or not Hicks could prove his innocence of multiple charges. *Id.* at 753-55. Had a new trial occurred, a jury could have conceivably found that Hicks proved his innocence regarding the sexual assaults but did not meet his burden regarding theft. At no point did the *Hicks* court establish that upon remand Hicks must prove innocence of *all charges* in order to recover. The *Hicks* court did not extend such a broad requirement that for Hicks to be successful on his malpractice claim, he must prove actual innocence on all charges. Such a suggestion would coningle the separate causation requirements of a legal malpractice claim and ignore the separate damages stemming from each wrongful conviction. In sum, the *Hicks* court succinctly defines this element as “a matter of public policy, *persons who actually commit the criminal offenses for which they are convicted should not be permitted to recover damages for legal malpractice* from their former defense attorneys.” *Id.* (emphasis added). This public policy requirement clearly seeks to enforce a broader sense of justice and accountability for criminal actions *actually committed* but offers no support to the Circuit Court’s finding that Jama is barred from asserting innocence to two felonies simply because he did not also assert his innocence as to a misdemeanor theft.

## **B. Analysis of the *Tallmadge* Decision**

Tallmadge was a seventy-five year old man who was incarcerated in the California penal system. *Tallmadge v. Boyle*, 2007 WI App 47, 300 Wis. 2d 510, 730 N.W.2d 173, 175. A California jury found him guilty of fifteen counts of sexually assaulting minors and sentenced him to 265 years in prison. In January of 2000, Tallmadge hired Attorney Boyle to focus on securing relief via writ of *habeas corpus*. *Id.* at 176. Boyle prepared a final draft of a state court writ providing it to Tallmadge in March or April 2003. *Id.* Tallmadge was not satisfied with the draft and fired Boyle in July 2003. *Id.* Tallmadge then retained Robert E. Sutton, who filed a writ of *habeas corpus* in federal court in September 2003. *Id.* In March 2004, United States Magistrate Judge Paul Abrams issued a decision dismissing the petition with prejudice based on the fact that it was not timely filed. *Id.* at 177.

As a result of the untimely filed writ, Tallmadge filed an action against Boyle and his insurer alleging legal malpractice among other counts in Wisconsin state court. *Id.* On Boyle's motion for summary judgment, the trial court dismissed the legal malpractice action, and Tallmadge appealed to the Wisconsin court of appeals. *Id.* The court of appeals offered an in-depth analysis of the *Hicks* element in upholding the circuit court's dismissal:

The trial court in the instant case concluded that Tallmadge failed to present sufficient evidence to create a dispute of fact as to causation. We agree with the trial court. There is no evidence to demonstrate that Tallmadge had any possibility of securing a new trial on all fifteen convictions. The federal *habeas* action filed by Sutton addressed only two of the fifteen convictions, and thus, even if it had succeeded, it would not have secured Tallmadge's freedom. *Id.* at 180.

The Court further stated:

There is nothing in this record to demonstrate that Tallmadge could prove that any action or inaction by Boyle caused him any recoverable injury. In a situation where a criminally convicted defendant files a legal malpractice lawsuit, the injury is different than in non-criminal settings. In order to prove causation, the convicted criminal must show that, but for his former attorney's conduct, he would have been successful in the criminal lawsuit. Success in this context is not merely to have a court grant a motion or even order a new trial. Success in this context is a get out of jail free card. Thus, success here means proving to a jury that the convicted criminal is innocent of all fifteen counts for which he was convicted. *Hicks* clearly declares this to be the law in Wisconsin. *Id.* at 181-82.

Undoubtedly, in the Circuit Court in Jama's case focused on the last two sentences of this passage. However, the context regarding Jama and Tallmadge could not be more distinguishable. The untimely writ filed in Tallmadge concerned only two of 15 sexual assault criminal counts, all of which individually would have kept the 70 year old man in prison longer than his life expectancy. *Id.* at 178. The ultimate goal of Tallmadge's writ of *habeas corpus* was to receive a new trial and to get out of prison. *Id.* at 181. This could not be accomplished and therefore, Tallmadge was not damaged as a result of the negligent untimely filing. *Id.*

The issue in *Tallmadge* centered on the causation element and whether or not Tallmadge could prove his attorney's actions caused him recoverable injury. *Id.* ("In order to prove causation, the convicted criminal must show that, but for his former attorney's conduct, he would have been successful in the criminal lawsuit."). Jama has already proven, though his criminal appeal, that but for Gonzalez' negligence, he would not have been convicted of the now vacated sexual assault charges. Jama has already met the burden of proving ineffectiveness and he has received his "get out of jail free card." (R. 13:7). Jama's convictions were vacated and he was released from prison. *Id.* If not for these previous court determinations, Jama would still be a convicted sex offender and

would still be in prison to this day due to his sexual assault convictions. Jama is attempting to show causation for damages sustained as a result of his wrongful sexual assault convictions due to Gonzalez' legal malpractice. Jama does not, nor can he, seek damages for his nine months of incarceration attributable to his theft charge despite Gonzalez' already determined ineffective defense. *Hicks* and *Tallmadge* clearly establish that Jama is precluded from showing he was damaged by Gonzalez' negligent representation regarding the theft charge unless Jama has sufficiently plead innocence as to that charge. (R. 13:3). While Jama does not assert his innocence as to the theft charge, it has no bearing on his innocence as to the sexual assault charges or damages as a result of those erroneous felony convictions. *Hicks* clearly establishes that Jama's innocence relating to the sexual assault charges is a matter for a jury. *Hicks*, 253 Wis. 2d at 755. Proving innocence as to the wrongful sexual assault convictions must be analyzed independently from a separate charge of theft.

**II. Wisconsin case law demands that a proof of innocence determination should be reserved for a jury and does not require proof of innocence as to every underlying charge in a criminal case.**

Of the five criminal charges Jama was convicted of, this court only need address the two sexual assault charges and the theft charge as the burglary convictions were previously set aside and Jama did not suffer damages as a result of those initial convictions. (R. 13:5). The distinction between the offenses of sexual assault and theft cannot be overstated. Second Degree sexual assault is a class C felony under Wisconsin criminal code punishable by up to 40 years in prison while theft of movable property under \$2,500 is a class A Misdemeanor punishable by up to 9 months in prisons. *Compare*

Wis. Stat. Ann. § 940.225(2)(cm) (Maximum incarceration for conviction of this offense is 40 years), *with* Wis. Stat. Ann. § 943.20(1)(a) (Maximum incarceration for conviction of this offense is 9 months). While these charges were brought under the same criminal complaint, the underlying actions and punishment are vastly different. Indeed these alleged criminal actions were against a singular victim, but the conduct allegedly occurred hours apart and consists of distinct and entirely separate acts.

These separate charges carried specifically tailored sentences and punishment for Jama and independently impact his alleged damages as a result of Gonzalez' negligence. Jama was sentenced to Nine months (203 days) for his theft which was served prior to his sentencing, and 6 years of probation for his second degree sexual assault. (R. 13:5-6). The additional 81 days served while Jama waited for sentencing was credited to his felony convictions as good time. *Id.* Jama was required to register as a sex offender, ordered to absolute sobriety, ordered to not enter an establishment whose purpose is the sale of alcohol, and eventually sat in prison for approximately two and-a-half years as a result of the two sexual assault convictions for violating his probation. (*Id.* at 6). Registering as a sex offender, the sentence of probation, and the subsequent years Jama spent in prison are unique punishments attributable only to the sexual assault convictions without any bearing or overlap with his theft conviction. To infer that Jama cannot prove to a jury that he is innocent of the two sexual assault charges because he plead guilty to the theft charge is an incredibly myopic view of our complex criminal legal system and unsupported by case law.



Indeed, Jama is estopped under the public policy element established in *Hicks* and its progeny of proving his innocence of the theft conviction, but that is all. After the convictions were vacated, Jama plead guilty to the charge of theft. The reasoning set forth in *Trevino v. Ladd & Milaeger*, states that pleading guilty to a specific charge bars a plaintiff from pursuing a legal malpractice claim as he cannot now assert innocence as to that specific charge in his civil complaint. 2002 WI App 165, 256 Wis. 2d 693, 647 N.W.2d 467. Trevino entered a plea pursuant to a plea agreement to one count of first-degree sexual assault of a child. *Id.* at ¶2. Trevino then brought a malpractice case against his attorney because he was not made aware of a recent increase in the penalty for the charge which allowed Trevino to be sentenced under a greater penalty scheme. *Id.* The malpractice case was dismissed on summary judgment as Trevino could not prove his innocence as to his conviction which the Wisconsin court of appeals upheld. *Id.* at ¶¶5-6. The *Trevino* case only dealt with one criminal count and conviction as opposed to multiple charges in the present matter.

The case of *Bartz v. Edmonds*, lends credence to the idea that plaintiffs in legal malpractice actions must be able to prove innocence of actual criminal conduct for which they are actually convicted of and not innocence as to every single charge levied against them in an underlying criminal proceeding. 2010 WI App 33, 323 Wis. 2d 822, 781 N.W.2d 550. Bartz shot a man with a shotgun at close range and eventually admitted to the shooting. *Id.* at ¶2. Bartz was convicted of first-degree intentional homicide. *Id.* Bartz' legal malpractice claim was based on his assertion that his attorney failed to notify him of the federal district court's decision and judgment denying his habeas petition,

allegedly costing him his appeal and an acquittal. *Id.* at ¶8. In order to meet the *Hicks* requirement of innocence, Bartz argued his trial attorney was ineffective as he believed he should have been sentenced to a lesser charge of first-degree reckless homicide relating to his culpability. *Id.* at ¶10. Bartz never denied the actual criminal action of shooting someone, simply the culpability. *Id.* The Appellate Court in *Bartz* analyzed the criminal conduct perpetrated and not the difference in charges, stating “[b]ecause Bartz admitted at trial and in his brief that he actually shot the victim, he cannot demonstrate that he is actually innocent; consequently, his legal malpractice claim against Edmonds was properly dismissed by the circuit court.” *Id.* While Bartz argued ineffectiveness led to a longer sentence, he did not deny the underlying criminal act of shooting someone with a gun. The court recognized this and sought to uphold the public policy of not rewarding criminal conduct through a malpractice suit.

Applying the reasoning in *Bartz* and *Trevino* would preclude Jama from asserting his innocence to any charges stemming from the specific criminal conduct of improperly taking of another’s property. Had the two burglary convictions not been dismissed and Jama suffered damages as a result of those convictions, he may be prevented from proving his innocence of those charges. The legal definitions of burglary and theft may differ in the same way the *Bartz* court observed legal definitions of first degree murder and reckless homicide differ. While the sentencing and damages differ in severity, the underlying criminal conduct remains the same. Jama did not plead guilty to the two Counts of burglary but his admitted criminal action of illegally taking another’s property could fall under the same category of criminal conduct the court seeks to prevent

monetizing off of in malpractice suits. The same cannot be said for the completely distinct and separate alleged conduct that led to two sexual assault convictions of which Jama has always professed his innocence and alleges so in his Complaint.

Gonzalez' argument at the circuit court level for dismissal of Jama's case does not meet the standard for dismissal. Gonzalez argues that despite his negligence, he should be protected from a legal malpractice action because out of 5 separate charges, Jama was actually guilty of one. (R. 14:3). Gonzalez is using the public policy element in *Hicks* as a safety net for his own negligence. Gonzalez seeks to shrug responsibility for his part in Jama's convictions for two sexual assault charges that were vacated due to his ineffectiveness. Accepting the Circuit Court's reasoning and Gonzalez's argument would set a dangerous precedent shielding negligent defense attorneys from civil liability. Gonzalez had never tried a sexual assault case prior to Jama and the results were disastrous for his client. At the Machner hearing, Judge Brez stated:

“Defendant had no one to advocate for his version of events as Attorney intentionally did not speak with him, intentionally did not investigate the facts in Defendant's possession and intentionally did not incorporate defendant's version into the defense theory. Consequentially, Attorney was perplexed as to an effective defense theory. Instead of speaking to his client to learn the facts, Attorney chose to make up “facts” which had no nexus to the facts known by Defendant which had little to no support in the evidence and which were internally conflicting.” (R. 13:6).

The sexual assault charges were the most severe and life-altering of the five brought against Jama. This was a case that required honest and zealous defense against the sexual assault charges which Jama did not receive. As a result, Jama faced the shame of registering as a sex offender and spent years in prison for a crime that he did not commit and has staunchly denied. Allowing Gonzalez to escape liability for the damages he

caused is not upholding the integrity of the justice system but in fact securing the opposite result. Wisconsin case law simply does not state or even infer that a legal malpractice plaintiff cannot plead innocence regarding two vacated convictions because of a separate charge and conviction. Whether or not Jama can prove he is actually innocent of the vacated sexual assault charges is a matter for a jury as required by *Hicks*. *Id.* at 753-54, 758.

### **III. Jama has sufficiently pleaded a claim for legal malpractice against Gonzalez and the Circuit Court's dismissal was in error.**

When analyzing a motion to dismiss, “[t]he sufficiency of a complaint depends on substantive law that underlies the claim made because it is the substantive law that drives what facts must be pled.” *Data Key Partners v. Permira Advisors, LLC*, 2014 WI 86, ¶ 31 (July 23, 2014). Essentially, a complaint must allege sufficient facts to “plausibly” state a claim under controlling law. A legal malpractice claim in Wisconsin contains the following elements: 1) existence of a lawyer-client relationship; 2) the attorney’s acts or omission constituted negligence; 3) the negligence cause injury to the claimant; 4) the nature and extent of the injury; and 5) “as a matter of public policy, persons who ***actually commit the criminal offense for which they are convicted*** should not be permitted to recover damages for legal malpractice from their former defense attorneys.” (R. 13:3, 7-15); *Hicks* at 755.

Jama’s complaint has unequivocally alleged the first four elements of legal malpractice. The fifth element of proof of innocence has been met as described above in exhaustive detail. Whether or not Jama can prove his actual innocence as to the sexual

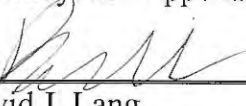
assault charges is a question for the jury and was incorrectly and prematurely dismissed by the Circuit Court as Jama's amended complaint has asserted his innocence as to those charges. At this stage, well-pled allegations must be accepted as true. Upholding the Circuit Court's reasoning would extend the scope of *Hicks* in a way that has not been previously contemplated or intended. Grouping every single criminal charge into one indistinguishable proof of innocence requirement ignores the fundamental characteristics of the Wisconsin criminal code distinguishing severity of specific offenses and allowable punishment under the sentencing guidelines. Gonzalez' representation of Jama as to every charge was ineffective, negligent and meets the standard of legal malpractice. Jama does not seek recovery for the one crime he actually committed, but for the damages stemming from his wrongful and now vacated sexual assault convictions of which he has asserted his innocence. Whether or not Jama can prove his innocence of the vacated sexual assault charges is a question for a jury.

### **CONCLUSION**

The Circuit Court committed error when in granted Gonzalez' motion to dismiss Jama's well-pled amended complaint. It was wrong when it held that Jama was precluded from pleading innocence as to the two initial charges of sexual assault for which he sustained significant damages due to Gonzalez' negligence. Wisconsin case law clearly reserves a determination on proof of innocence of these charges for a jury. Jama requests that this Court reverse the Circuit Court's dismissal and remand the case for further proceedings.

Dated this June 14, 2019 in Wauwatosa, Wisconsin.

JUDGE LANG & KATERS, LLC.  
Attorneys for Appellant

By:   
\_\_\_\_\_  
David J. Lang  
State Bar No. 01001218  
Kevin G. Raasch  
State Bar No. 1100196

MAILING ADDRESS:  
8112 W. Bluemound Road, Suite 101  
Wauwatosa, WI 53213  
Telephone: (414) 777-0778  
Facsimile: (414) 777-0776

### **FORM AND LENGTH CERTIFICATION**

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief and appendix produced with proportional times new roman font. This brief is 5,780 words, calculated using the Word Count function of Microsoft Word 2010.

Dates: June 14, 2019



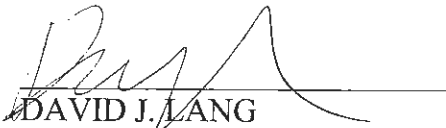
---

DAVID J. LANG

**CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)**

I hereby certify that I have submitted an electronic copy of this brief, and appendix, which complies with the requirements of Section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed from of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dates: June 14, 2019

  
DAVID J. LANG