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

08-01-2019

**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: August 1, 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

REPLY BRIEF 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
Phone: 414-777-0778
FAX: 414-777-0776
Attorneys for Plaintiff-Appellant

ARGUEMNT

The Defendants' response brief misconstrues the Plaintiff's argument which seeks an answer to the straight forward issue of whether or not a plaintiff must plead innocence as to every single underlying criminal charge for which he received legal representation in order to meet the pleading standard for legal malpractice against his former attorney. The Defendants erroneously surmise in their first argumentative paragraph that, "Mr. Jama proposes an interpretation [sic] Wisconsin law under which every criminal defendant who prevails – even partially – in a *Machner* hearing would be empowered to sue his or her former trial counsel for legal malpractice." (Response Brief, p. 3-4). Such a statement is perplexing and distracts from issue at hand. Mr. Jama's successful outcome in the *Machner* hearing finding Mr. Gonzalez' representation ineffective and subsequent reversal of Jama's convictions merely establishes a basis for his innocence of Second and Third Degree Sexual Assault charges which still must be proven in his legal malpractice suit. (R. 13:5-6). Emphasis of the *Machner* hearing decision merely seek to further distinguish Jama, who is no longer convicted of Second and Third Degree Sexual assault, from the plaintiff in *Tallmadge*. *Tallmadge v. Boyle*, 2007 WI App. 47, 300 Wis. 2d 510, 730 N.W.2d 173. Jama has alleged such innocence and Wisconsin case law suggests he has met the pleading standard of the *Hicks* public policy requirement.

The Defendants and the Circuit Court's basis for a requirement of innocence to all charges rests entirely on their interpretation of *Tallmadge* which is clearly distinguishable and does not set a hard and fast precedent but simply analyzed the "context" of Tallmadge's claims and alleged facts. Wisconsin case law does not require a plaintiff in a legal malpractice action to plead that he was innocent of every charge in an underlying

criminal case in order to meet the pleading standard against his former defense attorney. The Circuit Court's decision has now expanded the original public policy element. Jama still must plead innocence to the underlying criminal charges for which he was convicted and seeks damages as a result of his attorney's alleged negligent conduct. Jama has met his pleading standard and dismissal of his claims was improper.

1. Defendants' Analysis of *Tallmadge* is Overly Simplistic and Flawed

Defendants rightfully observe that *Hicks* did not address whether a Plaintiff must assert actual innocence as to all charged offenses. (Response Brief, p. 9). However the Defendants quickly fall off course in their understanding of *Tallmadge*, alleging that the court in *Tallmadge* specifically sought to address this issue.

The *Tallmadge* court narrowly tailored its decision in the context Tallmadge's specific criminal convictions and his recoverable injury, holding "[t]here is nothing in this record to demonstrate that Tallmadge could prove that any action or inaction by Boyle caused him any recoverable injury." *Tallmadge*, at ¶19. The court further stated, 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. *Id.* As every single one of Tallmadge's 15 convictions would have kept him in jail for his life expectancy, the only successful outcome in his criminal appeal would have been to achieve reversal of all 15 convictions. *Id.* As his appeal only addressed two of these convictions, Tallmadge would still remain in prison for the rest of his life and was unable to assert his innocence to all of the convictions. *Id.* As a result, Tallmadge could not prove that any action by his attorney caused any recoverable injury, even if all facts were found in his favor.

The Defendants' argument and the Circuit Court's decision ignores the fundamental malpractice elements of causation and recoverable injury available to Jama. As detailed in Jama's principle brief, the criminal acts of Theft and Second and Third Degree Sexual Assault are distinct and independent acts which result in substantially different punishments and recoverable injury for negligent representation. (Appellant Brief, p. 10). The Defendants pull quotes from *Tallmadge* but unequivocally fail to understand the reasoning and careful considerations behind the Court's determinations. The *Tallmadge* court was analyzing under a more stringent summary judgment analysis as opposed to a motion to dismiss and the fact that Tallmadge was still convicted felon. Jama's felony convictions were overturned and he suffered damages specifically related to these two sexual assault convictions entirely independent of the theft charge or any attributable conduct related to that theft charge. (R. 13:7).

Such injuries were never available in *Tallmadge*. The alleged legal malpractice of failing to file a timely appeal did not cause any damage to Tallmadge. *Tallmadge*, at ¶19. The *Tallmadge* court never intended to create a broad standard requiring innocence to every separate charge of an underlying criminal case. If the *Tallmadge* court intended to do so, there would be no point in analyzing the causation of attorney conduct, the potential damages alleged by Tallmadge, and what specifically "success" meant in the unique context of Tallmadge's alleged facts. *Id.*

Success in Jama's criminal trial would have resulted in acquittals of the sexual assault and burglary charges (the crimes he did not commit and has professed his innocence). If not for Gonzalez' alleged negligent representation, Jama alleges he would not have been convicted of Second and Third Degree Sexual Assault, and suffered the

injustice of his punishment as a result of those two convictions. These are cognizable injuries attributed to Gonzalez' conduct for which Jama has pled recoverable injury and innocence.

Plaintiff's principle brief asserts that the Circuit Court's decision essentially "precludes" Jama from pleading that he is innocent of the Sexual Assault charges which are the sole causes of his recoverable damages. Plaintiff does not reference preclusion as a legal term of art but in the sense that although the criminal charges were dismissed, Jama is actually prevented from alleging his innocence as to these charges for which he has suffered damages all because of a separate theft plea. Jama has alleged innocence as to two vacated convictions which are the sole basis for his damages which he has alleged were caused by Gonzalez' negligence. Such recovery was never available in *Tallmadge* and this Court should recognize such a distinction. Adopting the Circuit Court's analysis of actual innocence would be creating new law and setting additional burdensome elements for claiming legal malpractice that do not currently exist.

2. Defendants "Mainstream" Case law is Unpersuasive and Further Supports Plaintiff's Interpretation of *Hicks* and *Tallmadge*

Defendants' page long string-cite of jurisdictions adopting an "actual innocence" requirement is largely irrelevant as most of these cases do not address the issue on appeal. Plaintiff has never disputed that *Hicks* establishes an innocence requirement for legal malpractice claims in the context of criminal defense representation in Wisconsin. It is the scope of what "actual innocence" entails that determines whether or not Jama has sufficiently pled a malpractice action against Gonzalez. In fact, the majority of the out-of-jurisdiction cases cited by the Defendants do not conclude that "actual innocence"

requires pleading innocence to every separate and distinct criminal charge in an underlying criminal case in which the alleged malpractice arose.

The only case Defendants cite that supports the theory of proving innocence as to every underlying criminal charge is *Bailey v. Tucker*, 553 Pa. 237, 621 A.2d 108, 113 (1993) (establishing an element in Pennsylvania that, “the attorney's culpable conduct was the proximate cause of an injury suffered by the defendant/plaintiff, i.e., “but for” the attorney's conduct, the defendant/plaintiff would have obtained an acquittal or a complete dismissal of the charges). *Id.* The language Wisconsin courts have used to establish elements for legal malpractice related to criminal proceedings is entirely distinct from the conclusions of Pennsylvania courts. The Pennsylvania rule is an extreme outlier rather than the “mainstream” holdings Defendants erroneously contend them to be.

Diving further into the Defendants’ out-of-circuit cites, *Wiley* and *Aiken* enforce the public policy standard that “[t]he underpinnings of common law tort liability, compensation and deterrence, do not support a rule that allows recovery to one who is guilty of the underlying criminal charge. A person who is guilty need not be compensated for what happened to him as a result of his former attorney's negligence. There is no reason to compensate such a person, rewarding him indirectly for his crime.” (*Glenn v. Aiken*, *supra*, 569 N.E.2d at p. 788). Jama faced 5 separate criminal charges, of which, he has asserted his innocence to four of those charges and suffered damages as a result of two of those now vacated convictions. Just like *Tallmadge*, the principles of causation regarding the actual innocence requirement are addressed in almost every case this issue arises. Jama is no longer a convicted sex offender and his two charges of sexual assault have been vacated. It is the damages stemming from these convictions due to his

attorney's negligence that Jama seeks recovery not his plea of theft. There is no issue of causation regarding the theft conviction as Jama has faced no damages due the negligent representation. Jama has not asserted a cause of action or alleged damages regarding his 203 day sentence for theft and would not be able to benefit from his criminal conduct of theft under the *Hicks* public policy element. (R. 13:5-6). The actual innocence analysis should begin and end with Jama's two Sexual Assault convictions which are the only causes of action and recoverable injury due to alleged legal malpractice. Extending this requirement to all underlying criminal charges treats any and all crimes as indistinguishable, and ignores the separate conduct, severity, and punishment unique to each offense.

To date, the most expansive analysis of the "actual innocence" requirement comes from the Iowa Supreme Court in *Barker v. Capotosto*, 875 N.W.2d 157 (Iowa 2016). It appears the Defendants are well aware of this case as their string-cite is identical to the court's jurisdictional analysis. *Barker*, at 161-62. The *Barker* court extensively evaluated multiple jurisdictional rules regarding legal malpractice and how they have implemented the public policy requirement of actual innocence and causation. The *Barker* court succinctly summarized:

Thus, we think the causation determination will frequently take into account the guilt or innocence of the client. And ultimately, we are not persuaded by the remaining public policy concerns other than causation. For example, while the notion that an individual should not "profit from participating in an illegal act" is a good general principle, *Humphries*, 712 S.E.2d at 800, it is too general to describe how our legal system actually operates. We do not bar criminal defendants who are guilty of their crimes from recovering overpayments from their criminal defense counsel, suing for clearly illegal searches, or suing the medical staff in the prison for medical malpractice. ***By analogy, a criminal defendant who is convicted of a crime due to legal malpractice, and gets that conviction set aside, should not be categorically barred from suing his or her former attorney***

just because the defendant may have been guilty of some lesser charge that would have resulted in a lower sentence.

(Emphasis added) *Barker*, at 166-67.

The *Barker* court identified the exact factual pattern of this appeal. While *Barker* rejects an actual innocence requirement, it supports the Plaintiffs' interpretation of the unique factors considered in *Tallmadge*. *Barker* contends that the public policy elements, like the one established in *Hicks* and *Tallmadge*, simply do not extend to categorically bar Jama from suing Gonzalez for his alleged negligence regarding the overturned sexual assault convictions because of a plea to a separate and lessor crime. The elements and terminology determined by *Hicks* do not adopt the broad and overly simplistic elements of other jurisdictions such as Pennsylvania. As such, the *Hicks* innocence requirement should be addressed as to each underlying criminal action attributable to the negligence alleged.

Plaintiff does not suggest any of these out of circuit cases are controlling but simply refutes Defendants misconception that a "majority" of other jurisdiction have adopted their overbroad interpretation of *Tallmadge*. To adopt this view would allow future court's to ignore the specific and unique context of each individual malpractice suit, the elements of causation, damages alleged and recoverable injury pled.

3. Defendants' Offer No Rebuttal to Plaintiff's Argument that Proof of Innocence Should be Addressed as to the Specific Underlying Criminal Actions as Applied in the *Bartz* Decision.

As cited in Plaintiff's initial Brief, the Appellate Court in *Bartz* analyzed the specific criminal conduct allegedly perpetrated as to whether or not a malpractice plaintiff can assert his innocence. *Bartz v. Edmonds*, 2010 WI App 33, 323 Wis. 2d 822, 781 N.W.2d 550. In dismissing malpractice claims, the *Bartz* court distinctly identified

the underlying criminal conduct that resulted in the conviction. The *Bartz* court was uninterested in the discrepancy of damages perceived by the plaintiff as the underlying criminal conduct could not be refuted. *Barz* focused on the underling illicit conduct, the criminal act of shooting another human being. *Bartz*, at ¶15. Here, there is no conceivable nexus between the criminal actions of theft and the alleged criminal actions of sexual assault. They are separate crimes under the Wisconsin Criminal code, are distinct under the criminal sentencing guidelines, and require separate and unique legal defenses.

The public policy considerations reiterated in *Hicks* seek to prevent abuses of justice such as allowing a truly guilty person to benefit from his or her criminal conduct. *Hicks*, at 750-51. Jama has alleged his innocence of the two felony convictions which caused him damages. He should not be prevented from pleading his innocence as to these convictions because of a separate theft conviction. Jama has no other redress for the damages he sustained for two crimes he did not commit. Jama has successfully exhausted his post-conviction remedies and is no longer a convicted felon. If the circuit court's broadening of the *Hicks* and *Tallmadge* actual innocence standard is upheld, Jama and other innocent criminal defendants will be foreclosed from seeking civil remedies for wrongful convictions due to their attorneys' legal malpractice. Jama has unequivocally asserted his innocence of two Sexual Assault charges which are his only cause of damages. As *Bartz* focused on the actual criminal actions as a cause of legal consequences, so should this court. Suggesting that because Jama committed a theft, he must willing accept any and all damages stemming from Gonzalez' negligent legal

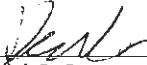
representation of Jama's felony charges is neither just or supported by the public policy concerns addressed in Wisconsin case law.

CONCLUSION

The Circuit Court committed error when in granted Gonzalez' motion to dismiss Jama's well pled amended complaint. The Circuit Court erred when it held that Jama was foreclosed from pleading innocence as to the two initial charges of sexual assault for which he sustained significant damages due to Gonzalez' negligence. That decision expands the law and redefines the actual innocence requirement of *Hicks*. Jama has pled innocence and 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 August 1, 2019 in Wauwatosa, Wisconsin.

JUDGE LANG & KATERS, LLC.
Attorneys for Plaintiff-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 2,501 words, calculated using the Word Count function of Microsoft Word 2010.

Dates: August 1, 2019



DAVID J. LANG

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this reply brief, 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.

Dated: August 1, 2019



DAVID J. LANG