BILLARY HINTON,
Plaintiff-Respondent,

v.

RICH LAWZIO,
Defendant-Appellant.

A-00-6851-T3

Superior Court, Appellate Division

Submitted July 7, 2000 -- Decided August 7, 2000

Before Judges GRIM, REAPER and MERCY.

J. LEE BERMAN, Gored & Berman L.L.P., attorneys for the plaintiff-respondent (Mr. Berman, of counsel and on the brief).

RICHARD CHAINEE, Doublebush & Chainee, P.C., attorneys for the defendant-appellant (Mr. Doublebush, of counsel and on the brief).

REAPER, J.A.D., joined by GRIM, J.A.D.

This case arises out of the January 21, 2000 decision of the Superior Court, Law Division, denying the motion by defendant Rich Lawzio to dismiss a legal malpractice action brought against him by plaintiff Billary Hinton on the alternate bases of (a) the bar of the statute of limitations and (b) failure to state a claim on which relief can be granted. The alleged malpractice occurred during defendant's representation of the plaintiff in a federal official corruption prosecution in 1996.

The trial court held that plaintiff's legal malpractice claim was timely filed and thus is not barred by the statute of limitations. It determined that the six-year limitations period of N.J.S.A. 2A:14-1 is appropriate since plaintiff alleges primarily economic damages, and that the action would still be timely under the two-year limitations period of N.J.S.A. 2A:14-2 because of tolling.

The Law Division further held that innocence is not an element in a legal malpractice claim stemming from a criminal case and that even a guilty plea does not preclude an individual from maintaining a legal malpractice claim against the attorney who represented her in a criminal action.

We disagree in every respect. We hold, first, that plaintiff's legal malpractice claim is barred by the two-year limitations period of N.J.S.A. 2A:14-2 and, second, that a guilty

person may not maintain a legal malpractice claim for the actions of her counsel during the criminal case that led to her conviction. Accordingly, we reverse the trial court's decision.

The Facts

The facts as established before Law Division Judge Jon Core Zine are as follows[1]:

Plaintiff Billary Hinton, a 1990 graduate of the Rutgers School of Engineering and a resident of Newark, New Jersey, was the Building Inspector for the City of Newark, New Jersey, between 1991 and 1997. Ms. Hinton was also licensed by the New Jersey Division of Consumer Affairs as a builder, plumber and electrician, and used those licenses in a business she ran called Homewreckers Inc. Homewreckers was a consulting practice in which plaintiff oversaw the rehabilitation of commercial buildings throughout northern New Jersey.

On March 12, 1996, plaintiff was approached in her office by Special Agent Ken Norton of the Federal Bureau of Investigation, who told plaintiff that he was in charge of investigating corruption in the building departments of cities throughout New Jersey. He informed plaintiff that she and other individuals were targets of a federal grand jury investigation. Plaintiff denied any knowledge of wrongdoing within the Newark building inspection department. Special Agent Norton repeatedly asked if there was anything that she wanted to tell him, and told her that her cooperation was important. Mr. Norton did not reveal the identity of the other individuals under investigation, or any details of the investigation. Plaintiff told Mr. Norton that any further contact with her should be made through her lawyer. Immediately after this meeting plaintiff retained the legal services of Rich Lawzio, a respected attorney in Newark who specializes in criminal cases.

In conversation between defendant and Agent Norton, it became clear that plaintiff was alleged to have conspired with another Newark official to extort money from a real estate developer. The United States Attorney sought plaintiff's cooperation in order to make a case against the other official and, according to plaintiff's allegations, at some point in the fall of 1996, informed defendant that the United States would offer transactional immunity for plaintiff if plaintiff would agree to testify as to all she knew about the activities of the other official. Plaintiff alleges that this offer was never communicated to her by defendant.

In the absence of any immunity agreement, plaintiff was indicted in the United States District Court for the District of New Jersey on December 17, 1996, on four counts of conspiracy and extortion. The day that the indictment was returned, plaintiff fired

[1] Because additional facts were submitted by both sides at the request of the trial court, defendant's motion was converted into a motion for summary judgment. See R. 4:46; *Wang v. Allstate Ins. Co.,* 125 N.J. 2, 9 (1991). In either case, we take the facts, as we are required to, in the light most favorable to the party resisting the motion to dismiss, giving every reasonable inference to the plaintiff. See *F.G. v. MacDonnell,* 150 N.J. 550, 556 (1997); *Brill v. Guardian Life Ins. Co.,* 142 N.J. 520 (1995).

defendant as her counsel. To that date, plaintiff had paid defendant a total of $35,000 for his legal services. The federal court promptly appointed Mr. Ron Raygun, a public defender, as plaintiff's new lawyer.

On March 6, 1997, counseled by Mr. Raygun, plaintiff entered into a plea agreement with the United States Attorney. Pursuant to that agreement, she pled guilty to count two of the indictment, which charged that plaintiff had conspired with Tiger Shark, a member of the Newark Planning Board, to extort money from Howard Nanian. Mr. Nanian is the president of HowNanian Construction, and had submitted building plans to plaintiff for a ten-story office building in downtown Newark. In return for the plea, the government agreed to dismiss the other charges.[2]

On April 23, 1997, plaintiff was sentenced to a sixty (60) month prison term "with the condition that the defendant be confined to a community treatment center for a period of thirty (30) months, and the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on Probation for a period of three years."

On May 7, 1997, the New Jersey Division of Consumer Affairs notified plaintiff that her licenses as a builder, plumber, and electrician were temporarily suspended based on her criminal record. The letter stated that "unless you file for appeal with the Division's Bureau on Character within 30 days, your licenses will be automatically permanently revoked . . . if you appeal this decision, the Bureau on Character will either allow you to maintain your licenses in a supervised capacity or revoke your licenses."

On June 2, 1997, plaintiff filed an appeal with the Bureau on Character in the Division of Consumer Affairs, to reconsider the revocation of her licenses. On October 24, 1997, Hezekiah Hardnose, head of the Bureau on Character, sent plaintiff a certified letter in which he stated that her appeal was denied, and her licenses were revoked.

On October 27, 1997, plaintiff through Mr. Raygun filed a motion before the United States District Court for leave to vacate her guilty plea. She alleged ineffective assistance of defendant as grounds for the motion. That motion was denied on September 1, 1998.

Pursuant to 28 U.S.C. §2255, on April 14, 1999, plaintiff filed a petition for habeas corpus in the United States District Court for the District of New Jersey. Her petition was grounded on the alleged ineffective assistance of counsel in defendant's representation. That petition remains pending before the federal court.

On October 25, 1999, plaintiff filed a complaint in the Superior Court, Law Division, against defendant and his law firm. Plaintiff's main contentions are described in paragraphs two and three of the first count of her complaint. We reproduce them in relevant part here:

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[2] Mr. Shark had accepted an offer of immunity on December 16, 1996, and has continued as a member of the Newark Planning Board.

> 2. . . .Mr. Lawzio, in the course of his legal representation to Ms. Hinton, failed to communicate an offer of transactional immunity from the United States Attorney for the District of New Jersey. Mr. Lawzio's failure to communicate such offer deviated from the acceptable standards of legal practice, which resulted in the indictment of Ms. Hinton. The indictment compelled Ms. Hinton to plead guilty to one such count which would have been avoided had Mr. Lawzio provided competent representation.
>
> 3. As a direct and proximate result of the in-actions of Mr. Lawzio, Ms. Hinton was caused to be indicted, incur a criminal record, lose her liberty, and suffer severe economic loss based on having her New Jersey licenses in building, plumbing and electrical revoked. In addition, Ms. Hinton was caused to expend large sums of money in payment for Mr. Lawzio's substandard services.

On November 29, 1999, defendant filed a motion to dismiss. His first basis was that the claim was governed by the two-year statute of limitations, N.J.S.A. 2A:14-2, and that the claim was time-barred. Defendant argued that the statute of limitations on plaintiff's claim began to run not later than the date on which plaintiff pled guilty, and thus her claim is time-barred. Alternatively, defendant argued that plaintiff pled guilty to a crime and therefore is solely responsible for all consequences flowing from the criminal act. Argument was heard on January 19,2000, and on January 21, 2000, the trial court entered an order denying the motion. Defendant sought relief in this court by motion filed January 31, 2000, and granted February 10, 2000.

Discussion

The initial question before the court is which of the two potentially applicable statutes of limitations should apply to plaintiff's claim. N.J.S.A. 2A:14-1 provides for a six-year statute of limitations for "any tortious injury to real or personal property, ...[or] for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of the Title..." N.J.S.A. 2A:14-2 provides for a two-year statute of limitations "for an injury to the person caused by the wrongful act, neglect or default of any person..." Plaintiff asks the court to apply the six-year statute; defendant argues for the two-year statute.

As an initial matter, a legal malpractice action accrues at the time an "attorney's breach of professional duty proximately causes a plaintiff's damages." *Grunwald v. Bronkesh*, 131 N.J. 483, 492 (1993). The statute of limitations begins to run when "the client suffers actual damage and discovers, or through the use of reasonable diligence should discover, the facts essential to the malpractice claim." *Id*. at 494.

We conclude that the actual harm as alleged here was the failure of the defendant to advise the plaintiff of an offer of transactional immunity. Presumably, that offer could have remained open until the plaintiff entered her plea of guilty to one count of the federal indictment. At the latest, then, we conclude that the cause of action accrued and the

statute of limitations began to run as of March 6, 1997. Plaintiff's suit was filed in the Law Division two years, seven months and 19 days thereafter.

The trial court found plaintiff's alleged injury to be primarily economic and not based on personal injury. Therefore, the trial court applied the six-year statute of limitations period, N.J.S.A. 2A:14-1, to plaintiff's legal malpractice claim and found it to have been timely filed. We disagree.

As described in her complaint, the damages that plaintiff sustained were essentially a result of her conviction and incarceration. Incarceration is a personal injury. *Earl v. Winne,* 14 N.J. 119, 132 (1953). The losses alleged here are similar to those raised by federal litigants under 42 U.S.C. §1983, and the two-year statute has been held applicable to such cases. See e.g. *Michaels v. New Jersey*, 955 F.Supp. 315, 322-323 (D.N.J. 1996). Indeed, the United States Supreme Court has upheld the application of the two-year statute of limitations period to civil rights claims under 42 U.S.C. §1983. *Wilson v. Garcia*, 471 U.S. 261, 276-77 (1985). While, in most cases, it is reasonable to anticipate that a criminal indictment will have adverse economic effects, such economic loss flows from the indictment and does not stand independently.

Since the suit here was filed more than two years after the accrual of the cause of action, it is time-barred.

Even were we to be in error as to the accrual of the loss, as our dissenting colleague argues, this action would nonetheless be barred because of plaintiff's inability to establish that she is, in fact, not guilty of the crime to which she pleaded guilty. The trial court had held, that even though plaintiff was convicted of a crime, this fact alone does not preclude her from bringing and maintaining a legal malpractice claim against defendant. We disagree.

In our view, innocence is a prerequisite to bringing a legal malpractice claim. Many convicted criminals allege that their attorneys failed to properly represent them. If we allow all convicted criminals to sue their lawyers, the courts will be overwhelmed with these types of claims. Lawyers will be reluctant to counsel these types of clients for fear of legal malpractice claims. Public policy goes against allowing convicted criminals to sue their attorneys.

Many states have ruled as we do now, that innocence is a necessary element of a claim of legal malpractice arising from the conduct of a criminal case. See e.g. *Wiley v. County of San Diego*, 19 Cal. 4th 532, 966 P.2d 983, 991 (1998); *Stevens v Bispham*, 316 Or. 221; 851 P.2d 556 (1993); *Glenn v Aiken*, 409 Mass. 699; 569 N.E.2d 783 (1991). Their reasoning is sound and compelling. As explained by the California Supreme Court in *Wiley*:

> Our legal system is premised in part on the maxim, "No one can take advantage of his own wrong." ... Regardless of the attorney's negligence, a guilty defendant's conviction and sentence are the direct consequence of his

> own perfidy. The fact that nonnegligent counsel "could have done better" may warrant postconviction relief, but it does not translate into civil damages, which are intended to make the plaintiff whole.
>
> Only an innocent person wrongly convicted due to inadequate representation has suffered a compensable injury because in that situation the nexus between the malpractice and palpable harm is sufficient to warrant a civil action, however inadequate, to redress the loss. ... In sum, "the notion of paying damages to a plaintiff who actually committed the criminal offense solely because a lawyer negligently failed to secure an acquittal is of questionable public policy and is contrary to the intuitive response that damages should only be awarded to a person who is truly free from any criminal involvement." ... We therefore decline to permit such an action where the plaintiff cannot establish actual innocence.

Id. at 538-539 [citations omitted].

We agree with the Wiley Court. All consequences that flow from the act of a criminal are the result of that act, and no intervening malpractice changes that causative factor. In our view, if a convicted criminal is allowed to pursue a legal malpractice claim, the legal system would be allowing the criminal to profit from his or her illegal conduct. *State ex rel. O'Blennis v. Adolf*, 691 S.W.2d 498, 504 (Mo. Ct. App. 1985). The convicted criminal may not shift assessed punishment to his or her former attorney and thus undermine our system of justice. *Shaw v. Alaska*, 861 P.2d 566, 571-572 (Alaska 1993). Therefore, on policy grounds, we hold that only the innocent may sue their attorneys for malpractice occurring in the context of a criminal case.

REVERSED.

MERCY, J.A.D., dissenting

I respectfully disagree with my colleagues and would affirm the decision of the court below to permit plaintiff's legal malpractice against defendant to proceed.

First, it is clear to me that it is not the label attached to a claim but rather the nature of the injury alleged that determines which of New Jersey's statutes of limitations should be applied to the claim. See *Montells v. Haynes*, 133 N.J. 282, 291 (1993) ("Our focus is on the nature of the injury, not the underlying legal theory of the claim"). It is further clear to me that plaintiff here is not alleging the personal injury of incarceration, nor the personal injury of damage to reputation. Plaintiff's affidavit in opposition to defendant's motion here states clearly:

> ". . .when I plea bargained I was prepared to lose my job as a building inspector and get a criminal record, but I was not prepared to lose my licenses . . .as a result of the loss of my licenses I am financially crippled."

Plaintiff takes no issue with the loss of her Newark job, for which she earned $31,000 per year. Her real loss was that she was required to terminate her consulting business, since that business required the use of her licenses to obtain building permits for the companies renovating the buildings. Plaintiff had consistently earned approximately $10,000 per month for the three years prior to the revocation of her licenses. Moreover, all companies that contracted with Homewreckers terminated their contracts and notified plaintiff that without license numbers for permits, they could not do business with her.

Thus, her claim focuses simply and solely on the economic consequences that she alleges flowed directly from the failure of the defendant attorney to advise her of an immunity offer from the United States Attorney. The loss alleged is a pecuniary loss in the revocation of her business licenses, and not the loss of her job as a building inspector or the loss of her reputation or her incarceration. Moreover, she alleges loss in the form of attorneys' fees and that, indisputably, is a purely pecuniary claim.

The six-year statute of limitations of N.J.S.A. 2A:14-1 applies to a legal malpractice claim where the attorney mishandles a workers' compensation claim and the attorney negligence caused "pecuniary loss" and not personal injury. *Carney v. Finn*, 145 N.J. Super. 234, 236 (App. Div. 1976); see also *Mant v. Gillespie*, 189 N.J. Super. 368 (App. Div. 1983). Plaintiff has suffered enormous economic loss, which includes the $35,000 paid to defendant, as well as her consulting business, which supplied her with the vast majority of her income. Plaintiff's injury is primarily economic, the six-year statute of limitations should apply, and therefore her suit is timely.

Even if the two-year statute applies, I would continue to find that plaintiff's claim is timely. In my view, the majority here did not determine the time of accrual accurately. Our Supreme Court has found that the accrual of a legal malpractice action occurs when the breach of an attorney's duty causes the plaintiff's damage. *Gautam v. DeLuca*, 215 N.J. Super. 388, 397 (App. Div. 1987). In this case, plaintiff did not suffer the economic damage alleged -- the loss of her licenses -- until her appeal was denied on October 24, 1997. She filed suit one day less than two years thereafter, and her claim should be held timely filed.

Moreover, the discovery rule postpones the accrual of a cause of action if the plaintiff did not or could not know the facts underlying a claim. *Tevis v. Tevis,* 79 N.J. 422, 431-432 (1979). While plaintiff knew of the criminal consequences of her plea in April 1997, she was not even aware at that time of the civil consequences, and could not assess her damages until her appeal to the Division of Consumer Affairs failed and her licenses were revoked. Therefore, it was not until October 24, 1997, when she became aware of all the facts of her injury, namely that her licenses were revoked, that her claim accrued. Plaintiff clearly understood, before then, that her licenses had only been suspended, and not revoked, and that she had an opportunity to convince the Bureau of Character in the Division of Consumer Affairs to allow her to continue to work under supervision. She made a plea for that in her appeal stating that " . . . I am innocent of any wrongdoing . . . this whole problem could have been avoided if not for my stupid lawyer not telling me of an immunity offer . . these licenses are critical to my financial survival . . . please let me keep

my licenses until I clear this whole mess up." Even when her licenses were revoked, she was told by the head of that Bureau, in a certified letter, that "If you can in fact 'clear this whole mess up' the Bureau on Character would certainly have to reconsider reactivating your licenses." She has done nothing since then but try to "clear this whole mess up."

To hold, as the majority does, that plaintiff should have filed her claim before the outcome of her appeal with the Division of Consumer Affairs, is senseless: she would have had to speculate on the decision (whether or not she would lose her licenses). It is inconsistent with the interests of justice for us to require plaintiffs to file suits based on speculation that they may suffer damages. Indeed, if she had been allowed to keep her licenses, plaintiff would likely never have filed a legal malpractice claim at all. Plaintiff became aware of her injury, loss of her licenses, less than two years before filing her complaint, and therefore her complaint is timely even if the two-year statute of limitations is applied.

The majority alternatively holds that a convicted person may not maintain a legal malpractice action for attorney misconduct that occurs in the course of the criminal case that led to the conviction unless such person can also establish innocence of the charged crime. I find such a rule to be senseless, and conclude that innocence ought not to be a prerequisite to bringing a legal malpractice claim.

To begin with, I find it repugnant to the American system of justice that we should deny recovery to those whose attorneys deviate from an acceptable standard of care merely because of the nature of the proceeding in which such malpractice occurred. In my judgment, there should be one, and only one, test for recovery for legal malpractice and that test should not change depending on whether the malpractice occurred in a civil case or a criminal case. The test should be whether the attorney's conduct fell short of the standard of care and whether, as the result of such malpractice, plaintiff suffered harm he or she would not otherwise have suffered. If plaintiff succeeds in showing that, but for the alleged negligence of this attorney, she would not have suffered the economic loss she claims, then I see no rational bar to her recovery. See *Snyder v. Baumecker*, 708 F.Supp. 1451, 1464 (D.N.J. 1989). It is no less a harm to an individual facing potential criminal charges to lose the opportunity to choose to accept an offer that will resolve those charges than it is for a civil litigant to lose the opportunity to choose whether to accept an offer that will result in the settlement of the civil case, and we certainly permit recovery in that civil setting. See e.g. *Sommers v. McKinney*, 287 N.J. Super. 1, (App. Div.).

Accepting as true the facts alleged by the plaintiff, there can be no question but that "in the absence of the alleged negligence the outcome of the case would have been different." *Herring v. Parkmann*, 631 So. 2d 996, 1001 (Ala. 1994). See also *Williams v. Callaghan*, 938 F.Supp. 46, 51 (D.D.C. 1996). If plaintiff can establish that there was in fact an offer of transactional immunity by the United States Attorney which she would have accepted, then the outcome of her case would unquestionably have been different; indeed, she would not have been prosecuted at all.

I would therefore hold, as my colleagues elsewhere have held, that innocence is not a

necessary prerequisite to the maintenance of a legal malpractice action arising from a criminal case. See e.g. *Shaw v. State*, 861 P.2d 566 (Alaska 1993) (innocence may be relevant but is not an element); *Silvers v. Brodeur*, 682 N.E.2d 811 (Ind. App. 1997). And see *Stevens v Bispham*, 316 Or. 221, 253-254 (Unis, J., concurring); 851 P.2d 556 (1993):

> ...[T]here is no necessary and direct link between not prevailing in a case and the existence of a claim for legal malpractice. A prevailing party can be harmed by a lawyer's negligence, just as a party can lose even though the lawyer was not negligent. An innocent person can be convicted even with adequate counsel, and a guilty person's conviction can be actionable because a lawyer's negligence failed to protect the rights that even a guilty person has. These are areas not well suited for brightline rules. The fact that a criminal defendant has not been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise, does not mean that a criminal defendant has not been harmed by the lawyer's negligence. Likewise, the fact that a criminal defendant has been exonerated of the criminal offense through reversal on direct appeal, through post-conviction relief proceedings, or otherwise, does not mean that the criminal defendant's lawyer was negligent. Nor does the fact that a person is acquitted at trial mean that the lawyer has not been negligent.

Alternatively, I would hold that plaintiff should be allowed to maintain her claim, at a minimum, until the conclusion of the federal court's consideration of her habeas corpus petition. See e.g. *Gebhardt v. O'Rourke*, 510 N.W. 2d 900 (Mich. 1994); *Berringer v. Steele*, 2000 Md. App. LEXIS 139 (Md. Ct. of Spec. App. Aug. 21, 2000). It is critical in my estimation to note that plaintiff has, from the outset, maintained her innocence of any wrongdoing, has explained that she pleaded guilty only to avoid more serious consequences her second attorney had convinced her would follow if she did not do so, and has sought repeatedly to obtain relief from her conviction in the federal courts. If plaintiff is granted the relief she seeks in the federal court, she should be allowed to continue with her civil action for legal malpractice against defendant.

For the foregoing reasons, I would affirm the trial court's order permitting plaintiff's claim against defendant to proceed.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-00-522

BILLARY HINTON, Plaintiff-Appellant, v. RICH LAWZIO, Defendant-Respondent.	:	**ORDER**

This matter having been brought before the Court on August 22, 2000, by the plaintiff-appellant, it is, on this 10th day of September, 2000, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before November 29, 2000.

STEPHEN W. TOWNSEND, Clerk
For the Court