

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-1558

DONALD L. CLARK,
Appellee,
vs.
STATE OF IOWA,
Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR JOHNSON COUNTY
HONORABLE LARS ANDERSON, JUDGE

**APPELLEE'S SUPPLEMENTAL BRIEF
AND REQUEST FOR ORAL ARGUMENT**

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CERTIFICATE OF SERVICE

On this 22nd day of May, 2020, Donald Clark served Appellee's Supplemental Brief and Request for Oral Argument on all other parties to this appeal by e-mailing one copy thereof to the respective counsel for said parties:

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ARGUMENT

I. Even Under a “Granular Approach,” the Issue in Clark’s PCR was Litigated for the Application of Issue Preclusion.

Although offensive issue preclusion is more restrictively and cautiously applied than defensive issue preclusion, it is undoubtedly still available in Iowa. In deciding whether to apply offensive issue preclusion, the question is not what issue is “at stake” as the State proposes; rather, the question is whether the party in the second action had a full and fair opportunity to litigate the issue in the first action. See *Gardner v. Hartford Ins. Accident & Indem. Co.*, 659 N.W.2d 198, 203 (Iowa 2003). “We scrutinize cases of offensive issue preclusion more closely by examining whether: (1) the party in the second action had a *full and fair opportunity to litigate* the issue in the first action; and (2) any other circumstances are present which would justify granting the party the opportunity to re-litigate those issues.” *Id.* at 203 **quoting** *Harrison v. State Bank of Bussey*, 440 N.W.2d 398, 401 (Iowa 1989). For the first time in this litigation, the State urges the Court to use a “granular approach” to decide whether the issues in post-conviction are the same as the issues in the present action. Even under a “cautious analysis” (State’s Reply Brief p. 19) or a “granular approach,” the record is clear the State had a full and fair opportunity to argue its factual and legal claims as to whether

Robertson breached his duty of care to Clark within the context of the post-conviction relief proceeding.

The factual and legal claims asserted by the State with regard to duty and breach in post-conviction are *precisely the same factual and legal claims on duty and breach* the State asserts in this legal malpractice case. See Appellee’s Final Brief p. 28-30. It is a stark omission that State has repeatedly consistently failed to challenge Clark’s argument in this regard. As a result, the Court can be left with no other conclusion than there are no circumstances that justify reversing the District Court, other than to undermine the very policy objectives that the use of offensive preclusion aims to avoid. See *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 655 (Iowa 2002) (“The purpose of issue preclusion is to protect litigants from the ‘vexation of relitigating identical issues with identical parties or those persons with a sufficient connective interest to the prior litigation.’”)

A. *Lemartec* is consistent with the law of issue preclusion in Iowa.

The “granular approach” as referenced in *Lemartec v. Eng’g & Constr. v. Advance Conveying Techs, LLC*, 940 N.W.2d 775, 785 (Iowa 2020) is nothing more than the standard analysis by the Court to determine whether “the issue” was actually litigated in the prior proceeding. *Lemartec* involved a written agreement with Conve & AVS, Inc. (herein “Conve”) to construct a

chlor-alkali manufacturing facility in Eddyville, Iowa. Conve in turn entered into a written agreement with Lemartec Engineering & Construction n/k/a Lemartec Corporation (Lemartec) to design and build the physical plant and a salt conveyor system. Lemartec then subcontracted with Advance Conveying Technologies L.L.C. (herein “ACT”) for design and manufacture of the conveying system and entered into another subcontract with Southland Process Group, L.L.C. (herein “SPG”) for the installation and erection of the conveyor system. The project to build and install the conveyor system went poorly and claims in federal and state courts ensued. A critical fact in *Lemartec* was that the initial litigation in federal court involved a dispute over ACT’s claim that Lemartec improperly withheld the balance owed under the purchase order. The subsequent case, in Iowa district court, was focused on whether the conveyor system was properly installed and failed to perform to specifications.

ACT won a judgment in federal court in the federal case. ACT filed a motion for summary judgment in the subsequent state court proceedings claiming that the judgment in the initial federal litigation compelled judgment in its favor in the state court proceedings.. *Id.* at 778. The Iowa district court granted summary judgment and reasoning that “the issue of indemnity rights

arising under the Purchase Order has been raised and litigated in the prior federal action.” *Id.* Lemartec appealed.

On appeal, ACT argued issue preclusion should apply and asked for a more broad and categorical approach claiming that because the pleadings in the two cases were *similar* issue preclusion should apply. Lemartec asserted this Court should instead focus on the narrow and different factual scenarios that gave rise to the dispute. *Id.* 785-87. This Court agreed with Lemartec and holding that the critical factual issue, the corrosion in the installed conveyor belt system, was not “actually litigated” in the initial federal litigation. *Id.* This Court held:

“We do not think there is a generally applicable rule that there can be only one litigated dispute under a contract. A contract may impose a number of obligations on a contracting party, the breaches of the contract may occur at different times and under different circumstances.” *Id.*

In other words, the critical issue in *Lemartec* was that the underlying claims in each cause of action arose at a different time and were based on different alleged breaches. Unlike *Lemartec*, the issue of whether or not Robertson breached essential duties in his legal representation of Clark is based on the *exact same set of facts in both causes of action*. The only facts that “give rise to the dispute” in this case are Robertson’s failures during his representation of Clark. These failures have not changed since the post-

conviction litigation. From a factual perspective, *Lemartec* is wholly inapposite to the facts of this case. In fact, *Lemartec's* laser focus on the question of whether the issue that gave rise to the dispute was *actually litigated* in the first action is entirely consistent with prior case law in Iowa on the application of offensive issue preclusion.

Clark contends *Lemartec* and its so-called “granular approach” supports him in this appeal because core issue that gave rise to this dispute—whether Robertson breached his duty of care to Clark and the facts and failed legal arguments argued by the State—were fully litigated in the PCR proceeding. See Appellant’s Final Brief p. 16-19, p. 28-30.

The State’s reliance on *Jorge Constr. Co. v. Weigel Excavating & Grading Co.*, 343 N.W.2d 439, 444 (Iowa 1984) in an attempt to distinguish Robertson’s *conduct* in the PCR case from the *issue* in the legal malpractice case is woefully flawed. The first suit in *Jorge*, was for breach of contract against Jorge, the general contractor, by a subcontractor for construction work completed at an elementary school. In the subsequent action, Jorge brought suit directly against another subcontractor for the difference between Jorge’s expenditures and the amount it obtained as a judgment in the earlier suit. This Court found the issue in the first case was whether Jorge was entitled to a share of a school district fund, and in the dispute in second case went further

and asked whether Jorge was entitled to additional damages *based on different facts*. This Court also found, similar to the reasoning in *Lemartec*, that the issue of these additional damages was not actually litigated in the first case and was neither material nor relevant to the disposition in the first action. *Id.* As a result, issue preclusion did not apply. *Id.*

Unlike *Jorge*, offensive issue preclusion is being used here solely to preclude unnecessary subsequent litigation on the breach issue which was clearly raised and litigated in both cases. Robertson's *conduct* fell outside the wide range of reasonable professional assistance in both instances. Contrary to the State's assertions, the *issue* in both cases is Robertson's *conduct*, *not* the *remedy* available. Clark already obtained a new criminal trial in PCR and the money damages available in legal malpractice flow from the very same breaches of the very same duty. Clark did not seek to apply offensive issue preclusion to issues not actually litigated in the first action. For example, Clark did not ask the district court to apply issue preclusion as to whether Robertson's conduct in the PCR proceeding was the proximate cause of Clark's damages or whether Clark is ultimately entitled to money damages in his legal malpractice case. An argument that the PCR order was preclusive with regard to proximate cause or damages would be a bridge too far and run afoul of both *Jorge* and *Lemartec*. Clark makes no such argument.

Finally, the State asserts the issues are not identical because the focus in PCR was on the Clark's liberty interest, which was somehow easier to demonstrate than breach in legal malpractice. The State is blissfully ignorant of the strong presumption in PCR proceedings that trial counsel's conduct was effective.¹ *Ennenga v. State*, 812 N.W. 2d 696, 710 (Iowa 2012). No similar presumption of competence exists in the context of a legal negligence claim. Accordingly, the standard for breach in an ineffective assistance of counsel case is likely more onerous than that of breach in a legal negligence claim. Contrary to the State's repetitive arguments, the standard of care weighs heavily in favor of finding the issues identical under a granular approach because the breach of duty in the malpractice case was wholly subsumed by the proof the higher of breach in post-conviction. In other words, when Clark hurdled the standard of breach of care in post-conviction litigation, he also sailed far above the bar necessary to prove breach in the malpractice context.

B. Applying Offensive Issue Preclusion Against a State Public Defender in a Legal Malpractice Case is Consistent with Iowa's Statutory Framework.

¹ "Establishing the first prong is not easy because 'there is a strong presumption trial counsel's conduct fell within the wide range of reasonable professional assistance.'" *Ennenga* at 710 **quoting** *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003) (Mansfield, J., dissenting).

The State correctly points out that Clark does not identify a single case applying offensive issue preclusion to criminal malpractice. Clark agrees with the State’s assertion in this regard; there aren’t any.² That being said, every time offensive issue preclusion is applied, it is, by necessity, fact specific to the particular facts of the case. It is, therefore, unlikely to find cases “factually” on all fours in the context of applying offensive issue preclusion. *Hunter v. Des Moines* involved the application of issue preclusion where the City of Des Moines was sued twice for failing to remove the same snow pile that caused two separate automobile collisions. *Hunter v. Des Moines*, 300 N.W.2d 212, 122 (Iowa 1981). Using the State’s theory, Hunter would have first been required to show the court another successful case applying offensive issue preclusion involving the failure to remove snow piles before successfully arguing offensive issue preclusion. Such a requirement

² The Iowa Supreme Court has a long history of deciding notable cases for the first time. See *e.g. Clark v. The Board of Directors*, 24 Iowa 266 (Iowa 1868) (holding that racially segregated schools had no place in Iowa, 86 years before the United States Supreme Court). In 1869, Iowa became the first state in the union to admit women to the practice of law. *Coger v. North Western Union Packet Co.*, 37 Iowa 145 (Iowa 1873) (ruling against racial discrimination in public accommodations 91 years before the United States Supreme Court reached the same decision). *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) held that a statutory ban on same sex marriage was unconstitutional under the Iowa Constitution before such a ban was upheld in many other jurisdictions.

would be absurd and make the use of offensive issue preclusion a near impossibility.

Clark does not argue for a categorical rule that all post-conviction rulings based on ineffective assistance of counsel control legal malpractice claims against criminal defense attorneys. See Appellant's Final Brief p. 20. Clark only asks that offensive issue preclusion be applied in a *granular* way to state employees and then only to the narrow issues of duty and breach. Contrary to what the State argues is "at stake" (including the obvious concern with its pocketbook), should this Court rule in favor of Clark, the State would still retain its right to a jury trial in all legal malpractice cases. Clark must still prove proximate cause and his damages. Finally, the approach indicated by this case is consistent with the Iowa Legislature already treating public defenders different than private attorneys by providing limited statutory immunity for public defenders in malpractice cases unless a plaintiff first obtains post-conviction relief. See Iowa Code § 815.10(6); *Barker v. Capotosto*, 875 N.W.2d 157, 168 (Iowa 2016).

A granular approach to offensive issue preclusion against public defenders is consistent with Iowa's statutory framework. First, the State very clearly defended Robertson's conduct in the PCR proceeding in the exact same manner in which it now defends Robertson's conduct now by virtue of

the doctrine of *respondeat superior* and Iowa Code § 669.5(b). As previously shown, the facts and legal arguments by the State in the PCR case and in this case are indistinguishable. See Appellant's Final Brief p. 28-30. Second, the Iowa Attorney General's Office has the responsibilities of supervising county attorneys in all criminal cases, including post-conviction relief proceedings, as well as defending public defenders in civil claims. See Iowa Code § 13.2. Most significantly, unlike the Alaska and Oregon cases cited by the State which concluded that a post-conviction ruling is not preclusive against a *private criminal defense attorney*, the State of Iowa controls both cases, and the State of Iowa will pay any adverse judgment. See e.g. *Stewart v. Elliott*, 239 P.3d 1236 (Ala. 2010), *Stevens v. Horton*, 984 P.2d 868 (Ore. App. 1999); See Iowa Code § 669.11.

CONCLUSION

The application of offensive issue preclusion in the context of post-conviction and legal malpractices cases may appear to be novel at first glance, however, even under the granular approach suggested by the State, offensive issue preclusion is generally applied to *factual disputes* where the same facts have already been weighed and decided by a previous fact-finder. A determination that the same facts have already been litigated in a prior case is not novel and is always fact-dependent. Whether or not that fact-dependent

analysis has ever been applied in a criminal defense context is of no matter. Nothing changes the simple fact that the breach decided in Clark's post-conviction case is the same breach in a subsequent legal malpractice case. A granular approach is nothing more or less than the approach always followed in determining whether or not offensive issue preclusion should be available. If the issues litigated are identical, any approach, granular or otherwise, seeks to avoid the public policy concern of unnecessary litigation and contradictory decisions on the Court over the same facts.

The Court should find the District Court did not abuse its discretion and uphold the ruling on summary judgment.

REQUEST FOR ORAL ARGUMENT

Clark requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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