

IN THE IOWA SUPREME COURT  
NO. 16-1392  
SCOTT COUNTY NO. LACE125606

RAY J. KRAKLIO,

Plaintiff – Appellant,

VS.

KENT SIMMONS

Defendant – Appellee.

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR SCOTT COUNTY  
THE HONORABLE HOBART DARBYSHIRE

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**APPELLANT’S FINAL BRIEF**

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I.

II. CERTIFICATE OF FILING

The undersigned hereby certifies that on the 27th day of March, 2017, he did file the attached final brief on behalf of the Appellant, Ray Kraklio by electronic filing the brief with the Clerk of the Supreme Court, 1111 East Court Avenue, Des Moines, IA 50319.


By:   
\_\_\_\_\_

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III. CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did serve the attached final brief on behalf of the appellant, Ray Kraklio by electronic filing the same on the 27th day of March, 2017 to the following:

Kent Simmons, Defendant

By:   
\_\_\_\_\_

Curtis Dial

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS,  
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This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in the proportionally space typeface or using word perfect word processing program in 14 font and Times New Roman style.

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By: 3/27/17

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V. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT.**

Cases:

Barker v. Cupotsto, 875 N.W.2d 157 (Iowa 2016)

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Rules:

Iowa R. App. Proc. 6.1101(2)

## STATEMENT OF THE CASE

Nature of the Case: This is an Appeal from an Order granting the Defendant's motion for summary judgment. Order on Defendant's Motion for Summary Judgment. App. At p. 82. The Plaintiff filed his Petition at Law and Demand for Jury Trial on October 17, 2014. Petition at Law and Demand for Jury Trial. App. At p. 1. The claim alleged legal malpractice. The Defendant filed an answer and ultimately moved for summary judgment. Motion for Summary Judgment. App. At p. 9. The District Court ultimately granted the motion for summary judgment and the Plaintiff filed a notice of appeal. Notice of Appeal. App. at p. 87.

### Course of Proceedings and Disposition in District Court:

The Petition at Law and Demand for Jury Trial was filed on October 17, 2014. Petition at Law and Demand for Jury Trial. App. At p. 1. On January 22, 2015 the Defendant filed his Answer. Answer. On June 15, 2015 the Plaintiff filed his Designation of Expert Witness. Designation of Expert Witness. App. At p. 8. On April 23, 2016 the Defendant filed his Motion for Summary Judgment as well as a Brief in support of his motion for summary judgment. Motion for Summary Judgment. App. At p. 9. Brief. App. At p. 27.

On May 9, 2016 the Plaintiff filed the necessary documents to resist the motion for summary judgment, including a Statement of Disputed Facts,

Submission of Documents in Support of Resistance to Motion for Summary Judgment and Resistance to Motion for Summary Judgment. Resistance to motion for Summary Judgment. App. At p. 38. Statement of Disputed Facts. App. At p. 42. Submission of Documents in Support of Resistance to Motion for Summary Judgment. App. At p. 44.

On May 19, 2016 the Defendant filed a Reply to the Resistance and on May 20, 2016 the Defendant filed a Brief in Support of his Reply to the Resistance.

Hearing on the Motion for Summary Judgment was held on May 20, 2016 and on July 18, 2016 the Court granted the motion for summary judgment. Order on Defendant's Motion for Summary Judgment. App. At p. 82. The Plaintiff's Notice of Appeal was filed on August 16, 2016. Notice of Appeal. App. At p. 87.

Facts Relevant for Review:

The Plaintiff and Defendant had an attorney-client relationship for many years. Affidavit of Plaintiff. App. At p. 45. The Plaintiff was convicted for criminal offenses and the Defendant represented the Defendant on some of the criminal offenses. The Plaintiff paid the Defendant at least \$10,000.00 for the Defendant to represent the Plaintiff. Affidavit of Plaintiff. App. At p. 45. On April 17, 2003 the Plaintiff was sentenced to serve a term of five years in the Iowa Department of Corrections. Affidavit of Plaintiff. App. At p. 45. The Plaintiff was placed on probation and continued on probation until February 4, 2010. Affidavit



of Plaintiff. App. At p. 45. However, during some of that time the Plaintiff's probation was revoked and the Plaintiff was incarcerated.

The Plaintiff believed that his probation should have discharged on April 17, 2008. Therefore, after April 17, 2008 the Plaintiff requested that the Defendant check into whether the Plaintiff's probation should have discharged. Affidavit of Plaintiff. App. At p. 45. The Defendant informed the Plaintiff that the Defendant would look into this issue for the Plaintiff, however, the Defendant failed to do this. Affidavit of Plaintiff. App. At p. 45. The Plaintiff therefore remained on probation until February 4, 2010.

On February 4, 2010 a probation violation complaint filed against the Plaintiff came on for hearing. At that time a probation violation hearing was held. At the conclusion of the hearing the District Court found that the Plaintiff's maximum period of probation had expired and the Plaintiff was discharged from his probation. Transcripts of Evidence probation violation hearing in FECR 255016. App. At p. 66. Therefore, the Plaintiff was discharged from probation on February 4, 2010, however, he had remained on probation for additional time prior to being discharged because the Defendant had not taken the necessary steps to have the Plaintiff's probation discharged when the time expired. Affidavit of Plaintiff. App. At p. 45.

Issues Presented: The issue in this appeal is whether the Court erred in

granting the Defendant's motion for Summary Judgment, and specifically whether the Court erred in requiring that the Plaintiff show that he had achieved relief from his conviction before advancing the legal malpractice claim.

## ROUTING STATEMENT

Applicant believes this matter may be retained by Iowa Appellate Court of as this matter does not involve an issue set forth in Iowa Rule of App. Procedure 61101(2).

## ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Standard of Review and Preservation of Error: Error was preserved by the Applicant filing his Notice of Appeal on August 16, 2016. Notice of Appeal. App. at p. 87. The standard of review is for errors at law. "We review a district court's grant of a motion for summary judgment for errors of law." Pitt v. Farm Bureau Life Ins. Co., 818 N.W.2d 91 (Iowa 2012).

#### Discussion:

The only issue in this case is whether the Plaintiff can proceed with a claim

against his previous attorney even though he did not first achieve relief from the convictions. The District Court found that since the Plaintiff had not filed a post conviction relief action and obtained relief from a prior conviction, then he could not proceed with a malpractice claim against the Defendant pursuant to Barker v. Cupotosto, 875 N.W.2d 157 (Iowa 2016). Although the District Court relied on Barker in granting the motion for summary judgment, the Barker case does not clarify the law in a manner which would require that summary judgment be granted. The Barker decision states that a party seeking to pursue a claim of legal malpractice against his attorney must not show actual innocence. In this matter, actual innocence is not claimed and therefore the Barker decision is not relevant.

The Barker case does state that a malpractice plaintiff still must obtain relief from the conviction, citing to Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003). The problem with relying on the Barker and Trobaugh decisions are that the facts in those matters are not similar to the facts in this case and the claim is not based on the same issues. In both Barker and Trobaugh the plaintiffs brought claims against attorneys who had represented them on criminal cases and claimed that the attorneys did not properly represent them on the criminal cases. That is not what is alleged in this case.

In the present matter the Defendant did represent the Plaintiff in criminal matters and did work which helped the Plaintiff. That work is not being

complained about or is the cause of this action. In this matter the Plaintiff paid the Defendant \$10,000.00 for the Defendant to represent the Plaintiff. At the time the Plaintiff was on probation. However, the Plaintiff's probation discharged as of April 17, 2008, yet, the Plaintiff continued to remain on probation. During this time the Defendant was representing the Plaintiff regarding steps to have the Plaintiff removed from probation. Although the Plaintiff was informed by the Defendant that the Defendant would look into the issue and see why the Plaintiff was required to continue reporting to probation, the Defendant did not do this. Ultimately, at a probation violation hearing held on February 4, 2010, at which time the Plaintiff was represented by another attorney, the District Court found that the Plaintiff's maximum discharge of probation had expired and the Plaintiff was released from probation. This is the action that the Plaintiff had requested Defendant take prior to this.

The issue in this matter is that even though the Defendant was paid to see that the Plaintiff was not required to report to probation after his sentence had expired, the Defendant did not do this and took no action to see that the Plaintiff was not required to continue reporting to probation after his term of probation had expired. In the present case, the Defendant did not do what he indicated to the Plaintiff he would do, that being to see that the Defendant was not required to report to probation after his sentence had expired. This is not what was

contemplated under the Barker and Trobaugh, decisions and this is a completely different issue.

There is also not really much the Plaintiff could do when he became aware of the legal malpractice. Even though Plaintiff believed that his sentence had expired and had requested that his attorney, the Defendant look into this, the Plaintiff did not become aware of the fact that his probation had in fact discharged until the hearing of February 4, 2010. At that time the Plaintiff was discharged from probation by the Court. Therefore, any claim for post conviction relief or to achieve relief at that time would have been moot. See Rarey v. State, 616 N.W.2d 531 (Iowa 2000) finding appeal of denial of postconviction relief application based on challenge to disciplinary sanctions against applicant was moot because he had discharged his sentence); State v. Wilson, 234 N.W.2d 140, 141 (Iowa 1975) (finding appeal from denial of postconviction relief application based on challenge to parole revocation was moot because applicant had discharged his sentence). When the Plaintiff became aware of the legal malpractice, the Plaintiff had no remedy to seek recourse against his attorney.

The other problem with applying the Barker and Trobaugh decisions to this case is that the Plaintiff is not claiming that he did not commit the crimes. This is not a case where the Plaintiff is coming to Court and alleging that he was wrongfully convicted. Therefore, it is impossible for the Plaintiff to achieve relief

from a conviction. However, even though the Plaintiff admits that he was convicted and is not seeking relief from his conviction, it is still possible for his attorney to commit malpractice. Taking the opposite approach, that taken by the District Court means that the Plaintiff could hire the Defendant to represent him in post conviction matters, as happened here, and the Defendant is basically immune from liability.

The elements of legal malpractice are set forth in Huber v. Watson, 568 N.W.2d 787 (Iowa 1997). To establish a prima facie claim for legal malpractice the plaintiff must introduce substantial evidence of the following elements: (1) the existence of an attorney-client relationship between the defendant and plaintiff giving rise to a duty; (2) the attorney, by either an act or a failure to act, breached that duty; (3) this breach proximately caused injury to the plaintiff; and (4) the plaintiff sustained actual injury, loss, or damage.

In this case there is no dispute that an attorney-client relationship existed giving rise to a duty. Also, there is no dispute that the Defendant breached the duty by his failure to act, in that the Defendant failed to take the necessary action to see that the Plaintiff was not required to report to probation after his probation period had expired. Therefore, the Plaintiff has shown the necessary elements to proceed with a claim for legal malpractice. Requiring the Plaintiff show relief from the conviction is not applicable in this matter and the Court erred by applying this

standard.

## CONCLUSION

As the Court erred in requiring the Plaintiff to show relief from the criminal conviction, the Court erred in granting the motion for summary judgment. For this reason, the Court should reverse and remand the decision of the Iowa District Court which granted the motion for summary judgment.

## REQUEST FOR ORAL ARGUMENT

The Appellant herein, request to be heard in oral argument pursuant to the Rules of Appellate Procedure.

Respectfully submitted,



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