ELECTRONICALLY FILED MAR 27, 2017 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 16-1392

RAY J. KRAKLIO

Plaintiff-Appellant,

vs.

KENT A. SIMMONS

Defendant-Appellee

APPEAL FROM THE SCOTT COUNTY DISTRICT COURT

THE HONORABLE J. HOBART DARBYSHIRE

APPELLEE'S BRIEF AND ARGUMENT

Kent A. Simmons
Attorney at Law
P.O. Box 594
Bettendorf, Iowa 52722
(563) 322-7784
ttswlaw@gmail.com

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CERTIFICATE OF COMPLIANCE

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

- this brief contains 5009 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903.

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- this brief has been prepared in a proportionally spaced typeface based on Word 14 in Arial font.

/s/ Kent A. Simmons

KENT A. SIMMONS

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STATEMENT OF ISSUE FOR REVIEW

WHETHER THERE WAS ERROR IN THE ORDER GRANTING SUMMARY JUDGMENT WHERE THE JUDGE SIMPLY APPLIED THE CLEARLY ESTABLISHED "EXONERATION RULE", PLAINTIFF NEVER CITED ANY AUTHORITY TO OVERTURN THAT RULE, AND THE FACTS OF THE INSTANT CASE DEMONSTRATE THE WISDOM OF THE POLICY BEHIND THE RULE.

Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003)

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

Anderson v. State, 801 N.W.2d 1 (Iowa 2011)

State v. Maynard, 232 N.W.2d 265 (Iowa 1975)

ROUTING STATEMENT

The Supreme Court has previously stated the very clear and simple rule that governs adjudication of the sole issue raised here. Plaintiff-Appellant has cited no authority for the proposition the rule should be changed. The appeal should be transferred to the Court of Appeals.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is an appeal challenging a very simple application of clearly established, unambiguous case law to dismiss Plaintiff Kraklio's lawsuit in Summary Judgment.

PROCEEDINGS: Kraklio's sole claim in his Complaint filed October 17, 2014, was that Attorney Simmons was liable for failing to see that Kraklio was discharged from felony probation supervision when the term expired in Scott

County No. FECR 255016. (App. 1-2) Defendant Simmons filed the Motion for Summary Judgment and required supporting documents on April 23, 2016. Pursuant to Rule of Civil Procedure 1.981, Simmons filed the brief in support of the motion that included the required Statement of Uncontested Facts. The Motion also included three attached exhibits, one of which was the attorney's sworn affidavit. (App. 9-37) The May 20, 2016 oral arguments on the Motion, before the Honorable J. Hobart Darbyshire, were not reported. Defendant Simmons raised four separate assignments for full summary relief:

1. Plaintiff must first gain relief through proceedings in the criminal case or in a postconviction proceeding that set aside the criminal conviction before he can pursue a claim for malpractice against his criminal defense attorney;

2. Kraklio's probation officer chose not to supervise him while his convictions were on direct appeal. At the beginning of the appeal process, Simmons advised Kraklio he had the right to begin the Supervision while on appeal because he had not posted an appeal bond, and Kraklio chose not to begin supervision. The supervision did not start until over two years after Kraklio was sentenced, and and the five-year term had not expired when Kraklio was discharged;

3. Kraklio could not produce expert testimony to establish Simmons had a duty to calculate his probation expiration date and insure his discharge; and

4. Even if Kraklio could establish a duty and the discharge was past the expiration date, Kraklio could not establish any actual loss, injury or monetary damage. (App. 10-11)

Although Simmons asked the Court to rule on all grounds he had raised, Judge Darbyshire chose to dispose of the suit on the simple ground Simmons had raised in his first assignment. Kraklio could not proceed in a malpractice claim because he had not gained relief from from one of the three class "C" felonies to which he had pled guilty. If the Court were to reverse the judge's ruling, he would have to proceed to rule on Defendant's other three grounds for summary judgment. (Ruling; App. 82-85)

Statement of the Facts

Attorney Simmons began representing Kraklio when the district court appointed him to handle the direct appeal on the criminal case in question. Simmons was able to gain a Limited Remand in that case that allowed him to conduct discovery depositions to develop the evidence that showed Kraklio should not have pled guilty to the three felonies because they were prosecuted beyond the Statute of Limitations. The Court of Appeals panel went ahead and concluded

there was no ineffective assistance on one of the felony counts. Kraklio's plea of guilty and conviction would stand on that class "C" felony. The other two felony counts were affirmed, also, but the panel reserved the question of ineffective assistance on those two counts for postconviction relief (PCR) proceedings. Kraklio later hired Simmons and paid him almost $10,000.00 for preparing, filing and litigating the PCR. The fee agreement was for pursuit of the PCR, only. Simmons later provided Kraklio with services related to his ongoing problems with probation supervision in the criminal case as a courtesy. The sentencing judge had imposed three ten-year sentences of imprisonment to run concurrently and suspended them, attempting to run three five-year periods of probation consecutively for a fifteen-year probation. The probation department corrected the supervision to one five-year term due to statutory constraints on probation. (Simmons Affidavit; App. 23-26)

The order on the Summary Judgment summarized the services Simmons rendered in the appeal and the PCR:

> After a lengthy investigation into welfare fraud allegedly committed by Kraklio, a trial information was filed on November 26, 2002, charging Plaintiff with three felony counts of fraudulent practice (Counts 4, 5, and 6 of the trial information) in case number 255016 in the District Court for Scott County. The alleged activity took place from the early 1980's through March of

> 2000. Kraklio pled guilty to all three counts on March 13, 2003. He was given a ten-year suspended sentence and placed on probation for five years. Kraklio was ordered to pay restitution in the amounts of $17,560.00 for Count 4, $66,100.87 for Count 5, and $40,800.64 for Count 6. (Order, p. 1; App)

The judge went on to explain Simmons eventually gained Kraklio summary judgment relief on the two counts that had been reserved for the PCR by the direct appeal decision, and those two counts were dismissed. That resulted in Kraklio escaping liability on over $83,000.00 in victim restitution judgments on those counts. (Order, p. 2; App. 83) Kraklio was actually in prison when the PCR relief was gained because his probation had been revoked for refusal to pay restitution. A judgment for over $40,000.00 in restitution remained in place for the count that remained as a conviction. The order set out the fact Simmons was able to get Kraklio out of prison by filing a Motion for Reconsideration of Sentence after his parole had been denied. Upon reinstatement of his probation, Simmons had no further involvement in the probation issues, and Kraklio's ongoing revocation problems were handled by court-appointed attorneys. Kraklio's ongoing assertion that Simmons continued to represent him on his probation failures after the Reconsideration of Sentence is simply false. (Order, 2-3, Simmons Affidavit; App. 23-26, 83-84)

ARGUMENT

THERE WAS NO ERROR IN THE ORDER GRANTING SUMMARY JUDGMENT BECAUSE THE JUDGE SIMPLY APPLIED THE CLEARLY ESTABLISHED "EXONERATION RULE", THE PLAINTIFF HAS NEVER CITED ANY AUTHORITY FOR OVERTURNING THAT RULE, AND THE FACTS OF THE INSTANT CASE DEMONSTRATE THE WISDOM IN THE POLICY BEHIND THE RULE.

STANDARD OF REVIEW: Appellee agrees with Appellant's stated standard of review for errors of law.

PRESERVATION OF ERROR: Appellee disagrees with Plaintiff-Appellant's assertion that he preserved error in the district court. The case law is perfectly clear in its refusal to grant Plaintiff authority to pursue a cause of action for legal

malpractice alleged to have occurred in a criminal case. Plaintiff has not been exonerated of the criminal conviction. In the district court and in argument below, Defendant Simmons has set out the longstanding rule that prohibits a convict from suing his lawyer for malpractice in connection to the case resulting in conviction, unless the conviction has been vacated. The Plaintiff did not cite any legal authority in the district court in an argument that the rule of the case law should be changed. The Plaintiff did not discuss the policy concerns supporting the Exoneration Rule to show any indication the rule was not intended to apply to his case. An appellant cannot raise an issue on appeal that he has not preserved and presented in a way that would give the trial judge an opportunity to rule on the issue. Additionally, the Plaintiff has not cited any legal authority in his brief filed in the instant appeal that would allow this Court to change the well established "Relief-Required Rule", also known as the "Exoneration Rule". "Failure to cite authority in support of an issue may be deemed waiver of that issue." Iowa Rule of Appellate Procedure 6.903 (2) (g) (3). Kraklio's statement of the Preservation of Error fails to refer to "places in the record where the issue was raised and decided." I.R. A.P. 6.903 (2) (g) (1). The issue on which Simmons prevailed was raised in the Motion for Summary Judgment filed April 23, 2016, and the trial court

granted relief in the Order on Defendant's Motion for Summary Judgment filed July 18, 2016. (App. 82-85) Specifically, Judge Darbyshire concluded:

> Kraklio stayed on probation after Counts 4 and 5 were vacated because Count 6 was affirmed by the Court of Appeals and never vacated on postconviction. Kraklio never achieved relief from Count 6, which was the cause of his probation, which was the basis of his claims against Simmons. As such, because Kraklio has never achieved relief from his conviction as to Count 6, he cannot advance a legal malpractice claim against Simmons, (Order, p. 4; App. 85)

THE MERITS:

A. Relief-Required or Exoneration Rule

The rule governing the issue upon which the district court granted summary judgment was established in a unanimous decision of the Iowa Supreme Court in *Trobaugh v. Sondag, 668 N.W.2d 577 (Iowa 2003)* , and it was recently reaffirmed in *Barker v. Capotosto, 875 N.W.2d 157 (Iowa 2016).* In *Trobaugh* and in *Barker,* the

plaintiffs were allowed to go forward with their complaints for criminal malpractice only because they first had obtained the "relief required" or had been "exonerated" from all of the criminal convictions in question. (*Trobaugh,* 668 NW 2d at 579; *Barker,* 875 NW 2d at 160) Kraklio's instant attempt in criminal malpractice **fails as a matter of law** because he failed to reach this threshold.

Ironically, it was Attorney Simmons who persuaded the PCR trial court to vacate two of the three Class "C" felony convictions resulting from Kraklio's guilty pleas. Attorney Simmons did **not** take almost $10,000.00 in fees to represent Kraklio on his criminal revocation proceedings, he received the fee for payment to prepare, file and litigate the PCR. (PCCE 106433) (App. 83) The law set out below from *Trobaugh,* as affirmed in *Barker,* explains the policy concerns disallowing a guilty person from suing for malpractice, and the particular facts of the instant case clearly show the wisdom in this policy.

In all of his responses, Mr. Kraklio attempts to shift blame for his predicaments to his attorney. In adopting what the *Barker* court would later call the "exoneration rule", the Court in *Trobaugh v. Sondag,* 668 N.W.2d 577, 582 (Iowa 2003) explained the operation of the rule and the policy concerns behind the rule. The *Trobaugh* court referred to the rule as the "relief-required approach":

Many courts have concluded that some form of relief from a conviction is necessary before a criminal defendant can successfully bring a civil lawsuit for legal malpractice against a former attorney. See Canaan v. Bartee, 72 p. 3d 911, 915-16 (Kan. 2003) (collecting cases)...

A court taking this approach to the issue generally grounds its conclusions on one of a number of policy-based considerations, including:

> equitable principles against shifting responsibility for the consequences of the criminal's action; the paradoxical difficulties of awarding damages to a guilty person; theoretical and practical difficulties of proving causation; the potential undermining of the postconviction process if a legal malpractice action overrules the judgments entered in the postconviction proceedings; preserving judicial economy by avoiding relitigation of settled matters; creation of a bright line rule determining when the statute of limitations runs on the malpractice action; availability of alternative postconviction remedies; and the chilling effect on thorough defense lawyering. Canaan, 72 p. 3d at 916.

****

Upon considering all of the issues presented and the wealth of commentary on this issue by other courts, we conclude that the approach that requires a defendant to achieve relief from a conviction before advancing a legal malpractice action against his former attorney is superior in this particular area of the law.

> In reaching this conclusion, we are persuaded by the extensive, well-reasoned policy arguments underlying the relief-required approach. See Canaan, 72 P.3d at 916. *Trobaugh* 668 N.W 2d at 581-583.

The Plaintiff does not address the exoneration rule or the policy behind the rule. He simply attempts to make a distinction on the facts, a distinction that is immaterial to the operation of the rule:

> As the sentence was discharged by the Court on February 4, 2010, the plaintiff could not have filed a postconviction relief action against the defendant. Once the sentence was discharged, the Plaintiff had not ability [sic] to seek postconviction relief. (Resistance par. 3).

The foregoing statement is not only immaterial. It is also false. A postconviction applicant can attack a conviction resulting in a sentence that has been discharged. The only limitation is that the PCR must be filed within three years from the date of procedendo on direct appeal. Section 822.3. Plaintiff's time to file a PCR expired April 29, 2008. If Kraklio believed the revocation hearing violated his rights, he could have filed a postconviction action pursuant to Section 822.2(e), and he had three years from the January 31, 2008 revocation to do that. The bottom line is that Mr. Kraklio never filed a PCR wherein he claimed Attorney Simmons was ineffective, and he never gained relief from Count 6, a class "C" felony, that carried five years probation. He did not gain the

"relief-required" or the "exoneration" from that felony that would be required before he could proceed with a civil action for malpractice against either of the attorneys who represented him in the criminal action or PCR. There were two reasons he gained relief on Counts 4 and 5. One was because Attorney Simmons gained a limited remand in the direct appeal and discovered the evidence that led the appellate court to reserve those two counts for PCR. The second reason was that Attorney Simmons then filed a PCR for Mr. Kraklio and obtained summary judgment vacating Counts 4 and 5.

B. Policy Behind the Rule

An important part of the Uncontested Facts developed in the Summary Judgment proceedings is Kraklio's concession that Simmons informed him shortly after the direct appeal process began that he could assert his right to have his supervised probation commence. Kraklio chose not to do that. This circumstance was set out in the Affidavit of Attorney Kent A. Simmons attached to the Motion for Summary Judgment, and was originally asserted as an Affirmative Defense of Waiver in his Answer. (Answer; Simmons Affidavit; App. 4, 24) In his affidavit filed in response to summary judgment, Kraklio did not deny that Simmons imparted this legal advice or the timing of the advice. Kraklio simply attested to his "legal" opinion:

> Although Kent claims that my probation was suspended, that is not the case. I never posted an appeal bond and continued on probation or incarceration from April 17, 2003 through February 4, 2010. (Kraklio Affidavit, 5/9/16; App. 46)

Simmons pointed out all the facts Kraklio's affidavit failed to contest in his Second Statement of Uncontested Facts filed May 19, 2016. (App. 74-77) The policy concerns underlying the "relief-required" or "exoneration" rule ring quite loudly in the instant case. Comparison of the affidavits of the parties illustrates almost everything that is wrong with a legal idea that a convict who has violated probation, and gone to prison for the violation, should be able to gain damages for mistakes made by a probation officer or his attorney in determining his discharge date. (Competing Affidavits; App.) Kraklio's affidavit even claims he should receive money damages for the "inconvenience" of being on probation supervision. Mr. Kraklio pled guilty to three felony counts, and never claimed he was not guilty of the felonious conduct. Attorney Simmons gained relief on two of the counts on the basis of ineffective assistance of other counsel in regard to the statute of limitations that applied to the criminal charges. Mr. Kraklio now seeks to benefit from his felonious conduct, and all the predicaments and "inconvenience" his conduct caused him.

In addition to the *Trobaugh* court's policy concerns with "shifting the responsibilities for the consequences of the criminal's action" and "the paradoxical difficulties of awarding damages to a guilty person," the next concern cited in *Trobaugh*

was "theoretical and practical difficulties of proving causation." Mr. Kraklio formally admitted that he is a fraud. He pled guilty not just to an isolated act of welfare fraud, but to a scheme that engaged a multitude of fraudulent acts over two decades. He was notified by Simmons in the first attorney-client meeting that the probation officer could not unilaterally refuse to provide supervision during the direct appeal process. Kraklio chose to forego a demand for the start of his credit for time spent on probation. Should a court apply an analysis for comparative fault ? He sat on his rights and enjoyed the freedom of an unsupervised lifestyle. If Simmons had notified the probation officer that Kraklio would consider his probation period to have commenced because he had not filed appeal bond, the expected result would be the officer would require Kraklio to submit to supervision. It is a safe bet Kraklio would have sued Attorney Simmons for taking action against his wishes.

As stated below, Plaintiff's so-called expert says nothing in his affidavit toward establishing a standard of care Attorney Simmons would be saddled with in regard to the operations of the probation department. Is he required to inform the department the credit should be considered to have commenced, or does he honor his client's wish to let the oversight allow him to remain unsupervised?

The Plaintiff's attempt to offer an expert witness to establish a standard of care or duty simply magnifies the quagmire that would be created in any attempt to develop law

that would give money damages to a convicted criminal who violates his probation. The answer to Interrogatory No. 3, signed by Attorney Henson, along with his affidavit, was just plainly wrong as a matter of law. The "expert's" affidavit states that Kraklio should have been discharged from "probation and/or incarceration" in April 2008. The expert makes reference to the "Anderson ruling" in reaching this conclusion. Because Mr. Kraklio's probation was revoked on January 31, 2008, his probation could not have been discharged on April 17, 2008. The "expert" claims Kraklio then should have been discharged from incarceration at that point, and the sentence should have been fully discharged.

The Plaintiff filed no brief in support of his resistance, and the expert gave no explanation of the "Anderson ruling" he relied upon. It is clear that the Plaintiff and his expert have a fatal misunderstanding of *Anderson v. State,* 801 N.W.2d 1 (Iowa 2011). Justice Waterman made it clear in *Anderson* that it seemed "counterintuitive" a probationer who spent time "**committed** to electronic monitoring and home supervision during his probation" was entitled to credit for the time in that supervision on his later prison sentence served after his probation was revoked. The Court's "counterintuitive" decision was driven by "the plain language of section 907.3(3), the Code (2007)." 801 N.W. 2d at 2 (emphasis added) In his statutory interpretation, Justice Waterman pointed out that resolving the question of credit under 907.3(3) required reading the statute

together with "Section 901.1B.1 at the level which the district department determines to be appropriate" for the probationer in question. 801 N.W. 2d at 4. (Citing the 1996 change to Section 907.3(3)). The Court then went on to interpret Mr. Anderson's factual situation under 901B.1. The Court determined the continuum's Level One sanctions under that section do not entitle a probationer to credit for time served because that unsupervised probation does not fit 907.3 requirements "restricting sentencing credits to sanctions when the DCS provides 'supervision or services.'" On the same page, Justice Waterman then summarized the credit a probationer gets when he is actually "serving" time on supervised probation subject to sanctions under Levels Two through Five:

> Level one sanctions are "[n]oncommunity-based corrections sanctions," which include self-monitored sanctions and sanctions "which are monitored for compliance by other than the… department of correctional services." Iowa Code Section 901B.1(1)(a). A defendant subjected to a level one sanction is not committed to correctional services "for supervision or services." Id. Sections 901B.1(1)(a), 907.3(3). Accordingly, a defendant is not entitled to sentencing credit for level one sanctions.
>
> The remaining sanction levels all require the DCS to supervise the defendant. Level two sanctions include "monitored sanctions," "supervised sanctions." and "intensive supervision sanctions," which include electronic monitoring, day reporting, and work release programs. Id. Section 901B.1(1)(b)

Whether Mr. Hobbs had the authority to transfer Kraklio to Level One, unsupervised probation, is immaterial. The operative fact is that Kraklio was on Level One sanctions from May 16, 2003, to at least August 1, 2005. He would not have received any credit on his prison sentence for that time period, if he had asked for it. If he had applied for credit on his term of supervised probation for that time period, Mr. Hobbs would have had the option of applying for an additional year of supervision. That extension would have been granted, as Kraklio was non-compliant with victim restitution, was revoked, and was sent to prison for over a year. See: Section 907.7 (1)

The Uncontested Fact is that Attorney Simmons advised Kraklio in his first conversation with him and told him that he could continue with probation supervision while on direct appeal. Kraklio chose to remain unsupervised. This fact is important for two reasons. The *Trobaugh* court's reference to the inequities of compensating a guilty person who is shifting blame, and the difficulty in sorting out causation, are illustrated in this circumstance. If Mr. Hobbs's decision was unauthorized, was that Attorney Simmons's fault ? Was the fact Kraklio chose to proceed on unsupervised probation Attorney Simmons's fault? How is Simmons involved in causation of any harm in this Uncontested Fact ? The inequity is very purely illustrated here with Kraklio attempting to game the system by declining to proceed with supervised probation, then turning around to tell the Court he should be given sentencing credit for unsupervised probation and

claiming Attorney Simmons should compensate him for any loss he suffered from his own decision on the options Simmons explained for him the first time he spoke to him.

C. Plaintiff's Waiver of Error

Simmons argued the application of the *Barker* and *Capotosto* cases in his brief filed contemporaneously with his Motion for Summary Judgment on April 23, 2016. (Brief pp. 5-6, 9-10; App. 31-32, 35-36) Plaintiff filed only one document in resistance to Summary Judgment, and that was the Resistance filed May 9, 2016. There was no supporting brief. The Resistance did not address the "Relief-Required Rule" or even mention *Trobaugh* or *Barker.* Kraklio did not cite any authority in the district court as to why those firmly established authorities should be overturned, and has cited no such authority in his opening brief in the instant appeal. Without authority for his argument that Judge Darbyshire's simple application of the "Relief-Required Rule" was in error, Kraklio first failed to preserve error and now has waived error pursuant to Rule 6.902 (2) (g) (3). See: *State v. Maynard, 232 N.W.2d 265, 266 (Iowa 1975).*

CONCLUSION

For all reasons stated, the Court must affirm the Order on Defendant's Motion for Summary Judgment and the dismissal of the suit.

CONDITIONAL WAIVER OF ORAL ARGUMENT

Appellee sees no need for oral argument and waives it, except that if the Appellant's request is granted, then Appellee requests to be heard in oral argument.

/s/ Kent A. Simmons

Kent A. Simmons
PO Box 594
Bettendorf, IA 52722
(563) 322-7784
ttswlaw@gmail.com