

Plaintiff Must Show Actual Innocence to Pursue Malpractice Claim Against His Criminal Defense Counsel

Lawyers for the Profession® Alert

Lawyers for the Profession® Alert | 2 min read

Sep 25, 2013

[Fink v. Banks, 2013 IL App \(1st\) 122177 \(1st Dist. Sept. 11, 2013\)](#)

Brief Summary

On the basis of ineffective assistance of counsel, the Illinois Appellate Court vacated plaintiff client's conviction for attempted homicide. The client was later convicted of reckless endangerment, but sued defendant, his lawyer, for negligence. The court dismissed the suit, finding that a conviction vacated because of ineffective assistance does not establish actual innocence. Further, the court concluded that a criminal legal malpractice plaintiff must prove that he or she is actually innocent of the convicted offence and any lesser included offenses.

Summary

The client was convicted of attempted first degree intentional homicide. The conviction was later vacated on the basis of ineffective assistance of counsel. The client was then charged with and convicted of first degree recklessly endangering safety, a lesser included offense of attempted first degree intentional homicide.

The client filed a complaint, alleging that the lawyer was negligent during the first trial. The lawyer moved to dismiss, arguing that the client's second conviction precluded him from establishing his actual innocence, which is a prerequisite for a criminal legal malpractice claim. The client argued that the order vacating his attempted homicide conviction established his actual innocence of that crime, and that the decision to charge him with reckless endangerment was further evidence of his innocence of attempted homicide.

The court of appeals found that the client did not plead, and could not prove, actual innocence of the charge for which he was originally convicted. In the client's post-conviction motion, he argued that the conviction should be reversed because he was denied effective assistance of counsel, not because he was innocent. The decision to

permit a new trial arose from the determination that the client's counsel was ineffective, not that the client was innocent. An order vacating a conviction on grounds unrelated to the merit of the charges does not establish actual innocence.

Moreover, the client's conviction on the lesser included offense lent support for the decision to dismiss the legal malpractice claim. Illinois courts have held that actual innocence requires the "defendant to be free of liability not only for the convicted crime, but also any related offenses." The client's failure to "prove he is actually innocent of attempted first degree homicide or any lesser included offenses dooms his legal malpractice claim."

Significance of Opinion

This decision is significant because it clarifies the boundaries of the actual innocence element, and provides guidance on the relation of a finding of ineffective assistance to a legal malpractice claim.

For more information, please contact [Terrence P. McAvoy](#) or Noah D. Fiedler.

This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Related People



Terrence P. McAvoy

Of Counsel

📞 312-704-3281