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IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

CARROLL EUGENE HUMPHRIES,

Plaintiff,

v.

Civil Action No. 07- C- 270

PAUL S. DETCH, ESQ.,

Defendant.

FILED
PUTNAM COUNTY CLERK COURT

ORDER

Pending before this Court is Defendant Paul S. Detch's ("Detch") Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted. Having considered the pleadings, the memoranda of law, the arguments of the parties, and the pertinent legal authorities, the Court hereby **GRANTS** Detch's Motion to Dismiss for failure to state a claim. The factual and legal basis for this ruling is as follows:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. On August 27, 1998, plaintiff Carroll Eugene Humphries ("plaintiff" or "Humphries") was indicted and charged in connection with the 1976 murder of one Billy Ray Abshire. See Compl. at & 1; Docket Sheet at Line 1, attached to Detch's Renewed Memorandum in Support of Motion to Dismiss as Exhibit 1. Plaintiff hired Detch to represent him in the criminal action styled State of West Virginia v. Carrol Eugene Humphries, Case No. 98-F-54 ("underlying criminal case"). On August 20, 1999, the jury in the underlying criminal case found Humphries guilty of being an accessory before the fact to murder in the first degree and conspiracy to commit murder. See Docket Sheet at Line 324. Humphries was sentenced to an indeterminate period of 1 to 5 years in prison for the conspiracy to commit murder

and life in prison with the possibility of parole after 10-years for accessory before the fact to commit murder. *Id.* at Line 330.

2. Humphries appealed his conviction to the West Virginia Supreme Court of Appeals, but the Supreme Court refused to take his Petition for Appeal on October 3, 2000. *Id.* at Line 378. Thereafter, on March 28, 2001, Humphries filed a Petition for Writ of Habeas Corpus with the West Virginia Supreme Court of Appeals claiming he suffered ineffective assistance of counsel in the underlying criminal case. *Id.* at Line 380. The Supreme Court accepted Humphries' habeas petition, and on April 23, 2007, the Supreme Court reversed Humphries' convictions in the underlying criminal case and remanded the matter for a new criminal trial against Humphries. *Id.* at Line 392.

3. Humphries did not, however, move forward with another trial to assert that he was not guilty of the crimes he was convicted of in the underlying criminal case. Instead, on July 23, 2007, Humphries entered a plea agreement wherein he pled *nolo contendere* to the crime of accessory before the fact to murder in the second degree, a lesser included offense of being an accessory before the fact to murder in the first degree. See Judgment Order, attached to Detch's Renewed Memorandum in Support of Motion to Dismiss as Exhibit 2. Plaintiff was therefore adjudged to be guilty of the crime of accessory before the fact to murder in the second degree and was sentenced to an indeterminate term of 5 to 18-years imprisonment. *Id.* at pp. 5-6. The plaintiff was thereafter remanded to the custody of the Sherriff of Greenbrier County to serve the balance of time applicable to that crime. It appears that the plaintiff was eventually released from prison in February of 2008.

4. Despite entering a plea of *nolo contendere* and being adjudged guilty of the crime of accessory before the fact to murder in the second degree, plaintiff has filed the instant action against Detch now claiming he was innocent, and therefore wrongfully convicted in the underlying criminal case. See Amended Complaint.

5. Detch responded to the original complaint with a Rule 12(b)(6) motion to dismiss, claiming that plaintiff's *nolo contendere* plea bars his legal malpractice claim as a matter of law. The motion to dismiss proceeded to hearing on December 6, 2007, and although the transcript indicates that the Court would deny the motion to dismiss, no Order was ever entered. The Hon. Edward Eagloski was the presiding judge at the time of the initial motion to dismiss. The docket sheet in this matter indicates that the plaintiff thereafter failed to take any action to prosecute this case

from December 6, 2007 to March 31, 2009, which prompted the Hon. Phillip Stowers, who had replaced Judge Eagloski as a Putnam County Circuit judge, to file a Notice of Intent to Dismiss this matter for failure to prosecute. The plaintiff opposed the dismissal for failure to prosecute, and the instant action was subsequently transferred to the undersigned judge.

6. Once this matter was transferred to the undersigned, and in light of the plaintiff's opposition to the dismissal for failure to prosecute, the Court notified the parties that this matter would proceed. The Court further instructed the parties to indicate whether any dispositive motions were pending or otherwise being sought in this matter, which prompted Detch to file his Renewed Memorandum in Support of Previously Filed Rule 12(b)(6) Motion to Dismiss. Detch filed his renewed motion to dismiss on October 2, 2009, which proceeded to hearing on December 3, 2009.

7. Although Detch's renewed motion to dismiss was based on a few alternative grounds, all such grounds relate directly to one underlying theme, namely that the plaintiff's nolo contendere plea to the lesser included offense of being an accessory before the fact to commit murder in the second degree bars as a matter of law, his legal malpractice claim against the defendant arising from the defendant's legal representation of the defendant in the defendant's initial trial.

CONCLUSIONS OF LAW

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure permits this Court to dismiss a plaintiff's complaint when it appears that the claims asserted cannot be established as a matter of law. See *Haines v. Hampshire County Com'n*, 607 S.E.2d 828 (W.Va. 2004). The West Virginia Supreme Court of Appeals has noted that a motion to dismiss is particularly appropriate "to weed out unfounded suits." *Harrison v. Davis*, 478 S.E.2d 104 (W.Va. 1996).

Detch essentially submits three related arguments (public policy, proximate causation, and collateral estoppel) in support on his contention that the plaintiff's nolo contendere claim bars his legal malpractice claim as a matter of law. All three of Detch's arguments are premised on his assertion that in order to succeed on a legal malpractice claim stemming from the defense of an underlying criminal matter, plaintiff must first be able to show that he was "actually innocent" of the criminal activity alleged in the underlying criminal matter.

Actual Innocence Required

This Court believes that in order for a criminal defendant to sue his attorney for legal malpractice based on an underlying criminal matter, such criminal defendant must be able to establish that he was actually innocent of the criminal conduct involved in the underlying matter. A contrary holding would lead to absurd results and violate the public policy of the State of West Virginia.

First, the Court notes that the overwhelming majority of jurisdictions, including both state and federal courts within the federal Fourth Circuit, require a plaintiff asserting legal malpractice arising from the defense of a criminal action to plead and prove that he was actually innocent of the both the crimes for which he was convicted and any lesser included offenses. See e.g., Ronald Mallen and James Smith, *Legal Malpractice* ' 26.13 (2007 Edition); *Brown v. Theos*, 550 S.E.2d 304, 306 (S.C. 2001) (affirming lower court's decision to grant attorney's Rule 12(b) (6) motion to dismiss because the complaint did not allege plaintiff was actually innocent in the underlying criminal matter); *Jones v. Link*, 493 F.Supp.2d 765 (E.D. Va. 2007) (applying Virginia law); *Levine v. Kling*, 123 F.3d 580, 582 (3rd Cir. 1997); *Slaughter v. Burney*, 683 A.2d 1234, 1235 (PA 1996); *Wiley v. County of San Diego*, 966 P.2d 983, 984-85 (Cal. 1998).

The most often cited reasoning behind the adoption of the so-called "actual innocence" rule is that it is necessary to preserve the integrity of the criminal justice system, and that a different rule would result in poor public policy contrary to well settled principles of law. See e.g., *Levine*, 123 F.3d at 582 (1997). In *Levine*, the Third Circuit Court of Appeals explained that without the "actual innocence" rule, "there would be cases in which a defendant guilty in fact of the crime with which he had been charged . . . would nevertheless obtain substantial damages for the loss of his liberty during the period of his rightful imprisonment." *Id.*

The Court in *Levine* logically reasoned that "not only would this be a paradoxical result, depreciating and in some cases wholly offsetting the plaintiff's criminal punishment, but it would also be contrary to fundamental principles of both tort and criminal law." *Id.* In this regard the Court explained that "tort law provides damages only for harms to the plaintiff's legally protected interests, and the liberty of a guilty criminal is not one of them." *Id.* Finally, with regard to criminal law, the Court in *Levine* noted that while a guilty criminal defendant may get lucky and obtain an acquittal through skillful representation, he certainly has no right to such a result,

and the law obviously does not afford the guilty man any type of relief when he does not obtain an acquittal. *Id.*

Other courts have followed a similar line of reasoning in adopting and applying the actual innocence rule. See, *Jones v. Link*, 493 F.Supp.2d 765 (E.D. Va. 2007) (noting that the rationale behind requiring a legal malpractice plaintiff complaining about his criminal conviction to plead and prove his actual innocence is that the courts will not assist one who participates in an illegal act to profit from the act's commission); *Wiley v. County of San Diego*, 966 P.2d 983, 984-85 (Cal. 1998) (in conducting a thorough survey of the law regarding legal malpractice actions stemming from underlying criminal cases, the Court noted that the overwhelming majority of jurisdictions require proof of innocence because a contrary rule would "shock the public conscience, engender disrespect for courts and generally discredit the administration of justice.") [emphasis added]; *Slaughter*, 683 A.2d at 1235 (PA 1996) (noting that when a criminal has been convicted due to the inadequacy of his counsel, the remedy is a new trial, and it is only when an innocent person is wrongfully convicted due to his attorney's negligence that the law will allow compensation for the wrong that has occurred).

Though the West Virginia Supreme Court has not addressed this issue, this Court is persuaded by and agrees with the overwhelming majority of jurisdictions in this regard, and therefore **FINDS** that in order for the plaintiff to succeed on his legal malpractice claim against Detch, he must establish that he was actually innocent of the crimes for which he was originally convicted and/or any lesser included offenses involving the same or related conduct.

Without Actual Innocence the Defendant's Actions Cannot Be The Proximate Cause of the Plaintiff's Incarceration

Having established that the plaintiff must prove that he was actually innocent of the alleged criminal conduct involved in the underlying action, the Court will now turn to the issue of whether the plaintiff's nolo contendere plea bars his malpractice claim.

Detch asserts that plaintiff's nolo contendere plea, which resulted in a legal adjudication finding the plaintiff to be guilty of accessory before the fact to murder in the second degree, establishes that it was the plaintiff's criminal conduct, not Detch's

alleged negligence, that proximately caused the plaintiff's conviction and imprisonment. This Court agrees.

First, the Court takes notice of the reasoning set forth in the highly analogous case *Brown v. Theos*, 550 S.E.2d 304 (S.C. 2001). *Brown* involved an action in which the legal malpractice plaintiff (Brown) was charged and convicted for trafficking in cocaine and three counts of distribution of cocaine, and sentenced to twenty-five years imprisonment. *Id.* at 305. After his convictions and sentences were affirmed on direct appeal, Brown sought post-conviction relief claiming ineffective assistance of counsel. *Id.* The lower court in *Brown* agreed that Brown had suffered ineffective assistance of counsel, and therefore granted a new trial. *Id.*

Instead of proceeding with a new trial, Brown opted to enter a nolo contendere plea to one count of trafficking in cocaine and three counts of distribution of cocaine and was sentenced to eight-years imprisonment. *Id.* Brown then filed a legal malpractice claim against his former defense attorneys, alleging that "but for their grossly negligent representation, he would have fared better at trial and would not have been convicted through a plea of no contest or otherwise." *Id.*

The South Carolina Supreme Court in *Brown* first recited the "actual innocence" rule and held that "in an action for legal malpractice based on conviction of a crime the general standard is the plaintiff must show innocence of the crime in order to establish liability." *Id.* at 306. Next the Court in *Brown* held that plaintiff's nolo contendere plea, which operates as a guilty plea, bars the plaintiff from pursuing his legal malpractice claim because "A[the plaintiff's] no contest plea, not his Attorneys' negligence, caused his incarceration." *Id.* Accordingly, the South Carolina Supreme Court affirmed the lower court's decision to grant the attorney's Rule 12(b)(6) motion to dismiss for failure to state a claim. *Id.*

The Court finds the reasoning set forth in *Brown* persuasive. As in *Brown*, the plaintiff's nolo contendere plea, which operates as a legal finding that the plaintiff was guilty of being an accessory before the fact to murder in the second degree, establishes that it was the plaintiff's own criminal conduct, not Detch's alleged negligence, that proximately caused his imprisonment. After all, subsequent to the entry of the plaintiff's nolo contendere plea, the plaintiff was sentenced to 5 to 18 years imprisonment, and although he received credit for the time he had already served, he was ultimately sent back to prison for approximately 6 additional months before being released.

The plaintiff argues that his nolo contendere plea should not act as a finding that he was guilty of any criminal conduct in the underlying action, and that it cannot be used against him in the instant action. In support of this claim, plaintiff refers to the general rule that pleas of nolo contendere in criminal proceedings are not admissible in subsequent civil proceedings. See W.V. R.Evid. 410.

This Court disagrees with the plaintiff in this regard. First, the Court notes that the South Carolina Supreme Court in *Brown v. Theos*, supra, addressed and rejected a similar argument. Like West Virginia, South Carolina adheres to the general rule that a nolo contendere plea cannot be used against the individual who entered the plea in a subsequent civil proceeding. *Brown*, 550 S.E.2d at 306. In fact, South Carolina's Rule of Evidence 410 is identical to West Virginia's Rule of Evidence 410. The Court in *Brown* held that:

We find [that Rule 410] does not contemplate the type of proceeding at issue in this case and is therefore inapplicable. Here, Brown is the plaintiff, not a defendant. He seeks to use his no contest plea offensively for his own benefit. This is not a case where a party attempts to use a no contest plea in a criminal matter to prove a defendant liable in a civil proceeding. Instead, Brown as a plaintiff is litigating whether his Attorneys' adequately advised him during his plea negotiations. Rule 410, SCRE was never intended to cover this type of case. Furthermore, federal courts have found Rule 410 of the Federal Rules of Evidence does not bar use of pleas against a defendant who becomes plaintiff with respect to events in plea. See also *Walker*, 854 F.2d at 143 ("We find a material difference between using the nolo contendere plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant's use of the nolo contendere plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages, after having admitted facts which would indicate no civil liability on the part of the [defendant] police.")

Id. at 307.

This Court agrees with the reasoning set forth in *Brown*, and further FINDS that the drafters of West Virginia Evidence Rule 410 did not intend for the rule to be used in order to allow the a plaintiff to use the rule in an offensive, rather than a defensive, manner.

Here, the plaintiff is attempting to profit from his nolo contendere plea in this malpractice action. The Court FINDS that public policy prevents such use of a plea bargain, and other courts appear to agree. See *Howarth v. Public Defender Agency*, 925 P.2d 1330, 1333 (AK 1996) ("a defendant convicted of a felony-including a defendant who goes free after making a salubrious plea bargain-should not be allowed to claim in court in subsequent litigation that the elements essential to his conviction did not exist. Allowing such a claim trivializes both the conviction and the criminal process"); *Ray v. Stone*, 952 S.W.2d 220, 224 (KY 1997) (finding that public policy mandates that one cannot profit from his criminal conduct, regardless of whether the conviction is the result of a guilty verdict or a plea bargain); *Gomez v. Peters*, 470 S.E.2d 692, 695-96 (GA 1996).

In sum, the Court FINDS that the plaintiff's nolo contendere plea bars him from establishing that Detch's alleged negligence proximately caused his imprisonment, and as such, plaintiff's complaint fails on its face. The plaintiff's incarceration was not proximately caused by the actions of the defendant Detch, however inadequate. The plaintiff's incarceration was proximately caused by his conviction of the felony offense of being an accessory before the fact to murder in the second degree. The Court GRANTS Detch's Rule 12(b)(6) motion to dismiss on this ground alone. See, e.g., *Gomez v. Peters*, 470 S.E.2d 692 (GA 1996) (holding that plaintiff's guilty plea in underlying criminal matter barred his legal malpractice claim because the guilty plea established that it was the plaintiff's own criminal conduct, not the alleged negligence of his attorney, was the proximate cause of his imprisonment); *Adkins v. Dixon*, 482 S.E.2d 797, 802 (VA 1997) (noting the public policy that courts will not allow one to profit from his own crime, the court held that it was plaintiff's criminal conduct, not the attorney's alleged negligence, that proximately caused the convictions).

**Without Actual Innocence the Plaintiff is
Collaterally Estopped From Asserting this Claim**

As an alternative but related argument, Detch also argues that the plaintiff's nolo contendere plea collaterally estoppes him from establishing he was actually innocent in the underlying matter, which also bars his legal malpractice claim. Once again, this Court agrees.

The West Virginia Supreme Court of Appeals has applied the doctrine of collateral estoppel in the legal malpractice setting. See *Walden v. Hoke*, 429 S.E.2d 504 (W.Va. 1993). *Walden* involved a legal malpractice action in which the plaintiff filed suit against the attorney who represented her in her preceding divorce action. *Id.* at 505. During the course of the divorce proceedings the plaintiff signed a separation and property settlement agreement that was part of a final divorce decree Order entered by the circuit court. *Id.* at 506. The agreement provided, among other things, that:

Husband shall receive the rest and residue of his State Workers Compensation settlement from this date hereafter; and ... [t]hat both the Husband and [plaintiff] ... further expressly acknowledge and agree that the above mutual covenants and agreed-upon terms are fair and reasonable; were not obtained by fraud, duress or any other unconscionable act or conduct by either of the parties.
Id.

After the Order was entered and the divorce was final, the plaintiff learned her former husband continued to receive workers' compensation payments, and she therefore filed a Rule 60(b) motion to set aside the final divorce and property settlement, arguing that they were obtained by fraud, duress, and unconscionable conduct. *Id.* The court denied the motion to set aside the divorce and property settlement agreement based on the divorce decree Order and the plain language of the property settlement agreement. *Id.* at 507.

Rather than filing an appeal of that ruling, the plaintiff filed a legal malpractice action against the attorney who represented her in the divorce, claiming that her attorneys had a conflict of interest, that she did not understand the settlement agreement, that she was under duress throughout the divorce, and that she did not know of the second workers' compensation award. *Id.* The lower court in the legal malpractice action found, based on the plain language of the property settlement agreement, the divorce decree Order, and the Order denying the Rule 60(b) motion, that the plaintiff "knowingly and intelligently waive[d] her rights" to the workers' compensation payments and that plaintiff entered into the agreement without "being subjected to fraud, duress, or other unlawful compulsions to enter into [the] [a]greement." *Id.* The lower court also found that the doctrine of collateral estoppel barred the plaintiff from re-litigating any issues that had previously been decided. *Id.* Plaintiff appealed this ruling to the West Virginia Supreme Court of Appeals.

In deciding whether to apply the doctrine of collateral estoppel in the legal malpractice action, the Court in *Walden* noted that precluding "parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation of [] multiple lawsuits, conserves judicial resources, and minimiz[es] the possibility of inconsistent decisions." *Id.* at 508. [emphasis added]. In addressing the specifics of the legal malpractice claim, the Court first noted that because there was "no question" that the claims relating to duress and lack of knowledge of the workers' compensation awards were decided in the earlier proceedings, plaintiff was collaterally estopped from re-litigating these issues against her attorney. *Id.* With regard to the claim that plaintiff did not properly understand the property settlement agreement, the Court noted that while this "appears to be a new claim, a careful analysis reveals it also revolves around the workers' compensation awards." *Id.* Here the Court held that because "[a] litigant cannot re-litigate, in a different jurisdiction, an issue previously ruled upon by another court merely by describing the same facts in a different way," collateral estoppel applied to this claim as well. *Id.*

The decision in *Walden* establishes that the plaintiff in this case is collaterally estopped from now asserting in this civil action that he was innocent of the crime of accessory before the fact to murder in connection with Billy Ray Abshire's death. As in *Walden*, where the legal malpractice plaintiff's claims contradicted the divorce agreement she had entered into in the underlying case, the plaintiff's assertion herein that he was innocent of the alleged criminal activity in the underlying action is in direct contravention to the Judgment Order entered by the Circuit Court of Greenbrier County, which recites a litany of items relating to Humphries' understanding of the effect of his nolo contendere plea, including: (i) that Humphries agreed to the terms of the written plea agreement, (ii) that Humphries had not been forced, threatened, or coerced to enter into the plea agreement, and that he voluntarily entered into the plea agreement, (iii) that Humphries fully understood the nature of the charges set forth in the indictment, (iv) that Humphries did not wish to proceed to trial, (v) that Humphries understood that by entering the plea of nolo contendere, he would be incriminating himself, (vi) and that he was being convicted of the crime of accessory before the fact to murder and waiving all rights to appeal that conviction. See Judgment Order at pp. 2 - 5, attached to Detch's Renewed Memorandum in Support of Motion to Dismiss as Exhibit 2. After the Circuit Court of Greenbrier County made all of the above affirmative findings, the Circuit Court found that Humphries entered into the plea agreement freely, voluntarily and upon

his own free will, and it therefore adjudged him to be guilty of the crime of being an accessory before the fact to murder in the second degree. *Id.* at p. 5.

Based on the above the Court **FINDS** that the plaintiff had a full and fair opportunity to litigate his guilt or innocence in the underlying action. Pursuant to the very terms of his no contest plea, the holding in *Walden*, and based on the public policy of preventing a convicted criminal plaintiff from profiting from his crime, as discussed above, the Court **FINDS** that the plaintiff is collaterally estopped from asserting that he was actually innocent of being an accessory before the fact to murder in connection with the death of Billy Ray Abshire. The Court **GRANTS** Detch's Rule 12(b)(6) motion to dismiss on this alternative ground as well.

CONCLUSION

For the reasons stated herein, this Court hereby **GRANTS** Detch's Rule 12(b)(6) Motion to Dismiss for failure to state a claim upon which relief can be granted and this matter is **ORDERED DISMISSED** and stricken from the Court's docket.

The Court reserves the parties' objections and exceptions and directs the Clerk to forward copies of this Order to all counsel of record, as stated below.

Entered this 18th day of December, 2009.



Hon. O. C. Spaulding, Chief Judge

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WEST VIRGINIA
CLERK OF COURT
I, _____, Clerk of the Circuit Court of said
County, do hereby certify that the
above is a true and correct copy of the
original as the same appears in the records of said Court
and in said State. Witness my hand and the seal of said Court
this 21st day of December 2009.

Rhonda Mathis
Circuit Court
Putnam County, W.Va.

ENTERED
PUTNAM COUNTY CIRCUIT COURT
CIVIL ORDER BOOK
NO. 169 PAGE 309-319
12-23-09
cc: Jackson Kelly
Forbes Law

