IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

DONALD LYLE CLARK, Plaintiff, vs. STATE OF IOWA, Defendant.	No. LACV079404 **PLAINTIFF'S AMENDED TRIAL BRIEF**

Plaintiff Donald L. Clark submits the following amended trial brief in compliance with the Court's pretrial orders and after review of the State's Proposed Jury Instructions, State's Third Motion in Limine, and State's Trial Brief:

I. Factual Summary: This is a civil case brought by the Plaintiff, Donald L. Clark, for legal malpractice. Mr. Clark asserts that attorney John Robertson was negligent in connection with defending him against the charge of Sexual Abuse in the 2nd Degree, in violation of Iowa Code § 709.3.

After being criminally charged on August 20, 2009, attorney John Robertson, a public defender, was appointed by the court to represent Mr. Clark. The criminal case went to jury trial on February 8, 2010, and Mr. Clark was found guilty and sentenced to prison for 25 years with a 17.5-year mandatory minimum sentence before he was eligible for parole. He served exactly 2,298 days or 6 years, 3 months and 17 days until he was released because his lawyer was deemed to have been ineffective.

The State of Iowa declined to re-try him and the criminal case was dismissed. At all relevant times, attorney Don's attorney John Robertson was an employee of the State of Iowa.

On October 13, 2017, Mr. Clark filed the legal malpractice case at bar. Mr. Clark argues his defense attorney was negligent and was the legal cause of Mr. Clark's wrongful conviction and

resulting damages. On April 13, 2013, while Mr. Clark was still in prison, his attorney, John Robertson passed away. Irrespective of Mr. Robertson's passing, the State of Iowa is legally responsible and stands in the shoes of attorney John Robertson's conduct under Iowa Code § 669.5(2)(a). Mr. Clark seeks damages associated with being wrongfully imprisoned and wrongfully labeled a child molester, including but not limited to emotional distress damages, past and future, physical imprisonment, being subjected to the threats of violence, actual violence and conditions of prison, loss of liberty, shame, humiliation, anxiety, fear, loss of enjoyment of life, past and future, and past attorney fees in being forced to bring his post-conviction relief action that overturned his conviction.

The State of Iowa denies attorney John Robertson did anything wrong in connection with defending Mr. Clark in his criminal case. In the alternative, the State of Iowa argues that even if Mr. Robertson was negligent, Mr. Clark was comparatively at fault for his conviction for his failure to assist in his own defense and/or because Mr. Clark is in fact guilty of the crime.

II. Legal Issues: The legal issues in this case for the jury to decide are the elements of legal malpractice. Legal malpractice in Iowa is based on the tort of negligence. As the Iowa Supreme Court said in reviewing this very case, "[t]o recover for legal malpractice, Clark must prove: (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. *Kraklio v. Simmons*, 909 N.W.2d 427, 434 (Iowa 2018) (*quoting Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997)). In Iowa, a criminal defendant is not required to prove actual innocence as a prerequisite to a legal malpractice claim against his former criminal attorney. *See Barker v. Capotosto*, 875 N.W.2d 157, 168 (Iowa 2016). The defendant is, however,

required to obtain judicial relief related to the purported malpractice before pursuing a malpractice claim. *See Kraklio*, 909 N.W.2d at 439 (allowing defendant to bring malpractice action based on ineffective assistance related to sentencing proceedings only after first showing "relief from the duration of his supervised probation"); *Trobaugh v. Sondag*, 668 N.W.2d 577, 583 (Iowa 2003) (adopting "approach that requires a defendant to achieve relief from a conviction before advancing a legal malpractice action" premised on conduct that resulted in an avoidable conviction). When the defendant is represented by a court-appointed attorney, as here, this prerequisite is statutory. *See* Iowa Code § 815.10(6). Having met this prerequisite, Clark brought the instant legal malpractice action.

An attorney is obligated to use the knowledge, skill and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances. *Schmitz v. Crotty*, 528 N.W.2d 112, 115 (Iowa 1995). A lawyer must engage in adequate preparation and perform legal tasks with a reasonable degree of care, skill and diligence. *Ruden*, 543 N.W.2d at 610-11. In a claim for legal malpractice, "unless the plaintiff's claim is based on standards of care and professionalism understood and expected by laypersons, the plaintiff will have to retain an expert to go forward." *Barker v. Capotosto*, 875 N.W.2d 157, 167 (Iowa 2016). Generally, the Iowa Supreme Court requires expert testimony on the standard of care in legal malpractice actions. *Stendler*, 897 N.W.2d at 505. "This is because the measure of the standard of care required is that of a similarly situated ordinary lawyer. *Id.* at 505-506, *citing to* 16 Gregory C. Sisk & Mark S. Cady, *Iowa Practice Series: TM Lawyer & Judicial Ethics* § 13:4(b), at 1106-07 (2015).

The question of whether Mr. Robertson's overt actions or failure to act in representing Mr. Clark in his criminal case fell outside the ordinary skill, prudence, or diligence expected of a similarly situated, ordinary attorney is a technical legal question that requires the use of an expert

witness. On the issues of (1) duty; (2) breach; and (3) proximate cause, Mr. Clark has retained and intends to call as his expert the Honorable Mark W. Bennett (Ret. U.S. District Judge, N.D. of Iowa).

A. Causation

In a legal malpractice case, the conduct of a party is the proximate cause of damage when it is a substantial factor in producing the damage and when the damage would not have happened except for the conduct. *See Thompson v. Kaczinski*, 774 N.W.2d 829, 836-39 (Iowa 2009). Here, Mr. Clark must prove that Mr. Robertson's negligence was a substantial factor in producing his damages and the damages would not have happened, except for Mr. Robertson's negligence. "This test holds "[t]he actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability." *Id.* at. 836. "Causation has two components: (1) the defendant's conduct must have in fact caused the plaintiff's damages (generally a factual inquiry) and (2) the policy of the law must require the defendant to be legally responsible for the injury (generally a legal question)." *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005) *quoting Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996).

The second component of causation is the legal cause or proximate cause component. Legal cause or proximate cause is about the scope of responsibility. *Id.* at 372. Actual causation as well as legal causation must exist between the negligence and the damages. *Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007). Proximate cause rules are among those rules that seek to determine the appropriate scope of a negligent defendant's liability. *Id.* at 372, *quoting* Dobbs, § 180, at 443. "Judicial decisions about proximate cause rules thus attempt to discern whether, in the particular case before the court, the harm that resulted from the defendant's negligence is so clearly outside

the risks he created that it would be unjust or at least impractical to impose liability." *Id.* at 372. In this case, if Mr. Robertson was negligent in defending Mr. Clark, the harm that resulted, (i.e., a loss of liberty, shame, humiliation, anxiety, fear, loss of enjoyment of life) is not so clearly outside the risks he created that it would be unjust or impractical to impose liability. Indeed, if Mr. Robertson's overt action or failure to act resulted in Mr. Clark being convicted of a sex crime against a minor, then the law mandates that he go to prison and suffer all the damages associated with that kind of loss of liberty.[1] Clearly, the Court may impose liability for this kind of injustice.

In order to sustain his burden of proof in a legal malpractice case, Mr. Clark must present evidence of the underlying criminal case, that establishes that he would have been found not guilty if Mr. Robertson had properly defended him. *See Huber*, 568 N.W.2d at 790. Presenting such evidence involves litigating the "suit within a suit," which will determine the liability of the defendant lawyer, rather than the third party against whom the underlying claim was directed. Sisk, Gregory L. *Lawyer Malpractice and Liability*, Iowa Practice, Vol. 16, 2015.

> "To establish causation and damages in an action arising out of Negligent representation in a legal proceeding, the plaintiff is essentially required to try the underlying proceeding within the malpractice action to establish that he or she would have prevailed in the underlying proceeding."

Nordine v. Woodburn, No. 13-0410, 2013 Iowa App. LEXIS 1211 *7-8 (Iowa Ct. App. Nov. 20, 2013).

B. Damages

The goal of legal malpractice is to put the clients in the position they would have occupied had the attorney not been negligent. *Sladek v. Kmart Corporation*, 493 N.W.2d 383, 840 (Iowa 1992). Put another way, the amount of the damages recoverable is limited to the amount of loss

[1] The emotional damage issue will be more fully explained in argument II (B)(2) below.

actually sustained as a proximate result of the negligence. *Dessel*, 431 N.W.2d at 362. There must be substantial evidence showing a reasonable basis from which an amount of damages may be inferred or approximated. *Shannon v. Hearity*, 487 N.W.2d 690, 693 (Iowa Ct. App. 1992).

Mr. Clark also seeks emotional distress (loss of enjoyment of life) damages in the past from the date of his incarceration after the guilty verdict for 2,298 days or 6 years, 3 months and 17 days, until the present time. Emotional distress damages arise from feelings of anguish, humiliation, embarrassment, anxiety, fear, loss of enjoyment of life, mental pain and suffering, despair, degradation, uncertainty, apprehensiveness, despondency, confusion, and tension. This includes all highly unpleasant mental reactions.[2] Emotional distress may include a loss of liberty. *See Lawson v. Nugent*, 702 F. Supp. 91, 95 (D.N.J. 1988) (holding plaintiff was allowed to offer proof of emotional distress resulting from a loss of liberty in legal malpractice suit filed against his criminal defense attorney) *cited in Miranda v. Said*, 836 N.W.2d 8, 14 (Iowa 2013).

Mr. Clark also seeks emotional distress (loss of enjoyment of life) damages in the future from his release from incarceration after 2,298 days or 6 years, 3 months and 17 days, and all feelings of anguish, humiliation, embarrassment, anxiety, fear, loss of enjoyment of life, mental pain and suffering, despair, degradation, uncertainty, apprehensiveness, despondency, confusion, and tension. This includes all mental and emotional suffering that are reasonably expected to occur in the future because of his conviction, time in prison, and all that prison entailed.[3]

1. The Court should allow evidence of Mr. Clark's non-pecuniary emotional distress damages.

The State seeks to prohibit Mr. Clark from introducing evidence or arguing that he is

[2] See Plaintiff's First Proposed Jury Instruction No. 29, with authority from Iowa Civil Jury Instruction 200.1 (modified), Iowa Civil Jury Instruction 200.12 (modified) and Iowa Civil Jury Instruction 200.13B (modified).
[3] *Id*.

entitled to non-pecuniary emotional distress damages. As support, the State offers the general rule that "absent intentional conduct by a defendant or some physical injury to the plaintiff, no recovery may be had for emotional distress." *See Mills v. Guthrie Cty. Rural Elec. Coop. Ass'n*, 454 N.W.2d 846, 852 (Iowa 1990). In offering this rule, the State ignores that certain exceptions exist. *See Miranda v. Said*, 836 N.W.2d 8, 14 (Iowa 2013). One such exception is [the] duty to exercise ordinary care to avoid causing emotional harm when supported by the nature of the relationship between the parties and the nature of the acts engaged in by the defendant within the context of the relationship." *Id.* at 14; *see also Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990). This is known as the "special relation to the actor" test as applied in *Oswald*. Put differently, the Iowa Supreme Court said in *Miranda*,

> "We have recognized recovery for emotional distress damages in actions which do not involve an intentional tort when a party negligently performed an act which was so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach."

Id. at 14, *citing to Lawrence v. Grinde*, 534 N.W.2d 414, 420-21 (Iowa 1995); *quoting Meyer v. Nottger*, 241 N.W.2d 911, 921 (Iowa 1976). In *Lawrence*, the Iowa Supreme Court suggested certain malpractice actions might support a claim for emotional distress damages. *Lawrence*, 534 N.W.2d at 421-22. *Lawrence* involved a plaintiff bringing a legal malpractice action against his attorney in bankruptcy who negligently failed to disclose in the bankruptcy questionnaire and schedules a settlement that the plaintiff had entered into with a business associate within the year prior to the bankruptcy. *Id.* at 416. When the federal government learned of the settlement, the plaintiff was indicted for bankruptcy fraud. *Id*. at 417. After the federal court found the plaintiff not guilty of bankruptcy fraud, he sued his attorney, seeking both economic loss and emotional

distress damages. *Id.* The Iowa Supreme Court held emotional distress damages were not available. *Id.* at 423. In so holding, the Court held that emotional distress damages were available only "in situations which involve both a close nexus to the action at issue and extremely emotional circumstances." *Id.* at 421. The Court further clarified that "damages for emotional distress which arise out of acts which invade an interest protected by tort law are recoverable only if the claimed emotional distress naturally ensures from the acts complained of." *Id.* at 422, *quoting Merenda v. Super. Ct*. 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87, 89 (Ct. App. 1992). The Court observed that "in special cases involving peculiarly person subject matters do the majority of jurisdictions recognize mental anguish may be a foreseeable damage resulting from attorney negligence." *Id*. at 422, quoting *Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256, 1257 (Nev. 1980).

In ultimately holding emotional distress damages were unavailable to the plaintiff in *Lawrence*, the Court reasoned that the plaintiff's emotional distress was one step removed from the attorney's negligence. *Id*. at 422. "Were it not for the indictment by the federal government for fraud, there would have been no basis for Lawrence's claim." *Id*. *Lawrence* is easily distinguishable from the present case. Mr. Robertson's negligence in defending Mr. Clark is in lock step with his emotional damages. Mr. Robertson knew that if he was negligent, it would result in his client being convicted and sent to prison. More than that, Mr. Robertson knew that if convicted of a child sex crime, his client would be labeled with one of the worst offenses possible in terms of potential violence to the client while in prison. It is commonly understood that child sex offenders routinely are targeted in prison for violence. Justice Carter in his dissent in *Lawrence* agreed with the view that a plaintiff suing an attorney for malpractice which resulted in criminal liability suffers emotional distress which should be compensable:

> "In the present case, the jury could have found that the defendant's negligence in filling out the bankruptcy schedules made it appear

> that the client had committed a serious federal crime. This in turn led to indictment, arrest and trial with the possibility of conviction and imprisonment – ***circumstances that by their very nature placed the client in a very stressful situation that continued over a lengthy period of time. The severe emotional impact that this would place on any normal person is neither trivial nor speculative***."

(Emphasis Added). *Id.* at 424. In so doing, Justice Carter explained "that *Lawrence* meets both the special relation to the actor test applied in *Oswald* and the unlikely occurrence of physical injury in connection with foreseeable emotional distress test invoked in the *Mentzer*[4] telegram case." *Id.* "The reasons for the general rule of nonliability advanced in section 436A of the Restatement do not fit the present controversy." *Id.* "The anxiety that would normally accompany the travail of being indicted, arrested, and tried for a serious federal crime is not in the realm of the trivial. A person subject to these occurrences will not be subject to feigning emotional distress. These circumstances create a strong likelihood that such distress will occur and will exist throughout the entire period of the criminal proceeding." *Id.* at 424.

Justice Carter's reasoning for allowing emotional distress damages in a legal malpractice case in *Lawrence* is even more compelling when applied to the circumstances in this case. Unlike *Lawrence*, if Mr. Robertson's negligence is proven, then Iowa law mandates a 25-year prison sentence with a mandatory minimum 17.5 years served before Mr. Clark is eligible for parole. Notwithstanding the obvious stress of trying to work with a negligent criminal defense attorney before and during trial, Mr. Clark's eventual incarceration caused him to be physically restrained in a prison where violence and threats of violence, especially given Clark's status as a sex offender, were a daily occurrence which makes emotional distress not just foreseeable, but certain. These gripping circumstances should create the presumption that emotional distress damages are

[4] *See Mentzer v. Union Tel. Co*., 93 Iowa 752, 62 N.W.1 (1895).

available to a plaintiff suing his criminal defense attorney for malpractice, that if proven, results in any significant loss of liberty or social stigma.

Consistent with Justice Carter's opinion, other jurisdictions have permitted awards of emotional damages when emotional distress is a natural and foreseeable consequence of a breach of contract or attorney malpractice. *See, e.g., Wagenmann v. Adams*, 829 F.2d 196, 221-22 (1st Cir. 1987) (applying Massachusetts law) (holding emotional distress damages are available when attorney negligence results in the client being forcibly deprived of his liberty and dispatched to a mental hospital); *Holiday v. Jones*, 215 Cal. App. 3d 102, 264 Cal. Rptr. 448, 455-56 (Ct. App. 1989) (holding emotional distress damages were appropriate when plaintiff had been wrongfully convicted of manslaughter because of his trial attorney's negligence); *Person v. Behnke*, 242 Ill. App. 3d 933, 611 N.E.2d 1350, 1353, 183 Ill. Dec. 702 (Ill. App. Ct. 1993) ("We hold that a valid claim exists for noneconomic damages resulting from a plaintiff's loss of custody and visitation of his children which allegedly resulted from an attorney's negligence."); *see also* D. Dusty Rhoades & Laura W. Morgan, Symposium, *Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 S.C. L. Rev. 837, 845 (1994) ("When an attorney's negligence causes a client's loss of liberty, courts have been willing to step away from the general rule barring damages for emotional distress.").

In *Miranda*, the Iowa Supreme Court was careful to note that not all negligence is very likely to cause severe emotional distress, and a duty of care to protect against emotional harm does not arise unless negligence is very likely to cause severe emotional distress. *Id.* at 29. To help identify those relationships which make it especially likely that severe emotional distress will occur, the Court considers any remoteness between the negligent conduct and the harm to the plaintiff. *See Lawrence*, 534 N.W.2d at 422 supra. Unlike *Lawrence*, the alleged negligence here

is in lock step with Iowa law's requirement of incarceration and a loss of liberty for sexual abuse in the second degree. If Mr. Clark is found guilty and Mr. Robertson's negligence is proven, then it is foreseeable that emotional distress would accompany the loss of liberty and social stigma of being labeled a child molester and Mr. Robertson as a seasoned criminal defense attorney certainly knew the likelihood of such damages when he represented Mr. Clark.

In this case, Mr. Robertson's negligence in defending Mr. Clark against allegations of a sex crime against a child and his resulting prison sentence fits squarely within the exception to the rule as charted in *Miranda.* While noting that most courts do not consider emotional distress as reasonably foreseeable in most legal malpractice cases, "nonetheless, we observed in special cases involving peculiarly personal subject matters do the majority of jurisdictions recognize that mental anguish may be a foreseeable damage resulting from attorney negligence." *Miranda,* 836 N.W.2d at 24, *quoting Selsnick v. Horton*, 96 Nev. 944, 620 P.2d 1256, 1257 (Nev. 1980). It is hard to fathom a subject matter more peculiarly personal and foreseeable than a teacher being accused of a sex crime against a child and being found guilty because of the negligence of his or her attorney, when the law mandates prison with a lengthy mandatory minimum sentence. As recognized in *Miranda*, "this standard is not one that threatens the practice of law, but is consistent with the ideals that protect the integrity of the practice of law." *Id.* at 33.

Finally, loss of liberty is a physical damage and further justification for allowing emotional damages even absent the special relationship. *See Wanatee v. Ault*, 12 F.Supp.2d 784, 788 (W.D. Iowa 2000) ("[E]very day of unconstitutional incarceration generally constitutes irreparable harm to the person in such custody.").

C. The Court should allow evidence of unrelated proceedings.

The State seeks to prevent Mr. Clark from introducing the post-conviction relief court's

ruling. The State previously argued the PCR ruling was irrelevant because of the summary judgment ruling that held issue preclusion applied to the issue of breach. If the summary judgment ruling were upheld on appeal, Mr. Clark might be inclined to agree with the State. However, because the summary judgment ruling was reversed in *State v. Clark*, 955 N.W.2d 459 (Iowa 2021), Mr. Clark is now required to prove both duty and breach. As such the PCR ruling is highly relevant. The jury should be allowed to know why Mr. Clark's conviction was overturned and why he was subsequently not re-tried. Mr. Clark is required to prove that except for Mr. Robertson's negligence, the result would have been a not guilty verdict. If the jury is not informed of the "why we are here" in this legal malpractice action, then the Court risks the jury thinking that no matter what actions Mr. Robertson did or failed to do, the result would have been the same—a guilty verdict or that Mr. Clark is in fact guilty of the crime. In order to produce a fair and fully informed verdict in this case, the jury should be instructed that Mr. Clark's conviction was overturned, the reasons it was overturned, and the fact that the State elected not to prosecute him for the second time. That information is also highly relevant in the context of proximate cause and for damages. To assuage the State's concern of prejudice, the Court may instruct the jury on the two different legal standards in PCR cases and legal malpractice and that successfully proving ineffective assistance of counsel does not conclusively prove negligence. The Court may also instruct the jury that the State's decision not to prosecute Mr. Clark a second time does not conclusively prove any of the elements of duty, breach, proximate cause or damages. This can be done in a very brief and non-inflammatory fashion to decrease the likelihood of any potentially prejudice to the State. To fail to provide the jury with the accurate history of the case, given the serious nature of the task, would result in confusion and eventual prejudice to Plaintiff in presenting and proving his case.

D. The Court should allow evidence/argument re: info available at time of criminal representation.

The State seeks to prevent Mr. Clark from introducing evidence or arguing about circumstances that did not exist at the time of Mr. Robertson's representation. As an example, the State states that Mr. Clark should not be allowed to introduce evidence that the alleged victim in the criminal case changed his testimony sometime after Mr. Robertson's representation. The alleged victim's credibility now and forever is one of the key issues at bar. Indeed, Plaintiff's expert will testify about how a proper cross examination of the alleged victim would have yielded benefits for the defense. This is especially true given the alleged victim is a proven liar. Moreover, Mr. Clark intends to offer evidence and argue Mr. Robertson failed to reasonably and properly investigate and prepare Mr. Clark's criminal defense. If Mr. Robertson did a proper investigation and proper preparation of Mr. Clark's criminal defense, he could have uncovered evidence which would have made it more likely that the effective cross-examination would have created reasonable doubt in the minds of the jury. Namely, as Plaintiff's expert Bennett will outline, Mr. Robertson would have discovered circumstances and argued legal theories that would have made the alleged victim's testimony fiction. Talking to witnesses, touring the scene, using his investigator, taking photographs, communicating with Mr. Clark prior to or during depositions and hearings or seeking to obtain the alleged victim's mental health records and/or his records from Midwest Academy all would have yielded benefits.[5] Mr. Clark should be permitted to argue or offer evidence of

[5] Please see Defendant's Exhibit A (6/8/09 E-mail from Chris Buszka to Parents) from Defendant's Proposed Exhibit 20, filed on September 6, 2022. *See State v. Cashen*, No. 8-719, 2009 Iowa App. LEXIS 122 (Ct. App. Feb 19, 2009) ("We affirm the trial court's ruling to allow disclosure of the medical records and conclude Schulmeister's medical records may be admissible for the limited purpose of an expert opinion on her violent propensities and/or ***her ability to accurately observe, recall, and relate events*.) (Emphasis Added)** rev'd by *State v. Cashen*, 2010 Iowa Sup. LEXIS 63 Iowa, July 2, 2010). Mr. Robertson could have sought and obtained Mr. Buzsca's mental health or Midwest Academy records, if he had properly prepared and/or investigated Mr. Clark's criminal case.

circumstances that *did* exist or *could have* been available had he represented Mr. Clark with the degree, skill, care and learning ordinarily possessed and exercised by other attorneys in similar circumstances including the fact that the key witness has been a proven liar, or had a propensity to lie because of the alleged victim's prior mental and emotional volatility.

III. Resistance to Motion to Bifurcate Issues for Trial[6]

On September 1, 2022, the State of Iowa filed a Motion to Bifurcate Issues for trial a mere 19 days before trial. This is a repeat performance. On October 7, 2019, 23 days before trial, the State of Iowa filed a motion seeking the same relief. The Court ruled that the State of Iowa's motion in 2019 was untimely. As the Court noted in its Order on October 21, 2019, "[t]he Trial Scheduling and Discovery Plan, incorporated into the order filed on January 18, 2018, provides at paragraph 10 that "all motions including motions for summary judgment and except motions in limine, must be filed. . . at least 60 days before trial, with copies to the assigned Judge. Contrary to the State's assertion, there is no exception for motions dealing with trial management issues. Indeed, the North Carolina case the State submitted to support its late filing is an obvious outlier. Moreover, the court held "[t]herefore, without the plaintiff's showing that the timing of defendant's motion prejudiced her, we hold that the motion was timely." *Kearns v. Horsley*, 114 N.C. Ap. 200, 552 S.E.2d 1, 18 (2001). Here, unlike in *Kearns*, the State's untimely filing is blatantly prejudicial to the Plaintiff.

The State of Iowa has been on notice of the Order denying a Phase Trial and knew the Court's position on this issue for the last 1,065 days and filed nothing. The State's motion is once

[6] *See* Motion to Bifurcate Issues for Trial, filed on 9/1/2022. Pursuant to Iowa R. Civ. P. 1.431(4), Plaintiff has ten (10) days to respond to this Motion and reserves the right to supplement his argument consistent with this Rule. In the meantime, Plaintiff incorporates by reference his Brief in Resistance to State of Iowa's Motion for Phase Trial filed on October 17, 2019 and the Court's Order denying the State's Motion for Phase Trial filed on October 21, 2019.

again untimely. We are now a mere 19 days before trial and the Plaintiff's legal team has prepared for trial under the assumption that the entire case would be heard and presented without bifurcation of the issues. Indeed, the Plaintiff's legal team has met with his experts, scheduled witnesses, subpoenaed witnesses, prepared examination of witnesses and exhibits, and completed its trial strategy. Now, in the final 19 days before trial, the State of Iowa again asks for bifurcation?

The prejudice to the Plaintiff could not be clearer and the untimeliness of the motion egregious given that this case was previously set for trial, the same motion was previously denied as untimely, and the State of Iowa again waited 517 days since procedendo was issued to ask for this relief. The motion should be denied.

IV. Comparative Fault[7]

The State of Iowa intends to argue the defense of comparative fault, pursuant to Iowa Code § 668.1. As explained below, the State should be wholly precluded from doing so until after the close of all evidence until the Court has a chance to hear all the facts in support and against this purported affirmative defense to make an informed ruling.

First, Defendant should be prohibited from arguing that Mr. Clark is comparatively at fault as compared to Mr. Robertson's negligence because he is guilty of the crime of sexually abusing the alleged victim because this would be unfairly prejudicial under Iowa R. Evidence 5.403. Similarly, the State should also be prohibited from introducing evidence used against Mr. Clark in the underlying criminal trial (e.g., failing to keep records of his counseling sessions, covering up his windows to his office and performing a sex act while in jail), in an attempt to argue that Mr. Clark is comparatively at fault. In *Barker v. Capotosto*, 875 N.W2d 157, 167 (Iowa 2016), the Iowa Supreme Court rejected these kinds of comparative fault arguments. In doing so, the court

[7] Please also see Plaintiff's Second Motion in Limine filed on 9/13/2022.

held "our legal malpractice precedents have not adopted the principle that subsequent negligent conduct by the attorney can be compared to the culpability of the client that required him to need the legal services in the first place." In other words, the defense of contributory negligence is inapplicable when a client's conduct contributes to the need for the legal assistance on which a subsequent legal malpractice claim is based.

This is consistent with the rule that a doctor on trial for medical malpractice cannot argue that a patient is comparatively at fault because the patient's negligence caused the need for medical care. As the Supreme Court of Iowa has explained, "patients who may have negligently injured themselves are nevertheless entitled to subsequent non-negligent medical treatment and to an undiminished recovery if such subsequent non-negligent treatment is not afforded." *Wolbers v. The Finley Hosp.,* 673 N.W.2d 728, 732 (2003) (quoting *Fritts v. McKinne,* 934 P.2d 371 (Okla.Ct.App.1996)). So too is a client who's actions may have contributed to the need for a criminal defense attorney's service is also entitled to subsequent non-negligent assistance of counsel and to an undiminished recovery if such subsequent non-negligent legal representation is not afforded. Therefore, the Defense cannot assert that Mr. Clark is comparatively at fault because he is guilty of the alleged crime or introduce evidence used against Mr. Clark at the underlying criminal trial, in an attempt to argue that he is comparatively at fault for his injuries.

Second, the State of Iowa should be prohibited from arguing that Mr. Clark is comparatively at fault as compared to Mr. Robertson's negligence for the failure to aid in his own defense. Despite an interrogatory requesting a legal basis for this argument, the State has repeatedly failed to provide one. In essence, the State's argument seems to be that Mr. Clark should have done the things which Mr. Robertson had an ethical obligation to do and for which he was hired to do. *See* Iowa R. Professional Conduct 32:1.1., cmt. 5 ("Competent handling of a

particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation."); Iowa R. Professional Conduct 32.1.3, cmt. 1 ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or person inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate the client's cause or endeavor."); and 32.1.4., cmt. 1 ("Reasonable communication between the lawyer and the client is necessary ***for the client to*** effectively participate in the representation.). (Emphasis Added); cmt. 3 ("Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter.")

Here, Mr. Clark is under no such duty to aid in his own defense unless and until there is evidence that Mr. Robertson attempted to contact Mr. Clark, or ask Mr. Clark's opinion about the scene of the alleged crime, or asked for photographs of the alleged scene, or ask Mr. Clark to produce character witness information. In this case, there is no evidence to support such an assertion. Indeed, the State's argument is that Mr. Clark should have known to do the things that only Mr. Robertson had a duty to do, even if Mr. Robertson did not advise him to do it. This argument is made up out of whole cloth.

This is not to say that comparative fault can never be an affirmative defense in a legal malpractice case. If there is evidence, for example, that an attorney advised a client to do certain things to aid in his own defense and the client fails to act or refuses to act, then comparative fault may be an appropriate consideration for the jury. When, as is the case here, the evidence shows that Mr. Robertson unreasonably failed to communicate with Mr. Clark regarding the defense of the case, then Mr. Clark should not be expected to act on his own behalf with the degree of skill,

care and learning ordinarily possessed by attorneys to effectively participate in his own defense. Put another way, Mr. Clark is not bound to anticipate the negligence of Mr. Robertson. *See Gorski v. Smith*, 2002 PA Super 334, 812 A.2d 683. (PA Superior Court 2002). ("However, one is not bound to anticipate the negligence of another. Thus, it is not contributory negligence to fail to guard against the lack of ordinary care by another.").

In *Gorski*, a legal malpractice case, the Superior Court of Pennsylvania held:

> "A client who retains an attorney to perform legal services has a justifiable expectation that the attorney will exhibit reasonable care in the performance of those services, since that is the attorney's sacred obligation to the client. The client is, therefore, under no duty to guard against the failure of the attorney to exercise the standard in the performance of the legal services for which the attorney is retained. Imposing such a duty on the client would clearly defeat the client's purpose for having retained the attorney in the first place."

Id. at 702.

Furthermore, the State apparently intends to rely on its expert witness testimony F. Montgomery Brown to establish this defense. However, Mr. Brown's interrogatory answers[8] lack any opinions on this subject, or in the case of his deposition testimony, any factual or legal basis for forming such an opinion. F. Montgomery Brown's expert opinion on this subject should be limited in scope to his first interrogatory answer and deposition testimony, if allowed at all.

Respectfully Submitted,

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[8] *See* Plaintiff's Motion to Strike Expert Testimony of F. Montgomery Brown filed on 9/8/2022, Exhibits A and C for his interrogatory answers.

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