FILED
10/13/2021
Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 21-0330

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA-21-0330

JASON TERRONEZ, Plaintiff and Appellant

v.

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C., Defendant and Appellee

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BRIEF OF APPELLANT

APPEAL FROM: District Court of the Eighth Judicial District
In and for the County of Cascade, Cause No. Bdv 18-0393
Honorable Elizabeth A. Best

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STATEMENT OF THE ISSUES

1. Did the District Court err when it determined this Court expressly rejected Terronez's ineffective assistance claim by failing to meet the lower standard of proof, which, as a matter of law, precludes a civil malpractice claim?
2. Did the District Court err by granting summary judgment, determining the ruling in *State v. Terronez* collaterally estops Terronez from bringing negligence claims against Foster's law firm?
3. Does Terronez's *Alford* plea in the criminal matter present an intervening cause which prevents him from bringing negligence claims against his former attorney's law firm?

STATEMENT OF THE CASE

This litigation springs from an underlying 2015 criminal matter, *State v. Terronez*. On the advice of his counsel Jeffry Foster ("Foster"), Jason Terronez ("Terronez") involuntarily and erroneously agreed to plead guilty to a crime he did not commit. Tragically, the next morning after Terronez's plea was entered, Foster was found dead, with the Fergus County Coroner determining that he had committed suicide. With new legal representation, Terronez successfully moved to withdraw his guilty plea on the grounds that Foster's assistance was ineffective. On appeal, this Court affirmed the District Court's ruling, finding numerous case-specific

considerations supporting good cause for withdrawal. While the criminal case was pending for a new trial, Terronez then sued Foster's law firm Davis, Hatley, Haffeman & Tighe, P.C. ("DHHT"), asserting claims of professional negligence and negligent supervision based on Foster's ineffective assistance. Prior to the second criminal trial, Terronez agreed to an *Alford* plea, which effectively resolved the criminal matter while allowing him to maintain his innocence. DHHT then filed a motion for summary judgment based on collateral estoppel, arguing that the Supreme Court's holding in *State v. Terronez* collaterally estops Terronez from bringing professional negligence and negligent supervision claims against DHHT. The District Court granted DHHT's motion, determining (1) when Terronez failed to meet the lower burden of proof for ineffective assistance of counsel, as a matter of law he could not meet the higher burden in the civil matter; and (2) all the elements of collateral estoppel applied, which precluded all of Terronez's civil claims. Terronez asserts summary judgment was improper because this Court recognized Foster's deficiency, collateral estoppel is not satisfied, and the *Alford* plea does not preclude a defendant from bringing a malpractice claim against former counsel or their firm.

STATEMENT OF THE FACTS

In 2015, Jason Terronez was accused of sexual assault by a five-year-old (L.W.) and found himself facing grave charges involving life in prison for a crime he did not

commit. *State v. Terronez,* 2017 MT 296, 389 Mont. 421, 406 P.3d 947. After seriously deficient representation by the 33-year-old Foster, and negligent supervision of Foster by DHHT, halfway through trial Foster recommended that Terronez accept the State's Plea Agreement with a recommended sentence of 25 years' incarceration. *Id.*; Appendix B, pg. 31. By the next morning, Foster had committed suicide under a pervasive climate of fear. Appendix B, pp. 5-6, 41.

After Foster's death, Terronez retained Michael Sherwood, who successfully moved the District Court to withdraw his guilty plea on the grounds that Foster's assistance was ineffective and based on a pervasive climate of fear since "[d]ay 2 of these proceedings," as expressed by Foster. Appendix B, pg. 6; Appendix D, *Order Granting Defendant's Motion to Withdraw Guilty* Plea. The State appealed and this Court affirmed the District Court's findings that good cause existed for withdrawal. Appendix A, *Opinion of the Court,* ¶¶32-33.

In that opinion, this Court recognized the difficulty in evaluating ineffective assistance without Foster's explanation for his actions and given the State's plausible explanations for Foster's conduct, and considering that counsel's conduct is "strongly presumed to be within professional norms." Appendix A at ¶¶ 28-30. Notwithstanding, this Court declined to conclude on the record before it that "Foster failed to exercise reasoned professional judgment that prejudiced Terronez," but

nonetheless affirmed the District Court's finding that good cause existed for Terronez to withdraw his plea on alternative grounds, based on the extreme events that occurred during the criminal proceeding. *Id.* at ¶¶ 30-31.

While the criminal case was pending, Terronez filed a civil suit against DHHT for professional negligence and negligent supervision, based on Foster's ineffective assistance of counsel and the erroneous advice to enter a guilty plea. *Complaint,* Case No. BDV 18-0393. Facing another trial with exhausted financial resources, Terronez was assigned Robert Snively, a public defender who advised him that his first guilty plea would negatively affect his ability to defend himself in the criminal trial as the withdrawn plea could be used as impeachment evidence. In light of these unfavorable circumstances, at mediation Snively recommended Terronez maintain his innocence by agreeing to an *Alford* plea, which would effectively end the case. By this time, Terronez had already spent 387 days in prison. Appendix I, *Sentence and Judgment,* Case No. DC 15-18, dated March 24, 2021, pp. 3, 11.

Shortly after sentencing, on April 6, 2021, DHHT filed a motion for summary judgment, arguing that collateral estoppel barred Terronez's negligence claims against DHHT, and that the *Alford* plea precluded Terronez from proving the causation element of negligence. Appendix J, *Defendant's Motion for Summary Judgment, Statement of Undisputed Facts and Brief In Support*, filed April 6, 2021. The District Court granted

their motion, determining that this Court's ruling in *State v. Terronez* precludes Terronez from bringing negligence claims against DHHT because, (1) Terronez failed to meet the burden of proof for ineffective assistance of counsel (i.e., a reasonable probability of a different result) and therefore couldn't meet the higher burden of proof in his civil case (preponderance of the evidence); and (2) because all four elements were met, collateral estoppel prevents Terronez from relitigating the malpractice issue. Appendix L, *Order Granting Defendant's Motion for Summary Judgment*, dated June 3, 2021, pg. 4.

Terronez appeals that ruling, arguing the District Court erred by granting summary judgment because, contrary to the District Court's determination, Terronez can meet the burden of proof in his civil claims against DHHT, the four required elements of collateral estoppel are not supported by the record, and a defendant electing to take an *Alford* plea is not precluded from asserting that counsel's performance was deficient or fell below an objective standard of reasonableness sufficient to prove damages in a negligence action.

STANDARD OF REVIEW

De novo review is appropriate for Summary Judgment rulings, where the Court applies the same criteria outlined in Mont. R. Civ. P. 56 as the District Court. *City of Missoula v. Fox,* 2019 MT 250, ¶ 6, 397 Mont. 388, 450 P.3d 898. Summary judgment

is appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56; *Borges v. Missoula County Sheriff's Office,* 2018 MT 14, ¶ 16, 390 Mont. 161, 415 P.3d 976. To determine whether a genuine issue of material fact exists, the Court views all evidence and draw all inferences in the light most favorable to the nonmoving party. *McLeod v. State ex rel. Department of Transportation,* 2009 MT 130, ¶12, 350 Mont. 285, 206 P.3d 956. To prevail, the moving party must demonstrate the absence of genuine issues of material fact; the nonmoving party must then prove, by more than mere denial, speculation and conclusory statements, that a genuine issue does exist. *Valley Bank v. Hughes,* 2006 MT 285, ¶ 14, 334 Mont. 335, 147 P.3d 185. If the court determines no genuine issues of material fact exist, it must then determine whether the moving party is entitled to judgment as a matter of law. *Howard v. St. James Community Hosp.,* 2006 MT 23, ¶ 14, 331 Mont. 60, 129 P.3d 126. Where a district court determined there is no material factual dispute and the moving party is entitled to judgment as a matter of law, the appropriate review determines whether the district court correctly applied the law. *Montana Immigrant Justice Alliance v. Bullock,* 2016 MT 104, ¶ 14, 383 Mont. 318, 371 P.3d 430.

Ineffective assistance of counsel, pursuant to *Strickland v. Washington,* 466 U.S. 668, 687 (1984), requires the plaintiff to show (1) counsel's performance was deficient;

and (2) the deficient performance so prejudiced the defendant as to deprive him of a fair trial. Pursuant to the Sixth Amendment of the United States Constitution, the deficiency must be prejudicial, falling below the range of reasonable competence such that, "but for counsel's deficient performance, it is *reasonably probable that the result of the challenged proceeding would have been different*." *State v. Senn,* 244 Mont. 56, 59, 795 P.2d 973, 975 (1990) (emphasis added); *State v. Aills,* 250 Mont. 533, 822 P.2d 87 (1991).

Attorney malpractice is a form of professional negligence, which requires proof (1) that the attorney owed the plaintiff a duty of care; (2) the attorney breached this duty by failure to use reasonable care and skill; (3) the plaintiff suffered an injury; and (4) the attorney's conduct was the proximate cause of the injury. *Labair v. Carey,* 2012 MT 312, ¶ 20, 367 Mont. 453, 291 P.3d 1160. In a civil malpractice suit, the plaintiff's burden is to prove, "*by a preponderance of the evidence* what injuries he suffered as a [proximate] consequence of the malpractice." *Id.,* at ¶ 43 (emphasis added) (citing *Lieberman v. Employers Ins. of Wausau*, 84 N.J. 325, 419 A.2d 417, 426 (1980); *see also Stott v. Fox*, 246 Mont. 301, 805 P.2d 1305 (1990). Some courts describe this procedure as a "suit within a suit," which requires the plaintiff to prevail in the underlying suit prior to bringing the attorney malpractice action. *Stott,* 805 P.2d at 1307-08.

Collateral estoppel, or issue preclusion, prohibits relitigation of an issue when four elements are met: (1) both proceedings involved the same parties or their privies; (2) the same issue was at issue and conclusively decided on the merits in the prior litigation; (3) the prior proceeding afforded the party or privy against whom estoppel is asserted a full and fair opportunity to litigate the issue; and (4) the prior proceeding resulted in a final judgment. *State v. Huffine,* 2018 MT 175, ¶ 16, 392 Mont. 103, 422 P.3d 102 (2018) (citing *Baltrusch v. Baltrusch*, 2006 MT 51, ¶¶ 16-18, 331 Mont. 281, 130 P.3d 1267; *Kullick v. Skyline Homeowners Ass'n,* 2003 MT 137, ¶ 18, 316 Mont. 146, 69 P.3d 225; Restatement (Second) of Judgments § 27). On review, the Court compares the "pleadings, evidence, and circumstances surrounding the two actions to determine whether the issues decided in the prior adjudication are identical to those presented in the current matter." *Baltrusch,* 2006 MT, at ¶ 25.

SUMMARY OF THE ARGUMENT

Summary judgment is inappropriate when issues of material fact remain in dispute. Here, the trial court erred when granting Summary Judgment as to the attorney malpractice and negligent supervision claims, improperly ruling that collateral estoppel barred Terronez's civil suit.

The facts in the record reveal that, in the underlying criminal matter, Foster's representation of Terronez was seriously deficient. The District Court recognized this

deficiency as grounds for withdrawal of Terronez's guilty plea. On appeal, the Montana Supreme Court acknowledged the District Court "did not err in allowing Terronez to withdraw his guilty plea," as there was sufficient evidence in the record to support the mixed law and fact determination for the District Court to find "good cause" supporting withdraw based on case-specific circumstances. Appendix A, ¶ 33.

The District Court in this matter recognized that an "… obviously distressed and unsupervised young lawyer … ultimately resulted in Terronez pleading guilty on apparently difficult facts." Appendix L, pg. 6. The District Court nonetheless determined that the Montana Supreme Court had expressly rejected Terronez's claim of ineffective assistance of counsel, and therefore he could not prove under any circumstances that Foster had acted negligently in his civil case, however the record provides otherwise. Further, the District Court erred when determining that collateral estoppel precludes Terronez's suit against Foster's firm DHHT because, (1) the issue of negligence in this matter, though related to the issue of ineffective assistance in the criminal matter, is not the same as the ultimate issue in the underlying criminal matter, with the civil standard of proof being different from the criminal standard of proof; and (2) the parties in the civil matter are not the same as the parties that were involved in the underlying criminal matter. Therefore, summary judgment on these bases was improper.

ARGUMENT

Summary judgment is inappropriate when issues of material fact remain in dispute. Mont. R. Civ. P. 56. In the underlying criminal matter, Terronez successfully moved to withdraw his guilty plea, arguing that his counsel Mr. Foster was ineffective. Appendix D, Order Granting Withdraw of Guilty Plea. On appeal, this Court affirmed the District Court's ruling, but on more comprehensive and compelling grounds. Appendix A. Terronez's negligence claims against DHHT are founded on Foster's deficiencies, but are directed at DHHT's action or inaction, not solely on Foster's deficient performance. Though DHHT argues these claims are barred by collateral estoppel, as discussed below, because the elements of collateral estoppel are not met, summary judgment is inappropriate.

1. **Whether the District Court erred when it determined this Court expressly rejected Terronez's ineffective assistance claim by failing to meet the lower standard of proof, which, as a matter of law, precludes a civil malpractice claim?**

"A criminal defendant who successfully overturns his conviction based on ineffective assistance of counsel may bring a legal malpractice action against his former attorney." *Clark v. State*, 955 NW 2d 459, 461 (Iowa 2021); *see also Fadness v. Cody* (1997), 287 Mont. 89, 951 P.2d 584 (1997); *Spencer v. Beck*, 2010 MT 256, 358 Mont. 295, 245 P.3d 21 (2010). Montana law recognizes that "parties who are drawn into litigation as a result of a professional's malpractice have a right to bring a subsequent

and separate suit against the professional." *Estate of Watkins v. Hedman, Hileman & LaCosta,* 2004 MT 143 at ¶33, 91 P.3d 1264 (2004) (citing *Fadness, supra,* 287 Mont. at 96-97, 951 P.2d at 588-89).

When the District Court found good cause for withdrawal of a guilty plea based on Foster's deficient performance, but on appeal this Supreme Court finds sufficient good cause exists based on all of the circumstances of the underlying case, does the subsequent determination preclude Terronez from bringing a malpractice action against Foster's firm? As discussed below, the answer must be no.

A. The Supreme Court did not 'expressly reject' ineffective assistance of counsel.

The District Court's conclusion that this Court, "expressly rejected Terronez's claim of ineffective assistance" misstates the Supreme Court's analysis. Appendix L, *Order Granting Defendant's Motion for Summary Judgment,* pg. 4. This Court's *de novo* review of Terronez's motion to withdraw his guilty plea scrutinized the entirety of the circumstances underlying the District Court's determination of good cause for *clear error.* That examination necessarily focused on the *voluntariness* of the plea because the State primarily disputed the District Court's determination that Foster's assistance under the circumstances was ineffective. Appendix A, *State v. Terronez,* 2017 MT 296, ¶ 26. Terronez countered the State's argument that good cause did not exist for him to withdraw his plea, arguing that his plea was involuntary because, "both prongs of

Strickland were satisfied, based on the evidence of Foster's deficiencies and the resulting prejudice to Terronez." *Id.*

This Court's comprehensive analysis took into account all of the extreme and unusual circumstances of the case, not just the five examples of Foster's ineffectiveness. Appendix A. The key factors contributing to this Court's conclusions included whether an evidentiary hearing was necessary, the voluntariness of the plea, whether Foster's assistance was effective, and the unusual, disturbing circumstances which created the "pervasive air of fear" surrounding the underlying criminal proceedings. *Id.* After exhaustively analyzing these factors, this Court declined to base their ruling on Foster's deficient performance, and instead concluded under *McFarlane and Robinson* that, "[s]ufficient evidence exists within the record to support the mixed fact and law determination of "good cause" for withdrawal based on case-specific circumstances." *Id.* at ¶33. Although this Court could not conclude from the underlying record in the criminal proceedings that Foster failed to exercise reasoned professional judgment that prejudiced Terronez, it does not follow that Terronez cannot meet his burden of proof in his civil case that Foster failed below the standard of care for malpractice.

"Findings of fact are clearly erroneous if they are unsupported by substantial evidence, the court misapprehended the effect of the evidence, or review of the record

convinces the Court that a mistake has been made." *State v. Warclub*, 2005 MT 149, ¶23, 327 Mont. 352, 114 P.3d 254 (2005) (citing *State v. Eixenberger,* 2004 MT 127, ¶ 13, 321 Mont. 298, 90 P.3d 453). Here, this Court already found that the District Court's findings of fact were not clearly erroneous. When reviewing the District Court's determination of the facts, this Court explicitly found that, "[t]he District Court made the factual determination that Foster was personally impacted and his performance was affected by the threatening behaviors from the outset of this case. *These findings were not clearly erroneous…*" which satisfies the standard of review for factual determinations. Appendix A, ¶34 (emphasis added).

In its Opinion, this Court further found that, "[t]hrough Foster, Terronez was impacted and his plea was at least partially induced by these events…," which demonstrates that the record established sufficient doubt concerning the voluntariness of Terronez's plea, thus satisfying the standard for withdrawal of a guilty plea. *Id.* at ¶ 34. As such, this Court affirmed the District Court's ruling under its own standards, and all judges concurred. *Id.* at ¶ 35. By acknowledging that Terronez was impacted by Foster's performance, although not by enough to justify "good cause" for withdrawal, this Court did not close the door to Terronez proving additional facts in a civil case that could demonstrate Foster's negligence.

The record does not support the District Court's assertion that this Court

expressly "rejected" Terronez's claim of ineffective assistance. On the contrary, it found Foster's performance was affected from the outset of the case. There is no evidence in the record that Terronez failed to meet the burden of proof to withdraw his plea as involuntary in the criminal case. In fact, this Court exhaustively listed the factors contributing to Foster's deficient performance, and determined the District Court's findings of fact, including the facts relevant to Foster's effectiveness – "were not clearly erroneous." *Id.* at ¶ 34. Therefore, the District Court's assertion to the contrary is incorrect, and summary judgment is in error.

B. Terronez is not required to prove a "suit within a suit" at this stage of the proceedings.

Contrary to DHHT's claims, requiring a plaintiff to prove a "suit within the suit" at the summary judgment stage, or proving they would have won the case before they could even go to trial, "is not what is intended under *Stott.*" *Labair,* 2012 MT, ¶ 37. In *Labair*, plaintiffs filed a legal malpractice action against their former counsel who failed to file their medical malpractice claim before the statute of limitations ran. In his summary judgment motion, the attorney argued his breach could not cause injury or damage to the Labairs because the underlying medical malpractice claims were not established. In *Labair,* this Court explained:

> "A plaintiff in a medical malpractice action is required to establish that the defendant doctor departed from the applicable standard of care, resulting in plaintiff's injuries. A defendant doctor may be entitled to

> summary judgment if the plaintiff fails to present competent expert medical testimony to establish these factors. However, once the plaintiff comes forward with such expert advice, summary judgment for the doctor is inappropriate and the case may proceed to trial."
> *Labair,* at ¶ 38.

The plaintiff is *never* obligated to establish success in advance of trial, only that they present competent evidence to withstand summary judgment. *Id.*; *see also Estate of Willson v. Addison,* 2011 MT 179, 361 Mont. 269, 58 P.3d 410, 414, ¶ 17 (2011); *Falcon v. Cheung,* 257 Mont. 296, 303, 848 P.2d 1050, 1055 (1993). "At the summary judgment stage, a plaintiff must simply establish that, but for her attorney's negligence, she would have been able to present sufficient evidence to withstand summary judgment…and reach the jury with her case." *Labair, supra,* at ¶ 38.

Under *Strickland,* ineffective assistance of counsel requires a defendant to establish (1) counsel's performance was deficient; and (2) the deficient performance so prejudiced the defendant as to deprive him of a fair trial. This deficiency must be prejudicial, falling far below the range of reasonable competence that there is *a reasonable probability of a different result*. *Senn, supra,* 244 Mont. at 59; *Aills,* 250 Mont. at 533 (emphasis added).

Professional negligence, on the other hand, requires a plaintiff to prove (1) the attorney owed the plaintiff a duty of care; (2) the attorney breached this duty by failure to use reasonable care and skill; (3) the plaintiff suffered an injury; and (4) the

attorney's conduct was the proximate cause of the injury. *Labair,* 2012 MT at ¶ 20. Unlike the criminal standard, the burden of proof required for a civil malpractice suit requires a plaintiff to prove the malpractice caused injury *by a preponderance of the evidence. Stott*, 805 P.2d at 1307.

Here, the District Court stated that because the Supreme Court found "Terronez did not meet his burden to surmount the lower standard of proof…it is not possible for Terronez to clear the higher bar for negligence in this civil proceeding." Appendix L, pg. 4. However, as discussed above, the District Court misstated this Court's analysis. This Court never rejected the District Court's determination that Foster's performance was ineffective, it simply found good cause was supported by the circumstances of the whole matter. *See* Appendix A, ¶34. The voluntariness of the plea was the central issue the Court analyzed, not Foster's ineffective assistance, however, it did determine that the District Court's findings of fact were, "not clearly erroneous." *Id.* at ¶ 34.

The District Court erred when concluding that Terronez had not met his burden. Terronez should be allowed the full and fair opportunity to present his claims in this civil matter, including the opportunity to engage in discovery to prove, by a preponderance of the evidence, that DHHT was negligent.

2. **Whether the District Court erred by granting summary judgment, determining the ruling in *State v. Terronez* collaterally estops Terronez from**

bringing negligence claims against Foster's law firm?

Collateral estoppel, or issue preclusion, prevents parties from incessantly waging piecemeal, collateral attacks against judgments. *Baltrusch v. Baltrusch,* 2006 MT 51, ¶ 15, 331 Mont. 281, 130 P.3d 1267 (2006). Promoting judicial economy and the finality of judgments, collateral estoppel requires the satisfaction of the following four elements: (1) both proceedings involved the same parties or their privies; (2) the same issue was at issue and conclusively decided on the merits in the prior litigation; (3) the prior proceeding afforded the party or privy against whom estoppel is asserted a full and fair opportunity to litigate the issue; and (4) the prior proceeding resulted in a final judgment. *Baltrusch,* at ¶¶ 16-18; *see also Huffine,* at ¶ 16.

It is undisputed that the underlying criminal trial has resulted in a final judgment. Appendix M. Therefore, this appeal only concerns whether the remaining elements required for collateral estoppel apply: whether both proceedings involved the same parties or their privies; whether the same issue was at issue and conclusively decided on the merits in the prior litigation; and whether the prior proceeding afforded the party or privy against whom estoppel is asserted a full and fair opportunity to litigate the issue.

A. The parties to both proceedings are not the same.

The party, or privity element requires that, "both proceedings involved the same

parties or their privies." *State v. Huffine,* 2018 MT 175, ¶ 16, 392 Mont. 103, 422 P.3d 102. The Montana Supreme Court determined, "[f]or purposes of res judicata and collateral estoppel, a party to the prior proceeding is one who [was] directly interested in the subject matter, and had a right to make defense, or to control the proceeding and to appeal from the judgment." *Id.,* at FN. 4; *see also Bernhard v. Bank of America National Trust & Savings Association* (1942), 19 Cal.2d 807, 122 P.2d 892, 894. Further, "[a] privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties." *Bernhard,* 122 P.2d at 894. "However, some courts have recognized that the original common law requirement for mutuality of parties or privies has evolved to require only that the party asserted to be estopped have been a party or privy to the prior judgment." *Bernhard*, 122 P.2d at 894-95; *Denturist Ass'n of Mont. v. State,* 2016 MT 119, ¶¶ 11-12, 383 Mont. 391, 372 P.3d 466. *Accord Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 321-27, 91 S.Ct. 1434, 1439-42, 28 L.Ed.2d 788 (1971) (citing *Bernhard*).

The parties in the underlying criminal matter were Terronez and the State of Montana. The parties in this civil matter are Terronez and Foster's law firm DHHT. These are not the same parties as those in the current civil matter and therefore collateral estoppel cannot lie because privity does not exist between the State of

Montana and DHHT.

The State of Montana was the interested party in the criminal proceeding and was the party "directly interested in the subject matter," not DHHT. DHHT had no right to intervene in the criminal proceeding, while the State of Montana did oppose Terronez's motion to withdraw his guilty plea and argued in Foster's stead why Foster may have acted the way he did. DHHT did not seek to intervene or explain Foster's performance to either assist or rebut Terronez's argument that Foster provided ineffective assistance when advising him on the plea. Further, DHHT had no right in the underlying criminal proceeding to control the proceeding or to appeal from the judgment which found that Foster's performance had failed the *Strickland* test. However, in this civil proceeding, DHHT *can* control the proceeding and can submit evidence to rebut Terronez's claims of negligence.

Both Terronez and DHHT are directly interested in the outcome of this case and have each individually invested substantial resources to support these interests. Both Terronez and DHHT have litigated at the District Court level in these proceedings; Terronez has appealed the summary judgment in favor of DHHT, and now both parties control their participation in the appellate proceedings.

In the underlying criminal matter, through Foster, DHHT nominally had an interest in the proceedings as Foster's employer, at least until Terronez erroneously

entered a guilty plea on Foster's advice. Though short-lived, DHHT's interest lasted as long as Foster represented Terronez and once Foster was deceased, DHHT's connection to Terronez was likewise severed. Terronez then had to rely on his new counsel, Mr. Sherwood, to provide him with competent legal counsel in place of DHHT, which failed to help Terronez even after Foster's tragic death.

Though DHHT may have been connected to Terronez through their employee Foster, there is no evidence that DHHT acquired an interest in Terronez's conviction. Moreover, there is no evidence DHHT was in privity with the State of Montana or assisted the State in its arguments as to why Foster may not have performed deficiently. Because the parties were not the same between the civil and criminal matters, and there is no privity between DHHT and Terronez, this element fails, and summary judgment is inappropriate.

B. The issues between the proceedings are not identical.

"Identity of issues is the most crucial element of collateral estoppel. In order to satisfy this element, the identical issue or "precise question" must have been litigated in the prior action." *Fadness v. Cody* (1997), 287 Mont. 89, 96-97, 951 P.2d 584, 588-89 (emphasis added). DHHT erroneously argues that collateral estoppel precludes Terronez from bringing his negligence claims against the firm. They erroneously rely on the theory that professional negligence and negligent supervision are the same issue

as ineffective assistance of counsel.

Issue preclusion only applies when the issue litigated in the underlying criminal matter is identical to the issue in the current civil matter. *See Estate of Watkins v. Hileman & Lacosta,* 2004 MT 143, ¶ 33, 321 Mont. 419, 91 P.3d 1264. "To satisfy issue identity, the parties must have litigated the identical issue or precise question in the prior action." *Id.*

Determining whether the issues are identical also requires a comparison of "the pleadings, evidence, and circumstances surrounding the two actions," which "extends to all questions essential to the judgment and actively determined by a prior valid judgment." *Baltrusch v. Baltrusch,* 2006 MT 51, ¶ 25, 331 Mont. 281, 130 P.3d 1267 (quoting *Holtman V. 4-G's Plumbing and Heating,* (1994), 264 Mont. 432, 439, 872 P.2d 318, 322 (internal quotations omitted); *Haines Pipeline Construction, Inc., v. Montana Power Co.* (1994), 265 Mont. 282, 288, 876 P.2d 632, 636. "The mere fact that two cases arise from the same transaction does not necessarily mean that each involve identical issues." *Estate of Watkins,* 2001 MT at ¶ 33 (quoting *Fadness*, 287 Mont. at 96-97). However, for judicial economy, this Court has applied collateral estoppel, "when the issues are so intertwined that to decide the issue before it, the Court would have to rehear the precise issue previously decided." *Baltrusch,* at ¶ 25 (quoting *Martelli v. Anaconda-Deer Lodge County* (1993), 258 Mont. 166, 169, 852 P.2d 579, 581).

i. The pleadings and circumstances in the underlying criminal matter

In the underlying criminal matter, Terronez successfully argued that Foster's deficient performance constituted good cause to withdraw his guilty plea. At the District Court level, the pleading of ineffective assistance of counsel prevailed. The issue of ineffective assistance was relevant to the voluntariness of Terronez's plea. On appeal, this Court acknowledged the District Court's analysis as "not clearly erroneous," however more compelling evidence came from the circumstances surrounding the pre-trial and trial environment.

Analyzed under the *Strickland* standard, the District Court found that Foster's performance was so deficient and prejudicial that Terronez was deprived of a fair trial because it was reasonably probable that the result of the criminal proceedings would have been different but for that deficient performance. Appendix D, *Order Granting Withdraw of Guilty Plea*; *see also Dawson v. State*, 2000 MT 219, ¶ 20, 301 Mont. 135, 10 P.3d 49. To support this showing, the District Court gave examples of Foster's pre-trial and trial performance, which were "not that of a reasonably competent attorney:"

- Foster failed to call A.T. as a witness after declaring he would do so in his opening statement.
- Foster failed to interview several critical prosecution witnesses prior to trial.
- Foster failed to subpoena the victim's medical records, relying instead on the prosecution and representations of the victim's parents.
- Foster failed to argue for admittance of powerful and potentially exculpatory DNA evidence.
- Foster failed to seek DNA samples of other males with whom L.W. may have

had contact.

Appendix D, pp. 6-9; Appendix C, *Affidavit of Torger Oaas, ¶12.*

The circumstances surrounding the criminal trial provided further compelling evidence, which independently supported good cause for withdrawal. Appendix D, pp. 6-9. The District Court observed the "pervasive air of fear surrounding the trial which … objectively appeared to have a serious deleterious effect on Foster such that the district court had serious doubts about Foster's effectiveness at trial and up to and including Terronez's guilty plea." *Id.* at pg. 8. These observations were evidenced by the following events which comprised the "pervasive air of fear" that surrounded the trial:

- David Welton's confrontation with Judge Oldenburg.
- David Welton's threat of suicide, and discharge of a weapon.
- David Welton's tailgating Terronez.
- Dana Terronez asking for a protective order against the Weltons.
- Foster stating taht he feared for his safety to a mental health advisor.
- Foster's attempts to avoid the Weltons by checking into a hotel and switching vehicles, only to encounter the Weltons at that hotel.
- The Weltons' attempt to video record Terronez' arrest.
- Officers being posted inside and outside the courtroom and conducting meetings on safety measures.
- The plea bargain occurring after hours in the courthouse with security officers present.
- Foster's uncharacteristic appearance (disheveled, unorganized/disorganized, and overly anxious – sweating profusely, running his fingers through his hair, stammering, pacing, repeating himself, etc.).
- Foster's unorganized/disorganized behavior that continued during his cross examination, which did not appear organized, searching, calculated to adduce or elicit evidence favorable to the defense.

- Foster failing to mitigate the harmful effects of the witness' testimony on direct examination.
- After Foster's windshield was shattered, counsel appeared visibly distraught, fearful for himself as well as the Defendant and the Defendant's family.
- Foster's erratic behavior (intending to present a full defense including evidence of the Defendant's good character, calling numerous character witnesses including Defendant's wife and children to testify; suddenly abandoning the good character defense and deciding not to call the Terronez children to testify; then announcing once again the defense would be presenting a full defense including evidence of the Defendant's good character moments before the parties announced they had reached a plea agreement).

Appendix D, pp. 6-9; Appendix C, *Affidavit of Torger Oaas*

Ultimately, the District Court found Foster's performance was deficient enough to warrant reversal of the plea, and this court affirmed on other compelling grounds. Appendix A. However, any mention of DHHT in the criminal matter is glaringly absent. See Appendix D; Exhibit B, *Brief Supporting Motion to Withdraw.*

ii. The pleadings and circumstances in this civil matter.

In Montana, the standard for professional negligence in criminal cases is inappropriate for civil cases. *In re A.S.,* 2004 MT 62, ¶ 21-25, 87 P.3d 408. Professional malpractice requires the former client to prove their attorney breached the duty of care owed to the client, which was the proximate cause of the client's injury, resulting in damages. *Mills v. Mather*, 890 P.2d 1277, 1282 (1995). Negligent supervision claims require proof of the existence of a duty, breach of duty, causation and damages. *Jackson v. State,* 1998 MT 46, ¶ 30, 956 P.2d 35 (1998). The existence of a legal duty is an

essential element of each of these claims, "which is a question of law to be determined by the district court." *Yager v. Deane* (1993), 258 Mont. 453, 456, 853 P.2d 1214, 1216.

In *Fadness*, the court found that because "the duties owed by the professionals to the plaintiff were not decided, nor even considered by the jury in the first case," there was no identity of issues. Similarly, in *Watkins*, the professional duties at issue were neither considered nor decided in the underlying action. Like *Fadness* and *Watkins*, here the underlying issue scrutinized counsel's performance in terms of the impact such performance had on the voluntariness of Terronez's plea, not based on whether Foster or his employer had breached their duties to Terronez under a negligence standard. The law firm's obligations were not even brought up in the underlying criminal matter because the issue there was the quality of Foster's performance, not whether DHHT properly took responsibility for that performance.

Like a parent responsible for the misdeeds of their child, DHHT is responsible for Foster's deficient performance in the underlying criminal matter. These issues are related, but they are not identical. Terronez's negligence claims against the law firm must be fundamentally evidenced by Foster's deficient performance or there would be no negligence claim. Whether Foster's deeds amounted to "ineffective assistance" such that there was good cause for withdrawal was the issue there. In this civil matter,

the question is whether DHHT was negligent in their duty as an employer by failing to guide or support Foster, help correct Foster's mistakes, or otherwise supervise him. Terronez asserts that because of the employer-employee relationship, the firm had a duty to provide support to Foster – to guide him and correct or mitigate the mistakes he made as he was making them; to provide support staff, proper supervision, etc. By failing to correct, supervise and support Foster, DHHT breached their duty to Terronez, and the issue in the civil matter is whether the breach of that duty caused Terronez's ensuing damages and injury.

By analogy, a misbehaving child's deeds are fundamentally connected to the parent's responsibility to supervise and correct that child's behavior. A child's misbehavior triggers the parent's responsibility, both to correct the behavior and to absorb the consequences of the child's actions. The deeds of the child are separate from, yet interdependent on the parent's duty. When a child behaves appropriately, the parent's duty does not dissolve because no correction is immediately necessary. Whether or not a child's behavior is appropriate does not relieve the parent of their ongoing responsibility to guide the child; and when consequences of misbehavior are realized, those consequences ultimately rest on the shoulders of the parent.

Foster was employed by DHHT, and it is well settled law that the doctrine of *respondeat superior* applies to an employer-employee relationship. "Distinct from direct

liability for an employer's own tortious conduct, the common law doctrine of respondeat superior imposes vicarious liability on employers for the tortious conduct of employees committed while acting within the scope of their employment." *Brenden v. City of Billings*, 2020 MT 72, ¶ 13, 399 Mont. 352, 470 P.3d 168.

Even the Montana Rules of Professional Responsibility provide a separate set of ethical guidelines for law firms and their employees. See Rule 5.1, *Responsibilities of Partners, Managers and Supervisory Lawyers*. As DHHT is a law firm, they are aware or should be aware of these additional obligations. As such, the consequences of Foster's actions are imputed to the firm. The District Court's determination that Foster was deficient likewise binds the firm to the consequences that flowed from his failures. Like Foster's parent, DHHT had the obligation to support and correct Foster when his performance faltered. They did not. Instead, DHHT attempts to hide their responsibility behind the argument that the issues are identical and were previously litigated. Notwithstanding, DHHT is obligated to face the issue of Foster's deficiency and their own deficiency in this civil matter, and they should not be allowed to hide their duty through collateral estoppel.

Terronez's negligence claims clearly enumerate DHHT's duty arising from the employer-employee relationship. In the underlying matter, this language does not exist because the civil and criminal standards and issues are not the same. Because the issue

of Foster's ineffective assistance in the underlying matter is not the same as whether Foster or DHHT was negligent under *respondeat superior* in the civil matter, the District Court erred when it determined these issues were the same, and summary judgment is inappropriate.

C. Terronez was not afforded a full and fair opportunity to litigate the issues of negligence in the underlying criminal proceeding.

The third element of collateral estoppel requires that the prior proceeding afforded the party or privy against whom estoppel is asserted a full and fair opportunity to litigate the issue. *Huffine*, 2018 MT at ¶ 16. This brings into question the adequacy of the proceeding with respect to the issues in question. *See State v. Perry* (1988), 758 P.2d 268, 276. Several factors supporting whether the opportunity given was adequate are the parties' role in the proceedings, whether they were represented by counsel and whether they had control over the proceedings or were able to appeal any ensuing decision. *See Duncan v. Clements*, 744 F.2d 48, 52 (8th Cir. 1984).

Here, the issue is whether Terronez had a full and fair opportunity to litigate the issue of Foster's negligence in the underlying criminal proceeding. He did not because the issue before Terronez's counsel was ineffective assistance of counsel, which was not subject to discovery against Foster or DHHT. Instead, Terronez was half-way through a criminal trial when he accepted a plea bargain on Foster's advice.

Appendix D. While Terronez was subsequently incarcerated, his counsel Mr. Sherwood sought external evidence, such as the affidavit of Mr. Oaas, to prove that Foster's efforts were deficient. Terronez's plea was subsequently withdrawn, and on remand, the second criminal matter ended with Terronez's *Alford plea* in mediation. Appendix I. Neither of these procedures ended in a fully litigated trial process. Importantly, neither of these procedures afforded Terronez any opportunity to litigate fully and fairly whether Foster's performance was deficient. Merely because Terronez received a favorable ruling with respect to the *Strickland* factors does not automatically equate to him receiving a full and fair opportunity to litigate the issue of whether Foster or DHHT were negligent in their representation of Terronez.

The District Court summarily stated that, "Terronez had a full and fair opportunity to litigate the effectiveness of Foster's representation in the criminal case," however the Court failed to point to any specific facts to substantiate their statement beyond a "vigorous debate" in the record from *Terronez*. Appendix L, pg. 6.

Further, as discussed above, the issue in this civil matter is not simply Foster's performance, but DHHT's obligation regarding that performance, which was *never* debated in the underlying criminal proceeding. Thus, in both the criminal proceeding and in this civil proceeding, Terronez has not had a meaningful opportunity to conduct discovery to seek out and gather evidence to further substantiate his

negligence claims because of the Motion to Stay and the Protective Order. *See* Appendices G and H.

Therefore, because Terronez never had a meaningful opportunity to develop discovery regarding the negligence issues in the underlying criminal proceeding, the District Court's statement to the contrary is in error, and this element of collateral estoppel fails.

3. **Does Terronez's *Alford* plea in the criminal matter present an intervening cause which prevents him from bringing negligence claims against his former attorney's law firm?**

The "*Alford* plea" originates from a North Carolina case where a defendant entered a guilty plea in his criminal trial while maintaining his innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970). Mr. *Alford* was indicted for first-degree murder. *Alford* had an extensive criminal record; facing strong evidence of guilt and substantially no evidentiary support for his claims of innocence, to avoid the death penalty he elected to plead guilty to a lesser charge, all the while maintaining his innocence. The United States Supreme Court commented, "[o]rdinarily a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind … [h]ere, Alford entered his plea but accompanied it with the statement that he had not shot the victim." Ultimately, the Supreme Court

determined the defendant's plea was knowingly, voluntarily and intelligently made (even though Alford maintained his innocence), "because in his view he had absolutely nothing to gain by a trial and much to gain by pleading."

Here, after the debacle at the trial level, which resulted in Terronez's involuntary guilty plea, with the distinguished assistance of Mr. Sherwood, Terronez successfully argued that Foster's ineffectiveness amply supported good cause to withdraw his guilty plea. Appendix B, *Brief supporting Defendant's Motion to Withdraw Guilty Plea*; Appendix C, *Affidavit of Torger Oaas*. This Court acknowledged the District Court's assessment of Foster's deficiencies but affirmed on more holistic grounds, taking into account *all the disturbing factors* affecting Terronez's plea. Appendix A.

Shortly after that decision, Terronez filed his negligence-based claims against DHHT, necessarily and fundamentally relying on Foster's ineffective assistance but also targeting DHHT's supervisory role in the underlying criminal matter, which was timely answered. Appendices E and F. As the second criminal trial proceeded, Terronez filed a motion for Scheduling Conference in the civil matter to be able to engage in discovery against DHHT. Appendix G, *Order Granting Motion to Stay,* pg. 1. In response, DHHT filed a motion to stay the civil proceedings pending the outcome of the criminal case, arguing "a conviction may raise an intervening cause issue on damages in this case." *Id.* at 2.

Terronez's response in opposition argued that a stay would delay his discovery efforts to obtain supporting evidence for his claims, including important toxicology reports and forensic analysis that could provide additional evidence of Foster's deficient performance, based on a *Stipulated Protective Order* that the parties had entered after Terronez had subpoenaed the Montana Department of Justice, Forensic Sciences Division and the Fergus County Coroner for records related to Foster's death. Appendix G, pg. 2; *see also* Appendix H, *Stipulated Protective Order*.

The District Court disagreed with Terronez and granted DHHT's motion to stay, finding that Terronez would not be unfairly prejudiced by staying discovery until his criminal trial is complete. Appendix G, pg. 2. Meanwhile, on remand in the criminal proceedings, and on the advice of his defense counsel Mr. Snively, Terronez agreed to enter an *Alford* plea with the State of Montana during the course of mediation. Appendix I, *Sentencing Order,* pg. 1. An ensuing Sentencing Order was filed on March 29, 2021. Appendix I. Eight days later, DHHT filed a motion for summary judgment, arguing in part that by entering an *Alford* plea, DHHT is absolved of liability for Terronez's negligence claims because the plea constitutes an intervening cause and therefore negligence cannot lie. *Id.* The District Court agreed and granted the motion. Appendix L, *Order Granting Summary Judgment*.

In their summary judgment motion, DHHT argued that under issue preclusion

principles, the *Alford* plea conclusively establishes that the causation element of negligence cannot lie in this matter. Appendix J, pg. 21. In response, Terronez offers a case from the Washington Supreme Court which is directly on point. *See Clark v. Baines*, 150 Wash.2d 905, 84 P.3d 245 (Wash. 2004).

In *Clark,* Mr. Baines entered an *Alford* plea in response to charges of assault with sexual motivation. *Clark,* 84 P.3d at 247. The complaining witness, Piety Ann Clark, subsequently sued Baines for sexual battery and outrage. *Id.* at 246. Baines counterclaimed for malicious prosecution and Clark filed a motion for partial summary judgment. *Id.* The trial court dismissed the counterclaim, concluding the *Alford* plea entered by Baines conclusively established probable cause for Clark's civil action and granted the motion. *Id.* The Court of Appeals affirmed in a split decision, however the Washington Supreme Court reversed, holding "an *Alford* plea cannot be used as a basis for collateral estoppel in a subsequent civil action." *Clark,* 84 P.3d at 246. In their decision, the Washington Supreme Court recognized that "the determination of whether application of collateral estoppel will work an injustice on the party against whom the doctrine is asserted – the fourth element – depends on whether the parties to the earlier proceeding received a full and fair hearing on the issue in question." *Id.* at 249.

The Court further explained, "a criminal conviction after a trial may, under

certain circumstances, be given preclusive effect in a subsequent civil action … [e]ssential to the underlying rationale of such a result is that a criminal trial provides a defendant a full and fair opportunity to develop and litigate the issues in the criminal case. The same cannot be said, however, where a criminal conviction results from an *Alford* plea." *Id.* at 250 (citing *Falkner v. Foshaug* (2001), 108 Wash.App. 113, 122-23, 29 P.3d 771; N.Y. *Underwriters Ins. Co., v. Doty* (1990), 58 Wash.App. 546, 550, 794 P.2d 521 (both citing *Safeco Ins. Co. of Am. v. McGrath* (1985), 42 Wash.App. 58, 62-64, 708 P.2d 657, *review denied* (1986), 105 Wash.2d 1004).

Ultimately, the Washington Supreme Court determined that, "[a]pplying collateral estoppel to give an *Alford* plea preclusive effect in a subsequent civil action is uniquely problematic. Where a defendant is convicted pursuant to an *Alford* plea, not only has there been no verdict of guilty after a trial, but the defendant, by entering an *Alford* plea has not admitted committing the crime." *Clark,* 84 P.3d at 251. (citations omitted). "As such an *Alford* plea cannot be said to be preclusive of the underlying facts and issues in a subsequent civil action." *Id.* at 251; *see also Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962), 58 Cal.2d 601, 605-06, 375 P.2d 439, 25 Cal.Rptr. 559 (1962) (citations omitted), cert denied, (1963) 372 U.S. 966, 83 S.Ct. 1091, 10 L.Ed.2d 130, quoted in *McGrath* (1985), 42 Wash.App. at 64, 708 P.2d 657, and *Doty* (1990), 58 Wash.App. at 550, 794 P.2d 521; *In re Disciplinary Proceeding*

Against McLendon (1993), 120 Wash.2d 761, 770, 845 P.2d 1006 (observing "[g]enerally, due process prohibits an Alford plea from being the basis for collateral estoppel in a subsequent action.").

The *Clark* facts are similar to this case. Terronez has maintained his innocence throughout the criminal matter and though there was half of a trial in the underlying criminal matter, there has been no verdict of guilty after that trial because Terronez successfully withdrew his guilty plea. In the second criminal proceeding on remand, Terronez entered his *Alford* plea in mediation, prior to trial. Therefore, there was no guilty verdict after trial in his case. Applying collateral estoppel here would invoke the same due process problems the Washington Supreme Court dispensed with in their holding.

Ultimately, the fundamental unfairness here is clear – Terronez has no recourse for the misdeeds of his now deceased counsel when collateral estoppel applies to an *Alford* plea. The Washington Supreme Court recognized these problems and ended the confusion by holding, "a defendant who pleads guilty pursuant to an *Alford* plea has not had a full and fair opportunity to litigate the issues in the criminal action. As such, an *Alford* plea as a matter of law fails the fourth element of the four-part collateral estoppel test because giving such a plea preclusive effect in a subsequent civil action would work an injustice against the party who entered the plea." *Clark*, 84 P.3d at 251.

Terronez urges this Court to consider the analysis provided by *Clark v. Baines* to prevent the inevitable injustice following from his *Alford* plea in the underlying criminal matter.

CONCLUSION

Summary judgment is inappropriate here because there are issues of material fact in dispute regarding whether DHHT should be held responsible for the damages and injury caused by their employee-attorney's deficient performance in Terronez's criminal case. Because the elements of collateral estoppel are not met, it cannot form the basis for summary judgment here. Moreover, Terronez's entering of an *Alford* plea means that he has accepted his punishment while maintaining his innocence; such as plea was based partly on the confounding nature of Foster's deficient advice, which weighed heavily on Terronez's ability to receive a subsequent fair trial. As such, the *Alford* plea cannot be used to estop Terronez from pursuing claims against DHHT because the underlying criminal trial did not establish a factual basis for the plea.

DATED this 12th day of October 2021.

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CERTIFICATE OF SERVICE

I, Gregory G. Costanza, certify that a true and accurate copy of the foregoing was served to the following on October 12, 2021 through the Montana Supreme Court Electronic Filing System:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rule of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Goudy Old Style text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 8,562 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance, Appendices, and Certificate of Service.

By: /s/ Gregory G. Costanza

APPENDIX

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