

GAYLOR V. JEFFCO: THE COURT REINFORCES A PLAINTIFF'S "ACTUAL INNOCENCE" BURDEN IN CRIMINAL LEGAL MALPRACTICE ACTIONS

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Last week, the New Hampshire Supreme Court held that a criminal defendant asserting a legal malpractice claim for post-conviction representation must meet the demanding standard of proving his "actual innocence." *Gaylor v. Jeffco*, No. 2009-549, slip op. at 3 (June 3, 2010), 2010 WL 2196478 (N.H.). The Court rejected the defendant's claim that since post-conviction representation necessarily does not involve "tactical or strategic decisions made during the trial", liability may be proven using the more traditional negligence standard. *Id.*

The criminal defendant, Gregory Gaylor, was indicted in December 1997 on multiple theft counts and one count of willful evasion of the New Hampshire business profits tax. During jury deliberations, Gaylor fled the jurisdiction. In his absence, he was convicted and sentenced to a prison term and to pay restitution. Defendant's appeal of his conviction was denied because of his fugitive status. He was arrested in Switzerland in 1999 and extradited to New Hampshire in 2000, where he began serving his sentences.

In 2000, Gaylor hired the defendant law firm to represent him in post-conviction proceedings. Beginning in April 2001, the law firm took a number of steps to overturn his conviction, including unsuccessful motions to the Supreme Court to accept Gaylor's appeal and petitions for writs of habeas corpus in the Superior Court and Federal District Court.

Unhappy with the outcome of these proceedings, Gaylor filed a legal malpractice action against the lawyers in January 2009, alleging that their failure to file a timely state court proceeding forfeited Gaylor's ability to challenge his convictions in federal court. The superior court granted the defendant law firm's motion to dismiss the writ, finding that in order to prevail, Gaylor had to allege and prove his "actual innocence." *Id.* at 1-2.

Attorney Conduct, Liability & Professionalism Practice Group

Peter Beeson, Co-Chair
603.410.1712
pbeeson@devinemillimet.com

**Mitch Simon, Of Counsel
and Co-Chair**
603.228.1541
msimon@devinemillimet.com

Andy Dunn
603.695.8503
adunn@devinemillimet.com

Bob Dewhirst
603.695.8646
rdewhirst@devinemillimet.com

Shelagh C.N. Michaud
603.695.8703
smichaud@devinemillimet.com

Anne E. Trevethick
603.695.8725
atrevethick@devinemillimet.com

Joshua M. Wyatt
603.695.8517
jwyatt@devinemillimet.com

DEVINEMILLIMET.COM

The legal issue in this case came down to whether the case was governed by the heightened “actual innocence” standard of *Mahoney v. Shaheen, Cappiello, Stein & Gordon, P.A.*, 143 N.H. 491 (1999), and *Therrien v. Sullivan*, 153 N.H. 211 (2006), or fell within the exception of *Hilario v. Reardon*, 158 N.H. 56 (2008), discussed below.

The general rule in New Hampshire is that in order to prevail in a legal malpractice action against a criminal defense attorney, the malpractice plaintiff, in addition to proving the normal elements of the case, must show that he was actually innocent of the underlying crime. The purpose of this rule is to prevent legal malpractice actions from shifting the responsibility for the criminal conduct away from the defendant. *Gaylor*, slip op. at 3 (citing *Mahoney*, 143 N.H. at 496). The *Mahoney* Court held that “tactical or strategic decisions made by defense counsel during their representation should not be subject to attack by clients unable to prove their actual innocence.” *Mahoney*, 143 N.H. at 498. The Court gave further definition to this principle in *Therrien*, in which the Court held that a criminal legal malpractice action may not be brought until the defendant receives relief from his underlying criminal conviction. 153 N.H. at 211-12.

However, this rule is not to be applied in all criminal matters. In *Hilario*, the criminal defendant appealed the dismissal of his legal malpractice action against his attorney, who, without client knowledge or consent, attempted to withdraw his guilty plea. This action ultimately led to the forfeiture of the client’s ability to suspend a portion of his sentence. *Hilario*, 159 N.H. at 59. In that case, the Supreme Court created a narrow exception to *Mahoney*, limited to those situations where the client’s malpractice claims are unrelated to underlying guilt or innocence. *Id.* at 64, 66. Since the issue in *Hilario* was the length of the defendant’s sentence and not his guilt or innocence, the Court found the policies underlying *Mahoney* to be inapplicable. Thus, the malpractice plaintiff was not required to prove his actual innocence.

In *Gaylor*, the Supreme Court ruled that, despite being raised in post-conviction proceedings, the issue in this malpractice case was related to *Gaylor*’s underlying guilt or innocence:

Gaylor makes no such claim here and continues to attack his underlying convictions. In *Mahoney*, we stated that “courts are generally concerned with malpractice actions that, even if they do not directly challenge the underlying conviction, tend to undermine or indirectly challenge it.” The plaintiffs’ malpractice action does exactly that, as *Gaylor* seeks federal habeas corpus relief to collaterally attack his underlying convictions. *Gaylor*, slip op. at 4 (citations omitted).

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

The *Gaylor* case does not break new legal ground, but it provides additional important definition of the narrow scope of the *Hilario* exception. For most malpractice cases brought by criminal defendants, the malpractice plaintiff will be required to prove duty, breach, proximate causation of damages and actual innocence.

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