

PROFESSIONAL LIABILITY UPDATE

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CRIMINAL LEGAL MALPRACTICE

California Law

By Jennifer A. Becker

Salisbury v. County of Orange (2005) 131 Cal.App.4th 756

The Fourth District holds that a criminal legal malpractice plaintiff is entitled to a jury determination on the factual innocence element.

Chad Salisbury was represented by an Orange County deputy public defender when a jury found him guilty of assault with a deadly weapon and a hate crime enhancement. Private counsel secured a new trial and Salisbury was acquitted.

In the legal malpractice trial the court determined that the question of Salisbury's factual innocence, a prerequisite to a claim of criminal legal malpractice, was a question of fact for the trial court, not the jury. The trial court found Salisbury had not established his actual innocence and dismissed the case for failure of proof.

A criminal legal malpractice plaintiff must obtain post-conviction relief and prove his or her actual innocence by a preponderance of the evidence. A criminal malpractice plaintiff has the same constitutional right to a jury trial on the element of actual innocence as he or she would have on the elements of duty, breach, causation and damage.

Even where the underlying action is equitable, the right to jury trial in a legal malpractice case prevails. Whether the issues are predominately questions of fact or law determines if a judge or jury decides the underlying case-within-a-case. The question of actual innocence is inherently factual. While proof of the government's inability to prove guilt may involve technical defenses and evidentiary rules, proof of actual innocence obliges the malpractice plaintiff to convince the civil jurors of his or her innocence.

The Court of Appeal would not apply case law holding that in the summary judgment context, the trial court can find that no triable fact exists if the plaintiff fails to submit any facts to demonstrate innocence. Salisbury had presented facts regarding his innocence and thus was entitled to a jury's determination.

Comment: As a strategic matter, counsel representing a criminal legal malpractice defendant should always consider a motion for summary judgment. In the

summary judgment context, the court can decide that a plaintiff has failed to meet his burden of establishing actual innocence by the preponderance of the evidence if the plaintiff fails to present exonerating facts. In the trial context, this issue is a question of fact for the jury.

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