

Nadine Smith, Deputy

CAUSE NO. _____

COLTON LESTER
Plaintiff

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IN THE DISTRICT COURT

V.

OF POLK COUNTY, TEXAS

CECIL BERG
SETH JOHNSON and
JOHNSON LAW OFFICE, PLLC
Defendants

411th
_____ **JUDICIAL DISTRICT**

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, Colton Lester, complaining of Defendants, Cecil Berg, Seth Johnson and Johnson Law Office, PLLC, and would respectfully show as follows:

I
DISCOVERY CONTROL PLAN

Based upon this Petition, this case should be controlled by a discovery control plan Level 2 pursuant to the Texas Rules of Civil Procedure, Rule 190.3. This is not an expedited action as Plaintiff has suffered and sustained pecuniary losses exceeding \$1,000,000.

II
PARTIES

Plaintiff, Colton Lester is an individual residing in Polk County, Texas.

Defendant, Cecil Berg is lawyer residing and practicing law in Polk County, Texas and may be served at 1000 FM 365, Onalaska, Texas 77360.

Defendant, Seth Johnson is lawyer residing and practicing law in resident of Nacogdoches, Texas and may be served at 928 N. University, Nacogdoches, Texas 75961.

Defendant, Johnson Law Office, PLLC is a Professional Limited Liability Company formed for the practice of law in Texas. Johnson Law Office, PLLC may be served by serving its principal, Seth Johnson at 928 N. University, Nacogdoches, Texas 75961.

III **JURISDICTION AND VENUE**

This Court has subject matter jurisdiction over the controversy because the claims asserted in this Petition arose, in whole or in part, in Texas and the amount in controversy exceeds the minimum jurisdictional limits of this Court.

This Court has personal jurisdiction over each Defendant because the acts and/or omissions complained of herein occurred in Texas, each Defendant does and/or did do business in the State of Texas, has committed a tort, in whole or in part in Texas, is a resident and citizen of Texas, and/or has minimum contacts with the State of Texas during the period of time complained of herein.

Venue is properly laid in Polk County, Texas because at least one of the Defendants resides in, and/or has a principle office and headquarters in Polk County, Texas. *See* TEX. CIV. PRAC. & REM. CODE § 15.002(a)(2),(3). Accordingly, venue is properly laid in Polk County, Texas.

IV **FACTUAL BACKGROUND**

This legal malpractice case arises out of the wrongful imprisonment of Plaintiff Colton Lester (“Lester”) which resulted solely because of the gross negligence and incompetence of his counsel. On August 26, 2014, Lester, at 17 years old, was charged by Information for a criminal attempt to violate Section 33.021(b) of the Texas Penal Code, attempted solicitation of a minor. The alleged offense date was April 27, 2014. Lester had previously retained Defendant Seth Johnson (“Johnson”), a licensed attorney in the State of Texas, to represent him for the referenced charge. Johnson represented to Lester that he was a criminal law specialist and had investigated

the case and that Lester should make a plea bargain with the State. Johnson negotiated a plea bargain agreement that would place Lester on Deferred Adjudication Probation for a term of five years. On August 26, 2014, while represented in court by Johnson and at the recommendation of Johnson, Lester plead guilty to the offense of attempted online solicitation of a minor.

In 2016, A Motion to Revoke Lester's probation was filed. Defendant Cecil Berg, a licensed attorney in the State of Texas, represented Lester in the hearing to revoke Lester's probation and Lester was sentenced to three years in the Texas Department of Corrections.

In October of 2017, Lester was contacted by the State Counsel for Offenders who informed him for the first time that the statute under which he was convicted was void prior to the offense date. Specifically, on October 30, 2013, The Court of Criminal Appeals, *in Ex Parte Lo*, 424 S.W.3d 10 (Tex. Crim. App. 2013) held that Section 33.021(b) of the Texas Penal Code was unconstitutional. Therefore, A writ of Habeas Corpus was filed on Lester's behalf, and on April 11, 2018, The Court of Criminal Appeals vacated Lester's sentence in its entirety.

Unbelievably, and most egregiously, Defendants failed to disclose to Lester that the statute under which he was charged was void and non-existent. Thus, due to Defendants' negligence, gross negligence and breach of fiduciary duty, Lester lost his freedom at the tender age of 19 and was forced to endure almost two years of prison time for allegedly committing a crime that did not exist. Lester was thrown in prison at a time in his life when his friends and others his age were entering college and/or planning their future in the world. Needless to say, Lester has suffered severe emotional distress due to the gross misconduct of Defendants and lost time that can never be returned to him.

V
STATEMENT OF CLAIMS

Therefore, it has become necessary to bring this suit to collect a legal debt of money damages owing to Plaintiff due to the Defendants' actions. The Defendants' actions constitute negligence, gross negligence and breach of fiduciary duty as those terms are understood in law.

A. NEGLIGENCE

Plaintiff incorporates those facts set forth above as if recited herein verbatim. In addition to the allegations outlined above, the following errors and/or omissions by Defendants in the underlying representation constitute negligence:

- Failure to protect Plaintiff's interest;
- Failure to diligently represent Plaintiff;
- Failure to address Plaintiff's rights and defenses;
- Failure to raise the issue that the statute under which Plaintiff was charged was void;
- Failure to protect Plaintiff's constitutional rights; and
- Failure to protect Plaintiff's freedom.

Of course, nothing Plaintiff did, or failed to do, caused or in any way contributed to cause the occurrences that resulted in losses and damages to Plaintiff. On the contrary, the Defendants fell below the standard of care for attorneys practicing law in Texas, and thus, Defendants' conduct was a proximate and/or producing cause of Plaintiff's losses and damages.

B. GROSS NEGLIGENCE

Plaintiff incorporates those facts set forth above as if recited herein verbatim. In addition to the allegations above, the following acts of malfeasance constitutes gross negligence. Defendants were grossly negligent because their acts or omissions in failing to raise the fact that Plaintiff was charged with a crime that did not exist. Thus, when viewed objectively from the

standpoint of Defendants at the time they were representing Plaintiff, their conduct involved an extreme degree of risk, considering the probability and magnitude of the potential harm to Plaintiff—the loss of his freedom. Defendants had actual, subjective awareness of the risk of Plaintiff being subjected to prison, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of Plaintiff. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(A) and (B). In fact, Plaintiff was subjected to prison due solely to Defendants’ extreme malfeasance.

“The factor which ‘lifts ordinary negligence into gross negligence is the mental attitude of the defendant. . . .’” *Rhodes v. Batilla*, 848 S.W.2d 833, 844 (Tex. App.—Houston [14th Dist.] 1993, writ denied). When a lawyer, through their omissions, acts in direct contravention to the purpose for which they were retained and with an extreme degree of risk to their client, they can be held grossly negligent. *See Id.* Defendants’ utter lack of care as to Plaintiff’s underlying case and blind ignorance of the law is the factor which lifts their conduct from ordinary negligence to gross negligence. *See Id.* Thus, they are liable for exemplary damages and mental anguish caused to Plaintiff. *See Id.* (upholding award to client in legal malpractice case for \$125,000 in actual damages and \$125,000 in exemplary damages).

C. BREACH OF FIDUCIARY DUTY

At all times material, Defendants owed Plaintiff various fiduciary duties as a matter of law, including, among others:

- Duty of loyalty and utmost good faith;
- Duty of candor;
- Duty of confidentiality;
- Duty to refrain from self-dealing;
- Duty to act with integrity of the strictest kind;

- Duty of fair, honest dealing;
- Duty of full disclosure all material facts;
- Duty to represent Plaintiff with undivided loyalty; and
- Duty to act with absolute perfect candor, openness, honesty, and without any concealment or deception.

Defendants intentionally breached one or more of the above fiduciary duties by concealing from Plaintiff that the statute he was charged under had been abolished. Defendants concealed this fact so that they could extract more attorney's fees from Lester rather than having the charges brought against him immediately thrown out. Defendants did this to place their own interests ahead of Plaintiff. Defendants further breached their fiduciary duties to Plaintiff by not disclosing their malfeasance to Plaintiff. These breaches of fiduciary duty proximately caused Plaintiff damages in that, had Defendants not placed their interests ahead of Plaintiff's, Plaintiff would have never been sent to prison for almost two years and would not have been forced to endure the emotional trauma that comes to serving almost two years in prison for a crime that does not exist.

VI **DISCOVERY & TOLLING RULE**

To the extent necessary, Plaintiff affirmatively pleads the discovery rule and/or the *Hughes* tolling rule to any defense of limitations asserted by Defendants regarding any of Plaintiff's causes of action.

VII **DAMAGES**

Regarding the causes of action and conduct alleged above, Plaintiff has sustained pecuniary losses that were proximately caused by Defendants' conduct. Plaintiff hereby seeks the maximum allowable of actual damages that are within the jurisdictional limits of this court and Plaintiff seeks monetary relief in excess of \$1,000,000.

A. ACTUAL DAMAGES

Plaintiff seeks actual damages in an amount in excess of \$1,000,000.

B. EXEMPLARY DAMAGES

Due to Defendants' gross negligence and breach of fiduciary duty, Plaintiff is entitled to exemplary damages which he seeks herein. Plaintiff seeks exemplary damages to the maximum extent of the law.

C. EMOTIONAL DISTRESS DAMAGES

Plaintiff is entitled to emotional distress damages due to Defendants' malfeasance and hereby seeks such damages to the maximum extent of the law.

D. FEE FORFEITURE

The Court may order all fees obtained by a fiduciary to be disgorged as a result of the breach of fiduciary duty when the fiduciary breaches a fiduciary duty. Thus, Plaintiff seeks to disgorge all of the fees paid to Defendants.

**VIII
JURY DEMAND**

Plaintiff desires to have a jury decide this case and makes this formal request pursuant to Texas Rule of Civil Procedure 216. This request is filed more than thirty days before this case has been scheduled for trial and all fees have been paid.

**IX
REQUEST FOR DISCLOSURE**

Under Texas Rule of Civil Procedure 194, Plaintiff requests that Defendants disclose, within 50 days of the service of this request, the information or material described in Rule 194.2.

X
PRAYER

THEREFORE, Plaintiff prays that after trial herein, that judgment be entered against Defendants jointly and severally as prayed for, that costs of court be taxed against Defendants, that Plaintiff be given prejudgment as well as post judgment interest, and for such other and further relief, at law and in equity to which Plaintiff may show himself to be justly entitled, to which the Court believes Plaintiff to be deserving, and for which Plaintiff will ever pray.

Respectfully submitted,

THE KASSAB LAW FIRM

/ s / Lance Christopher Kassab
LANCE CHRISTOPHER KASSAB
Texas State Bar No. 00794070
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DAVID ERIC KASSAB
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Houston, Texas 77004
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Facsimile: 713-522-7410

ATTORNEYS FOR PLAINTIFF

CIVIL CASE INFORMATION SHEET

CAUSE NUMBER (FOR CLERK USE ONLY):

COURT (FOR CLERK USE ONLY):

STYLED

Colton Lester vs. Cecil Berg, et al.

Nadine Smith, Deputy

(e.g., John Smith v. All American Insurance Co; In re Mary Ann Jones; In the Matter of the Estate of George Jackson)

A civil case information sheet must be completed and submitted when an original petition or application is filed to initiate a new civil, family law, probate, or mental health case or when a post-judgment motion for modification or enforcement is filed in a family law case. The information should be the best available at the time of filing. This sheet, approved by the Texas Judicial Council, is intended to collect information that will be used for statistical purposes only. It neither replaces nor supplements the filings or service of pleading or other documents as required by law or rule. The sheet does not constitute a discovery request, response, or supplementation, and it is not admissible at trial.

1. Contact information for person completing case information sheet:		Names of parties in case:	Person or entity completing sheet is:
Name: <i>Lance C. Kassab</i>	Email: <i>lance@kassablaw.com</i>	Plaintiff(s)/Petitioner(s): <i>Colton Lester</i>	<input type="checkbox"/> Attorney for Plaintiff/Petitioner
Address: <i>1214 Elgin</i>	Telephone: <i>7135227400</i>	Defendant(s)/Respondent(s): <i>Cecil Berg</i>	<input type="checkbox"/> Pro Se Plaintiff/Petitioner
City/State/Zip: <i>Houston TX 77004</i>	Fax: <i>7135227410</i>	<i>Seth Johnson</i>	<input type="checkbox"/> Title IV-D Agency
Signature: <i>Lance C. Kassab</i>	State Bar No: <i>00794070</i>	<i>Johnson Law Office PLLC</i>	<input type="checkbox"/> Other: _____
			Additional Parties in Child Support Case: _____
			Custodial Parent: _____
			Non-Custodial Parent: _____
			Presumed Father: _____

2. Indicate case type, or identify the most important issue in the case (select only 1):

Civil		Family Law		
Contract	Injury or Damage	Real Property	Marriage Relationship	Post-judgment Actions (non-Title IV-D)
<input type="checkbox"/> Consumer/DTPA <input type="checkbox"/> Debt/Contract <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Other Debt/Contract:	<input type="checkbox"/> Assault/Battery <input type="checkbox"/> Construction <input type="checkbox"/> Defamation Malpractice <input type="checkbox"/> Accounting <input checked="" type="checkbox"/> Legal <input type="checkbox"/> Medical <input type="checkbox"/> Other Professional Liability:	<input type="checkbox"/> Eminent Domain/Condemnation <input type="checkbox"/> Partition <input type="checkbox"/> Quiet Title <input type="checkbox"/> Trespass to Try Title <input type="checkbox"/> Other Property:	<input type="checkbox"/> Annulment <input type="checkbox"/> Declare Marriage Void Divorce <input type="checkbox"/> With Children <input type="checkbox"/> No Children	<input type="checkbox"/> Enforcement <input type="checkbox"/> Modification—Custody <input type="checkbox"/> Modification—Other
Foreclosure <input type="checkbox"/> Home Equity—Expedited <input type="checkbox"/> Other Foreclosure <input type="checkbox"/> Franchise <input type="checkbox"/> Insurance <input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Non-Competition <input type="checkbox"/> Partnership <input type="checkbox"/> Other Contract:	<input type="checkbox"/> Motor Vehicle Accident <input type="checkbox"/> Premises Product Liability <input type="checkbox"/> Asbestos/Silica <input type="checkbox"/> Other Product Liability List Product: _____ <input type="checkbox"/> Other Injury or Damage:	Related to Criminal Matters <input type="checkbox"/> Expunction <input type="checkbox"/> Judgment Nisi <input type="checkbox"/> Non-Disclosure <input type="checkbox"/> Seizure/Forfeiture <input type="checkbox"/> Writ of Habeas Corpus—Pre-indictment <input type="checkbox"/> Other: _____	Other Family Law <input type="checkbox"/> Enforce Foreign Judgment <input type="checkbox"/> Habeas Corpus <input type="checkbox"/> Name Change <input type="checkbox"/> Protective Order <input type="checkbox"/> Removal of Disabilities of Minority <input type="checkbox"/> Other: _____	Title IV-D <input type="checkbox"/> Enforcement/Modification <input type="checkbox"/> Paternity <input type="checkbox"/> Reciprocals (UIFSA) <input type="checkbox"/> Support Order
Employment <input type="checkbox"/> Discrimination <input type="checkbox"/> Retaliation <input type="checkbox"/> Termination <input type="checkbox"/> Workers' Compensation <input type="checkbox"/> Other Employment:	Other Civil <input type="checkbox"/> Administrative Appeal <input type="checkbox"/> Antitrust/Unfair Competition <input type="checkbox"/> Code Violations <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Intellectual Property			Parent-Child Relationship <input type="checkbox"/> Adoption/Adoption with Termination <input type="checkbox"/> Child Protection <input type="checkbox"/> Child Support <input type="checkbox"/> Custody or Visitation <input type="checkbox"/> Gestational Parenting <input type="checkbox"/> Grandparent Access <input type="checkbox"/> Parentage/Paternity <input type="checkbox"/> Termination of Parental Rights <input type="checkbox"/> Other Parent-Child: _____
Tax <input type="checkbox"/> Tax Appraisal <input type="checkbox"/> Tax Delinquency <input type="checkbox"/> Other Tax	Probate & Mental Health Probate/Wills/Intestate Administration <input type="checkbox"/> Dependent Administration <input type="checkbox"/> Independent Administration <input type="checkbox"/> Other Estate Proceedings		<input type="checkbox"/> Guardianship—Adult <input type="checkbox"/> Guardianship—Minor <input type="checkbox"/> Mental Health <input type="checkbox"/> Other: _____	

3. Indicate procedure or remedy, if applicable (may select more than 1):

<input type="checkbox"/> Appeal from Municipal or Justice Court	<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Prejudgment Remedy
<input type="checkbox"/> Arbitration-related	<input type="checkbox"/> Garnishment	<input type="checkbox"/> Protective Order
<input type="checkbox"/> Attachment	<input type="checkbox"/> Interpleader	<input type="checkbox"/> Receiver
<input type="checkbox"/> Bill of Review	<input type="checkbox"/> License	<input type="checkbox"/> Sequestration
<input type="checkbox"/> Certiorari	<input type="checkbox"/> Mandamus	<input type="checkbox"/> Temporary Restraining Order/Injunction
<input type="checkbox"/> Class Action	<input type="checkbox"/> Post-judgment	<input type="checkbox"/> Turnover