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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio State Bar Association (the "Association") is an unincorporated association with more than 24,000 members in the State of Ohio. Its membership includes lawyers, judges, law students and non-lawyers. The Association's lawyer members range from sole practitioners to members practicing in the nation's largest firms. Its members' practices likewise include every branch of legal, professional knowledge. Irrespective of their type of firm or area of practice, the decision of the court of appeals will adversely affect the ability of members of the Association to provide competent, zealous representation to the public. This case is, thus, of significant concern to the Association since it relates directly to the issue of whether the limited privity exception to a lawyer's qualified immunity will continue to be fully recognized.

It is for the foregoing reasons that Amicus Curiae Ohio State Bar Association is vitally interested in this case and requests that the Court adopt the position of Appellees/Cross-Appellants.

STATEMENT OF THE CASE AND FACTS

The Ohio State Bar Association accepts the Statement of Facts and the Statement of the Case, as stated by the Appellees/Cross-Appellants Stephen Yurasek, David Allen, and Allen, Yurasek & Merklin, and hereby incorporates them herein by reference.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The limited privity exception to a lawyer's qualified immunity should be interpreted narrowly, and found to not encompass a duty owed by a deceased majority shareholder to minority shareholders of a closely held corporation relating to a private stock transfer.

A. The Qualified Immunity for Ohio Lawyers Applies Herein.

Appellees/Cross-Appellants Stephen Yurasek, David Allen, and Allen, Yurasek & Merklin were engaged to assist Mary Behrens in transferring certain assets prior to her death, not a matter to which her fiduciary duty as a majority shareholder pertained; and thus, should be immune from the suit of Appellants/Cross-Appellees Julie LeRoy and Mary Miller. The decision for the Union County Court of Appeals, Third Appellate District should be reversed.

An Ohio lawyer possesses qualified immunity from liability to third parties, stemming from acts he or she takes while representing a client. *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, at ¶69. As this Court has recognized, "an attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously." *Simon v. Zipperstein*, 32 Ohio St.3d at 77, citing *Scholler v. Scholler* (1984), 10 Ohio St.3d 89, ¶1 of the Syllabus. In *Scholler*, this Court explained that the rationale for its holding is that the lawyer's duty is to attend to the needs of his or her client, not to the needs of a third party not in privity with the client. *Id.* at 76. If a lawyer were required to meet to the needs of a third party not in privity with his or her client, the fear of lawsuits by third parties against him or her would make that lawyer hesitant to provide diligent representation to the client with

undivided loyalty. To address this concern, this Court places an extremely high threshold for third parties to satisfy if they seek to pursue a malpractice claim against a lawyer.

Ohio case law endorsing attorney immunity from third party lawsuits parallels the spirit and letter of the Code of Professional Responsibility which attorneys must follow.¹ By adopting the provisions of the Code of Professional Responsibility, this Court has directed lawyers representing organizations and/or individuals owing fiduciary duties to others to exercise diligence avoiding conflicts of interest. The Code is replete with examples of this directive.

Disciplinary Rule 5-101(A)(1) generally requires a lawyer to refuse employment when the interests of the lawyer may impair the lawyer's independent professional judgment. This Rule provides that:

Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests.

Code of Professional Responsibility, DR 5-101(A)(1).

Similarly, Disciplinary Rule 5-105(A) requires a lawyer to refuse to accept or continue representation of a client if the interests of another client may impair the independent professional judgment of the lawyer and states as follows:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

¹ During the events in this case and presently, Ohio lawyers are governed by the Code of Professional Responsibility. This Court has adopted the Ohio Rules of Professional Conduct effective February 1, 2007.

Code of Professional Responsibility, DR 5-105(A).

Pursuant to DR 5-105(C), a lawyer may only represent multiple clients if it is “obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.”

This Court’s legal ethics rules also underscore the undivided loyalty that a corporate lawyer owes to his or her clients. Ethical Consideration 5-19 provides as follows:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stock holder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization * * * (emphasis added)

Code of Professional Responsibility, EC 5-19.

Another significant rule is Ethical Consideration 5-16, relating to a lawyer’s representation of multiple clients, which states:

A lawyer representing a fiduciary that owes fiduciary duties to third parties does not solely by representation of the fiduciary engage in multiple representations even if the third parties’ interests conflict with the interests of the fiduciary or other third parties. As used in this Ethical Consideration, “fiduciary” includes only a trustee under an express trust or an executor, administrator, or personal representative.

Code of Professional Responsibility, EC 5-16.

The Code of Professional Responsibility serves as additional support for the immunity vested in lawyers from lawsuits brought by parties who are not in privity with the lawyer. Ohio’s disciplinary and legal ethics rules mandate that a lawyer’s loyalty generally be devoted to a single client or entity. A lawyer’s departure from the principle

of undivided loyalty is only permissible under the limited circumstances set forth by this Court in its Disciplinary Rules and case holdings. Attending to the legal interests of a third party who is not in privity with the lawyer's client is not a valid basis for compromising a lawyer's undivided loyalty to his or her client. The Court of Appeals Opinion undermines and defies the precedent set by this Court and the Code of Professional Responsibility. The Court of Appeals' ruling must be overturned.

B. The Court of Appeals Improperly Expanded This Court's Prior Rulings on Lawyer Representation of Legal Entities.

The Court of Appeals improperly expanded previous holdings by this Court in cases involving legal entities such as a limited partnership and a closely held corporation. In the case of *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, this Court addressed the narrow issue of the validity of a legal malpractice case against a lawyer for a limited partnership by a third party. When deciding the validity of the third party's claim, this Court held that "an attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship only regarding matters to which the fiduciary duty relates." *Id.* at 458. This Court explained that the partners comprising a limited partnership owe fiduciary duties to each other; thus, in a limited partnership, the general partner owes a fiduciary duty to the limited partners of the enterprise. *Id.* at ¶2 of the Syllabus. Because the legal representation at issue actually related to a fiduciary duty, this Court found that the privity exception was met. *Id.* at 458. As will be discussed in further detail below, the Court of Appeals broadly expanded the *Arpadi* holding and misapplied it herein.

Similarly, the Court of Appeals was misguided in its reliance on *Crosby v. Beam* (1989), 47 Ohio St.3d 105. In *Crosby*, this Court described a closely held corporation

as one with a few shareholders and whose corporate shares are not usually traded on a securities market. *Id.* at 107. With regard to whether an individual shareholder in a closely held corporation could sue in his or her individual capacity, this Court held that “generally, majority shareholders have a fiduciary duty to minority shareholders.” *Id.* at 108. The Court never addressed the issue of whether a third party was in privity with the lawyer representing a majority shareholder in a private transfer of stock. The extremely general principles set forth in *Crosby* are not germane to this Court’s analysis of the narrow issue at hand. *Crosby* should not be misconstrued to unduly expand the privity exception to a lawyer’s qualified immunity from lawsuits.

C. The Court of Appeals Substantially Broadened the Privity Exception to a Lawyer’s Qualified Immunity.

The Court of Appeals substantially broadened the limited privity exception to a lawyer’s qualified immunity as set forth in *Zipperstein*, *supra*, and its progeny. The Court of Appeals also misconstrued the *Arpadi* decision, *supra*, wherein the privity exception was only found to be met because the subject matter of the lawsuit concerned specific matters to which the fiduciary duty related. The Court of Appeals also misapplied *Crosby*, *supra*, in which this Court made the general observation that majority shareholders have a fiduciary duty to minority shareholders. By misapplying this Court’s precedent, the Court of Appeals inexplicably extrapolated the following:

Appellants have clearly alleged that Marysville News was a closely held corporation, under the definition provided in *Crosby*, and that decedent was the majority stockholder in that closely held corporation. Thus, because decedent, as the majority stockholder, owed a fiduciary duty to Appellants, as minority stockholders, we find that Appellants were in privity with decedent for the purposes of the stock transfer, pursuant to *Arpadi*. Accordingly, Appellants’ claim involving the stock transfer clearly falls within the privity exception to the *Simon v. Zipperstein* rule.

Opinion at ¶17.

No other court interpreting the rulings of this Court has held that the privity exception in *Zipperstein* should be interpreted so broadly to include the relationship between shareholders in a corporation. See *Thompson v. Karr* (C.A. 6, July 15, 1999), No. 98-3544, 1999 U.S. App. LEXIS 16846, at *26. The *Thompson* Court refused to expand the privity exception, and offered justification against such an expansion. The *Thompson* Court noted that the *Arpadi* decision expressly distinguished between a partnership and a corporation when determining to whom lawyers owe allegiance. *Id.* The Court found that limited partnerships are not separate legal entities and are therefore not similar to corporations. *Id.* Thus, the Court distinguished an attorney's role in representing an entity with an aggregate of individuals as opposed to a separate legal entity.

In the case sub judice, the Court of Appeals incorrectly determined that the deceased majority shareholder owed a general fiduciary duty to the minority shareholders and that the decedent's private stock transfer constituted a "matter to which the fiduciary duty relates". The Court of Appeals misconstrued the privity exception. The only authority relating to the fiduciary duty owed to shareholders in a close corporation is *Crosby*, supra. However, *Crosby* merely held that a majority shareholder breaches a fiduciary duty by using the majority control of the corporation to his or her own advantage, without providing minority shareholders with an equal opportunity to benefit. *Crosby* must be construed in its narrow context. The facts of this case do not even remotely resemble the examples of breaches of fiduciary duties by majority shareholders addressed in *Crosby*.

The underlying case herein does not involve a claim that the decedent used her majority control in the corporation to Appellants' disadvantage. Appellants did not allege any other facts similar to those set forth in *Crosby* to establish a fiduciary duty. Instead, Appellants made the bald assertion that there was "collusion" and that the decedent should have bequeathed her private shares of stock to Appellants instead of transferring them to her grandson. Clearly, these allegations were insufficient for the Court of Appeals to find that a valid claim was pled. The mere fact that Appellants and the decedent were shareholders in the same corporation does not equate with privity regarding the decedent's testamentary bequests.

The legal services that Appellees-Cross Appellants provided to the decedent were to assist her in transferring certain assets prior to her death. The fact that one asset was stock in the same corporation in which Appellants held stock was fortuitous. This circumstance does not give rise to "privity" enabling Appellants to recover damages from decedent's lawyer. If the Court of Appeals' decision is endorsed by this Court, it would essentially extinguish the well-established immunity rule, which has properly guarded lawyers from unwarranted third-party lawsuits for many decades. Lawyers for majority shareholders in close corporations would have an affirmative obligation to consult with all minority shareholders regarding any private stock transfer and potentially a host of other legal services performed for their clients. Moreover, the analysis of the Court of Appeals assumes that the interests of all minority shareholders are identical. If the decision is allowed to stand, what should the lawyer do when there is no such congruency of interests.

Lawyers for shareholders would frequently find themselves in conflicts of interest and would be incapable of effectively representing their clients. Such an untenable and impractical rule would create an opportunity for many unreasonable third party malpractice claims. The Court of Appeals' unwarranted expansion of *Zipperstein* and *Arpadi* was erroneous. This Court should revisit its holdings in *Zipperstein* and *Arpadi* and enunciate a clear rule regarding exceptions to a lawyer's immunity in the context of representing corporations and limited partnerships. This Court should reverse the decision of the Union County Court of Appeals, Third Appellate District on the privity issue.

CONCLUSION

The Court of Appeals radically broadened the narrow privity exception to a lawyer's qualified immunity from liability to third-party lawsuits. This Court should reaffirm and clarify its holdings that Ohio lawyers possess qualified immunity from liability to third parties, stemming from acts he or she takes while representing a client. The Court of Appeals' decision creates an unworkable rule. The decision further runs contrary to a lawyer's oath and obligations under the Code of Professional Responsibility. If a lawyer is required to meet the needs of third parties not in privity with his or her client, the fear of lawsuits by third parties against the lawyer would make the lawyer hesitant to offer diligent representation to the client with undivided loyalty.

This Court should also reaffirm and clarify its holdings that the privity exception can only be met when the lawsuit by the third party concerns matters precisely to which the fiduciary duty relates. Finally, this Court should also reaffirm and clarify that majority shareholders owe a fiduciary duty to minority shareholders in a very narrow context, i.e., when a majority shareholder breaches a fiduciary duty by using the majority control of the corporation to their own advantage, without providing minority shareholders with an equal opportunity to benefit.

For the foregoing reasons, *Amicus Curiae* Ohio State Bar Association respectfully urges this Court to reverse the holding of the Fifth District Court of Appeals for Ohio regarding the question of law related to the privity exception to a lawyer's qualified immunity.

Respectfully submitted,



EUGENE P. WHETZEL (0013216)

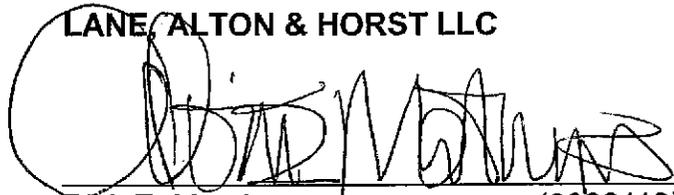
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CERTIFICATE OF SERVICE

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