IN THE SUPREME COURT OF OHIO

JULIE LEROY, *et al.*	:	
	:	Consolidated Cases
Appellants/Cross-Appellees,	:	No. 05-1593 and 05-1926
	:	
v.	:	On appeal from the Union
	:	County Court of Appeals,
ALLEN YURASEK & MERKLIN, *et al.*	:	Third Appellate District
	:	Court of Appeals Case No. 14-04-09
Appellees/Cross-Appellants.	:	

MERIT BRIEF OF APPELLEES/CROSS-APPELLANTS STEPHEN YURASEK, DAVID ALLEN, AND ALLEN YURASEK & MERKLIN

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FILED
OCT 30 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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INTRODUCTION AND STATEMENT OF FACTS

A. Introduction

The Third District Court of Appeals made two critical errors in this case which, if left unresolved, will undermine years of sound Ohio caselaw regarding an attorney's liability in malpractice to third parties. First, the court of appeals held that each third-party minority shareholder in a close corporation has standing to sue the majority shareholder's personal attorney for malpractice, based on the majority shareholder's purely private transfer of stock. Second, the court of appeals held that such a third-party plaintiff need only plead a naked and conclusory allegation of "collusion" to satisfy this Court's test for standing in third-party malpractice actions. Both of these dangerous precedents must be soundly rejected by this Court.

Subject only to very limited exceptions, this Court has repeatedly held that attorneys are immune from malpractice lawsuits brought by third parties whom the attorneys do not represent. See *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158; *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 512 N.E.2d 636. In this case, the court of appeals turned this long-standing Ohio law on its head. According to the appellate court, when the lawyer for a majority shareholder in a close corporation handles a private stock transfer for his client, each and every minority shareholder has standing to individually sue that lawyer for malpractice. The result of this decision would be catastrophic for Ohio attorneys, who would now – under the court of appeals' ruling – have a duty to unknown third parties every time they advise or represent their actual client, the majority shareholder, in a purely private transaction. Such a rule is illogical and unworkable and cannot be the law in Ohio.

If the court of appeals' decision stands, Ohio attorneys will be faced with such a tangled web of conflicts that they simply will not represent clients involved with close corporations. Clearly, this issue is of considerable importance to the entire legal profession, and not just to Appellees/Cross-Appellants Allen Yurasek & Merklin, David Allen and Stephen Yurasek ("Cross-Appellants"). Indeed, both the Ohio State Bar Association and the Ohio Association of Civil Trial Lawyers have indicated that they will file *amicus* briefs in support of Cross-Appellants' arguments on this issue. More importantly, the court of appeals' holding flies in the face of well-reasoned decisions from Ohio and other jurisdictions addressing third-party standing in legal malpractice. See, e.g., *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, 628 N.E.2d 1335; *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 548 N.E.2d 217; *Zipperstein*, 32 Ohio St.3d at 76; *Thompson v. Karr* (C.A.6, July 15, 1999), No. 98-3544, 1999 U.S. App. LEXIS 16846. Accordingly, Cross-Appellants respectfully ask this Court to reaffirm its holdings in *Zipperstein* and *Scholler*, reverse the court of appeals' decision, and hold that the privity exception is not met where a majority shareholder's attorney handles a purely private stock transfer.

Adding to the confusion, the Union County Court of Appeals further held that, where a third-party plaintiff pleads collusion to acquire standing under *Scholler* and *Zipperstein*, the plaintiff may simply recite the word "collusion" in his complaint without alleging any supporting facts. Such a holding disregards Ohio's well-established pleading principles. The result is that strangers to the attorney-client relationship may now sue attorneys without providing adequate notice of any factual basis for their claims. Under this precedent, Rule 12(B)(6) of the Ohio Rules of Civil Procedure will be rendered a nullity. Cross-Appellants ask this Court to reverse

the court of appeals' holding and hold that, in order to adequately plead collusion, a plaintiff must plead more facts than simply invoking the word "collusion" in his complaint.

B. Statement of Facts

Appellants, Julie LeRoy and Mary Miller, are two of the three surviving children of decedent Mary Elizabeth Behrens ("Decedent"). (Supp. S-2.) In November 2001, Decedent executed a new will, drafted by her attorney, David Allen of the law firm Allen Yurasek & Merklin. (Supp. S-3.) At this time, Decedent was the largest shareholder in Marysville Newspapers, Inc., a closely-held corporation. (Supp. S-2.) On December 27, 2001, in a purely private transaction involving a single transferor and transferee, Decedent transferred her shares in the family corporation not to Appellants, but to her grandson, Kevin Behrens. (Supp. S-3.) In return, Kevin Behrens gave his grandmother a promissory note for $567,000. (Supp. S-3.) Decedent's attorneys, Cross-Appellants Allen Yurasek & Merklin, drafted the documents to effectuate that transfer. (Supp. S-3 – S-4.)

On May 1, 2002, Mrs. Behrens died. (Supp. S-2.) Thereafter, Appellants learned of their mother's new will and the stock transfer. (Supp. S-4.) They responded by suing Cross-Appellants – their mother's attorneys – for alleged malpractice on December 24, 2002. In their Complaint, Appellants raise two counts of legal malpractice against Cross-Appellants, one based in negligence and the other based on breach of contract. (Supp. S4 – S-7.) (Appellants' belief that legal malpractice sounds in both tort and contract law formed the basis for their entire appeal before this Court. As Appellants have correctly noted in their Memo in Lieu of Appellant Brief, however, that appeal is now moot.) In each count, Appellants complain that Cross-Appellants wrongfully assisted in the transfer of Decedent's Marsyville News stock and that Cross-Appellants wrongfully prepared Decedent's will. (Supp. S-4 – S-7.)

On January 24, 2003, Cross-Appellants moved to dismiss Appellants' Complaint for lack of standing. (Appellants filed a similar complaint on behalf of the Estate in April 2003 under a new case number. The common pleas court consolidated the two cases.) On December 6, 2004, the Union County Court of Common Pleas filed a Judgment Entry granting Cross-Appellants' motion to dismiss Appellants' individual claims for want of standing. (Appx. A-21.) Appellants appealed the common pleas court's judgment to the Union County Court of Appeals.

On July 11, 2005, the court of appeals issued a decision reversing the common pleas court and reinstating the Complaint. On August 29, 2005, in response to a motion for reconsideration filed by Appellants, the court of appeals vacated the July decision and issued a new, nearly identical opinion. (Appx. A-7.) (As a result, and as Appellants noted in their Memo in Lieu of Merit Brief, the court's August 29, 2005 decision rendered moot Appellant's grounds for appeal in this case.)

Cross-Appellants filed notices of appeal in response to both the July 11, 2005 and August 29, 2005 decisions by the court of appeals, under case numbers 05-1593 and 05-1926, respectively. (Appx. A-1, A-4.) This Court granted jurisdiction to hear each appeal. On February 8, 2006, this Court granted Appellants' motion to consolidate the two cases and ordered the parties to combine briefing in alignment with case number 05-1593.

RESPONSE TO APPELLANTS' BRIEF

As Appellants noted in their Memorandum in Lieu of Merit Brief, Appellants' grounds for appeal were rendered moot when the court of appeals vacated its July 11, 2005 decision and issued a new opinion on August 29, 2005. Therefore, Cross-Appellants need not provide a substantive response to Appellants' brief. Cross-Appellants present their grounds for reversal below.

ARGUMENT

Proposition of Law No. I:

Third-party minority shareholders of a close corporation lack standing to sue the majority shareholder's personal attorney in legal malpractice for his role in effecting the majority shareholder's private and testamentary transfer of stock. *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 76, 512 N.E.2d 636, *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, 458, 628 N.E.2d 1335, applied.

A. The Standard for Third-Party Malpractice Claims

To establish a cause of action for legal malpractice, a plaintiff must prove (1) an attorney-client relationship giving rise to a duty; (2) breach of that duty; and (3) damages caused by the breach. *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 105, 538 N.E.2d 1058. This Court has repeatedly held that attorneys have immunity from malpractice lawsuits brought by third parties whom the attorneys do not represent – subject only to limited exceptions. See *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158; *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 512 N.E.2d 636; *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, 628 N.E.2d 1335. "It is by now well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice." *Zipperstein*, 32 Ohio St.3d at 76 (citing *Scholler*, 10 Ohio St.3d, paragraph one of the syllabus); see also *Savings Bank v. Ward* (1879), 100 U.S. 195, 25 L.Ed. 621.

In other words, third-party malpractice claims are viable only if the complaint alleges facts sufficient to show either (1) privity between the third party and the actual client; or (2) malice by the attorney. "The rationale for this posture is clear: the obligation of an attorney is to direct his attention to the needs of the client, not to the needs of a third party not in privity with the client." *Zipperstein*, 32 Ohio St.3d at 76. Further, "[t]o allow indiscriminate third-party

actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to offer proper representation to his client in fear of some third-party action against the attorney himself." Id. (internal quotations omitted).

The Montgomery County Court of Appeals recently reflected on the rationale behind the rule in *Zipperstein* as follows:

> An attorney owes a primary duty to his client and must act accordingly. In a real sense, this principle is legally enforceable in light of the Code of Professional Responsibility. Specifically, EC 5-1 states:
>
> "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, *nor the desires of third persons* should be permitted to dilute his loyalty to his client."
>
> Were the rule otherwise, an attorney would be faced with a sharp conflict of interest. On one hand, the attorney must have an interest in promoting and protecting the interests of his client. On the other hand, if no such immunity exists, an attorney may be reticent to advance the cause of his client out of fear of lawsuits by third persons arising out of the attorney's representation of his client. This proposition was well stated in *Petrou v. Hale* (1979), 43 N.C.App. 655, at 661, 260 S.E.2d 130
>
> "*** If an attorney whose primary duty is to promote the cause of his client in a light most favorable to him within the bounds of the law is also required to protect the rights of an adverse party, he will be caught in the midst of a conflict of interest. More importantly, if mere negligence in protecting the rights of an adverse party becomes the standard of liability, attorneys will be fearful of instituting lawsuits on behalf of their clients. The end result would be the limitation of free access to the courts."

Moffitt v. Litteral, Montgomery App. No. 19154, 2002-Ohio-4973, at ¶78-81 (quoting Chief Justice Celebrezze's dissenting opinion in *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 159, 447 N.E.2d 1285). As discussed below, the court of appeals in this case ignored these bedrock principles.

B. <u>The Court of Appeals' Holding Was Error</u>.

Appellants concede that they are strangers to the attorney-client relationship between Decedent and Cross-Appellants. (Supp. S-5.) Accordingly, Appellants fail to satisfy the first

element of a third-party malpractice claim and lack standing in their own right to sue Cross-Appellants for legal malpractice. Nevertheless, the court of appeals has dangerously ignored the long-standing policy affirmed in *Scholler*, *Zipperstein*, and *Arpadi* and unacceptably broadened the circumstances under which "privity" supposedly supports third-party malpractice claims. The court of appeals held that where a majority shareholder transfers her private stock, the "privity" exception to *Zipperstein* is met. Accordingly, minority shareholders having no relationship to the transfer or with the majority shareholder's attorney may now sue the attorney for malpractice. This holding simply cannot stand.

To reach its novel conclusion, the court of appeals misconstrued this Court's decision in *Arpadi*, 68 Ohio St.3d 453. In *Arpadi*, this Court addressed the narrow question of "***whether the duty owed by an attorney to exercise due care in the provision of legal services to a partnership extends to the limited partners as well." Id. at 456. The case involved an attorney malpractice claim by a third party involving a limited partnership. The Court in *Arpadi* held that "those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates." Id. at 458 (emphasis added). Because the legal representation in *Arpadi* actually related to the partnership, the privity exception was met, and the limited partners had standing to sue counsel for the partnership. Id.

Recognizing that the instant case does not involve a limited partnership but rather a close corporation, the court of appeals then misapplied *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 548 N.E.2d 217, in which this Court defined a closely held corporation. In *Crosby*, this Court noted that "[g]enerally, majority shareholders have a fiduciary duty to minority shareholders." Id. at 108. From this very general rule, the court of appeals held that:

> 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.

(Appx. A-17 – A-18.)

As discussed below, the court's holding is inappropriate for four distinct reasons. First, the court misapplied the long-standing definition of privity in Ohio. Second, the court improperly expanded settled Ohio law regarding the privity exception, contrary to sound analysis by this Court, Ohio appellate courts, the Sixth Circuit, and other courts. Third, the court completely failed to analyze whether the complaint filed by Appellants involves a "matter to which the fiduciary duty relates," as required by this Court. *Arpadi*, 68 Ohio St.3d at 458. Finally, the court's holding improperly creates a whole new cause of action in Ohio, contrary to settled law.

1. **The Court of Appeals Misapplied the Definition of Privity.**

Under Ohio law:

> Privity is defined as "the connection or relation between two parties, each having a legally recognized interest in the same subject matter .***; mutuality of interest ***" Black's Law Dictionary (7 Ed.Rev.1999), 1217. For legal malpractice purposes, privity between a third person and a client exists where the client and the third person share a mutual or successive right of property or other interest.

Sayyah v. Cutrell (Brown 2001), 143 Ohio App.3d 102, 111-12, 757 N.E.2d 779.

> In determining privity, the trial court must first examine the interest the original attorney-client relationship was intended to protect, and then compare it to the interest of the third person bringing suit for the alleged malpractice. See *Scholler, 10 Ohio St. 3d at 104*. Privity exists if the interest of the client is concurrent with the interest of the third person.

Id. at 112 (emphasis added); see also *Swiss Reinsurance Am. Corp., Inc. v. Roetzel & Andress* (Summit), 163 Ohio App.3d 336, 2005-Ohio-4799, 837 N.E.2d 1215, at ¶27 ("In determining privity in the context of standing to bring a malpractice claim, we must determine whether the parties' interests are the same, such that representing the client is equivalent to representing the party alleging privity with the client.").

Ohio courts consistently reject claims of privity under *Scholler* and *Zipperstein* where the interests of the plaintiff and the client do not align. See, e.g., *Swiss Reinsurance* at ¶25, 28 (although plaintiff insurance company retained the attorney to defend its insured, no privity between the insurance company and the insured where the attorney "refused to place [the insurance company's] interest in proceeding to trial in front of [the insured's] interest in settlement"); *Hahn v. Satullo* (Franklin), 156 Ohio App.3d 412, 2004-Ohio-1057, 806 N.E.2d 567, at ¶65 (no privity between plaintiffs and their former attorneys, whom plaintiffs sued for malpractice, thus no standing to sue former attorneys' counsel); *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.*, Highland App. No. 01CA21, 2002-Ohio-6170, at ¶63 ("[B]ecause the interest between appellant and the Hollenbaugh defendants was not the same, no privity exists *** [and] appellant may not maintain a legal malpractice action against appellees ***."); *Am. Express Travel Rel Ser Co. v. Mandilakis* (Cuyahoga 1996), 111 Ohio App.3d 160, 165, 675 N.E.2d 1279 (no privity between plaintiff corporation and embezzler, thus no standing to sue embezzler's attorney for failure to disclose the embezzlement).

In *Hile v. Firmin, Sprague & Huffman Co., L.P.A.* (Hancock 1991), 71 Ohio App.3d 838, 595 N.E.2d 1023, the Hancock County Court of Appeals considered whether there was privity between a corporation's attorneys and officers and directors of the corporation. First, the court observed: "Although corporate directors have a fiduciary relationship with the corporation, their

interests are not always identical. As such, the corporate attorney must direct his attention to the interests of the corporation." Id. at 841. The court then cited EC 5-18 of the Code of Professional Responsibility:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, 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.

Id. at 842. The court ultimately held that there was no privity between the directors and the corporation's attorneys:

> The attorneys did not act negligently in their relationship with the corporation. The negligence alleged is separate from their duty to the corporation and, as such, cannot be imputed upon them absent an individual attorney-client relationship between attorneys and directors.

Id. at 842-43. Accordingly, the court affirmed the summary judgment entered by the trial court in favor of the attorneys. Id. at 843.

In this case, the court of appeals erred when it failed to "examine the interest the original attorney-client relationship was intended to protect, and then compare it to the interest of the third person bringing suit for the alleged malpractice." *Sayyah*, 143 Ohio App.3d at 112. Appellants do <u>not</u> allege that their interests were aligned with Decedent's, who retained Cross-Appellants to effectuate a private stock transfer, or that Cross-Appellants' representation of Decedent was equivalent to representing Appellants. Rather, Appellants have alleged only that Marysville News was a closely held corporation, that Decedent was the largest stockholder in that closely held corporation, and that Appellants are minority shareholders. Appellants then complain that they should have standing to sue Cross-Appellants for malpractice based on Cross-Appellants' handling of Decedent's private stock transfer. The interests of

Decedent and Appellants simply did not align. The court of appeals, however, failed to even consider this fact. Rather, the court of appeals abruptly held that, simply because Appellants are minority shareholders of Marysville News, they may sue Appellees for malpractice – even based on a private stock transfer. This decision was error and should be reversed.

2. The Court of Appeals Improperly Expanded Settled Ohio Law.

Rather than analyze whether the parties' interests were properly aligned, the court of appeals justified its decision by effectively concluding, for the first time in Ohio, that a minority shareholder always has privity with the majority shareholder of a close corporation, and therefore may sue the majority shareholder's attorney for malpractice, even when that attorney represents the majority shareholder in a purely private matter. As discussed below, the court of appeals' holding was not only error, but also creates a dangerous precedent that would result in chaos in the field of legal malpractice.

a. The Court of Appeals Improperly Expanded the Holding in *Crosby*.

The court of appeals' decision appears to be a first in Ohio. The court has read this Court's narrow holding in *Crosby* – that under certain circumstances, majority shareholders have a fiduciary duty to minority shareholders – and broadened the law so much so that all minority shareholders always have standing to sue the majority shareholder's attorney for malpractice for whatever reason – including private transactions. This was certainly not this Court's intent when it rendered its holding in *Crosby*, and it cannot remain the law in Ohio.

In *Aschinger v. Columbus Showcase Co.* (C.A.6, 1991), 934 F.2d 1402, 1413, the Sixth Circuit distinguished *Crosby*. The plaintiff in *Aschinger*, much like the court of appeals in this case, argued that under *Crosby*, "each shareholder of a close corporation owes a heightened duty to the other." Id. The Sixth Circuit disagreed:

> We find such a reading of *Crosby* is far too broad. The case concerned the relationship between a majority shareholder and a minority shareholder in a close corporation. The Ohio court held that the fiduciary duty a majority shareholder owes to a minority shareholder in every corporation obtains in a close corporation and is even heightened. *Id.* The *Crosby* court was concerned that a majority shareholder not misuse his power in promoting his personal interests at the expense of corporate interests, which would be detrimental for minority shareholders. In the present case, the relationship between plaintiff and defendant was not that of a minority and a majority shareholder. Moreover, there is no allegation in the present case that defendant used his power to force plaintiff to sell his shares of stock or that the sale was detrimental to corporate interests. For these reasons, we do not believe that *Crosby v. Beam* applies.

Id. (emphasis added).

In this case, the court of appeals made the same error as the plaintiff in *Aschinger*. Without applying the law to the facts of this case, the court of appeals found privity simply "because Decedent, as the majority stockholder, owed a fiduciary duty to Appellants, as minority stockholders." As the Sixth Circuit has pointed out, however, "such a reading of *Crosby* is far too broad." *Aschinger*, 934 F.2d 1402, 1413. Rather, the court of appeals should have drawn the same distinctions with *Crosby* that the court in *Aschinger* did. Specifically, unlike the instant case, the *Crosby* court was "concerned that a majority shareholder not misuse his power in promoting his personal interests at the expense of corporate interests . . . ." Id. As in *Aschinger*, there is no such concern in this case. Rather, Appellants complain only about Decedent's private stock transfer to her grandson – which certainly does not implicate "corporate interests." Appellants may feel personally jilted by their mother's sale to her grandson, but that does not give them standing to sue their mother's counsel for malpractice.

b. <u>The Court of Appeals Improperly Expanded the Holding in *Arpadi*.</u>

The court of appeals also took an improper logical leap when it expanded the narrow holding in *Arpadi* – that under certain circumstances, limited partners may sue the attorney for the partnership – to broadly apply to close corporations. The court of appeals' abrupt expansion of this limited holding was error and should be reversed.

"The courts of Ohio have not so far extended *Arpadi* to close corporations." *Thompson v. Karr* (C.A.6, July 15, 1999), No. 98-3544, 1999 U.S. App. LEXIS 16846, at *26. Until now, no Ohio court has ever held that the privity exception to *Zipperstein* (and this Court's holding in *Arpadi*) should be broadened to include the relationship between shareholders in a corporation. See, e.g., *Sayyah*, 143 Ohio App.3d at 111 (by representing an incorporated association, its attorney does not necessarily and automatically enter into an attorney/client relationship with each of the association's members). This is because the reasoning of *Arpadi* is applicable solely to cases involving partnerships. Indeed, the Court's holding was based upon the unique characteristics of a partnership:

> A partnership is an aggregate of individuals and does not constitute a separate legal entity. (R.C. 1775.05[A], construed; *Byers v. Schlupe [1894], 51 Ohio St. 300, 314, 38 N.E. 117, 121*, followed.)

Arpadi, 68 Ohio St.3d 453, at paragraph one of the syllabus. For these reasons – and contrary to the court of appeals' decision – the *Arpadi* holding cannot be expanded to cases involving corporations.[1]

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[1] Significantly, a number of courts in other jurisdictions have declined to find exceptions to attorneys' immunity, even in the context of <u>limited partnerships</u>. See, e.g., *Rose v. Summers, Compton, Wells & Hamburg, P.C.* (Mo.App.1994), 887 S.W.2d 683, 686 ("Our holding that an attorney does not owe a duty to limited partners as individuals is in accord with the majority of other jurisdictions who have considered this issue.") (citing *Hopper v. Frank* (C.A.5, 1994), 16 F.3d 92, 95; *Wanetick v. Mel's of Modesto, Inc.* (N.D.Cal.1992), 811 F.Supp. 1402, 1409; *Morin v. Trupin* (S.D.N.Y.1991), 778 F.Supp. 711, 736; *Amsler v. Am. Home Assur. Co.*

In 1999, in fact, the Sixth Circuit expressly declined to make this very expansion of Ohio law. *Thompson*, 1999 U.S. App. LEXIS 16846, at *26. In *Thompson*, a minority shareholder in a closely held corporation sued the lawyer for both the corporation and the majority shareholder for legal malpractice and breach of fiduciary duty. The plaintiff argued that the lawyer "breached a fiduciary duty that he owed to Kenneth Thompson as a minority shareholder in the closely held corporation." Id. at *23.

> Plaintiffs' argument proceeds as follows: (1) controlling shareholders owe a fiduciary duty to minority shareholders; (2) as a fiduciary of John Thompson, the controlling shareholder, Karr was in privity with Kenneth Thompson, who was a minority shareholder; (3) Karr therefore also owed a fiduciary duty to Kenneth Thompson as a minority shareholder; (4) Karr breached that duty. Plaintiffs' theory essentially seeks to extend the principles announced in *Arpadi v. First MSP Corp., 68 Ohio St. 3d 453, 628 N.E.2d 1335 (1994),* which applied to limited partnerships, to close corporations.

Id. at 23-24.

Similar to this case, the plaintiffs in *Thompson* argued that the *Arpadi* decision should be expanded based on *Crosby*, 47 Ohio St.3d 105. The *Thompson* court observed: "*Crosby* held that claims of breach of fiduciary duty by minority shareholders against majority shareholders of a close corporation who used their control to deprive minority shareholders of the benefit of their investment could be brought as individual or direct actions rather than derivative actions." *Thompson*, 1999 U.S. App. LEXIS 16846, at *25. The plaintiffs in *Thompson* argued that "because the Supreme Court of Ohio has recognized that majority shareholders of close corporations owe a fiduciary duty to minority shareholders, *** just as general partners owe a fiduciary duty to limited partners, the rule of *Arpadi* extending the attorney-client relationship must also apply to close corporations." Id. at *25-26.

(Fla.App.1977), 348 So.2d 68, 71, overruled on other grounds, *Goldome Sav. Bank v. Wulsin* (Fla.1988), 530 So.2d 291).

The district court rejected the plaintiffs' arguments:

> The Court declines the plaintiff's invitation to extend *Arpadi* in this fashion. That case held that an attorney retained by a general partner to act as counsel for a limited partnership owes a duty of due care, not a fiduciary duty, to the limited partners regarding matters of concern to the partnership. *Arpadi, 68 Ohio St. 3d at 458. Arpadi* does not hold that an attorney retained by a corporation or its majority shareholder thereby owes a fiduciary duty to a minority shareholder in that corporation.
>
> Note too that *Arpadi* expressly distinguished between a partnership and a corporation when determining to whom an attorney owes his allegiance. This Court sitting in a diversity matter cannot find that *Arpadi* imposes a fiduciary duty or a new duty of care on Karr.

Thompson v. Karr (N.D. Ohio 1998), 4 F.Supp.2d 731, 735-36 (emphasis added). The Sixth Circuit affirmed, observing that "it is the place of the Ohio courts, if not the Ohio legislature, and not of this court sitting in diversity, to extend the fiduciary and professional duties of attorneys of close corporations to the corporations' minority shareholders." *Thompson*, 1999 U.S. App. LEXIS 16846, at *27.

Before deferring to Ohio courts, however, the Sixth Circuit recognized multiple and compelling arguments against the expansion. First, as the district court observed, "*Arpadi* held that an attorney owes a duty of due care, not a fiduciary duty, to the limited partners regarding matters of concern to the partnership." Id. at *26. The plaintiff in *Thompson* had incorrectly argued that the attorney owed him a fiduciary duty.

Second, the Sixth Circuit noted that the *Arpadi* decision "expressly distinguished between a partnership and corporation when determining to whom an attorney owes his allegiance." Id. at *26 (internal quotations omitted). The Court in *Arpadi* found it significant that limited partnerships are not "separate legal entities" and are thus not similar to corporations. Id. at *27 n.7; see also *Pucci v. Santi* (N.D.Ill.1989), 711 F.Supp. 916, 927 n.4 ("[T]he general view appears to be that where an entity is by law an aggregate of individuals, the lawyer has an

attorney-client relationship with each of those individuals."). The Court in *Arpadi* illustrated this distinction between limited partnerships and corporations in response to a specific argument. The appellees had argued that extending the attorney-client relationship to limited partners would create an ethical dilemma for the attorney, citing the Ohio Code of Professional Responsibility. See EC 5-19 (formerly EC 5-18) ("A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer employee, representative, or other person connected with the entity."). As the court in *Thompson* observed, however, the Ohio Supreme Court rejected this argument, noting that while EC 5-18 applies to corporations, it does not apply to limited partnerships. *Thompson*, 1999 U.S. App. LEXIS 16846, at *27 n.7; see also *Roberts v. Heim* (N.D.Cal.1988), 123 F.R.D. 614, 625 (declining to apply EC 5-18 to limited partnerships: "But as respondents, themselves, acknowledge, limited partnerships are not corporations and cannot be treated as such.").[2]

"The statutory and decisional law of this state has consistently adhered to the principle that a partnership is an aggregate of individuals and does not constitute a separate legal entity." *Arpadi*, 68 Ohio St.3d at 457. "Further, a partnership not only does not constitute an entity

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[2] The disciplinary rule in Ohio has changed. This Court has adopted the Ohio Rules of Professional Conduct, effective February 1, 2007, which supersede and replace the Ohio Code of Professional Responsibility. Rule 1.13 of the new rules provides:

> (a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

The Comments to the rule provide that "Rule 1.13 draws substantially upon EC 5-19 [formerly EC 5-18]." However, Comment 1 to the new rule also provides that [t]he duties defined in this rule apply equally to unincorporated associations." Thus, unlike former EC 5-18, the rule in Ohio now arguably applies to <u>both</u> corporations and partnerships.

similar to a corporation for purposes of EC 5-18, it also lacks the attributes of a separate legal entity in most other respects." Id. "Inasmuch as a limited partnership is indistinguishable from the partners which compose it, the duty arising from the relationship between the attorney and the partnership extends as well to the limited partners." Id. at 458.

A corporation, on the other hand, is a separate legal entity. See *A.G. Financial, Inc. v. LaSalla*, Cuyahoga App. No. 84880, 2005-Ohio-1504, at ¶34 ("The attorney for a corporation owes his duty to the corporation, not the individual shareholders."); *Bd. of Edn. of Whitehall City School Dist. v. Franklin Cty. Bd. of Revision*, Franklin App. Nos. 01AP-878, 01AP-879, 2002-Ohio-1256, 2002 Ohio App. LEXIS 1228, at *9 ("In contrast [to partnerships], both a limited liability company and a corporation are separate legal entities."); see also *Agley v. Tracy* (1999), 87 Ohio St.3d 265, 268, 719 N.E.2d 951 ("A corporation is an entity separate and apart from the individuals who compose it***"); cf. *Bowen v. Smith* (Wyo.1992), 838 P.2d 186, 188 (in a dispute between majority shareholder and minority shareholders regarding distribution of settlement proceeds, "the law firm was not representing the minority shareholders and violated no fiduciary relationship to them in continuing to represent the initial client after the disagreement about division of settlement proceeds developed"), overruled on other grounds, *Bevan v. Fix* (Wyo.2002), 42 P.3d 1013, 1032 n.12.

Before declining to expand *Arpadi*'s holding to close corporations, the Sixth Circuit in *Thompson* made a final distinction between limited partnerships and close corporations:

> Tax status of the organization and its shareholders is essentially the only respect in which partnerships and S-corporations are similar under the law. The ability to insulate shareholders from liability, however, is the chief benefit and principal motivation of incorporation. In this respect, the law in no way differentiates S-corporations or closely held corporations from other corporations. *See* Ohio Const. art. XIII, § 3 ("Dues from private corporations shall be secured by such means as may be prescribed by law,

> but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her.").

Thompson, 1999 U.S. App. LEXIS 16846, at *26-27. Therefore, the Sixth Circuit declined to find privity between the majority and minority shareholders and affirmed the district court's grant of summary judgment for the defendant attorneys. Id. at *31. The court of appeals' decision in this case flies in the face of *Thompson*'s sound analysis.

In this case, the court of appeals' vague expansion of this Court's purposefully narrow precedent cannot stand. Unlike the facts in *Crosby* and *Arpadi*, the disputed transaction here involved Cross-Appellants' representation of Decedent as a private individual. The court of appeals, apparently uninterested in this fact, effectively held that there is always privity between majority and minority shareholders, and therefore, standing to sue the majority shareholders' attorney, for whatever reason. In doing so, the court failed to consider the important difference between a limited partnership and a corporation. The court's holding flies in the face of sound analysis from Ohio courts, the Sixth Circuit, and this Court. Accordingly, this Court should reject the court of appeals' holding and reaffirm its holdings in *Zipperstein* and *Scholler*.

3. The Appellate Court Failed to Consider Whether a Private Stock Transfer Is a "Matter to Which the Fiduciary Duty Relates".

Not only did the court of appeals improperly expand *Arpadi*, but it also misapplied *Arpadi*'s central holding. In order to reach its conclusion, the court of appeals necessarily had to determine that, not only did Decedent owe a general fiduciary duty to the minority shareholders, but Decedent's private stock transfer was specifically a "matter[] to which the fiduciary duty relates." *Arpadi*, 68 Ohio St.3d at 458. This represents a complete misunderstanding of the privity exception as established by *Zipperstein* and *Arpadi*.

In *Crosby*, 47 Ohio St.3d at 108, the Supreme Court held that majority shareholders owe a fiduciary duty to minority shareholders in a limited context. Specifically, a majority shareholder has a fiduciary duty "not to misuse his power by promoting his personal interests at the expense of corporate interests." Id. at 109 (quoting *United States v. Byrum* (1972), 408 U.S. 125, 137). The Court in *Crosby* held that majority shareholders' conduct is actionable where they breach a fiduciary duty "by utilizing their majority control of the corporation to their own advantage, without providing minority shareholders with an equal opportunity to benefit***." *Crosby*, 47 Ohio St.3d at 109 (emphasis added). The Court provided examples: "[T]he majority or controlling shareholders may refuse to declare dividends, may grant majority shareholders-officers exorbitant salaries and bonuses, or pay high rent for property leased from the majority shareholders." Id. at 108.

Indeed, the fiduciary duty that is owed in both the partnership and close corporation context is limited. Ohio courts routinely recognize, as the *Crosby* Court also recognized, that the fiduciary duty is limited to situations in which the fiduciary takes advantage of his or her position to his or her own benefit or to the detriment of the partnership or corporation. See *Crosby*, 47 Ohio St.3d at 109; see also *Brose v. Bartlemay* (Apr. 16, 1997), Hamilton App. No. C-960423, 1997 Ohio App. LEXIS 1478, at *16-17 ("A general partner's fiduciary duty applies only to situations where one party could take advantage of his position to reap personal profit or act to the partnership's detriment."); *Gigax v. Repka* (Montgomery 1992), 83 Ohio App.3d 615, 623, 615 N.E.2d 644 ("[A] general partner's fiduciary duty applies only where a partner will take advantage of his position in the partnership for his own profit or gain***.") (citations omitted).

In this case, Appellants do not claim that Decedent utilized her majority control in the corporation at all, let alone that Decedent engaged in conduct inuring to their disadvantage. Nor

do they allege any other facts similar to those set forth in *Crosby* as implicating a fiduciary duty. (Supp. S-2 – S-7.) Rather, they apparently complain that Decedent should have bequeathed her private shares of stock to Appellants – Decedent's children – instead of transferring them to Kevin Behrens – her grandson. Somehow, this argument was enough for the court of appeals to find privity. However, the court of appeals provided no guidance as to why Decedent's private stock transfer constitutes "majority control of the close corporation," *Crosby*, 47 Ohio St.3d at 109, or why it otherwise is a "matter[] to which the fiduciary duty relates." *Arpadi*, 68 Ohio St.3d at 458. This was error.

In reality, of course, the stock transfer was merely a shifting of Decedent's private assets, and did not relate to any fiduciary duty that Decedent may have owed to Appellants. The fact that Appellants and Decedent were shareholders in the same corporation does not mean that they were in privity with respect to Decedent's testamentary bequests. The legal services that Cross-Appellants provided to Decedent were to assist her in transferring certain of her assets prior to death. That one particular asset happened to be stock in the same corporation in which Appellants also happen to hold stock was purely incidental, and does not give rise to "privity" entitling Appellants to sue Decedent's attorney. Accordingly, this Court should reverse the decision of the court of appeals and affirm the trial court's dismissal of Appellants' claim regarding the stock transfer.

4. <u>The Court of Appeals Improperly Created a New Cause of Action</u>.

The court's decision also creates a completely new cause of action outside of malpractice law. Normally, as the Court in *Crosby* observed, suits by shareholders must be brought as a derivative suit. However, when the harm caused by the majority shareholder "can be construed to be individual in nature, then a suit by a minority shareholder against the offending majority or

controlling shareholders may proceed as a direct action." *Crosby*, 47 Ohio St.3d at 109. In this case, by holding that Appellants "were in privity with Decedent for the purposes of the stock transfer," the court has necessarily also held that Decedent had a fiduciary duty to Appellants with respect to that transfer. In other words, disgruntled minority shareholders may now file direct, individual actions against majority shareholders who decide to sell their personal shares of the company's stock. The court of appeals' fashioning of new law simply does not work.

Proposition of Law No. II:

Where a plaintiff must plead collusion as a required element of a cause of action, the plaintiff must plead the circumstances constituting collusion with particularity under Rule 9(B) of the Ohio Rules of Civil Procedure; a general unsupported statement of collusion does not satisfy either Rule 9(B) or Rule 12(B)(6).

A. The Standard for a Motion to Dismiss

Rule 12(B)(6) of the Ohio Rules of Civil Procedure requires that a complaint "state a claim upon which relief can be granted." "In construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations in the complaint are true and make all reasonable inferences in favor of the nonmoving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.

The general rule in Ohio is that a plaintiff "is not required to prove his or her case at the pleading stage and need only give reasonable notice of the claim***." *State ex rel. Edwards v. Toledo City School Dist. Bd. of Educ.* (1995), 72 Ohio St.3d 106, 109, 647 N.E.2d 799. However, "[u]nsupported *conclusions* *** are not taken as admitted by a motion to dismiss and are not sufficient to withstand such a motion." *Mitchell*, 40 Ohio St.3d at 193. Moreover, despite Ohio's general notice pleading policy, "[i]n a few carefully circumscribed cases, this court has modified the standard for granting a motion

to dismiss by requiring that the plaintiff plead operative facts with particularity." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (citing *Mitchell*, 40 Ohio St.3d 190 (employee's intentional tort claim against employer); *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584 (negligent hiring claim against religious institution); Civ.R. 9(B) ("In all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity.")). As discussed below, the court of appeals in this case failed to observe these well-established pleading principles.

B. <u>The Court of Appeals' Holding Was Error</u>.

As noted above, third-party malpractice claims are viable only if the complaint alleges facts sufficient to show (1) privity; or (2) malice by the attorney. *Zipperstein*, 32 Ohio St.3d at 76. As for the second exception, the court of appeals held that the "malice" exception to *Zipperstein* was met where the complaint simply included the word "collusion," without any facts that would support such a claim. Specifically, the court of appeals observed that Appellants had alleged a conflict of interest and had alleged that Cross-Appellants "committed some or all of the aforementioned acts in collusion with Dan and Kevin." (Appx. A-19.) From this, and nothing more, the court determined that "Appellants have clearly set forth collusion***." (Appx. A-19.)

As discussed below, the court of appeals' holding was error for three district reasons. First, the court of appeals allowed Appellants to merely plead an unsupported legal conclusion to survive a motion to dismiss. Second, the court of appeals erred when it failed to require that a claim of "collusion" under *Zipperstein* be pled with particularity.

Finally, the court of appeals failed to consider whether the "malice" alleged in the Complaint was directed at Appellants.

1. The Court of Appeals Allowed Appellants to Plead an Unsupported Legal Conclusion.

"The Ohio courts have provided precious little guidance in the interpretation of the maliciousness requirement of *Scholler* and similar cases." *Luciani v. Schiavone* (S.D.Ohio Jan. 2, 2001), No. C-1-97-272, 2001 U.S. Dist. LEXIS 25918, at *17. "Two Ohio appellate courts have opined that an attorney may act maliciously when he acts with an ulterior motive separate and apart from his client's interests." Id. (citing *Thompson v. R & R Serv. Sys., Inc.* (Franklin June 19, 1997), Nos. 96APE10-1277, 96 APE10-1278, 1997 Ohio App. LEXIS 2677; *Fallang v. Hickey* (Aug. 31, 1987), Butler App. No. CA86-11-163, 1987 Ohio App. LEXIS 8542). "Another court has defined malice in this context to imply '[a] condition of mind which prompts a person to do a wrongful act willfully, that is, on purpose, to the injury of another without justification or excuse.'" *Sprouse v. Eisenman*, Franklin App. No. 04AP-416, 2005-Ohio 463, at ¶12 (quoting *Moffitt* at ¶82) (internal quotations omitted)). "In a decision post-dating *Scholler*, the Ohio Supreme Court suggested that an attorney acts maliciously when special circumstances 'such a [sic] fraud, bad faith, [or] collusion' are present." *Hahn* at ¶67 (quoting *Zipperstein*, 32 Ohio St.3d at 76-77); *Luciani*, 2001 U.S. Dist. LEXIS 25918, at *18 (same). No court, however, has explicated the pleading requirements for these "special circumstances" of fraud, collusion, or bad faith.

At least one Ohio court has held that simply pleading "malice," without more, is insufficient to withstand a motion to dismiss under *Scholler*. See *Wolfe v. Little* (Apr. 27, 2001), Montgomery App. No. 18718, 2001 Ohio App. LEXIS 1902, at *13 ("[B]are, conclusory allegations are insufficient to survive a motion to dismiss."). In *Wolfe*, the plaintiffs alleged that

the defendant-attorneys committed the tort of abuse of process and that the defendants owed a duty to the plaintiffs not to commit such acts. The court rejected the argument that there was any duty: "Instead, attorneys only owe a duty to third persons arising from their performance as attorneys if the third person is in privity with the attorneys' client or if the attorneys act maliciously." Id. at *14 (citing *Scholler*, 10 Ohio St.3d 98). The court continued:

> Even though Appellants used the word "maliciously" under this cause of action in the complaint, this is not sufficient in itself to withstand a motion to dismiss. Because Appellees do not have a duty to begin with, they cannot "maliciously breach" nonexistent duties. Furthermore, Appellants draw an unsupported conclusion that the attorneys acted "maliciously," which is also insufficient to survive a motion to dismiss.

Id. at *15 (citing *Shell v. Crain's Run Water & Sewer Dist.* (Montgomery Jan. 21, 2000), No. 17961, 2000 Ohio App. LEXIS 125, at *3); see also *Fallang*, 1987 Ohio App. LEXIS 8542, at *23 ("Because appellant's complaint fails to allege attorneys Baden and Ross possessed any personal ulterior motive, which was separate from Dr. Hickey's, by filing Dr. Hickey's reinstatement suit, we find appellant's complaint fails to state a claim against them for abuse of process."); *Sprouse* at ¶13-14 (affirming dismissal where appellants failed to allege "any facts that could reasonably suggest malice or would indicate that appellee acted with an ulterior motive separate from her good-faith representation of her client's interest"); cf. *Hahn* at ¶68 ("Here, defendants Satullo and Reminger & Reminger's use of a professional copying service to reproduce a case file does not constitute malicious conduct or conduct without legal justification or excuse.").

In this case, the court of appeals held that Appellant's recitation of the word "collusion," and nothing more, was sufficient as an allegation of "malice" to survive a motion to dismiss. This was error, as Appellant's pleading amounts to nothing more than an unsupported legal conclusion. Indeed, Appellants fail to allege that Cross-Appellants had any personal ulterior

motive separate from their good-faith representation of Decedent. Accordingly, the court's decision should be reversed.

2. The Court of Appeals Failed to Require that Collusion Be Pled With Particularity.

As discussed above, under some circumstances, this Court has required that a plaintiff plead his claims with particularity. Examples include intentional tort claims against an employer, negligent hiring claims against a religious institution, and fraud. "[I]n each of these cases, sound public policy mandated that the claims involved receive intense scrutiny from the beginning." *York*, 60 Ohio St.3d at 145.

This Court articulated the policy behind Civ.R. 9(B)'s requirements for pleading fraud in *Haddon View Invest. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 158, 436 N.E.2d 212:

> The requirement that allegations of fraud be pleaded with particularity stems from, among other sources, a concern that potential defendants be shielded from lightly made public claims or accusations charging the commission of acts or neglect of duty which may be said to involve moral turpitude. *** The need for this protection is most acute where the potential defendants are professionals whose reputations in their field of expertise are most sensitive to slander.

(internal quotations omitted) (emphasis added). In this case, a claim that an attorney has committed "collusion" unquestionably implicates these same concerns and should require that the operative facts be pled with particularity.

"Collusion" has not been defined by many Ohio courts. The Mahoning County Court of Appeals observed:

> "**Collusion.** An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose." Black's Law Dictionary, p.240.

Dutton v. Dutton (Mahoning 1998), 127 Ohio App.3d 348, 353, 713 N.E.2d 14 (emphasis added).

Other states have analyzed the term in more detail. The courts in Missouri, for example, employ the same "exceptional circumstances" rule as *Zipperstein* when determining whether an attorney can be sued by a third-party. *Macke Laundry Serv. Ltd. Partnership v. Jetz Serv. Co.* (Mo.App.1996), 931 S.W.2d 166, 177. "The basis for the exceptional circumstances rule is that 'fraud, collusion, or a malicious or tortious act' is conduct which is beyond the conditional or qualified privilege of an attorney." Id. The *Macke* court then discussed the term collusion:

> Inclusion of the term "collusion" in the exceptional circumstances rule does not significantly expand the scope of the rule. The legal meaning of the term "collusion" is "a secret concert of action between two or more for the promotion of some <u>fraudulent purpose</u>." Collusion is also defined as "an agreement between two or more persons to <u>defraud</u> another under the forms of law, or to accomplish an illegal purpose." <u>The term "collusion" requires fraud or an "illegal purpose,"</u> matters already included in the rule by the terms "<u>fraud</u>" and "malicious or tortious act."

Id. at 179 n.6 (internal citations omitted) (emphasis added).

The definitions of collusion are rife with references to fraud. Certainly, an accusation of collusion in a complaint constitutes a public accusation "charging the commission of acts or neglect of duty which may be said to involve moral turpitude." *Haddon View*, 70 Ohio St.2d at 158. This is especially true in this case, where the "potential defendants are professionals whose reputations in their field of expertise are most sensitive to slander." Id. Cross-Appellants in this case are attorneys who have been accused of colluding with their client to commit wrongful acts against third parties. This Court should require that the operative facts be pled with particularity, as required by Civ.R. 9.

Applying the heightened pleading standard in this case, Appellants' Complaint unquestionably fails to state a claim upon which relief can be granted. Indeed, Appellants have alleged no facts supporting their ethereal claim of collusion. Accordingly, this Court should reverse the court of appeals' decision.

3. The Court of Appeals Failed to Consider Whether the "Malice" Alleged Was Directed at Appellants.

Finally, in addition to the pleading requirements set forth above, the law requires that any "malice" alleged (and, therefore, any "collusion") must be directed at the plaintiff in order to qualify for *Zipperstein*'s exception to immunity. *Firestone v. Galbreath* (C.A.6, 1992), 976 F.2d 279. In *Firestone*, the grandchildren of a decedent sued the decedent's law firm based upon the firm's work in the sale of the decedent's property and preparation of her will. The Sixth Circuit held that the plaintiffs failed to plead the "malice" exception outlined in *Zipperstein*:

> Weeding through the complaint, our search reveals that the [plaintiff] Grandchildren alleged that the Bricker defendants assisted the Galbreaths in their efforts to defraud Dorothy Galbreath. The complaint is void of any allegations that the Bricker defendants acted out of malice towards the Grandchildren, or that the Grandchildren entered into the Bricker defendants' calculations in any way.

Id. at 287 (emphasis added). "Therefore, we agree with the district court that the complaint makes inadequate allegation of malice toward the Grandchildren to overcome the privity problem." Id.; see also *Kimble Mixer Co. v. Hall* (Feb. 22, 2005), Tuscarawas App. No. 2003 AP 01 0003, 2005-Ohio-794, at ¶87-88 (affirming directed verdict where trial court found that "there was no evidence presented of any malice on the part of Hall toward Plaintiff. There was no evidence that Hall ever represented the Plaintiff in any capacity") (emphasis added).

In the instant case, neither the Complaint nor the court of appeals made any reference to whether the ambiguous "collusion" alleged in the Complaint was directed at Appellants. In fact,

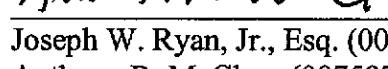
both the Complaint and the decision are void of any allegations that Appellants entered into Cross-Appellants' calculations in any way when they effectuated Decedent's private stock transfer. Further, Appellant's Complaint is completely devoid of any factual allegations supporting the naked invocation of the term "collusion." Accordingly, this Court should reverse the appellate court's decision.

CONCLUSION

The court of appeals' decision below is fundamentally incorrect in holding that minority shareholders of a close corporation have standing to sue the majority shareholder's attorney for legal malpractice based on a purely private stock transfer. Further, the court of appeals also erred when it held that the "malice" exception to *Zipperstein* is met where the Complaint simply includes the word "collusion," without any facts that would support such a claim.

The decision below should be reversed. If the court's decision is allowed to stand, the resulting rule would be catastrophic for Ohio attorneys, who would now have a duty to unknown third parties every time they advise or represent a majority shareholder in a purely private matter. Further, the court of appeals' holding also means that strangers to the attorney-client relationship may now sue attorneys by simply invoking a simple word – "collusion" – without providing adequate notice of any factual basis for their claims. A reversal of the court of appeals' holding would sustain Ohio's well-reasoned and long-standing policy regarding third-party malpractice suits and would more efficiently define the pleading requirements for third-party plaintiffs seeking to raise such malpractice claims.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a true and accurate copy of the foregoing Merit Brief Of Appellees/Cross-Appellants Stephen Yurasek, David Allen, and Allen Yurasek & Merklin has been served by ordinary United States mail, postage prepaid, on this 30th day of October, 2006, upon the following:

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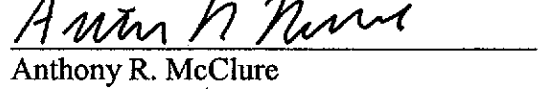
Julie Behrens LeRoy and Mary Behrens Miller



Anthony R. McClure

IN THE SUPREME COURT OF OHIO

Allen Yurasek & Merklin, *et al.*,	:	Case No. 05-1593
Appellants,	:	
v.	:	ON APPEAL FROM THE UNION COUNTY COURT OF APPEALS, THIRD APPELLATE DISTRICT
Julie Behrens LeRoy, *et al.*,	:	
Appellees.	:	Court of Appeals Case No. 14-04-49

NOTICE OF APPEAL OF APPELLANTS ALLEN YURASEK & MERKLIN, DAVID ALLEN AND STEPHEN YURASEK

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FILED
AUG 25 2005
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

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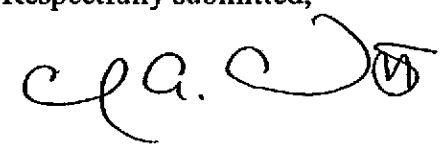
NOTICE OF APPEAL OF APPELLANTS ALLEN YURASEK & MERKLIN, DAVID ALLEN AND STEPHEN YURASEK

Appellants Allen Yurasek & Merklin, David Allen and Stephen Yurasek hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Union County Court of Appeals, Third Appellate District, entered in *LeRoy, et al. v. Allen Yurasek & Merklin, et al.*, Court of Appeals Case No. 14-04-49, on July 11, 2005.

This case is one of public or great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby affirms that he caused the foregoing to be served via hand-delivery, this 25th day of August, 2005 upon the following:

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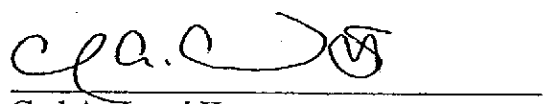

Carl A. Aveni II

IN THE SUPREME COURT OF OHIO

Allen Yurasek & Merklin, *et al.*,	:	Case No. 05-1926
Appellants,	:	
v.	:	ON APPEAL FROM THE UNION COUNTY COURT OF APPEALS, THIRD APPELLATE DISTRICT
Julie Behrens LeRoy, *et al.*,	:	
Appellees.	:	Court of Appeals Case No. 14-04-49

NOTICE OF APPEAL OF APPELLANTS ALLEN YURASEK & MERKLIN, DAVID ALLEN AND STEPHEN YURASEK

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FILED
OCT 13 2005
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANTS ALLEN YURASEK & MERKLIN, DAVID ALLEN AND STEPHEN YURASEK

Appellants Allen Yurasek & Merklin, David Allen and Stephen Yurasek hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Union County Court of Appeals, Third Appellate District, entered in *LeRoy, et al. v. Allen Yurasek & Merklin, et al.*, Court of Appeals Case No. 14-04-49, on August 29, 2005.

This case is one of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby affirms that he caused the foregoing to be served via hand-delivery, this 13th day of October, 2005 upon the following:

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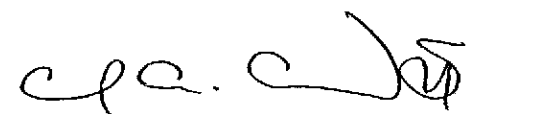

Carl A. Aveni II

COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY

JULIE BEHRENS LEROY, ET AL. CASE NUMBER 14-04-49

PLAINTIFFS-APPELLANTS

v. OPINION

ALLEN YURASEK & MERKLIN, ET AL.

DEFENDANTS-APPELLEES

COURT OF APPEALS
UNION COUNTY
2005 AUG 29 AM 3: 16
CLERK

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment reversed and cause remanded.

DATE OF JUDGMENT ENTRY: August 29, 2005

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Rogers, J.

{¶1} Having vacated the previously issued opinion in this case, *Leroy, et al. v. Allen, Yurasek & Merklin, et al.*, 3d Dist. No. 14-04-49, 2005-Ohio-3516, we issue the following opinion upon motion for reconsideration.

{¶2} Plaintiffs-Appellants, Julie Behrens LeRoy and Mary Behrens Miller (hereinafter jointly referred to as "Appellants"), appeal a judgment of the Union County Court of Common Pleas, granting Defendants-Appellees, Allen Yurasek & Merklin, David Allen and Stephen Yurasek (hereinafter jointly referred to as "Appellees"), motion to dismiss, pursuant to Civ.R. 12(B)(6). On appeal, Appellants assert that that the trial court committed error in finding that they were barred, under *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, from asserting a claim of legal malpractice against Appellees. Finding that the claims asserted by Appellants in their complaint fall within the exception to the *Simon v. Zipperstein* rule, we reverse the judgment of the trial court.

{¶3} On May 1, 2002, Decedent, Mary Elizabeth Behrens, died, survived by her three children, who included Appellants and Dan Behrens, as well as her

grandson, Kevin Behrens, son of Dan Behrens. Prior to her death, Mary Behrens and her children were the owners of Marysville Newspapers, Inc. ("Marysville News") Marysville News was a small, family owned corporation, which published several newspapers in Union, Delaware, Hardin, Wyandot and Logan counties. As of October of 2001, the distribution of the one hundred and forty-three shares of stock in Marysville News was as follows: Decedent owned sixty-three shares, Dan Behrens owed thirty shares, Julie Behrens owned thirty shares and Mary Behrens owned twenty shares.

{¶4} Appellants allege that, in November of 2001, a new will was prepared and that Appellee, David Allen, represented Decedent in the preparation of that will. Additionally, Appellants allege that, in December of 2001, Appellees participated in a stock transfer, involving Decedent and Kevin.

{¶5} In December of 2002, following Decedent's death, Appellants filed a complaint, on their own behalf, against Appellees. In their complaint, Appellants alleged two counts of legal malpractice, which included negligence and breach of contract. Additionally, the complaint alleged the following facts:

> * * *
> **9. The [Marysville News] is a closely held corporation within the ambit of *Crosby v. Beam* (1989), 47 Ohio St.3d 105 and its progeny.**
> * * *
> **11. As of November 2001, Decedent was under the care of others 24 hours a day due to numerous physical ailments and dementia.**

12. As of November 2001 and until Decedent's death, Dan was Decedent's attorney in fact.
13. Prior to November 2001, Decedent had a will.
14. Upon information and belief, in November 2001, Dan Behrens orchestrated the execution of another purported Will ("November 2001 Will"). Defendant Allen represented the Decedent in the preparation of the November 2001 Will.
15. On December 27, 2001, Dan and Kevin Behrens orchestrated a separate transfer of all of Decedent's stock in [Marysville News] to Kevin.
16. Despite being the attorney in fact for Decedent, Dan advised Kevin with respect to said transfer and participated in setting the price for the transfer.
17. The transfer price was $567,000, for which Kevin gave Decedent a promissory note. Kevin gave Decedent a security interest in the shares, but Dan, Kevin, and Defendants later orchestrated a release of that security for other than fair value.
18. Defendants participated in the preparation and/or execution of the November 2001 Will and in doing so simultaneously acted as counsel for Decedent, Dan, Kevin, and [Marysville News].
19. Defendants prepared the documents by which Dan and Kevin effectuated the transfer of all of Decedent's [Marysville News] stock to Kevin, and in doing so simultaneously acted as counsel for Decedent, Kevin and the [Marysville News].
20. The November 2001 Will is not the last will and testament of Decedent, because it was the result of undue pressure and/or influence upon Decedent, imposed directly and indirectly by Dan and Kevin, in collusion with Defendants.

{¶6} In their first count of legal malpractice, Appellants alleged that Appellees' negligently assisted in the transfer of Decedent's Marysville News stock and that Appellees were negligent in the preparation of Decedent's will. In the second count of legal malpractice, Appellants alleged that Appellees' breached their contract to provide legal services with respect to Decedent's estate planning. The second count was based upon the tortuous actions in the first count. In their

complaint, Appellants argued that Appellees lack immunity under *Simon v. Zipperstein*, because Appellees acted in bad faith. In the alternative, Appellants argued that if their case did fall within the *Simon v. Zipperstein* rule, then Appellees actions fell within one of the exceptions to that rule. Specifically, Appellants noted that the apparent conflict of interest in Appellees' representation of Decedent as well as Dan and Kevin, rose to the level of collusion. Additionally, Appellants asserted that they were in privity with Decedent for the issue of the stock transfer.

{¶7} In January of 2003, Appellees filed a motion to dismiss, pursuant to Civ.R. 12(B)(6), arguing that Appellants, as third parties, were barred from pursuing claims of legal malpractice against Appellees for their representation of Decedent, pursuant to *Simon v. Zipperstein*. Subsequently, the trial court granted Appellees' motion to dismiss.[1] It is from this judgment that Appellants appeal, presenting the following assignment of error for our review.

> **The court of common pleas erred in dismissing Appellant's Complaint (filed on their own behalf in Union County Court of Common Pleas No. 02-CV-0327) for failure to state a claim upon which relief can be granted.**

{¶8} In the sole assignment of error, Appellants assert that the trial court erred in granting Appellees' Civ.R. 12(B)(6) motion to dismiss. Essentially,

[1] In addition to this cause, in April of 2003, Appellants filed a similar complaint on behalf of the estate. That case number is 03-CV-0127, and it was consolidated with this case by the trial court in September of

Appellants assert that their complaint does, in fact, state a claim upon which relief can be granted because (1) their claims do not fall within the general rule of *Simon v. Zipperstein* and (2) even if their claims do fall within the general rule of *Simon v. Zipperstein*, Appellees' actions fall within the exceptions to that general rule.

{¶9} In reviewing a Civ.R. 12(B)(6) motion for dismissal, we accept all of the factual allegations in the complaint as true. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. Because the factual allegations are presumed to be true, a reviewing court must decide only legal issues, and an entry of dismissal on the pleadings is reviewed de novo. *Schumacher v. Amalgamated Leasing, Inc.*, 156 Ohio App.3d 393, 2004-Ohio-1203, at ¶ 5, citing *Mitchell,* 40 Ohio St.3d at 192. However, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *Schumacher,* 156 Ohio App.3d at ¶ 5, citing *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144-145. "In order to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R.12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus.

2004. We note that the judgment entry dismissing Appellants' complaint in this case includes a notation that case number 03-CV-0127 remains pending.

{¶10} In the case sub judice, counts one and two involve claims of negligence and breach of contract respectively. Both counts raise claims of legal malpractice and both are based upon the same alleged conduct. Essentially, the conduct complained about involves two separate legal issues. The first issue deals with the transfer of Decedent's Marysville News stock. According to Appellants' complaint, the transfer was made prior to Decedent's death and Appellees assisted in that transfer. The second issue involves Appellees' participation in the preparation of a will, which was allegedly drafted for Decedent in November of 2001.

{¶11} Attorneys in Ohio enjoy a qualified immunity from liability to a third party arising out of acts he or she takes while representing a client. *Hahn v. Satullo,* 156 Ohio App.3d 412, 2004-Ohio-1057, at ¶ 69. "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 98, para. one of the syllabus. In *Simon*, the Court set forth the following rationale for this rule: "[T]he obligation of an attorney is to direct his attention to the needs of the client, not to the needs of a third party not in privity with the client." *Simon* at 76. The fear of indiscriminate third party suits against attorneys would make attorneys

reluctant to offer zealous client representation. Id. To allay this fear, courts place a heightened burden on third parties seeking to assert claims against attorneys representing their clients. Other state courts have taken similar approaches. See, e.g., *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.* (Colo.1995), 892 P.2d 230, 235 (attorney not liable to non-client absent fraud or malice); *Strid v. Converse* (Wis.1983), 331 N.W.2d 350, 356 (attorney not liable to non-client unless fraud, collusion, or malicious or tortious act); *Roth v. La Societe Anonyme Turbomeca France* (Mo.App.2003), 120 S.W.3d 764, 776 (same); but, see, *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (Cal.App.2003), 107 Cal.App. 4th 54, 69 (no special preference for suit against third-party attorney).

{¶12} In their complaint and on appeal, Appellants assert that *Simon v. Zipperstein* should not control, because Appellees acted in bad faith. Essentially, Appellants argue that the issue of bad faith is a gateway issue, which must be addressed first. As noted above, in *Simon v. Zipperstein*, the Supreme Court, quoting *Scholler*, held that "'[a]n 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 with maliciously.'" *Simon v. Zipperstein*, 32 Ohio St.3d at 77. While Appellants argue that under this rule bad faith is a gateway issue,

upon review of the rest of the *Simon v. Zipperstein* opinion, we find that bad faith is merely one of the special circumstances or exceptions to the general immunity granted under the rule. Specifically, the Supreme Court, in *Simon v. Zipperstein*, also states that "[i]n the instant case, appellee's complaint set forth no special circumstances such as fraud, *bad faith*, collusion or other malicious conduct which would justify departure from the general rule." Id. at 76-77. Thus, based upon the Supreme Court's own language we are satisfied that allegations of bad faith are merely an additional special circumstance or exception that must be alleged.

{¶13} Additionally, considering the definition of bad faith, we find that bad faith is essentially embodied within any malicious behavior that would otherwise be alleged. Bad faith has been defined as "'a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud.'" *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276, quoting *Slater v. Motorists Mut. Ins. Co.* (1962), 174 Ohio St. 148, para. two of the syllabus, overruled on other grounds in *Zoppo v. Homestead Ins. Co.* (1994), 71 Ohio St.3d 552. Thus, based on the above definition, it is difficult to envision a case where you could have an attorney who has engaged in fraud, collusion or other malicious conduct without having acted in bad faith. Accordingly, we find bad faith to be an element of fraud, collusion or other malicious conduct, rather than a separate issue to be considered on its own.

{¶14} Having found that bad faith is not a separate gateway issue, we will now consider whether the issue of the stock transfer falls within one of the exceptions to the general qualified immunity set forth in *Simon v. Zipperstein.* As to this issue, Appellants' complaint stated that Marysville News was a closely held corporation, within the ambit of *Crosby v. Beam.* The complaint included the stock allocation for the Marysville News prior to the transfer, showing that at that time Decedent was the majority stock holder in what appeared to be a closely held corporation. Finally, the complaint alleged that Decedent, as the majority stockholder of the Marysville News, owed a fiduciary duty to Appellants.

{¶15} In *Arpadi v. First MSP Corp* (1994), 68 Ohio St.3d 453, the Supreme Court addressed an attorney malpractice claim by a third party, involving a limited partnership. In addressing the issue of a third party's claim of attorney malpractice, the *Arpadi* Court noted that it has been recognized that "an attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship." Id. at 458. The Court went on to state that "[i]n a partnership, the partners of which it is composed owe a fiduciary duty to each other. Consequently, in a limited partnership, the general partner owes a fiduciary duty to the limited partners of the enterprise." Id. (citations omitted.)

{¶16} Accordingly, the Court held that "[a] fortiori those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-

client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates." Id. As such, the Court went on to recognize that limited partners are indistinguishable from general partners and that a fiduciary relationship exists between limited partners, creating privity and, furthermore, an attorney-client relationship between the general partner's attorney and the limited partners. Id.

{¶17} *Crosby v. Beam*, 47 Ohio St.3d at 107, defines a closely held corporation as "a corporation with a few shareholders and whose corporate shares are not generally traded on a securities market." In determining whether an individual stockholder in a closely held corporation could bring an individual action as opposed to a shareholder's derivative suit, the *Crosby* Court held that "[g]enerally, majority shareholders have a fiduciary duty to minority shareholders." Id. at 108. Additionally, the Court went on to state that "[t]his duty is similar to the duty that partners owe one another in a partnership because of the fundamental resemblance between the closely held corporation and a partnership." Id.

{¶18} In the case sub judice, 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.

{¶19} Based on the above, we are satisfied that, taking the allegations in the complaint as true, Appellants have set forth facts, which, if proven, would allow them to recover. Accordingly, the trial court erred in dismissing Appellants' complaint pursuant to Civ.R. 12(B)(6) on the issue of the stock transfer.

{¶20} Secondly, we address the issue of the will. As noted above, the Supreme Court in *Simon v. Zipperstein*, held that "an attorney is immune from liability to a third person arising from his performance as an attorney in good faith, unless such third person is in privity with the client or the *attorney acts maliciously*." *Simon*, 32 Ohio St.3d at 77 (emphasis added). In deciding the case in *Simon v. Zipperstein*, the Supreme Court made the following findings: "In the instant case, appellee's complaint set forth no special circumstances such as fraud, bad faith, *collusion* or other malicious conduct which would justify departure from the general rule." Id. at 76-77 (emphasis added).

{¶21} In the case sub judice, Appellant's complaint specifically alleged a conflict of interest in Appellees' representation of Decedent and Dan Behrens.

Additionally, Appellants specifically alleged that "Defendants committed some or all of the aforementioned acts in collusion with Dan and Kevin."

{¶22} Taking Appellants' allegations as true, Appellants have clearly set forth collusion, which is one of the special circumstances specifically mentioned in *Simon v. Zipperstein*. Accordingly, without commenting on the sufficiency of the evidence, we are satisfied that Appellants' complaint has set forth facts which if true would allow them to recover, since their claim falls within one of the exceptions of the *Simon v. Zipperstein* rule. Therefore, the trial court additionally erred in granting Appellees' Civ.R. 12(B)(6) motion to dismiss on the issue of the will.

{¶23} Having found that Appellants' were in privity with Decedent on the issue of the stock transfer and that their complaint clearly set forth the special circumstance of collusion on the issue of the will, Appellants' assignment of error is sustained.

{¶24} Having found error prejudicial to the appellant herein, in the particulars assigned and argued, we reverse the judgment of the trial court and remand the matter for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

CUPP, P.J., and SHAW, J., concur.
r

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

UNION COUNTY

JULIE BEHRENS LEROY, ET AL.	**CASE NUMBER 14-04-49**
PLAINTIFFS-APPELLANTS	**JOURNAL**
v.	**ENTRY**
ALLEN YURASEK & MERKLIN, ET AL.	
DEFENDANTS-APPELLEES	

COURT OF APPEALS
UNION COUNTY
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CLERK

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is reversed at the costs of the appellees for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

Robert R. Cupp

Stephen R. Shaw

JUDGES

DATED: August 29, 2005

2004 DEC -6 PM 3:21
CLERK

IN THE UNION COUNTY COURT OF COMMON PLEAS
MARYSVILLE, OHIO

Julie Behrens LeRoy	:	
Plaintiffs,	:	Case No. 2002-CV-0327[1]
v.	:	Judge Parrott
Allen Yurasek & Merklin, *et al.*	:	
Defendants.	:	

JUDGMENT ENTRY

Defendants' January 24, 2003 Motion to Dismiss the claims of Plaintiffs Julie LeRoy and Mary Miller is hereby GRANTED. Pursuant to Civ.R. 12(B)(6), judgment is hereby ENTERED in favor of Defendants on the claims of Plaintiffs Julie LeRoy and Mary Miller. The Court finds, pursuant to Civ.R. 54(B), that there is no just reason for delay of appeal of this Judgment Entry.

The claims asserted on behalf of the Estate of Mary Elizabeth Behrens remain pending. The Court further ORDERS , pursuant to the agreement of the parties, that the Administrator of the Estate of Mary Elizabeth Behrens (James L. Crates), is hereby substituted as the plaintiff

[1] Cases No. 2002-CV-0327 and No. 2003-CV-0127 were consolidated by the court's September 21, 2004 Journal Entry, which states: "These cases are consolidated for purposes of trial and all further proceedings shall be filed under the earliest case number, 2002-CV-0327."

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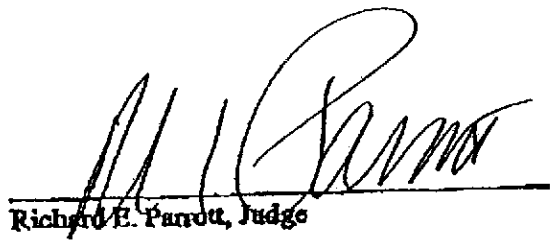
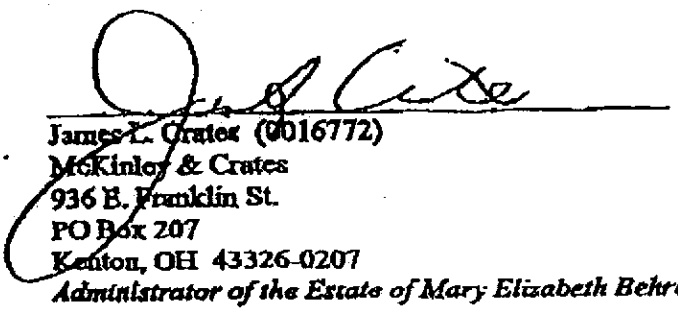
with respect to the claims asserted on behalf of the Estate of Mary Elizabeth Behrens, replacing Julie LeRoy and Mary Miller.



Richard E. Parrott, Judge

AGREED AS TO FORM:



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LEXSEE 1997 OHIO APP. LEXIS 1478

EDWARD A. BROSE and MARBRO BUILDERS, INC., Plaintiffs-Appellants, v. VICTORY BARTLEMAY and BARTLEMAY & ASSOCIATES, INC., Defendants, and THOMAS YEAGER, SOCIETY BANK, N.A., and DAVID G. ZILCH, Defendants-Appellees.

APPEAL No. C-960423

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

1997 Ohio App. LEXIS 1478

April 16, 1997, Date of Judgment Entry On Appeal
April 16, 1997, Filed

NOTICE: [*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Civil Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. A-9105270.

DISPOSITION: Judgment Appealed From is: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, partner and his building company (builder), challenged a decision of the Hamilton County Court of Common Pleas (Ohio), which granted summary judgment to defendants, other partner and bank, in the action of the partner and the builder alleging breach of contract and fiduciary duties as well as negligent misrepresentation.

OVERVIEW: Both partners formed a limited partnership for the purpose of developing commercial property. The limited partnership then joined with another company to form a new partnership, which secured a loan for the project. One of the bank's loan requirements was that a construction contract be in place and that construction would begin within a week of the loan. Without such a contract being in place, the builder began work. When construction ultimately stopped, the bank declared the loan in default and both partners agreed to be bought out by the managing partner of the new partnership. The partner alleged that he had suffered financial hardship due to the loss of project commissions. The court held that 1) the other partner had not ordered the builder to begin work and committed no acts that would subject him to liability, 2) the other partner and the bank did not unfairly benefit from the builder's work, 3) there was no cause of action for negligent misrepresentation, because there was no evidence of any false statements given, and 4) there was no breach of fiduciary duty, because there was no such relationship with the bank and the other partner did not take advantage of his position.

OUTCOME: The court affirmed the grant of summary judgment to the bank and other partner.

CORE TERMS: partnership, partner, construction contract, matter of law, general contractor, summary judgment, entitled to judgment, intentional infliction of emotional distress, managing partner, fiduciary relationship, granting summary judgment, conspiracy, loan agreement, negligent misrepresentation, issues of material fact, breach of contract, unjust enrichment, obtain a judgment, outrageous, injure, issue of material fact, assignment of error, emotional distress, causes of action, quantum meruit, fiduciary duty, contractor, default, handle, lease

LexisNexis(R) Headnotes

Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Causes of Action > Partnership Liabilities
Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > General Overview
Torts > Procedure > Multiple Defendants > Joint & Several Liability

[HN1] In Ohio, partners are jointly, rather than jointly and severally, liable for contractual obligations of the partnership. Ohio Rev. Code Ann. § 1775.14(B). A creditor in proceedings in execution of a judgment against the partnership must first exhaust partnership property before resorting to the personal assets of the partners. Therefore, any action against a partner is premature until a judgment is obtained against the partnership and its assets found insufficient to meet the obligation.

Contracts Law > Types of Contracts > Implied-in-Law Contracts
[HN2] Unjust enrichment occurs when a party retains money or benefits which in justice and equity belong to another. As ordinarily defined, the concept of unjust enrichment includes not only loss on one side but gain on the other, with a tie of causation between them.

Contracts Law > Types of Contracts > Implied-in-Law Contracts
[HN3] Quantum meruit is an equitable doctrine resting on the principle that an individual should not be permitted to unjustly enrich himself or herself at another's expense without making compensation or restitution for the benefits received. Quantum meruit is generally awarded when one party confers some benefit upon another without receiving just compensation for the reasonable value of services rendered.

Civil Procedure > Summary Judgment > Standards > General Overview
Contracts Law > Types of Contracts > Implied-in-Law Contracts
[HN4] Summary judgment is properly entered on an unjust-enrichment claim when a party to a contract retains only those benefits to which it is entitled under the terms of the agreement, and when the record contains no evidence of fraudulent, illegal or bad-faith conduct on the part of that party.

Torts > Business Torts > Fraud & Misrepresentation > Negligent Misrepresentation > Elements
[HN5] Negligent misrepresentation is defined as follows: one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Business & Corporate Law > General Partnerships > Formation > General Overview
Business & Corporate Law > General Partnerships > Management Duties & Liabilities > Fiduciary Responsibilities > Duty of Good Faith & Loyalty
Governments > Fiduciary Responsibilities
[HN6] A fiduciary relationship exists between partners and imposes on them the duty to exercise the utmost good faith and honesty in all dealings and transactions relating to the partnership. A general partner's fiduciary duty applies only to situations where one party could take advantage of his position to reap personal profit or act to the partnership's detriment.

Banking Law > Depository Institutions > Customer-Bank Relations > General Overview
[HN7] The relationship of a debtor and creditor without more is not a fiduciary relationship. A fiduciary relationship can arise out of an informal relationship only where both parties understand that a special trust or confidence has been reposed.

Banking Law > Depository Institutions > Customer-Bank Relations > General Overview
[HN8] Advice given by a creditor to a debtor in a commercial context in which the parties deal at arm's length, each protecting his or her respective interests, is insufficient to create a fiduciary relationship. A fiduciary relationship cannot be created unilaterally.

Banking Law > Depository Institutions > Customer-Bank Relations > General Overview
[HN9] A lender's decision in an arm's length commercial transaction to enforce its contractual rights does not constitute an act of bad faith.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview
Torts > Negligence > Actions > Negligent Infliction of Emotional Distress > Potential Plaintiffs
[HN10] The tort of negligent infliction of emotional distress applies when a bystander or witness to a sudden negligently caused event is traumatized by its emotionally distressing occurrence. Without that factual scenario, a claim for intentional infliction of emotional distress rather than negligent infliction is appropriate.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements
[HN11] One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress. To state a claim for intentional infliction of emotional distress, the plaintiff must show that the defendant's conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > Elements
Torts > Procedure > Multiple Defendants > Concerted Action > Civil Conspiracy > Elements
[HN12] Civil conspiracy is defined as a malicious combination of two or more persons to injure another in person or property, in a way not competent of one alone, resulting in actual damages.

HEADNOTES: CONTRACTS - CORP./PARTNERSHIP/JT.ADV. - CIVIL MISCELLANEOUS - TORT MISCELLANEOUS

SYLLABUS:

An individual partner was not liable for an alleged breach of contract, when he committed no personal acts or omissions that would have subjected him to liability, and when he had no liability as a partner in the absence of a judgment obtained against the two partnerships that stood primarily exposed to any liability on the claim asserted by the plaintiffs.

Claims of quantum meruit and unjust enrichment were properly denied as a matter of law, when the individual defendant did not personally benefit from the transaction in question and had no liability as a partner in the absence of any pursuit of relief against two partnerships, and when the institutional defendant did not receive any benefit beyond what it was entitled to under a loan agreement, and its conduct was not otherwise shown to have been fraudulent, illegal, or in bad faith. [*2]

Claims of negligent misrepresentation were properly denied as a matter of law, when there was no justifiable reliance on any statements made by the individual defendant in view of a considerable change in circumstance that resulted in another individual taking over the managing interest in a partnership and assuming the day-to-day operation of the project in question, and when the institutional defendant made no false statements and took no part in the decision that gave rise to the claims.

Claims of breach of fiduciary duty were properly denied as a matter of law, when, in his partnership relationship with the plaintiffs, the individual defendant did not take advantage of his position to achieve personal gain, act in bad faith, or engage in unfair dealing, and when the institutional defendant was simply a commercial creditor that legitimately acted at arm's length to enforce its own contractual rights.

A claim of negligent infliction of emotional distress was properly denied as a matter of law, when it did not involve an incident in which a bystander to a sudden, negligently caused event was traumatized by its emotionally distressing occurrence.

A claim of intentional infliction [*3] of emotional distress was properly denied as a matter of law, when the defendants' conduct did not rise to the extreme and outrageous level necessary to subject them to liability, and when there was no showing that they intended to cause emotional distress or knew that one of the plaintiffs was particularly susceptible to such distress.

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Rendigs, Fry, Kiely & Dennis, D. Michael Poast, Esq., No. 0019124, and Robert F. Brown, Esq., No. 0040143, 900 Fourth & Vine Tower, Cincinnati, Ohio 45202, for Defendants-Appellees Society Bank, N.A., and David G. Zilch.

JUDGES: M.B. BETTMAN, P.J., DOAN and SUNDERMANN, JJ.

OPINION: DECISION.

PER CURIAM.

Plaintiffs-appellants, Edward A. Brose and Marbro Builders, Inc., filed suit against defendants-appellees, Thomas Yeager, Society Bank, N.A., and David Zilch, as well as defendants, Victor Bartlemay [*4] and Bartlemay & Associates, Inc. (collectively "Bartlemay"). In their complaint, appellants raised causes of action against appellees for breach of contract, quantum meruit, unjust enrichment, negligent misrepresentation, breach of fiduciary duty, negligent and intentional infliction of emotional distress, and conspiracy. All defendants filed motions for summary judgment. The trial court denied Bartlemay's motion but granted those filed by Yeager,

Society and Zilch on all claims. We affirm the trial court's judgment.

The materials supporting and opposing the motions for summary judgment show that Brose and Yeager formed a limited partnership, BY Development Company, No. II ("BY II"), for the purpose of developing property that they had acquired into a shopping plaza called Crescentville Square Shopping Center. Brose, president and shareholder of Marbro Builders, entered the partnership under the belief that he would handle the finance and construction of the shopping center and that Yeager would handle the leasing. Subsequently, BY II began negotiations with Zilch of Society Bank regarding financing. In June 1988, BY II received an initial commitment from Society to finance the project. [*5] At that time, Brose and Yeager had two prospective tenants.

Society became concerned about its position when the prospective leases never materialized. It issued revised letters of commitment steadily decreasing the amount of the loan and increasing the amount of equity required from the borrowers. The bank initially required Brose and Yeager to come up with a $ 150,000 letter of credit. That requirement was eventually changed to $ 300,000 in cash.

Brose did not have the assets to supply his half of the letter of credit but claimed that he could assign to the bank part of the commissions he was to receive as contractor on the project. He claimed that Zilch stated that the proposal was workable but it was never formally accepted by Society. Yeager did not have the assets necessary for his half and contacted Bartlemay, principal shareholder of Bartlemay & Associates, about possible association with the project.

Subsequently, BY II and Bartlemay & Associates formed a general partnership, Crescentville Square Development Company ("CSDC"), to develop the project. Bartlemay & Associates owned the majority interest in the partnership and became the managing partner. On November 9, [*6] 1988, CSDC entered into a Construction Loan Agreement with Society for $ 1,215,000. Bartlemay contributed $ 300,000 in cash, which represented the first disbursement of funds by Society for the project. One condition of the loan agreement was that a construction contract be executed within a week.

Without any construction contract being agreed upon, Marbro

3 began construction work on the project and began requesting draws from Society which included payments to itself and its subcontractors. Society paid two draws directly to Brose. However, sometime during the early months of 1989, Bartlemay became un-happy with Marbro's construction work. He instructed Society not to honor any more of Marbro's draw requests without his approval as CSDC's managing partner. In March 1989, Bartlemay ordered Marbro to cease any further work. Eventually construction stopped completely due to the conflict between the partners.

Society declared the loan to be in default because (1) the parties had not entered into a construction contract; (2) construction on the project had ceased; (3) Brose and Yeager had failed to deliver personal guarantees; and (4) no prospective lease agreements existed. In [*7] May 1989, Zilch held a meeting with the partners and their respective attorneys to discuss the matter, but nothing was resolved.

Subsequently, Zilch phoned the partners and suggested that they meet again on Friday June 16, 1989, without their attorneys. He told them that if they could not resolve their differences, the bank would begin foreclosure proceedings the following Monday. At that meeting, Bartlemay proposed a settlement agreement in which Bartlemay & Associates would buy out Yeager and Brose's interests in CSDC for one dollar each and hold them harmless for all partnership obligations. Brose and Yeager agreed and signed a settlement agreement and release of all claims drafted by Bartlemay. Brose claimed he had no choice but to sign since he was under duress and without the advice of counsel. However, afterward the three former partners went out for an amicable lunch. Bartlemay went on to complete the project. Brose claimed he suffered severe financial hardships due to the loss of commissions and fees associated with the project.

In their sole assignment of error, appellants state that the trial court erred in granting summary judgment in favor of appellees. Appellants argue [*8] that genuine issues of material fact exist and that competing reasonable inferences can be drawn from the facts which must be construed most strongly in appellants' favor. We find this assignment of error is not well taken.

I. Breach of Contract (Yeager)

Appellants claim that Marbro entered into a construction contract with CSDC under which Marbro would realize management fees and commissions for services performed. Appellants also claim that Marbro satisfactorily performed all services required of it under the contract until it was wrongfully ordered to cease work, and that the cancellation of Marbro's services breached the contract between Marbro and CSDC.

The record shows that no written construction contract was ever executed between Marbro and CSDC; indeed, the lack of a construction contract was one of the reasons Society considered the loan to be in default.

Brose even conceded that there was nothing in writing to show that Marbro was to be the general contractor on the project. Nevertheless, the trial court found that "there is certain language in the CSDC partnership agreement and the Loan Agreement which refer to Marbro as the general contractor and arguably create a [*9] genuine issue of material fact as to whether or not there was an agreement to enter into a construction contract with Marbro and engage it as the general contractor on the *** Project." Our reading of the record supports this conclusion.

Nevertheless, even if we assume the existence of a contract, Yeager himself was not a party to the contract between Marbro and CSDC. Further, the trial court concluded that it was Bartlemay, as managing partner of CSDC, who had ordered Marbro off the job and who had committed any breach of contract. The court stated that "notably absent from the record is any consequential involvement on behalf of Yeager" in relation to the termination of Marbro's services. We agree with the court's assessment of the record. Yeager committed no personal acts or omissions that would subject him to liability. Any liability on his part would result from his being a general partner in BY II, which in turn was a partner in CSDC, and he would only be liable if the partnerships were found to be liable. See *Ungerleider v. Ewers* (1925), 20 Ohio App. 79, 89-90, 153 N.E. 191, 194-95.

[HN1] In Ohio, partners are jointly, rather than jointly and severally, liable for contractual [*10] obligations of the partnership. R.C. 1775.14(B); *Wayne Smith Constr. Co. v. Wolman, Duberstein & Thompson* (1992), 65 Ohio St. 3d 383, 604 N.E.2d 157, paragraph two of the syllabus. A creditor in proceedings in execution of a judgment against the partnership must first exhaust partnership property before resorting to the personal assets of the partners. *Id.* at paragraph one of the syllabus. Therefore, any action against a partner is premature until a judgment is obtained against the partnership and its assets found insufficient to meet the obligation. *Arbor Village Condominium Assn. v. Arbor Village, Ltd., L.P.* (1994), 95 Ohio App. 3d 499, 511-13, 642 N.E.2d 1124, 1132-33. This court has held in a case involving some of the same parties that the trial court did not err in granting judgment on the pleadings to a partner when the partnership was not named as a party in the complaint. *Marbro Builders, Inc. v. Yeager* (Dec. 31, 1996), 1996 Ohio App. LEXIS 5898, Hamilton App. Nos. C-960023 and C-960036, unreported.

In the present case, appellants must obtain a judgment against CSDC before they can obtain a judgment against CSDC's partners, Bartlemay & Associates and BY II. Then they must obtain a judgment [*11] against BY II before they can obtain a judgment against its partner, Yeager. However, no such judgments have been obtained. To the contrary, neither of the partnerships has even been named as a party.

We find no issues of material fact. Construing the evidence most strongly in appellants' favor, we hold that reasonable minds could only come to the conclusion that Yeager was not liable for breach of contract. Consequently, he was entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in his favor on that claim. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St. 2d 64, 66, 375 N.E.2d 46, 47.

II. Unjust Enrichment (Yeager) and Quantum Meruit (Yeager and Society)

[HN2] Unjust enrichment occurs when a party retains money or benefits which in justice and equity belong to another. *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St. 3d 109, 110-11, 532 N.E.2d 124, 125; *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 14 N.E.2d 923, 926-27. "As ordinarily defined, the concept of unjust enrichment includes not only loss on one side but gain on the other, with a tie of causation between them." *Fairfield Ready Mix v. Walnut Hills* [*12] *Associates, Ltd.* (1988), 60 Ohio App. 3d 1, 3, 572 N.E.2d 114, 116.

[HN3] Quantum meruit is an equitable doctrine resting on the principle that an individual should not be permitted to unjustly enrich himself or herself at another's expense without making compensation or restitution for the benefits received. *Natl. City Bank v. Fleming* (1981), 2 Ohio App. 3d 50, 57-58, 440 N.E.2d 590, 599; *In re Estate of Fleisch* (Sept. 25, 1996), 1996 Ohio App. LEXIS 4166, Hamilton App. No. C-950282, unreported. "Quantum meruit is generally awarded when one party confers some benefit upon another without receiving just compensation for the reasonable value of services rendered." *Aultman Hosp. Assn. v. Community Mut. Ins. Co.* (1989), 46 Ohio St. 3d 51, 55, 544 N.E.2d 920, 924.

Appellants claimed that they provided services for site development and construction for which they were not compensated and therefore that CSDC was enriched by the benefit of those services. The trial court found that the evidence reasonably supported such a claim against Bartlemay, who took over the project after buying out BY II's interest in CSDC. However, there is no evidence that Yeager personally benefited from these construction services [*13] since he was left in the same position as Brose when he sold his interest. Any liability on Yeager's part would rest on his status as a partner in CSDC and BY II, but the partnerships are not parties to the action. Consequently, the trial court did not err in granting Yeager's motion for summary judgment on these two causes of action.

As to Society, appellants claim that the services they provided increased the value of the real estate. Therefore,

if Society foreclosed it would have received the same benefits that Bartlemay received as their successor in interest. Appellants also claim that Society's "exposure" on this troubled loan was limited through this increase in value of the collateral. However, [HN4] summary judgment is properly entered on an unjust-enrichment claim when a party to a contract retains only those benefits to which it is entitled under the terms of the agreement, and when the record contains no evidence of fraudulent, illegal or bad-faith conduct on the part of that party. *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App. 3d 228, 237, 646 N.E.2d 528, 533-34; *Eyerman v. Mary Kay Cosmetics, Inc.* (C.A.6, 1992), 967 F.2d 213, 222. See, [*14] also, *Cincinnati v. Cincinnati Reds* (1984), 19 Ohio App. 3d 227, 230-31, 483 N.E.2d 1181, 1185. Appellants presented no evidence of fraudulent, illegal or bad-faith conduct on Society's part, or that it received any benefit other than what it was entitled to under the loan agreement.

We find no issues of material fact. Construing the evidence most strongly in appellants' favor, we hold that reasonable minds could come to but one conclusion, that Yeager and Society did not unfairly benefit from appellants' services. Therefore, they were entitled to judgment as a matter of law on appellants' claims for unjust enrichment and quantum meruit. Consequently, the trial court did not err in granting their motions for summary judgment on those claims.

III. Negligent Misrepresentation (Yeager and Society)

The Ohio Supreme Court has defined [HN5] "negligent misrepresentation" as follows:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* [*15] upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. [Emphasis *sic.*]

Delman v. Cleveland Hts. (1989), 41 Ohio St. 3d 1, 4, 534 N.E.2d 835, 838, quoting 3 Restatement of the Law 2d, Torts (1965) 126-27, Section 552(1).

Appellants claimed that they relied upon false statements by Yeager and Society that Marbro would be the general contractor on the project. The record demonstrates that at the outset of the project, the agreement between Yeager and Brose was that Yeager would handle the leasing of the project and Brose the construction. No evidence was presented that any representations by Yeager in that regard were false and misleading. However, the situation was later altered considerably when Bartlemay became the managing partner of CSDC and took control of the day-to-day operation of the project, including the selection of the general contractor and the payment of draws. Any reliance by appellants on statements by Yeager after that time was not justified.

Similarly, the record contains no evidence of false statements by Society regarding appellants' role in the project. Though Society knew the [*16] parties contemplated the Marbro would be the contractor, the construction loan agreement contains no such requirement. Society only required an executed construction contract; it did not designate who the contractor should be. CSDC's managing partner removed Marbro as the general contractor, and the record does not show that Society was involved in that action.

We find no issue of material fact. Construing the evidence most strongly in appellants' favor, we hold that reasonable minds could reach but one conclusion, that Yeager and Society were not liable for negligent misrepresentation. They were entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment on those claims.

IV. Breach of Fiduciary Duty (Yeager and Society)

Yeager, as Brose's partner, owed him a fiduciary duty. *Dunn v. Zimmerman* (1994), 69 Ohio St. 3d 304, 306, 631 N.E.2d 1040, 1042. [HN6] A fiduciary relationship exists between partners and imposes on them the duty to exercise the utmost good faith and honesty in all dealings and transactions relating to the partnership. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App. 3d 127, 130-31, 572 N.E.2d 198, 200. A general [*17] partner's fiduciary duty applies only to situations where one party could take advantage of his position to reap personal profit or act to the partnership's detriment. *Leigh v. Crescent Square, Ltd.* (1992), 80 Ohio App. 3d 231, 237, 608 N.E.2d 1166, 1169-70.

The record contains no evidence that Yeager took advantage of his position in the partnership for his own gain. Appellants claim that Yeager sided with Bartlemay in partnership disputes. Nevertheless, the record does not show that Yeager participated in the decision to remove Marbro as the general contractor or in causing Brose to withdraw from the partnership. In fact, Yeager signed over his own interest in the partnership to Bartlemay

under the same terms and conditions as Brose. Arguably, Yeager failed to live up to his obligation to secure leases for the project. However, the record does not reflect that his failure was the result of bad faith or unfair dealing.

As to Society, the general rule is that [HN7] the relationship of a debtor and creditor without more is not a fiduciary relationship. A fiduciary relationship can arise out of an informal relationship only where "both parties understand that a special trust or confidence [*18] has been reposed." *Ed Schory & Sons, Inc. v. Francis* (1996), 75 Ohio St. 3d 433, 442, 662 N.E.2d 1074, 1081; *Salem v. Central Trust Co.* (1995), 102 Ohio App. 3d 672, 676, 657 N.E.2d 827, 830.

In this case the evidence shows nothing more than the usual debtor-creditor relationship between appellants and Society. Appellants cite various examples of how Zilch advised Brose during the loan negotiations. However, [HN8] "advice given by a creditor to a debtor in a commercial context in which the parties deal at arm's length, each protecting his or her respective interests, is insufficient to create a fiduciary relationship." *Schory, supra,* at syllabus. Nothing in the record shows that Society understood that Brose, an experienced businessman, was placing special trust or confidence in the relationship. A fiduciary relationship cannot be created unilaterally. *Salem, supra,* at 678, 657 N.E.2d at 831. Compare *Stone v. Davis* (1981), 66 Ohio St. 2d 74, 419 N.E.2d 1094, certiorari denied *sub nom. Cardinal Fed. S. & L. Assn. v. Davis* (1981), 454 U.S. 1081, 102 S. Ct. 634, 70 L. Ed. 2d 614.

Further, nothing in the record demonstrates that Society acted in bad faith. It simply sought to protect [*19] its position and to exercise its rights under the loan agreement. [HN9] A lender's decision in an arm's length commercial transaction to enforce its contractual rights does not constitute an act of bad faith. *Schory, supra,* 75 Ohio St. 3d at 443-44, 662 N.E.2d at 1082-83; *Salem, supra,* at 678, 657 N.E.2d at 832.

We find no issue of material fact. Construing the evidence most strongly in appellants' favor, we hold that reasonable minds could come to but one conclusion, that neither Yeager nor Society breached a fiduciary duty to appellants. Accordingly, they were entitled to judgment as a matter of law and the trial court did not err in granting their motions for summary judgment on those claims.

V. Negligent/Intentional Infliction of Emotional Distress (Yeager, Zilch and Society)

[HN10] The tort of negligent infliction of emotional distress applies when "a bystander or witness to a sudden negligently caused event is traumatized by its emotionally distressing occurrence." *Bartlett v. Daniel Drake Mem. Hosp.* (1991), 75 Ohio App. 3d 334, 339, 599 N.E.2d 403, 406. Without that factual scenario, a claim for intentional infliction of emotional distress rather than negligent infliction is appropriate. [*20] *Id.*; *Haller v. Phillips* (1990), 69 Ohio App. 3d 574, 579, 591 N.E.2d 305, 307-08.

The Ohio Supreme Court has stated that [HN11] "one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress *** ." *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 453 N.E.2d 666, syllabus. To state a claim for intentional infliction of emotional distress, the plaintiff must show that the defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* at 375, 453 N.E.2d at 671, quoting Restatement of the Law 2d, Torts (1965) 73, Section 45, Comment d. In this case, even with the evidence construed most strongly in appellants' favor, the conduct appellants complain of does not, as a matter of law, rise to the extreme and outrageous level necessary for a prima facia case of intentional infliction of emotional distress. Compare *Foster v. McDevitt* (1986), 31 Ohio App. 3d 237, 511 N.E.2d 403. Further, the record does not show that Yeager, [*21] Zilch or Society intended to cause Brose emotional distress or that they knew he was particularly susceptible to emotional distress. See *id.* at 240, 511 N.E.2d at 407.

We find no issues of material fact. Construing the evidence most strongly in appellants' favor, we hold that reasonable minds could reach only one conclusion, that appellees' conduct did not fall under the tort of negligent infliction of emotional distress and that it was not so outrageous as to constitute intentional infliction of emotional distress. Consequently, Yeager, Zilch and Society were entitled to judgment as a matter of law, and the trial court did not err in granting summary judgment in their favor on those claims.

VI. Conspiracy (Yeager, Zilch and Society)

[HN12] Civil conspiracy has been defined as "a malicious combination of two or more persons to injure another in person or property, in a way not competent of one alone, resulting in actual damages." *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St. 3d 415, 419, 650 N.E.2d 863, 866. Brose claims that Yeager, Society and Zilch engaged in an unlawful course of conduct by breaching their various obligations and conspiring to secure appellants' [*22] withdrawal from the project. However, since all of the other substantive causes of action which would underlie a claim of conspiracy are without merit, the conspiracy claim must also fail. *Minarik v. Nagy* (1963), 8 Ohio App. 2d 194, 195, 193 N.E.2d 280, 281.

Further, no evidence was presented that Yeager, Zilch or Society combined with each other or Bartlemay in a plot to maliciously injure Brose. The record shows that the primary dispute in this case existed between Brose and Bartlemay, and that Yeager was little more than a bystander to that conflict. In fact, as the relationship between the partners deteriorated, Yeager sought only to protect himself from personal financial ruin, and he withdrew from CSDC on the same terms as Brose.

The record also shows that Society was flexible in dealing with the partners and gave them many opportunities to cure the problems causing the default. In fact, the June 16, 1989, meeting which ultimately resulted in Bartlemay buying out Brose and Yeager was called by Zilch to allow the partners one last chance to resolve their differences. Appellants claim that Society's failure to pay Marbro's third draw request was clear evidence of the conspiracy. [*23] However, the loan documents show that the borrower was CSDC, not Brose or Marbro, and that any obligation Society owed was not to appellants but to the partnership whose managing partner was Bartlemay.

We find no issue of material fact. Construing the evidence most strongly in appellants' favor, we hold that reasonable minds could come to but one conclusion, that Yeager, Zilch and Society were not acting together to maliciously injure appellants. Consequently, they were entitled to judgment as matter of law, and the trial court did not err in granting summary judgment in their favor on those claims.

In sum, we hold that the trial court did not err in granting the motions of Yeager, Zilch and Society for summary judgment on all claims against them raised by appellants. Any cause of action appellant may have is against Bartlemay, who still remains as a defendant. Accordingly, we overrule appellants' assignment of error and affirm the judgment of the trial court. M.B. BETTMAN, P.J., DOAN and SUNDERMANN, JJ.

LEXSEE 1987 OHIO APP. LEXIS 8542

David Fallang, M.D., Plaintiff-Appellant v. Michael S. Hickey, M.D., et al., Defendants-Appellees

No. CA86-11-163

Court of Appeals of Ohio, Twelfth Appellate District, Butler County

1987 Ohio App. LEXIS 8542

August 31, 1987, Decided

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sought review of the decision of the Court of Common Pleas of Butler County (Ohio), which dismissed his complaint alleging invasion of privacy, intentional and negligent infliction of serious emotional distress, defamation, malicious prosecution, and abuse of process arising from defendant's prosecution of a reinstatement suit, his extrajudicial distribution of allegedly defamatory materials, and a television news interview.

OVERVIEW: The court found that defendant's attempt to obtain certain medical records of plaintiff's patients in connection with defendant's reinstatement suit did not constitute an invasion of plaintiff's privacy and the trial court properly dismissed plaintiff's invasion of privacy claim. However, plaintiff's complaint did allege an abuse of process by defendant and whether that claim could be proven was not a proper consideration in a Ohio R. Civ. P. 12(B)(6) motion. The court found that plaintiff's allegations of defendant's conduct did not rise to the level of "outrageous" conduct and the trial court properly dismissed plaintiff's claims for negligent and intentional infliction of serious emotional distress. Defendant's ambiguous statement that was capable of reasonable interpretation as a criticism of plaintiff's judgment in an administrative, and not a medical or surgical capacity, did not constitute defamation per se. The court found that the allegedly defamatory letter mailed into the state by a nonresident physician was sufficient to subject that physician to personal jurisdiction and the trial court erred in concluding it lacked personal jurisdiction over him.

OUTCOME: The court reversed the trial court's judgment dismissing appellant's abuse of process complaint against defendant and its decision that it lacked personal jurisdiction over the nonresident physician and remanded for further proceedings. The court affirmed the remainder of the trial court's decision.

CORE TERMS: abuse of process, assignment of error, reinstatement, defamation, invasion of privacy, patient, personal jurisdiction, packet, defamed, cover letter, reputation, serious emotional distress, defamatory, mailing, allegedly defamatory, cause of action, defamation action, defendant-appellee, actionable, media, assignments of error, disclosure, intentional infliction of emotional distress, infliction of emotional distress, ulterior motive, newscast, libel, lawsuit, malicious prosecution, medical community

LexisNexis(R) Headnotes

Torts > Intentional Torts > Invasion of Privacy > Public Disclosure of Private Facts > General Overview
[HN1] In order to state a cause of action for publication of facts concerning his private life, the plaintiff must establish that the matter publicized was not left open to the public eye, but rather, was truly a matter of his private concern.

Torts > Intentional Torts > Invasion of Privacy > Public Disclosure of Private Facts > General Overview
[HN2] One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public.

Torts > Intentional Torts > Invasion of Privacy > Public Disclosure of Private Facts > General Overview
[HN3] An individual's right to privacy is personal and cannot be vicariously asserted.

Torts > Intentional Torts > Abuse of Process > Elements
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN4] To make a case of abuse of process a claimant must show that one used process with an ulterior motive as the gist of the offense is found in the manner in which process is used. There must also be shown a further act in the use of process not proper in the regular conduct of the proceeding.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
[HN5] An Ohio R. Civ. P. 12(B)(6) motion is not designed to act as a determination of the merit of the pleader's claims, but only to determine whether, if the allegations of the challenged pleading are true, they state a legal cause of action.

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Torts > Intentional Torts > Abuse of Process > Elements
[HN6] Whether a claim can be proved is not a proper consideration in a Ohio R. Civ. P. 12(B)(6) motion.

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview
[HN7] The conduct which is necessary to constitute intentional infliction of emotional distress is "extreme and outrageous," conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview
[HN8] The liability for intentional infliction of emotional distress clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must be some freedom to express unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Torts > Intentional Torts > Defamation > Defamation Per Se
Torts > Intentional Torts > Defamation > Procedure
[HN9] The determination of whether a certain statement is defamatory per se is a question of law.

Torts > Intentional Torts > Defamation > Defamation Per Se
[HN10] To constitute libel per se, it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred, or contempt, or affect him injuriously in his trade or profession.

Legal Ethics > Professional Conduct > Opposing Counsel & Parties
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN11] Generally, an attorney is immune from liability to third parties arising from the performance of his professional activities as an attorney on behalf of, and with the knowledge of his client, unless the third party is in privity with the client.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN12] Where a defendant claims a court lacks personal jurisdiction over him, the burden of demonstrating the court actually possesses personal jurisdiction lies with the plaintiff.

Torts > Intentional Torts > Defamation > Elements > General Overview
[HN13] One of the essential elements of a defamation action is publication; i.e., the revelation of defamatory material to a third party by the defendant. Generally, the greatest damage to a plaintiff's reputation takes place in the locale where the defamatory material about him is published.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN14] Ohio R. Civ. P. 4.3(A) gives the courts of Ohio jurisdiction over non-residents who cause tortious injury by an act or omission in the state of Ohio.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts
[HN15] A defendant who purposefully directs written material at the residents of another state can be said to have "fair warning" that such deliberate conduct could thereby establish minimum contacts with that other state which are sufficient to establish personal jurisdiction over it in that state, particularly where the litigation results from injuries alleged to arise out of the defendant's activities in that state.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits
Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview
[HN16] A relationship among the defendant, the forum, and the litigation is the essential foundation of a state exercising personal jurisdiction over a non-resident.

COUNSEL: [*1]

Jeffery E. Richards, and Dennis Fallang, for Plaintiff-Appellant

Baden, Jones, Scheper & Crehan Co., L.P.A., David H. Landis, for Defendant-Appellee, Michael S. Hickey, M.D.

David M. Green, for Defendant-Appellee, Scripps-Howard Broadcasting Co.

Rendigs, Fry, Kiely & Dennis, Michael E. Maundrell, for Defendants-Appellees, Thomas E. Baden and Fred Ross

Millikin & Fitton Law Firm, James E. Michael and Gregory E. Hull, for Defendant-Appellee, James M. Long, III, M.D.

JUDGES:

HENDRICKSON, P.J., KOEHLER and YOUNG, JJ., concur.

OPINION:

MEMORANDUM DECISION AND JUDGMENT ENTRY

PER CURIAM. This cause came on to be heard upon an appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Butler County, and the briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered, are passed upon in conformity with App. R. 12(A) as follows:

This is an appeal by plaintiff-appellant, David J. Fallang, M.D., (hereafter "appellant") from a judgment of the Court of Common Pleas Court of Butler County which dismissed his complaint against defendants-appellees, Michael S. Hickey, M.D. (hereafter "Dr. Hickey") [*2] and others, because it failed to state a claim on which relief can be granted, (Civ. R. 12[B][6]).

The record discloses that in June, 1984 appellant and Dr. Hickey were surgeons at Middletown Hospital. Appellant was then chief of surgery at that facility while Dr. Hickey had only been recently granted hospital privileges. It appears that after assisting Dr. Hickey in the performance of surgery, appellant raised questions about Dr. Hickey's surgical skills and brought them to the attention of the hospital's president and executive committee. Shortly thereafter, Dr. Hickey's hospital privileges were first limited and then temporarily suspended all together.

In an attempt to regain his hospital privileges, Dr. Hickey filed suit seeking an injunction and damages. Representing Dr. Hickey in that action were two attorneys, Thomas E. Baden and Fred Ross. Soon after filing suit, Dr. Hickey began an extra-judicial letter writing campaign. As a part of this effort, he distributed a packet of materials, which contained letters of recommendation and support, to local media organizations and certain members of the medical community. Shortly thereafter, he appeared on a television newscast. [*3]

It is Dr. Hickey's prosecution of his reinstatement suit, the extrajudicial distribution of the packet of materials, the television news interview which followed its distribution, as well as the print and radio news reports about that suit's progress which culminated in the filing of the case sub judice on July 22, 1985. In its seven counts n1 appellant's complaint alleged invasion of privacy, intentional and negligent infliction of serious emotional distress, defamation, malicious prosecution, and abuse of process.

Appellees responded to appellant's complaint by filing motions to dismiss based on Civ. R. 12. Many of the motions included supporting materials and affidavits revealing facts not previously set forth in appellant's

complaint. However, the trial court did not treat any of the motions as though they were seeking summary judgment. See Civ. R. 12(B).

On September 17, 1986, the common pleas court filed an opinion in which it sustained, for a variety of reasons, each appellee's motion to dismiss. Judgment in conformity with that opinion was entered on October 23, 1986. This appeal followed.

In his brief before this court appellant raises seven assignments of error. They [*4] address the propriety of the lower court's judgment dismissing certain causes of action against only appellees Baden, Ross, WCPO, Dr. Hickey and Dr. James M. Long, III. Appellant's assignments of error state:

FIRST ASSIGNMENT OF ERROR:

"The trial court erred in dismissing the invasion of privacy claim against defendant-appellee Hickey."

SECOND ASSIGNMENT OF ERROR:

"The trial court erred in dismissing the abuse of process claim against defendant-appellee Hickey."

THIRD ASSIGNMENT OF ERROR:

"The trial court erred in dismissing the intentional/negligent infliction of emotional distress claim against defendant-appellee Hickey."

FOURTH ASSIGNMENT OF ERROR:

"The trial court erred in dismissing the defamation claim against defendant-appellee Hickey."

FIFTH ASSIGNMENT OF ERROR:

"The trial court committed error in dismissing the defamation claim against defendant-appellee WPFB [WCPO]."

SIXTH ASSIGNMENT OF ERROR:

"The trial court erred in dismissing the abuse of process and intentional infliction of emotional distress claim against defendant-appellees, Baden and Ross."

SEVENTH ASSIGNMENT OF ERROR:

"The trial court erred in granting a 12(B)(2) motion [*5] in favor of defendant Long."

For his first assignment of error appellant claims the common pleas court erred in dismissing his invasion of privacy complaint against Dr. Hickey based on Dr. Hickey's naming appellant as a defendant in his reinstatement suit.

The record reveals that as a part of his reinstatement suit, Dr. Hickey's original but not his subsequently amended complaint sought certain patient records from appellant. Dr. Hickey allegedly sent copies of this complaint, including the patient information demand, to the media and local medical colleagues. Appellant claims this intrusion into his medical practice constitutes an invasion of privacy. Dr. Hickey, on the other hand, argues that not every aspect of a person's life is private and that, in any case, no information about appellant's patients was disclosed except the fact that it was being sought. n2

We find this assignment of error to be without merit and sustain the common pleas court's judgment dismissing appellant's invasion of privacy claim based upon it.

In Housh v. Peth (1956), 165 Ohio St. 35, the Ohio Supreme Court first recognized three different types of invasion of privacy in Ohio: appropriation [*6] of name or likeness, publicizing private affairs, and intrusion into private activities so as to cause mental suffering, shame, or humiliation. While appellant's complaint and brief are not clear as to which of these privacy invasions he alleges, we believe his claim is that Dr. Hickey publicized appellant's private life in such a manner as to cause him suffering, shame, or humiliation.

In Penwell v. Taft Broadcasting Co. (1984), 13 Ohio App. 3d 382, we held that, [HN1] "* * * in order to state a cause of action for publication of facts concerning his private life, the plaintiff must establish that the matter publicized was not left open to the public eye, but rather, was truly a matter of his private concern. Jackson v. Playboy Enterprises (S.D. Ohio 1983), 574 F.Supp. 10, at 13." To that end we adopted Restatement of the Law 2d, Torts, (1977), 383, Section 652(D), which provides:

[HN2] "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that:

"(a) would be highly offensive to a reasonable person, and

"(b) is not of legitimate concern to the public." [*7]

Dr. Hickey's complaint alleged appellant wrongfully took part in the suspending of his medical practice privileges at Middletown Regional Hospital, a medical facility open to the public. We believe the public has an interest in receiving quality health care and in having competent physicians administer such care. This interest makes decisions affecting the physicians who provide such health care at Middletown Regional Hospital a matter of legitimate public concern, and not a matter solely within the private domain, or of concern to appellant alone.

Because appellant does not deny he played a role in Dr. Hickey's loss of practice privileges at Middletown Regional Hospital, we find he was properly made a party to litigation concerning the validity of that action and Dr. Hickey's possible reinstatement. Since Dr. Hickey's reinstatement involves a matter of public concern respecting health care in Middletown, (particularly at Middletown Regional Hospital), we conclude appellant did not allege a cause of action for invasion of privacy merely by virtue of Dr. Hickey's filing of a reinstatement suit naming appellant as a defendant therein.

Turning to appellant's claim that his privacy [*8] was invaded by Dr. Hickey's attempt to obtain information about certain persons who were allegedly appellant's patients, we are persuaded it too fails to state an actionable invasion of privacy.

[HN3] An individual's right to privacy is personal and cannot be vicariously asserted. Lambert v. Garlo (1985), 19 Ohio App. 3d 295, paragraph two of the syllabus. An action for invasion of privacy is meant to vindicate one's right to some form of personal privacy against those who would wrongfully make it public. Here, however, appellant's invasion of privacy claim about disclosure of certain patients' names does not concern the disclosure of facts or events about appellant's private life, but rather his professional or business life, which is certainly not private in the commonly accepted sense because it is shared with his patients, who are members of the general public. Killilea v. Sears, Roebuck & Co. (1985), 27 Ohio App. 3d 163, 166-67.

While this court can understand and sympathize with any physician's desire to keep confidential the names of his patients and the contents of their medical records in his possession, the unauthorized, unprivileged, or unlawful disclosure by [*9] another person of a physician's records does not invade such physician's privacy; i.e., his private life, but instead arguably injures his professional stature and ability to earn a living in the future because it gives the appearance that such physician is either unwilling or unable to maintain the confidentiality of his patient's records.

Because we find no privacy right of appellant's was invaded by Dr. Hickey's attempt to obtain certain medical records in connection with his reinstatement suit, we find appellant's invasion of privacy claim in this regard was properly dismissed for failing to state a claim on which relief can be granted.

Our final query on appellant's first assignment of error concerns whether the trial court properly dismissed appellant's claims concerning Dr. Hickey's disclosure of some of appellant's patients' names to the media and others in the medical community in a packet of materials.

We overrule this aspect of appellant's first assignment of error for the same reasons as we overruled appellant's argument with respect to disclosure of these names in Dr. Hickey's complaint: no privacy right of appellant's is thereby invaded.

Having rejected all three [*10] aspects of appellant's first assignment of error, we overrule it.

For his second assignment of error appellant alleges the common pleas court erred in dismissing his abuse of process claim against Dr. Hickey. We agree.

The abuse of process allegation of appellant's complaint against Dr. Hickey, which the trial court dismissed because it failed to state a claim on which relief could be granted, (see Civ. R. 12[B][6]), is found in paragraph 38. It reads:

"38. The inclusion of the eleven (11) patients' names and the request for their hospital charts contained in the Complaint for Injunctive Relief was the use of the judicial process with the ulterior motive of harassing, intimidating, pressuring, and improperly influencing Dr. Fallang and further acts were committed in the improper use of process, thereby amounting to an abuse of process which damaged Dr. Fallang both personally and professionally." (Emphasis added).

In Clermont Environmental Reclamation Co. v. Hancock (1984), 16 Ohio App. 3d 9, (hereafter "CER") this court distinguished abuse of process from malicious prosecution and held:
[HN4]
"To make a case of abuse of process a claimant must show that [*11] one used process with an ulterior motive as the gist of the offense is found in the manner in which process is used. There must also be shown a further act in the use of process not proper in the regular conduct of the proceeding." (Emphasis added.)

CER. supra, paragraph one of the syllabus.

Having so clarified the nature of an abuse of process action in CER, we reversed a Civ. R. 12(B)(6) dismissal of a counterclaim alleging abuse of process. Moreover, we were careful to point out that the failure to include the factual details of one's cause of action was not a Civ. R. 12(B)(6) defect because Civ. R. 8(A) only requires a party to set forth a short and plain statement of his claim for relief and a Civ. R. 12(E) motion, (for a more definite statement of the pleader's claims), was still available.

In reviewing any dismissal of a complaint for failure to state a claim on which relief can be granted, a number of well-known rules must be kept in mind. [HN5] A Civ. R. 12(B)(6) motion is not designed to act as a determination of the merit of the pleader's claims, Taylor v. Fed-

eral Kemper Ins. Co. (W.D. Ark. 1982), 534 F.Supp. 196, but only to determine whether, if [*12] the allegations of the challenged pleading are true, State, ex rel. Alford, v. Willoughby (1979), 58 Ohio St. 2d 221; Royce v. Smith (1981), 68 Ohio St. 2d 106, they state a legal cause of action. O'Brien v. University Community Tenants Union (1975), 42 Ohio St. 2d 242.

Using these rules, we have reviewed the instant complaint. Having done so, we conclude the trial court erred in finding appellant's abuse of process allegations fail to state a cause of action. We find paragraph 38 of appellant's complaint does allege an abuse of process by Dr. Hickey. [HN6] Whether that claim can be proved is not a proper consideration in a Civ. R. 12(B)(6) motion, Slife v. Kundtz Properties (1974), 40 Ohio App. 2d 179, paragraph four of the syllabus, and is not now before us. Accordingly, appellant's second assignment of error has merit and is sustained.

For his third assignment of error appellant claims the trial court erred in dismissing his intentional and negligent infliction of emotional distress actions against Dr. Hickey.

We begin by noting that Ohio law recognizes causes of action for negligent infliction of serious emotional distress, Schultz v. Barberton [*13] Glass Co. (1983), 4 Ohio St. 3d 131, and intentional infliction of emotional distress. Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369.

Recognizing that appellant's claims for intentional and negligent infliction of emotional distress stemmed from Dr. Hickey's appearance on a local television station and his mailing of an informational packet to the media and members of the local medical community, the trial court dismissed appellant's complaint finding it constituted the expression of protected speech in the form of an opinion and, consequently, was not actionable as either intentional or negligent infliction of emotional distress.

While we believe the trial court erroneously employed elements of the law of defamation to a claim for emotional distress, its decision is nevertheless correct based on other principles of Ohio law.

The Ohio Supreme Court described [HN7] the conduct which is necessary to constitute intentional infliction of emotional distress as "extreme and outrageous." This behavior the court described as:

"* * * conduct * * * so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious [*14] and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

[HN8] "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime the plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must be some freedom to express unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936)."

Yeager, supra, at 375.

Based on this language from Yeager, supra, we conclude that appellant's allegations that Dr. Hickey appeared on television in support [*15] of his reinstatement complaint; that he claimed his loss of hospital privileges stemmed from an attempt to limit medical competition; that he mailed a copy of his reinstatement complaint as well as a vague and uncomplimentary letter to the media and local medical colleagues in an attempt to obtain his reinstatement; that he circulated petitions which supported his abilities; and that he sought letters of support from former colleagues and encouraged nurses to be critical of appellant, do not, as a matter of law, rise to the level of being something which this court would term "outrageous!" Reamsnyder v. Jaskolski (1984), 10 Ohio St. 3d 150. Indeed, we question whether, if we sustained appellant's position, any plaintiff could ever again file a lawsuit claiming to be victim of wrongdoing and then appear publicly in an attempt to garner public support for his position without fear of an emotional distress lawsuit by his opponent. Consequently, we hold the trial court properly dismissed appellant's claims for negligent and intentional infliction of serious emotional distress. Appellant's third assignment of error is overruled.

For his fourth assignment of error appellant claims [*16] the common pleas court erred in dismissing his defamation action against Dr. Hickey. n3 This assignment is also without merit.

Appellant alleges that Dr. Hickey's declaration in the cover letter which accompanied the packet of materials he distributed, which stated that "* * * Dr. Fallang [has] handled this matter in a grossly inappropriate manner," as well as Dr. Hickey's statement during a newscast that

his loss of hospital privileges stemmed from an effort to reduce medical competition, were defamatory per se. We disagree.

While appellant terms both statements defamatory per se, the trial court correctly concluded that [HN9] the determination of whether a certain statement is defamatory per se is a question of law, Becker v. Toulmin (1956), 165 Ohio St. 549, and that neither of these two statements constitutes defamation per se. In Becker, supra, at p. 553, the Ohio Supreme Court stated:

[HN10] "To constitute libel per se, it must appear that the publication reflects upon the character of such person by bringing him into ridicule, hatred, or contempt, or affect him injuriously in his trade or profession."

The supreme court went on to note at p. 553-54: [*17]

"* * * [I]n order to constitute libel per se, it must appear that the words in the publication of themselves injuriously affect the person concerning whom they are said. If they can reasonably have another innocent meaning and are not libelous of themselves, they cannot constitute libel per se."

The statement "Dr. Fallang [has] handled this matter in a grossly inappropriate manner" is capable of many interpretations. It could refer to procedural or remedial as well as the substantive aspects of Dr. Hickey's loss of hospital privileges. Stated differently, among other things, Dr. Hickey's statement could mean that appellant has failed to follow or has ignored proper procedures; that appellant failed to consider all the available evidence; or that appellant failed to afford Dr. Hickey a fair opportunity to be informed of the charges against him or allow him an opportunity to defend himself before he was deprived of his hospital privileges. None of these interpretations constitute a comment on appellant's medical or surgical skills. Instead, they question either the procedure used to suspend Dr. Hickey or appellant's interpretation of the facts and his decision based upon [*18] those facts. Because this statement is capable of reasonable interpretation as a criticism of appellant's judgment in an administrative, and not a medical or surgical capacity, we agree with the trial court that it does not constitute defamation per se.

We further conclude, based upon an examination of the totality of the circumstances, that Dr. Hickey's allegedly defamatory statement in his cover letter is his opinion, and thus not a statement of fact about appellant's actions. Consequently, it is not actionable. Scott v. News-Herald (1986), 25 Ohio St. 3d 243. Applying the four factors set out in Scott, supra at 250, we find: (1) that the specific language used in the cover letter (that Dr. Hickey's loss of privileges was handled in a "grossly inappropriate manner"); (2) that the substance of the claim was not readily verifiable; (3) that the general context of the statement (it is located on the bottom line of a cover letter sent with a packet of materials designed to show an error was made in the termination of Dr. Hickey's hospital privileges), and (4) that the broader context of the events in issue (the packet was sent following the bringing of a suit for [*19] reinstatement), all suggest that the cover letter was an expression of Dr. Hickey's personal opinion about what occurred. Greer v. Columbus Monthly Publishing Corp. (1982), 4 Ohio App. 3d 235.

Because we find Dr. Hickey's cover letter for his packet of materials fails to contain any actionable defamation as a matter of law, we sustain the trial court's judgment dismissing appellant's defamation suit.

Turning to appellant's claim that Dr. Hickey's televised statement, which suggested that his loss of privileges was motivated by efforts to reduce competition, constituted defamation per se, we are also convinced it fails to state a claim on which relief can be granted. No mention of appellant is made in the broadcast, and there is no identification of any particular group of individuals, beyond the vague term "they," as the parties responsible for Dr. Hickey's loss of privileges. Thus, there is no small group of unnamed but identifiable officials described in Dr. Hickey's televised statement as there was in McGuire v. Roth (1965), 8 Ohio Misc. 92. Moreover, even if a small identifiable group was mentioned, the context in which the question was asked by the WCPO reporter [*20] clearly shows it sought Dr. Hickey's opinion as to why he believed he was suspended, which is not actionable under Scott, supra.

Since neither Hickey's allegedly defamatory cover letter nor his televised remarks are sufficient to constitute a cause of action, we overrule appellant's fourth assignment of error altogether.

For his fifth assignment of error, appellant alleges the trial court erred in dismissing his defamation action against WCPO. We again disagree.

We have already determined Dr. Hickey's remarks during the WCPO newscast were not actionable because they constituted Dr. Hickey's opinion as to why he lost his hospital privileges and because it did not identify appellant individually or as a member of any particular group. Since Dr. Hickey never uttered a defamatory statement during WCPO's newscast, no claim for defamation exists against WCPO. Accordingly, appellant's fifth assignment of error is overruled.

For his sixth assignment of error appellant alleges the trial court erred in dismissing claims for abuse of

process and intentional infliction of emotional distress against attorneys Baden n4 and Ross.

In reviewing appellant's complaint we find no allegations [*21] which constitute extreme and outrageous conduct by either Baden or Ross. They are simply alleged to have filed a lawsuit. This fails to rise to the level of conduct necessary to constitute the tort of intentional infliction of emotional distress. Yeager, supra. Accordingly, we affirm the trial court's dismissal of the claim for intentional infliction of emotional distress against both Baden and Ross.

With respect to appellant's abuse of process allegations against these attorneys, we find appellant summarily claims they acted maliciously and with an unidentified ulterior motive in bringing Dr. Hickey's reinstatement suit. In dismissing this cause of action the trial court concluded Baden and Ross had not sought a collateral advantage over appellant. n5 However, the trial court was not entitled to reach conclusions of fact following a Civ. R. 12(B)(6) motion unless it was treating the motion to dismiss as a motion for summary judgment and it gave fourteen days notice of that fact to all parties. Petrey v. Simon (1983), 4 Ohio St. 3d 154, paragraph two of the syllabus. This was never done. It was error for the trial court to reach any factual conclusion about Baden's and [*22] Ross' conduct. It was supposed to simply compare the allegations of appellant's complaint against the elements of an abuse of process claim against an attorney.

In the second assignment of error we have ruled appellant's abuse of process allegations against Dr. Hickey were sufficient to withstand a Civ. R. 12(B)(6) motion. However, simply because we reached this conclusion as to Dr. Hickey does not automatically mean appellant's complaint is also sufficient to sustain an abuse of process action against Dr. Hickey's attorneys.

[HN11] Generally, an attorney is immune from liability to third parties arising from the performance of his professional activities as an attorney on behalf of, and with the knowledge of his client, unless the third party is in privity with the client. Pournaras v. Hopkins (1983), 11 Ohio App. 3d 51. Appellant's complaint alleges Baden and Ross acted maliciously to abuse legal process while representing Dr. Hickey. However, appellant never alleged he was in privity with Dr. Hickey or that Baden and Ross filed suit on behalf of Dr. Hickey for any reason other than Dr. Hickey was their client.

Recognizing the duty of loyalty and zealousness Baden and Ross owed [*23] Dr. Hickey as his attorneys, Woyczynski v. Wolf (1983), 11 Ohio App. 3d 226, and balancing these duties against the potential for abuse of process which overzealousness might cause, we find Baden and Ross' bare filing of a suit against appellant on Dr. Hickey's behalf will not suffice to constitute an abuse of process unless it is also alleged Baden and Ross personally had some ulterior motive, separate and apart from their client's interest, which was furthered by the use of the allegedly abusive process. Ewart v. Wibolt Stores, Inc. (1976), 38 Ill. App. 3d 42. Because appellant's complaint fails to allege attorneys Baden and Ross possessed any personal ulterior motive, which was separate from Dr. Hickey's, by filing Dr. Hickey's reinstatement suit, we find appellant's complaint fails to state a claim against them for abuse of process. Appellant's sixth assignment of error is accordingly overruled.

For his seventh assignment of error appellant alleges the trial court erred in dismissing his defamation claim against Dr. Long, because the court lacked jurisdiction over his person. In support of this assignment of error appellant argues that Dr. Long's mailing of an [*24] allegedly defamatory letter n6 from South Carolina to Ohio was sufficient "minimum contacts" with Ohio, see Internat'l. Shoe Co. v. Washington (1945), 326 U.S. 310, to confer personal jurisdiction over Dr. Long on Ohio's courts. Thus, appellant submits, dismissal of his defamation complaint against Dr. Long for lack of personal jurisdiction was error.

Dr. Long responds first by saying the trial court's personal jurisdiction ruling was correct. Alternatively, he argues that even if the trial court erred, appellant's complaint fails to state a claim for defamation on which relief can be granted because Dr. Long's letter is entitled to statutory immunity based on R.C. 2305.25. Since the trial court based its judgment dismissing Dr. Long on a lack of personal jurisdiction, we shall limit our inquiry to that ruling.

[HN12] Where a defendant claims a court lacks personal jurisdiction over him, the burden of demonstrating the court actually possesses personal jurisdiction lies with the plaintiff. Jurko v. Jobs Europe Agency (1975), 43 Ohio App. 2d 79; Giachetti v. Holmes (1984), 14 Ohio App. 3d 306. Here, since it is undisputed that Dr. Long mailed an allegedly defamatory [*25] letter from South Carolina to James Flynn, the President of Middletown Regional Hospital, in Middletown, Ohio, we must determine whether Dr. Long's mailing of that letter brings appellant's suit within Ohio's long arm provision, Civ. R. 4.3(A), and also complies with the due process clause's requirement that a defendant have "minimum contacts" with the forum state. Internat'l. Shoe Co., supra.

In beginning an examination of the adequacy of Dr. Long's actions to bring him within the jurisdiction of Ohio's courts it is essential to keep in mind that the purpose of a defamation action is to vindicate the plaintiff's interest in his good reputation. Damage to one's reputa-

tion by defamation typically occurs following the publication of defamatory oral or written material about an individual to third parties. [HN13] Consequently, one of the essential elements of a defamation action is publication; i.e., the revelation of defamatory material to a third party by the defendant. Matalka v. Lagemann (1985), 21 Ohio App. 3d 134. Generally, the greatest damage to a plaintiff's reputation takes place in the locale where the defamatory material about him is published. Rusack v. [*26] Harsha (M.D. Pa. 1978), 470 F. Supp. 285. This is particularly true in cases, such as this, where the defamed individual lives and earns his livelihood in the locale where publication occurs.

[HN14] Civ. R. 4.3(A) gives the courts of Ohio jurisdiction over non-residents who cause "tortious injury by an act or omission in this state." The gist of appellant's defamation complaint against Dr. Long concerns Flynn's receipt in Middletown and subsequent reading of Dr. Long's allegedly defamatory letter about appellant, a local physician. While that letter was undisputedly written and mailed in South Carolina, it was published in Ohio as a result of appellant's deliberate mailing of the letter to Middletown. Because the letter's publication and thereby the alleged injury to appellant's reputation occurred in Ohio, the trial court's conclusion, that Dr. Long had done nothing in Ohio to cause him come within this state's jurisdiction, was error. Indeed, such a "harmful effects" inquiry was precisely the kind of test expressly approved by the United States Supreme Court in Calder v. Jones (1984), 465 U.S. 783, at 789, 104 S.Ct. 1482, at 1487, which was also a multi-state defamation action. [*27] Accordingly, we conclude that since Dr. Long's purposeful mailing of an allegedly defamatory letter into Ohio may have caused injury to appellant's reputation in Ohio, appellant's action against Dr. Long for that letter's damage to his reputation falls within Civ. R. 4.3(A)(3) and makes him subject to personal jurisdiction in Ohio. Rusack, supra.

Having decided that Dr. Long is subject to service of process under Civ. R. 4.3(A)(3), we must now determine whether appellant's action against Dr. Long in Ohio complies with the requirement that Dr. Long have "minimum contacts" with Ohio. Internat'l. Shoe Co., supra. See Annotation (1984), Propriety, Under Due Process Clause of Fourteenth Amendment, of Forum State's Assertion or Exercise of Jurisdiction Over Nonresident Defendant in Defamation Action, 79 L.Ed. 2d 992.

Initially we note that it is Dr. Long's contact with Ohio in the letter he sent to Flynn which forms the predicate for appellant's defamation action. In Burger King Corp. v. Rudzewicz (1985), 471 U.S. 462, 105 S.Ct. 2174, at 2182, the United States Supreme Court found that [HN15] a defendant who purposefully directed written material at the residents of another [*28] state could be said to have "fair warning" that such deliberate conduct could thereby establish minimum contacts with that other state which were sufficient to establish personal jurisdiction over it in that state, Keeton v. Hustler Magazine, Inc., (1984), 465 U.S. 770, at 774, 104 S.Ct. 1473, at 1478, particularly where the litigation results from injuries alleged to arise out of the defendant's activities in that state. Helicopteros Nacionales de Colombia, S.A. v. Hall (1984), 466 U.S. 408, 415, 104 U.S. 1868, 1872.

In addressing the ability of a state to exercise personal jurisdiction over a non-resident, United States Supreme Court has emphasized that [HN16] "a relationship among the defendant, the forum, and the litigation" is the essential foundation of such jurisdiction. Shaffer v. Heitner (1977), 433 U.S. 186, 204, 97 S.Ct. 2569, 2579. In the case sub iudice, Dr. Long's purposeful mailing of the allegedly defamatory letter to Middletown, the place where appellant resides and practices medicine, creates the necessary contact between the forum, Dr. Long, and the defamation complaint's substance to satisfy Shaffer's interpretation of the minimum contacts [*29] requirement of Internat'l. Shoe Co.. Accordingly, we conclude the common pleas court erred in concluding it lacked personal jurisdiction over Dr. Long with respect to appellant's defamation complaint against him. Appellant's seventh assignment of error is sustained. n7

Appellant's second and seventh assignments of error are sustained and his first, third, fourth, fifth, and sixth are overruled. The trial court's judgment dismissing appellant's abuse of process complaint against Dr. Hickey is reversed as is its decision that it lacked personal jurisdiction over Dr. Long. This cause is remanded for further proceedings on appellant's abuse of process action against Dr. Hickey and appellant's defamation claim against Dr. Long.

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final order herein appealed from be, and the same hereby is, affirmed in part and reversed in part.

It is further ordered that a mandate be sent to the Court of Common Pleas of Butler County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the court being of the [*30] opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant and appellees, by their counsel, except.

HENDRICKSON, P.J., KOEHLER and YOUNG, JJ., concur.

n1 Count One of the complaint alleged that efforts to obtain eleven patient charts from appellant as a part of Dr. Hickey's reinstatement suit was an invasion of appellant's privacy as well as his ability to maintain physician-patient confidentiality, that it was done to improperly influence appellant and intentionally inflict serious emotional distress upon him, and that the reinstatement litigation itself constituted malicious prosecution or an abuse of process.

Count Two alleged appellee Baden defamed appellant by making statements in the Middletown Journal which suggested that an attempt to limit medical service competition was behind Dr. Hickey's loss of hospital privileges. It further alleged the Middletown Journal failed to properly verify its story with appellant in order to write a fair and impartial report and thereby damaged appellant's reputation and caused him to suffer serious emotional distress.

[*31]

Count Three alleged that a statement contained in the cover letter to the packet of materials, which suggested that appellant had handled Dr. Hickey's suspension in "a grossly inappropriate manner," defamed and damaged appellant's reputation by accusing him of gross malfeasance. Appellant further alleged a letter by Dr. Thomas M. Long, III, questioning the motives of any person accusing Dr. Hickey of being inadequately trained, also defamed him. Appellant finally alleged the identified deflamatory statements caused him to suffer serious emotional distress.

Count Four alleged Dr. Hickey defamed and caused appellant serious emotional distress during the course of an August 14, 1984 WCPO television newscast by alleging that his hospital privileges suspension was motivated by an effort to limit medical competition. It further alleged WCPO was culpable because it did not act reasonably because it failed to investigate or learn the truth or falsity of Dr. Hickey's allegation before publishing it, and for failing to fairly and impartially report about Dr. Hickey's suspension and Dr. Hickey's suit against appellant.

Count Five alleged that the filing of an amended complaint in Dr. Hickey's reinstatement action by Baden and Ross constituted malicious prosecution of an otherwise meritless suit and abuse of legal process.

[*32]

Count Six alleged that the Middletown Journal defamed appellant when it published a report on May 14, 1985, that Dr. Hickey's reinstatement suit complaint was being amended because of newly discovered evidence. The newspaper was alleged to be liable because it failed to properly investigate the statement, did not contact appellant about it, and did not fairly and impartially report the story.

Count Seven alleged that WPFB radio defamed appellant in a radio news broadcast about the amending of Dr. Hickey's reinstatement suit complaint alleging essentially the same reasons as set forth for The Middletown Journal.

n2 A concern over ethical appearances occurs to us as between appellee Dr. Hickey and appellee Thomas Baden and the law firm to which the latter belonged. See footnote 4 infra. The briefs before us show that appellee Baden, an attorney in the firm of Baden, Jones, Scheper & Crehan Co., L.P.A., is a co-defendant in certain causes of action along with Dr. Hickey. Notwithstanding this alignment, it appears that Baden's law firm has taken up Dr. Hickey's defense in the instant appeal. We wonder whether Dr. Hickey's interest and Baden's interest in these actions might not somehow conflict given appellant's allegations, and whether, if this is a possibility, the law firm should continue to represent a co-defendant in a lawsuit in which one of its primary members was also a co-defendant in certain counts with the party it now represents.

[*33]

n3 Our examination of the record discloses there are two distinct defamation claims within appellant's complaint. First, there is the alleged libel of appellant by Dr. Long's mailing of a letter to James Flynn, President of Middletown Re-

gional Hospital, in Middletown. Second, there is the libel of appellant which occurred when Dr. Hickey duplicated his copy of Dr. Long's letter and distributed it in his own packet of materials sent to the media and others in the medical community.

Because the trial court based its decision to dismiss Dr. Long from the instant suit on a lack of personal jurisdiction and, therefore, did not reach the merits of the defamation charges against him, we do no more than point out these two distinct claims.

n4 Appellee Thomas Baden died on December 25, 1986. Following the submission of this case on May 18, 1987, Baden's counsel moved to dismiss the appeal against him because his estate was not substituted as a party pursuant to Civ. R. 29 in spite of the filing of a suggestion of his death on February 26, 1987.

In light of our decision herein disposing of the claims against Baden's estate, we find this motion to be moot and overrule it.

[*34]

n5 The trial court also concluded that appellant failed to allege the necessary element of further acts by Baden and Ross in addition to use of lawful process of an improper purpose. However, that conclusion is clearly erroneous in light of paragraph 38 of appellant's complaint, in which additional acts were alleged without further elaboration.

n6 Only a portion of Dr. Long's letter is alleged to contain defamatory material. That portion which allegedly defamed appellant states:

"* * * Because of my personal knowledge of [Dr. Hickey's] training and his performance, I can state that any accusation of inadequate training is categorically untrue, and I would have to seriously question the motives of any person who would make such accusations in the face of the facts."

n7 We do not hereby express any opinion about the merit of appellant's claim, its viability in the face of the immunity granted by R.C. 2305.25, or its ability to survive a future motion for summary judgment. These questions are not ripe for determination on an appeal from a judgment dismissing a complaint for lack of jurisdiction over the defendant.

LEXSEE 2001 U.S. DIST. LEXIS 25918

Ralph J. Luciani, et al., Plaintiffs, vs. F. Joseph Schiavone, et al., Defendants.

Case No. C-1-97-272

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

2001 U.S. Dist. LEXIS 25918

January 2, 2001, Decided
January 2, 2001, Filed

PRIOR HISTORY: Luciani v. Schiavone, 210 F.3d 372, 2000 U.S. App. LEXIS 13074 (6th Cir. Ohio, 2000)

DISPOSITION: [*1] Defendants' motion for summary judgment denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs, a husband and minor children, sued defendants, an attorney and a related entity, alleging, inter alia, abuse of process. The district court dismissed the claims, but the appellate court reversed as to the abuse of process claim. On remand, defendants moved for summary judgment.

OVERVIEW: The husband's wife petitioned for the dissolution of their marriage in New Mexico. The wife dismissed the action and moved, with their children, to Ohio. In Ohio, the wife filed a petition for separation and other documents regarding custody and support. The husband petitioned for dissolution in New Mexico. The Ohio action was dismissed. In the federal action, the husband argued that defendants abused process by asking the Ohio court to resolve issues of custody and support when it lacked jurisdiction to do so. The federal court determined that summary judgment was inappropriate for deciding the abuse of process claim because a reasonable fact finder could conclude that (1) defendants brought the Ohio action to pressure the husband to submit to Ohio's jurisdiction issues that were not properly before the Ohio court, (2) defendants were attempting to obtain judgments that the Ohio court had no power to issue, and (3) the husband suffered direct damage as a result of the Ohio proceeding. Defendants may not have been immune from liability arising from their performance as counsel to the wife because plaintiffs demonstrated that defendants may have acted maliciously.

OUTCOME: The court denied defendants' summary judgment motion.

CORE TERMS: custody, summary judgment, abuse of process, separation action, probable cause, fact finder, maliciously, non-moving, perverted, moving party, immunity, settle, infer, child support, deposition, powerless, favorable, privity, order prohibiting, ulterior purpose, dissolution, accomplish, married, genuine issue of material fact, answers to interrogatories, special circumstances, sufficient evidence, property division, property issues, burden of proof

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Materiality
[HN1] Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.

Civil Procedure > Summary Judgment > Standards > Need for Trial
[HN2] The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party.

Civil Procedure > Summary Judgment > Standards > Materiality
[HN3] The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. The issue of material fact required by Fed. R. Civ. P. 56(c) to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial.

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Trials > Judgment as Matter of Law > General Overview
[HN4] Although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, the United States Supreme Court has stated that the summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. According to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview
Civil Procedure > Summary Judgment > Standards > Appropriateness
[HN5] Summary judgment is clearly proper against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial. Significantly, the United States Supreme Court also instructs that the plain language of Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make that showing with significantly probative evidence. Rule 56(e) requires the non-moving party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Supporting Materials > Affidavits
Civil Procedure > Summary Judgment > Supporting Materials > Discovery Materials
[HN6] There is no express or implied requirement in Fed. R. Civ. P. 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. Rule 56(a) and (b) provide that parties may move for summary judgment with or without supporting affidavits. Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

Torts > Intentional Torts > Abuse of Process > General Overview
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN7] In order to prove abuse of process under Ohio law, plaintiffs must establish each of the following: (1) that defendants set a legal proceeding in motion in proper form and with probable cause; (2) that defendants perverted the proceeding to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. The key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought action.

Torts > Intentional Torts > Abuse of Process > General Overview
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN8] Generally, if a suit is instituted in an attempt to settle a case, there is no abuse of process. This general rule does not apply if the attempt to settle involves issues that are not properly before the court.

Governments > Courts > Authority to Adjudicate
Torts > Intentional Torts > Malicious Prosecution > General Overview

[HN9] Abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order.

Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN10] Under Ohio law, an attorney is not liable to a third party for his performance as an attorney unless the party is in privity with his client. Even if the third party is not in privity with his client, the attorney is not immune from liability if he acted maliciously.

Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN11] The Ohio courts have provided precious little guidance in the interpretation of the maliciousness requirement of Scholler and similar cases. Two Ohio appellate courts have opined that an attorney may act maliciously when he acts with an ulterior motive separate and apart from his client's interests. Ohio law does not require that a plaintiff prove such a motive in order to overcome the general immunity identified in Scholler.

Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN12] The Ohio Supreme Court has suggested that an attorney acts maliciously when special circumstances such a fraud, bad faith, or collusion are present.

Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN13] An attorney who attempts to obtain relief from a court that he knows to be powerless to grant it acts in bad faith.

COUNSEL: For Ralph J Individually and as next friend of Michael Luciani and Mathew Luciani, Plaintiff: Craig P Kvale, Steven C Polly, Webster & Webster, LLP - 1, Cleveland, OH; Donald James Mooney, Jr., Ulmer & Berne - 1, Cincinnati, OH; Gail E Sindell, Kaufman & Cumberland Co LPA, Cleveland, OH.

For F Joseph Schiavone, Defendant: John William Hust, Michael Edward Maundrell, Schroeder Mundrell Barbiere & Powers - 1, Cincinnati, OH.

For F Joseph Schiavone Co., L.P.A., Defendant: Michael Edward Maundrell, Schroeder Mundrell Barbiere & Powers - 1, Cincinnati, OH.

JUDGES: Sandra S. Beckwith, United States District Judge.

OPINION BY: Sandra S. Beckwith

OPINION:

Memorandum and Order

On September 10, 1998, this Court entered judgment in favor of Defendants with respect to all four claims asserted by Plaintiffs in this matter: malicious prosecution, abuse of process, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiffs appealed the judgment, and the United States Court of Appeals reversed this Court's judgment with respect only to the abuse of process claim and remanded this action for further [*2] proceedings. This matter is now before the Court upon Defendants' renewed motion for summary judgment with respect to the abuse of process claim. Plaintiff Ralph Luciani asserts that claim on behalf of himself and his two minor sons against attorney F. Joseph Schiavone and F. Joseph Schiavone Co., LPA.

1. Background

Plaintiff Ralph Luciani and his former wife, Karen Luciani, were married in 1984 in Ohio. Mrs. Luciani's family resides in Ohio. The Lucianis were married in the home of Defendant Schiavone and his wife, who is a friend of Karen Luciani's. The Lucianis moved to New Mexico after they were married and have resided there, almost continually, since late 1984. They have two sons, born in 1986 and 1988.

On November 1, 1996, Karen Luciani filed a petition for the dissolution of her marriage to Ralph Luciani in Bernalillo County, New Mexico. The New Mexico court issued an order prohibiting either parent from removing their children from New Mexico without the written consent of the other parent. On November 7, 1996, Karen Luciani dismissed the New Mexico action and moved, with her children, to Ohio. Karen Luciani went to Defendant Schiavone's residence in particular.

On [*3] November 7, 1996, Ralph Luciani filed a police report in Bernalillo County, New Mexico, concerning the disappearance of his children. He also lodged a complaint against Karen Luciani with the district attorney for that county.

Once in Ohio, on November 8, 1996, Karen Luciani, represented by Defendants, filed a petition for separation, pursuant to Ohio Revised Code ("O.R.C.") § 3105.17, in the Court of Common Pleas for Butler County, Ohio. Karen Luciani filed various other documents in the Ohio action with regard to custody and support. The Butler County Court of Common Pleas issued an order prohibiting the removal of the Luciani children from Ohio.

Also on November 8, 1996, Ralph Luciani filed a petition for dissolution in Bernalillo County, New Mexico. The court there issued an order prohibiting the removal of the Luciani children from New Mexico, although the children were already in Ohio when the order was issued.

On December 2, 1996, pursuant to Ralph Luciani's complaint against Karen Luciani, the Federal Bureau of Investigations removed the children from Karen Luciani's custody and returned them to New Mexico, into the custody of Ralph Luciani. On [*4] January 16, 1997, Karen Luciani acquiesced to the jurisdiction of the New Mexico court. On January 30, 1997, on the basis of Karen Luciani's acquiescence to the jurisdiction of the New Mexico court, the Butler County Court of Common Pleas dismissed her petition for separation.

Prior to their appeal from this Court's judgment, Plaintiffs had argued that Defendants filed the action in Butler County on Karen Luciani's behalf without probable cause. In its decision on appeal, the Court of Appeals suggested that Plaintiffs could prove that Defendants initiated that action with probable cause but then perverted the process of the Ohio court by requesting relief that the court was powerless to provide. On remand, Plaintiffs have adopted that line of argument, arguing that Defendants had probable cause to file the separation action in Ohio because Karen Luciani was in Ohio when the action was commenced. They argue, however, that Defendants abused process by asking the Ohio court to resolve issues of custody and support when it did not have jurisdiction to do so. Those arguments now form the basis for Plaintiffs' abuse of process claim. Defendants seek summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure [*5] , with respect to that claim.

2. The Summary Judgment Standard

[HN1] Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The evidence presented on a motion for summary judgment is construed in the light most favorable to the non-moving party, who is given the benefit of all favorable inferences that can be drawn therefrom. United States v. Diebold, Inc., 369 U.S. 654, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962). "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (emphasis in original).

[HN2] The Court will not grant summary judgment unless it is clear that a trial is unnecessary. The threshold inquiry to determine whether there is a need for trial is whether "there are any [*6] genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson, 477 U.S. at 250. There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id.

[HN3] The fact that the weight of the evidence favors the moving party does not authorize a court to grant summary judgment. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 472, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962). "The issue of material fact required by Rule 56(c) . . . to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." First National Bank v. Cities Service Co., 391 U.S. 253, 288-89, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968).

Moreover, [HN4] although summary judgment must be used with extreme caution since it operates to deny a litigant his day in court, Smith v. Hudson, 600 F.2d 60, 63 [*7] (6th Cir.), cert. dismissed, 444 U.S. 986, 62 L. Ed. 2d 415, 100 S. Ct. 495 (1979), the United States Supreme Court has stated that the "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). According to the Supreme Court, the standard for granting summary judgment mirrors the standard for a directed verdict, and thus summary judgment is appropriate if the moving party establishes that there is insufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Id. at 323; Anderson, 477 U.S. at 250.

Accordingly, [HN5] summary judgment is clearly proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322. Significantly, the Supreme Court also instructs that the "the plain language of Rule 56(c) mandates [*8] the entry of summary judgment, after adequate time for discovery and upon motion" against a party who fails to make that showing with significantly probative evidence. Id.; Anderson, 477 U.S. at 250. Rule 56(e) requires the non-moving party to go beyond the pleadings and desig-

nate "specific facts showing that there is a genuine issue for trial." Id.

Further, [HN6] there is no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or similar materials negating the opponent's claim. Id. Rule 56(a) and (b) provide that parties may move for summary judgment "with or without supporting affidavits." Accordingly, where the non-moving party will bear the burden of proof at trial on a dispositive issue, summary judgment may be appropriate based solely on the pleadings, depositions, answers to interrogatories, and admissions on file.

3. Analysis

[HN7] In order to prove abuse of process under Ohio law, Plaintiffs must establish each of the following:

> (1) that Defendants set a legal proceeding in motion in proper form and with probable cause;
>
> (2) that Defendants perverted the proceeding to attempt to accomplish an ulterior [*9] purpose for which it was not designed; and
>
> (3) that direct damage has resulted from the wrongful use of process.

See Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A., 68 Ohio St.3d 294, 298, 1994 Ohio 503, 626 N.E.2d 115 (1994). "The key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought . . . action." Id. at 300.

Plaintiffs base their abuse of process claim in this action upon Defendants' involvement in the separation action commenced by Karen Luciani in Butler County. In its decision in this matter, the Court of Appeals stated as follows:

> [HN8] Generally, if a suit is instituted in an attempt to settle a case, there is no abuse of process. See Whelan v. Abell, 293 U.S. App. D.C. 267, 953 F.2d 663, 671 (D.C. Cir. 1992). This general rule does not apply if the attempt to settle involves issues that are not properly before the court. If the Ohio separation action was properly before the court and Mr. Schiavone was attempting to settle only the issue of separation, there would be no abuse of process. If, however, Mr. Schiavone was attempting to settle custody, support, and property issues that [*10] were not properly before the court in the separation action, he would be seeking a collateral advantage.

When Mrs. Luciani visited Ohio in October 1996, she drafted a settlement letter with Mr. Schiavone's assistance. Mr. Schiavone stated that he did not consider Mrs. Luciani a client when he helped her with the letter, but that he gave her legal advice as it pertained to her situation if she moved to Ohio. He first considered her to be a client on the morning of the day she left New Mexico.

Mr. Schiavone had, however, been in contact with Mr. Quintana, Mrs. Luciani's lawyer in New Mexico. They had discussed Mrs. Luciani's case and situation, and Mr. Schiavone was aware that the Temporary Domestic Order prevented Mrs. Luciani from taking the children out of New Mexico. Mrs. Luciani was present in Mr. Quintana's office when he and Mr. Schiavone had a telephone conversation regarding New Mexico and Ohio law.

One or two days before Mrs. Luciani left New Mexico, Mr. Quintana called Mr. Schiavone to ask whether she could file a legal separation action in Ohio. Sometime prior to November 7, Mr. Schiavone instructed Mrs. Luciani not to leave New Mexico until she checked with [*11] Mr. Quintana and made sure it was legal for her to leave. Mrs. Luciani called Mr. Schiavone's office on the morning she left New Mexico, but did not speak with him personally.

Mr. Schiavone stated that he advised Mrs. Luciani not to come to Ohio, because if the case were contested, it would be better to litigate in New Mexico to protect the assets and to make it easier on the children. Once she arrived in Ohio, he felt that it was imperative to get her under the jurisdiction of the Ohio courts. He stated that the Ohio court might have jurisdiction over assets located outside the state,

particularly if Dr. Luciani agreed to the jurisdiction. Mr. Schiavone also believed that the Ohio court would have jurisdiction to enter orders regarding custody and child support under the Uniform Child Custody Jurisdiction Act.

Mr. Schiavone stated that his office prepared the documents filed in the legal separation action, but pointed out several times that the affidavit was his client's, and not his. Although the address given on the documents was not where Mrs. Luciani actually resided while in Ohio, it was her original intention to live with her mother, and not with the Schiavones. Mr. [*12] Schiavone admitted that the statement that Mrs. Luciani had not been a party to any custody litigation in the past five years was not true because the New Mexico dissolution proceedings involved custody and allocation of parental rights. He was sure that he reviewed the affidavit before filing it, but it was still filed with a false statement. Mr. Schiavone stated that he did not realize there was a misstatement until several days before his deposition. He believed that Mrs. Luciani did not knowingly lie in the affidavit, and that any inaccuracies were her mistake.

Mrs. Luciani admitted that there had been custodial proceedings prior to November 7. She stated that she circled the items on the affidavit, but then said she did not remember circling any of it. She read and signed the affidavit, and assumed that Mr. Schiavone had read it as well. Mrs. Luciani admitted that the statement regarding custody proceedings in the past five years was false.

While the case before us was pending in the district court, Judge Conese, the judge before whom the Ohio action was litigated, filed an affidavit. He stated that he was aware of the previous New Mexico filing and dismissal while the [*13] Ohio case was pending, including on November 8 when he entered the order granting temporary custody and child support. He was also aware that Mrs. Luciani and the children were staying at the Schiavone home. According to Judge Conese, Mr. Schiavone informed him of these facts.

Viewing the evidence in light most favorable to Dr. Luciani, we conclude there is a genuine issue of material fact regarding whether Mr. Schiavone perverted the Ohio action in an attempt to accomplish an ulterior purpose. Because of the close personal relationship between his wife and Mrs. Luciani, Mr. Schiavone was aware of the history of difficulties in the Luciani marriage. He knew that Mrs. Luciani had filed and dismissed the New Mexico action, immediately leaving the state with the children when the Temporary Domestic Order was no longer in effect. He knew that an Ohio court would have jurisdiction over a separation action but not a divorce action. The complaint he filed requested custody, support, and property division, even though he should have been aware that the Ohio court may have lacked jurisdiction over these issues. See Stanek v. Stanek, 1994 Ohio App. LEXIS 4261, No. CA94-03-080, 1994 WL 519826 (Ohio [*14] Ct. App. Sept. 26, 1994). The Ohio court actually granted child support to Mrs. Luciani. Mr. Schiavone's office prepared, and he reviewed, the documents that contained the false statements. Additionally, Judge Conese's affidavit implies that Mr. Schiavone had improper ex parte contact with the judge.

The evidence is such that a reasonable fact finder could infer that Mr. Schiavone brought the separation action to pressure Dr. Luciani to submit to Ohio's jurisdiction on issues that were not properly before the court. Assuming, without deciding, that Mr. Schiavone had probable cause to bring the separation action but did not have probable cause to request custody, support, or property division, a jury could infer that he was using the Ohio action as a bargaining chip to obtain a custody arrangement and property settlement that the Ohio court had no power to order. Alternatively, a jury could infer that Mr. Schiavone was attempting to obtain actual judgments from the Ohio court that it had no power to grant. "Simply, [HN9] abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself

> powerless to order." Robb [v. Chagrin Lagoons Yacht [*15] Club], 62 N.E.2d at 14. Although the custody, support, and property claims were related to the separation proceeding, they must be considered collateral to the proceeding if the Ohio court had no jurisdiction over them.

2000 U.S. App. LEXIS 5842 at *11-17.

The Court is persuaded that a reasonable fact finder could conclude that the first two elements of the abuse of process claim are satisfied. The Court of Appeals noted that an Ohio court would have jurisdiction over a separation action between the Lucianis. See Stanek v. Stanek, 1994 Ohio App. LEXIS 4261, No. CA94-03-080, 1994 WL 519826 (Ohio Ct. App. Sept. 26, 1994). Defendants do not argue to the contrary. A reasonable fact finder could conclude that Defendants initiated the Ohio action with probable cause.

The Court of Appeals concluded that a reasonable fact finder could infer that Defendants brought the Ohio action to pressure Ralph Luciani to submit to Ohio's jurisdiction on issues that were not properly before the Ohio court. Alternatively, the Court of Appeals concluded, a fact finder could conclude that Defendants were attempting to obtain judgments that the Ohio court had no power to issue. In short, the court [*16] concluded that Plaintiffs could prove that Defendants had perverted the Ohio "proceeding to attempt to accomplish an ulterior purpose for which it was not designed." Yaklevich, 68 Ohio St.3d at 298.

Plaintiffs have identified evidence of direct damage resulting from the alleged wrongful use of process. While a dispute between the parties concerning some of the evidence of damage is unresolved, Defendants do not seriously contest Plaintiff Ralph Luciani's contention that he was damaged financially by virtue of the collateral proceedings in Ohio, which necessitated the services of counsel n1. The Court concludes that a reasonable fact finder could conclude that Plaintiff Ralph Luciani, and possibly the other Plaintiffs, suffered direct damage as a result of the alleged perversion of the Ohio proceeding.

> n1 Defendants attack Plaintiffs' evidence of financial damage on the ground that the evidence of attorneys' fees is not broken down to show which fees relate exclusively to the portions of the Ohio action over which the Ohio court did not have jurisdiction. Plaintiffs need not, however, prove the amount of damages in order to survive Defendants' motion for summary judgment. Rather, they need only demonstrate that they were damaged. Defendants do not seriously contend that none of the attorneys' fees related to the custody and property issues before the Ohio court that were not properly before it.

[*17]

Defendants have argued that they are immune, under Ohio law, from liability to Plaintiffs arising from their performance as counsel to Mrs. Luciani. The Court of Appeals noted that [HN10] "under Ohio law, an attorney is not liable to a third party for his performance as an attorney unless the party is in privity with his client." Slip opinion, p.11 (citing Scholler v. Scholler, 10 Ohio St.3d 98, 103, 10 Ohio B. 426, 462 N.E.2d 158 (1984)). The Court of Appeals further noted that "even if the third party is not in privity with his client, the attorney is not immune from liability if he acted maliciously." Id.

Plaintiffs were not in privity with Defendants' client, Mrs. Luciani, for purposes of establishing liability for abuse of process. See Scholler, 10 Ohio St.3d at 103-04. Accordingly, in order to overcome the general immunity recognized in Scholler, supra, Plaintiffs must demonstrate that Defendants acted maliciously.

[HN11] The Ohio courts have provided precious little guidance in the interpretation of the maliciousness requirement of Scholler and similar cases. Two Ohio appellate courts have opined that an attorney may act maliciously when he acts with an ulterior [*18] motive separate and apart from his client's interests. See Thompson v. R & R Service Systems, Inc., 1997 Ohio App. LEXIS 2677, Nos. 96APE10-1277, 96APE10-1278, 1997 WL 359325, *14 (Ohio Ct. App. Franklin Cty. June 19, 1997); Fallang v. Hickey, 1987 Ohio App. LEXIS 8542, No. CA86-11-163, 1987 WL 16298, *8 (Ohio Ct. App. Butler Cty. Aug. 31, 1987). Plaintiffs have not identified any ulterior motive on the part of Defendants that was "separate and apart" from Mrs. Luciani's interests. As they have argued, however, Ohio law does not require that a plaintiff prove such a motive in order to overcome the general immunity identified in Scholler, supra.

In a decision post-dating Scholler, [HN12] the Ohio Supreme Court suggested that an attorney acts maliciously when special circumstances "such a fraud, bad faith, [or] collusion" are present. Simon v. Zipperstein, 32 Ohio St.3d 74, 76-77, 512 N.E.2d 636 (1987). See also Firestone v. Galbreath, 976 F.2d 279, 287 (6th Cir. 1992). Plaintiffs have not attempted to demonstrate that the special circumstances of fraud or collusion are present. They contend, however, that they can prove that Defendants acted in bad faith and, therefore, [*19] maliciously, in perverting the Ohio proceedings.

Plaintiffs contend that Defendants knew, or should have known, that the Ohio court was without jurisdiction over property and custody issues. They contend, on that basis, that Defendants could not have been acting in good faith when they sought the Ohio court's intervention in those matters. They must, therefore, have been acting in bad faith, Plaintiffs contend. Because bad faith constitutes a special circumstance negating the general immunity recognized in Scholler, Plaintiffs contend that Defendants are not protected by that immunity.

While the Court does not conclude that the absence of good faith always equates to the presence of bad faith, the Court agrees that [HN13] an attorney who attempts to obtain relief from a court that he knows to be powerless to grant it acts in bad faith. The Court concludes, therefore, that Plaintiffs may establish that Defendants acted in bad faith, and, therefore, maliciously, when they perverted the Ohio proceeding by seeking relief that the Ohio court could not grant. The Court concludes, therefore, that Defendants are not entitled to summary judgment with respect to Plaintiffs' claim for abuse of [*20] process.

4. Conclusion

For those reasons, Defendants' motion for summary judgment (Doc. 48) is hereby **DENIED.** The Court **DIRECTS** the Clerk to establish final pretrial and trial dates in consultation with counsel.

IT IS SO ORDERED.

01-02-01

Sandra S. Beckwith

United States District Judge

LEXSEE 1999 U.S. APP. LEXIS 16846

KENNETH J. THOMPSON; KENNETH P. FRANKEL, Trustee pursuant to Irrevocable Trust Agreements dated 9/10/92 and 12/29/87, Plaintiffs-Appellants, -v- BERNARD KARR; MCDONALD, HOPKINS, BURKE & HABER, Defendants-Appellees.

No. 98-3544

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1999 U.S. App. LEXIS 16846

July 15, 1999, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 206 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 206 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY:

Reported in Table Case Format at: 1999 U.S. App. LEXIS 24544.

PRIOR HISTORY: On Appeal from the United States District Court for the Northern District of Ohio. 96-02060. Gwin. 4-27-98.

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiffs challenged an order of the United Stated District Court for the Northern District of Ohio granting summary judgment in favor of defendant attorneys in an action by plaintiffs alleging legal malpractice in connection with defendants' services in structuring a sale of stock.

OVERVIEW: Plaintiffs, a son of the founder of a family-owned company and an inter vivos trustee, alleged legal malpractice and breach of fiduciary duty against defendant attorneys in structuring a sale of stock to an irrevocable trust. Defendants had represented the company founder for many years and they were instructed by the founder to structure the sale of the stock under which plaintiff son, as trustee, purchased non-voting stock from the father to be repaid through a promissory note. Plaintiff son's membership in the company was terminated and he alleged that defendants were negligent for failing to anticipate circumstances in which he might be unable to repay the note. The court established that there was no attorney-client relationship between plaintiffs and defendants who were paid by the company rather than plaintiffs. Further, defendants received instructions from the father and not plaintiffs and regarded themselves as serving the interests of the father. The court also held that although the father owed fiduciary duty to other members of the company, defendants, as attorneys to the father, did not owe plaintiffs such a duty. The court awarded judgment in favor of defendants.

OUTCOME: Order granting summary judgment was affirmed because appellants failed to establish neither an attorney-client relationship nor a fiduciary duty so as to subject appellees to liability.

CORE TERMS: attorney-client, shareholder, fiduciary duty, partnership, beneficiary, summary judgment, partner, owe, removal, duty, owed, promissory note, stock purchase, relationship existed, privity, legal malpractice, fiduciary, preparing, entity, irrevocable trust, malpractice, stock, controlling shareholder, state law, breached, diversity jurisdiction, minority shareholder, reasonably believed, general partner, non-voting

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN1] Appellate court reviews entry of summary judgment de novo.

Civil Procedure > Summary Judgment > Standards > Appropriateness
Civil Procedure > Summary Judgment > Standards > Legal Entitlement
Civil Procedure > Summary Judgment > Standards > Materiality
[HN2] Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56.

Civil Procedure > Counsel > General Overview
Torts > Malpractice & Professional Liability > Attorneys
[HN3] To establish a legal malpractice claim relating to civil matters, a plaintiff must prove three elements: (1) existence of an attorney-client relationship giving rise to a duty, (2) breach of that duty, and (3) damages proximately caused by the breach.

Civil Procedure > Removal > Proceedings > General Overview
[HN4] See 28 U.S.C.S. § 1441 (b).

Civil Procedure > Removal > Proceedings > General Overview
[HN5] After removal, if a case is tried on the merits without objection and judgment entered, the appellate court should not concern itself with whether removal was proper, but should instead examine whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Torts > Malpractice & Professional Liability > Attorneys
[HN6] The test for attorney-client relationship is essentially whether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client.

Evidence > Privileges > Attorney-Client Privilege > Elements
Torts > Malpractice & Professional Liability > Attorneys
[HN7] An essential element as to whether an attorney-client relationship has been formed is the determination that the relationship invoked such trust and confidence in the attorney that the communication became privileged and, thus, the information exchanged was so confidential as to invoke an attorney-client privilege.

Business & Corporate Law > Limited Partnerships > Management Duties & Liabilities
Governments > Fiduciary Responsibilities
Torts > Malpractice & Professional Liability > Attorneys
[HN8] An attorney employed by the general partner in a limited partnership is in privity with the limited partners, and therefore also owes a duty of care to the limited partners in matters relating to the partnership.

COUNSEL: For KENNETH J. THOMPSON, Plaintiff - Appellant: Joshua R. Cohen, Ellen Maglicic Kramer, Kohrman, Jackson & Krantz, Cleveland, OH.

For KENNETH P. FRANKEL, Plaintiff - Appellant: Kenneth P. Frankel, Smith & Smith, Avon Lake, OH.

For BERNARD L. KARR, MCDONALD HOPKINS BURKE & HABER COMPANY, L.P.A., Defendants - Appellees: Walter R. Matchinga, Richard L. Warren, Jr., Quandt, Giffels & Buck, Cleveland, OH.

JUDGES: BEFORE: KENNEDY, SILER, and MOORE, Circuit Judges. KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part.

OPINION BY: KENNEDY

OPINION:

KENNEDY, Circuit Judge. This appeal arises from a diversity action for legal malpractice in connection with defendants' services in structuring a sale of stock to an irrevocable [*2] trust of which plaintiff Kenneth J. Thompson was the named trustee and sole income beneficiary. Plaintiff Kenneth J. Thompson ("Plaintiff" or "Kenneth"), who remains the beneficiary of two trusts established by his father, and plaintiff Kenneth P. Frankel ("Frankel"), who replaced Kenneth Thompson as trustee of the two trusts, claim that the district court erred in (1) concluding that no attorney-client privilege existed between plaintiffs and Karr; (2) holding that the defendants breached no fiduciary duty to the plaintiffs; and (3) holding that plaintiffs suffered no damages as a proximate result of defendant's alleged malpractice. For the reasons set forth in this opinion, we affirm the decision of the district court.

I. FACTUAL BACKGROUND

Plaintiff Kenneth J. Thompson is the son of John P. Thompson, who founded Thogus Products Company ("Thogus"), a small family-owned plastic injection molding company, in the 1950s. John Thompson died on July 30, 1997. He had two children, plaintiff and his sister, Kathleen Hlavin ("Kathleen"), both of whom worked for Thogus. Kathleen is a shareholder in Thogus, has worked at Thogus since 1974, and manages the company. Kenneth began working [*3] for Thogus in 1974 and later became Vice President in charge of sales and marketing. He is not a shareholder in Thogus, but served as Trustee under two irrevocable trust agreements established by his father, dated 1987 and 1992, which own stock in Thogus. n1 Kenneth is also the sole income beneficiary of both of these trusts. On October 18, 1998, the Probate Court in the Court of Common Pleas for Cuyahoga County, Ohio appointed Kenneth P. Frankel to replace plaintiff as Inter Vivos Trustee of the 1987 and 1992 trusts. n2

n1 There are 169 voting shares of Thogus, identified as Class A stock. The company has only three shareholders holding voting stock: (1) Thompson (and now his Estate), (2) Hlavin, and (3) two of three irrevocable trusts established by Thompson. Thompson, the president of the company, owned 125 of the voting shares. Hlavin personally owned 22 of the voting shares. The remaining 22 shares of voting stock were owned between the two trusts of which Plaintiff was the trustee and beneficiary.

Thogus maintained 16,900 shares of nonvoting stock, identified as Class B stock, which was owned as follows: (1) the 1992 trust: 5,300 shares; (2) the 1987 trust: 2,305 shares; (3) an irrevocable trust of which Hlavin was the Trustee and beneficiary: 7,605 shares; and (4) Thompson: 1,690 shares.

Thus, Thompson owned 10.6% of the nonvoting stock, or equity of the company. The trust controlled by Hlavin owned 44.7% of the nonvoting stock, or equity of the company. The two trusts controlled by Plaintiff owned 44.7% of the non-voting stock, or equity of the company. *See Thompson v. Thogus Products Co.*, 1998 Ohio App. LEXIS 2718, No. 72840, 1998 WL 323590, *1 and n.2, 3 (June 18, 1998, Ct. App. 8 Dist.).

[*4]

n2 Following his appointment as Trustee of the 1987 and 1992 trusts, Frankel filed with this court a Motion to Substitute Parties, which we granted on February 24, 1999.

Defendants Bernard Karr ("Karr") and his law firm, McDonald, Hopkins, Burke & Haber ("McDonald, Hopkins"), have represented John Thompson and Thogus for many years. As attorneys for John Thompson and Thogus, they prepared the documents necessary to establish the 1987 trust. It is their involvement in structuring the 1992 trust and related instruments, however, that motivated this lawsuit. At John Thompson's request, Karr prepared the documents that established the 1992 irrevocable trust. Karr prepared a sale of stock agreement under which Kenneth, in his capacity as Trustee, purchased non-voting stock from his father. In connection with this stock purchase, Kenneth, also in his capacity as Trustee, executed a promissory note in favor of his father in the principal amount of $ 530,000. The note calls for Kenneth, as Trustee, to repay the principal in nine annual installments, plus interest. The trust agreement, stock purchase [*5] agreement, and promissory note were each executed on September 10, 1992.

Thogus is organized as a Subchapter § corporation under the United States tax code. The company pays no federal income tax on its earnings but instead requires shareholders to pay tax on their proportional share of the corporation's income. 26 U.S.C. § 1363. Karr prepared documents to establish the 1992 irrevocable trust as a Qualified Subchapter § Trust ("QSST") so that Thogus could continue its status as a Subchapter § corporation. n3 Karr prepared a letter to the Internal Revenue Service for the purpose of making the Subchapter § election. Kenneth signed the letter in his capacity as the income beneficiary on September 10, 1992, thereby making the election. At the time the $ 530,000 promissory note was prepared, Thogus distributed its corporate income to shareholders in the form of "bonuses." It was both Kenneth's and Karr's understanding that Kenneth would pay off the $ 530,000 promissory note for the 1992 stock purchase with monies from "bonuses" paid to him each year, although this was not written into any of the agreements. Kenneth never personally received these funds as they were [*6] automatically redirected to his father.

n3 Only certain kinds of trusts, Qualified Subchapter § Trusts, may own stock in a Subchapter § corporation. *See* 26 U.S.C. § 1361 (c), (d). To qualify, the terms of the trust must require that all of the income . . . of which is distributed (or required to be distributed) currently" to the income beneficiary. 26 U.S.C. § 1361 (d)(3)(A)-(B).

After the documents for the trust and stock purchase transaction were completed, Karr and McDonald, Hopkins performed some legal work for Kenneth and his wife. On October 6, 1992, Karr opened an estate planning file for them. Defendants contend that this estate planning work was performed between November 21, 1992 through 1993. Thogus, not Kenneth, paid the bill for these services. From February through July 1994, defendants represented Kenneth in connection with the buy-out of another shareholder in a travel agency in which Kenneth and his wife held an interest.

Since 1991, Kenneth [*7] had been in charge of sales and marketing for Thogus. At a meeting on August 2, 1995, Kenneth's sister, Kathleen, told him that she was dissatisfied with his performance and that this issue had to be resolved. Karr, who also attended the August 2 meeting, suggested that Kenneth contact an attorney to protect his interests. On August 3, Kenneth spoke with an attorney for the purpose of retaining him for legal representation. At a board of directors meeting on August 28, 1995, the board, comprised of the holders of the voting shares, voted to terminate Kenneth as an officer and employee of Thogus.

After his termination, Kenneth filed a lawsuit against his father, his sister, Thogus, and the company accountant in Cuyahoga County Court of Common Pleas. John Thompson in turn filed suit against Kenneth for nonpayment of the loan. The result in one of the state actions was a judgment in Kenneth's favor for $ 750,000. n4

n4 This $ 750,000 judgment was vacated on appeal and the case reversed and remanded on the ground that Thogus (as opposed to John Thompson, the controlling shareholder) remained immune from liability. *See Thompson v. Thogus Products Co.*, 1998 Ohio App. LEXIS 2718, No. 72480, 1998 WL 323590 (Ct. App. 8 Dist., June 18, 1998). The court left open the question of whether Thompson breached a fiduciary duty by firing his son without a legitimate business purpose. *See id.* at *9.

[*8]

II. PROCEDURAL BACKGROUND

Kenneth filed this legal malpractice case against the defendants on August 6, 1996 in the Cuyahoga County Court of Common Pleas. On September 20, 1996, Karr and McDonald, Hopkins removed the case to the United States District Court for the Northern District of Ohio based on diversity of citizenship between the parties. n5

n5 At the time of removal, Kenneth was a South Carolina resident. He then apparently moved to North Carolina prior to filing his second amended complaint in the district court. Both defendants are Ohio residents. They conceded for removal purposes that plaintiff could recover more than $ 50,000 in damages, the then amount-in-controversy requirement for purposes of diversity jurisdiction under 28 U.S.C. § 1332.

On December 22, 1997, Kenneth filed a second amended complaint in which he added his status as Trustee of the 1987 and 1992 irrevocable trusts to the list of named plaintiffs in this action. The Second Amended Complaint sought compensatory [*9] and punitive damages against Karr based upon alleged claims for legal malpractice and breach of fiduciary duty.

On January 20, 1998, Karr and McDonald, Hopkins moved for summary judgment on all of the claims alleged in the Second Amended Complaint. On April 27, 1998, the district court granted defendants' motion for summary judgment and entered an order terminating Kenneth's case. Kenneth appealed the district court's decision in both his capacity as beneficiary and Trustee of the 1987 and 1992 trusts.

III. DISCUSSION

[HN1] This court reviews entry of summary judgment *de novo. Rutherford v. City of Cleveland*, 137 F.3d 905, 908 (6th Cir. 1998). [HN2] Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56. In reviewing the record, this court must interpret the facts in the light most favorable to the non-movant. *See Montgomery v. Carr*, 101 F.3d 1117, 1121 (6th Cir. 1996).

[HN3] To establish a legal malpractice claim relating [*10] to civil matters under Ohio law, a plaintiff must prove three elements: (1) existence of an attorney-client relationship giving rise to a duty, (2) breach of that duty, and (3) damages proximately caused by the breach. *Krahn v. Kinney*, 43 Ohio St. 3d 103, 105, 538 N.E.2d 1058, 1060 (1989). The district court granted summary judgment for defendant Karr first on grounds that the record demonstrated no attorney-client relationship between plaintiffs and Karr "in relation to the matters complained of," i.e. in relation to preparation of the 1992 Irrevocable Trust, Stock Purchase Agreement, Promissory Note, and Qualified Subchapter § Trust election. The district court also held that the plaintiffs failed to

establish that Karr, as counsel to the closely-held corporation, owed a fiduciary duty to Kenneth in his capacity as a minority shareholder of the corporation under *Arpadi v. First MSP Corp.*, 68 Ohio St. 3d 453, 458, 628 N.E.2d 1335 (1994). Because plaintiffs' complaint stated a claim against McDonald, Hopkins in its capacity as Karr's employer under a theory of vicarious liability, and plaintiffs' claims against Karr failed, McDonald, Hopkins was also entitled [*11] to summary judgment. Finally, the district court held that the plaintiffs failed to show that they suffered damages as a proximate result of defendants' malpractice. The plaintiffs now appeal each of the district court's holdings. After briefly discussing the procedural question presented by defendants' removal of the case to federal court, we shall address each of the plaintiffs' claims in turn.

A. Removal by Resident Defendants

Defendants' removal of the instant case from state to federal court was improper, as resident defendants cannot remove. Title [HN4] 28 U.S.C. § 1441 (b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable *only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.*

(Emphasis added). This case was originally filed in the Court of Common Pleas for Cuyahoga County, Ohio and the defendants [*12] are both citizens of the State of Ohio. As a result, this case was not removable to federal court. Neither party has raised the issue but since it relates to our jurisdiction we raise it sua sponte.

In *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 31 L. Ed. 2d 612, 92 S. Ct. 1344 (1972), the Supreme Court held that, [HN5] after removal, if a case is tried on the merits without objection and judgment entered, the appellate court should not concern itself with whether removal was proper, but should instead examine "whether the federal district court would have had original jurisdiction of the case had it been filed in that court." *Id.* at 702. We applied the *Grubbs* exception in *Morda v. Klein*, 865 F.2d 782, 784 (6th Cir. 1989). In *Morda*, the plaintiffs brought a civil RICO claim against the defendants in Michigan state court, which the defendants removed to federal court. *Id.* at 783. At the time of the *Morda* decision, the Sixth Circuit adhered to the rule that RICO jurisdiction was exclusively federal. *See Chivas Products Ltd. v. Owen*, 864 F.2d 1280, 1285 (6th Cir. 1988), *abrogated by* [*13] *Tafflin v. Levitt*, 493 U.S. 455, 458, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990). By operation of the derivative jurisdiction doctrine, the district court lacked removal jurisdiction. Applying *Grubbs* however, we held that "because the District Court would have had jurisdiction had this case originally been filed there, because there was no other bar to federal jurisdiction at the time of judgment, and because the plaintiff never objected to summary judgment at any time before or during the three-week trial below," the lack of derivative jurisdiction was irrelevant and we had jurisdiction of the appeal. *Morda*, 865 F.2d at 784.

A number of circuits have determined that *Grubbs* applies not only to cases that have been "tried" on the merits, but also to cases in which the district court granted summary judgment. *See Able v. Upjohn Co., Inc.*, 829 F.2d 1330 (4th Cir. 1987); *Farina v. Mission Investment Trust*, 615 F.2d 1068 (5th Cir. 1980); *Sorosky v. Burroughs Corp.*, 826 F.2d 794 (9th Cir. 1987); *Borg-Warner Leasing v. Doyle Elec. Co., Inc.*, 733 F.2d 833 (6th Cir. 1984). The Sixth Circuit [*14] addressed application of *Grubbs* to cases disposed of on summary judgment in *Federal National Mortgage Association v. LeCrone*, 868 F.2d 190 (6th Cir. 1989). In *LeCrone*, we declined to apply *Grubbs* to a case in which summary judgment had been granted and in which removal to federal court had been improper because the parties had invested significantly fewer resources in the case than had the parties in either *Grubbs* or *Morda*. In *LeCrone*, unlike *Grubbs* and *Morda*, one of the parties presented the issue of lack of subject matter jurisdiction to the district court at the time of removal. *Id.* at 195. In addition, "unlike the case in *Morda* where the parties had engaged in a three-week trial before the District Judge, the parties in [*LeCrone*] simply filed briefs and motions and appeared before a magistrate." *Id.* at 195. As a result, "neither the desire to discourage jurisdictional sandbagging nor a concern for judicial economy" justified application of *Grubbs*. *Id.* at 195.

Disposition of a case on summary judgment does not entirely offset concerns over needless expenditure of judicial [*15] resources. In *Chivas Products Ltd.* v. *Owen*, we recognized in dicta that summary judgment may in some cases "involve limited issues with minimal investment of time or may require extensive time and effort exceeding that experienced in many cases tried 'on the merits.'" *Chivas Products*, 864 F.2d at 1287 (citations omitted). Therefore the question before us today is whether, on the record facts, the instant case warrants application of *Grubbs* so that we have jurisdiction over the appeal. The facts before us appear to fall somewhere

between those in *Morda* and *LeCrone*. As in *Morda*, where we applied *Grubbs*, neither party has challenged removal. Like *LeCrone*, where we declined to apply *Grubbs*, there was no trial in the district court, but rather the mere filing of briefs and motions. Review of the record reveals, however, that other significant resources have been expended throughout these proceedings. In view of the extensive discovery already completed in this case, as well as the time invested in the district court's opinion and our own preparation, we are persuaded that *Grubbs* should apply. As the interests of judicial economy counsel [*16] exercise of jurisdiction over the appeal, and because the district court would have had original jurisdiction of the case had it been filed there, n6 we shall decide the case on its merits.

n6 As discussed in note 5 *supra*, the technical requirements of diversity jurisdiction, including diversity of citizenship and amount in controversy, have been met.

B. Existence of Attorney-Client Relationship

Plaintiffs contend that sufficient evidence was presented to preclude summary judgment on the question of whether Kenneth Thompson had an attorney-client relationship with defendants, which is a prerequisite to filing a legal malpractice claim. The type of evidence necessary to support a determination as to whether an attorney-client relationship exists may vary with the circumstances. *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 82 Ohio App. 3d 255, 261, 611 N.E.2d 873, 876 (Ct. App. 6 Dist. 1992). [HN6] The test is essentially "whether the putative client reasonably believed that the relationship [*17] existed and that the attorney would therefore advance the interests of the putative client." *Id.*

[HN7] An "essential element as to whether an attorney-client relationship has been formed is the determination that the relationship invoked such trust and confidence in the attorney that the communication became privileged and, thus, the information exchanged was so confidential as to invoke an attorney-client privilege." *Landis v. Hunt*, 80 Ohio App. 3d 662, 669, 610 N.E.2d 554, 558 (Ct. App. 10 Dist. 1992). In *Landis v. Hunt*, the Court of Appeals for Franklin County, Ohio, found an attorney-client relationship had been established when the putative clients, the Landises, contacted an attorney for the purpose of defining their legal rights arising from misdiagnosis of Tom Landis's cancer. *Id.* The attorney told them that he did not handle malpractice claims himself, but would confer with a colleague and get back to them. Thereafter, on two separate occasions, the attorney told the Landises he thought their claims were barred by a one-year statute of limitations for medical malpractice. *Id.* The Landises never signed a contract, were never charged a fee, and never [*18] signed any authorization form agreeing to the attorney's representation. The Court of Appeals opined that as the attorney nevertheless rendered legal advice based on the facts the Landises had given him, and they relied on this legal advice in not pursuing any medical malpractice claims arising from misdiagnosis of Tom Landis's cancer, "the relationship created between [the attorney] and the Landises was based upon a confidential communication which invoked the attorney-client privilege." *Id.* at 669-70, 610 N.E.2d at 558-59. As a result, an attorney-client relationship had been established. In *Henry Filters, Inc. v. Peabody Barnes, Inc.*, the trial court granted defendant corporation's motion to disqualify attorneys who agreed to represent both plaintiff and defendant in preparing and prosecuting a joint patent application, abandoned the patent application, failed to notify defendant of the abandonment, and then represented plaintiff in a suit against defendant for defective goods. *Henry Filters*, 82 Ohio App. 3d at 257-59, 611 N.E.2d at 874-75. The Court of Appeals for Wood County, Ohio affirmed the trial court's decision on grounds that the defendant [*19] reasonably believed that an attorney-client relationship existed between itself and the attorneys. As evidence of such reasonable belief, the court observed that the defendant corporation: (1) expressly appointed the attorneys in a document signed by both parties that read, "I hereby appoint the following attorney(s) and/or agents to prosecute this application and to transact all business in the Patent and Trademark Office connected therewith;" (2) supplied the attorneys with confidential information for the purpose of preparing the patent application; and (3) agreed to pay one-half of the attorney fees. *Id.* at 258-61, 611 N.E.2d at 874-76.

The record in the instant case offers no evidence comparable to that in *Landis* or *Henry Filters* that would allow us to conclude that Kenneth reasonably believed an attorney-client relationship existed between himself (as beneficiary or Trustee) and the defendants, and that the defendants would therefore advance his interests in structuring the 1987 trust and 1992 stock purchase agreement. With regard to the 1992 trust, Karr stated in his deposition, "In my mind, it was very clear that we were representing [John Thompson] [*20] and the company in this transaction." He also testified that "what was going on here was an extremely generous gift . . . from his father to Ken" and that he had "rarely had to represent people in receiving gifts." Plaintiffs do not allege that Kenneth sought legal advice from the defendants in connection with the 1992 stock purchase, that he expressly appointed or hired Karr to represent his interests as either Trustee or as beneficiary of the 1987 and 1992 trusts, nor do they point to any exchange of confidential information between Kenneth and defendants for the purpose of structuring the 1987 trust, or the 1992 trust

agreement, stock purchase, promissory note, and QSST election. Instead, the evidence suggests that these documents were prepared solely on behalf of John Thompson. Kenneth's signature was merely required on each document to complete the deals. Indeed, from the evidence, the act of signing appears to have been his most substantial involvement in the transactions.

While an attorney-client relationship arose out of defendants' provision of estate planning services for Kenneth and his wife, the earliest evidence of such a relationship is the opening of the couple's client [*21] file on October 6, 1992, almost one month after the 1992 stock purchase was completed. Although it is possible that Kenneth conferred with Karr sometime prior to September 10, 1992 about doing some estate planning work, he offers no proof of any such communication before October 1992. Kenneth's own deposition testimony appears to confirm that his relationship with Karr grew out of Karr's representation of John Thompson in preparing the "1992 buy-out agreements":

> Q. Your contacts with Mr. Karr were just generally ones of brief meetings in the office as he was there to meet with your father and --
>
> A. Right, predominantly.
>
> Q. Can you tell me how it came to be that Mr. Karr became involved in preparing any documents, wills, for you and your wife?
>
> A. It just naturally flowed, I suppose from when the 1992 buy-out agreements were being prepared and the association that I met him. I didn't know any other attorneys and I could see no reason why not to use him, and there were no objections by him or anyone else. In fact he was recommended.
>
> Q. By whom?
>
> A. Family.
>
> Q. Which of your family members recommended him?
>
> A. My father, probably.
>
> Q. How did [*22] it come to be that about that time you desired to have a will drawn?
>
> A. Because of the position I was then in, after the purchase agreements and such were done.

From the record, we cannot conclude that Kenneth reasonably believed that an attorney-client relationship existed any time before or during the 1992 stock purchase so as to impose upon the defendants a duty to advance or safeguard his interests in either the 1987 or 1992 transaction. Because plaintiffs cannot show that an attorney-client relationship existed between Karr and Kenneth Thompson in his capacity as Trustee or beneficiary of the 1987 and 1992 trusts, we affirm summary judgment for Karr on plaintiffs' legal malpractice claims. For the same reasons, we affirm summary judgment for McDonald, Hopkins as Karr's employer.

We note briefly that plaintiffs also challenge the district court's holding that plaintiffs "can make no showing that the defendants . . . . proximately cased the damages Kenneth Thompson alleges he suffered as a result of legal malpractice." Plaintiffs correctly state that Ohio does not require "but for" causation in attorney malpractice cases. Rather, a plaintiff must show "that there is a [*23] causal connection between the conduct complained of and the resulting damage or loss." *Vahila v. Hall*, 77 Ohio St. 3d 421, 674 N.E.2d 1164 (1997), syllabus; *Robinson v. Calig & Handleman*, 119 Ohio App. 3d 141, 694 N.E.2d 557 (1997). As plaintiffs cannot establish that the defendants owed a duty of professional care or that they breached such a duty, however, we need not address the issue of damages.

B. Existence of Fiduciary Duty

As an alternative argument, plaintiffs contend that Karr breached a fiduciary duty that he owed to Kenneth Thompson as a minority shareholder in the closely held corporation. Plaintiffs' argument proceeds as follows: (1) controlling shareholders owe a fiduciary duty to minority shareholders; (2) as a fiduciary of John Thompson, the controlling shareholder, Karr was in privity with Kenneth Thompson, who was a minority shareholder; (3) Karr therefore also owed a fiduciary duty to Kenneth Thompson as a minority shareholder; (4) Karr breached that duty. Plaintiffs' theory essentially seeks to extend the principles announced in *Arpadi v. First MSP Corp.*, 68 Ohio St. 3d 453, 628 N.E.2d 1335 (1994), which applied [*24] to limited partnerships, to close corporations.

The holding of the Supreme Court of Ohio in *Arpadi* turned upon the baseline principle that in a limited partnership, the general partner owes a fiduciary duty to the limited partners of the enterprise. *Arpadi*, 68 Ohio St. 3d at 453, 628 N.E.2d at 1336, P2 of syllabus. The Supreme Court of Ohio held that "those persons to whom a fiduciary duty is owed are in privity with the fiduciary such

that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary relates." *Arpadi*, 68 Ohio St. 3d at 454, 628 N.E.2d at 1336, P3 of syllabus. In other words, [HN8] an attorney employed by the general partner in a limited partnership is in privity with the limited partners, and therefore also owes a duty of care to the limited partners in matters relating to the partnership.

Plaintiffs then argue that because Ohio courts have recognized that limited partnerships are similar to close corporations, the *Arpadi* rule should also apply to close corporations. Plaintiffs rely in particular upon the decision of the Supreme Court of Ohio in *Crosby v. Beam*, 47 Ohio St. 3d 105, 548 N.E.2d 217 (1989). [*25] *Crosby* held that claims of breach of fiduciary duty by minority shareholders against majority shareholders of a close corporation who used their control to deprive minority shareholders of the benefit of their investment could be brought as individual or direct actions rather than derivative actions. *See id.* at 105, 548 N.E.2d 218, P3 of syllabus. In dicta, the Court observed:

> Close corporations bear a striking resemblance to a partnership. In essence, the ownership of a close corporation is limited to a small number of people who are dependent on each other for the enterprise to succeed. Just like a partnership, the relationship between the shareholders must be one of trust, confidence and loyalty if the close corporation is to thrive.

Id. at 107-08, 548 N.E.2d at 220. Plaintiffs contend that because the Supreme Court of Ohio has recognized that majority shareholders of close corporations owe a fiduciary duty to minority shareholders, *see Crosby*, 47 Ohio St. 3d at 105, 548 N.E.2d 218, P2 of syllabus, just as general partners owe a fiduciary duty to limited partners, the rule of *Arpadi* extending the attorney-client [*26] relationship must also apply to close corporations. The district court declined to extend *Arpadi* in this manner.

The district court made two observations in support of its holding. First, it observed that while Kenneth claims Karr owed him a fiduciary duty as an extension of his attorney-client relationship with John Thompson, *Arpadi* held that an attorney owes a duty of due care, not a fiduciary duty, to the limited partners regarding matters of concern to the partnership. Second, the district court noted that plaintiffs overlooked language in *Arpadi* that "expressly distinguished between a partnership and corporation when determining to whom an attorney owes his allegiance." n7 The courts of Ohio have not so far extended *Arpadi* to close corporations. n8 Moreover, as the district court noted, *Arpadi* itself reaffirms significant differences between partnerships and the corporate form. Tax status of the organization and its shareholders is essentially the only respect in which partnerships and S-corporations are similar under the law. The ability to insulate shareholders from liability, however, is the chief benefit and principal motivation of incorporation. In this [*27] respect, the law in no way differentiates S-corporations or closely held corporations from other corporations. *See* Ohio Const. art. XIII, § 3 ("Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her."). Whatever the logic of plaintiffs' argument, it is the place of the Ohio courts, if not the Ohio legislature, and not of this court sitting in diversity, to extend the fiduciary and professional duties of attorneys of close corporations to the corporations' minority shareholders.

n7 In *Arpadi*, the Supreme Court of Ohio reproduced the following provision of the Ohio Code of Professional Responsibility:

> A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity an not to a stockholder, 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 in the organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case, the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

Arpadi, 68 Ohio St. 3d at 456-57, 628 N.E.2d at 1338 (quoting EC-518). The *Arpadi* court observed that the appellees could not rely upon EC-518 for the proposition that extending the attor-

ney-client relationship to limited partners would create an ethical dilemma for the attorney. *Id.* The ethical rule is not applicable to limited partnerships because they are not "separate legal entities" and are not similar to corporations. *See id.*

[*28]

n8 Three Ohio cases cite *Arpadi* in a substantive manner: *Dunn v. Zimmerman*, 69 Ohio St. 3d 304, 631 N.E.2d 1040 (1994); *Goldstein v. Christiansen*, 70 Ohio St. 3d 232, 638 N.E.2d 541 (1994); and *Dynes Corp. v. Seikel, Koly & Co., Inc.*, 100 Ohio App. 3d 620, 654 N.E.2d 991 (Ct. App. 8 Dist. 1994). All three of these cases address the fiduciary duty that partners in a partnership owe to one another. None refer to the duties between shareholders in a corporation.

C. Standing Of A "Vested Beneficiary" To Sue Defendants For Malpractice

Finally, Kenneth Thompson also argues that regardless of whether an attorney-client relationship existed between himself and Karr, his status as the sole beneficiary of the 1992 trust entitled him to pursue malpractice claims against the attorneys who created the trust. The district court did not address this argument in its opinion.

Plaintiff cites *Elam v. Hyatt Legal Services*, 44 Ohio St. 3d 175, 541 N.E.2d 616 (1986), for the proposition that parties with a vested interest in a trust may [*29] sue the trust's counsel for professional negligence. *Elam* is distinguishable, however, because in that case counsel for the executor of an estate failed to properly transfer property to which the beneficiaries were clearly entitled as remaindermen under the decedent's will. Because (1) their interests were vested, (2) the executor had a fiduciary duty to protect the beneficiaries' interests, and (3) the executor's attorney was in privity with the beneficiaries, the beneficiaries of the property transfer had standing to sue the executor's attorney for professional negligence in improperly preparing and recording a certificate of transfer that excluded their interest. *Id.* at 176-77, 541 N.E.2d at 617-18. In this case, the 1992 trust was not negligently administered, but rather operated exactly as structured. Instead, plaintiff seeks to sue the defendants for alleged negligence in creating the trust for their failure to anticipate circumstances in which he might be unable to repay the promissory note.

Accordingly, plaintiff alleges that vested beneficiaries may assert malpractice claims against settlors' counsel for errors in forming a trust under the following three [*30] cases: *Bucquet v. Livingston*, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976); *Pizel v. Zuspann*, 247 Kan. 54, 795 P.2d 42, *modified* 247 Kan. 699, 803 P.2d 205 (1990); and *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42 (Mo. App. 1997). Regardless of whether Kenneth Thompson is a vested beneficiary with standing to sue under Ohio law, the cited cases do not support his argument. None actually involve Ohio law and all of them are distinguishable from the instant case because the beneficiaries sued the attorneys for negligence in failing to effectuate the intent of the settlor. In contrast, Kenneth Thompson presents no evidence to suggest that, in preparing the necessary documents for the 1987 or 1992 trusts, the defendants failed to effectuate John Thompson's intent. Instead, John Thompson's request that Kenneth sign a promissory note makes it quite obvious that he fully intended to impose payment obligations upon his son. We may also infer from the evidence that Thompson intended to deprive Kenneth of a continuous source of funding for the stock purchase when he terminated Kenneth's employment and [*31] stopped paying him bonuses. Kenneth could prevail on this particular theory of liability only if he could show that John Thompson *intended* his continued receipt of bonuses, that Karr was aware of Thompson's intent, and then failed to structure the trusts so his intent would be realized. As he cannot show such facts, Kenneth Thompson's claim against Karr and McDonald, Hopkins must fail.

IV. CONCLUSION

Because plaintiffs can establish neither an attorney-client relationship nor a fiduciary duty so as to subject the defendants to liability, we **AFFIRM** the district court's grant of summary judgment for the defendants.

CONCUR BY: KAREN NELSON MOORE (In Part)

DISSENT BY: KAREN NELSON MOORE (In Part)

DISSENT:

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. In *Arpadi v. First MSP Corp.*, 68 Ohio St. 3d 453, 628 N.E.2d 1335 (Ohio 1994), the Ohio Supreme Court held that an attorney-client relationship established with a general partner extends to the limited partners by virtue of the fiduciary duty owed to the limited partners by the general partner. The Ohio Supreme Court has not considered whether the rule of *Arpadi* applies in the analogous [*32] close corporation context, that is, whether an attorney-client relationship established with a controlling shareholder extends to the minority shareholders by virtue of the fiduciary duty owed to the minority shareholders by the controlling shareholder. The plaintiffs argue that it should. According to the majority, however, this court, sitting in diversity jurisdiction, is not in a position to decide this

close question in favor of the plaintiffs; rather, it is a matter for the Ohio courts or legislature. Because I believe that we are obligated to predict how the Ohio Supreme Court would rule on this issue, whether for or against the plaintiffs, I respectfully dissent in part.

Federal courts sitting in diversity jurisdiction face a difficult balancing act. On the one hand, it is settled that "where the Ohio Supreme Court has not spoken, our task is to discern, from all available sources, how that court would respond if confronted with the issue." *Garrett v. Akron-Cleveland Auto Rental, Inc. (In re Akron-Cleveland Auto Rental, Inc.)*, 921 F.2d 659, 662 (6th Cir. 1990). But on the other hand, we are warned to "shun the temptations of prematurely anticipating changes [*33] in state law." *See* JACK H. FRIEDENTHAL, MARY KAY KANE, AND ARTHUR R. MILLER, CIVIL PROCEDURE 221 (2d ed. 1993). In this case the majority heeds the latter warning. For several reasons, however, I think that we are obligated to use our best judgment to anticipate how the Ohio Supreme Court would rule on this point.

First, the plaintiffs do not ask us to anticipate Ohio's adoption of a doctrine that has been developed elsewhere and never applied in Ohio. The *Arpadi* doctrine was announced by the Ohio Supreme Court, and it is not much of a leap to apply the doctrine in the present setting. The crucial holdings in *Arpadi* are (1) "those persons to whom a fiduciary duty is owed are in privity with the fiduciary such that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates," *Arpadi*, 628 N.E.2d at syllabus P 3, and (2) general partners owe a fiduciary duty to limited partners. *Id.* at syllabus P 2. As it is well-established under Ohio law that controlling shareholders of close corporations owe a fiduciary duty to minority shareholders, *see Crosby v. Beam*, 47 Ohio St. 3d 105, 548 N.E.2d 217, 220-21 (Ohio 1989), [*34] the case for applying the rule of *Arpadi* in this context is strong.

Moreover, the district court's reservations concerning the proposed extension of *Arpadi* are not well founded. To prevail the plaintiffs must establish that an attorney-client relationship existed between themselves and the defendants. The court in *Arpadi* found just such a relationship, and thus the district court's concern with whether *Arpadi* established a fiduciary relationship or a duty of care is immaterial. Also, although the court in *Arpadi* expressly distinguished partnerships from corporations, as the district court and majority note, this observation neglects the crucial legal distinction between the typical public corporation and a close corporation: At least in the absence of a controlling shareholder, fiduciary duties do not extend among the shareholders of public corporations. *See, e.g., Priddy v. Edelman*, 883 F.2d 438, 445 (6th Cir. 1989) ("Minority shareholders owe no fiduciary duty to fellow shareholders.").

Second, in refusing to decide difficult questions of state law, federal courts often have attempted to shift responsibility onto the plaintiffs who failed to [*35] file in state court. *See, e.g., Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 472 (11th Cir. 1993) (suggesting that plaintiffs who wanted to argue for a change in state law should have filed their case in state court). Such an attitude surely would be misplaced in this case, however, since the plaintiffs did file in state court and the case was removed by the defendants.

Third, I am concerned that our refusal to consider seriously the application of *Arpadi* pressed by the plaintiffs could encourage forum shopping and prosecution of additional diversity cases in the federal courts. We cannot be sure which way the Ohio Supreme Court would rule on this question, but the defendants are assured of victory if we refuse to make a prediction and simply fall back upon an unwillingness to extend state law. Parties, like the defendants, that can cause a diversity case to be heard in federal court are more likely to choose the federal forum if a refusal to extend state law to a new situation is in their favor and if the federal courts can be counted on to refuse the proposed extension.

Because I believe we are obligated to predict whether the Ohio Supreme Court would [*36] apply the *Arpadi* holding to the facts of this case, I respectfully dissent in part.

LEXSEE 2001 OHIO APP. LEXIS 1902

DEBRA WOLFE AND NAMON JOHNSON, Plaintiffs-Appellants vs. DON A. LITTLE and KENT J. DEPOORTER, Defendants-Appellees

C.A. Case No. 18718

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

2001 Ohio App. LEXIS 1902

April 27, 2001, Rendered

PRIOR HISTORY: [*1] T.C. Case No. 99-CV-5554.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, defendants in a previous action, sought review of a decision of the trial court (Ohio) in favor of appellees, attorneys, which granted their motion to dismiss a claim for abuse of process allegedly arising in the previous action.

OVERVIEW: Appellants received a subpoena duces tecum to attend depositions. Appellants claimed they did not attend the depositions on the instructions from their attorney. Appellees' client was granted a default judgment in the amount of $ 25,000. The trial court denied appellant's motion to set aside the judgment and appellants alleged ex parte communication by attorneys occurred that resulted in the judgment being raised to $ 300,000. Appellants filed an action in the trial court alleging abuse of process in the previous case, which the trial court dismissed for failure to state a claim upon which relief could be granted. The appellate court found that appellees committed improper acts in the judicial process in the previous action, but that such acts were committed solely for the benefit of their client. The appellate court ruled that appellants' claim fell short of alleging facts demonstrating that appellees acted maliciously and for an ulterior motive separate from their client's interests. Thus, the appellate court held that no claim for which relief could be granted had been pled and upheld the ruling of the trial court.

OUTCOME: The judgment of the trial court was affirmed.

CORE TERMS: abuse of process, ulterior purpose, motion to dismiss, maliciously, deposition, ex parte communication, default judgment, ulterior motive, due process, lawsuit, notice, demonstrating, perverted, learning, deprive, survive, abusing, privity, coerce, bare, assignment of error, false information, issue presented, depriving, subpoena, attend, legal proceeding, facts supporting, summary judgment, probable cause

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Motions to Dismiss
Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A trial court may only grant a motion to dismiss when, after examining the complaint, it appears beyond doubt that the non-moving party can prove no set of facts which would entitle him to the requested relief. In its examination of the complaint, the trial court must accept all factual allegations contained therein as true, as well as all reasonable inferences drawn therefrom. Although the factual allegations of the complaint are taken as true, unsupported conclusions of a complaint are not sufficient to withstand a motion to dismiss. Furthermore, when a motion to dismiss is granted by the trial court, an appellate court must review that decision de novo.

Torts > Intentional Torts > Abuse of Process > Elements
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN2] The three elements of abuse of process are: (1) that a legal proceeding has been set in motion in proper

form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. In addition, when an action for abuse of process is raised against an attorney, he may only be held liable if he acts maliciously and has an ulterior purpose which is completely separate from his client's interest. The tort of abuse of process is to provide a remedy in situations where an appropriate legal procedure has been properly initiated, and even has ultimate success, but has been corrupted in order to accomplish some ulterior motive for which a court proceeding was not intended. Abuse of process occurs where someone attempts to achieve, through use of the court, that which the court is itself powerless to order.

Civil Procedure > Pretrial Judgments > Default > Relief From Default
Civil Procedure > Judgments > Relief From Judgment > General Overview
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN3] The key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought previous action.

Civil Procedure > Pretrial Matters > Subpoenas
[HN4] Pursuant to Ohio R. Civ. P. 45(A)(1)(c), a party's attendance at a deposition should be secured by notice, not subpoena.

Torts > Intentional Torts > Abuse of Process > General Overview
Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN5] The ulterior purpose or motive in an abuse of process action is interpreted as an attempt to gain an advantage outside the proceeding, such as payment of money or surrender of a claim, using the process itself as the threat.

Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN6] In order to sustain an abuse of process claim against attorneys, appellants need to allege facts demonstrating attorneys acted maliciously and for an ulterior purpose completely separate from their client's interest.

Torts > Intentional Torts > Malicious Prosecution > General Overview
[HN7] Attorneys only owe a duty to third persons arising from their performance as attorneys if the third person is in privity with the attorneys' client or if the attorneys act maliciously.

COUNSEL: MICHAEL C. ECKERT, Springboro, Ohio Attorney for Plaintiffs-Appellants.

TRACY A. CASSINELLI, Cincinnati, Ohio Attorney for Defendants-Appellees.

JUDGES: BROGAN, J. WOLFF, P. J., and YOUNG, J., concur.

OPINION BY: BROGAN

OPINION: BROGAN, J.

Plaintiff-Appellants Debra Wolfe and Namon Johnson ("Appellants") brought the present action against attorneys Don A. Little and Kent J. Depoorter ("Appellees") for abuse of process and breach of duty, allegedly arising in a previous case. In the previous lawsuit ("Loyalty Transfer case"), Appellees represented Loyalty Transfer and Storage, Inc., who filed the action against Wolfe, Johnson, and 3-D Distributing Co., Inc. (collectively, "3-D Distributing defendants"). Because the procedural history of the Loyalty Transfer case is important to the present case, we will review it briefly as established in Appellants' complaint.

Allegedly, the first contact received by Appellants regarding the Loyalty Transfer case was a subpoena *duces tecum* to attend depositions scheduled for March 19 and 20, 1998. Appellants claim they did not attend the depositions on the instruction of their attorney, H. Vincent [*2] Walsh. On March 20, 1998, Appellees filed a motion for discovery sanctions against the 3-D Distributing defendants, requesting sanctions in the form of default judgment. It was not until four days later, March 24, that Wolfe received service of process and the complaint. It is not clear from the record of this case when Johnson received service.

On March 27, 1998, default judgment was entered against the 3-D Distributing defendants. Thereafter, the 3-D Distributing defendants filed a motion to set aside default judgment, to which Appellees responded. Attached to the response was an affidavit from Little representing that Attorney Walsh had sent him a letter explaining that he had advised Appellants not to appear for their depositions. Attorney Walsh denies ever sending such a letter, and Appellees have never produced it.

The trial court overruled the motion to set aside the default judgment and a damages hearing was held, where the magistrate found the 3-D Distributing defendants liable to Loyalty Transfer for $ 25,000. The trial court filed an entry and judgment adopting this decision.

Approximately three weeks later, the magistrate filed an amended decision wherein she raised [*3] the judgment to $ 300,000. This also was adopted by the trial court in a final judgment entry. Appellants allege that at some point between the issuing of the original judgment entry and the amended magistrate decision, Appellees had an ex parte communication with the court, which resulted in the increased judgment amount.

On December 13, 1999, Appellants filed the present case against Appellees for breach of duty and abuse of process. Soon after filing their answer, Appellees filed a motion to dismiss for failure to state a claim upon which relief may be granted. Special Magistrate Bixler granted the motion to dismiss and Appellants appealed this decision. However, because Magistrate Bixler could not issue a final appealable order, we remanded. The trial court issued a final judgment entry adopting the magistrate's decision, which also was timely appealed. Appellants raised the following assignment of error in their brief:

The trial court erred in granting plaintiff's motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(B)(6).

[HN1] A trial court may only grant a motion to dismiss when, after examining the complaint, it appears beyond doubt [*4] that the non-moving party can prove no set of facts which would entitle him to the requested relief. ***York v. Ohio State Hwy. Patrol*** (1991), 60 Ohio St. 3d 143, 144, 573 N.E.2d 1063. In its examination of the complaint, the trial court must accept all factual allegations contained therein as true, as well as all reasonable inferences drawn therefrom. ***Mitchell v. Lawson Milk Co.*** (1988), 40 Ohio St. 3d 190, 192, 532 N.E.2d 753. "Although the factual allegations of the complaint are taken as true, 'unsupported conclusions of a complaint are * * * not sufficient to withstand a motion to dismiss.'" ***Shell v. Crain's Run Water and Sewer Dist.***, 2000 Ohio App. LEXIS 125, *3 (Jan. 21, 2000), Montgomery App. No. 17961, unreported, citing ***State ex rel. Hickman v. Capots*** (1989), 45 Ohio St. 3d 324, 324, 544 N.E.2d 639. Furthermore, when a motion to dismiss is granted by the trial court, an appellate court must review that decision *de novo*. ***Groves v. Dayton Pub. Schools*** (1999), 132 Ohio App. 3d 566, 567, 725 N.E.2d 734.

Appellants listed three separate issues for review under their sole assignment of error.

First issue [*5] presented for review: Did Appellant's Complaint state a cause of action for abuse of process when it alleged that Appellees intentionally and maliciously committed acts in the furtherance of their improper, ulterior motive of depriving Appellants of their rights to due process, such acts including conducting an ex parte communication with the court which resulted in a 1200% increase of the judgment amount, from $ 25,000 to $ 300,000, lying to the court and filing false documents, and not disclosing important procedural issues?

Appellants allege that Appellees committed the tort of abuse of process during the Loyalty Transfer [HN2] case. The three elements of the tort are: "(1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process." ***Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*** (1994), 68 Ohio St. 3d 294, 298, 626 N.E.2d 115. In addition, when an action for abuse of process is raised against an attorney, he may only be held liable if he acts [*6] maliciously and has an ulterior purpose which is completely separate from his client's interest. ***Thompson v. R & R Service Systems, Inc. v. Cook***, 1997 Ohio App. LEXIS 2677, *36 (June 19, 1997), Franklin App. No. 96APE10-1277, 96APE10-1278, unreported, citing ***Scholler v. Scholler*** (1984), 10 Ohio St. 3d 98, 462 N.E.2d 158, paragraph one of syllabus (other citations omitted). The tort of abuse of process developed to provide a remedy in situations where an appropriate legal procedure has been properly initiated, and even has ultimate success, but has been corrupted in order to accomplish some ulterior motive for which a court proceeding was not intended. *Yaklevich*, 68 Ohio St. 3d at 297. Basically, "abuse of process occurs where someone attempts to achieve through use of the court that which the court is itself powerless to order." ***Robb v. Chagrin Lagoons Yacht Club, Inc.*** (1996), 75 Ohio St. 3d 264, 271, 662 N.E.2d 9.

The parties do not dispute that the first element of this tort was met. The Loyalty Transfer case was a legal proceeding that was set in motion in proper form and with probable cause. Conversely, the second element is disputed [*7] by the parties. In order to show the process was perverted to accomplish an ulterior purpose, the Appellants must show both an act committed during the process that was not proper in the normal conduct of the proceeding and the Appellees' ulterior motive. ***Pheils v. Garber-Lawrence Pub. Group, Inc.***, 1993 Ohio App. LEXIS 5914, *38-39 (Dec. 10, 1993), Lucas App. No. L-92-418, unreported (citations omitted).

In their complaint, Appellants allege that Appellees (1) improperly subpoenaed them to a deposition contrary to the civil rules, (2) submitted a false affidavit with their response to Appellants' motion to set aside default judg-

ment, and (3) initiated an ex parte communication with the trial court which resulted in a twelve hundred percent increase in the judgment. Taking these allegations as true, we believe Appellants have demonstrated that Appellees committed improper acts during the judicial [HN3] process. However, the "key consideration in an abuse of process action is whether an improper purpose was sought to be achieved by the use of a lawfully brought previous action." *Yaklevich*, 68 Ohio St. 3d at 300. We find that Appellants did not properly allege an ulterior purpose in their complaint. [*8]

Appellants made a bare allegation that Appellees committed the above three acts with the ulterior purpose to deprive them of their right to due process. However, Appellants were required to allege facts demonstrating that these acts were committed for that ulterior purpose. ***Nosker v. Greene County Regional Airport Authority***, 1997 Ohio App. LEXIS 2183, *7 (May 23, 1997), Greene App. No. 96 CA 101, unreported. When examining Appellants' complaint, they did not allege facts supporting this or any other ulterior purpose.

First, Appellees sent a subpoena *duces tecum* to Appellants, as well as sending a notice pursuant to the rules, in order to secure their testimony in a deposition and compel them to bring necessary documents. Although this could have been a procedural mistake n1, there were no facts indicating how use of the subpoenas could have deprived Appellants of their due process rights, or that they were used for any other ulterior purpose.

n1 [HN4] Pursuant to Civ.R. 45(A)(1)(c), a party's attendance at a deposition should be secured by notice, not subpoena.

[*9]

Appellants further alleged that Little filed an affidavit with the trial court containing false information. The only potential false information we can discern would be a statement that Appellants' attorney had sent a letter to Little explaining that he had advised Appellants not to attend their depositions. Again, clearly it is not appropriate to submit an affidavit containing false information. However, Appellants did not disclose facts in their complaint demonstrating that this allegedly false statement was made to deprive them of their due process rights.

Finally, Appellants claimed that Appellees had an ex parte communication with the trial court which resulted in the trial court filing an amended judgment entry increasing the judgment amount from $ 25,000 to $ 300,000. Taking the allegations in the complaint as true, an ex parte communication with the trial court is completely inappropriate and could possibly subject the attorney to disciplinary action, if proven. Nonetheless, even if this ex parte communication occurred, the complaint does not state facts supporting that it was conducted for any purpose other than furthering the interests of Appellees' client.

Assuming arguendo [*10] Appellants properly pled deprivation of due process as an ulterior purpose, their abuse of process claim still would not survive a motion to dismiss. [HN5] In reviewing several abuse of process cases, we found that the ulterior purpose or motive has been interpreted as an attempt to gain an advantage outside the proceeding, such as payment of money or surrender of a claim, using the process itself as the threat. *Robb*, 75 Ohio St. 3d at 271 (abusing process to coerce members of a yachting club to vote in their favor). See, also, ***Blank v. Secrux, Inc.*** (1997), 123 Ohio App. 3d 248, 255, 704 N.E.2d 21 (abusing process to coerce payment of a settlement regardless of merit); *Thompson*, 1997 Ohio App. LEXIS 2677, *37 (abusing criminal process to coerce adjustment of private civil claims); ***Chain v. Internatl City Bank and Trust Co.*** (E.D. La.1971), 333 F. Supp. 463, 466 (listing typical ulterior purposes as extortion of money, prevention of a conveyance, compelling someone to give up possession of something of value, when these things were not the purpose of the suit).

In contrast, Appellants in the present case claim that Appellees [*11] perverted the process in order to deprive them of their due process rights. Appellants rely on ***Pheils v. Garber-Lawrence Pub. Group, Inc.***, 1993 Ohio App. LEXIS 5914 (Dec. 10, 1993), Lucas App. No. L-92-418, unreported, to argue that deprivation of due process rights has been recognized as an ulterior purpose in an abuse of process claim. The case appealed in *Pheils* was the fifth in a line of lawsuits brought by David Pheils or someone in privity with him to enforce a settlement agreement against the Garbers. *Pheils*, 1993 Ohio App. LEXIS 5914, *9. In the latest case, service by publication was utilized because the Pheils claimed that they could not with due diligence locate a current address for the Garbers. When the Garbers did not file an answer, default judgment was entered against them. After learning of the default judgment, the Garbers successfully had it vacated, and filed an answer and several counterclaims, including a claim for abuse of process. ***Id.*** at pp. 6-7. Following motions for summary judgment from every party, the trial court granted all filed by the Pheils, particularly granting judgment in their favor on the abuse of process claim. ***Id.*** at p.7.

The court of appeals in *Pheils* [*12] reversed summary judgment on the abuse of process claim, finding there were genuine issues of material fact regarding the elements of the tort, including the ulterior purpose. ***Id.*** at p.14. More specifically, the court found the possible ulte-

rior purposes for using service by publication on the basis of known inaccurate information were to prevent the Garbers from learning of and defending the case, or harassment. *Id.*

On the other hand, in ***Grange Mut. Cas. Co. v. Klatt***, 1997 Ohio App. LEXIS 1125 (Mar. 18, 1997), Franklin App. No. 96APE07-888, unreported, the court found no abuse of process with similar facts. The plaintiffs in *Klatt* issued service through the Secretary of State with the alleged ulterior purpose of prohibiting appellees from learning of and defending the action. The *Klatt* court found this fell short of an abuse of process claim because the service was not completed in an attempt to gain a collateral benefit outside of the process, but instead was an improper use of the rules to gain an objective contemplated by the process, i.e. succeeding in the lawsuit. *Klatt*, 1997 Ohio App. LEXIS 1125, *13.

We agree with this reasoning of the *Klatt* court. In the present case, Appellants [*13] claim that Appellees presumably issued a subpoena instead of notice to appear for a deposition, filed an allegedly false affidavit, and conducted an ex parte communication with the court, all with the ulterior purpose of depriving Appellants of their right to due process. Like the allegations in *Klatt*, we believe this falls short of the ulterior motive necessary for an abuse of process claim, because it was not an attempt to gain a collateral benefit outside of the process. Instead, Appellees were acting to advance the interests of their client and succeed in the lawsuit.

Because Appellees are attorneys, [HN6] in order to sustain an abuse of process claim against them, Appellants needed to allege facts demonstrating Appellees acted maliciously and for an ulterior purpose completely separate from their client's interest. *Thompson*, 1997 Ohio App. LEXIS 2677, *29-30. Instead, they only made bare allegations in their complaint that these acts were done with the ulterior purpose of depriving them of their due process rights. See, ***Nosker, supra***. As we stated previously, bare, conclusory allegations are insufficient to survive a motion to dismiss. ***State ex rel. Fain v. Summit Cty. Adult Prob. Dept.*** (1995), 71 Ohio St. 3d 658, 659, 646 N.E.2d 1113. [*14] Further, all improper acts allegedly committed by Appellees would also logically advance the best interests of their client.

Based on the foregoing, we agree with the trial court that Appellants did not sufficiently plead an ulterior purpose to support their abuse of process claim. The first issue for review is therefore overruled.

Second issue presented for review: In Ohio, does an attorney owe a duty to an opposing party to refrain from maliciously initiating and participating in ex parte communications the direct result of which is the raising of a judgment by 1200% without notice and to refrain from engaging in other malicious conduct such as filing false documents and concealment of important procedural issues?

Appellants attempt to argue that "as attorneys licensed to practice in the State of Ohio," Appellees owed duties to Appellants not to commit the acts alleged in the first issue for review. We agree with the trial court there is no basis in law for these "duties." Instead, [HN7] attorneys only owe a duty to third persons arising from their performance as attorneys if the third person is in privity with the attorneys' client or if the attorneys act maliciously. ***Scholler, supra***, [*15] at paragraph one of syllabus. Appellants made no allegations in their complaint that they were in privity with Appellees' client, but instead alleged that Appellees "maliciously breached the aforementioned duties."

Even though Appellants used the word "maliciously" under this cause of action in the complaint, this is not sufficient in itself to withstand a motion to dismiss. Because Appellees do not have a duty to begin with, they cannot "maliciously breach" nonexistent duties. Furthermore, Appellants draw an unsupported conclusion that the attorneys acted "maliciously," which is also insufficient to survive a motion to dismiss. See ***Shell, supra***.

Because no duty existed for Appellees to have breached against Appellants, their second issue for review is overruled.

Third issue presented for review: Do the facts alleged in Plaintiff's complaint state any claim upon which relief may be granted or have Plaintiffs simply suffered a maliciously inflicted injury for which the Courts recognize no remedy?

Appellants do not present any new arguments in their third issue for review that were not already addressed in the prior two issues. However, in answer to the question posed by [*16] Appellants, their appropriate remedy would have been a timely appeal to the Loyalty Transfer case.

Based on the foregoing, we find the trial court did not err in granting Appellees' motion to dismiss. Accordingly, Appellants' sole assignment of error is overruled. Judgment affirmed.

WOLFF, P. J., and YOUNG, J., concur.