

IN THE SUPREME COURT OF OHIO

JULIE LEROY, *et al.*

Appellants/Cross-Appellees,

v.

ALLEN YURASEK & MERKLIN, *et al.*

Appellees/Cross-Appellants.

Consolidated Cases  
No. 05-1593 and 05-1926

On appeal from the Union  
County Court of Appeals,  
Third Appellate District  
Court of Appeals Case No. 14-04-09

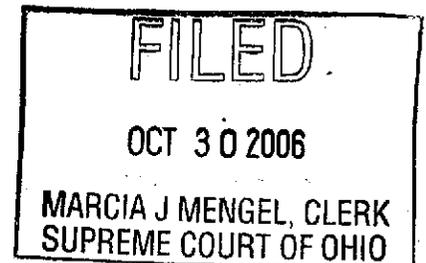
SUPPLEMENT TO THE BRIEFS OF  
APPELLEES/CROSS-APPELLANTS STEPHEN YURASEK, DAVID ALLEN,  
AND ALLEN YURASEK & MERKLIN

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLP  
Charles E. Ticknor, III (0042559)  
(Counsel of Record)  
Thomas J. Bonasera (0021783)  
Paul Giorgianni (0064806)  
191 W. Nationwide Blvd.  
Columbus, OH 43215  
Phone: 614/221-8448; Fax: 614/221-8590

*Attorneys for Appellants/Cross-Appellants  
Julie Behrens LeRoy and Mary Behrens Miller*

PORTER WRIGHT MORRIS & ARTHUR, LLP  
Anthony R. McClure (0075977)  
(Counsel of Record)  
Joseph W. Ryan, Jr. (0023050)  
Huntington Center  
41 South High Street  
Columbus, OH 43215-6194  
Phone: 614/227-2126; Fax: 614/227-2100  
Email: amclure@porterwright.com  
jryan@porterwright.com

*Attorneys for Appellees/Cross-Appellants  
Allen Yurasek & Merklin, David Allen and  
Stephen Yurasek*

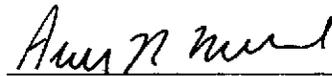


Pursuant to Rule VII of the Ohio Supreme Court Practice Rules, Appellees/Cross-Appellants Allen Yurasek & Merklin, David Allen and Stephen Yurasek submit this Supplement to the Briefs, containing those portions of the record necessary to enable this Court to determine the questions presented. This Supplement includes the index below.

**INDEX**

	<u>Page</u>
Complaint..... (December 24, 2002)	S-1

Respectfully submitted,



Joseph W. Ryan, Jr., Esq. (0023050)  
Anthony R. McClure (0075977)  
Porter Wright Morris & Arthur, L.L.P.  
41 South High Street  
Columbus, Ohio 43215  
(614) 227-2047

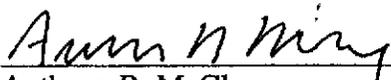
*Attorneys for Appellees/Cross-Appellants  
Stephen Yurasek, David Allen, and  
Allen Yurasek & Merklin*

**PROOF OF SERVICE**

I certify that a true and accurate copy of the foregoing Supplement to the Briefs has been served by ordinary United States mail, postage prepaid, on this 30<sup>th</sup> day of October, 2006, upon the following:

Thomas J. Bonasera  
Charles E. Ticknor, III  
Paul Giorgianni  
Buckingham, Doolittle & Burroughs, LLP  
191 W. Nationwide Blvd.  
Columbus, Ohio

*Attorneys for Appellants/Cross-Appellants  
Julie Behrens LeRoy and Mary Behrens Miller*

  
\_\_\_\_\_  
Anthony R. McClure

IN THE UNION COUNTY COURT OF COMMON PLEAS  
MARYSVILLE, OHIO

COURT OF COMMON PLEAS  
UNION COUNTY

2002 DEC 24 AM 11:58

*Shirley A. ...*  
CLERK

Case No: 2002 CV 0322

Julie Behrens LeRoy  
12577 Kings Pine Avenue  
San Diego, CA 92131, and

Mary Behrens Miller  
542 Surrey Lane  
Marysville, OH 43040,

Plaintiffs,

v.

Allen Yurasek & Merklin  
233 W. Fifth Street  
Marysville, OH 43040-0391,

David F. Allen  
622 West Ninth Street  
Marysville, OH 43040-1405, and

Stephen J. Yurasek  
15150 Wildwood Lane  
Marysville, OH 43040-8903,

Defendants.

Jury demand endorsed hereon

COURT OF APPEALS  
UNION COUNTY

2003 JUN 30 AM 11:58

*Shirley A. ...*  
CLERK

Julie Behrens LeRoy and Mary Behrens Miller ("Plaintiffs"), for their Complaint against Defendants Allen Yurasek & Merklin; David F. Allen; and Stephen J. Yurasek ("Defendants") state as follows:

Introduction

1. Upon information and belief, the individual Defendants are partners in the Defendant firm. This action arises from Defendants' provision of legal services to members of

the family of Mary Elizabeth Behrens ("Decedent") and the family's closely held corporation. Defendants' wrongful conduct included purporting to represent multiple adverse parties with respect to the same transaction; failing to learn of and effectuate Decedent's wishes with respect to disposition of her shares in the corporation; failing to exercise the knowledge, skill and ability ordinarily possessed and exercised by members of the bar; and failing to be ordinarily and reasonably diligent, careful, and prudent in discharging their duties.

### Background Facts

2. Plaintiff Julie Behrens Leroy, Plaintiff Mary Behrens Miller, and Dan Behrens are the three surviving children of Decedent, who died May 1, 2002.

3. Dan Behrens is currently the Executor of Decedent's estate.

4. A motion to remove Dan Behrens as Executor is pending in the Union County Common Pleas Court, Probate Division.

5. Kevin Behrens is the son of Dan Behrens and the grandson of Decedent.

6. Decedent had been the matriarch of the Behrens family and the largest shareholder in Marysville Newspapers, Inc. ("the Corporation").

7. The Corporation is an Ohio corporation for profit incorporated on December 30, 1950.

8. The Corporation publishes the Marysville *Journal-Tribune* and Richwood *Gazette*, and is a one-fourth owner of Premier Printing, Inc., which prints six newspapers in Union, Delaware, Hardin, Wyandot, and Logan counties.

9. The Corporation is a closely held corporation within the ambit of *Crosby v. Beam* (1989), 47 Ohio St.3d 105, and its progeny.

10. As of October 2001, the Corporation was jointly owned by Decedent and her three surviving children. The distribution of shares was as follows:

Decedent	63 shares
Dan	30
Julie	30
Mary	<u>20</u>
Total	143 shares

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 the Corporation 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 the Corporation.

19. Defendants prepared the documents by which Dan and Kevin effectuated the transfer of all of Decedent's Corporation stock to Kevin, and in doing so simultaneously acted as counsel for Decedent, Dan, Kevin, and the Corporation.

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.

21. The November 2001 Will is not the last will and testament of Decedent, because Decedent lacked testamentary capacity.

22. Defendants failed to competently and reasonably advise Decedent with respect to the November 2001 Will.

23. Defendants failed to competently and reasonably advise Decedent with respect to the transfer of all of Decedent's Corporation stock to Kevin and the subsequent release of the security interest.

24. Neither Dan, Kevin, nor any of the Defendants advised Plaintiffs of the existence of the November 2001 Will until after Decedent died.

25. Neither Dan, Kevin, nor any of the Defendants advised Plaintiffs of the December 27, 2001 transaction until after Decedent died.

26. All paragraphs of this Complaint are hereby incorporated into all other paragraphs and counts of this Complaint

**Count 1: Legal Malpractice (Negligence)**

27. Defendants, once retained as counsel, owed a common-law duty to Decedent and to Plaintiffs to provide legal services in a reasonable and competent manner, and unimpeded by conflicts of interest.

28. Defendants breached that duty by the aforementioned conduct.
29. As a result of said breach of duty, Decedent and Plaintiffs were injured.
30. The legal malpractice claims asserted in this Complaint are not barred by the holding in *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74.
31. The legal malpractice claims asserted in this Complaint do not fall within the general rule set forth in *Simon v. Zipperstein*.
32. To the extent that the legal malpractice claims asserted in this Complaint fall within the general rule set forth in *Simon v. Zipperstein*, those claims also fall within the exception to that general rule, which is also set forth in *Simon v. Zipperstein*, because special circumstances exist that would justify departure from the general rule were it otherwise applicable.
33. Said special circumstances include but are not limited to the following:
- (a) Defendants represented multiple adverse parties with respect to the November 2001 Will – namely, Decedent, the Corporation, Dan, and Kevin. Thus, Defendants' liability *arises from* their conflicts of interest. *Simon v. Zipperstein* is inapplicable because the public policy underlying the general rule of *Simon v. Zipperstein* is to avoid putting lawyers in a position of potential conflict with respect to the interests of their estate planning clients and the estate beneficiaries. Because Defendants in fact took on this multiple representation, Defendants are not entitled to the protection of the general rule set forth in *Simon v. Zipperstein*.
  - (b) Defendants represented multiple adverse parties with respect to the transfer of Corporation shares from Decedent to Kevin – namely, Decedent, the Corporation, Dan, and Kevin. Thus, Defendants' liability *arises from* their conflicts of interest. *Simon v. Zipperstein* is inapplicable because the public policy underlying the general rule of *Simon v. Zipperstein* is to avoid putting lawyers in a position of potential conflict with respect to the interests of their estate planning clients and the estate beneficiaries. Because Defendants in fact took on this multiple representation, Defendants are not entitled to the protection of the general rule set forth in *Simon v. Zipperstein*.
  - (c) At the time of the transfer of Corporation shares from Decedent to Kevin, as well as at the time of the making of the November Will, Defendants

represented Dan in his personal capacity. Dan is a co-beneficiary with Plaintiffs under the November 2001 Will and Decedent's previous Will. *Simon v. Zipperstein* is inapplicable because the public policy underlying the general rule of *Simon v. Zipperstein* is to avoid putting lawyers in a position of potential conflict with respect to the interests of their estate planning clients and the estate beneficiaries. Because Defendants in fact took on representation of both Decedent and one of the beneficiaries of Decedent's estate, Defendants are not entitled to the protection of the general rule set forth in *Simon v. Zipperstein* with respect to claims asserted by the other beneficiaries of the estate.

- (d) At the time of the transfer of Corporation shares from Decedent to Kevin, as well as at the time of the making of the November Will, Defendants represented Dan in his personal capacity, yet Dan was also the attorney in fact for Decedent.
- (e) Decedent, as majority shareholder of the Corporation, a close corporation, owed a fiduciary duty of the utmost good faith and loyalty to Plaintiffs.
- (f) Defendants committed the aforementioned acts in bad faith, either knowing or presumptively with knowledge of their conflicts of interest.
- (g) Defendants committed some or all of the aforementioned acts in collusion with Dan and Kevin.
- (h) To the extent that the legal malpractice claims asserted in this Complaint fall within the general rule and outside the exception set forth in *Simon v. Zipperstein*, the foregoing facts establish a good faith basis for modifications or reversal of *Simon v. Zipperstein*.

34. To the extent that the legal malpractice claims asserted in this Complaint fall within the general rule and outside the exception set forth in *Simon v. Zipperstein*, the foregoing facts establish a good faith basis for modification or reversal of *Simon v. Zipperstein*.

#### **Count 2: Legal Malpractice (Breach of Contract)**

35. Defendants had a contract with Decedent to provide legal services with respect to Decedent's estate planning.

36. Plaintiffs were third-party beneficiaries of said contract.

37. Defendants breached that contract by the aforementioned tortious conduct.

38. As a result of said breach of contract, Decedent and Plaintiffs were injured.

WHEREFORE, Plaintiffs demand judgment against Defendants jointly and severally as

follows:

- A. compensatory damages in excess of \$25,000;
- B. punitive damages in excess of \$25,000;
- C. an award of fees and expenses, including attorneys' fees and expenses incurred by Plaintiffs in prosecuting this Complaint;
- D. pre-judgment and post-judgment interest; and
- E. court costs and such other relief to which Plaintiffs may be entitled.

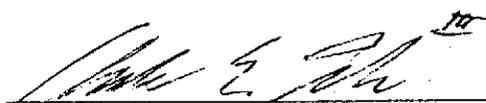
**Jury Demand**

Plaintiffs request trial by jury as to all issues so triable.

COURT OF COMMON PLEAS  
CLERK  
2002 DEC 24 AM 11:12

Respectfully submitted,

**THOMPSON HINE LLP**



Thomas J. Bonasera (0021783)  
Charles E. Ticknor, III (0042559)  
Paul Giorgianni (0064806)  
10 West Broad Street, 7th Floor  
Columbus, OH 43215-3435  
Phone: (614) 469-3200; Fax: (614) 469-3361  
www.ThompsonHine.com  
*Attorneys for Julie Behrens LeRoy  
and Mary Behrens Miller*