

IN THE SUPREME COURT OF OHIO

JULIE LEROY, <i>et al.</i>	:	
	:	Consolidated Cases
Plaintiffs/Cross-Appellees,	:	No. 05-1593 and 05-1926
	:	
v.	:	On appeal from the Union
	:	County Court of Appeals,
ALLEN YURASEK & MERKLIN, <i>et al.</i> ,	:	Third Appellate District,
	:	Court of Appeals Case No. 14-04-49
Defendants/Cross-Appellants.	:	

MERIT BRIEF OF PLAINTIFFS/CROSS-APPELLEES
JULIE LEROY AND MARY MILLER

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 Plaintiffs/Cross-Appellees

PORTER WRIGHT MORRIS & ARTHUR LLP
Anthony R. McClure (0075977)
(Counsel of record)
Joseph W. Ryan, Jr. (0023050)
Huntington Center
41 South High Street
Columbus, Ohio 43215-6194
Phone: 614/227-2126
Fax: 614/227-2100

Attorneys for Defendants/Cross-Appellants

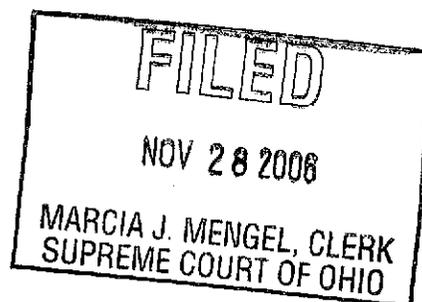


TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
STATEMENT OF FACTS	5
I. Decedent was the family matriarch.	5
II. Defendants, while purporting to represent Decedent, conspired in the creation of an invalid will that disinherited Plaintiffs.	6
III. Defendants, while purporting to represent Decedent, conspired to transfer all of Decedent’s stock to Kevin.	6
ARGUMENT	8
I. Standard of review.	8
II. Summary: Plaintiffs’ Complaint states a claim upon which relief can be granted.	9
III. Defendants’ collusion, bad faith, malice, and Plaintiffs’ privity – taken together – justify departure from the general rule of attorney immunity.	11
A. Defendants colluded with Dan and Kevin.	11
1. Plaintiffs’ Complaint describes Defendants’ collusion with particularity.	11
2. The Court should reject Defendants’ Proposition of Law No. 2	12
a. Proposition of Law No. 2 is moot.	12
b. Malice may be averred generally.	13
c. Not all collusion is necessarily fraud.	14
d. Plaintiffs’ Complaint avers malice.	14

e. The Complaint notifies Defendants of the nature of the case.	17
B. Defendants acted in bad faith.	17
C. The “privity” issue.	19
1. The Court need not address the “privity” issue and Defendants’ Proposition of Law No. 1.	19
2. Plaintiffs were in privity with Decedent regarding Decedent’s ownership of the majority share of the Corporation’s stock.	19
3. The Court should reject Defendants’ Proposition of Law No. 1.	21
a. Proposition of Law No. 1 is unnecessary because the facts of this appeal plainly fall within the <i>Simon v. Zipperstein</i> “special circumstances” exception.	21
b. Plaintiffs and Decedent had mutual interests regarding Decedent’s ownership of the majority of the Corporation’s stock.	22
c. The court of appeals’ decision does not expand the holding of <i>Crosby</i>	25
d. The court of appeals’ decision does not expand the holding of <i>Arpadi</i>	28
IV. The sound public policy behind <i>Simon v. Zipperstein</i> dictates that Defendants not be immune under these circumstances.	30
V. If Plaintiffs’ claims are barred by <i>Simon v. Zipperstein</i> , the Court should modify <i>Simon v. Zipperstein</i> to bring the egregious facts of this case within the “special circumstances” exception.	32
CONCLUSION	33
CERTIFICATE OF SERVICE	34

TABLE OF AUTHORITIES

Cases

<i>American Express Travel Related Services Co. v. Mandilakis</i> (1996), 111 Ohio App.3d 160, 165	24
<i>Arpadi v. First MSP Corp.</i> (1994), 68 Ohio St.3d 453.....	20, 28, 29, 30
<i>Aschinger v. Columbus Showcase Co.</i> (C.A.6 1991), 934 F.2d 1402, 1413	27
<i>Connely v. McColloch</i> , (Wyo. 2004), 83 P.3d 457, ¶23	32
<i>Crosby v. Beam</i> (1989), 47 Ohio St.3d 105.....	5, 19, 25, 26, 27, 28, 30
<i>Dutton v. Dutton</i> (1998), 127 Ohio App.3d 348, 353.....	14
<i>Dykes v. Gayton</i> (2000), 139 Ohio App.3d 395	33
<i>Dykes v. Gayton</i> (2000), 90 Ohio St.3d 1442	33
<i>Elam v. Hyatt Legal Serv.</i> (1989), 44 Ohio St.3d 175	28
<i>Firestone v. Galbreath</i> (C.A.6 1992), 976 F.2d 279	15
<i>Gotthardt v. Candle</i> (1999), 131 Ohio App.3d 831, 835.....	18
<i>Hahn v. Satullo</i> , 156 Ohio App.3d 412, 2004-Ohio-1057, ¶ 67.....	14, 24
<i>Hile v. Firmin, Sprague & Huffman Co., L.P.A.</i> (1991), 71 Ohio App.3d 838.....	25
<i>Kenty v. Transamerica Premium Ins. Co.</i> (1995), 72 Ohio St.3d 415, 418	8, 16
<i>Kimble Mixer Co. v. Hall</i> , 5th Dist., 2005-Ohio-794	16
<i>Lashua v. Lakeside Title & Escrow Agency</i> , 5th Dist., 2005-Ohio-1728, ¶ 48.....	14, 16
<i>Luciani v. Schiavone</i> (S.D. Ohio Jan. 2, 2001), No. C-1-97-272, 2001 U.S. Dist. LEXIS 25918, *19-20.....	15
<i>Macke Laundry Serv. Ltd. Partnership v. Jetz Serv. Co.</i> (Mo.Ct.App. 1996), 931 S.W.2d 166, 175	14
<i>McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.</i> , 4th Dist., 2002-Ohio-6170, ¶¶ 55-63	24

O'Brien v. University Community Tenants Union (1975), 42 Ohio St.2d 242..... 8

Sayyah v. Cutrell (2001), 143 Ohio App.3d 102, 113 20, 23

Simon v. Zipperstein (1987), 32 Ohio St.3d 74 *passim*

Swiss Reinsurance America Corp. v. Roetzel & Andress (2005),
163 Ohio App.3d 336, ¶¶ 26-28 24

Thompson v. Karr (C.A.6 1999), 182 F.3d 918 (unpublished table decision),
full text of opinion at 1999 U.S. App. LEXIS 16846..... 29, 30

Vector Research, Inc. v. Howard & Howard Attorneys P.C. (C.A.6 1996),
76 F.3d 692, 700 13, 16

Wolfe v. Little (Apr. 27, 2001), Montgomery App. No. 18718,
2001 Ohio App. LEXIS 1902 12

York v. Ohio State Highway Patrol (1991), 60 Ohio St.3d 143, 144 13

Rules and Other Authorities

Civ.R. 8(A) 16

Civ.R. 9(B) 13, 14

Civ.R. 12(B)(6)..... 1, 2, 3, 10, 32

Civ.R. 56..... 23

Fed.R.Civ.P. 9(b)..... 13

INTRODUCTION

Simon v. Zipperstein (1987), 32 Ohio St.3d 74, provides Ohio attorneys immunity from liability to non-clients, except when “special circumstances” justify departure from that general rule. Such special circumstances may include the attorney acting in collusion with others, the attorney acting in bad faith or with malice, or the plaintiff being in privity with the attorney’s client. Plaintiffs’ Complaint states a claim upon which relief can be granted because it expressly pleads, in great detail, Defendants’ collusion, bad faith, and malice, and Plaintiffs’ privity with Defendants’ client. The attorney-immunity rule of *Simon v. Zipperstein* plainly does not apply to the facts in this appeal. The Court should affirm the court of appeals judgment, which reinstated Plaintiffs’ Complaint following an erroneous Civ.R. 12(B)(6) dismissal.

From a public policy perspective, the question facing this Court is a simple one: Should the law immunize or discourage the attorney conduct described in the Complaint? The answer is obvious. This case arises from Defendants’ legal services to members of the family of Mary Elizabeth Behrens (“Decedent”). Decedent was mentally incompetent and on her death bed. Defendants, while purporting to act as her attorneys, conspired with two of their other clients to effect a purported change of Decedent’s will, and then an outright transfer of most of Decedent’s wealth to one of the co-conspirator clients, for almost no value. The transfer was of her majority share in the family business. Plaintiffs/Cross-Appellees Julie LeRoy and Mary Miller are Decedent’s daughters, and were beneficiaries of Decedent’s Estate under both the former will and the purported new will, and shareholders in the family corporation. As a result of Defendants’ conduct, Plaintiffs did not receive the portion of Decedent’s wealth that Decedent intended. Instead, the Decedent’s entire majority stake in the corporation – and thus most of her wealth – went to Decedent’s son Dan (the only other shareholder) and his son Kevin (one of Decedent’s seven

grandchildren). In addition to representing Decedent for estate-planning purposes, Defendants were corporate counsel for the business *and* represented Kevin in the fraudulent, end-of-life, *inter-vivos* transfer of all of Decedent's shares in the business to Kevin. All this occurred when Decedent was mentally incompetent.

This appeal is from a Civ.R. 12(B)(6) dismissal. If the extraordinary facts of this appeal do not fall within the *Simon v. Zipperstein* "special circumstances" exception, then it is unlikely that any allegations short of outright theft ever will. The Court should affirm the court of appeals' reinstatement of Plaintiffs' Complaint.

STATEMENT OF THE CASE

Decedent died May 1, 2002. Decedent's son Dan Behrens was appointed executor.

Decedent's daughters, Plaintiffs Julie and Mary, filed their Complaint on December 24, 2002 (Union County Court of Common Pleas Case No. 02-CV-0327).

On January 24, 2003, Defendants served a Civ.R. 12(B)(6) motion to dismiss.

On April 15, 2003, Plaintiffs filed a substantially similar complaint, this time on behalf of Decedent's Estate (Case No. 03-CV-0127). Plaintiffs filed a complaint on behalf of Decedent's Estate because executor Dan Behrens – Defendants' co-conspirator – refused to do so.

On May 14, 2003, Defendants served a Civ.R. 12(B)(6) motion to dismiss the second case (No. '127).

On May 20, 2003, the court of common pleas dismissed both Complaints. Plaintiffs appealed, but the court of appeals ruled that the May 20th dismissal was not a final appealable order.

On December 6, 2004, the court of common pleas filed a judgment entry, again dismissing Plaintiffs' Complaint. The second case (No. '127) remained pending, but it was voluntarily dismissed without prejudice on December 7, 2004, terminating the court of common pleas proceedings.

On July 11, 2005, the court of appeals reversed, in *LeRoy v. Allen Yurasek & Merklin*, 3rd Dist., 2005-Ohio-3516.

On August 25, 2005, the court of appeals granted Plaintiffs' motion for reconsideration and vacated that opinion. Four days later, on August 29, the court re-issued the opinion and judgment entry, having made only one change, deleting footnote 1 in the opinion, as Plaintiffs

had requested. *LeRoy v. Allen Yurasek & Merklin*, 3rd Dist., 162 Ohio App.3d 155, 2005-Ohio-4452.

On August 25, 2005, Plaintiffs, unaware that the court of appeals that day would vacate its first opinion, filed a notice of appeal to this Court, which was given Case No. 05-1593. That appeal was mooted by the court of appeals' August 29th re-issued opinion and entry.

On October 13, 2005, Defendants filed their notice of appeal, which was given Case No. 05-1926.

This Court accepted the appeals for review and consolidated them. 108 Ohio St.3d 1411, 2006-Ohio-179; 108 Ohio St.3d 1435, 2006-Ohio-421.

STATEMENT OF FACTS

Because this case was decided upon a Civ.R. 12(B)(6) motion to dismiss, the facts set forth in the Complaint, plus all reasonable inferences therefrom, are presumed to be true.

I. Decedent was the family matriarch.

Julie LeRoy, Mary Miller, and Dan Behrens are the three surviving children of Decedent Mary Elizabeth Behrens, who died May 1, 2002. (Complaint ¶ 2.) Kevin Behrens is the son of Dan Behrens and the grandson of Decedent. (Complaint ¶ 5.) Defendants are the law firm of Allen Yurasek & Merklin, and firm attorneys David F. Allen and Stephen J. Yurasek. At the time the Complaint was filed, Dan was the Executor of Decedent's estate.¹ (Complaint ¶ 3.)

Decedent was the matriarch of the Behrens family and the largest shareholder in Marysville Newspapers, Inc. ("the Corporation"). (Complaint ¶ 6.) The Corporation publishes the Marysville *Journal-Tribune* and Richwood *Gazette*, and was a one-fourth owner of Premier Printing, Inc., which printed six newspapers in Union, Delaware, Hardin, Wyandot, and Logan counties. (Complaint ¶ 8.) The Corporation was and is a closely held corporation within the ambit of *Crosby v. Beam* (1989), 47 Ohio St.3d 105, and its progeny. (Complaint ¶ 9.)

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

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

(Complaint ¶ 10.)

¹ The court of common pleas probate division (Judge Rapp of Hardin County, sitting by assignment) removed Dan as executor on March 4, 2003 and appointed an independent administrator w.w.a. on May 2, 2003.

As of November 2001, Decedent was under the care of others 24 hours a day due to numerous physical ailments and dementia. (Complaint ¶ 11.) Also as of November 2001 and until Decedent's death, Dan Behrens was Decedent's attorney in fact. (Complaint ¶ 12.)

II. Defendants, while purporting to represent Decedent, conspired in the creation of an invalid will that disinherited Plaintiffs.

Prior to November 2001, Decedent had a will, under which Plaintiffs and Dan would each receive roughly an equal share of Decedent's majority share of the Corporation's stock (Complaint ¶¶ 13, 33(c)) – which would give Julie and Mary, together, the majority of shares and control of the Corporation. In November 2001, with Decedent incapacitated and on her deathbed, Dan orchestrated the execution of a purported new will ("November 2001 Will"), which would provide Dan with the majority of shares. 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, and because Decedent lacked testamentary capacity. (Complaint ¶¶ 20-21.)

Defendant David Allen purported to represent Decedent in the preparation of the November 2001 Will, while simultaneously acting as counsel for Dan, Kevin, and the Corporation. (Complaint ¶ 14, 18.) Defendants failed to competently and reasonably advise Decedent with respect to the November 2001 Will. (Complaint ¶ 22.)

III. Defendants, while purporting to represent Decedent, conspired to transfer all of Decedent's stock to Kevin.

Dan apparently had second thoughts about whether the November 2001 Will was the best means of his taking control of the Corporation. On December 27, 2001, Dan and his son Kevin orchestrated the immediate transfer of all of Decedent's stock in the Corporation to Kevin. (Complaint ¶ 15.) Dan, despite being the attorney in fact for Decedent (the ostensible seller),

advised his son Kevin (the ostensible buyer) regarding the transfer and personally set the price. (Complaint ¶ 16.) The transfer price of \$567,000 was grossly inadequate. Kevin, in his early 20s and relatively poor, gave Decedent only a promissory note and a security interest in the shares. But several months later, Dan, Kevin, and Defendants orchestrated the release of that security for other than fair value. (Complaint ¶ 17.) Thus Kevin became the majority shareholder of the Corporation in exchange for nothing but a promise to pay, and his creditor would soon be dead, to be replaced by his father, who would be the estate executor and was his co-conspirator.

Defendants conspired in this malfeasance. 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. (Complaint ¶ 19.) Defendants failed to competently and reasonably advise Decedent with respect to the transfer of Decedent's stock to Kevin and the subsequent release of the security interest. (Complaint ¶ 23.) Indeed, Defendants knowingly participated in these illicit schemes.

Defendants, Dan, and Kevin kept their conspiratorial acts secret from Plaintiffs, who were Decedent's only other children, were the only other shareholders of the Corporation, and were directors of the Corporation. It was only after Decedent died four months later that Plaintiffs learned of the November 2001 Will and the transfer of shares to Kevin. (Complaint ¶¶ 24-25.)

ARGUMENT

I. Standard of review.

This Court, like the lower courts, must accept as true all of the facts set forth in the Complaint and all of the reasonable inferences to be drawn therefrom:

A motion to dismiss can be granted only where the party opposing the motion is unable to prove any set of facts which would entitle him to the relief requested. When reviewing a complaint under this standard, the factual allegations contained in the complaint are taken as true. When reviewing a case on a motion to dismiss, the reviewing court must construe all material allegations in the complaint and all reasonable inferences drawn therefrom in favor of the nonmoving party.

Kenty v. Transamerica Premium Ins. Co. (1995), 72 Ohio St.3d 415, 418 (citations omitted). A motion to dismiss can be sustained only if it is “beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.” *O’Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, syllabus.

Defendants pay lip service to these propositions (Defendants’ Brief, 21) but ask the Court to make assumptions *contrary* to the Complaint.

Defendants mischaracterize the stock transfer to Kevin as a routine “mother’s sale to her grandson” (Defendants’ Brief, 12) – a mischaracterization that assumes there was no incompetency, no undue influence, no multiple representation, and no malpractice. The facts in this appeal are: (1) Decedent was incompetent (Complaint ¶¶ 11, 21); (2) the stock transfer was the result of undue influence (Complaint ¶¶ 11-23, 33); (3) Defendants knowingly undertook a conflict-laden multiple representation for an illicit purpose (Complaint ¶ 33 and *passim*); and (4) Defendants committed malpractice (Complaint ¶¶ 22, 23, and *passim*).

Defendants mischaracterize their conduct as “good-faith representation of Decedent.” (Defendants’ Brief, 25.) The facts in this appeal are that Defendants acted in bad faith and mali-

ciously, purporting to represent Decedent, but in fact taking almost all her wealth and giving it to their favored clients, Dan and Kevin. (Complaint ¶ 33(g) and *passim*.)

Defendants fault the Complaint for being “void of any allegations that [Plaintiffs] entered into [Defendants’] calculations in any way when they effectuated Decedent’s private stock transfer.” (Defendants’ Brief, 28.) The truth is that Defendants were the long-time counsel for the Corporation; knew all of the Behrens family, including Plaintiffs; knew Plaintiffs were the only other shareholders and were directors of the Corporation; and knowingly failed to effectuate Decedent’s wishes that Plaintiffs be the testamentary beneficiaries of her shares in the Corporation.

The Ohio State Bar Association’s *amicus* brief makes the same mistake – incorporating only Defendants’ incomplete statement of facts, and ignoring the facts that reflect poorly on Defendants. (The OSBA does *not* ask this Court to reverse the court of appeals’ judgment. The OSBA only asks this Court to reject the court of appeals’ “privity” analysis.)

This Court, like the court of common pleas, must accept as true all the facts in the Complaint plus all reasonable inferences drawn therefrom. Defendants, in bad faith and with the malicious ulterior motive of serving the interests of Dan and Kevin, purported to represent the interests of the incompetent Decedent but instead colluded with Dan and Kevin to give Decedent’s controlling interest in the Corporation to Kevin. Defendants did all this with perfect knowledge of the facts, including Plaintiffs’ status as the only other children and shareholders, and all while serving as counsel to the Corporation.

II. Summary: Plaintiffs’ Complaint states a claim upon which relief can be granted.

Defendants do not argue (nor could they) that the Complaint fails to state a claim for legal malpractice *per se*. Rather, Defendants’ Motion to Dismiss rises or falls depending upon a single question: whether Plaintiffs have standing to sue Defendants for their misconduct. Under

a plain reading of *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, Plaintiffs' Complaint pleads "special circumstances" justifying departure from the general rule of attorney immunity. Plaintiffs thus have standing.

The general rule of attorney immunity is that attorneys are immune from liability to non-clients: "[A]n attorney may not be held liable by third parties as a result of having performed services on behalf of a client" *Id.* at 76. The immunity rule does not apply when there are "special circumstances" justifying departure from that general rule. Such special circumstances include: (1) the attorney colluded with someone; (2) the attorney acted in bad faith or with malice; and (3) the plaintiff was in privity with the client:

[A]n 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. [¶] 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.

In this appeal, any one of the following such special circumstances justifies departure from the general rule: (1) Defendants colluded with Dan and Kevin; (2) Defendants acted in bad faith and maliciously; and (3) Plaintiffs, as the only other shareholders in the closely-held Corporation, were in privity with Decedent regarding her ownership of the majority share of the Corporation's stock. Thus, Plaintiffs' Complaint states a claim upon which relief can be granted. The court of appeals correctly reinstated Plaintiffs' Complaint following the trial court's Civ.R. 12(B)(6) dismissal. This Court should affirm.

III. Defendants' collusion, bad faith, malice, and Plaintiffs' privity – taken together – justify departure from the general rule of attorney immunity.

A. Defendants colluded with Dan and Kevin.

1. Plaintiffs' Complaint describes Defendants' collusion with particularity.

Defendants wrongly contend that Plaintiffs' Complaint fails to specify Defendants' collusion: "[Plaintiffs'] pleading amounts to nothing more than an unsupported legal conclusion." (Defendants' Brief, 24.)

That contention is patently false. The entire Complaint paints the picture of Defendants' collusion with Dan and Kevin. Here are the central facts:

- As of November 2001, Decedent was under the care of others 24 hours a day due to numerous physical ailments and dementia (Complaint ¶ 11), thus rendering her susceptible to the influence and control of her attorneys at law (Defendants) and her attorney in fact (Dan).
- Dan was Decedent's attorney in fact. (Complaint ¶ 12.)
- Dan orchestrated the execution of the November 2001 Will. (Complaint ¶ 14.)
- Dan and Kevin orchestrated the stock transfer to Kevin for less than fair consideration. (Complaint ¶¶ 15-17.)
- Dan, despite being the attorney in fact for Decedent, advised Kevin with respect to the transfer. (Complaint ¶ 16.)
- Defendants, with full knowledge of all the facts, simultaneously purported to represent Decedent, Dan, Kevin, and the Corporation in these matters. (Complaint ¶ 18-19.)
- Defendants acted in collusion with Dan and Kevin. (Complaint ¶ 33(g).)

Plaintiffs' Complaint describes Defendants' collusion with their preferred clients, Dan and Kevin, who controlled the Corporation (another of Defendants' clients) against their other client, Decedent. Defendants' ulterior motive while purporting to serve Decedent was to serve Dan and

Kevin. Short of describing the specific conversations they had, it is unclear what allegations would satisfy Defendants' unstated definition of "collusion."

Defendants' reliance on *Wolfe v. Little* (Apr. 27, 2001), Montgomery App. No. 18718, 2001 Ohio App. LEXIS 1902 (Defendants' Brief, 23-24), is misplaced. In *Wolfe*, the defendant-attorneys were merely "acting to advance the interests of their client and succeed in the lawsuit." *Id.* at *13. Here, in contrast, Defendants acted to advance the interests of *other* clients (Dan and Kevin) while purporting to advance the interests of Decedent.

This appeal does *not* present the typical multiple-representation conflict of interest. In the typical multiple-representation conflict of interest, the law firm at least *tries* to maintain an ethical screen between its attorneys who are representing adverse clients. Here, Defendants, with full knowledge of all the facts, knowingly chose to take direction from clients Dan and Kevin, contrary to the interests of their incompetent client, Decedent. *In the context of professional misconduct, no collusion could be more egregious.*

Plaintiffs' Complaint sets forth the type of circumstances that this Court in *Simon v. Zipperstein* must have had in mind when the Court said that collusive, bad-faith, or malicious attorney conduct would not be protected by the general rule of attorney immunity. When lawyers behave like this, the law should not protect them at all, much less with an immunity that kills a lawsuit at the pleading stage.

2. The Court should reject Defendants' Proposition of Law No. 2.

a. Proposition of Law No. 2 is moot.

Plaintiffs' Complaint describes Defendants' collusion with particularity. Therefore, this Court need not address Defendants' Proposition of Law No. 2 (Defendants' Brief, 21-28), which

asks this Court to rewrite Civ.R. 9(B) to add “collusion” as an allegation that must be pled with particularity. Proposition of Law No. 2 is moot.

b. Malice may be averred generally.

As for the substance of Proposition of Law No. 2, Defendants’ first argument for why collusion should be subject to the heightened Civ.R. 9(B) pleading standard is that all “collusion” is “malicious conduct” (Defendants’ Brief, 23-24). Even assuming that all collusion is malicious conduct, Defendants’ argument does not mean that Plaintiffs’ Complaint fails to state a claim. Indeed, Defendants’ argument is self-defeating. Civ.R. 9(B) expressly provides that malice need *not* be averred with particularity: “Malice . . . may be averred generally.” Civ.R. 9(B).

The plain meaning of the analogous federal Rule 9(b)² was correctly applied in *Vector Research, Inc. v. Howard & Howard Attorneys P.C.* (C.A.6 1996), 76 F.3d 692, 700. The court of appeals reversed the trial court’s Rule 12 dismissal of non-clients’ claims against an attorney:

Under Federal Rule of Civil Procedure 9(b), malice “may be averred generally.” This is so because malice, like the other mental conditions which may be averred generally under Rule 9(b), is difficult to demonstrate at the pleading stage of litigation. Moreover, under Rule 8(a)(2), a claim need only be “a short and plain statement . . . showing that the pleader is entitled to relief.” An attempted demonstration of malice in a complaint would, in all likelihood, be neither short nor plain. [¶] The liberal federal pleading rules are directly on point, and those rules enable a plaintiff (as was done here) to allege malice coupled with tortious acts and survive a motion to dismiss.

The Civil Rules thus require *the same or less* specificity for pleading malice than for other accusations – not more specificity as Defendants argue.

² The state and federal rules are the same. “[T]he standard for granting a [Civ.R. 12(B)(6)] motion to dismiss is in accord with the notice pleading regimen set up by the Federal Rules of Civil Procedure and incorporated into the Ohio Rules of Civil Procedure.” *York v. Ohio State Highway Patrol* (1991), 60 Ohio St.3d 143, 144.

c. Not all collusion is necessarily fraud.

Defendants' second argument for why collusion should be subject to the heightened Civ.R. 9(B) pleading standard is that all "collusion" is "fraud" (Defendants' Brief, 25-27). The falsity of that proposition is established by the same authorities Defendants cite to support it.

Defendants cite Black's Law Dictionary, as quoted by *Dutton v. Dutton* (1998), 127 Ohio App.3d 348, 353 (Defendants' Brief, 25-26). But that quote includes alternative, non-fraud definitions that reflect the facts of this case: "An agreement between two or more persons . . . to obtain an object forbidden by law. It implies . . . lawful means for the accomplishment of an unlawful purpose." In *Dutton* there was no collusion and no fraud, and the adequacy of the pleading was not an issue.

Defendants rely on *Macke Laundry Serv. Ltd. Partnership v. Jetz Serv. Co.* (Mo.Ct.App. 1996), 931 S.W.2d 166, 175, for the proposition that "collusion" is "fraud," which must be pled with specificity. Defendants are wrong for two reasons. First, *Macke* espouses the same alternative, non-fraud definition of "collusion" as Black's Law Dictionary: "The term 'collusion' requires fraud *or* an 'illegal purpose . . .'" *Id.* at 179, n. 6 (emphasis added). Second, in *Macke* there was no collusion, no fraud, and no attorney malpractice.

d. Plaintiffs' Complaint avers malice.

"Malice . . . may be averred generally." Civ.R. 9(B). A complaint need not even use the word "malice." A complaint adequately pleads malice if it "allege[s] facts . . . from which the essential element of malice may be *inferred*." *Lashua v. Lakeside Title & Escrow Agency*, 5th Dist., 2005-Ohio-1728, ¶ 48 (emphasis added).

An attorney acts maliciously "when he acts with an ulterior motive separate and apart from his client's interests." *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, ¶ 67.

Whether malice exists is a factual determination to be made on a case-by-case basis, and generally not by dispositive motion. For example, in *Luciani v. Schiavone* (S.D. Ohio Jan. 2, 2001), No. C-1-97-272, 2001 U.S. Dist. LEXIS 25918, *19-20 – which Defendants cite with approval (Defendants’ Brief, 23) – the court overruled the defendant-attorneys’ motion for summary judgment, because the “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.”

In this appeal, Defendants’ malice is established in two ways. First, Defendants concede the point by arguing that all collusion is malicious conduct (Defendants’ Brief, 23-24). Second, it is a reasonable inference from the Complaint that Defendants “acted with an ulterior motive separate and apart from [Decedent’s] interests” – namely: (1) serving the interests of their other clients, Dan and Kevin; and (2) serving their own interest of keeping the Corporation – the leading newspaper publisher in the county – as a client.

Defendants fault Plaintiffs’ Complaint for not expressly stating that the alleged malice was “directed at [Plaintiffs].” (Defendants’ Brief, 27-28.) Defendants’ argument is wrong for two reasons.

First, Defendants fail to cite any law for the extraordinary proposition that a plaintiff fails to state a claim unless her pleading expressly states that the wrongful conduct was directed at her. The two authorities Defendants cite do not support their argument. In *Firestone v. Galbreath* (C.A.6 1992), 976 F.2d 279, the court upheld dismissal of an attorney-malpractice claim because the Complaint did not mention the plaintiffs at all, except for one passing mention. *Id.* at 287 n. 6. Here, in contrast, Plaintiffs are key figures in their Complaint: they are two of the three surviving children (Complaint, ¶ 2); they are two of the three shareholders of the Corpora-

tion (¶ 10); and, despite being directors and the only other shareholders, were kept in the dark by Defendants – their Corporate counsel – regarding the stock transfer until after Decedent’s death (¶¶ 24-25). The other case on which Defendants rely, *Kimble Mixer Co. v. Hall*, 5th Dist., 2005-Ohio-794, was an appeal from a trial verdict. The adequacy of the pleading was not an issue. To whom the alleged malice was directed was not an issue. The trial court merely stated that the attorney had not acted maliciously toward the plaintiffs, and the court of appeals affirmed. *Id.* at ¶ 87.

Defendants’ argument that the Complaint fails to state a claim because it does not state that the alleged malice was “directed at [Plaintiffs]” is wrong for a second reason: It relies on a non-existent, hyper-technical pleading rule more at home in medieval England than in the modern, notice-pleading regime of the Ohio Rules of Civil Procedure. Plaintiffs were required only to set forth “a short and plain statement of the claim.” Civ.R. 8(A); *Vector Research*, 76 F.3d at 700. Plaintiffs are entitled not only to a presumption of truth as to their allegations but also a presumption of truth as to all reasonable inferences drawn therefrom. *Kenty*, 72 Ohio St.3d at 418; *Lashua*, 2005-Ohio-1728, at ¶ 48. Defendants knew all the facts, including the fact that their conduct would disinherit Plaintiffs – which is why Defendants kept the conspiracy secret from Plaintiffs even though Plaintiffs were the only other shareholders and were directors, and Defendants were their corporate counsel. As a result of Defendants’ conduct, Decedent’s wishes were not followed; Plaintiffs lost a substantial portion of the bequests Decedent intended for them; Plaintiffs were squeezed out of their positions as directors and ultimately owners of the Corporation; and Plaintiffs endured painful and expensive intra-family litigation in the probate court.

Plaintiffs’ Complaint adequately pleads malice.

e. The Complaint notifies Defendants of the nature of the case.

Defendants do not even argue – nor could they – that Plaintiffs’ Complaint fails to advise them of the nature of this case. Their attack on the specificity of the Complaint is a ruse. The Court should reject Defendants’ Proposition of Law No. 2.

B. Defendants acted in bad faith.

Defendants characterize their conduct as “good-faith representation of Decedent.” (Defendants’ Brief, 25.) The Complaint says otherwise, alleging that “Defendants committed the aforementioned acts in bad faith, either knowing or presumptively with knowledge of their conflicts of interest.” (Complaint ¶ 33(f).) Defendants’ bad faith is further specified as follows:

- As of November 2001, Decedent was under the care of others 24 hours a day due to numerous physical ailments and dementia. (Complaint ¶ 11.)
- As of November 2001 and until Decedent’s death, Dan Behrens was Decedent’s attorney in fact. (Complaint ¶ 12.)
- Defendant Mr. Allen represented Decedent in the preparation of the November 2001 Will. (Complaint ¶ 14.)
- 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. (Complaint ¶ 18.)
- 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. (Complaint ¶ 19.)
- 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, and because Decedent lacked testamentary capacity. (Complaint ¶¶ 20-21.)
- Defendants failed to competently and reasonably advise Decedent with respect to the November 2001 Will. (Complaint ¶ 22.)

- Defendants also 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. (Complaint ¶ 23.)

Defendants conspired with Decedent's attorney in fact (Dan)³ to deprive Decedent (and ultimately Plaintiffs) of her majority share of the Corporation. And when Dan was appointed executor of Decedent's Estate, Dan hired Defendants as the Estate's counsel, and they refused to sue Defendants on behalf of the Estate. Under the control of Dan and Defendants, Decedent lost all her stock in the family business for nothing more than an unsecured promissory note from a recent college graduate dependent on his father for employment. The corruption behind the transfer of stock to Kevin is also proved by the fact that this *inter vivos* transfer created a massive capital gain tax liability for Decedent, which would not have existed had the shares passed upon her imminent death.

Reasonable inferences from the Complaint are (1) that Defendants knowingly pursued the conflicting multiple representations and pursued Dan and Kevin's wishes, rather than Decedent's wishes, because Defendants wanted to please Dan and Kevin and keep the high-profile and influential Corporation as a client; and (2) Defendants knowingly pursued the multiple conflicting representations knowing that Decedent was incompetent and unable to defend herself from the conspiracy. Defendants acted in bad faith.

³ At the time of the making of the November 2001 Will, at the time of the December 2001 transfer of Decedent's stock to Kevin (Dan's son), and at the time of the release of Decedent's security interest in about February 2002, Dan was the attorney in fact for Decedent. When a fiduciary relationship exists and the fiduciary is benefited by his conduct, there is suspicion that the transaction resulted from undue influence, and a presumption of undue influence arises. The burden of proof is on the fiduciary to show that there was no undue influence. *Gotthardt v. Candle* (1999), 131 Ohio App.3d 831, 835. Thus, there is a legal presumption that Dan, conspiring with his son Kevin and with the Defendants, exerted undue influence over Decedent.

C. The “privity” issue.

1. The Court need not address the “privity” issue and Defendants’ Proposition of Law No. 1.

Defendants’ collusion, bad faith, and malice together (if not each separately) constitute “special circumstances” justifying departure from the general rule of attorney immunity. Thus, the Court need not address the “privity” issue, which is the subject of Defendants’ Proposition of Law No. 1. (Defendants’ Brief, 5-21.)

2. Plaintiffs were in privity with Decedent regarding Decedent’s ownership of the majority of the Corporation’s stock.

The privity between Decedent and Plaintiffs regarding Decedent’s ownership of the majority of the Corporation’s stock arises from their being minority shareholders of the Corporation, a closely held corporation within the ambit of *Crosby v. Beam* (1989), 47 Ohio St.3d 105, and its progeny. (Complaint ¶ 9.) The only four shareholders of the Corporation were Decedent; Plaintiffs; and Dan, Defendants’ co-conspirator. (Complaint ¶ 10.)

Shareholders in a close corporation owe each other a fiduciary duty of the utmost good faith and loyalty. In *Crosby*, the Court stated:

Generally, majority shareholders have a fiduciary duty to minority shareholders. Courts in sister states and Ohio appellate courts have found a heightened fiduciary duty between majority and minority shareholders in a close corporation. This duty is similar to the duty that partners owe one another in a partnership because of the fundamental resemblance between the close corporation and a partnership. . . . [T]he standard of a duty [is] of the utmost good faith and loyalty.

Id. at 108 (citations, footnote, and quotation marks omitted).

Persons owing each other a fiduciary duty are in privity with each other regarding matters to which the fiduciary duty relates:

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 ex-

tends to those in privity therewith regarding matters to which the fiduciary duty relates.

Arpadi v. First MSP Corp. (1994), 68 Ohio St.3d 453, paragraph three of the syllabus. *Accord Sayyah v. Cutrell* (2001), 143 Ohio App.3d 102, 113 (holding that there was a genuine issue of material fact as to whether the plaintiff members of incorporated association were in privity with the association so as to allow the plaintiffs' claims of legal malpractice against the association's attorney).

In *Arpadi*, this Court held unanimously that because the limited partners in a partnership are in privity with the general partners, limited partners may sue the general partners' attorney for malpractice. *Arpadi*, 68 Ohio St.3d at 458. Similarly, because minority shareholders in a close corporation are in privity with the majority shareholder, minority shareholders may sue the majority shareholder's attorney "regarding matters to which the fiduciary duty relates" – namely, misappropriation of the majority shareholder's stock.

In this case, Defendants' misconduct was as closely related to Decedent's fiduciary duty as it could possibly be: Defendants' misconduct affected the Decedent's majority ownership – the source of her fiduciary duty. Moreover, this effect was not incidental. All of Defendants' misconduct was motivated by a desire to change that majority ownership.

Because Plaintiffs were in privity with Defendants' client (Decedent) "regarding a matter to which Decedent's fiduciary duty relates" – her ownership of the majority of the Corporation – Defendants' misconduct changing the majority ownership is not immunized by *Simon v. Zipperstein*. These "special circumstances" are rendered more "special" and egregious by the facts that (1) Defendants knew that their other co-conspiring client (Dan) was Decedent's attorney in fact and owed his own fiduciary duty to Decedent; (2) Defendants knew that Dan was the only other shareholder and the president and a director of the Corporation, thereby owing his own fiduciary

duty to Plaintiffs; and (3) Defendants were counsel for the Corporation and intentionally kept the scheme secret from Plaintiffs, who were directors and the only other shareholders.

3. The Court should reject Defendants' Proposition of Law No. 1.

- a. Proposition of Law No. 1 is unnecessary because the facts of this appeal plainly fall within the *Simon v. Zipperstein* "special circumstances" exception.**

Generally, Defendants' Proposition of Law No. 1 will reflect the correct application of *Simon v. Zipperstein*. But not under the extraordinary circumstances of this appeal.

Defendants so struggle to avoid the egregious facts of this appeal that they confounded themselves into drafting a proposition of law that does not even say what they really mean. Defendants' Proposition of Law No. 1 is: "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." Surely, Defendants do not mean to espouse the proposition that *under no possible set of circumstances* can a third-party minority shareholder ever sue the majority shareholder's personal attorney in legal malpractice for his role in effecting the majority shareholder's private or testamentary transfer of stock. In most cases, *Simon v. Zipperstein* already bars fellow shareholders and partners from contesting the estate planning services of their deceased colleagues' attorneys. But in this case, under the *Simon v. Zipperstein* exception, Plaintiffs state a claim against the defendant attorney, not *merely* because Plaintiffs were minority shareholders but also because:

- the attorneys' misconduct was aimed at changing, and did change, the majority ownership of the corporation;
- the attorneys were also the attorneys for the corporation;
- the attorneys conspired with the only other shareholder;
- the transaction changing the majority ownership was not supported by anything approaching adequate consideration;

- the client-transferor was mentally incompetent and physically incapacitated; and
- the plaintiff shareholders were disinherited of the majority shareholders' shares by a sham will.

Whatever Defendants mean by their Proposition of Law No. 1, it is an unnecessary proposition of law because the facts of this appeal plainly fall within the *Simon v. Zipperstein* "special circumstances" exception. Attorneys for close corporations and close corporations' majority shareholders owe no duty to minority shareholders, unless the attorney conspires with another shareholder to commit illicit acts to obtain the majority shareholder's stock. That is what happened in this case.

It is only by ignoring the facts that Defendants muster the nerve to mischaracterize the court of appeals' opinion as "[holding] that "all minority shareholders always have standing to sue the majority shareholder's attorney for malpractice for whatever reason" (Defendants' Brief, 11.) The truth is that the court of appeals' opinion stands for the following proposition, which this Court should adopt, if it feels the need to adopt one at all:

A finding of privity between majority and minority shareholders of a close corporation regarding the majority shareholder's ownership of the corporation's stock may in appropriate circumstances justify departure from the general rule of attorney immunity from third-party claims. [*Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, applied.]

b. Plaintiffs and Decedent had mutual interests regarding Decedent's ownership of the majority of the Corporation's stock.

Defendants contend that there was no privity because Plaintiffs and Decedent did not share a mutuality of interest. (Defendants' Brief, 8-11.)

Plaintiffs shared with their mother two mutual interests regarding her ownership of the majority of the Corporation's stock.

First, Plaintiffs, being two of the three other shareholders, shared an interest in who owned the majority stake and who controlled the Corporation. Defendants conspired with their other clients, Dan and Kevin, to assure that Dan (the only other shareholder) and his son Kevin owned a majority stake and controlled the Corporation after Decedent died. These facts alone establish privity; Defendants' conduct is only more egregious because they also purported to represent the Corporation itself.

Second, Plaintiffs, as beneficiaries under all of their mother's wills, shared an interest in the preservation of her assets. Decedent was incompetent and on her death bed. Dan and Kevin, with Defendants help, took the stock from her and replaced it with an unsecured promissory note of little value. Decedent's (and later her estate's) wealth was further depleted by the fact that the death-bed transfer of stock to Kevin created a massive capital-gain tax liability for Decedent, which would not have existed had the shares passed upon her death. This intentionally injurious "estate-planning" by Defendants only confirms that they were doing the bidding of Dan and Kevin, not Decedent.

Defendants cite six cases as if those cases suggest that Plaintiffs did not have any mutual interest with Plaintiff. (Defendants' Brief, 8-10). In each of those six cases, however, there was no mutuality of interest, and the facts are so different from this case that those cases do not in any way denigrate the conclusion that Plaintiffs had a mutuality of interest with Decedent regarding her majority ownership of the Corporation's stock.

In *Sayyah v. Cutrell* (2001), 143 Ohio App.3d 102, 111-114, the trial court granted summary judgment to the defendant lawyer. The court of appeals reversed on the ground that there was a genuine issue as to whether the plaintiffs were in privity with the lawyer's client. The court of appeals did so even though the plaintiffs to that point had failed to identify their "mutu-

ality of interest” with the lawyer’s client. If the *Sayyah* plaintiffs survived a Civ.R. 56 motion for summary judgment, Plaintiffs’ Complaint in this case survives Defendants’ Civ.R. 12 motion to dismiss.

In *Swiss Reinsurance America Corp. v. Roetzel & Andress* (2005), 163 Ohio App.3d 336, ¶¶ 26-28, the court correctly ruled that there was no privity between an insurance company and its insured. The court so ruled because in that particular case (unlike most insurance-defense cases) the interests of the insurance company and the insured diverged – indeed, in relevant part they were diametrically opposed, with the insured threatening the insurance company with a bad-faith claim for refusing to settle the insured’s case.

In *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, ¶ 63-65, the plaintiffs sued their law firm for malpractice, then sued a second law firm, the firm who represented the first law firm, alleging that an act performed by the second law firm in the course of representing the first law firm constituted tortious invasion of privacy. There was no mutuality of interest: the plaintiffs and their former law firm (the client of the defendant/second law firm) were litigation adversaries at the time of the alleged invasion of privacy.

In *McGuire v. Draper, Hollenbaugh & Briscoe Co., L.P.A.*, 4th Dist., 2002-Ohio-6170, ¶¶ 55-63, the facts were the same as those in *Hahn*, except that the plaintiffs’ claims against the second law firm were for malpractice, conversion, and spoliation of evidence. Here, too, there was no mutuality of interest: the plaintiffs and their former law firm (the client of the defendant/second law firm) were litigation adversaries at the time of the allegedly tortious conduct, and their interests “could not be more diverse.” *Id.* at ¶ 63.

In *American Express Travel Related Services Co. v. Mandilakis* (1996), 111 Ohio App.3d 160, 165, the plaintiffs sued a lawyer whose client had embezzled \$2.6 million from them. The

plaintiffs alleged that the lawyer owed them a duty to disclose the embezzlement. There was no mutuality of interest: the defendants' client had stolen money from the plaintiffs and therefore had diametrically opposed interests.

In *Hile v. Firmin, Sprague & Huffman Co., L.P.A.* (1991), 71 Ohio App.3d 838, former directors of a liquidated corporation sued the corporation's attorneys, alleging that the attorneys owed the directors a duty to advise them that certain action by the corporation could result in the directors being personally liable for the corporation's sales taxes. The court ruled that there was no privity, because "[t]he attorneys did not act negligently in their relationship with the corporation." *Id.* at 842. In other words, the attorneys gave sound advice to the corporation, and the directors, having a differing interest from the corporation in the matter, were not in privity.

c. The court of appeals' decision does not expand the holding of *Crosby*.

Defendants mischaracterize the court of appeals' opinion as:

- "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;" and
- "[holding] that "all minority shareholders always have standing to sue the majority shareholder's attorney for malpractice for whatever reason"

(Defendants' Brief, 11.) Defendants reiterate this argument at pages 18 to 20 of their brief, expressing it in terms of whether Decedent's majority share of the Corporation's stock is a "matter to which her fiduciary duty to Plaintiffs relates."

As explained above, the court of appeals' opinion stands only for the proposition that a finding of privity between majority and minority shareholders of a close corporation regarding the majority shareholder's ownership may in appropriate circumstances justify departure from the general rule of attorney immunity.

Defendants' mischaracterize the nature of the asset as "purely incidental" (Defendants' Brief, 20) – as if the privity analysis should be the same if the asset were Decedent's car instead of her majority stake in the closely-held Corporation. *Amicus* the OSBA makes the same mistake, saying: "The fact that one asset was stock in the same corporation in which Appellants held stock was fortuitous." (OSBA Brief, 12.) Defendants grasp at straws arguing that the disposition of a majority of shares in a multi-million-dollar, four-shareholder corporation "does not implicate 'corporate interests.'" (Defendants' Brief, 12.)

No matter could possibly be more related to a majority shareholder's fiduciary duty to minority shareholders than the source of that duty – the majority shareholder's stock ownership. Moreover, Decedent's stock was *the only reason* Defendants, Dan, and Kevin rigged Decedent's November 2001 Will and the stock transfer to Kevin. The stock (which was Decedent's only significant asset other than her house) constituted the majority ownership of a multi-million-dollar family business, of which (1) Dan was the CEO; (2) Kevin was an employee and Dan's heir apparent; (3) Plaintiffs were directors; (4) Plaintiffs were the only other shareholders; and (5) Defendants were corporate counsel. The fact that the asset at issue was Decedent's majority ownership of the Corporation's stock is not "purely incidental" – it is *the only reason* Defendants did what they did.

Defendants contend that "unlike the instant case, . . . *Crosby* . . . was concerned that a majority shareholder not misuse his power in promoting his personal interests at the expense of corporate interests. [T]here is no such concern in this case." (Defendants' Brief, 12 (quotation marks omitted).)⁴ Defendants reiterate this argument at pages 18-20 of their brief, correctly not-

⁴ In this part of their brief, Defendants cite *Aschinger v. Columbus Showcase Co.* (C.A.6 1991), 934 F.2d 1402, 1413. *Aschinger* has nothing to do with this case. The *Aschinger* court noted that *Crosby* was distinguishable because *Crosby* was about a majority shareholder's fiduciary

ing that Plaintiffs “do not claim that Decedent utilized her majority control in the corporation.” (Defendants’ Brief, 19.)

Defendants’ argument misses the point. Plaintiffs are not suing Decedent or her estate. Decedent was a victim, not a wrongdoer. Contrary to Defendants’ contention (Defendants’ Brief, 20-21), this case has nothing to do with a majority shareholder breaching a fiduciary duty and does not represent a “new cause of action” in Ohio law. This case is about attorneys hijacking their client’s majority stockholding.

Decedent owned the majority of the Corporation’s shares. The only way the conspirators could get control of the Corporation was to illicitly obtain Decedent’s stock. And by doing so, the conspirators inflicted Plaintiffs’ injury: loss of the bequests Decedent intended for them, and loss of their directorships. Plaintiffs were harmed by this conspiracy just as surely as if the majority shareholder herself had breached her fiduciary duty by squeezing them out of the Corporation. This is precisely the type of situation where justice invokes the *Simon v. Zipperstein* privity exception – all the more so because Defendants were counsel for all sides to these illicit transactions: Decedent, Dan, Kevin, and the Corporation itself.

duty to a minority shareholder, while “[i]n the present case, the relationship between plaintiff and defendant was *not* that of a minority and a majority shareholder.” *Id.* at 1413 (emphasis added).

The other *Aschinger*-related error in Defendants’ Brief concerns the statement in *Aschinger* that “such a reading of *Crosby* is far too broad.” *Id.* The court was referring to the plaintiffs’ argument “that under *Crosby*, each shareholder [whether majority or minority] of a close corporation owes a heightened fiduciary duty to the other.” *Id.* Defendants’ Brief erroneously states that the court was referring to the proposition that “the majority stockholder [owes] a fiduciary duty to . . . minority stockholders.” (Defendants’ Brief, 12.) That is indeed what *Crosby* and *Aschinger* say.

No matter could be more related to a majority shareholder's fiduciary duty to minority shareholders than majority ownership of the corporation's stock – the source of the fiduciary duty. Thus, the court of appeals' decision does not expand the holding of *Crosby*.

d. The court of appeals' decision does not expand the holding of *Arpadi*.

Defendants wrongly contend that “the reasoning of *Arpadi* is applicable solely to . . . partnerships.” (Defendants' Brief, 13.) Neither the syllabus nor the body of the opinion support Defendants' contention. In both places, the Court referred to “fiduciary duty” generally, not solely the fiduciary duty between partners:

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, 68 Ohio St.3d 453, paragraph three of the syllabus & 458. That Defendants' contention is wrong is further demonstrated by the fact that the *Arpadi* Court relied on *Elam v. Hyatt Legal Serv.* (1989), 44 Ohio St.3d 175, which addressed not a partnership but a decedent's estate. *See Arpadi*, 68 Ohio St.3d at 457-458.

Defendants wrongly characterize *Arpadi* as implicitly limiting its holding to partnerships, based on *Arpadi*'s citation of EC 5-18. (Defendants' Brief, 16-17). EC 5-18 states that an attorney for a corporation owes allegiance to the entity and not to a stockholder. The *Arpadi* Court said that EC 5-18 was irrelevant: “The duty owed by the attorney for a partnership to the limited partners thereof must be determined not by reference to EC 5-18 but to the prior decisional law of this court.” *Id.* at 457. The Court then summarized *Scholler*, *Simon v. Zipperstein*, and *Elam*. Thus, the *Arpadi* Court did not distinguish corporations and limit its “privity” holding to partner-

ships. The Court said EC 5-18 was irrelevant and held generally that “a fiduciary duty” could be the basis for privity.

In *Arpadi*, the fiduciary duty happened to arise between partners; in this case, the fiduciary duty happens to arise between majority and minority shareholders in a close corporation. The court of appeals did not expand the holding of *Arpadi*. The court of appeals merely relied on *Arpadi* in its “privity” analysis before applying *Simon v. Zipperstein*.

Defendants’ reliance on *Thompson v. Karr* (C.A.6 1999), 182 F.3d 918 (unpublished table decision), full text of opinion at 1999 U.S. App. LEXIS 16846, is misplaced for four reasons.

First, *Thompson* did not so much decide the question before it as it did punt it: “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.” *Id.* at *27. The one judge on the panel who *did* opine said that “the case for applying the rule of *Arpadi* in this context is strong.” *Id.* at *34 (Moore, J., dissenting).

Second, the facts of *Thompson* do not implicate any public policy warranting an exception to attorney immunity – neither a bright-line rule nor on the facts of the case. In *Thompson*, the plaintiff sued the attorney regarding his work structuring a stock sale from the attorney’s client (the majority shareholder) to the trust of which the plaintiff was trustee. Thus, the plaintiff/trustee was adverse to the attorney’s client in the transaction. Moreover, the plaintiff/trustee had full knowledge of the circumstances as the defendant/attorney was doing his work, including knowledge of the defendant/attorney’s role in the transaction. The defendant/attorney was the long-time attorney for the majority shareholder and the corporation; the plaintiff/trustee was a vice president of the corporation and the son of the majority shareholder. Here, in contrast,

Plaintiffs played no role in the transactions; part of Defendants' conspiracy was keeping the transactions secret from Plaintiffs; and the transactions were illicit in their very concept.

Third, the court in *Thompson*, *id.* at *27, n. 7, failed to appreciate the irrelevance of EC 5-18 (discussed above). The court in *Thompson* cavalierly ignored *Crosby* by saying that “[t]ax status . . . is essentially the only respect in which partnerships and S-corporations are similar under the law.” *Id.* at 26.

Fourth, Defendants cite the district court opinion in *Thompson* for the proposition that *Arpadi* distinguished between “duty of due care” and “fiduciary duty.” There is no such distinction, as the court of appeals dissenter noted. *Id.* at *34 (Moore, J., dissenting). And in this case, whether one characterizes Defendants' duty as “fiduciary” or “due care,” Defendants breached it.

IV. The sound public policy behind *Simon v. Zipperstein* dictates that Defendants not be immune under these circumstances.

This Court in *Simon v. Zipperstein* must have recognized that it would be unwise to create a categorical rule immunizing attorney malfeasance like this. The public policy underlying the attorney-immunity rule of *Simon v. Zipperstein* is that the law should protect attorneys from *unwanted* potential conflicts when representing estate-planning clients:

The rationale for this posture [the general rule of immunity] 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. . . . Some immunity from being sued by third persons must be afforded an attorney so that he may properly represent his client. *To 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.

Simon v. Zipperstein, 32 Ohio St.3d at 76 (citations, quotation marks, and ellipsis omitted) (emphasis added). In this case, Defendants *knowingly* and *voluntarily* took on conflicting representations, and did so to intentionally do wrong. These facts do not implicate the public policy ra-

tionale for attorney immunity. The public policy underlying the attorney-immunity rule of *Simon v. Zipperstein* is to protect against unintended and unwanted conflicts of interest – not to protect lawyers who create their own conflicts of interest by colluding with one set of clients against another client (much less so when they are intentionally doing wrong to an incompetent client).

Ohio law should discourage, not protect, conduct such as the conduct Defendants engaged in while purporting to represent every faction of the Behrens family and business. Ohio law *does* discourage such conduct: Defendants' conduct falls *outside* of the scope of conduct immunized by the general rule of *Simon v. Zipperstein*.

Another special circumstance in this case that was not true in *Simon v. Zipperstein* is that in this case Decedent did not nominate any of the Defendants to be the executor of the Estate. In *Simon v. Zipperstein*, the testator nominated his attorney – the attorney who drafted the will – to be executor, and the attorney was duly appointed. *Simon v. Zipperstein*, 32 Ohio St.3d at 75. It was that attorney whom the estate beneficiary sued for malpractice. Because the general rule is that only the executor can bring claims on behalf of an estate, one might infer from the testator's nomination of the attorney who drafted his will that the testator was disinclined (if not expressly waiving) any malpractice claim he might have against the attorney relating to the will. In this case, in contrast, no such inference can be made, because Decedent did not nominate any of the Defendants to be her executor.

The genius of *Simon v. Zipperstein* is that it leaves to the trial courts, for determination on a case-by-case basis, when an attorney's mischief justifies departure from the general rule of attorney immunity. Protecting the public from attorney wrongdoing is too important a mission for this Court to create a bright-line rule that would immunize the attorney mischief in this case.

This appeal is from a Civ.R. 12(B)(6) dismissal, not a summary judgment or trial judgment. If it is “beyond doubt” from the egregious circumstances described in Plaintiffs’ Complaint that Plaintiffs “can prove no set of facts entitling them to recovery” under *Simon v. Zipperstein*, then it is unlikely that any set of facts short of outright theft will ever fall within the *Simon v. Zipperstein* exception. If the Court deprives Plaintiffs of standing to sue Defendants, it is unlikely that any beneficiary will ever be able to state a claim for legal malpractice against a decedent’s estate-planning attorney in Ohio.

V. If Plaintiffs’ claims are barred by *Simon v. Zipperstein*, the Court should modify *Simon v. Zipperstein* to bring the egregious facts of this case within the “special circumstances” exception.

The egregious facts of this case distinguish it from *Simon v. Zipperstein*. This case presents a litany of “special circumstances” that render the attorney-immunity rule inapplicable. But if this Court disagrees with that proposition, then the Court should modify *Simon v. Zipperstein* to the extent necessary to allow Plaintiffs’ claims to be heard.

There is no reason to think that this Court in *Simon v. Zipperstein* wanted to immunize a law firm that voluntarily took on the kind of conflicting representations that Defendants did in this case. Moreover, with *Simon v. Zipperstein*, Ohio is “part of a thinning minority” of jurisdictions that virtually categorically bar intended beneficiaries from suing attorneys for their malpractice. *Connely v. McColloch*, (Wyo. 2004), 83 P.3d 457, ¶23. The *Connely* court’s nationwide review found that “[o]nly New York, Texas, Ohio, and Nebraska continue to hold there is no recovery for nonclients.” *Id.* at ¶22.

This Court once already granted jurisdiction to reconsider *Simon v. Zipperstein*. In *Dykes v. Gayton* (2000), 139 Ohio App.3d 395, the court of appeals, relying entirely on *Simon v. Zipperstein*, affirmed dismissal of a complaint filed by beneficiaries of a decedent’s estate against

the decedent's attorney. But the court said: "This case may indeed be appropriate for review by our state's highest court, and we would respectfully invite the same." *Id.* at 398. The Court agreed to hear the appeal, *Dykes v. Gayton* (2000), 90 Ohio St.3d 1442. The case was voluntarily dismissed, apparently pursuant to a settlement agreement, before any ruling by this Court. *See* 91 Ohio St.3d 1418 and 1466.

Plaintiffs' claims are not barred by *Simon v. Zipperstein*. But if they are, then it is time for this Court to modify *Simon v. Zipperstein* and hold:

Intended beneficiaries harmed by a lawyer's malpractice have a cause of action against lawyers who provided estate-planning services or conspired in intentionally causing harm to the client, estate, and intended beneficiaries, even though no attorney-client relationship existed. [*Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, modified.]

CONCLUSION

The Court should affirm the judgment of the Third District Court of Appeals and direct that this case be remanded to the Union County Court of Common Pleas for further proceedings.

Respectfully submitted,



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 Plaintiffs/Cross-Appellees
Julie LeRoy and Mary Miller

CERTIFICATE OF SERVICE

A copy of this document was served this 28th day of November 2006 by regular U.S. Mail, postage pre-paid, upon Anthony R. McClure, Porter Wright Morris & Arthur LLP, Huntington Center, 41 South High Street, Columbus, Ohio 43215-6194.

Paul Georgeant

362875