

IN THE SUPREME COURT OF OHIO

JULIE LEROY, *et al.*,

Plaintiffs-Cross Appellees,

v.

ALLEN YURASEK & MERKLIN, *et al.*,

Defendants-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 No. 14-04-49

BRIEF OF AMICUS CURIAE
OHIO ACADEMY OF TRIAL LAWYERS
IN SUPPORT OF PLAINTIFFS-CROSS APPELLEES

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Academy Trial Lawyers (hereinafter (“OATL”). OATL is comprised of approximately 1,715 attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* intervenes in this appeal on behalf of Plaintiff/Cross-Appellee, Julie Leroy. OATL urges this Court to carefully consider the issues presented herein. Unfortunately, attorneys do commit malpractice in the course of representing clients in estate planning matters. Typically, the impact is not felt until the client has passed away and the heirs realize that the attorneys’ neglect has deprived them of some or all of their inheritance. The current state of the law denies a recovery to many of the victims of these oversights and omissions simply because the survivors never maintained a direct relationship with the attorney. Estate planning attorneys are thus immunized to a large extent from liability for their mistakes, simply because the nature of their practice involves clients who cannot possibly discern that a claim exists while they remain alive. It would be hypocritical of the OATL to remain silent while countless estate beneficiaries are denied a remedy against a negligent attorney under such circumstances.

STATEMENT OF FACTS

Amicus curiae Ohio Academy of Trial Lawyers (“OATL”) adopts and incorporates herein by reference the Statement of Facts set forth in the Brief of Plaintiffs/Cross-Appellees Julie LeRoy and Mary Miller.

ARGUMENT

PROPOSITION OF LAW

Lawyers who are negligent in the course of estate planning are legally liable to third parties who were foreseeably damaged by that negligence. *Simon v. Zipperstein* (1981), 32 Ohio St. 3d 74, 512 N.E. 2d 636, modified and applied.

We take no position on the merits on the complicated minority-shareholder issues at bar. Nor do we take a position regarding the question whether the plaintiffs herein have alleged fraud, malice, or other circumstances which would justify permitting the case to go forward under existing law (except to say that, given the procedural posture of the case and the facts as described in Plaintiffs/Cross-Appellees' brief, we believe that they have). Instead, we limit our remarks to the argument that this Court should reconsider its holdings in *Simon v. Zipperstein* and *Scholler v. Scholler* so that appropriate third parties may prosecute actions for legal malpractice committed in the context of estate planning without establishing privity or fraud. Ohio is one of only four states which afford estate planning lawyers what amounts to near-complete immunity for their negligence, and the Ohio Academy of Trial Lawyers respectfully asserts that it is time for the doctrine of full-throated privity in legal malpractice cases to be dispatched to the reliquary.

Privity of contract was for many years the primary vehicle by which liability of contracting parties to persons outside the contractual relationship was defeated. Because relationships between professionals and their clients are themselves contractual, privity long occupied a paramount role in evaluating the circumstances under which a lawyer can be liable to a non-client. Privity as a bar to an attorney's liability to third parties for negligence first found voice in *National Savings Bank v. Ward* (1880), 100 U.S. 195, 25 L.Ed. 621, 10 Otto 195

(interpreting the law of the District of Columbia). The Court held that a bank which relied on a title opinion uttered by the lawyer for a landowner could not sue the lawyer for an opinion which, while erroneous, was not fraudulent or malicious.

Six Justices were in the majority. Chief Justice Morrison Waite of Ohio wrote for the three dissenters,

I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from his failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found.

Id., 100 U.S. at 207. While the dissent made occasional converts,¹ it was generally disregarded, such that, in cases of legal malpractice, strict privity (with a purported exception for fraud and malice) became the general rule. This Court, “emphasiz[ing] that [its] view . . . is shared by other jurisdictions,” joined what was probably, at the time, the main jurisprudential stream with its unsigned opinion in *Simon v. Zipperstein* (1987), 32 Ohio St. 3d 74, 76, 512 N.E.2d 636, 638 (*per curiam*).

In *Simon*, the Court held that absent “special circumstances such as fraud, bad faith, collusion or other malicious conduct,” a beneficiary could not sue his father’s lawyer for incorrectly drafting the father’s will to divert funds from the apparently-incompetent son to his stepmother. The Court referred to its prior holding in *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158 (syllabus) (Celebrezze, J.), which held as follows:

¹ *E.g. Flaherty v. Weinberg* (1985), 303 Md. 116, 492 A.2d 618. The Maryland Supreme Court acknowledged Chief Justice Waite’s foreseeability analysis in concluding that third-party legal malpractice claims are governed by third-party beneficiary principles.

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.

In *Zipperstein*, the Court “emphasize[d] that our view on the liability of attorneys to third-persons as a result of services performed in good faith on behalf of a client is shared by other jurisdictions.” 32 Ohio St.3d at 76, citing *Ward*, 100 U.S. 195, and decisions from New York, Illinois, North Carolina, Oregon, Nebraska, and Texas.

The opinion in *Zipperstein* was accompanied by a spirited dissent. *Id.* at 77 (Brown, J., dissenting). While Chief Justice Waite’s dissent is not mentioned, Justice Brown’s opinion is distinctly similar: He made clear the view that the guiding principle should be *foreseeability* and noted that privity does not bar third parties from suing physicians,² architects,³ manufacturers,⁴ and accountants,⁵ and disagreed with the majority that an attorney’s duty of undivided loyalty, or risks of conflict-of-interest, justified allowing lawyers to escape the consequences of negligence for which any non-lawyer could be held to answer. To the dissent’s no-privity litany, subsequent decisions have added, at least, appraisers,⁶ surveyors,⁷ and insurance agents.⁸

² *Id.*, citing *Shaweker v. Spinell* (1932), 125 Ohio St. 423, 181 N.E. 896.

³ *Id.*, citing *Kocisko v. Charles Shutrump & Sons Co.* (1986), 21 Ohio St. 3d 98, 101, 21 OBR 392, 394, 488 N.E. 2d 171, 174 (Wright, J., dissenting).

⁴ *Id.*, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 4 O.O. 3d 466, 364 N.E. 2d 267.

⁵ *Id.*, citing *Haddon View Investment Co. v. Coopers & Lybrand* (1982), 70 Ohio St. 2d 154, 24 O.O. 3d 268, 436 N.E. 2d 212.

⁶ *Perpetual Fed. Savings and Loan Ass'n v. Porter & Peck, Inc.* (1992), 80 Ohio App. 3d 569, 609 N.E.2d 1324.

⁷ *DeCapua v. Lambacher* (1995) 105 Ohio App. 3d 203, 663 N.E.2d 972.

⁸ *Merrill v. William E. Ward Ins.* (1993), 87 Ohio App. 3d 583, 622 N.E.2d 743.

Scholler and *Zipperstein* have combined to form an essentially-impermeable barrier to legal malpractice claims resulting from a lawyer's negligent will-drafting. In *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, the Court permitted limited partners to sue their general partner's attorney only because partners are in privity with each other, and in *Elam v. Hyatt Legal Services* (1989), 44 Ohio St. 3d 175, 541 N.E.2d 616, the Court held that where counsel for the executor negligently executed a transfer of real estate to the detriment of identified remaindermen, privity existed because the remaindermen's interest had vested.⁹

However (and, we daresay, correctly, given the clarity of the syllabus in *Scholler* and its application in *Zipperstein*), the lower Ohio courts have viewed themselves as firmly bound by the privity requirement, even as jurisdictions throughout the land have changed their approach to the problem of negligent will-drafting.¹⁰ The clearest example of this is *Dykes v. Gayton* (2000),

⁹ It appears, in fact, that the disappointed heir in *Zipperstein* also had a vested interest in his father's estate. In *Elam*, the Court noted this apparent anomaly: "We note without comment that, while the holding in *Zipperstein, supra*, was based largely on the fact that the person in question was only a potential beneficiary, a review of the facts seems to indicate that the person's interest was vested." *Elam*, 44 Ohio St. 3d at 177 n.2. This seeming inconsistency is discussed at some length by the court of appeals in *Brinkman v. Doughty* (2000), 140 Ohio App. 3d 494, 498, 748 N.E.2d 116, 119.

¹⁰ *E.g., Calvert v. Sharf* (2005), 217 W.Va. 684, 619 S.E.2d 197 (named beneficiary can sue testator's lawyer for malpractice); *Leak-Gilbert v. Fahle* (2002), 2002 OK 66, 55 P.3d 1054 ("when the will fails to identify all of the decedent's heirs as a result of the attorney's substandard professional performance, an intended will beneficiary may maintain a legal malpractice action under negligence or contract theories against an attorney"); *Blair v. Ing* (2001), 95 Hawaii 247, 21 P.3d 452, 463 (beneficiaries of trust could proceed on both contract and tort theories against attorneys); *Powers v. Hayes* (2001), 172 Vt. 535, 776 A.2d 374, 375 (ordering to trial allegations by decedent's daughter against will-drafting attorney); *Mieras v. DeBona* (1996), 452 Mich. 278, 550 N.W.2d 202 (beneficiary named in will may sue testator's attorney for malpractice); *Simpson v. Calivas* (1994), 139 N.H. 1, 650 A.2d 318, 322 (identified beneficiary is third-party beneficiary of testator's representation agreement with counsel); *McLane v. Russell* (1989), 131 Ill. 2d 509, 137 Ill. Dec. 554, 546 N.E.2d 499, 501-502 (non-client "primary intended beneficiary" can sue attorney); *Walker v. Lawson* (Ind. 1988), 526 N.E.2d 968 (beneficiary can sue lawyer who drafted will); *Schreiner v. Scoville* (Iowa 1987), 410 N.W.2d 679, 682 (lawyer owes duty to beneficiaries identified in testamentary instruments); *Hale v. Groce* (1987), 304 Or. 281, 744 P.2d 1289, 1292 (third party who testator directed attorney to include in will can pursue

139 Ohio App. 3d 395, 744 N.E.2d 199, *rev. granted* (2000), 90 Ohio St. 3d 1442, 736 N.E.2d 903, *app. dis.* (2001) 91 Ohio St. 3d 1466, 743 N.E.2d 921.¹¹ In that case, the defendant-attorney failed to have his client's will properly witnessed and the identified heirs brought suit. The court of appeals opened its opinion by characterizing the question of the heirs' right to sue as "an important public policy issue," but ultimately found itself "compelled" by *Zipperstein* and *Scholler* to affirm the trial court's dismissal. *Id.* at 397. In closing, the court observed: "This case may indeed be appropriate for review by our state's highest court, and we would respectfully invite the same." *Id.* at 398. This Court did, in fact, grant review, but a private settlement resulted in dismissal of the appeal. *See* (2001), 91 Ohio St. 3d 1466, 743 N.E. 2d 921.

The unusual procedural posture of this case suggests that the Court has concluded it appropriate to take up the respectful suggestion of the *Dykes* panel once and for all.

negligence action against attorney); *Stangland v. Brock* (1987), 109 Wash. 2d 675, 747 P.2d 464, 467-68 (authorizing both contract and tort claims); *Ogle v. Fuiten* (1984), 102 Ill. 2d 356, 80 Ill. Dec. 772, 466 N.E.2d 224, 226 (non-clients may have both negligent or breach-of-contract claims); *Needham v. Hamilton* (D.C. 1983), 459 A.2d 1060 (intended beneficiary can sue negligent drafter for malpractice); *Guy v. Liederbach* (1983), 501 Pa. 47, 459 A.2d 744, 746 (1983) (named legatee may sue drafter); *Auric v. Continental Casualty Co.* (1983), 111 Wis. 2d 507, 331 N.W.2d 325, 328 (beneficiary may sue attorney); *Stowe v. Smith* (1981), 184 Conn. 194, 441 A.2d 81, 83; *Lucas v. Hamm* 1961), 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 688-89, *cert. denied*, 368 U.S. 987 (1962) (intended beneficiaries who lost testamentary rights because of failure of attorney could assert tort or contract claim against attorney); *Pinckney v. Tigani* (2004), 2004 Del. Super. LEXIS 386 (Del. App. 2004) (third party named in will may sue for scrivener's error); *Passell v. Watts* (Fl. App. 2001), 794 So. 2d 651; *Francis v. Piper* (Minn. App. 1999), 597 N.W.2d 922, 924 (attorney may be liable to a non-client third party who client intended to benefit); *Johnson v. Sandler, Balkin, Hellman & Weinstein* (Mo. App. 1997), 958 S.W.2d 42, 49 (lawyer owes duty to intended-beneficiary non-client); *Teasdale v. Allen* (D.C. Ap. 1987), 520 A.2d 295 (intended beneficiaries had standing to bring legal malpractice action); *Woodfork v. Sanders*, 248 So. 2d 419, 425 (La. App. 1971) (privity not a bar); *Wisdom v. Neal* (D.N.M. 1982), 568 F. Supp. 4, 7 (under New Mexico law, heirs could sue testator's attorney for malpractice).

¹¹ *See American Express Travel Rel. Ser. Co. v. Mandilakis* (1996), 111 Ohio App. 3d 160, 675 N.E.2d 1279 (privity bars malpractice claim by non-client even in face of lawyer's unethical failure to report client's fraud).

The Academy respectfully submits that it is time for the Court to revisit *Zipperstein* and *Scholler*, and accept Justice Brown’s invitation “not to abandon *stare decisis*, but . . . to bring attorney malpractice—based upon professional *negligence*—into line with the body of tort law.” *Zipperstein*, 32 Ohio St. 3d at 78, 512 N.E.2d at 639.

The reasons are painfully apparent. As succinctly put by the New Hampshire Supreme Court, “although there is no privity between a drafting attorney and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demands an exception to the privity rule.” *Simpson v. Calivas* (N.H. 1994), 650 A.2d 318, 322. The California Supreme Court long ago wrote:

When an attorney undertakes to fulfil the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests.

Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 164-65, 74 Cal. Rptr. 225 (Cal. 1969).

Indeed, the reasons why *Zipperstein* should be overruled were well-cataloged by the dissent in that case, and we respectfully urge that the post-*Zipperstein* jurisprudence demonstrates that this is, as the Franklin County Court of Appeals said, “an important public policy issue . . . appropriate for review by our state's highest court.” The problem is simple: *Zipperstein* causes injustice because it elevates form over substance.

We also respectfully submit that the Court should not limit the universe of third persons who may bring suit to those who are specifically identified in the will and should instead protect all those who the attorney could or should have foreseen would be injured if he or she was negligent. *Cf. Calvert v. Sharf* (2005), 217 W.Va. 684, 619 S.E.2d 197. *Calvert* and similar

cases address situations where, for example, a proper will is improperly executed. However, it fails to address situations where a testator's intention, clearly expressed, is not implemented because, for example, the lawyers leave out an heir or fail to include distribution to grandchildren. As the *Calivas* court said:

Under such a limited exception to the privity rule, a beneficiary whose interest violated the rule against perpetuities would have a cause of action against the drafting attorney, but a beneficiary whose interest was omitted by a drafting error would not. Similarly, application of such a rule to the facts of this case would require dismissal even if the allegations—that the defendant botched Robert Sr.'s instructions to leave all his land to his son—were true. We refuse to adopt a rule that would produce such inconsistent results for equally foreseeable harms, and hold that an intended beneficiary states a cause of action simply by pleading sufficient facts to establish that an attorney has negligently failed to effectuate the testator's intent as expressed to the attorney.

650 A.2d at 322.

We also recognize that the unique nature of these cases—the client and principal witness having expired—raises a risk that poseurs will seek to advantage themselves of the opportunity to tie up an estate (albeit that floodgates more often admit a trickle than a deluge). We therefore believe that the Court should determine that (1) where a plaintiff is named in the testamentary documents, but the drafting attorney allegedly failed to ensure that the testator's wishes regarding that heir were properly provided, the heir may sue the drafting attorney for legal malpractice; and (2) where the plaintiff is not named in the testator's will, the plaintiff is permitted to maintain a legal malpractice action where, but only where, proof of the testator's intent can be established by clear and convincing evidence (a result which is consistent with the Court's jurisprudence governing efforts to overcome qualified privileges).

As the Court likely knows, these questions have been the subject of an enormous amount of scholarly endeavor in the years since *Zipperstein*, mostly decrying the strict privity rule, with some commentators attempting to find what amounts to a golden mean, balancing the interest of

the state and the courts in the solemnity of wills against the desire that cases of legal malpractice not go unredressed. The approach we advocate is developed in one such article, by Prof. Bradley E.S. Fogel (Fogel, B.E.S., *Attorney v. Client--Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning* (2001), 68 Tenn. L. Rev. 261, 326).

At least one court has adopted this approach:

[W]here the only person who could explain what he wanted to accomplish by the Trust Agreement is dead . . . a clear and convincing burden of proof for plaintiffs in malpractice actions who seek to contradict solemnly drafted and executed testamentary documents appropriately balances all the competing interests.

Pivnick v. Beck (1999), 326 N.J. Super. 474, 741 A.2d 655, *aff'd* (2000) 165 N.J. 670 (*per curiam*).¹² While several courts in addition to New Jersey's have held that extrinsic evidence is

¹² The New Jersey Supreme Court affirmed the Appellate Decision in terms, but also relied on the Restatement of the Law Governing Lawyers:

The American Law Institute has taken a position that is consistent with the holding of the Appellate Division. Regarding suits by nonclients, Section 51 of the Restatement (Third) of the Law Governing Lawyers provides that "a lawyer owes a duty of care "to a nonclient when . . . the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient." Restatement (Third) of the Law Governing Lawyers § 51(3)(a) (1998). Comment f to section 51 explains:

When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third person must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document. *See* Restatement Third, Property (Donative Transfers) §§ 11.2 and 12.1 (Tentative Draft No. 1, 1995) (preponderance of evidence to resolve ambiguity in donative instruments; clear and convincing evidence to reform such instruments). Restatement (Third) of the Law Governing Lawyers § 51 comment f (1998).

165 N.J. at 671. Because Ohio law appears not to permit reformation of wills, this principle does not apply here.

admissible to prove the testator's intent in a legal malpractice case,¹³ requiring that evidence to satisfy the clear-and-convincing standard serves as a caution to parties who would overreach while permitting those with legitimate claims to seek justice. There is nothing unfair about that.

While the OATL respects the importance of the venerable doctrine of *stare decisis*, a departure is warranted in this instance. This Court has recognized that:

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Westfield Ins. Co. v. Galatis, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256, paragraph one of the syllabus.

All three elements of this test have been satisfied in this instance. Assuming for the sake of argument that *Zipperstein* and *Scholler* were correctly decided by their respective majorities, much has changed over the last twenty years. Given the enormous concern that has been generated over medical malpractice litigation, it is certainly incongruous for a specialized branch of the practice of law to enjoy immunity from such liability. Once it has been accepted that all attorneys should be held accountable for their mistakes, it becomes apparent that the present rule of "strict privity" precludes "practical workability" of this objective. Finally, abandoning *Zipperstein* and *Scholler* will not work undue hardship since no attorney should be operating under the assumption that negligence can be perpetrated with impunity. Indeed, it is safe to assume that the vast majority of estate planning specialists learn of the *Zipperstein* and *Scholler*

¹³ See, e.g., *Creighton Univ. v. Kleinfeld* (E.D. Ca. 1995), 919 F. Supp. 1421, 1427; *Simpson v. Calivas* (1994), 650 A.2d 318, 322 (N.H. 1994); *Hale v. Groce* (Or. 1987), 304 Ore. 281, 744 P.2d 1289, 1290; *Ogle v. Fuiten* (Ill. 1984), 102 Ill. 2d 356, 466 N.E.2d 224, 225, 80 Ill. Dec. 772; *Stowe v. Smith* (Conn. 1981), 184 Conn. 194, 441 A.2d 81.

protections only after they have been sued for malpractice by an heir or beneficiary (to their great relief). With the three-prong *Galatis* test having been fulfilled, it is appropriate for this Court to now correct this anomaly in Ohio law. See *State ex rel. Advanced Metal Precision Prods. v. Industrial Comm.*, 111 Ohio St. 3d 109, 112, 2006-Ohio-5336, 855 N.E. 2d 435, 439 ¶18-20.

On a final note, it should be remembered that it was this Court that first fashioned the strict privity rule in *Zipperstein* and *Scholler*. Revamping these precedents is thus this Court's prerogative since the principles established therein have never received the blessing of the General Assembly. As was explained in *Gallimore v. Children's Hosp. Med. Cntr.* (1993), 65 Ohio St. 3d 244, 253, 617 N.E. 2d 1052, 1059:

When the common law has been out of step with the times, and the legislature, for whatever reason, has not acted, we have undertaken to change the law and rightfully so. After all, who presides over the common law but the courts? (citations omitted).

No legitimate justification therefore exists for Ohio to remain slavishly affixed to outdated rules of strict privity in the context of legal malpractice.

CONCLUSION

"No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists." W. Prosser, Law of Torts 4th Ed. at 327. The Academy respectfully urges that reasonable women and men alike would all agree that when a lawyer fouls up someone's estate planning, invoking a formalistic rule which protects only lawyers is not fair. The strict privity rule of *Simon v. Zipperstein* should be abandoned, and this Court should hold that a third party foreseeably damaged by an attorney's negligent estate planning may bring an action for professional negligence against the drafter.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served upon the following, via regular U.S. mail, postage prepaid, this 29th day of November, 2006:

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