IN THE SUPREME COURT OF OHIO

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

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FILED
DEC 15 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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INTRODUCTION

Attorneys in Ohio enjoy qualified immunity from malpractice lawsuits by third parties for sound public policy reasons. See *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 462 N.E.2d 158; *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 512 N.E.2d 636. In this case, the court of appeals ignored this long-standing rule in two ways. First, the court held that when the lawyer for a majority shareholder in a close corporation handles a private stock transfer for his client, each and every minority shareholder has standing to individually sue that attorney for malpractice. Second, the court of appeals held that such a third-party plaintiff need only plead a naked and conclusory allegation of "collusion" to satisfy this Court's test for standing. Each of these erroneous holdings should be rejected by this Court.

Throughout their merit brief, Appellants demonstrate a fundamental misunderstanding of the rule espoused in *Scholler* and *Zipperstein*. Appellants make two critical errors. First, contrary to Appellants' assertion, the question before this Court is <u>not</u> whether the law should "immunize or discourage the attorney conduct described in the Complaint." (Apps.' Br. at 1.) Indeed, the law already "discourages" legal malpractice and certainly does not "immunize" attorneys from liability for such malpractice. Rather, the question before this Court is whether <u>these Appellants</u> – complete strangers to the attorney-client relationship – should have standing to sue Cross-Appellants for malpractice. Because Appellants have failed to plead facts that would establish any exception to the rule set forth in *Zipperstein*, the answer is no.

Second, Appellants erroneously argue (without case law support) that the Court should consider all their allegations – regarding privity, bad faith, and collusion – together, and conclude that they somehow add up to one acceptable exception to the rule in *Zipperstein*. Indeed, Appellants' first subsection on the merits reads as follows: "Defendants' collusion, bad

faith, malice, and Plaintiffs' privity – taken together – justify departure from the general rule of attorney immunity." (Apps.' Br. at 11.) In reality, of course, Appellants must adequately plead at least one of the exceptions in order to obtain standing. They may not inadequately plead multiple exceptions to achieve the same result. In the end, Appellants have failed to plead facts that would establish either privity or malice.

Compounding Appellants' misunderstanding of this Court's law and policy, in their merit brief, Appellants advance several new and, quite frankly, outrageous allegations against Cross-Appellants. None of these incredible accusations are present in the Complaint, and it is unclear why Appellants advance them now. Examples of these new allegations include the following:

- "Dan apparently had second thoughts about whether the November 2001 Will was the best means of his taking control of the Corporation." (Apps.' Br. at 6.)
- "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." (Id. at 7.)
- "Defendants kept the conspiracy a secret" because they "knew all the facts, including the fact that their conduct would disinherit Plaintiffs." (Id. at 16.)
- "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." (Id.)
- The stock transfer "created a massive capital gain tax liability for Decedent, which would not have existed had the shares passed upon her imminent death." (Id. at 18.)
- "Defendants conspired with Decedent's attorney in fact (Dan) to deprive Decedent (and ultimately Plaintiffs) of her majority share of the Corporation." (Id.)
- "[W]hen 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." (Id.)

- "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." (Id.)

- "Decedent's stock was ***the only reason*** Defendants, Dan, and Kevin rigged Decedent's November 2001 Will and the stock transfer to Kevin." (Id. at 26.)

- "[T]he conspirators inflicted Plaintiffs' injury: loss of the bequests Decedent intended for them, and loss of their directorships." (Id. at 27.)

- "Defendants ***knowingly*** and ***voluntarily*** took on conflicting representations, and did so to intentionally do wrong." (Id. at 30.)

- "Decedent did not nominate any of the Defendants to be the executor of the Estate." (Id. at 31.)

- Defendants were "intentionally doing wrong to an incompetent client." (Id.)

Each and every one of these "allegations" is absent from Appellants' Complaint and does not constitute an allegation, factual or otherwise, on which Appellants may now rely as this Court reviews the sufficiency of the pleadings. See *Rogers v. Targot Telemarketing Servs.* (Franklin 1990), 70 Ohio App.3d 689, 692, 591 N.E.2d 1332 ("In assessing the propriety of the trial court's action [under Civ.R. 12(B)(6)], we examine only the allegations of the complaint."). Hardly any of these incredible assertions even resemble the truth. None are appropriate.

Ultimately, the court of appeals' decision must be reversed, as it has expanded and misapplied this Court's long-standing precedent. Appellants have failed to adequately plead either exception to the rule in *Zipperstein* immunizing counsel from third-party malpractice claims, and Appellants have failed to show why this Court should abandon the sound public policy supporting the rule. Further, amicus curiae Ohio Academy of Trial Lawyers ("OATL") advocates a dangerous change to Ohio law that is not even relevant to this case. For all these reasons and those set forth below, this Court should reverse the court of appeals' decision.

ARGUMENT

A. The Estate – Not Appellants – Has Standing to Sue.

Contrary to Appellants' and OATL's contention, Ohio law does not "protect" attorneys with "impunity" from legal malpractice claims. (Apps.' Br. at 12; OATL's Br. at 11.) Rather, even if individual beneficiaries lack standing to sue a testator's counsel in their own right, there are established mechanisms for deterring substandard legal advice once the testator dies. The decedent's estate stands in the shoes of the decedent, assuming the right to pursue all claims that the decedent could have brought while living. See, e.g., R.C. 2107.46. Unlike the individual beneficiaries, the executor of the estate serves as the decedent's personal representative and, thus, enjoys standing to sue the decedent's lawyers. See, e.g., *McBride v. Vance* (1906), 73 Ohio St. 258, 266, 76 N.E. 938. If the executor fails to pursue the decedent's claims, the beneficiary may step in and file suit – derivatively on behalf of the estate. R.C. 2107.46.

Seen against this backdrop, *Zipperstein*'s qualified immunity against malpractice suits by third-party beneficiaries is perfectly reasonable. If every individual beneficiary of an estate enjoyed separate co-equal standing to sue the decedent's lawyer for estate-planning advice given to the decedent in her lifetime, those lawyers could be subjected to as many concurrent suits as there are beneficiaries – in as many jurisdictions. Thus, as a matter of efficiency and fairness, it makes eminent sense to funnel all potential claims through the estate representative. This policy is shared by other jurisdictions. See, e.g., *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* (Tex.2006), 192 S.W.3d 780, 786; *Nevin v. Union Trust Co.* (Me.1999), 726 A.2d 694, 701.

In this very case, in fact, Appellants filed a similar, parallel claim to the instant matter, but putatively on behalf of the Estate. By Order of December 6, 2004, the Administrator of the Estate was substituted for Appellants as the real party in interest to that suit. (Appx. A-21 – A-

22.) The Administrator voluntarily dismissed the Estate's claims without prejudice to re-filing. Thus, contrary to Appellants' contention, there remains an available mechanism for adjudicating the full scope and quality of legal services that Cross-Appellants provided to Decedent. With such a mechanism in place, the court of appeals' expansion and misapplication of Ohio law appears particularly unwarranted and should be reversed.

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

The court of appeals erred when it held, without analysis, that minority stockholders have privity with the majority shareholder regarding purely private stock transactions. In so holding, the court of appeals misconstrued this Court's decisions in both *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, 628 N.E.2d 1335, and *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 548 N.E.2d 217. Further, this decision was directly contrary to the Sixth Circuit's sound reasoning in *Thompson v. Karr* (C.A.6, July 15, 1999), No. 98-3544, 1999 U.S. App. LEXIS 16846. (Appx. A-50.) This Court should reverse the court of appeals' decision.

1. <u>The Court of Appeals Misapplied the Definition of Privity</u>.

The court of appeals erred when it failed to "[e]xamine the interest the original attorney-client relationship was intended to protect, and then compare it to the interest of the third person bringing suit for the alleged malpractice." *Sayyah v. Cutrell* (Brown 2001), 143 Ohio App.3d 102, 112, 757 N.E.2d 779. Here, Appellants do not allege that their interests were aligned with Decedent's with respect to the private stock transfer. The court of appeals ignored this fact and erroneously held that Appellants have standing simply because they were minority shareholders.

Appellants' contention that they shared a mutual interest with Decedent is meritless. First, Appellants argue that they "shared an interest in who owned the majority stake and who controlled the Corporation." (Apps.' Br. at 23.) This does not illustrate mutual interests.

Indeed, with respect to Cross-Appellants' administration of the private stock transfer from Decedent to her grandson, the attorney-client relationship was not intended to protect Appellants' interests regarding who was to receive that stock. Appellants' Complaint does not allege otherwise. Second, Appellants argue – without record support – that they "shared an interest in the preservation of [Decedent's] assets." (Id.) Appellants shared this interest because, they argue, Appellants are "beneficiaries under all of their mother's wills." (Id.) To show privity under Appellants' theory, however, Appellants must plead that their interests as minority shareholders align with Decedent's. Appellants have apparently abandoned that notion. Indeed, under Appellants' rationale, any beneficiary is in privity with a decedent regarding private asset transfers, simply because they "share[] an interest in the preservation of her assets." (Apps. Br. at 23.) This cannot be – and indeed is not – the law in Ohio.

Appellants' attempt to distinguish case law also fails, as they do not dispute the fact that the court of appeals never actually compared the parties' interests in this case. See *Sayyah*, 143 Ohio App.3d at 112. Indeed, any such analysis leads to the conclusion that there is no privity.

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

Despite Appellants' attempt to re-characterize the court of appeals' holding, the court erroneously expanded sound Ohio Supreme Court precedent. Indeed, without applying the law to the facts of this case, the court of appeals found privity simply "because Decedent, as the majority stockholder, owed a fiduciary duty to Appellants, as minority stockholders." (Appx. A-17 – A-18.) This holding not only was error, but also creates a dangerous precedent in Ohio.

Contrary to Appellants' contention, the Sixth Circuit's reasoning in *Aschinger v. Columbus Showcase Co.* (C.A.6, 1991), 934 F.2d 1402, 1413 is on point. In that case, the Sixth Circuit analyzed this Court's holding in *Crosby* and rejected the plaintiff's argument that "each

shareholder of a close corporation owes a heightened fiduciary duty to the other." Id. As the court in *Aschinger* noted, unlike the instant case, the *Crosby* Court was "concerned that a majority shareholder not misuse his power in promoting his personal interests at the expense of corporate interests ***." Id. As in *Aschinger*, there is no such concern in this case. Rather, Appellants complain only about Decedent's private stock transfer to her grandson.[1] That the court of appeals accepted this as grounds for privity represents a fundamental shift in Ohio law and an inappropriate expansion of this Court's holding in *Crosby*.

3. <u>The Court of Appeals Expanded and Misapplied the Holding in *Arpadi*.</u>

The court of appeals also created dangerous new law when it expanded the narrow holding in *Arpadi*, which applies only to limited partnerships. Contrary to Appellants' assertion, the Court in *Arpadi* found it very significant that "[a] partnership is an aggregate of individuals and does not constitute a separate legal entity." *Arpadi*, 68 Ohio St.3d 453, paragraph one of the syllabus. By contrast, "[a] corporation is an entity separate and apart from the individuals who compose it." *Agley v. Tracy* (1999), 87 Ohio St.3d 265, 268, 719 N.E.2d 951. Appellants do not even acknowledge this critical distinction in their merit brief.

Appellants' characterization of the Court's holding in *Arpadi* as a "general" rule is meritless. First, Appellants contend that "[t]he *Arpadi* Court said that EC 5-18 was irrelevant." (Apps.' Br. at 28.) This is the point. The appellee in *Arpadi* had argued that extending the attorney-client relationship to limited partners would create an ethical dilemma for the attorney, citing EC 5-18. This Court rejected this argument, noting that while <u>EC 5-18 applies to corporations</u>, it does not apply to limited partnerships. Thus, contrary to Appellants' contention, the Court did, in fact, "distinguish corporations and limit its 'privity' holding to partnerships."

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[1] Appellants' attempt to liken this case to a "squeeze out" by Decedent fails, as this outrageous allegation appears nowhere in the Complaint. (Apps.' Br. at 27.)

(Apps.' Br. at 28-29.) The Sixth Circuit agrees. See *Thompson*, 1999 U.S. App. LEXIS 16846, at *26 (noting that the *Arpadi* decision "expressly distinguished between a partnership and corporation when determining to whom an attorney owes his allegiance") (internal quotations omitted).

The court of appeals also misapplied *Arpadi*'s central holding. In this case, the stock transfer was a shifting of Decedent's private assets, unrelated to any fiduciary duty that Decedent may have owed to Appellants. The court of appeals ignored this fact and erroneously found privity, without any analysis as to how the private stock transfer is a "matter[] to which the fiduciary duty relates." *Arpadi*, 68 Ohio St.3d at 458.

Appellants rely on unsupported, irrelevant facts in their attempt to defend the court of appeals' erroneous decision. Remarkably, Appellants argue that there is privity "not ***merely*** because Plaintiffs were minority shareholders, but also because" Cross-Appellants allegedly engaged in a "conspiracy" and had conflicts of interest. (Apps' Br. at 21-22.) Appellants concede that without these extra "special circumstances," there would be no privity at all:

> 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 shareholders' stock.

(Id. at 22.) Of course, the court of appeals did not hold this, and it is not what Appellants pled.

The court of appeals did <u>not</u> adopt Appellants' "privity plus special circumstances" test, nor has any court before or since. As this Court held in *Zipperstein*, the "special circumstances" to which Appellants repeatedly refer are simply examples of "malicious conduct" and have no relevance to privity. 32 Ohio St.3d at 77. On the issue of privity, the only question is whether the private stock transfer is a "matter[] to which the fiduciary duty relates." *Arpadi*, 68 Ohio St.3d at 458. The court of appeals failed to analyze this question, committing reversible error.

Appellants argue that the stock transfer is related to Decedent's fiduciary duty because the stock represents the "source of that duty." (Apps.' Br. at 26.) By this rationale, Appellants would argue that they should be permitted to sue Decedent for a breach of fiduciary duty based on this private transfer. Appellants do not go this far, however, noting that "this case has nothing to do with a majority shareholder breaching a fiduciary duty *** ." (Id. at 27.) The reason, of course, is simple: the stock transfer was a private transaction. By failing to recognize this, the court of appeals committed reversible error and created a new cause of action in Ohio.[2]

4. The Reasoning in *Thompson* Is Directly On Point.

Appellants correctly note that the Sixth Circuit in *Thompson* "punted" the issue before it, but the single dissenter was not the only judge who opined. Indeed, before deferring to Ohio courts, the majority recognized compelling reasons against expanding the *Arpadi* holding to close corporations. (Cross-Apps.' Br. at 15-16.) Appellants' attempt to distinguish *Thompson* also fails, as Appellants only repeat their unsupported theory of "conspiracy." In the end, Appellants have failed to plead facts establishing that the private stock transfer was related to Decedent's fiduciary duty. Applying the sound principles set forth in *Crosby* and *Arpadi* and echoed in *Thompson*, this Court should reject the court of appeals' expansion of Ohio law.

C. The Court of Appeals' Holding Regarding Collusion Was Error.

The court of appeals erred when it held that Appellants adequately pled collusion, simply by alleging that Cross-Appellants "committed some or all of the aforementioned acts in collusion with Dan and Kevin." (Appx. A-19.) This Court should reverse the court of appeals' decision.

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[2] Contrary to Appellants' assertion, nowhere in their merit brief do Cross-Appellants refer to the stock transfer as "routine." (Id. at 8.) Rather, as both the court of appeals and Appellants fail to recognize, Decedent's stock transfer to her grandson was private.

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

No court in Ohio has set forth the requirements for pleading the "malice" exception to the rule set forth in *Scholler* and *Zipperstein*. At the very least, simply pleading "malice," without more, is insufficient to withstand a motion to dismiss under *Scholler*. *Wolfe v. Little* (Apr. 27, 2001), Montgomery App. No. 18718, 2001 Ohio App. LEXIS 1902, at *13. (Appx. A-60.) In this case, the court of appeals held that Appellants' recitation of the word "collusion," and nothing more, was sufficient as an allegation of a *Zipperstein* exception to survive a motion to dismiss. This was error.

Appellants argue, apparently in the alternative, that they have specifically pled "malice." Of course, the court of appeals did not analyze this issue, holding instead that Appellants alleged "collusion." In any event, Appellants' argument fails. "Malice" means "(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174; see also *Sprouse v. Eisenman*, Franklin App. No. 04AP-416, 2005-Ohio-463, at ¶13-14 (considering whether plaintiffs alleged that defendant "acted with an ulterior motive separate from her good-faith representation"). Appellants' Complaint fails to plead any facts establishing this definition. In fact, the word "malice" appears nowhere in the Complaint. (Supp. S-1 – S-7.)

Appellants argue that malice is established in two ways. "First, [Cross-Appellants] concede the point by arguing that all collusion is malicious conduct." (Apps.' Br. at 15.) Quite frankly, Cross-Appellants are unsure what Appellants mean by this (Appellants make the same statement at page 13 of their brief). As the Court in *Zipperstein* held, "collusion" is one of a set of examples that would satisfy the "malice" exception. See *Zipperstein*, 32 Ohio St.3d at 76.

Cross-Appellants certainly do not concede that Appellants have successfully pled collusion, as Appellants have simply invoked the term "collusion" without supporting facts. Contrary to Appellants' contention, they have failed to provide a "short and plain statement" of their claim and have failed to advise Cross-Appellants of the nature of the case.

Second, Appellants contend that the Court should draw a "reasonable inference" that Cross-Appellants acted with malice. (Apps.' Br. at 15.) Appellants then fail, however, to apply the standard for malice expressed in the very case on which they rely. *Lashua v. Lakeside Title & Escrow Agency*, Stark App. No. 2004CA00237, 2005-Ohio-1728, at ¶44 (requiring (1) hatred, ill will, or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons). In this case, the Complaint never mentions "malice" and recites no facts, such as ill will, conscious disregard, or ulterior motive, that would establish any definition for malice, whether by inference or otherwise. (Supp. S-1 – S-7.) Accordingly, this Court should reject Appellants' attempt to plead malice in the alternative.

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

This Court has determined that it requires a heightened pleading standard in order to protect against "lightly made public claims or accusations charging the commission of acts or neglect of duty which may be said to involve moral turpitude." *Haddon View Invest. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 158, 436 N.E.2d 212; see also *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584. "The need for this protection is most acute where the potential defendants are professionals whose reputations in their field of expertise are most sensitive to slander." *Haddon View*, 70 Ohio St.2d at 158.

This Court should require such a heightened pleading standard for claims of collusion in cases alleging legal malpractice. Indeed, the various definitions of collusions are rife with

references to fraud and other "moral turpitude." See *Dutton v. Dutton* (Mahoning 1998), 127 Ohio App.3d 348, 353, 713 N.E.2d 14 (defining collusion as "[a]n agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law") (citations omitted); *Macke Laundry Serv., Ltd. Partnership v. Jetz Serv. Co.* (Mo.App.1996), 931 S.W.2d 166, 179 n.6 ("The legal meaning of the term 'collusion' is 'a secret concert of action between two or more for the promotion of some fraudulent purpose.'") (citations omitted). Certainly, a public accusation of collusion in a complaint, against legal professionals such as Cross-Appellants, implicates the public policy outlined in *Haddon View.* Accordingly, this Court should require the operative facts to be pled with particularity.

Appellants' argument that "[n]ot all collusion is necessarily fraud" ignores the sound public policy expressed by this Court in *Haddon View.* (Apps.' Br. at 14.) Appellants have made outrageous accusations against these Cross-Appellants (which Cross-Appellants vehemently deny), by vaguely pleading "collusion." These accusations may impair Cross-Appellants' reputation in their profession. Appellants should not be permitted to cavalierly invoke the term "collusion," without alleging supporting facts, simply because this trigger word will open the door for Appellants to obtain standing to which they are otherwise not entitled.[3]

The Complaint does not come close to pleading collusion with particularity. As this Court has held, to plead with particularity, "[t]he mere incantation of the elements" of the cause of action is not enough. *Byrd,* 57 Ohio St.3d at 61; cf. *Aluminum Line Prods. Co. v. Brad Smith Roofing Co., Inc.* (Cuyahoga 1996), 109 Ohio App.3d 246, 259, 671 N.E.2d 1343 (to plead

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[3] Similarly, Appellants' argument that malice may be averred generally does not mean that Appellants may simply invoke the word "collusion" in order to satisfy their pleading requirements. See, e.g., *Wolfe*, 2001 Ohio App. LEXIS 1902, at *15. Certainly, Appellants would agree that they would have to plead the "fraud" exception with particularity. Pleading collusion should be no different.

fraud, a plaintiff must plead with particularity "the time, place and content of the false representation; the fact misrepresented; the identification of the individual giving the false representation; and the nature of what was obtained or given as a consequence of the fraud"). Here, Appellants have pled absolutely no facts suggesting collusion, such as an agreement to defraud Appellants or to "obtain an object forbidden by law." *Dutton*, 127 Ohio App.3d at 353. Accordingly, the court of appeals' decision should be reversed.

Appellants call Cross-Appellants' motion to dismiss a "ruse," but it is Appellants who have made vague and damaging accusations against Cross-Appellants – without supporting facts. Appellants should not be permitted to manufacture standing to sue Cross-Appellants – standing that the Estate has already exercised in another, parallel lawsuit – by using a magic word. Such a rule would open the floodgates to endless complaints including similar inflammatory accusations against attorneys in Ohio. This Court should stop this dangerous precedent in its tracks.

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

Ohio law provides that any "malice" alleged (and, therefore, any "collusion") must be directed at the plaintiff in order to invoke the exception to immunity. See, e.g., *Firestone v. Galbreath* (C.A.6, 1992), 976 F.2d 279, 287 (applying Ohio law). In this case, the Complaint makes no reference to whether the "collusion" was directed at Appellants or whether Appellants entered into Cross-Appellants' calculations in any way. The court of appeals failed to even consider the nature of Cross-Appellants' ambiguous "collusion." This was error.

Contrary to Appellants' claim, *Firestone* is on point and Appellants are not "key figures in their Complaint." (Apps.' Br. at 15.) As Appellants themselves point out, other than their introduction in the second paragraph, Appellants are mentioned only three times in the facts of their 38-paragraph Complaint. There are no allegations – in either the Complaint or Appellants'

unsupported "facts" listed on page 16 of their brief – that Cross-Appellants acted out of malice towards Appellants. Further, Appellants fail to cite any case law for their tenuous suggestion that the Complaint sets forth the type of circumstances this Court "must have had in mind" when describing the exceptions to attorneys' qualified immunity in *Zipperstein*. (Id. at 12.)

In their Complaint, Appellants do not mention the term "malice" even once. They do not allege that Cross-Appellants acted intentionally or with utter disregard to anyone's rights. They certainly do not plead facts – either generally or with particularity – that would establish that Cross-Appellants engaged in "collusion." Finally, even if Appellants did plead that Cross-Appellants acted with malice, they do not allege that such malice was directed at Appellants. Accordingly, Appellants' Complaint fails to allege any of the exceptions to the rule in *Zipperstein*, and the court of appeals' decision should be reversed.

4. Appellants May Not Plead Bad Faith as an Exception to *Zipperstein*.

Appellants apparently hope to alternatively establish the "malice" exception by claiming that Cross-Appellants committed "bad faith." (Apps.' Br. at 17.) The court of appeals has already rejected this argument, holding that "bad faith is not a separate gateway issue." (Appx. A-16.) "[W]e find bad faith to be an element of fraud, collusion or other malicious conduct, rather than a separate issue to be considered on its own." (Appx. A-15.) The reasoning is simple: "[C]onsidering the definition of bad faith, we find that bad faith is essentially embodied within any malicious behavior that would otherwise be alleged." (Id.) Appellants have not appealed, or even acknowledged, this portion of the court of appeals' decision. This Court should reject Appellants' attempt to trigger the "malice" exception on the grounds of "bad faith."

In any event, the Complaint fails to plead that Cross-Appellants acted in bad faith. The Complaint only alleges that Cross-Appellants engaged in conflicts of interest and invokes the

unsupported legal conclusion of "bad faith." (Supp. S-6.) Otherwise, Appellants rely on new, unsupported, and false accusations in their brief in order to establish their "claim" of bad faith. (Apps.' Br. at 18.) Of course, these accusations cannot be considered when determining whether the Complaint sufficiently establishes standing. See *Rogers*, 70 Ohio App.3d at 692. The Court should reject Appellants' attempt to manufacture standing where there is none.

D. Public Policy Favors Immunity.

In the name of "public policy," Appellants apparently hope to achieve standing by repeating alleged "egregious" facts, which are entirely absent from the Complaint. These new allegations, Appellants argue, establish that Cross-Appellants' conduct falls outside the "scope of conduct" immunized by the rule in *Scholler* and *Zipperstein*. (Apps.' Br. at 31.) Appellants continue to misunderstand the policy rationale of *Scholler* and *Zipperstein*. Despite Appellants' arguments to the contrary, Ohio law does, in fact, "discourage" legal malpractice. Indeed, to the extent that a malpractice claim exists, the Estate is entitled to pursue such a claim (and, indeed, has already done so in this case). Ultimately, Appellants fail to allege actual facts that would confer standing for them to sue Cross-Appellants.[4]

E. This Court Should Not Modify the Holding in *Simon v. Zipperstein*.

1. This Court Should Not Adopt OATL's Proposed Holding.

OATL's proposed change to the law is irrelevant to the issues in this case. OATL urges this Court to abandon its long-standing precedent in *Scholler* and *Zipperstein* in favor of a new rule providing standing to "intended beneficiaries" to sue the decedent's attorney for

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[4] Appellants make one last effort to establish a "special circumstance" by claiming – without support – that Decedent did not nominate Cross-Appellants to be executor of the Estate. (Apps.' Br. at 31.) This fact was not alleged in the Complaint and, therefore, cannot be considered now. In any event, Appellants' new argument is irrelevant, as Appellants fail to establish how this "fact" triggers either the privity or malice exception in *Zipperstein*.

malpractice. OATL's proposed rule would require that a plaintiff either be named in the testamentary documents or provide clear and convincing evidence of the testator's intent. (OATL's Br. at 9.) Even if this Court were inclined to adopt such a rule, however, this would not be the proper case in which to do so, for Appellants have failed to plead facts that would confer standing. Indeed, Appellants do not allege any facts regarding Decedent's actual intent. (Supp. S-1 – S-7.) As a result, this case does not present an appropriate opportunity for this Court to abandon the long-standing precedent in *Scholler* and *Zipperstein*.

In any event, abandoning *Scholler* and *Zipperstein* and adopting OATL's proposed rule would be catastrophic for Ohio's attorneys. As OATL correctly observed, this Court may overrule its previous decisions only where (1) the decision was wrong at the time, or changes in circumstances no longer justify adherence to the rule; (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. OATL has completely failed to establish that any of these requirements has been met in this case, let alone all three.

a. <u>The Public Policy Remains Sound</u>.

OATL mischaracterizes the *Scholler* and *Zipperstein* decisions as an "essentially-impermeable barrier" to legal malpractice claims. (OATL's Br. at 6.) To the contrary, as discussed above, Ohio law provides mechanisms for holding an attorney liable for failing to render adequate legal advice to a decedent. Much like Appellants, OATL incorrectly frames the question as whether Ohio should deter legal malpractice, when the real question is under what circumstances may complete strangers to the attorney-client relationship bring individual legal malpractice claims against the attorney.

OATL compares the qualified immunity for attorneys with other professions such as architects, manufacturers, and accountants, and specifically singles out the medical profession on page 11 of its brief. Such an analysis, however, ignores the very public policy underlying the *Scholler* and *Zipperstein* decisions. As this Court expressed succinctly in *Zipperstein*:

> 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.

Zipperstein, 32 Ohio St.3d at 76 (internal quotations omitted). These truths certainly have not changed in the last twenty years. Further, these concerns cannot be applied as easily to a doctor, architect, or any other profession listed in OATL's litany. For attorneys, however, the danger is real:

> If an attorney whose primary duty is to promote the cause of his client in a light most favorable to him within the bounds of the law is also required to protect the rights of an adverse party, he will be caught in the midst of a conflict of interest.

Moffitt v. Litteral, Montgomery App. No. 19154, 2002-Ohio-4973, at ¶81 (citations omitted).

OATL relies heavily on a 1994 New Hampshire decision, *Simpson v. Calivas* (N.H.1994), 650 A.2d 318, 322, for the proposition that courts in other jurisdictions have methodically and uniformly adopted OATL's proposed "intended beneficiary" theory.[5] As recently as 1999, however, the Supreme Judicial Court of Maine expressly rejected the reasoning in *Simpson*:

> When there is a personal representative to assert the financial claims on behalf of the estate, however, the better rule appears to be not to allow individual beneficiaries to assert claims for negligence. Otherwise, it is possible that a number of individual beneficiaries could assert

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[5] OATL is apparently mistaken when it estimates that Ohio is "one of only four states" that employs a "privity" theory. (OATL's Br. at 3.) As of May 2006, the Supreme Court of Texas put the estimate at nine. *Belt*, 192 S.W.3d at 783 n.1 (collecting cases).

> differing and conflicting malpractice claims, and attorneys, in drafting wills and estate planning documents, could be presented with difficult challenges resolving conflict of interest issues with respect to named beneficiaries at times when they are drafting the documents.

Nevin, 726 A.2d at 701; see also *Belt*, 192 S.W.3d at 786

In the end, OATL has offered no evidence or caselaw suggesting that "changes in circumstances no longer justify continued adherence" to the rule in *Zipperstein*. *Westfield*, 100 Ohio St.3d 216, paragraph one of the syllabus.[6] Accordingly, this Court should reject OATL's proposed rule change.

b. <u>The Current Rule Is Not Unworkable</u>.

OATL asserts that "attorneys should be held accountable for their mistakes." (OATL's Br. at 11.) Again, OATL reveals a fundamental misunderstanding of the issue, as shared by Appellants. The question is not whether attorneys should be held accountable for their mistakes (they are). Rather, the question is whether third parties such as Appellants, who have no relationship whatsoever with the attorney, should be permitted to sue the attorney for legal malpractice. The law in Ohio on this issue is sound. Indeed, just because Appellants have failed to allege facts that would confer standing for them to sue Cross-Appellants, this does not mean that attorneys in Ohio are not "held accountable," or that attorneys enjoy "impunity" from liability for legal malpractice. It simply means that Ohio is protecting the idea that attorneys must hold their duty to their actual clients in the highest regard, and when those duties conflict with the interests of third parties, attorneys should not be afraid to represent their clients.

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[6] If anything, the policy in Ohio is changing to provide <u>more protection</u> for attorneys. This Court has adopted the Ohio Rules of Professional Conduct, effective February 1, 2007, which supersede and replace the Ohio Code of Professional Responsibility. Rule 1.13 of the new rules "draws substantially upon EC 5-19 [formerly EC 5-18]." (Comments to Rule 1.13.) Unlike the former rule, however, "[t]he duties defined in this rule apply equally to unincorporated associations." (Comment 1 to Rule 1.13.) In other words, Ohio has apparently decided to apply this protection to <u>both</u> corporations and partnerships.

Zipperstein, 32 Ohio St.3d at 76. The current rule in Ohio, as recognized by this Court in 1984, supported by other states as recently as 2006, and applied by Ohio appellate courts as recently as 2002, is certainly not "unworkable."

c. **Changing the Rule Would Create Remarkable, Undue Hardship.**

As discussed throughout this and other briefs, eliminating the qualified immunity established in *Scholler* and *Zipperstein* would create chaos in the legal profession in Ohio. Ohio attorneys would now have a duty to unknown third parties every time they advise or represent a client. Indeed, "if no such immunity exists, an attorney may be reticent to advance the cause of his client out of fear of lawsuits by third persons arising out of the attorney's representation of his client." *Moffitt* at ¶80 (quoting Chief Justice Celebrezze's dissenting opinion in *Petrey v. Simon* (1983), 4 Ohio St.3d 154, 159, 447 N.E.2d 1285).

Remarkably, OATL suggests – without support – that "it is safe to assume that the vast majority of estate planning specialists learn of the *Zipperstein* and *Scholler* protections only after they have been sued for malpractice by an heir or beneficiary (to their great relief)." (OATL's Br. at 11-12.) The Court should not rely on an unsupported statement such as this. In reality, of course, the policy in Ohio is sound, clear, and firmly established. Changing the rule now would create endless confusion in the legal profession.

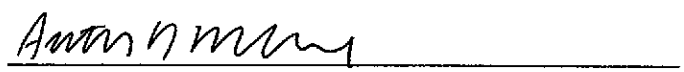
2. **This Court Should Not Adopt Appellants' Proposed Holding.**

Appellants apparently also advocate an "intended beneficiary" theory, much like OATL's proposed holding, as well as a rule conferring standing where an attorney "conspired in intentionally causing harm to the client, estate, and intended beneficiaries." (Apps.' Br. at 33.) Much like OATL's proposal, however, even if this Court adopts Appellants' dangerous proposed holding, Appellants have not alleged facts that would establish standing. Indeed, the Complaint

contains no facts about Decedent's intent, no allegations of conspiracy, no allegations of intentional harm to Decedent, and no allegations of intentional harm to Appellants. Accordingly, this Court should reject Appellants' proposed change to Ohio law, reaffirm its holding in *Scholler* and *Zipperstein*, and reverse the court of appeals' decision.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in Cross-Appellants' merit brief, this Court should reverse the decision below, reaffirm its holdings in *Scholler* and *Zipperstein*, and reject the proposed holdings advanced by both Appellants and OATL.



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