

IN THE SUPREME COURT OF OHIO

Julie Behrens LeRoy, et al.

Appellants/Cross-Appellees,

v.

Allen, Yurasek & Merklin, et al.

Appellees/Cross-Appellants.

Consolidate Cases

Case Nos. 05-1593 & 05-1926

On Appeal from the Union County

Court of Appeals, Third Appellate

District, Court of Appeals No. 14-04-19

FILED

DEC 18 2006

AMICUS CURIAE REPLY BRIEF OF THE OHIO STATE BAR ASSOCIATION, CLERK
IN SUPPORT OF POSITION OF APPELLEES/CROSS-APPELLANTS COURT OF OHIO
ALLEN, YURASEK & MERKLIN, ET AL.

CHARLES E. TICKNOR, III (0042559)

(counsel of record)

THOMAS J. BONASERA (0021783)

PAUL GIORGIANNI (0064806)

Buckingham, Doolittle & Burroughs, LLP

191 West Nationwide Boulevard

Columbus, OH 43215

Phone: (614)221-8448; Fax: (614)221-8590

Counsel for Appellants/Cross-Appellants

ANTHONY R. MCCLURE (0075977)

(counsel of record)

JOSEPH W. RYAN, JR. (0023050)

Porter, Wright, Morris & Arthur LLP

41 South High Street

Columbus, OH 43215

Phone: (614)227-2000; Fax: (614)227-2100

E-mail: amcclure@porterwright.com

Counsel for Appellees/Cross-Appellants

PAUL W. FLOWERS (0046625)

Paul W. Flowers Co., L.P.A.

Terminal Tower, 35th Floor

50 Public Square

Cleveland, OH 44113-2216

Phone 216/344-9393; Fax: 216/344-9395

Email: pfw@pwfco.com

Amicus Curia Chairman OATL

EUGENE P. WHETZEL (0013216)

(counsel of record)

P.O. Box 16562

Columbus, OH 43216

Phone: (614)487-2050; Fax: (614)485-3191

E-mail: gwhetzel@ohiobar.org

Counsel for Ohio State Bar Association

ALVIN E. MATHEWS, JR. (0038660)

(counsel of record)

RICK E. MARSH (0002110)

AMY J. ERVIN (0066441)

Lane Alton & Horst LLC

175 South Third Street, Ste. 700

Columbus, OH 43215

Phone: (614)228-6885; Fax: (614)228-0146

E-mail: amathews@lah4law.com

Counsel for Ohio State Bar Association

FREDERICK M. MORGAN, JR. (0027687)

(Counsel of Record)

MICHAEL S. MILLER (0009398)

Volkema, Thomas LPA

700 Walnut Street, Suite 400

Cincinnati, Ohio 45202

Phone: 513/651-4400; Fax: 513/651-4405

E-mail: rmorgan@vt-law.com

Attorneys for Ohio Academy of Trial

Lawyers

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INTRODUCTION

Amicus Curiae Ohio State Bar Association (the "Association") filed a brief in this matter due to its significant concern relating to the issue of whether the limited privity exception to a lawyer's qualified immunity will continue to be fully recognized. The Association supports Defendants/Cross-Appellants' ("Defendants") position that the limited privity exception to an Ohio lawyer's qualified immunity should be interpreted narrowly and found not to encompass a duty owed by a deceased majority shareholder to minority shareholders of a closely held corporation relating to a private stock transfer.

In response to the Association's Brief, Plaintiffs/Cross-Appellees ("Plaintiffs") insist that both Defendants and the Association made factual mistakes.¹ However, it is Plaintiffs who are mistaken herein. First, Plaintiffs mistakenly assert that the Association does not ask this Court to reverse the Court of Appeals' judgment. (Plaintiffs' Brief, p. 9.) The Association very clearly requested on several occasions in its Brief that the Court of Appeals' judgment be reversed. (Association's Brief, pp, 6, 9, 13 & 14.) The focus of the Association's Brief is on the privity issue, and the Association has asked that the Court of Appeals' judgment be reversed on this issue.

Second, Plaintiffs are mistaken in their privity analysis by contending that they were in privity with the decedent and her attorneys with respect to a private stock transfer. Even Amicus Curiae Ohio Academy of Trial Lawyers (the "OATL") agrees with Defendants' and the Association's analysis. The OATL acknowledges that Plaintiffs' claims are barred by *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74 and *Scholler v. Scholler* (1984), 10 Ohio St.3d 89. The OATL's position is merely that this Court

¹ Plaintiffs argue that Defendants only referenced the facts favorable to them. However, Plaintiffs' statement of facts notably does not contain any factual support for their position that privity has been established herein.

reconsider this well-established precedent. The contentions of Plaintiffs and the OATL are incongruous. The privity exception does not apply to the private transfer of stock by a majority shareholder in a close corporation.

The Association joins in Defendants' request that this Court uphold its precedent and reverse the Court of Appeals' radical broadening of the narrow privity exception to an Ohio lawyer's qualified immunity from liability to third parties.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: The limited privity exception to a lawyer's qualified immunity should be interpreted narrowly, and found to not encompass a duty owed by a deceased majority shareholder to minority shareholders of a closely held corporation relating to a private stock transfer.

A. Neither Plaintiffs nor the OATL Address the Code of Professional Responsibility.

The Association devoted an entire section of its Brief explaining the relationship between the immunity vested in lawyers from lawsuits brought by parties who are not in privity with the lawyer and the provisions of the Code of Professional Responsibility. Neither Plaintiffs nor the OATL addressed the Association's position or how the Court of Appeals' ruling can be reconciled with a lawyer's obligation to comply with the Code of Professional Responsibility.

By adopting the Code of Professional Responsibility, this Court has mandated that lawyers representing organizations and/or individuals owing fiduciary duties to others exercise diligence to avoid conflicts of interest.² As more fully explained in the

² During the events in this case and presently, Ohio lawyers are governed by the Code of Professional Responsibility. This Court has adopted the Ohio Rules of Professional Conduct which will become effective on February 1, 2007. The Ohio Rules of Professional Conduct contains the same standards with regard to conflicts of interest as the provisions that are addressed herein.

Association's Brief, this mandate is exemplified by Disciplinary Rules 5-101(A)(1), 5-105(A) and 5-105(C) and Ethical Considerations 5-19 and 5-16.

By failing to respond to the Association's position in this regard, Plaintiffs have missed the critical issue herein. The critical issue is that members of the Bar must be able to provide competent, zealous representation to the public by serving their clients with undivided loyalty. The Court of Appeals' opinion thwarts a lawyer's ability to provide this essential representation.

As established through Ohio's disciplinary and legal ethics rules, a lawyer's loyalty generally must be devoted to a single client or entity. A lawyer's departure from the principle of undivided loyalty is only permissible under very limited circumstances. A lawyer can not compromise his or her undivided loyalty by catering to the vast range of legal interests of third parties who are not in privity with the lawyer's client. The Court of Appeals has created an unmanageable rule. As the ruling now stands, lawyers are required to consider the interests of their clients, as well as the interests of third parties. It will be nearly impossible for lawyers to comply with their obligation to avoid conflicts of interest and provide zealous representation. The Court of Appeals' decision undermines a lawyer's ability to exercise undivided loyalty and his or her obligation to comply with the Code of Professional Responsibility. The decision on privity must be reversed.

B. The Positions Taken by Plaintiffs and the OATL can not be Reconciled.

The OATL filed an amicus curiae brief to support the position of Plaintiffs. However, the OATL's position runs contrary to the position being taken by Plaintiffs. Plaintiffs contend that the circumstances herein fall within the limited privity exception to an attorney's qualified immunity in *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74. To

the contrary, the OATL acknowledges that this case does not fall within the limited privity exception under *Zipperstein* but asks that this Court reconsider the *Zipperstein* holding. More specifically, the OATL requests that this Court reconsider its precedent to allow third parties to prosecute actions for legal malpractice committed in the context of estate planning without establishing privity or fraud. Thus, the OATL implicitly supports the position of both Defendants and the Association herein that a proper application of *Zipperstein* herein negates a finding of privity. This Court should uphold its precedent, find that the limited privity exception has not been met and reject the OATL's request to reconsider its holdings.

The position of both Plaintiffs and the OATL cannot be reconciled. Even the OATL, which supposedly supports Plaintiffs' position, concedes that the Court of Appeals wrongly applied the limited privity exception in *Zipperstein*. The OATL rightly recognized the Court of Appeals' error.

It also bears noting that the OATL's comments are limited to lawsuits relating to a lawyer's alleged negligent drafting of a will. The OATL does not address privity as it relates to a majority shareholder's private transfer of stock which is the issue of concern to the Association. In fact, the OATL even states that it does not take a position on the complicated minority shareholder issues at bar. The Court of Appeals' finding of a privity exception only applied to the private stock transfer, not the issue of the will. The Court of Appeals did not find that Plaintiffs were in privity with Defendants with respect to the will. Rather, the Court of Appeals found that the collusion exception applied to the drafting of the will. Therefore, the OATL is asking this Court to address an issue

which is not in controversy.³

Additionally, it must be emphasized that the Association strongly opposes the OATL's request to open the floodgates and allow the "universe of third persons" to bring suit. Not only does the OATL aspire to permit a beneficiary to sue the testator's lawyer, but the OATL also seeks to allow anyone else who the lawyer could or should have possibly foreseen would be injured by the lawyer's representation to sue the testator's lawyer. The position endorsed by the OATL is biased and concerning.

The OATL's request that this Court open the floodgates of litigation to the universe is biased towards plaintiffs in general, which is understandable given that the OATL is widely recognized as a plaintiff's organization. Moreover, the OATL's position does not take into account the negative impact that such a rule would have on all lawyers with regard to third party claims. In addition to being partial to the plaintiffs-bar, the proposed result is concerning to the legal community as a whole. Under the OATL's theory, a lawyer would owe a duty to the "universe." Not only would the lawyer be incapable of providing undivided loyalty and zealous representation, the lawyer would conceivably have minimal opportunities to represent parties due to conflicts of interest arising. Moreover, the lawyer would be in constant fear of third party lawsuits by individuals who are dissatisfied with a testator's will. This is precisely the result that this Court sought to avoid in *Zipperstein*.

This Court should reject the OATL's request to overrule its precedent and find -- as the OATL implicitly agrees -- that the limited privity exception does not apply to a private transfer of stock by a majority shareholder in a close corporation.

³ Even if this Court adopts the OATL's position -- which the Association strongly opposes -- the holding should not be expanded to allow lawsuits brought by third parties relating to a private transfer of stock by a majority shareholder.

C. The Court of Appeals Substantially Broadened the Privity Exception to a Lawyer's Qualified Immunity.

Contrary to Plaintiffs' characterization of the Court of Appeals' ruling, the decision clearly substantially broadened the established precedent.⁴ The ruling speaks for itself and needs no interpretation. The Court of Appeals plainly found that because the decedent, as the majority stockholder, owed a fiduciary duty to the minority stockholders, the minority shareholders were in privity with the decedent for the purposes of the private stock transfer. (Opinion, pp. 11-12.) Whether Defendants committed "illicit acts" or other appropriate circumstances justified a departure from the general rule of attorney immunity was not relevant to the Court of Appeals' analysis as Plaintiffs have suggested. (Plaintiffs' Brief, p. 22.)⁵ By virtue of its ruling, the Court of Appeals has held that anytime a majority shareholder transfers stock, privity exists between the majority and minority shareholders to allow third party lawsuits related to the transfer. The Court of Appeals' ruling greatly expanded this Court's precedent and should be reversed.

Plaintiffs' argument is that privity has been established because the conduct at issue related to the **source** of the decedent's fiduciary duty. This is insufficient under this Court's precedent. Pursuant to *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, "an attorney retained by a fiduciary owes a similar duty to those with whom the client has a fiduciary relationship **only regarding matters to which the fiduciary duty**

⁴ As discussed in Section B above, even the OATL inherently agrees that the Court of Appeals expanded the precedent.

⁵ Such factors were appropriately not addressed by the Court of Appeals given that they are entirely unrelated to the privity analysis. Notably, Plaintiffs do not cite to any portion of the Court of Appeals' opinion to support their contention.

relates." *Id.* at 458. (Emphasis added.)⁶ In order to establish privity, the claimant must prove that the conduct was related to the fiduciary duty itself, not the source of the fiduciary duty. By contending that the stock transfer related to the source of the fiduciary duty and not the duty itself, Plaintiffs have defeated their position herein. Plaintiffs have not and could not argue that the private transfer of stock related to the fiduciary duty itself. Apparently recognizing this weakness in their position, Plaintiffs repeatedly attempt to divert this Court's attention to their claims that Defendants committed illicit or malicious acts. However, those allegations involve a separate and distinct issue from the application of the privity exception. The privity exception does not apply to the decedent's transfer of stock because it did not relate to her fiduciary duty.

The Court of Appeals' broad expansion of the privity exception is further illustrated by the fact that no other court has endeavored to include the relationship between shareholders in a corporation with the privity exception. Both Defendants and the Association cited to the case of *Thompson v. Karr* (C.A. 6, July 15, 1999), No. 98-3544, 1999 U.S. App. LEXIS 16846, wherein the court refused to expand the privity exception and offered justification against such an expansion. While Plaintiffs attempted to avoid the holding in *Thompson* – a case which certainly counters their proposition -- they fail to cite to any other case which has expanded the privity exception

⁶ The Association agrees with Defendants' proposition that the *Arpadi* holding is limited in its application to partnerships and should not apply herein. (Also see, *Thompson, infra*, wherein the court noted that the *Arpadi* decision expressly distinguished between a partnership and a corporation when determining to whom lawyers owe allegiance. *Id.* The court found that limited partnerships are not separate legal entities and are therefore not similar to corporations. *Id.* Thus, the court distinguished an attorney's role in representing an entity with an aggregate of individuals as opposed to a separate legal entity. However, even if *Arpadi* can be applied to a close corporation, the privity exception has not been established.

to include the relationship between shareholders in a close corporation. *Thompson* is a good example of a proper application of the privity exception.

The Court of Appeals has broadly expanded the privity exception set forth by this Court. If the Court of Appeals' decision stands, the well-established attorney immunity rule will effectively be extinguished. Lawyers will be subjected to unwarranted third-party lawsuits in contravention of decades of precedent. From a practical standpoint, lawyers for majority shareholders in close corporations would have an affirmative obligation to consult with all minority shareholders regarding any private stock transfer, as well as countless other legal services performed for their clients. This would result in frequent conflicts of interest and render a lawyer incapable of effectively and zealously representing their clients. Plaintiffs never address the import of the result they seek, especially with regard to the conflicts of interest and a lawyer's ethical obligations. This unworkable rule will result in numerous unreasonable third party malpractice claims and run afoul to public policy considerations.

The Court of Appeals' unsupported expansion of *Zipperstein*, *Scholler* and *Arpadi* was erroneous. This Court should clarify its holdings by enunciating a clear rule regarding exceptions to a lawyer's immunity in the context of representing corporations and limited partnerships. This Court should reverse the decision of the Court of Appeals as it relates to the privity issue.

CONCLUSION

For the reasons stated above, in addition to those set forth in the Association's Brief, *Amicus Curiae* Ohio State Bar Association respectfully requests that this Court reverse the Court of Appeals' radical broadening of the narrow privity exception to a lawyer's qualified immunity from liability to third-party lawsuits. *Amicus Curiae* Ohio

State Bar Association respectfully urges this Court to reverse the holding of the Fifth District Court of Appeals for Ohio regarding the question of law related to the privity exception to a lawyer's qualified immunity.

Respectfully submitted,

Eugene P. Whetzel by *APF - per authority*
EUGENE P. WHETZEL (0013216)

P.O. Box 16562
Columbus, OH 43216
Telephone (614) 487-2050
Counsel for Ohio State Bar Association

LANE, ALTON & HORST LLC

Amy J. Ervin
Rick E. Marsh (0002110)
Alvin E. Mathews, Jr. (0038660)
Amy J. Ervin (0066441)
175 South Third Street, Ste. 700
Columbus, OH 43215
Telephone (614) 228-6885
Facsimile (614) 228-0146
Email: rmarsh@lah4law.com
Email: amathews@lah4law.com
Email: aervin@lah4law.com
Counsel for Ohio State Bar Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the following was served upon the following by ordinary, U.S. mail, postage prepaid, this 18th day of December, 2006:

Charles E. Ticknor, III, Esq.
Thomas J. Bonasera, Esq.
Paul Giorgianni, Esq.
Buckingham, Doolittle & Burroughs, LLP
191 West Nationwide Boulevard
Columbus, OH 43215
Counsel for Appellants/Cross-Appellants

Eugene P. Whetzel, Esq.
P.O. Box 16562
Columbus, OH 43216
Counsel for Ohio State Bar Association

Anthony R. McClure, Esq.
Joseph W. Ryan, Jr., Esq.
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, OH 43215
Counsel for Appellees/Cross-Appellants



Alvin E. Mathews, Jr. (0038660)
Amy J. Ervin (0066441)