

IN THE SUPREME COURT OF OHIO

ROBERT E. SCHLEGEL, as Executor of)	ON APPEAL FROM THE
the Estate of Margaret E. Schlegel, et al.)	HOLMES COUNTY COURT OF
)	APPEALS, FIFTH APPELLATE
Plaintiffs-Appellants,)	DISTRICT
)	
vs.)	COURT OF APPEALS
)	CASE NO. 05 CA 011
THOMAS D. GINDLESBERGER, ESQ.)	
)	
Defendant-Appellee)	

**Memorandum in Support of Jurisdiction
of Appellants Robert E. Schlegel, Executor, et al.**

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PROPOSITION OF LAW

An intended beneficiary of a decedent's estate plan may maintain an action against an attorney who is negligent in the creation of such a plan even though the beneficiary is not in direct privity with that attorney.

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EXPLANATION OF WHY THIS CASE IS
A CASE OF PUBLIC OR GREAT INTEREST

The issues presented herein are of public and great general interest. In this era of the redefinition of the rules of attorney conduct and the role of the attorney the anomaly presented by a strict adherence to the doctrine of privity as set forth in *Simon v. Zipperstein*, (1987) 32 Ohio St.3d 74 and *Scholler v. Scholler* (1984) 10 Ohio St.3d 98 needs to be eliminated.

Courts of Appeals for Franklin and Holmes counties have each written that the privity doctrine needs to be revisited by this state's highest court¹. Indeed in the Homes County opinion the Court wrote at paragraph 32 of its opinion:

{¶32} Despite our conclusion, we invite the Ohio Supreme Court to revisit this issue because there should be a remedy to any wrong. We find Justice Brown's dissent in *Simon v. Zipperstein*, supra, persuasive as he correctly notes that , " * * *the use of privity as a tool to bar recovery has been riddled * * * to the extent that we are left with legal malpractice as perhaps, the only surviving relic." Id. at 77. Without relaxing the concept of privity, intended beneficiaries may suffer damages without any remedy and an attorney who negligently drafts a will is immune from liability to those persons whom the testator intended to benefit under his or her will.

To like affect the Dykes Court stated "we believe...appellants raise a persuasive public policy argument...This case may indeed be appropriate for review by our states highest court, and we would respectfully invite the same." *Dykes v. Gayton*, supra. This Honorable Court agreed with the 10th District when it granted a discretionary appeal in *Dykes*, 90 Ohio St.3d 1442, but never had a chance to consider the issues as the parties in *Dykes* reached a settlement and

¹ *Dykes v. Gayton*, 139 Ohio App.3d 395, 90 Ohio St.3d 1442, 92 Ohio St.3d 1466 (the Franklin County case) and the case herein appealed from Homes County.

jointly moved this Court to dismiss the appeal (91 Ohio St.3d 1466). The Court was again presented with an opportunity to revisit *Simon* and *Scholler* when it agreed to bear the issues in *Leroy v. Allen Yurasek & Merklin*, consolidated cases No. 05-1593 and 05-1926, currently appearing on the Court's open docket. In that litigation the Court has before it the brief of Amicus Curiae Ohio Academy of Trial Lawyers, setting forth the proposition of law as follows:

Lawyers who are negligent in the course of estate planning are liable to third parties who were foreseeably damaged by that negligence. *Simon v. Zipperstein*, (1981) 32 Ohio St.3d 74, 512 N, 6.2d 636, modified and applied.

It is apparent that this Honorable Court already has on several occasions agreed to reexamine *Zipperstein* rule and to reconsider whether or not to continue granting negligent lawyers immunity from liability to the very persons whom their negligence damages thus denying their redress. This Court's interest in the issues shows that they are matters of public and great general interest.

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STATEMENT OF THE CASE AND FACTS

Margaret Schlegel and her deceased husband had been clients of Defendant Gindlesberger for many years. He represented them in a variety of interrelated matters including their business (i.e. dairy farm), real estate, estate planning and probate matters. He knew their wealth, their intent and their family.

When Margaret's husband died there where a lot of taxes due and Margaret went to Gindlesberger to do what needed to be done to avoid such taxes at her death to the extent possible. At all times Gindlesberger knew that at the core of Margaret's estate plan was the fact that, ultimately, she wanted her three children to share equally in the wealth that she and her husband had built.

In the course of his representation several decisions were made relating to a certain parcel of real property which Margaret wished to essentially give as an advancement to one of her three children. Gindlesberger prepared the documents and advised his client, Margaret, as to their affect. What Gindlesberger did not appreciate, because he did not know or understand the basic law, was that he had created a tax nightmare known as retained interest in real estate.

When Ginglesberger prepared a deed intended to transfer the property he included in that deed a clause whereby Margaret retained certain rights over the property relating to her son's ability to mortgage the property in the future. At the same time he failed to either file or explain to Margaret the need to file a gift tax return or to provide that the gift of the property was to be considered a "net gift" where the recipient would pay the taxes. It was the combination of these errors that matured upon her death to utterly destroy Margaret's dispositive plan.

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After these transactions were complete she, in the company of her children, was assured by Gindlesberger more than once that her estate planning was in good shape. Gindlesberger never recognized his colossal blunder.

Upon Margaret's death the State and the I.R.S. determined that the then current value of the "gifted" real property was required to be included in the taxable basis of her estate, the taxes due became general obligations of the estate. That tax bill would, for all practicable purposes, eat up the entirety of Margaret's remaining estate with the result that her three heirs would **not** share equally, but that one of the three would end up, tax free, with the property he received as her intended advancement and the remaining two would end up with **nothing**.

When sued, Gindlesberger relied upon the "lack of privity" defense; this despite the fact that he admitted both that he never knew about the tax effect of the retained interest until after the death, and that he knew at all times she wanted her three children to share equally in her property and wealth.

Plaintiffs-Appellants sued Gindlesberger in the Court of Common Pleas for Holmes County, Ohio (Case No. 04 CV 076). Following discovery Defendant Gindlesberger filed his Motion for Summary Judgment which was granted. Plaintiffs-Appellants appealed to the Holmes County Court of Appeals (Fifth District, Case No. 05 CA 011), and on December 26, 2006, that Court filed its opinion affirming the trial court on the basis of *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74. This appeal follows.

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ARGUMENT IN SUPPORT OF THE PROPOSITION OF LAW:

AN INTENDED BENEFICIARY OF A DECEDENT'S ESTATE PLAN MAY MAINTAIN AN ACTION AGAINST AN ATTORNEY WHO IS NEGLIGENT IN THE CREATION OF SUCH A PLAN EVEN THOUGH THE BENEFICIARY IS NOT IN DIRECT PRIVITY WITH THAT ATTORNEY.

Ohio remains in the distinct minority of states which still cling to the notion of privity when it comes to holding "estate planning" lawyers responsible to those whom they injure though through their professional negligence. The time has long since passed, as Justice Brown wrote in his oft quoted dissent in *Zipperstein*, that this vestigial remnant of contract law be put to rest "...not to abandon *stare decisis*, but...to bring attorney malpractice – based upon professional *negligence* – into line with the body of law." *Simon v. Zipperstein*, 32 Ohio St.3d at 78.

In those states which have already abandoned the privity rule² in the context of the negligent estate planning lawyer the reasoning used by the Supreme Court of California in 1969 has generally been adopted.

When an attorney undertakes to fulfil the [estate planning] 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 [dispositive] scheme; and thus the possibility of thwarting the [client'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 [dispositive] scheme works no practical effect except to deprive his intended beneficiaries of the intended [results].

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

² The list is long and has previously been set forth in the brief of Amicus Curiae Ohio Academy of Trial Lawyers in the case of *Leroy, et al. v. Allen Yurasek & Merklin, et al.*, consolidated case nos. 05-1593 and 05-1926, currently pending before this Court.

This reasoning becomes even more compelling where, as is the case here, the offending attorney admittedly knew who the intended beneficiaries were and how his "client" intended them to benefit. The agreement that an attorney can have only one master simply does not and cannot apply. Where it can be shown that the attorney knows his client's dispositive intent, knows the identity of the beneficiaries (or the definition of the class of beneficiaries), and thereafter that same attorney counsels his estate planning client in a way that essentially destroys the client's plan, it is a tragedy that everyone other than the learned, trusted professional suffers damage.

Although the negligence of the Defendant herein does not go to the drafting of a will *per se*³ the principle set forth by the Wisconsin Supreme Court in 1983 applies.

Allowing a will beneficiary to maintain a suit against an attorney who negligently drafts or supervises the execution of a will is one way to make an attorney accountable for his negligence.

Accountability should result in increasing the care with which attorneys draft will and see to their execution. It is consistent with and promotes this state's longstanding public policy supporting the right of a testator to make a will and have its provisions carried out. Public policy supports the imposition of liability on an attorney who acts negligently in drafting or supervising the execution of a will resulting in a loss to a beneficiary named therein. Therefore the lack of privity should not be a bar to this action.

Aurick v. Continental Casualty Company, 111 Wis. 3d 507, 331 N.W. 2d 325 (1983).

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³ Here the Defendant erred regarding the disposition of property by *inter vivos* transfer in a manner which totally frustrated his client's overall dispositive scheme.

There is no difference between the negligent drafting/supervision of the execution of a will and the negligent creation of an ancillary document which destroys the very heart of a client's estate plan.

It would seem that the major excuse for the retention of the *Zipperstein* rule is *stare decisis*. It is a noble goal to keep the law constant so that one can look to the state of the law as a guidepost upon which to premise future action, and that the guidepost be one that can be relied upon. However no one can argue that an attorney should be allowed to rely on immunity on the bases of *stare decisis* as justification for not doing a competent job in the future.

Similarly the rubric of "the flood of litigation" from a universe of unhappy relatives bears no credence in 2007. An attorney who properly discharges his obligations of disclosure to his client under the mandate of today's rules of ethics and conduct will have no concerns in this regard. Today there should be little room for the disinherited (or disappointed) to argue that the decedent intended him to benefit if, indeed, that is not the case. Every attorney will have already memorialized the client's intent outside of the final documents and in plain language (see Prof. Cond. Rule 1.4(a)(2); (3); 1.4(b) eff. 2-1-2007). The risk that a lawyer might be sued in a defensible case cannot possibly outweigh the benefit of assuring competent professional services.

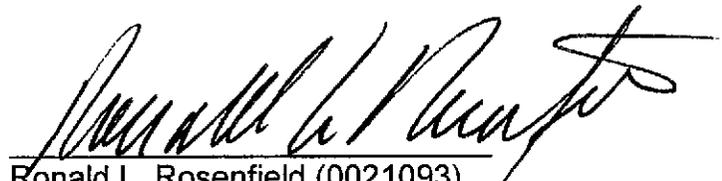
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CONCLUSION

The *Zipperstein* rule is a Court made rule, a common law rule. It deprives injured third parties from their constitutional right to a remedy against those who negligently caused that injury. The majority of this Court believed the rule to be appropriate when *Zipperstein* was decided. This Court has the inherent right to correct the common law when it is no longer in step with the times, especially, as here, when the legislature has not acted otherwise (see *Gallimore v. Children's Hosp. Med. Ctr.* (1993), 65 Ohio St.3d 244).

Respectfully submitted,



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APPENDIX A

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COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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5TH DISTRICT APPEALS COURT
HOLMES COUNTY
DORCAS L. MILLER, CLERK

ROBERT E. SCHLEGEL, Executor of
the Estate of MARGARET E.
SCHLEGEL, et al.

Plaintiffs-Appellants

-vs-

THOMAS GINDLESBERGER, et al.

Defendants-Appellees

JUDGES:

Hon. John W. Wise, P. J.
Hon. Sheila G. Farmer, J.
Hon. John F. Boggins, J.

Case No. 05 CA 11

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common
Pleas, Case No. 04 CV 76

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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Wise, P. J.

{¶1} Appellants Robert Schlegel, et al. ("appellants") appeal the decision of the Holmes County Court of Common Pleas that granted Appellee Thomas Gindlesberger's ("Appellee Gindlesberger") motion for summary judgment dismissing appellants' legal malpractice claim. The following facts give rise to this appeal.

{¶2} In 1986, the decedent, Margaret Schlegel, executed her Last Will and Testament prepared by Appellee Gindlesberger. The decedent's three children, Roy Schlegel, Robert Schlegel and Anna Shoemaker, were the beneficiaries under the will. In 1990, Appellee Gindlesberger also assisted the decedent in executing a general warranty deed, with joint right of survivorship, in which she conveyed most of her interest in a property known as "Hanna Farm" to Appellee Roy Schlegel.

{¶3} The decedent died on June 30, 2003. In July 2003, her will was admitted to probate in the Holmes County Court of Common Pleas. The assets comprising the decedent's estate had to be sold to pay the state and federal taxes. Appellants blamed Appellee Gindlesberger. Appellants claimed Appellee Gindlesberger's representation of the decedent was negligent because he failed to advise her of the tax consequences of making an inter vivos transfer of Hanna Farm to Appellee Schlegel, while maintaining a life estate.

{¶4} Thereafter, on June 29, 2004, appellants filed a complaint in the Holmes County Court of Common Pleas alleging legal malpractice against Appellee Gindlesberger. Appellants also sued Appellee Schlegel claiming Appellee Schlegel effectively received an inheritance by receiving Hanna Farm from the decedent. Appellants maintain this distribution frustrated the decedent's intent to divide her

property evenly among her children and as a result, Appellee Schlegel was unjustly enriched by Appellee Gindlesberger's negligence.

{¶5} Appellee Schlegel filed an answer and cross-claim, for legal malpractice, against Appellee Gindlesberger due to the fact that appellants did not receive any assets under the decedent's last will and testament. All parties moved for summary judgment. The trial court issued a judgment entry on December 5, 2005, in which it denied Appellee Schlegel's motion for summary judgment on the unjust enrichment claim. The trial court granted Appellee Gindlesberger's motion for summary judgment dismissing the legal malpractice claims filed by appellants and Appellee Schlegel.

{¶6} Appellants filed a notice of appeal on December 29, 2005, which is designated Case No. 05 CA 11. Appellee Schlegel filed a notice of appeal on December 22, 2005, which is designated Case No. 05 CA 10. Appellants set forth the following assignment of error for our consideration.

{¶7} "I. THE TRIAL COURT ERRED IN GRANTING APPELLEE GINDLESBERGER'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING APPELLANTS' CLAIM FOR LEGAL MALPRACTICE."

I

{¶8} In their sole assignment of error, appellants maintain the trial court erred when it granted Appellee Gindlesberger's motion for summary judgment and dismissed their legal malpractice claim against him. We disagree.

{¶9} Our standard of review is de novo, and as an appellate court, we must stand in the shoes of the trial court and review summary judgments on the same standard and evidence as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30

Ohio St.3d 35. Accordingly, an appellate court must independently review the record to determine whether summary judgment was appropriate, and we need not defer to the trial court's decision. See *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711; *Morehead v. Conley* (1991), 75 Ohio App.3d 409, 411-412.

{¶10} Civ.R. 56(C) provides:

{¶11} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only [therefrom], that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in the party's favor."

{¶12} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the nonmoving party has no evidence to prove its case. The moving party must specifically point to some evidence that demonstrates that the nonmoving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the nonmoving party to set forth specific facts demonstrating that there is a genuine issue of material

fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107.

{¶13} The issue presented in this assignment of error is whether appellants have standing to bring a negligence claim against the decedent's attorney. In order to establish a cause of action for malpractice, a plaintiff must establish a tripartite showing: an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by the breach. *Vahila* at syllabus, following *Krahn v. Kinney* (1989), 43 Ohio St.3d 103.

{¶14} In its judgment entry granting Appellee Gindlesberger's motion for summary judgment, the trial court concluded there was no evidence that an attorney-client relationship existed or sufficient privity, with an attorney-client relationship, between Appellee Gindlesberger and appellants. Judgment Entry, Dec. 5, 2005, at 6. In reaching this conclusion, the trial court referenced the Ohio Supreme Court's decision in *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, wherein the Ohio Supreme court held that in the absence of fraud, collusion or malice, an attorney may not be held liable in a malpractice action by a beneficiary or purported beneficiary of a will where privity is lacking. *Id.* at 76.

{¶15} Appellants argue this general rule of privity should be abandoned because an attorney who drafts a will, for a client, is aware that his or her professional competence affects not only the client but also those whom the client intends to benefit from that will. We are bound by precedent to follow the Ohio Supreme Court's decision in the *Simon v. Zipperstein* case. Therefore, we find the only individual to have an attorney-client relationship with Appellee Gindlesberger was the decedent. Appellee

Gindlesberger drafted the last will and testament and survivorship deed on behalf of the decedent. Further, appellants do not allege fraud, bad faith, collusion or other malicious conduct that would justify departure from the general rule.

{¶16} Despite our conclusion, we invite the Ohio Supreme Court to revisit this issue because there should always be a remedy to any wrong. We find Justice Brown's dissent in *Simon v. Zipperstein*, supra, persuasive as he correctly notes that, " * * * the use of privity as a tool to bar recovery has been riddled * * * to the extent that we are left with legal malpractice as perhaps, the only surviving relic." *Id.* at 77. Without relaxing the concept of privity, intended beneficiaries may suffer damages without any remedy and an attorney who negligently drafts a will is immune from liability to those persons whom the testator intended to benefit under his or her will.

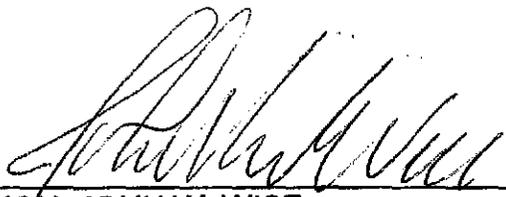
{¶17} Appellants' sole assignment of error is overruled.

{¶18} For the foregoing reasons, the judgment of the Court of Common Pleas, Holmes County, Ohio, is hereby affirmed.

By: Wise, P. J.

Farmer, J., and

Boggins, J., concur.



HON. JOHN W. WISE



HON. SHEILA G. FARMER



HON. JOHN F. BOGGINS

JWW/d 1128

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IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

2006 DEC 26 AM 10:31

5TH DISTRICT APPEALS COURT
HOLMES COUNTY
DORCAS L. MILLER, CLERK

ROBERT E. SCHLEGEL, Executor of
the Estate of MARGARET E. SCHLEGEL,
et al.

Plaintiffs-Appellants

-vs-

THOMAS GINDLESBERGER, et al.

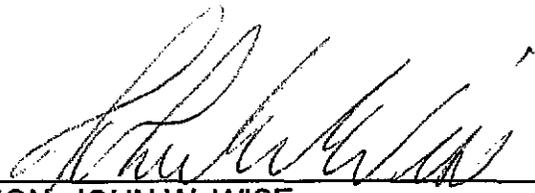
Defendants-Appellees

JUDGMENT ENTRY

Case No. 05 CA 11

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Holmes County, Ohio, is affirmed.

Costs assessed to Appellants.



HON. JOHN W. WISE



HON. SHEILA G. FARMER



HON. JOHN F. BOGGINS

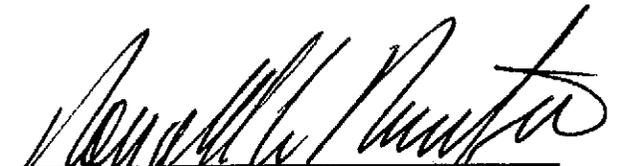
CERTIFICATE OF SERVICE

I certify that a copy of this **Memorandum in Support of Jurisdiction of Appellants Robert E. Schlegel, Executor, et al.** has been sent via regular U.S.

Mail this 19th day of January, 2007 to the following:

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