

IN THE SUPREME COURT OF OHIO

**ROBERT E. SCHLEGEL, as Executor of
the Estate of Margaret S. Schlegel, et al.**

Plaintiffs/Appellants,

v.

THOMAS D. GINDLESBER, ESQ., et al.

Defendants/Appellees

**ON APPEAL FROM THE
HOLMES COUNTY COURT
OF APPEALS, FIFTH APPELLATE
DISTRICT**

**COURT OF APPEALS
CASE NO. 05 CA 011**

**SUPREME COURT
CASE NO. 07-0113**

**DEFENDANT/APPELLEE THOMAS D. GINDLESBERGER, ESQ. MEMORANDUM
IN OPPOSITION TO JURISDICTION**

Michael J. Collins (0063846)
21 East Frankfort Street
Columbus, Ohio 43206
(614) 443-4866/ (614) 443-4860 fax
mcollins@nemethlaw.com
Attorney for Appellee,
Thomas D. Gindlesberger

Ronald Rosenfield (0021093)
440 Leader Building
526 Superior Avenue
Cleveland, Ohio 44114
(216) 696-9300/ (216) 696-9370 fax
rosenfield@rlresq.com
Attorney for Appellants,
Robert E. Schlegel, as Executor,
Robert E. Schlegel and Anna Mae
Shoemaker

Stanley R. Rubin (0011671)
437 Market Avenue North
Canton, Ohio 44702
(330) 455-5206/ (330) 455-5200 fax
srrubin22@aol.com
Attorney for Appellant,
Roy W. Schlegel

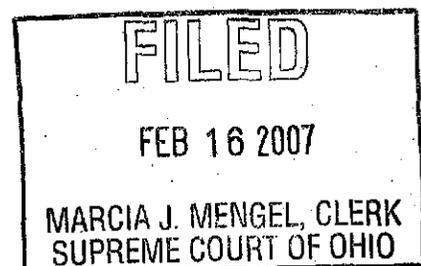


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	3
Explanation of why this case is not one of Public or great general interest.....	4
Response to Statement of the Case and Facts.....	6
Response to Proposition of Law.....	8
Conclusion.....	11
Proof of Service.....	12

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Dykes v. Gayton</i> , (2000) Ohio St.3d 1442, 736 N.E.2d 203.....	4
<i>Leroy v. Allen Yurasek & Merklin</i> consolidated case numbers 05-1593 and 05-1926.....	4
<i>Simon v. Zipperstein</i> (1987), 32 Ohio St. 3d, 512 N.E.2d 636,638.....	4, 5, 8, 9, 10, 11
<i>Waymar Lutz, et al. v. Jacinth Craft Baloch</i> Supreme Court Case 2006-1910.....	5
<i>Westfield Insurance Company v. Galatis</i> 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E.3d 1256 at ¶1.....	9

**EXPLANATION OF WHY THIS CASE IS NOT ONE
OF PUBLIC OR GREAT GENERAL INTEREST
ON THE PRIME MATTER OF A SON AND DAUGHTER**

This case has no public or great general interest. This case simply involves a private matter of disgruntled children trying to criticize their deceased mother's former attorney, because they believe that they received too little from their mother's estate, and believe that the estate paid too much in taxes. Appellee Thomas D. Gindlesberger never represented Appellants Roy W. Schlegel and Anna Mae Shoemaker and therefore, they should not be able to sue Appellee Gindlesberger for the legal services rendered to their mother.

Appellants argue that jurisdiction should be accepted by this court, because the fact that jurisdiction was accepted six (6) years ago in *Dykes v. Gayton* (2000) 90 Ohio St.3d 1442, 736 N.E.2d 203. That matter was jointly dismissed by the parties before briefing or argument.

Appellants also argue that this should be a matter of public or great general interest, because the court has accepted jurisdiction in the case *Leroy v. Allen, Yurasek and Merklin*, consolidated case numbers 05-1593 and 05-1926, currently appearing on the court's open docket. In that case, an amicus brief has been filed by the Ohio Academy of Trial Lawyers with the proposition of law to it overturn *Simon v. Zipperstein* (1987) 32 Ohio St. 3d, 512 N.E.2d 636. However, the Supreme Court, in deciding the issues present in that case, need not address the validity of the rule in *Simon v. Zipperstein*, as the issue was decided based on the exception enumerated in *Simon v. Zipperstein*. Therefore, it is misleading to argue this case has great public interest because the Supreme Court has accepted jurisdiction in the *Leroy* case, when the issues are nowhere close to identical.

Additionally, this Court had the opportunity to accept jurisdiction in *Waymar Lutz, et al. v. Jacinth Craft Baloch, et al.* Supreme Court case number 2006-1910. In that case, the

Appellants were once again seeking to relax the privity requirements, so the son of deceased parents could bring a legal malpractice claim against his parents' attorneys. This court on January 24, 2007 declined jurisdiction to hear this case. Since the issues in that case are nearly identical to the issues presented by Appellants seeking jurisdiction in this case, jurisdiction should be denied.

Appellants have stated no constitutional question here, and are clearly requesting the court to ignore *stare decisis*. Appellants have presented no compelling reason for this court to ignore *stare decisis* and overrule the decision it rendered in *Simon v. Zipperstein*, *supra*.

RESPONSE TO STATEMENT OF THE CASE AND FACTS

Defendant-Appellee Thomas D. Gindlesberger is a lawyer who has been practicing in Holmes County for over fifty (50) years. (See motion for summary judgment Thomas D. Gindlesberger, Affidavit ¶3.) One of his clients, was Margaret S. Schlegel. At the request of Margaret Schlegel, Appellee Gindlesberger prepared a deed transferring the Hannah Farm during the lifetime and prepared the last will and testament with two codicils (Id. at 6a through e.) All legal services were performed at the request of Margaret Schlegel and not her children, Plaintiffs-Appellants, Robert E. Schlegel and Anna Mae Shoemaker Id. at ¶7. Margaret Schlegel died on June 30, 2003. (See Plaintiffs' Complaint ¶6.) Plaintiff-Appellant Robert Schlegel was the administrator of Margaret Schlegel's estate and Plaintiff-Appellant Anna Mae Shoemaker was a beneficiary under Margaret Schlegel's will (See Plaintiffs' Complaint) Plaintiff-Appellant Robert Schlegel testified that Mr. Gindlesberger was an attorney for his father and mother (See deposition of Robert Schlegel pg. 8) Plaintiff-Appellant Robert Schlegel never hired Defendant-Appellee Gindlesberger to perform any legal services for him Id. at pg. 9. Defendant-Appellee Gindlesberger had never provided Plaintiff-Appellant Robert Schlegel any advice. Plaintiff-Appellant Robert Schlegel never had any input, with regard to the contents of the will and Plaintiff-Appellant Robert Schlegel did not hire Defendant-Appellee Gindlesberger to prepare the last will and testament. Further, Plaintiff-Appellant Robert Schlegel never met with Defendant-Appellee Gindlesberger to discuss his mothers will. Id. at pg. 18. Obviously, Margaret Schlegel had the right to change her will at anytime. Id. at pg. 19 Plaintiff-Appellant Robert Schlegel, also testified that Defendant-Appellee Gindlesberger did not act with malice towards him, and did not act for his own benefit Id. at pg. 30.

The unrebutted testimony was that Defendant-Appellee Gindlesberger prepared the will pursuant to decedent Margaret Schlegel's wishes and instructions. It was Margaret Schlegel's decision as to how her estate would be handled and disbursed upon her death. (See deposition of Anna Mae Shoemaker pg. 14.) In the survivorship deed that was prepared or life estate interest was specifically reserved at the request of Margaret S. Schlegel, as she did not want her son to mortgage the farm as it had never been mortgaged from the time she and her husband owned the farm. (See summary judgment motion, affidavit ¶6b.) The will and all codicils were prepared at the request of Margaret Schlegel, and reflected her testamentary intent Id. at 6e.

Plaintiffs-Appellants Robert E. Schlegel and Anna Mae Shoemaker complained that this reserving of interest of the life estate has created tax implications that have adversely affected their inheritance. However, the under rebutted evidence, is that Defendant-Appellee Gindlesberger prepared the will, and the transfer of the Hannah Farm, pursuant to his client's instructions. The only individual, to whom an attorney can listen to in these situations, is his client, not some intended beneficiaries who at some point may be written out of the will.

Plaintiffs-Appellants fail to recognize that they are not vested to any of their mother's property at the time the will and the transfer of interest in the Hannah Farm were drafted, and up until the time of Margaret Schlegel's death. This will and other transfers could have been changed to completely exclude Plaintiffs-Appellants and there would have been nothing the Plaintiffs-Appellants could have done. Therefore, the beneficial interest of Plaintiffs-Appellants Roy Schlegel and Anna Mae Shoemaker were at all times subject to defeasance. Plaintiffs-Appellants agree that Defendant-Appellee Gindlesberger was not their lawyer at anytime. Under these undisputed facts, summary judgment was properly affirmed in Appellee Gindlesberger's favor and there is no public or great general interest served by further review of this case.

RESPONSE TO PROPOSITION OF LAW

Non-clients not in privity with an estate planning attorney and not having an actual vested beneficial interest that would create privity do not have standing to sue the testator's lawyer for legal malpractice.

The trial court properly granted summary judgment to Defendant-Appellee Gindlesberger on Plaintiffs-Appellants Robert E. Schlegel and Anna Mae Shoemaker's Complaint for legal malpractice, by correcting applying the holding of *Simon v. Zipperstein* (1987), 32 Ohio St.3d, 512 N.E.2d 636. The only individual alleged to have an attorney/client relationship with Defendant-Appellee Gindlesberger was the decedent Margaret Schlegel, and on behalf of whom, Defendant-Appellee Gindlesberger drafted the survivorship deed and the last will and testament.

In addition, Plaintiffs-Appellants Robert Schlegel and Anna Mae Shoemaker in their Complaint, and the evidence throughout discovery, did not reveal any special circumstances such as fraud, bad faith, collusion, or other malicious conduct which would justify the departure from the general rule that an attorney may not be held liable to third-parties as a result of having performed services on behalf of another.

The Ohio Supreme Court has already considered all of the arguments made by Plaintiffs-Appellants Robert E. Schlegel and Anna Mae Shoemaker in the trial court and in their briefs, to support their position that they should be able to maintain a legal malpractice claim against their mother's attorneys as beneficiaries and as the administrator of the estate. These arguments have been correctly rejected by this court in *Simon v. Zipperstein*, supra.

The Supreme Court in 1987, reaffirmed the position long held in common law and affirmed their previous holdings that an attorney is immune from liability to the third-persons arising from the performance as an attorney in good faith on behalf of his client, unless such

third-parties are in privity with a client or where the attorney acts maliciously. *Simon* at 512 N.E.2d 638. The court in affirming this holding in 1987 found specifically that an executor and beneficiaries lack standing to bring a malpractice action against an attorney who prepared the testator's last will and testament.

As this court has recently noted, *stare decisis* is the "bedrock" of the American judicial system. For that reason opinions become controlling precedent that is creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that newly chosen course for laws is a significant improvement over the current course that we should depart from precedent. See *Westfield Insurance Company v. Galatis* 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 at ¶1. Therefore, under *Galatis*, the decision of the Supreme of Court may be overruled where (1) the decision was wrongly decided at that time, or changes in the circumstances no longer justify continued adherence to that decision, (2) the decision defies practical workability and (3) abandoning the precedent would not create an undue hardship for those that relied upon it. See *Galatis* at syllabus 1.

There is no evidence that the decision that this court made in *Simon v. Zipperstein* was wrongly decided at that time. Additionally, there are no changes in circumstances that no longer justify continued adherence to the decision. In fact, in this increasingly litigious society, it is important for an attorney preparing a will, that his one true allegiance is that of his client, the testator.

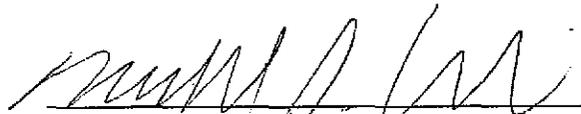
The decision does not defy practical workability, and in fact is imminently more workable than a situation where an attorney has to take into account the interest of a non-vested beneficiary and when drafting a will. The obvious pitfalls in such a rule are clear.

Additionally, abandoning this precedent would create an undue hardship on attorneys who have relied upon it. If *Simon v. Zipperstein* is overruled, all attorneys who have drafted wills, have to contact all the beneficiaries to make sure that their interests are fully protected. The undue hardship upon practicing attorneys is clear. Therefore, this court's standard for overruling a prior decision issued by this court is not met and therefore jurisdiction should be declined on that basis alone.

CONCLUSION

The Court of Appeals properly affirmed the trial court's decision granting summary judgment by applying Ohio Supreme Court Law as articulated in *Simon v. Zipperstein*. This appeal does not involve any issue of public or great interest as it merely involves two beneficiaries under a will. Additionally, there has been no articulated reason as to why *stare decisis* should be disregarded and *Simon v. Zipperstein* should be overruled. Accordingly, this court should refuse jurisdiction and deny the discretionary appeal requested by Plaintiffs-Appellants.

Respectfully submitted,



John C. Nemeth (0005670)

Michael J. Collins (0063846)

JOHN C. NEMETH & ASSOCIATES

21 East Frankfort Street

Columbus, Ohio 43206

(614) 443-4866 Telephone

(614) 443-4860 Facsimile

mcollins@nemethlaw.com

Attorney for Defendant-Appellee

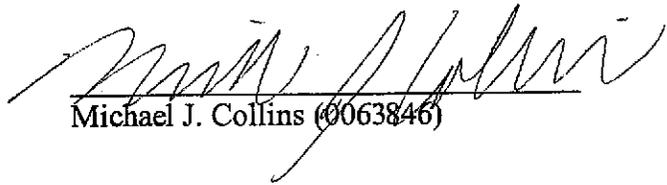
Thomas D. Gindlesberger

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by regular United States Mail, postage prepaid upon the following this 15th day of February, 2007:

Ronald L. Rosenfield, Esq.
440 Leader Building
526 Superior Avenue
Cleveland, OH 44114
Attorney for Plaintiffs-Appellants
Robert E. Schlegel, et al.

Stanley R. Rubin, Esq.
437 Market Avenue North
Canton, OH 44702
Attorney for Defendant-Appellee
Roy W. Schlegel


Michael J. Collins (0063846)