

IN THE SUPREME COURT OF OHIO

ROBERT E. SCHLEGEL, as Executor of) CASE NO. 07-113
the Estate of Margaret E. Schlegel, *et al.*)
Plaintiffs-Appellants,) ON APPEAL FROM THE
vs.) HOLMES COUNTY COURT OF
THOMAS D. GINDLESBERGER, ESQ.) APPEALS, FIFTH APPELLATE
) DISTRICT
Defendant-Appellee)
)
)

Merit Brief of Appellants Robert E. Schlegel, Executor, *et al.*

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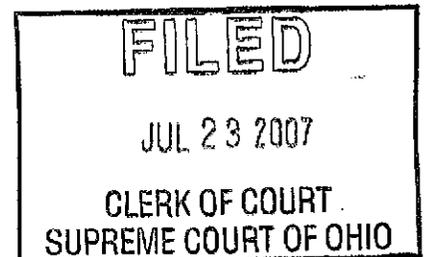


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STATEMENT OF FACTS

This case is on appeal from the Order of the Holmes County Court of Appeals (5th District, Case No. 05 CA 011) (Appx. p. 4) affirming the decision of the Trial Court in granting of Defendant Gindlesberger's Motion for Summary Judgment (Appx. p. 12)¹

When filed in the Court of Common Pleas for Holmes County the parties were the personal representatives of the Estate of Margaret S. Schlegel, and two of her children, Anna Mae Shoemaker and Robert E. Schlegel. The Defendants were Roy W. Schlegel (another of Margaret's children) and Margaret's attorney of many years, Thomas D. Gindlesberger. Robert E. Schlegel thereafter cross-claimed against the Defendant-Appellee Gindlesberger.

In the intervening years Robert E. Schlegel has died, and currently before the Court as Appellants are Anna Mae Shoemaker, both as Executrix of the Estate of Margaret S. Schlegel and in her own right, Nora M. Schlegel, Executrix of the estate of Robert E. Schlegel and Roy W. Schlegel.

Factually this case revolves around legal services performed by Gindlesberger for and at the behest of Margaret S. Schlegel between 1986 and 2003, those services involving her estate planning and the transfer of her real property in conjunction with that planning. In all of these regards, Gindlesberger acted as Margaret's lawyer (Anna Mae Shoemaker deposition, p. 7, ln. 16).

¹ Plaintiffs-Appellants alleged a cause of action sounding in unjust enrichment against Defendant-Appellant Roy W. Schlegel. The trial court denied Defendant-Appellant Roy W. Schlegel's motion for Summary Judgment and that action is stayed pending the resolution of this appeal.

Margaret owned, amongst her other assets, two tracts of land. These were known respectively as “The Hannah Farm” and “The Home Place.” In 1990 Margaret wanted (for reasons not germane here) to transfer “The Hannah Farm” to her son, Roy W. Schlegel, and his wife. Prior to this she had provided that the farm would pass to him through her will. (Gindlesberger deposition, p. 31, ln 17)

When he prepared a deed of conveyance for Margaret (Gindlesberger deposition, p. 31, ln 22) he drafted it reserving unto Margaret (the Grantor) three separate rights:

“Grantors reserve to themselves, in gross, the right, license and easement for the use of water from the premises herein conveyed to adjoining premises owned by the Grantors.” (Supp. p. 17)

“Said Grantor, Margaret S. Schlegel, a widow, unremarried, reserves unto herself a life estate interest in and to the herein described premises for and during her natural lifetime.” (Supp. p. 17)

“Grantor reserves unto herself the oil and gas rights to the herein described premises inclusive of the royalties therefrom for and during her natural lifetime only.” (Supp. p.17)

The inclusion of these retained interests in the deed triggered Internal Revenue Code Sections 2036 (a) *et. seq.* (Supp. 31). The simple effect of Section 2036 (a) is to include for the purposes of estate taxation the entire value on her death of “The Hannah Farm” in her taxable estate. With the value of “The Hannah Farm” included the amount of the estate tax was so large as to wipe out the entire inheritance Margaret had intended for Anna Mae Shoemaker and Robert E. Schlegel. (Shoemaker deposition, p. 17, ln 14)

This deed was prepared and witnessed by Gindlesberger. (Supp. p. 17); was executed by Margaret in July 1990 and was duly recorded.

Following the preparation and execution of the July 1990 deed Gindlesberger on many occasions continued to represent Margaret regarding her estate plan. Minimally this opportunity presented itself on October 17, 1994 when he prepared a codicil for Margaret (Supp. p. 25); on May 31, 1996 (Supp. p. 26); and on July 3, 1997 (Supp. p. 28). An examination of Gindlesberger's office notes for these dates reveals that on at least one of these occasions (May 31, 1996) he consulted with and reviewed Margaret's estate plan not only with Margaret, but with two of her children, Anna Mae Shoemaker and Robert E. Schlegel. (Supp. p. 26)

In advising Margaret S. Schlegel Gindlesberger never considered the Federal or State Estate tax consequences of I.R.C. 2036 (a) *et. seq.* (Supp. p. 31). Indeed, he admits in his deposition that he never even learned of the existence of the "retained interest" rule until after her death (Gindlesberger deposition, p. 61, ln 25 - p. 62, ln 20).

During the entirety of his representation of Margaret, as is relevant to the issue at bar, Gindlesberger knew and understood that it was her intent, so far as practicable, have her children share in her estate as equals. (Gindlesberger deposition, p. 37, ln 25 - p. 39, ln 25) (Shoemaker deposition, p. 18, ln 10).

This failure to understand the law and its frustrating effect on his client's estate plan constituted negligence by Gindlesberger, as set forth in the affidavit of Lisa D. Summers, Esq., which was submitted in the Summary Judgment Proceedings below (Supp. 35). As this matter was disposed of below by Summary Judgment we must assume that Gindlesberger was negligent.

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.

ARGUMENT

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.

Lawyers in Ohio who commit the types of negligence alleged to have been committed here can sleep at night without fear of having to count retribution to those whom their negligence has harmed. The continued application of the rules of law set forth in *Simon v. Zipperstein* (1987), 32 Ohio St. 3d 74, 512 N. E. 2d 633 and *Scholler v. Scholler* (1984), 10 Ohio St. 3d 98, 462 N.E.2d 158 give these malfeasing lawyers a free pass.

Those rules provide (in an estate planning setting) that absent an attorney-client relationship (privity) or, unless the attorney acts with malice, he will not be liable to those persons his client intended to benefit, even where his client's estate planning desires and intended beneficiaries are well known to him and it is by dint of his negligence alone that the plan fails. The traditional negligence consideration of the foreseeability of damage as a result of negligence does not apply to lawyers.²

This Court's recently announced decision in *Leroy v. Allen, Yurasek & Merklin* _____ Ohio St. 3d _____, 2007-OHIO-3608 does not modify this longstanding

² In Ohio almost every professional can be held liable to third parties, not in privity, for their negligence., i.e. Physicians, Architects, Accountants.

inequity; in recent years, however, several of the Ohio Courts of Appeals have advocated just such modification.

In *Dykes v. Gayton*, (2000), 139 Ohio App. 3d 395, Judge Kennedy, writing for the Court stated (at page 398):

We believe, however, that appellants raise a persuasive public policy argument which requests that we balance the public policy that supports the right of a testator to make a will and have its provisions carried out with the public policy that favors some immunity for attorneys, as against lawsuits by third-parties, so that the attorney may properly represent his client without the fear of indiscriminate third-party actions. Scholler, Simon. This case may indeed be appropriate for review by our state's highest court, and we would respectfully invite the same."

In *Ryan v. Wright*, 2007-OHIO-942, this same court, in an opinion authored by Judge Brown, again expressed its belief that *Simon* was ripe for revisitation. Judge Brown in *Ryan* cited the opinion in the case at bar written by Judge Wise. Although applying *Simon* as it was required to do, Judge Wise wrote for the 5th District:

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. (Appx. p. 10)

Under the rule in *Simon* the loss as a result of an attorney's malpractice inequitably falls upon the shoulders of the very people the attorney and his client undertook to protect. As was recognized by the Supreme Court of California in 1961, the duty owed by an attorney in drafting a will extends to the client's intended beneficiaries so as to avoid such an inequitable result. *Lucas v. Hamm*, 56 Cal. 2d 583

(1961). That Court later in *Heyer v. Flaig*, 70 Cal. 2d 223 restated the reasoning behind *Lucas*, when it held:

1. An attorney who negligently fails to fulfill a client's testamentary directions incurs liability in tort for violating a duty of care owed directly to the intended beneficiaries.

In the case of *Lucas v. Hamm*, supra, 56 Cal.2d 583, 15 Cal.Rptr. 821, we embraced the position that an attorney who erred in drafting a will could be held liable to a person named in the instrument who suffered deprivation of benefits as a result of the mistake. Although we stated that the harmed party could recover as an intended third-party beneficiary of the attorney-client agreement providing for legal services, we ruled that the third party could also recover on a theory of tort liability for a breach of duty owed directly to him. At the heart of our decision in *Lucas v. Hamm* lay this recognition of duty.

The *Heyer* Court further went on to opine:

When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. *Heyer v. Flaig* (1969), 70 Cal. 2d 223, 228, 74 Cal. Rptr. 225, 228-229, 449 P. 2d 161, 164-165.

Here the negligence of Gindlesberger goes beyond the mere error in drafting. He served as Margaret S. Schlegel's attorney in not only the role of legal scrivener, but also as her estate planning advisor. The duty he owed to Margaret cannot be limited only to her. The very essence of his undertaking was to deliver the benefits she wished to confer upon her children.

In *Licata v. Spector*, 26 Conn. Supp. 378 (1966), cited with approval by the Connecticut Supreme Court in *Stowe v. Smith*, 184 Conn. 194 (1981) the Court (in

answering its own question regarding the liability of the drafter of a will to the intended beneficiaries) wrote:

A duty of care to perform such a contract may be justified by projecting into this field the cardinal principles of negligence law, and such a duty would be owed to those foreseeably injured by negligent performance, or nonperformance, in a way over and above the withholding of the benefit contracted for, i.e. the drafting of a proper will, without regard to any question of reliance under the contract. Liability for a negligent performance, should be imposed where the injury to the plaintiff is foreseeable and where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered, as an incident to the enterprise. 2 Harper & James, Torts § 18.6, pp. 1052, 1053. That the drafting of wills by an attorney is related to the 'enterprise' of the defendant needs no discussion. State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 234, 140 A.2d 863, 69 A.L.R.2d 294.

In *Stowe* (Supra), again considering negligence in the drafting of a will, the Court wrote:

If the defendant thwarted the wishes of the testatrix, an intended beneficiary would also suffer an injury in that after the death of the testatrix the failure of her testamentary scheme would deprive the beneficiary of an intended bequest. It therefore follows that the benefit which the plaintiff would have received under a will prepared in accordance with the contract is so directly and closely connected with the benefit which the defendant promised to the testatrix that under the allegations of the complaint the plaintiff would be able to enforce the contract. (*Supra* at 198).

The only difference between the case at bar and the facts in the cases recognizing the right of the intended beneficiaries to seek compensation from the negligent attorney, is that here the error was not in the drafting of a will but in not understanding the import of another type of document prepared in furtherance of the attorney's client's dispositive scheme. This, Appellants submit, is a difference without distinction.

It matters not if the attorney's negligence was in the way he drafted a will thereby destroying the prospective beneficiaries inheritance, or in the attorney's failing to know the effect that a transfer of property coupled with a reservation of rights would produce the identical effect. In both circumstances the employment of the attorney was to further the dispositive intent of his client to benefit others, and in both he failed his employment.

Many courts throughout this country have faced similar issues and have declined to abide by a stringent general rule which insulates attorneys from liability to foreseeable third-parties due to negligence. See; *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P. 2d 685 (1961) (lack of privity between beneficiaries of will and attorney who drew will did not preclude beneficiaries from maintaining an action against attorney for allegedly negligently preparing testamentary instruments); *Guy v. Liederbach*, 501 Pa. 47, 459 A. 2d 744 (1983) (named legatee of will may bring suit as intended third-party beneficiary of contract between attorney and testator for drafting of will which specifically names legatee as recipient of all or part of estate); *Succession of Killingworth*, 292 So. 2d 536 at 542-543 (La. 1973) (an attorney's clear error in confecting a will constitutes a breach of the contractual stipulation for the benefit of the intended legatee); *Olge v. Fuiten*, 102 Ill. 2d 356, 466 N.E. 2d 224 (1984) (purpose of employment of attorney was to draft wills, not only for benefit of testators, but for benefit of intended contingent beneficiaries); *McAbee v. Edwards*, 340 So. 2d 1167 (Fl. App. 1976) (attorney owed beneficiary a duty to properly advise deceased client); *Lacata v. Spector*, 26 Conn. Supp. 378, 225 A. 2d 28 (1966) (legatees under will, declared invalid and inoperative because of lack of statutory requisites as to

attesting witnesses, could maintain action against attorney drafting will for loss sustained by legatees because of attorney's alleged negligence); and *Clagett v. Dacy*, 47 Md. App. 23, 420 A. 2d 1285 (1980) (exception to the strict privity requirement is most often seen and applied in actions based on drafting errors in wills that, by their very nature, will likely impact upon persons other than the attorney's immediate employer). There is no logical reason that this rule should not be extended to all errors in estate planning and wealth transfer to succeeding generations where both the client's desires and his intended beneficiaries' are known to the offending attorney.

As the courts in the foregoing decisions have keenly emphasized, an attorney must be aware in his or her capacity of drafter of a will or the advisor in an estate plan (1) that the purpose of the professional employment is for the benefit of third-parties; and (2) that an error in the drafting and/or execution will not result in harm upon the immediate client, who will likely be deceased at the time that the error is discovered; rather, the harm befalls the intended beneficiaries. It is only reasonable that by allowing such beneficiaries to maintain suit against an attorney who negligently drafts or supervises the execution of a will or other planning documents is one way to make an attorney accountable for his negligence. In Ohio there is the right to make an estate plan (including both predeath and testamentary transfers of property) and have such plan carried out in accord with the desires of the client. This right reflects a strong concern that people should be as free as possible to dispose of their property as they wish upon their death. By refusing a decedent's beneficiaries the right to sue an attorney who negligently creates or supervises the estate planning efforts of his client denies accountability for the errant attorney. As the Wisconsin supreme Court said:

Accountability should result in increasing the care with which attorneys draft wills 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. 2d 507, 331 N.W. 2d 325 (1983).

CONCLUSION

Appellants respectfully ask this Court to overturn the rules of law in *Scholler* and *Simon* in favor of a rule which recognizes the reality of those who truly suffer loss as the result of an attorney's negligence in performing estate planning functions for a client.

The Court might feel that appellant's proposed proposition of law is too broad and should be limited to only those intended beneficiaries demonstrably known to the attorney. Appellants believe that all within the circle of foreseeability should be protected.

Perhaps the most eloquent argument in favor of overturning *Simon* is found in *Simon* itself, at Justice Herbert R. Brown's dissent:

I must respectfully dissent. The result reached by the majority means that an attorney who negligently prepares a will is immune from liability for malpractice. For example, if an attorney carelessly fails to see that the will is signed by the required number of witnesses, no action can be brought against the inattentive lawyer. This is so because the client, the testator, must die before the will becomes operative. Nonetheless, only the client, says the majority, may bring the malpractice action. To reach this undesirable result, the majority trots out that old chestnut, privity.

In the law of torts, the use of privity as a tool to bar recovery has been riddled (and rightly so) to the extent that we are left with legal malpractice as, perhaps, the only surviving relic. For example, a physician who negligently injures a spouse or a minor child is responsible to the other spouse or to the parent(s) for their corresponding loss of consortium or loss of services, notwithstanding the absence of privity. See *Shaweker v. Spinell* (1932), 125 Ohio St. 423 , 181 N.E. 896; cf. *Clouston v. Remlinger Oldsmobile Cadillac, Inc.* (1970), 22 Ohio St.2d 65 , 51 O.O. 2d 96, 258 N.E. 2d 230, and *Whitehead v. Gen. Tel. Co.* (1969), 20 Ohio St.2d 108 , 49 O.O. 2d 435, 254 N.E. 2d 10, 41 A.L.R. 3d 526. Likewise, an architect or builder who defectively designs or constructs a building is liable to a person thereby injured, despite a lack of privity. *Kocisko v. Charles Shutrump & Sons Co.* (1986), 21 Ohio St.3d 98 , 101, 21 OBR 392, 394, 488 N.E. 2d 171, 174 (Wright, J., dissenting). Additionally, the manufacturer of a defective product

is not excused for want of privity from liability to an injured user. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317 , 4 O.O. 3d 466, 364 N.E. 2d 267. Even an accountant is no longer immune from liability to third persons who foreseeably rely upon his or her negligent representations. *Haddon View Investment Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154 , 24 O.O. 3d 268, 436 N.E. 2d 212.

While the court of appeals below should perhaps have given greater obeisance to *Scholler v. Scholler* (1984), 10 Ohio St.3d 98 , 10 OBR 426, 462 N.E. 2d 158, this court is under no such duty. The requirement of privity in a legal malpractice action should be put to a well-deserved burial. Such is not to abandon *stare decisis*, but rather to bring attorney malpractice - based upon professional negligence - into line within the body of tort law.

What the majority has done is to make a mechanical application of *Scholler, supra*, to the facts of the cause sub judice. Then, the majority blandly claims that its view is "shared by other jurisdictions." The issue before us is not that simple. An examination of the seven cases cited by the majority reveals that only two involve an attorney's negligence in drafting a will. See *St. Mary's Church of Schuyler v. Tomek* (1982), 212 Neb. 728, 325 N.W. 2d 164, and *Maneri v. Amodeo* (1963), 38 Misc. 2d 190, 238 N.Y. Supp. 2d 302. The remaining five cases arise from a potpourri of factual situations, having nothing to do with the issue before us.

Actually, most courts that have faced the issue have been unwilling to use privity to insulate attorneys from liability for negligent will preparation. See *Lucas v. Hamm* (1961), 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P. 2d 685; *Auric v. Continental Cas. Co.* (1983), 111 Wis. 2d 507, 331 N.W. 2d 325; *Guy v. Liederbach* (1983), 501 Pa. 47, 459 A. 2d 744; *Succession of Killingsworth* (La. 1973), 292 So. 2d 536, 542-543; *Olge v. Fuiten* (1984), 102 Ill. 2d 356, 80 Ill. Dec. 772, 466 N.E. 2d 224; *McAbee v. Edwards* (Fla. App. 1976), 340 So. 2d 1167; *Licata v. Spector* (1966), 26 Conn. Supp. 378, 225 A. 2d 28; *Clagett v. Dacy* (1980), 47 Md. App. 23, 420 A. 2d 1285. These courts have perceptively emphasized that in drafting a will, the attorney knows that (1) the client has employed him or her for the specific purpose of benefiting third persons, and (2) the consequences of an error by the lawyer will most likely fall upon those intended beneficiaries rather than upon the client.

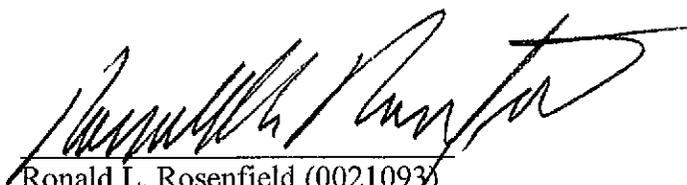
The majority has unfortunately been blinded by the mirage of conflict of interest. The majority states, and I agree, that "the obligation of an attorney is to direct his [or her] attention to the needs of the client, not to the needs of a third party not in privity with the client." Where the attorney's job is to draft a will, however, the needs of the client simply require the attorney to competently construct an instrument that will carry out the client's intentions as to the distribution of his or her property upon death. If the attorney

negligently fails to fulfill those needs, with the result that an intended beneficiary receives less than the client desired, surely the client, if he or she were still alive, would want the intended beneficiary to bring an action against the attorney. The conflict of interest bugaboo is nonexistent in such a case.

I would hold that an attorney who negligently drafts a will is not immune from liability to those persons whom the testator intends to be beneficiaries thereunder. *Simon*, (Supra at 77, Justice Brown dissenting)

The time has come to make Justice Herbert's last words the law of Ohio, as applies not only to wills but to all facets of what is now a major legal industry, the Estate Planning Lawyer.

Respectfully submitted,



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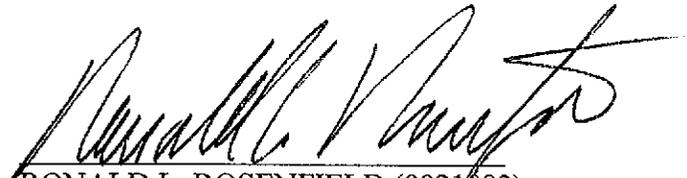
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I certify that a copy of this **Merit Brief of Appellants Robert E. Schlegel, Executor, et al.** has been sent via regular U.S. Mail this 70th day of July, 2007 to the following:

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APPENDIX

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07-0113

IN THE SUPREME COURT OF OHIO

ROBERT E. SCHLEGEL, as Executor of)	ON APPEAL FROM THE
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)	APPEALS, FIFTH APPELLATE
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vs.)	COURT OF APPEALS
)	CASE NO. 05 CA 011
THOMAS D. GINDLESBERGER, ESQ.)	
)	
Appellee)	

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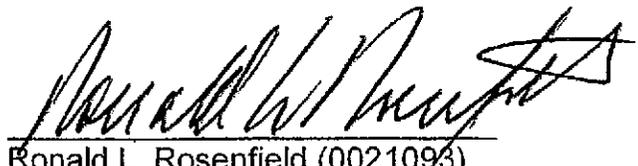
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Notice of Appeal of Appellant Robert E. Schlegel, Executor, et al.

Appellants Robert E. Schlegel, as Executor, Robert E. Schlegel and Anna Mae Shoemaker hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Holmes County Court of Appeals, Fifth District, entered in Court of Appeals case number 05 CA 011 on December 26, 2006.

This case is one of public or great general interest.

Respectfully submitted,



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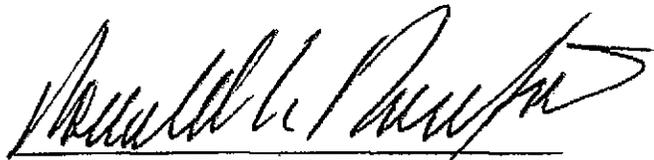
CERTIFICATE OF SERVICE

I certify that a copy of this **Notice of Appeal** has been sent via regular U.S.

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

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FILED

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.

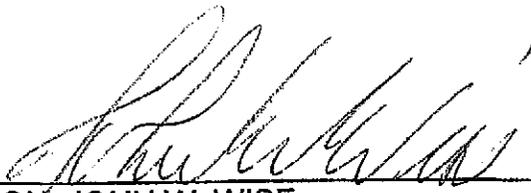
Defendants-Appellees

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. BOGGS

FILED

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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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:

APPEARANCES:

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For Defendants-Appellees

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AND

STEPHEN KNOWLING
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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.

{¶15} 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.

{¶16} 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.

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

I

{¶18} 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.

{¶19} 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.

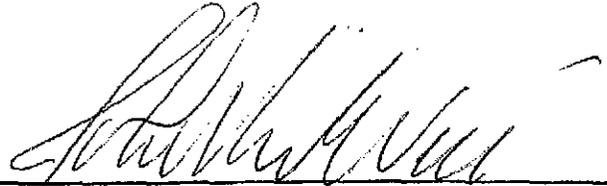
{¶17} Appellants' sole assignment of error is overruled.

{¶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

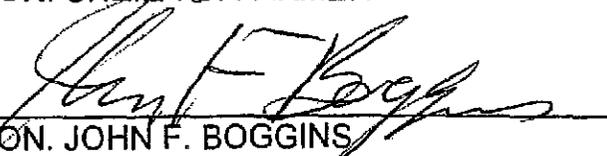
Boggins, J., concur.



HON. JOHN W. WISE



HON. SHEILA G. FARMER



HON. JOHN F. BOGGINS

JWW/d 1128

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

FILED

2005 DEC -5 AM 9:45

DEPUTY CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

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

Plaintiffs,

V.

THOMAS D. GINDLESBERGER,
et. al.,

Defendants,

◆ Case No. 04-CV-076

◆ JUDGE DAVID E. STUCKI
(by Supreme Court Assignment)

◆ JOURNAL ENTRY

Journalized: Journal _____, Page(s) _____

This matter came before the Court on Defendant Thomas D. Gindlesberger's, Motion for Summary Judgment, filed on May 31, 2005, Defendant Roy W. Schlegel's Motion for Summary Judgment filed on June 1, 2005, and Plaintiff's Brief in Opposition to Defendant Thomas D. Gindlesberger, and Defendant Roy Schlegel's Motions for Summary Judgment, filed July 22, 2005. Defendant Roy W. Schlegel filed a Reply on July 27, 2005, and Defendant Thomas D. Gindlesberger filed a Reply on July 28, 2005. The Court heard oral argument and took this matter under advisement. The Court has now reviewed and considered the entire record in this matter.

Summary Judgment Standard

Summary Judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The moving party must initially inform the trial court of the basis for its motion and identify those portions of the record which demonstrate the absence of a genuine issue of material fact.

Celotex v. Catrett (1986), 477 U.S. 317, citing with approval *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108. See, also, *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. A material fact is one that "might affect the outcome of the suit under governing law" *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party must establish more than "[t]he mere existence of a scintilla of evidence in support of [his] motion." *Anderson*, 477 U.S. at 252.

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth the specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E)

Once the moving party has satisfied his initial burden, the non-moving party must "set forth specific facts showing that there is a genuine issue for trial and, if the non-movant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Vahila* at 1171, quoting *Dresher* at 293.

Plaintiffs' Claims

Plaintiffs Robert E. Schlegel, as executor of the Margaret S. Schlegel estate and in his own right, and Anna Mae Shoemaker, beneficiary and daughter of decedent, have filed the instant action alleging individual claims. The individual claim against Defendant Thomas D. Gindlesberger for legal malpractice alleges that he was negligent in the transfer of real property to Defendant Roy W. Schlegel from the estate of decedent Margaret Schlegel. This alleged negligence purportedly resulted in substantial State and Federal tax consequences resulting in an inequitable distribution of the decedent's estate among her

three children, Robert E. Schlegel, Anna Mae Shoemaker, and Roy E. Schlegel. The individual claim against Defendant Roy W. Schlegel alleges that due to the negligence of Defendant Thomas D. Gindlesberger, Defendant Schlegel was unjustly enriched at the expense of the Plaintiffs. Defendant Roy W. Schlegel has filed a cross-claim against Defendant Thomas D. Gindlesberger. The cross-claim alleges that due to his negligence regarding his knowledge of federal and state tax laws pertaining to the transfer of real property, Defendant Schlegel has suffered losses and estate tax liability, in addition to Plaintiff's action against him.

Statement of the Facts

Margaret Schlegel, the decedent, was a client of Mr. Gindlesberger. Mr. Gindlesberger prepared Margaret Schlegel's last will and testament and two codicils. In 1990, Margaret Schlegel contacted Mr. Gindlesberger to prepare a Survivorship Deed transferring the "Hanna Farm" to Roy Schlegel while retaining a life estate. Roy Schlegel operated his dairy business on the "Hanna Farm." Roy approached Margaret concerning making improvements on the "Hanna Farm" to increase milk production. Roy wanted to obtain a mortgage loan to finance the project. (T. Gindlesberger Dep. at 32.) Margaret Schlegel refused to sign a mortgage on the property and told Roy to obtain financing through the equipment supplier. Roy Schlegel agreed to seek financing through the equipment supplier however, prior to the expansion Roy wanted to ensure that he would receive the "Hanna Farm" after Margaret's death. Margaret requested Mr. Gindlesberger to prepare the Survivorship Deed.

Following the death of Margaret Schlegel, Plaintiffs discovered that Margaret's

estate was responsible for the State and Federal taxes owed on the transfer of the improved "Hanna Farm," thus depleting the entire estate. The property Margaret Schlegel left to the Plaintiffs would have to be sold to cover the taxes on the "Hanna Farm." Defendant Roy Schlegel therefore would have received his portion of his inheritance whereas the Plaintiffs would receive nothing. Plaintiffs contend that the taxes owed on the "Hanna Farm" preclude Margaret Schlegel's intention of an equitable division of her estate among her three children.

The Plaintiffs argue that Mr. Gindlesberger's failure to advise Margaret Schlegel of the tax consequence constitutes legal malpractice. Mr. Gindlesberger testified that he had advised Margaret Schlegel that she should meet with her accountant Ken Bromund, CPA concerning the effects of the transfer on her estate. (T. Gindlesberger Dep. At 25.)

In addition, Plaintiffs claim that Defendant Roy Schlegel has been unjustly enriched through the negligence of Mr. Gindlesberger. Plaintiffs argue that the 1990 Survivorship Deed unjustly enriched Roy Schlegel to the Plaintiffs detriment, hence frustrating Margaret Schlegel's intention that her children share her estate equally.

Defendant Roy Schlegel initiated a cross-claim against Mr. Gindlesberger. Roy Schlegel argues that due to Mr. Gindlesberger's negligence concerning the taxes on the "Hanna Farm," he is being sued by the Plaintiffs.

Analysis of the Summary Judgment Motions by the Court

In addition to the Summary Judgment Standard set forth above, the Court now elaborates on this standard by providing the following analysis which it will use in ruling upon the Defendants' Motions for Summary Judgment.

The Defendants must submit factual material supported by evidence of at least affidavit quality showing that, if true, demonstrates a defense to the action. The Plaintiffs must then respond to the Motions for Summary Judgment with evidence, by affidavit or otherwise, i.e., depositions, transcripts of evidence or written stipulations, setting forth specific facts showing that there is a genuine issue for trial. This standard was enunciated in *East Ohio Gas Company v. Walker*, 59 Ohio App.2d 216, and adopted by the Fifth District Court of Appeals in *Zindle v. Parker*, 1991 WL 70159 (Ohio App. 5 Dist.). In applying this standard to the instant case, this Court does not find that the Plaintiffs have responded to the Motions for Summary Judgment with any type of evidence, by affidavit or otherwise, setting forth specific facts showing that there is a genuine issue for trial. The only affidavit provided in response to the Motions for Summary Judgment is the Affidavit of Lisa D. Summers, Esq. The Court finds that this affidavit does not support Plaintiff's claims of legal malpractice.

Motion for Summary Judgment of Thomas Gindlesberger

Thomas D. Gindlesberger moves this Court for Summary Judgment on the basis that there remains no genuine issue of material fact and that he is entitled to judgment as a matter of law. Thomas D. Gindlesberger argues that there was never an attorney-client relationship between Plaintiffs or Defendant Roy Schlegel and himself regarding the legal services provided in their complaint. Thomas D. Gindlesberger argues that Plaintiff's claim of legal malpractice and Defendant Roy Schlegel's cross-claim are without merit as they fail to meet the elements of a legal malpractice claim.

The necessary elements needed in order to prove a claim for legal malpractice are

(1) an attorney-client relationship; (2) a professional duty arising from that relationship; (3) breach of that duty; (4) proximate cause; and (5) damages. *Vahila v Hall* (1996), 77 Ohio St. 3d 421, 674 NE 2d 1164; *Krahn v. Kinney* (1989), 43 Ohio St 3d 103, 538 NE 2d 158. The Supreme Court of Ohio has held "that an attorney may not be held liable to third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for who the legal services were performed, or unless the attorney acts with malice." *Simon v. Zipperstein*, 512 N.E. 2d 636 (1987).

Margaret S. Schlegel retained Thomas D. Gindlesberger to prepare her last will and testament and two codicils. (See Thomas D. Gindlesberger Motion for Summary Judgment pg. 2) Margaret Schlegel paid Thomas D. Gindlesberger for his services and she determined how her estate would be handled and disbursed upon her death. (See Thomas D. Gindlesberger Motion for Summary Judgment pg. 3) Margaret requested that Thomas D. Gindlesberger prepare the Survivorship Deed for the "Hanna Farm" and she requested a life estate in the property. (See affidavit of Thomas D. Gindlesberger, ¶ 6(b).) Thomas D. Gindlesberger advised Margaret Schlegel to consult her accountant Ken Bromund concerning the tax implications of the deed to her estate. (See affidavit of Thomas D. Gindlesberger ¶ 6(c).) Plaintiffs Robert Schlegel and Anna Mae Shoemaker and Defendant Roy Schlegel admitted in their depositions that they were not clients of Thomas D. Gindlesberger. The Court finds there is no evidence that an attorney-client relationship or sufficient privity with an attorney-client relationship existed between Defendant Gindlesberger and the Plaintiffs Robert and Anna Mae Shoemaker, or Defendant Roy Schlegel.

The Plaintiffs and Defendant Schlegel argue that Thomas D. Gindlesberger's negligence falls within the "special circumstances" provided by the Supreme Court of Ohio in *Simon*, pp. 76-77, that justifies departure from the general rule of attorney immunity from third parties. (Plaintiff's Brief in Opposition pg 6). In *Simon*, the court determined that the administrator of the estate and the beneficiary lacked the requisite privity to sustain a malpractice action against the decedent's attorney unless there was a finding of malicious behavior. 512 N.E. 2d 76. However, neither Plaintiffs nor Defendant Schlegel have presented evidence that Thomas D. Gindlesberger ever acted in fraud, bad faith, collusion or in any other malicious manner.

The Court finds that there is no evidence by affidavit or otherwise creating a genuine issue of material fact as to the Roy Schlegel Cross Claim and the Complaint against Thomas D. Gindlesberger. Therefore the Court finds said Motion for Summary Judgment well taken and grants the same. See, *East Ohio Gas Company v Walker*, 59 Ohio App. 2d 216, *Zindle v. Parker*, 1991 WL 70159 (Ohio App. 5 Dist.), *Rafoth v. Smith & Schmidt Assoc., Inc.* (1985), 55 B.R. 820, and *Reprogle v. Pub, Inc.*, 2002WL 31108630 (Ohio App. 3d Dist.).

Motion for Summary Judgment of Roy Schlegel

Roy Schlegel argues in his Motion for Summary Judgment that Plaintiffs have failed to establish a claim of unjust enrichment and his motion should be granted. However, Plaintiffs argue that Roy Schlegel knew of Margaret Schlegel's intention that all of her children share equally in her estate. (Roy Schlegel Dep at pp 18-22). In addition, Plaintiffs argue that Margaret Schlegel's estate will be depleted by the taxes owed on the "Hanna

Farm," taxes that Roy Schlegel should be responsible to pay. Plaintiffs argue that because of the tax burden, Roy Schlegel would receive all of Margaret Schlegel's assets without any of the tax burden. (See Anna Mae Shoemaker's Dep pg 37) As a result, Robert Schlegel and Anna Mae Shoemaker would receive nothing from their mother's estate. (See Anna Mae Shoemaker's Dep pg 37) This Court finds that Plaintiffs have established that there is a genuine issue as to such material fact, and denies the Summary Judgment Motion of Defendant Roy Schlegel.

The foregoing judgments are final and dispositive as to the claims addressed. Because these judgments are not dispositive on all pending claims, the remaining pending issues are hereby scheduled for a status/scheduling conference to be held in the Holmes County Courthouse on the 20th of January, 2006 at 9:00 A.m.

Pursuant to Rule 54(B) of The Ohio Rules of Civil Procedure, the Court's disposition of these issues are made with the express determination THAT THERE IS NO JUST REASON FOR DELAY.

IT IS SO ORDERED.

Dated: 12-1-5



DAVID E. STUCKI, JUDGE
Holmes County Common Pleas Court
(By Supreme Court Assignment)

cc: Atty. Ronald Rosenfield (216-696-9300); Atty. Michael Collins(614-443-4866); Atty. Stanley Rubin (330-455-5206); Atty. Stephen Knowling (330-674-9776); Robert Schlegel, Anna Mae Schoemaker, and Roy Schlegel, and Judge Stucki,

[] Copies distributed on _____ by _____