

IN THE SUPREME COURT OF OHIO

ROBERT E SCHLEGEL, as Executor of)
the Estate of Margaret E. Schelgel, et al.)
Plaintiff-Appellants,)

-vs-

THOMAS D. GINDLESBERGER, ESQ.)
Defendant-Appellee)

CASE NO: 07-113

ON APPEAL FROM THE
HOLMES COUNTY COURT OF
APPEALS, FIFTH APPELLATE
DISTRICT CASE NO. 05 CA-010

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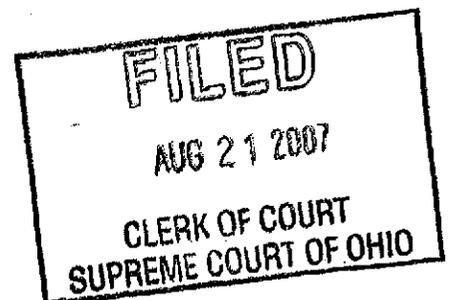


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STATEMENT OF FACTS

Appellee Thomas D. Gindlesberger is a lawyer who practiced for over 50 years in Holmes County. See Motion for Summary Judgment Thomas D. Gindlesberger, Affidavit ¶3. One of his clients was the decedent Margaret E. Schlegel. At the request of Margaret Schlegel, Appellee Gindlesberger prepared a deed transferring "The Hannah Farm" during her lifetime and prepared a last will and testament with two codicils. *Id.* at 6(a)-(e). All legal services were performed at the request of Margaret Schlegel and not her children, the Appellants in this action. The legal services at issue in this case, involve Appellee Thomas Gindlesberger preparing a deed of conveyance, and drafting the last will and testament and two codicils for his client Margaret Schlegel. See Plaintiffs' Complaint and Plaintiffs' Brief pg 2 and Supplement pg. 17. In the deed of conveyance that was prepared by Appellee Gindlesberger for his client, he reserved for his client a life estate interest, license and easement for the use of water for the premises conveyed to the adjoining premises owned by Margaret Schlegel and oil and gas rights inclusive of the royalties. See Appellants' Brief pg. 2, Supplement pg. 17. Appellee Gindlesberger reserved these interests at the specific request of his client Margaret E. Schlegel. See Affidavit of Thomas Gindlesberger ¶6 (b).

When this life estate was reserved for his client, in conjunction with the will, there was increased estate taxes for the estate upon Margaret Schlegel's death. The Appellants, although not the client of Appellee Gindlesberger, sued Appellee Gindlesberger for legal malpractice because their inheritance has been decreased by estate taxes as a result of their mother wanting to retain a life estate interest in the property she was transferring to one of her children.

Appellants argue that the facts and circumstances of this case demonstrate why this court's holding in *Simon v. Zipperstein* (1987), 32 Ohio St. 3d 74, 512 N.E. 2d 636 and a strict privity requirement should be overturned. Actually, this case demonstrates why *Simon v. Zipperstein* was such an important decision and its holding needs to remain the law in the State of Ohio.

If Appellants' proposition of law is adopted and applied to this case, Appellee Gindlesberger had the option of not fulfilling his client's wishes and not reserving a life estate to prevent any potential liability from future heirs for the tax implications. Obviously if he were to make that decision, and if discovered by Margaret E. Schelgel, he would be liable for malpractice. His other decision was to do exactly what his client requested, and if Appellant's position is accepted and *Simon v. Zipperstein* is overruled, then he exposes himself to a legal malpractice complaint by the heirs of his client. Therefore, the safest course of conduct for Appellee Gindlesberger was simply to refuse employment to eliminate any potential legal malpractice liability either from his client for not doing what was requested, or from his client's heirs who could now sue him for their decreased inheritance. It is for this ethical conundrum that would be present, that Ohio has consistently held that an Attorney may not be held liable by a third party as a result of having performed services on behalf of the 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. See *Simon v. Zipperstein* Id. at 512 N.E. 2d 638.

All of the other facts in this case support the conclusion that Appellee Gindlesberger should not be liable to Appellants, the decedent's heirs for legal malpractice. Appellee Gindlesberger testified that he did not represent Robert Schlegel, Roy Schlegel or Anna Mae

Shoemaker in providing the legal services from which are now complained. See Affidavit of Thomas D. Gindlesberger, Esq. ¶7. This expert opinion was supported by Appellants. The administrator of the Estate, former Appellant Robert Schlegel testified that Appellee Gindlesberger was an Attorney for his father and his mother. See Deposition of Robert Schlegel pg. 8. Robert Schlegel never hired Thomas Gindlesberger to perform legal services for him Id. at pg. 9. Thomas Gindlesberger had never given Robert Schlegel any legal advice Id. at pg 9. Former Appellant Robert Schlegel never saw his mother's will until she passed away Id. at pg 7.

Appellant Anna Mae Shoemaker testified that Appellee Gindlesberger was her mother's attorney. See Deposition of Anna Mae Shoemaker pg 7. Her mother Margaret Schlegel is the one who retained Appellee Gindlesberger to prepare the deed of conveyance of the property and prepare the will, and it was her mother who paid for the legal services Id. at pg 8. Appellee Gindlesberger attempted to fulfill her mother's desires with regard to her property Id. at pg. 10. Appellant Shoemaker conceded that she never retained Appellee Gindlesberger for any legal services Id. at pg 14. Appellee Gindlesberger prepared the deed for conveyance of the property, and the last will and testament and two codicils at the request of the decedent Margaret Schlegel. Further, it is undisputed that as a result of Margaret Schlegel's desire to maintain a life estate interest in "The Hannah Farm" that she was granting prior to her death, that it had an adverse tax consequences on the Estate upon her death. It is further undisputed that if *Simon v. Zipperstein* remains the law in Ohio, Appellants cannot maintain a legal malpractice claim against Appellee Gindlesberger.

Appellants urge an overruling of *Simon v. Zipperstein* so they can proceed with their perceived legal malpractice claim against Appellee Gindlesberger. However, when the facts of this case, and the policy considerations are considered, the correct conclusion, is that *Simon v.*

Zipperstein is good law, and the privity exceptions present in that decision should not be expanded. Appellee Gindlesberger requests the decision made by the Court of Appeals granting summary judgment for Appellee be affirmed based on the precedent established in the Ohio Supreme Court decision of *Simon v. Zipperstein*.

ARGUMENT

RESPONSE TO PROPOSITON OF LAW I

The limited privity exception to a lawyer's qualified immunity as held in *Simon v. Zipperstein* (1987), 32 Ohio St 3d 74, should not be expanded so that an intended beneficiary of a decedent's estate may maintain an action against an attorney who is alleged to be negligent in preparing a deed transferring property and will which results in increased estate taxes.

A. Essential elements for a legal malpractice claim

The necessary elements for legal malpractice are well settled in Ohio. The essential elements in a legal malpractice action are (1) an attorney client relationship; (2) professional duty arising from that relationship; (3) breach of that duty; (4) proximate cause; (5) and damages *Vahila v. Hall* (1996), 97 Ohio St. 3d 421, 674 N.E. 2d 1164; *Krahn v. Kinney* (1989), 43 Ohio St. 3d 103, 538 N.E. 2d 158. Traditionally failure to prove any one of these elements entitles Defendant to summary judgment on a legal malpractice claim *Chatfield v. Mitchell, Davis and Kramer*(1994), Franklin App. #94 ape 01-23; *O'Brien v. Moyer* (1994), Franklin App.#94ape06-848. Appellants' proposition of law would no longer require an attorney/client relationship for a legal malpractice action to be viable. This would require an expansion of the limited privity exceptions that have been recognized, and should not be adopted.

This court 20 years ago concisely and persuasively explained the reason for the necessary privity before a legal malpractice action can be maintained against an attorney. It wrote

It by now is well established in Ohio that an attorney may not be held liable by 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.

The rationale for this posture is clear; the obligation of attorneys is to direct his attention to the needs of the client, not to the needs of a third-party not in privity with the client. As was stated by the court in *WDG Inc.*, supra

“...some immunity for being sued by third persons must be afforded an attorney so that he may properly represent his client. To allow in discriminate third-party actions against an attorney of necessity would create a conflict of interest at all times, so that the attorney may well be reluctant to offer proper representation to his client in fear of some third-party action against the attorney himself. See *Zipperstein* at 32 Ohio St. 3d 76 internal citations omitted.

In the recent Supreme Court case *Leroy v. Allen, Yurasek & Merklin* _____ Ohio St. 3d _____, 2007-Ohio-2608, the Ohio State Bar Association filed an amicus curiae brief urging the exceptions in *Simon v. Zipperstien* to be narrowly interpreted. In support of this position, they relied extensively on the Code of Professional Responsibility which would have been in effect at the time that Appellee Gindlesberger drafted the deed, will, and codicils. The Code of Professional Responsibility codifies the issues present in *Simon v. Zipperstein* that an attorney can only have allegiance to the client.

Disciplinary Rule 5-101 (A) (1) requires a lawyer to refuse employment when the interests of the lawyer may impair the lawyer’s independent professional judgment. This rule provides that

“except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably will be affected by the lawyer’s financial, business, property or personal interests.

Similarly, Disciplinary Rule 5-105 (A) requires a lawyer to refuse to accept or continue to representation of a client when the interest of another client may impair the professional judgment of the lawyer as follows:

A lawyer shall decline proffered employment if the exercise of independent professional judgment on behalf of the client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under disciplinary rule 5-105 (C)

Effective February 1, 2007 this court has adopted Ohio Rules of Professional Conduct. However, these rules have similar language present in the former disciplinary rules for conflict of interest. The general principles in these rules, are particularly strong. They read as follows:

The principles of loyalty and independent judgment are fundamental to the attorney/client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyers loyalty to the client.

Therefore the rules and professional responsibility serve an additional support for the immunity afforded lawyers from lawsuits brought by parties that are not in privity with the lawyer. Ohio's disciplinary rules mandate that a lawyer's loyalty generally be devoted to a single client or entity. Attending to the legal interests of a third party, i.e. intended beneficiaries, who are not in privity with the lawyer's client is not a valid basis for compromising a lawyer's undivided loyalty to his or her client. To accept the Appellants' proposition of law undermines and defies the precedents set by this court and the disciplinary rules and the Ohio Rules of Professional Conduct adopted by this court

An attempt to apply Appellants' proposition of law to the facts of this case demonstrates the problems in relaxing the privity requirements.

In 1986 at the request of Margaret Schlegel, Appellee Gindlesberger prepared her last will and testament. A codicil was also prepared in 1988. See Affidavit of Thomas D. Gindlesberger, Esq. ¶ 6(D). In 1990, Margaret Schlegel desired to transfer "The Hannah Farm" to one of her sons and daughter-in-law, but she wished to keep a life estate interest for the benefit of herself. See Id. and Appellants brief pg. 2 and Supplement pg 17. When Margaret Schlegel was requesting that "The Hannah Farm" be transferred, the only legal interests of which Appellee Gindlesberger could be concerned based on Ohio decisional law and the Code of

Professional Responsibility were that of Margaret Schlegel. Margaret Schlegel wanted to keep a life estate interest in the property and therefore it was his duty, to make certain that a life estate interest was retained in the property. At the time she was requesting the deed to transfer the property, and retain a life estate interest, it would have been against Ohio Supreme Court law, and the Code of Professional Responsibility to consider the impact on the heirs. The only client whose interest's could be considered would have been Margaret Schlegel. She wanted to retain a life estate interest in the property, and therefore following the wishes of the client, the deed was prepared retaining the life estate interest. It would be negligent and unethical for Appellee Gindlesberger to consider the interests of the heirs when providing the legal services requested by his client.

This is why the beneficiaries of an Estate should not have standing to bring a legal malpractice claim against an attorney providing legal services for the decedent. The reason for this consistent holding in the State of Ohio is that the only person an attorney preparing a will for has a duty is the testator. Consequently, there is no duty to the executor of the estate or the beneficiaries. Accordingly, following Ohio Supreme Court decisional law and the Code of Professional Responsibility, and now the model code, summary judgment would be appropriately granted to Appellee Gindlesberger.

B. There are compelling policy revisions to maintain the strict privity rule with limited exceptions as defined in *Simon v. Zipperstein*.

The Ohio Association for Justice has filed an amicus curiae brief which is extremely similar to the brief they filed in *Leroy v. Allen Yurasek & Merklin*. In their brief, they argue that policy considerations require the modification of *Simon v. Zipperstein* to extend liability to lawyers who are negligent in the course of estate planning to third parties who were foreseeably damaged by that negligence. However, the policy for keeping the strict privity rule present in

Simon v. Zipperstein far outweighs any policy considerations advanced by Appellants and Ohio Association for Justice.

First, nine jurisdictions respect the sanctity of the attorney/client relationship and have maintained the strict privity rule. See *Belt v. Nopperheimer, Bland, Henderson & Tate* (Texas 2006) 192 S.W. 3d 780 additional citations omitted. The strict privity rule protects the integrity and solemnity of the will. The beneficiaries in this case with relaxation of the privity rule, are in fact requesting courts to reform the will so that an attorney will be responsible for the payment of taxes. If such liabilities were allowed, the attorney would be paying out-of-pocket for an additional request to the beneficiaries not expressed in the will. It is also noted that any attorney's liability would be severely disproportionate to the cost of the will. See *Noble v. Bruce* reaching identical conclusion (Court of Appeals Maryland, 1998) 349 Md. 730, 709 A., 2d 1264, 1577.

In *Noble v. Bruce*, supra, the court while doing an extensive survey of states' malpractice law in the estate planning context, ultimately decided that the strict privity rule was the appropriate rule to follow. The court also noted the protection of the attorney/client relationship as important and primary. The court wrote:

In addition, the strict privity rule protects the attorney/client relationship. Adopting a rule that would subject an attorney to liability to disappointed beneficiaries interferes with the attorney's ability to fulfill his or her duty of loyalty to the client and compromises the attorney's ability to represent the client zealously. As demonstrated by the *Noble* case, potential conflict of interests may exist between the client's interests and the interests of the beneficiaries. The beneficiaries have alleged that Bruce was negligent in failing to advise the law of a bypass trust to allow both spouses to take advantage of the unified credit against estate tax... minimizing the estate inheritance tax for beneficiaries, however may not always be the ultimate driving force behind the testator's decision regarding the provisions contained in his/or her will. There may be compelling non-tax reasons to employ a bypass trust including flexibility for the survivors.

That is exactly what occurred in this case and why the strict privity rule should be retained. There were other reasons that the decedent Margaret Schlegel, desired to retain a life estate when transferring the property and minimizing estate taxes was not the ultimate driving force behind the decision to retain the life estate and the drafting of her will. It was in Margaret Schlegel's best interests to retain the life estate, and it was in the beneficiaries' best interests to minimize the estate taxes. A lawyer representing a client, in preparing this deed, will, and transfer, must only be a servant to the interests of his client, and not consider any impact on the beneficiaries. The only way that can occur, is if the strict privity requirements that are present in *Simon v. Zipperstein* are maintained.

The *Noble* court also realizes that an expansion of the privity rules opens attorney/client contracts to the scrutiny of non-clients which place an undue burden on the attorney/client relationship and possibly the whole legal profession as a whole. An attorney should be able to control the scope of his representation of what is to be accepted. Imposing liability in favor of non-clients generally speaking, threatens those interests. In threatening the interests of the attorney, the interests of potential clients may also be compromised; they may not be able to obtain legal services as easily in situations when potential third-party liability exists. Before banning privity the courts need good reasons for thinking that the prior arrangements are inadequate. See *Noble v. Bruce* 709 A 2d 1271. Citations omitted.

That is the type of situation that would be encountered in this case. If Appellee Gindlesberger was to completely insulate himself from liability his only safe course of conduct, would be not to draft the deed as requested by his client Margaret Schlegel. To eliminate the qualified immunity that has been present for 20 years would create remarkable undue hardship. The chaos would be easily imagined. Attorneys would now have a duty to unknown third parties

every time they advise or represent a client. Indeed, if no such immunity exists, an attorney may decline to advance the cause of his client out of fear of lawsuits by third persons arising out the attorney's representation of his client. *Moffitt* at ¶80 *Moffitt v. Litteral*, Montgomery App.# 1914, 2002-Ohio-4973 at ¶80. If the rule was adopted as proposed by the Appellants and the Ohio Association of Justice, any attorney preparing a will or deed would be rightly concerned about the potential unlimited number of litigants who could sue him for the drafting of one document.

C. The requirements for abandoning stare decisis to overrule *Simon v. Zipperstein* have not been met.

This court has recently noted that stare decisis is the bedrock of the American judicial system. For that reason an opinion that has become controlling precedent creates stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for law 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*, this court may overrule its previous decisions only where (1) the decision was wrongly decided at that time, or changes in the circumstances no longer justify the 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. The Appellants and the Ohio Association for Justice have failed to establish any of these requirements in this case.

There is no evidence that the decision that this court made in *Simon v. Zipperstein* was wrongly decided at that time. There is no evidence or case law suggesting that changes in the circumstances no longer justify continue adherence to the rule in *Zipperstein*. In fact, other

courts have continued to apply the strict privity doctrine as outlined above, and therefore that demonstrates that continued adherence to this decision is justified.

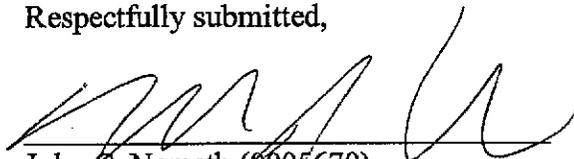
Additionally, there is no evidence that the current rule is unworkable. As pointed out in the briefs in the *Leroy* case, the question is whether third-parties such as the Appellants in this case, who have no relationship whatsoever with the attorney, should be permitted to sue the attorney for malpractice. The law that Ohio has followed on this issue is sound. Ohio has protected this idea that attorneys must uphold their duty to their actual clients in the highest regard and when those duties conflict with the interests of third-parties, such as the beneficiaries in the will in this case, attorneys should not be afraid to represent their clients. The current rule in Ohio and recognized by this court in 1984 and supported by other states as recently as 2006 and being applied consistently by Appellate Courts has not proven to be unworkable.

Abandoning this 20 year old precedent would create undue hardship on the attorneys who relied upon it. If *Simon v. Zipperstein* is modified as requested by Appellants and the Ohio Association for Justice, all attorneys who have drafted wills, have to contact all of the beneficiaries in these wills to make sure that their interests are fully protected. Besides being unethical and a violation of the Model Rules, this hardship is clear. If the modification as proposed by Ohio Association for Justice and Appellants in this case were adopted, potential litigation for attorneys that would have exposure would be limitless. Therefore, this court's standard for overruling its prior decision issued by this court is not met and therefore the proposition of law of Appellants and Ohio Association of Justice should be rejected and the holding in *Zipperstein* should be reaffirmed and the court of appeals decision in this case should be affirmed based on its holding.

CONCLUSION

For the forgoing reasons, this court should affirm the lower court's decision and reaffirm its holding in *Simon v. Zipperstein*, and reject the proposed holding advanced by both Appellants and Ohio Association for Justice.

Respectfully submitted,



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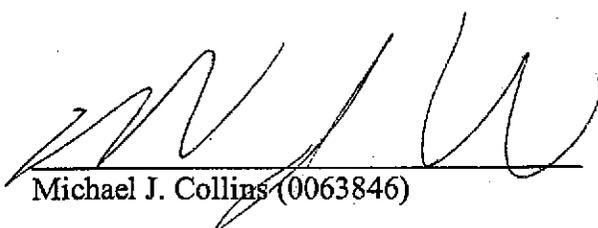
The undersigned hereby certifies that a copy of the foregoing was served by regular U.S.

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