

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)
)
)

Reply Brief of Appellants Robert E. Schlegel, Executor, et al.

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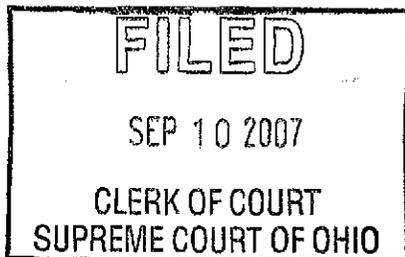


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ARGUMENT

By accepting the propositions of law urged by Appellants and Amicus this court will not subject attorneys practicing in the State of Ohio to “indiscriminate third-party actions” yielding “conflict[s] of interests at all times” as urged by Appellee. Nor will it subject the attorney to scrutiny by “unknown” third parties (or the fear of such scrutiny), nor will it open the flood-gates of litigation. Accepting the Appellant’s/Amicus’ propositions of law will merely require that Ohio’s attorneys will have to suffer the consequences of their failures to comply with Rule 1.1 of the Ohio Rules of Professional Conduct, to wit:

“Rule 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.”

The Rule’s comments further go on discussing the “Legal Knowledge and Skill” requirement by stating that “In determining whether a Lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter.”

Here the Appellant undertook to advise Margaret Schlegel as to her estate planning which included both testamentary and non-testamentary transfers of her property. We cannot lose track of the simple facts (which were uncontested) around which Appellants’ case turns 1.) Appellee knew that Margaret wanted her property to be enjoyed by her three children in virtual equipoise; 2.) He never advised her of the devastating tax consequences to be visited upon two of her three children at her death because of the “retained interest” he claims she wanted; 3.) He admits that he did not

know the law as it applied to “retained interests” which for attorneys practicing in this area of law is negligent.

The Appellee seems in his brief to argue that allowing those individuals such as Appellants standing to sue the result will be that the attorney will have to choose between serving his client and serving the client’s intended beneficiaries. He argues that the attorney will have to take into account both the wishes of his client and the wishes of those the client wants to benefit as a result of the attorney’s employment. Nothing could be further from the truth or the effect of Appellant’s/Amicus’ propositions.

The proposed statements of law are limited to that class of potential claimants whose potential damage is foreseeable, i.e. the intended beneficiaries of the client’s estate plan. The Appellee wants this Court to evaluate his duty as being only to do what the client tells him to do without having to advise the client of the legal effect thereof. He claims that his client wanted a deed with a retained interest, that he prepared such a deed and there his duty ended, the devil take the hindermost.

The Appellee’s argument fails to take into account that when his client asked him to prepare such a deed it became his duty to advise her of the legal (tax) implications of such a move and the effects that it would have on her general dispositive scheme. Had he done so and she nonetheless instructed him to go ahead then there would be no claim, because he would have fulfilled his professional duties to his client. But, by failing to meet his duty to his client, he caused foreseeable harm to the Plaintiffs, and he should not be immunized from liability for that harm. It was his lack of the knowledge required by Prof. Cond. Rule 1.1 that constituted the negligent failure that resulted in harm to the very class of individuals he knew his client wanted to benefit.

In *Stowe v Smith*, 184 Conn. 194 (1981), p. 98 the Supreme Court of Connecticut wrote, in a case brought by the intended heirs of a decedent for the negligent drafting of a will intended to effectuate an estate plan:

The present complaint, however, alleges that the defendant assumed a relationship not only with the [decedent] but also with the intended beneficiaries. If the defendant thwarted the wishes of the [decedent], an intended beneficiary would also suffer an injury in that after the death...the failure of her [dispositive] scheme would deprive the beneficiary of an intended bequest. **It therefore follows that the benefit which the plaintiff would have received under [a dispositive scheme] prepared in accordance with the contract is so directly and closely connected with the benefit which the defendant promised to the [decedent] that under the allegations of the complaint the plaintiff would be able to enforce the contract.** (emphasis added)

There can be no argument here but that Margaret Schlegel could not have understood the far-reaching effects that the execution of the “retained interest” deed would have on her general dispositive plan. The Appellee has admitted that at all times, both before and after the execution of that deed, he understood her intent was to benefit her children equally. She at all times wanted the Appellee to preserve her wishes, the Appellee promised to do so, he failed and, as in *Stowe* the Appellants should be able to enforce his obligation to his client.

Appellants/Amicus do not urge a blanket abrogation of the privity rule in “sue the lawyer” cases. There are many arguments against such a move. The Appellants/Amicus do, however, argue that the reasoning and rule set forth by the Supreme Court of Illinois in the case of *Pelham v. Griesheimer*, 92 Ill.2d 13 (1982), p.20 be adopted:

While privity of contract has been abolished in many areas of tort law, the concern is still that liability for negligence not extend to an unlimited number of potential plaintiffs. In the area of legal malpractice the attorney’s

obligations to his client must remain paramount. In such cases the best approach is that the plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party intended beneficiaries of the relationship between the client and the attorney in order to recover in tort. (citations omitted)

The Pelham Court went on, at p.21, quoting *Clagett v. Darcy* 47 Md.App. 23 (1980):

Whether the action is based upon a contract (express or implied), to which the traditional rules applying to third party beneficiaries may apply, or more on a theory of negligence--the violation of a duty not founded on contract--there must be shown ... that the plaintiff, if not the direct employer/client of the defendant attorney, is a person or part of a class of persons specifically intended to be the beneficiary of the attorney's undertaking.

The Court then concluded:

... for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary intent and purpose of the attorney-client relationship was to benefit ... the third party.

Here the Appellee's admitted ignorance of the devastating effect of the retained interest rules, and *ipso facto* his failure to advise his client, occurred as part and parcel of Margaret Schlegel's engagement of Appellee in the management of her assets, not in a vacuum, but in the broader context of her estate planning and her never changing, constantly expressed intent to equally benefit her three children.

CONCLUSION

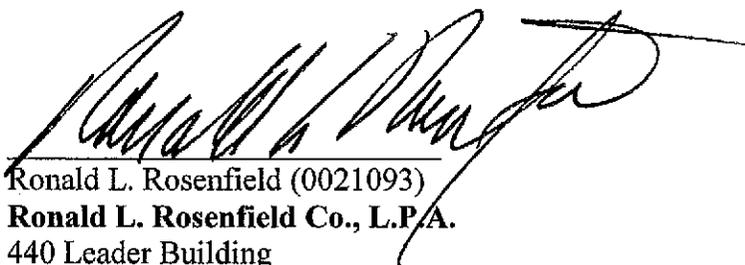
When an attorney is employed to carry out mission for a client, and that mission is for the specific purpose of beneficially affecting the rights of persons or classes known and identified, and the attorney negligently carries out that mission, those persons should be able to later stand in the shoes of the original client. Where the attorney carries out his mission appropriately and competently, such that those the client intended to benefit will in fact benefit, there will be no claim. But, if the attorney is negligent in carrying out his client's mission, with the result that the client's desire to benefit a third person fails, both the client and the intended beneficiaries are damaged, and the attorney should be held accountable.

The law should provide that where the attorney is negligent in carrying out his client's mission, not just the client in direct privity, but all of those whom the client intended to benefit and who were foreseeably injured should be able to seek redress.

Simon v. Zipperstein should be modified and applied so that an intended beneficiary of a decedent's estate plan may maintain an action against an attorney who is negligent in his or her representation of the decedent with regard to the desired estate plan even though the beneficiary is not in direct privity with that attorney. The law of Ohio should be that lawyers who are negligent in the course of estate planning are legally liable to third parties who are foreseeably damaged by that negligence, and the adoption

of such a rule will not result in placing attorneys in a position of having to serve two masters with different interests—instead, liability will only lie where the attorney negligently fails to implement the client’s wishes, which negligence foreseeably injures the very third party the client intended to benefit from the attorney’s legal services.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Ronald L. Rosenfield', is written over a horizontal line. The signature is fluid and cursive.

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PROOF OF SERVICE

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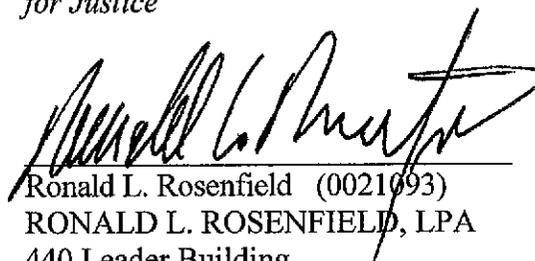
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