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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-22-01056

Erika Fabian .....Appellant,

vs.

Ross M. Lindsay, III and Lindsay & Lindsay, LLC .....Respondents.

BRIEF OF *AMICUS CURIAE* THE GREENVILLE ESTATE PLANNING STUDY GROUP IN SUPPORT OF RESPONDENTS

Amicus Curiae
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STATEMENT OF ISSUES ON APPEAL

Should South Carolina continue to require the plaintiff to establish privity in order to bring an attorney malpractice suit?

STATEMENT OF THE CASE

The Amicus adopts the Statements of the parties for purposes of this Brief and considers any differences immaterial to the discussion set forth herein.

ARGUMENT

In order to have standing to bring suit, "[a] plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (citing Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n. 2, 472 S.E.2d 612, 613 n. 2 (1996); Ellis v. Davidson, 358 S.C. 509, 523, 595 S.E.2d 817, 824 (Ct.App.2004); Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct.App.2002)). The Appellant in this case urges that this Court carve an exception to the first standing requirement set forth above by granting an "intended third-party beneficiary" standing to bring suit for perceived drafting errors by a testator's or settlor's attorney.

It is respectfully submitted by the Amicus that this Court should decline to create such an exception because relaxing the privity requirement will needlessly inhibit the attorney-client relationship by diluting the attorney's duty to the client. Accordingly, this Brief will address: (1) the history of the privity requirement in South Carolina and our courts' strict adherence thereto; (2) the lack of a consensus on a better alternative to privity; and (3) the importance of the privity requirement in connection with the attorney-client relationship.

I. BOTH HISTORICAL AND RECENT PRECEDENT SUPPORTS MAINTAINING THE PRIVITY REQUIREMENT IN SOUTH CAROLINA.

South Carolina courts have strictly adhered to the rule that a plaintiff in a legal malpractice action must establish the existence of an attorney-client relationship. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). This position follows precedent first set forth in 1842 by Winterbottom v. Wright, announcing the English common law rule

that privity of contract must exist in order for a duty to extend to a third party, and adopted by the United States Supreme Court thirty-seven years later in Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879). Max N. Pickelsimer, Comment, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. REV. 581, 581–82 (2007).

As a result of the privity requirement, "'an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.'" Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (quoting Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct.App.1986)). Additionally, "an attorney owes no duty to a non-client unless he 'breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.'" Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (citing Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). Several recent cases, discussed below, have invited this Court to find or create a duty to a third person arising out of an attorney's alleged negligence, and on each occasion the Court has adhered to the privity rule.

In the first of these cases, Rydde v. Morris, *supra*, this Court examined "whether an attorney's alleged negligent failure to timely draft a will and arrange for its execution permits prospective beneficiaries of the estate to maintain a cause of action for legal malpractice." 381 S.C. 643, 645, 675 S.E.2d 431, 432. Declining to adopt that position, this Court noted that even jurisdictions which had liberalized the privity requirement "nevertheless draw the line and refuse for compelling policy reasons to permit a malpractice

claim by a non-client for negligent failure to draft a will." Id. at 647, 675 S.E.2d at 433. Though limiting its holding to the specific facts in Rydde, this Court nonetheless found "no reason to depart from existing law which imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina." Id. at 650, 675 S.E.2d at 435.

Notably, the Rydde opinion discussed at length the concept of a medical professional's limited duty to third parties recently announced in Hardee v. Bio–Medical Applications of S.C., Inc., 370 S.C. 511, 636 S.E.2d 629 (2006). In Hardee, a physician failed to provide appropriate warnings of the possible ill effects of dialysis to a patient and was sued by the occupants of a vehicle the patient struck after losing control of his own vehicle following treatment. Id. at 513, 636 S.E.2d at 630. The Hardee Court in a "very narrow holding" allowed the non-patients to bring suit against the doctor on the grounds that "a medical provider's breach of a potential duty to reasonably foreseeable third parties is inextricably connected to a breach of duty to the patient, and therefore does not hamper the doctor-patient relationship." Id. at 516, 636 S.E.2d at 632.

Distinguishing Hardee, this Court in Rydde opined that "[t]he imposition of a duty on an attorney to a prospective beneficiary of a nonexistent will would wreak havoc on the attorney's ethical duty of undivided loyalty to the client and force an impermissible wedge in the attorney-client relationship." 381 S.C. 643, 650, 675 S.E.2d 431, 435. Thus, while not dispositive of the particular question in this case, Rydde strongly cautioned against eroding the attorney-client relationship by altering the attorney's duties and emphasized the importance of maintaining a strict duty which runs solely to the client.

Mere months after Rydde, this Court's opinion in Moore v. Weinberg further clarified South Carolina jurisprudence regarding an attorney's duties to non-clients by

addressing whether "an attorney may be liable to a third party for disbursing funds to the attorney's client where the attorney was aware that the funds were assigned to the third party." 383 S.C. 583, 587-88, 681 S.E.2d 875, 878 (2009). In Moore, the attorney contended that allowing the third party to bring suit in this scenario would "intrude upon the attorney/client relationship and greatly hinder an attorney's ability to represent his client." Id. at 588, 681 S.E.2d at 878. Rejecting his contention, this Court noted that under the facts at hand, "the duty arises from an attorney's role as an escrow agent and is independent of an attorney's status as a lawyer and distinct from duties that arise out of the attorney/client relationship." Id. The Moore decision thus preserved the full protection of the attorney-client relationship while recognizing that an attorney could incur liability to third parties by assuming separate and distinct fiduciary duties.

Most recently, in Argoe, *supra*, an attorney was retained by the Appellant's son to assist in matters related to the protection of the Appellant's assets via the son's durable power of attorney. 388 S.C. 394, 398-99, 697 S.E.2d 551, 553. Appellant brought multiple causes of action against the attorney arising out of this representation. Id. at 399, 697 S.E.2d at 554. Affirming the trial court's grant of summary judgment, this Court flatly rejected the Appellant's assertion that the Respondent attorney either breached a duty of care owed to the Appellant or committed legal malpractice on the grounds that Appellant was not the attorney's client. Id. at 400-02, 697 S.E.2d at 554-55. The Court also strongly reaffirmed the existing privity requirement by declining to "create a rule that would extend an attorney's liability to those in privity with his or her client," noting that "[w]e disagree with this general rule and vehemently oppose its adoption as it would apply in this situation." Id. at 405, 697 S.E.2d at 556-57.

While the specific question presented by the case underlying this appeal has not yet been decided by this Court, the opinions summarized above have implicated the same principles at issue here. In each instance, this Court's decision firmly upheld the traditional privity requirement based upon the importance of maintaining the integrity of the attorney-client relationship. To place this case in the proper context, it is therefore instructive to more thoroughly examine some of the principles underlying the attorney-client relationship in order to understand how it is furthered by the privity requirement.

II. STATES ABANDONING THE PRIVITY REQUIREMENT HAVE FAILED TO ESTABLISH A CONSENSUS ALTERNATIVE.

Appellant both underestimates the number of states adhering to the traditional privity requirement and incorrectly implies that the remaining states are unified in their rejection of privity.

At least ten states hold to the traditional rule that privity is required in order to bring an attorney malpractice claim: Alabama, Arkansas, Colorado, Maryland, Massachusetts, New York, Ohio, South Carolina, Texas and Virginia. See Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002) (declining "to change the rule of law in this state that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty"); Born v. Hosto & Buchan, PLLC, 2010 Ark. 292, 372 S.W.3d 324, 330 (2010) (noting that the Arkansas "immunity statute protects attorneys from civil liability from those not in privity of contract with them for actions taken during the course of their employment as attorneys"); Glover v. Southard, 894 P.2d 21, 23 (Colo. Ct. App. 1994) (affirming the lower court's dismissal of a negligence claim involving an inconsistent will and trust on the grounds that "[a]n attorney . . . is not liable to a third party absent conduct that is fraudulent or malicious"); Noble v. Bruce, 349 Md. 730, 752, 709 A.2d 1264, 1275 (1998) (refusing

"the beneficiaries' invitation to create a new rule in Maryland governing attorney liability to nonclients arising out of will drafting or estate planning" in favor of "the traditional rule of strict privity"); Miller v. Mooney, 431 Mass. 57, 64, 725 N.E.2d 545, 551 (2000) (declining to allow non-clients to sue the decedent's attorney due to the "potential conflict of interest between the defendant's duty of undivided loyalty" to his client versus the plaintiff beneficiaries of the estate); Estate of Schneider v. Finmann, 15 N.Y.3d 306, 310, 933 N.E.2d 718, 721 (2010) (maintaining New York's adherence to the rule that "strict privity remains a bar against beneficiaries' and other third-party individuals' estate planning malpractice claims absent fraud or other circumstances"); Swiss Reinsurance Am. Corp., Inc. v. Roetzel & Andress, 163 Ohio App. 3d 336, 342, 837 N.E.2d 1215, 1220 (2005) (citing the longstanding rule from Simon v. Zipperstein, 32 Ohio St.3d 74, 76, 512 N.E.2d 636 (1987) 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 whom the legal services were performed, or unless the attorney acts with malice"); Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996) (refusing to recognize an "exception to the privity barrier as to lawyers who negligently draft a will or trust"); Copenhaver v. Rogers, 238 Va. 361, 366, 384 S.E.2d 593, 595 (1989) (upholding summary judgment for defendant attorneys in suit by grandchildren over failure of trust language because "no cause of action exists in such cases absent privity of contract").

Maine follows the traditional privity rule, except in a very narrow instance not at issue in this case where the estate has no personal representative. Estate of Keatinge v. Biddle, 2002 ME 21, 789 A.2d 1271, 1276 (2002) (recognizing that "individual beneficiaries could not bring a malpractice claim against a lawyer who prepared estate

planning documents when there was a personal representative for the estate"). The North Dakota Supreme Court also appears to adhere to strict privity. Moen v. Thomas, 2001 ND 110, 628 N.W.2d 325, 329 (2001) (reversing summary judgment for the drafting attorney of a trust and declining to examine as a matter of first impression whether to create an exception to the privity requirement where there was a genuine issue of material fact as to whether the plaintiff had formed an attorney-client relationship with the attorney, but acknowledging that "[o]ur prior cases have indicated a plaintiff in a legal malpractice case must establish the existence of an attorney-client relationship").

Additionally, the Supreme Court of Vermont has adhered to the traditional privity rule in a corporate litigation context and does not appear to have otherwise examined the issue. See Handverger v. City of Winooski, 191 Vt. 84, 89, 38 A.3d 1158, 1161 (2011) (acknowledging "relaxation in some jurisdictions of the strict attorney-client privity basis for legal malpractice where injured third parties could show the 'client's purpose in retaining the attorney was to directly benefit a third party,'" but reiterating that the Vermont Supreme Court had "declined to extend such standing to bank shareholders seeking damages from corporate counsel for malpractice") (citations omitted); see also Bovee v. Gravel, 174 Vt. 486, 488, 811 A.2d 137, 140 (2002) ("The requirement of attorney-client privity to maintain a malpractice action ensures that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.") (quotations omitted).

Finally, it does not appear that the supreme courts of Alaska or Tennessee have examined an analogous case. Notably, a Tennessee appellate court recently noted that "[t]he paramount requirement in a legal malpractice claim is the existence of an attorney-client

relationship," and therefore upheld dismissal of legal malpractice causes of action against a lawyer as to non-clients in the suit since "[b]ecause there was no attorney-client relationship . . . there can be no claim of legal malpractice vis a vis these particular plaintiffs." PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 543 (Tenn. Ct. App. 2012), appeal denied (Sept. 19, 2012).

The thirty-five states that no longer require strict privity for a plaintiff to bring suit for alleged drafting errors have only that in common; that is, relaxation to some extent of the privity requirement is the only unifying theme among these jurisdictions. It is thus an oversimplification to frame the issue as merely a "privity versus non-privity" debate because in reality, several distinctly different alternatives to strict privity have been developed and none has emerged as a clear leader. The doctrines recognized in these non-privity jurisdictions are generally composed of third-party beneficiary, tort, contract, and balancing test theories of recovery[1].

California was the first state to abandon the strict privity requirement for attorney malpractice suits by adopting the so-called "balancing test" theory in Lucas v. Hamm, 56 Cal. 2d 583, 588, 364 P.2d 685, 687 (1961). About twelve states have subsequently adopted some form of the balancing test analysis, which is generally seen as the most expansive abrogation of the traditional privity doctrine. In fact, the balancing test has been criticized as too broad by other states which have relaxed the traditional privity requirement. See, e.g., Guy v. Liederbach, 501 Pa. 47, 51, 459 A.2d 744, 746 (1983).

By a slim margin, the "third-party beneficiary" exception is employed by a plurality of states which have abrogated strict privity, and recognizes a duty to non-clients who are

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[1] Mississippi alone has categorically abolished the privity requirement in almost all contexts by statute. See Miss. Stat. Ann. § 11-7-20.

named in testamentary instruments. See, e.g., Harrigfeld v. Hancock, 140 Idaho 134, 90 P.3d 884 (2004). Early iterations of the third-party beneficiary analysis were grounded strictly in contract law and rejected the applicability of a negligence analysis to the attorney-client relationship. Guy, 501 Pa. at 58, 459 A.2d at 750. This strictly contractual approach has been criticized due to the difficulty of establishing whether the intent of the contract was primarily to benefit the client by disposing of the estate versus the attorney and client entering a contract expressly to benefit the third party. See Copenhaver v. Rogers, 238 Va. 361, 368, 384 S.E.2d 593, 596 (1989) (noting that "[t]here is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client."); Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., 467 So. 2d 315, 317 (Fla. Dist. Ct. App. 1985) ("Although it is generally stated that the action can be grounded in theories of either tort (negligence) or contract (third-party beneficiary), the contractual theory is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence.") (citations omitted).

Some courts have blurred this distinction and allow third-party beneficiary claims grounded in both tort and contract based on the assertion that the attorney assumes a duty to the third party beneficiary. See Hale v. Groce, 304 Or. 281, 286, 744 P.2d 1289, 1292 (1987); Blair v. Ing, 95 Haw. 247, 259, 21 P.3d 452, 464 (2001). This approach has the dubious distinction of combining the overly-broad tort method with the flawed contract approach.

A few states follow the "Florida-Iowa" rule, under which "liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the

testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that negligence." DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983) (emphasis in original). This approach is arguably the least damaging to the attorney-client relationship since it seeks to confine the non-client's cause of action to errors in direct contravention of the contents of the testamentary document. However, despite limiting the dangers associated with allowing extrinsic proof of a testator's allegedly frustrated intent, this rule still represents an unnecessary alteration of the attorney's strict duty of loyalty which runs solely to the client. See Rydde, *supra*.

III. PUBLIC POLICY SUPPORTS MAINTAINING THE PRIVITY REQUIREMENT BECAUSE OF ITS IMPORTANCE TO THE ATTORNEY-CLIENT RELATIONSHIP.

Adherence to the strict privity requirement protects the attorney's fiduciary duty of loyalty and advocacy for his or her client, prevents this duty from becoming diluted by creating obligations to third parties, and rationally limits the liability of the attorney to his or her client instead of opening the door to claims by disappointed beneficiaries.

This Court has recognized "[t]he relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.'" Spence v. Wingate, 395 S.C. 148, 158-59, 716 S.E.2d 920, 926 (2011) (citing Weatherford v. Price, 340 S.C. 572, 582, 532 S.E.2d 310, 315 (Ct.App. 2000) (quoting 7 Am.Jur.2d *Attorneys at Law* § 137 (1997))). The focus of the attorney in such a relationship must be solely on the client's interests to the exclusion of all others. See Noble v. Bruce, 349 Md. 730, 741, 709 A.2d 1264, 1270 (1998) (noting that "the [privity] rule protects the attorney's duty of loyalty to and effective advocacy for

his or her client. While the testator/client is alive, the lawyer owes him or her a duty of complete and undivided loyalty.") (citations omitted).

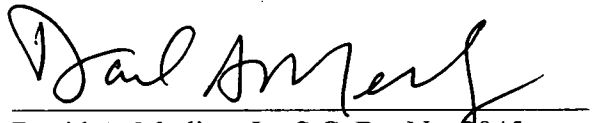
Although the privity rule may seem at times to dictate a harsh result, the importance of unmitigated loyalty to the client necessitates adherence to the traditional requirement. A compelling statement for maintaining attorneys' immunity for "negligent acts or omissions that may cause damage to third parties" was recently made by a Colorado appellate court, noting that "[t]his rule recognizes the nature of the adversarial relationship between a client's attorney and other parties; it protects the attorney's duty of loyalty and effective advocacy for the client; and it avoids creating potential liability to an unlimited number of third parties." Turman v. Castle Law Firm, LLC, 129 P.3d 1103, 1105 (Colo.Ct.App. 2006). At its worst, abolition of the privity requirement opens the door for disappointed would-be heirs and beneficiaries to seek money from the client's attorney after being omitted from the testator's estate plan. Barcelo v. Elliott, 923 S.W.2d 575, 578 (Tex. 1996). Barcelo and other cases recognize the potential for liability to third parties to create a conflict during the estate planning process by dividing the attorney's loyalty between the client and the third-party beneficiaries. Id.; Noble, 349 Md. at 741, 709 A.2d at 1270.

Finally, and particularly in an estate planning context, "[r]elaxing privity to permit third parties to commence professional negligence actions against estate planning attorneys would produce undesirable results—uncertainty and limitless liability." Estate of Schneider v. Finmann, 15 N.Y.3d 306, 310, 933 N.E.2d 718, 721 (2010). As one court noted, "it would be unsafe to permit an action claiming that a lawyer failed to follow his client-testator's directions to be maintained on the basis of testimony from disappointed beneficiaries." Mieras v. DeBona, 452 Mich. 278, 291-92, 550 N.W.2d 202, 208 (1996).

Allowing this sort of testimony and other extrinsic evidence opens the door to attacks on testamentary documents that were, and should remain, the exclusive evidence of a testator's intent. In particular, the content of conversations between the testator and his or her attorney during the estate planning process inherently concern matters of a highly personal nature, especially involving decisions as to particular bequests and the amounts given, or not given, to beneficiaries.

CONCLUSION

Far from the "privity versus non-privity" analysis urged by opponents of strict privity, the cases cited above demonstrate the lack of consensus among state courts which have relaxed the privity requirement. In fact, it is clear that the number of states adhering to strict privity is comparable to the number of states adopting any particular alternative. More importantly, relaxing the privity requirement will needlessly inhibit the attorney-client relationship by creating obligations to third parties and exposing estate planning attorneys to greatly expanded liability. Adherence to the strict privity requirement protects the attorney's fiduciary duty of loyalty and advocacy for his or her client and protects this duty from dilution while rationally limiting the liability of the attorney to only his or her client. Accordingly, it is respectfully submitted by the Amicus that this Court should maintain its consistent adherence to the traditional requirement that a plaintiff must establish privity in order to bring an attorney malpractice suit.



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PROOF OF SERVICE

I, the undersigned, do hereby state that I have on March 17, 2014, served a copy of the **MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE** and **BRIEF OF *AMICUS CURIAE* THE GREENVILLE ESTATE PLANNING STUDY GROUP IN SUPPORT OF RESPONDENTS** upon all parties, through their attorney(s) of record, by depositing copies of the documents in the United States Mail, first class, sufficient postage prepaid, with the return address(es) clearly noted, addressed as follows:

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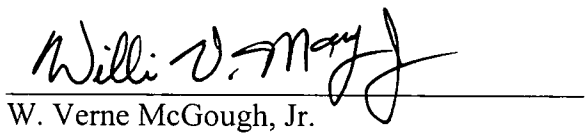

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