THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-213726
Civil Action No. 2012-CP-22-01056

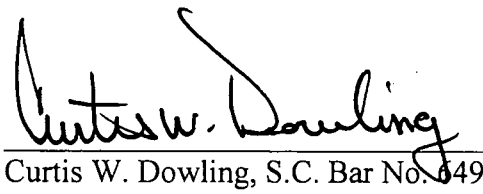
Erika Fabian,..... Appellant,

v.

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

RESPONDENTS' PETITION FOR REHEARING

Respondents, Ross M. Lindsay, III and Lindsay & Lindsay, LLC, through their undersigned counsel and pursuant to Rules 221(a) and 240, SCACR, hereby respectfully petition the Court for rehearing of this matter. The grounds for this petition are that the Court's opinion in this matter, Fabian v. Lindsay, Op. No. 27460 (S.C. Sup. Ct. filed Oct. 29, 2014) (Shearouse Adv. Sh. No. 43 at 30), overlooks the compelling policy considerations for preserving the privity rule as well as the unintended negative consequences of relaxing the rule. This petition is supported by the memorandum of law filed herewith and such other law, argument, and policy as the Court may find applicable.



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November 10, 2014

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MEMORANDUM IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING

Respondents, Ross M. Lindsay, III and Lindsay & Lindsay, LLC, through their undersigned counsel and pursuant to Rule 240(c)(2), SCACR, submit the following Memorandum in Support of their Petition for Rehearing.

FACTUAL AND PROCEDURAL BACKGROUND

According to the Amended Complaint, Respondents, a South Carolina attorney and his law firm, drafted a trust agreement for Dr. Denis Fabian (the "Decedent") which was executed on May 25, 1990. (R. p. 21, ¶ 4). The Decedent's wife, Marilyn, was to be the life beneficiary of the trust. (R. p. 22, ¶ 4). Marilyn's children from a prior marriage and the Decedent's two nieces, including Appellant, were allegedly to be the remainder

beneficiaries. (R. p. 22, ¶ 7). However, the Decedent's alleged intent to provide for Appellant was—in Appellant's view—defeated by a drafting error, resulting in her disinheritance. (R. pp. 23-25, ¶¶ 11-12). Appellant thereafter filed this action against Respondents, alleging negligence and breach of contract. (R. pp. 8-41). Respondents moved to dismiss, and the Circuit Court granted Respondents' motion in an Order entered December 7, 2012. (R. pp. 1-7). Appellant appealed and this Court certified the case by Order entered May 2, 2013. After briefing and argument, the Court issued its opinion reversing the Circuit Court's dismissal of the Amended Complaint and remanding for further proceedings. Fabian v. Lindsay, Op. No. 27460 (S.C. Sup. Ct. filed Oct. 29, 2014) (Shearouse Adv. Sh. No. 43 at 30). Respondents now respectfully petition the Court for rehearing on the grounds that its opinion overlooks the compelling policy considerations for preserving the privity rule as well as the unintended negative consequences of relaxing the rule.

ARGUMENT

I. THE COURT'S OPINION OVERLOOKS THE COMPELLING POLICY CONSIDERATIONS FOR PRESERVING THE PRIVITY RULE.

In their briefs, Respondents and the amicus, the Greenville Estate Planning Study Group, outlined several compelling policy considerations supporting preservation of the privity rule. Those considerations—which have been relied on by at least seven state high courts since 1996[1]—include: (1) that the privity rule protects the attorney's duty of loyalty to and effective advocacy for his or her client; (2) that the privity rule protects against the potential for unlimited liability against attorneys; and (3) that the privity rule

[1] See, e.g., Estate of Schneider v. Finmann, 933 N.E.2d 718 (N.Y. 2010); Johnson v. Hart, 692 S.E.2d 239 (Va. 2010); Shoemaker v. Gindlesberger, 887 N.E.2d 1167 (Ohio 2008); Robinson v. Benton, 842 So.2d 631 (Ala. 2002); Nevin v. Union Trust Co., 726 A.2d 694 (Me. 1999); Noble v. Bruce, 709 A.2d 1264 (Md. 1998); Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996).

protects attorney-client confidentiality. Yet the Court's opinion does not confront—or even address—any of these considerations. It does not balance them against competing policy concerns or even simply raise and reject them. Rather, the Court's opinion is written as if the privity rule is utterly unjustifiable and there are no legitimate arguments to the contrary. Respondents respectfully request that the Court grant rehearing in order to fully evaluate whether, as the Texas Supreme Court put it, "the greater good is served by preserving a bright-line privity rule[.]" Barcelo, 923 S.W.2d at 578.

II. THE COURT'S OPINION OVERLOOKS THE UNINTENDED NEGATIVE CONSEQUENCES OF RELAXING THE PRIVITY RULE.

As recognized by the Supreme Court of the United States in 1879, relaxation of the privity rule has the potential to produce "the most absurd consequences, to which no limit can be seen[.]" Nat'l Sav. Bank of D.C. v. Ward, 100 U.S. 195, 203 (1879). At oral argument, the undersigned echoed the Ward Court's warning, asserting that relaxation of the privity rule would be akin to opening Pandora's box.[2] One of the dangers of relaxing the rule, foreshadowed by the Court of Appeals of Maryland in 1998, is that "potential clients . . . might not be able to obtain legal services as easily in situations where potential third party liability exists." Noble, 709 A.2d at 1270. As it turns out, the Noble court's concern was prescient. Within days after the Court's opinion was issued, Respondents learned that free or reduced cost estate planning services were in severe jeopardy of being terminated throughout South Carolina as a result of the privity rule's relaxation. Respondents are informed and believe that the Nelson Mullins Wills for Heroes Program, which offers free will preparation services to first responders throughout the state, will be

[2] According to Wikipedia, the phrase "to open Pandora's box" means "to perform an action that may seem small or innocent, but that turns out to have severely detrimental and far-reaching consequences." Pandora's box, http://en.wikipedia.org/wiki/Pandora%27s_box (last visited Nov. 10, 2014).

forced to cancel all further South Carolina events once this Court's opinion becomes final. See, e.g., Harleysville Mut. Ins. Co. v. State, 401 S.C. 15, 23, 736 S.E.2d 651, 655 n.2 (2012) (noting that "[a]n opinion of an appellate court is not final until the remittitur is filed in the lower court" and that "[t]he timely filling of a petition for rehearing stays the sending of the remittitur, thereby depriving the decision of finality") (citations omitted). Respondents are further informed and believe that similar programs, such as the South Carolina Bar's Habitat for Humanity Wills Clinic and the South Carolina Appleseed Legal Justice Center's Lawyers 4 Vets initiative—which provide will preparation services to underprivileged individuals and military veterans—are also evaluating whether they will be able to continue providing such services now that their volunteer attorneys may be at risk of malpractice claims. And according to recent E-Blasts distributed by the South Carolina Bar, it appears there are no wills, trusts, and estates clinics scheduled in the near future, whereas in the past there had generally been at least one or two held in most months.

Moreover, the legal community is already recognizing the far-reaching ramifications of the Court's opinion. On November 5, 2014, prominent legal malpractice attorneys Ronnie Richter and Eric Bland published a blog article entitled "SC Supreme Court Issues Game Changer Opinion in Legal Malpractice – If you think Fabian only applies to trusts and estates lawyers, think again!"[3] In the article, Messrs. Richter and Bland write:

> While it is clear that Fabian now extends liability to intended third party beneficiaries in a trust and estate setting, its implications are likely far broader. The lynchpin of the Fabian decision was the abandonment of privity as an absolute requirement in legal malpractice claims. . . . We

[3] http://legalmalpracticeforum.com/?p=169 (last visited Nov. 10, 2014).

> think Fabian will have long and broad implications far beyond trusts and estates.

Appellants are, apparently, not alone in their belief that Pandora's box has been opened. Messrs. Richter and Bland—and surely other members of the plaintiffs' bar—stand ready and willing to take advantage of the floodgates' opening and swamp the courts with lawsuits against all types of attorneys, not just those who practice estate planning. It is this precise concern that has led other courts, including the Supreme Court of the United States, to leave the privity rule in place. See, e.g., Ward, 100 U.S. at 203 ("[I]f we hold that the plaintiff can sue in such a case, there is no point at which such actions will stop. The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty."); Barcelo, 923 S.W.2d at 578 ("[W]e are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting actions in other situations.").

Respondents respectfully request that the Court grant rehearing in order to consider whether these and other unintended negative consequences of the Court's opinion which have not yet manifested themselves weigh in favor of preserving the privity rule.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the Court grant rehearing of this matter.

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PROOF OF SERVICE

I, the undersigned employee of Barnes, Alford, Stork & Johnson, LLP, do hereby state that I have on November 10, 2014, served a copy of the enclosed **RESPONDENTS' PETITION FOR REHEARING** and **MEMORANDUM IN SUPPORT OF RESPONDENTS' PETITION FOR REHEARING** upon all other 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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RECEIVED
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