THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

App. Case No. 213726
Case No. 2012-CP-22-01056

Erika Fabian. . . . . Appellant,

vs.

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

APPELLANT'S RETURN TO PETITION FOR REHEARING

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I. The Opinion did not overlook any compelling policy considerations or any consequences of relaxing the antiquated privity rule.

The Respondents' Petition for Rehearing should be denied. This Court's Opinion, No. 27460, ___ S.C. ___, ___ S.E.2d ___, 2014 WL 5462562 (Oct. 29, 2014) ("the Opinion") carefully evaluated the policy considerations and the consequences implicated by its decision, discarding the strict privity requirement and "recogniz[ing] a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent." The Opinion carefully reviewed the policy considerations undergirding the privity / standing concerns and also specifically circumscribed available tort and contract claims to the creation of wills or other estate planning documents sufficient to quell any concerns as the applicability of this ruling in other contexts.

A. Policy considerations.

The Petitioners' arguments are misplaced when they assert that the Opinion completely overlooked, failed to confront, failed to address, and failed to balance any of the policy considerations related to the lawyer's duty of loyalty to the client, potential for unlimited liability, and the protection of attorney-client privilege. (Resp. Pet. at pp. 2 - 3). First, the Court thoroughly considered and discussed each policy consideration and ultimately determined that the antiquated rule of strict privity improperly left some beneficiaries with no ability to seek redress to enforce the testators' intent. *See Fabian*, 2014 WL 5462562, at *9. In fact, the Court devoted a majority of its Opinion to addressing and weighing the various policy concerns, including a thorough analysis of the policy

implications of the various approaches to easing strict privity, including the balancing of factors test, the Florida-Iowa Rule and the third-party beneficiary of contract theory[1]. *See id.* at *5-10. After its review of the law and the policy considerations, the Court noted that the "'grounds for the imposition of a legal duty in tort law generally, which apply to lawyers *in every other context*, are no less important in estate planning'" and found "there are compelling policy reasons supporting recognition of these claims." *Id.* at 10 (emphasis added) (quoting *Barcelo v. Elliott*, 923 S.W.2d 575, 579-80 (Tex. 1996)).

Second, the Court found that each of those policy considerations emanate from the lawyer's duty to satisfy the client's intent. *See id.* at *5-6, 7. Next, the Opinion provides standing only to "a narrow class" of "persons who are named in the estate planning document or otherwise identified in the instrument by their status (e.g., my children and grandchildren, my wife's children)." *Id.* at *10.

The Court did not overlook any policy considerations but instead carefully weighed and specifically addresses the various policy concerns implicated in its decision. The Court

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[1] Citing *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958); *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961); *Fickett v. Super. Ct.*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976); *Pizel v. Zuspann*, 795 P.2d 42, 51 (Kan. 1990); *Donahue v. Shugart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995) (en banc); *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987); *Mieras v. DeBona*, 550 N.W.2d 202 (Mich. 1996); *Ventura County Humane Society v. Holloway*, 115 Cal. Rptr. 464, 468 (Ct. App. 1974); *Creighton Univ. v. Kleinfeld*, 919 F. Supp. 1421, 1425 n.5 (E.D.Cal. 1995); *Jewish Hosp. Of St. Louis, Mo. v. Boatmen's Nat'l Bank of Belleville*, 633 N.E.2d 1267, 1273-76 (Ill. App. Ct. 1994); *Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004); *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981); *Blair v. Ing*, 21 P.3d 452, 464 (Haw. 2001); *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983); *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986); *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931); *Barcelo v. Elliott*, 923 S.W.2d 575, 579-80 (Tex. 1996).

noted that when a client hires a lawyer to "carry out his intent for estate planning" the intent is necessarily "to provide for his beneficiaries." *Id.* at *9. "This intent in estate planning is directly and inescapably for the benefit of the third-party beneficiaries." *Id.* Understanding that the lawyer's negligence is sometimes not discovered until the client's death, the Court recognized that, if the intended beneficiary is not given the right to sue, an exception has been carved out for estate planning lawyers to be insulated from any concerns or consequences for their malpractice. "In these circumstance, retaining strict privity in a legal malpractice action for negligence committed in preparing will or estate documents would serve to improperly immunize this particular subset of attorneys from liability for their professional negligence." *Id.*

B. Consequences.

The Petition for Rehearing (and the untimely amicus brief, if it is considered at all) consists almost entirely of frantic posturing that the Court overlooked the potential negative consequences of its decision. In layering on the dooms-day metaphors, Petitioners compare the Court's decision to the opening of "Pandora's box" and release of the 'floodgates" in predicting the courts will be "swamped" with new causes of action. Petitioners have forgotten the built-in layers of protection that will serve to limit the new cause of action in *Fabian* to a very small category of intended beneficiaries with specific evidence showing the lawyer's services defeated or diminished the client's intent. In addition, the "floodgate" of legal claims Respondents prophesy will gush out of "Pandora's Box" are constrained by a multitude of protective measures, including the South Carolina

Frivolous Proceedings Act[2], Rule 11 of the South Carolina Rules of Civil Procedure[3], and the statutory requirements of an Expert Affidavit[4] to simultaneously support any legal malpractice complaint. If that were not enough, the Opinion, by majority vote, imposes a burden of proof standard that requires clear and convincing evidence of the testamentary intent[5] and the Court's holding that these causes of action are "limited to persons who are named in the estate planning document or otherwise identified in the instrument by their status."[6]

The Opinion specifically addressed Respondents' concerns of potential consequences when noting that its limited holding "does not impose an undue burden on estate planning attorneys as it merely puts them in the same position as most other legal professionals by making them responsible for their professional negligence to the same extent as attorneys practicing in other areas." *Id.* at *9. In further apocalyptic predictions, Respondents argue that the Court's decision will cause a complete and total closure of free will-preparation clinics across the state because "their volunteer attorneys may be at risk of malpractice claims." (Resp. Pet. at p.4). Respondents completely ignore the fact that these lawyers already are at risk for malpractice claims for their negligent acts if the client discovers the negligence and incurs legal damages, such as additional legal fees, to correct

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[2] *See* S.C. CODE ANN. § 15-36-10, et seq. (2006).

[3] *See* Rule 11, SCRCP.

[4] *See* S.C. CODE ANN. § 15-36-100(B) (2006).

[5] *See Fabian*, 2014 WL 5462562, at *11.

[6] *See id.* at *10.

those errors. The only difference is now the lawyers working at a wills free clinic will be subject to those same claims *after* their client passes away. In other words, they will be held to the same standard of care, and have the same exposure, as a lawyer working at any other type of legal free clinic providing legal services on matters other than estate planning. It is important to consider that lawyers meeting the standard of care and providing adequate legal services have no cause for concern because the homeless, indigent and our Nation's brave veterans and first responders all deserve to be represented by lawyers who strive to meet or exceed the standard of care and not have their estate planning counsel hiding behind an antiquated privity rule insulating them from meeting their responsibilities for the financial consequences caused by negligent acts or omissions.[7]

Petitioners–in Henny Penny fashion–prophesy that the Court's Opinion will release the evils from "Pandora's box," fling open the "floodgates" and "swamp" the judicial system, hysteria aside, the Court has simply provided for a remedy to right a wrong in very important but very limited circumstances.[8] The sky is in fact not falling, it is only a tiny

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[7] Both the untimely amicus brief's and Respondents' posturing of the imminent demise of pro bono clinics seem disingenuous given that, "Pro Bono lawyers who take case referrals, serve as LAMP volunteers, participate in Ask-A-Lawyer and lead free legal clinics are automatically covered on every Pro Bono case accepted! Lawyers who do pro bono legal work on their own, or who are appointed pursuant to Rule 608, are also covered by malpractice insurance through the Pro Bono Program." http://scbar.org/MemberResources/ProBonoProgram.aspx (last visited Nov. 19, 2014).

[8] Henny Penny, also known as Chicken Little, is a fable about a chicken who, after an acorn falls on her head, believes the "sky is falling" and the world is coming to an end. It is a common idiom indicating a hysterical or mistaken belief that disaster is imminent. *See, e.g.*, Steven Kellogg, CHICKEN LITTLE (1985) and D. L. Ashliman, THE END OF THE WORLD THE SKY IS FALLING (1999) (folktales in which storytellers from around the world make light of paranoia and mass hysteria).

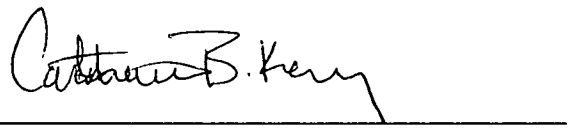
acorn.

Conclusion

Appellant, Erika Fabian, respectfully requests this Court deny Respondents' Petition for Rehearing.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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Beaufort, South Carolina

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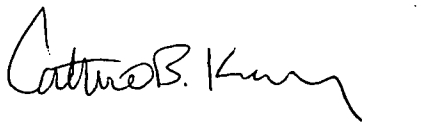
PROOF OF SERVICE

I, Catherine B. Kerney, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the APPELLANT'S RETURN TO PETITION FOR REHEARING on counsel for Respondents: Ross M. Lindsay, III, and LINDSAY & LINDSAY, LLC by depositing a copy of the same in the United States Mail, postage prepaid, on the 19th day of November, 2014 addressed to Curtis W. Dowling, J.D. and Matthew G. Gerrald, J.D., BARNES, ALFORD, STORK & JOHNSON, LLP, P.O. Box 8448, Columbia, SC 29202.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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