THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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Case No. 2012-CP-22-01056

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Erika Fabian. . . . . Appellant,

vs.

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

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# APPELLANT'S INITIAL BRIEF

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## Statement of Issues

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II. Whether a lawyer's negligence in drafting a trust agreement permits intended beneficiaries of the estate to maintain a cause of action *in tort* for professional negligence.

III. Whether a lawyer owes a duty to a person who is not a client but who is intended to benefit directly from a testamentary document the lawyer prepares for and is executed by a client.

IV. Whether a lawyer's errors in drafting a trust agreement permits intended beneficiaries of the estate to maintain a cause of action *in contract* as an intended third-party beneficiary.

V. Whether South Carolina will join the majority of states in recognizing generally that a lawyer owes a duty to a non-client intended beneficiary of an executed trust agreement (or will) where it is shown that the testator's intent has been defeated or diminished by the lawyer's negligence resulting in a loss to the beneficiary.

VI. Whether South Carolina, in the event strict privity is relaxed for a legal malpractice claim by an intended third-party beneficiary, should employ the modified balancing factor approach to determine whether the plaintiff has standing to sue.

VII. Whether the Complaint stated facts sufficient to constitute a cause of action under South Carolina law.

## Statement of the Case

On October 1, 2012, Appellant, Erika Fabian (Erika), filed a Summons and Complaint in the Court of Common Pleas for Georgetown County, South Carolina, asserting – as a third party beneficiary – claims for professional negligence and breach of contract against Respondents, Ross M. Lindsay, III, and LINDSAY & LINDSAY, LLC (collectively "Lindsay"). Lindsay is the lawyer who prepared the trust agreement executed by Dr. Denis Fabian, Erika's uncle, with a specific intent to provide Erika with twenty-five percent of the remaining trust corpus after the death Dr. Fabian's wife, Marilyn. (Complaint, ROA ___). On October 29, 2012, Erika filed an Amended Summons and an Amended Complaint. (Amended Complaint, ROA ___).

On November 9, 2012, Lindsay filed a motion to dismiss the Complaint pursuant to Rule 12 (b)(6), SCRCP, asserting that South Carolina courts have not recognized, and would not recognize, a legal malpractice action on the facts alleged in the Complaint. (Motion to Dismiss Complaint, ROA ___). Lindsay's motion asserted that a plaintiff in a legal malpractice action in South Carolina must be in privity with the lawyer in order to have standing to assert the claims alleged in the Complaint. Lindsay contended that because Erika did not allege that she was in privity, no facts were stated in the Complaint supporting a claim for relief. Later in November 2012, Lindsay filed another motion to dismiss this time seeking to dismiss the Amended Complaint on the same grounds stated in the original motion. (Motion to Dismiss Amended Complaint, ROA ___).

On December 6, 2012, a hearing on the motion to dismiss was held before the Honorable Benjamin J. Culbertson, during which the Amended Complaint, legal memoranda, and arguments of counsel were presented, and after which an Order was

entered on December 7, 2012, granting the motion and dismissing the lawsuit. (Order dismissing Amended Complaint, ROA ___).

On December 13, 2012, Erika timely appealed the Order dated December 7, 2012.

## Facts

Because Erika's Amend Complaint was dismissed on a motion pursuant to Rule 12(b)(6), SCRCP, the following relevant factual allegations, which must be taken as true for the purposes of this appeal, are all set forth as alleged in the Amended Complaint (Amended Complaint, ROA ___), with corresponding paragraphs numbered as they are in the pleading:

4. On May 25, 1990, Dr. Denis Fabian, a successful and wealthy surgeon, executed a Trust Agreement that had been drafted by [Lindsay]. Dr. Fabian as married to Marilyn Fabian at the time he executed these trusts and they had been married since 1973. Dr. Fabian was about eighty (80) years old at the time he executed these instruments and his wife Marilyn, who would be the life beneficiary, was about twenty years his junior and in good health. Dr. Fabian had one living brother at the time, Eli Fabian, and Eli was about the same age as Dr. Fabian and in relatively poor health. Marilyn Fabian had two adult daughters from a prior marriage. Dr. Fabian had two living nieces, Miriam Fabian, born to Dr. Fabian's brother Eli and plaintiff Erika Fabian, who was born to Dr. Fabian's brother Zoltan Fabian, who predeceased Dr. Fabian, in the Nazi concentration camp Bergen Belsen in 1945. Erika's mother died in 1968 and Dr. Fabian was well aware of his niece Erika's loss of both her father and mother at an early age.

5. Dr. Fabian died on February 5th of 2000, his brother Eli died a few weeks later, thus Eli survived Dr. Fabian, but not Dr. Fabian's wife Marilyn, the life beneficiary of

the Trust corpus and income.

6. Plaintiff Erika Fabian had been told by her uncle and his wife Marilyn that she was being provided for in Dr. Fabian's estate plan. The Trust reflects Dr. Fabian's intent to provide for his nieces if his brother did not survive so as to be able to receive his share.

7. At the time of Dr. Fabian's death, everyone involved in this matter, from the widow life beneficiary, Marilyn, to the two cousins and drafting lawyer [Lindsay] were under the impression that one half of Dr. Fabian's estate was going to pass to his nieces Miriam and Erika upon Marilyn's death in the future, Marilyn enjoying the corpus and income for her life, with the other half to be distributed to Marilyn's children from her prior marriage. There was no reason to think otherwise, the only other named beneficiary, brother Eli, had also just died.

8. On July 30, 2001, [Lindsay] mailed plaintiff Erika Fabian a letter enclosing two pages from Dr. Fabian's trust and informed her for the first time that since Eli had survived her uncle by a few weeks that she would be getting nothing from this trust. The share that would have been distributed to Erika would be distributed to Eli's estate upon Marilyn's death some day in the future. Cousin Miriam was the only heir to her father Eli's estate and thus she would now be the beneficiary of both shares.

9. This bizarre and unexpected outcome came as a surprise to all of the parties, including the widow and drafting lawyer [Lindsay], a windfall to one cousin, Miriam, and as devastating news to the other, Erika.

10. [Lindsay] informed Erika Fabian, per his July 31st letter, that she was no longer a beneficiary of her uncle's Trust by the operation of this language in the trust. This will hereinafter be referred to as the "subject provision".

> Upon or after the death of the survivor of my said spouse and me, my Trustee shall divide this Trust as then constituted into two (2) separate shares so as to provide One (1) share for the children of Marilyn K. Fabian and One (1) share for my brother, Eli Fabian. If either of my wife's children predceases (sic) her, the predeceased child's share shall be distributed to his or her issue per stirpes. If my said brother, ELI FABIAN, predeceases me, then one half of his share shall be distributed to his daughter, MIRIAM FABIAN, or her issue per stirpes; and the other half of his share shall be distributed to my niece, ERICA FABIAN, or her issue per stirpes" (Emphasis added).

11. While the opening sentence of this trust paragraph plans the first division of the Trust corpus to occur "upon or after the death of the survivor or my said spouse and me", something that still has not occurred since Dr. Fabian's spouse is still living, it then in sentence three (3) creates the problem that has resulted in years of litigation and which effectively defeated the Settlor's intent by accidentally disinheriting cousin Erika. The problem is that the Trust language failed to contemplate or plan for the most likely situation, that where Eli survives his brother but not his brother's wife, who was twenty years younger. Had that third sentence in the subject provision simply read, "If my said brother, ELI FABIAN, predeceases *us*", instead of "*me*", this trust would have succeeded in carrying out the intent of the Settlor. It does not. The wording drafted by [Lindsay] ignores the stated requirement that both the settlor and his wife be dead before any distributions are made.

12. There is no reasonable doubt as to the following:

a. [Lindsay] knew that [Erika] was an intended beneficiary of the Trust, as he drafted documents naming her as a beneficiary;

b. There were only three individuals identified by name in the Trust other than Dr. Fabian's wife, those being plaintiff Erika Fabian, her cousin Miriam Fabian, both

living as of the date of this filing, and Dr. Fabian's brother Eli, who was in poor health and in his 70's when the trust documents were drafted;

c. [Lindsay] knew that a substantial financial interest was being created by the Trust Agreement he was drafting by virtue of his conversations with the Settlor and his wife, and revealed by the fact that on April 6th of 1990 [Lindsay] placed a value on Dr. Fabian's estate of $4,500,000.00 in his engagement letter to Dr. Fabian and his wife;

d. [Lindsay] knew that Dr. Fabian intended for his wife Marilyn to receive the benefit of the Trust Corpus and income for her lifetime, as it is stated in the Trust Agreement;

e. [Lindsay] knew that Dr. Fabian intended for half of his remaining trust corpus to go to his wife's daughters upon her death as it is stated in the Trust Agreement;

f. [Lindsay] knew that Dr. Fabian intended for the other half of his remaining trust corpus to go to this brother Eli, if Eli survived to the time of distribution to take his share, as it is stated in the Trust Agreement;

g. [Lindsay] knew that Dr. Fabian did not intend to leave anything from his Trust to his brother Eli, if Eli was deceased at the time of distribution;

h. [Lindsay] knew that Dr. Fabian had no intention of leaving anything to a deceased brother;

i. [Lindsay] knew that Dr. Fabian wanted Eli's share of his estate to pass to his two named nieces, Erika and Miriam, if Eli was not alive to receive his share as that is the logical conclusion from the wording of the Trust Agreement since no distribution to anyone would occur until the death of Dr. Fabian's spouse Marilyn. There is no other distribution language for a plan if Eli survived Dr. Fabian but predeceased the spouse;

j. [Lindsay] knew or should have known that the wording of the subject provision of the trust agreement failed to contemplate the most likely event, that Eli might survive Dr. Fabian, but not Dr. Fabian's wife Marilyn, a woman twenty years younger than either Eli or her husband;

k. Eli Fabian survived Dr. Fabian by several weeks. Dr. Fabian died on February 5th, 2000 and Eli passed away on March 12, 2000. This made no difference to the Trust as no distributions would be made until Marilyn passed away. It made a difference worth millions of dollars to Miriam and Erika;

l. The named life beneficiary of the Trusts drafted by [Lindsay], Marilyn, Dr. Fabian's wife of 27 years at his death, is alive and well some twenty-two years after the drafting and execution of Dr. Fabian's estate planning instruments;

m. In an action brought by Erika to reform the subject provision, [Lindsay] took the position that the Trust Agreement was not ambiguous and did not need to be corrected, a position contrary to that of Dr. Fabian's wife and Dr. Fabian's accountant and business advisor, in [Lindsay]'s effort to prevent the Trust he had drafted from being found to be ambiguous;

n. At least two South Carolina Courts have found the subject provision to be ambiguous;

o. One Court found that the subject provision contradicted what Dr. Fabian told his wife and family that he intended and that it created an "absurd result";

p. Upon Dr. Fabian's death in February of 2000, the Trust he created had a value of approximately Thirteen Million Dollars ($13,000,000.00);

q. By virtue of the wording in the trust language, which defeated her

uncle's stated intent, Erika would be entitled to nothing. Her cousin Miriam would receive both her share and Erika's; and,

r. Plaintiff Erika Fabian was first informed that she did not have any remaining beneficial interest in her uncle's Trust per a letter from Defendant Lindsay mailed to her on July 30, 2001.

UNDERLYING PROCEDURAL HISTORY

13. Plaintiff Erika Fabian brought an action in the Georgetown County Probate Court (Civil Action 2004-GC-22-21) seeking to reform the subject provision, correct this error, effectuate the Settlor's intent and mitigate her damages. This action would have also had the effect of mitigating or eliminating the damages for which [Lindsay] could be held responsible.

14. To avoid having to bring an action against [Lindsay] to toll the statute of limitations, which would have arguably run on or after July 31st, 2004, three years after plaintiff could have first become aware of [Lindsay]'s negligence, [Erika] and [Lindsay] entered into a series of Tolling Agreements, which expressly stated that:

> The parties believe that the voluntary extension of the statute of limitations will eliminate any time deadline pressure with the goal of resolving all issues without litigation.

15. Had the parties not entered into these Tolling Agreements, [Erika] would have been compelled to bring her action against Mr. Lindsay or lose her right to do so thus forcing litigation against the drafting lawyer before trying to correct the mistake he had made. The parties have executed subsequent tolling agreements as the years of litigating the reformation passed and, following the trial of the reformation case in June of 2010, they continued to do so in an attempt to resolve this matter without litigation. The last tolling

agreement extended the statute of limitations through October 10th, 2012. This action is being brought within that stated period.

16. Cousin Miriam Fabian removed the reformation action from Probate Court to Circuit Court on May 10th, 2007 and that action became Civil Action 2007-CP-22-01225. Motions were filed and hearings were held on the removal issues.

17. Trustees Marilyn Fabian and Walter Pikul filed a Declaratory Judgment action in December of 2008 asking the Court for guidance on the applicability of the new Probate Code section to the issues in the reformation case. Miriam Fabian removed that action, motions were filed and hearings were held.

18. Miriam Fabian filed Motions to strike the affidavits and testimony of Marilyn Fabian and plaintiff's experts, hearings were held, those motions were denied and motions to reconsider filed and denied.

19. Miriam Fabian moved for Summary Judgment, hearings were held, the Motion denied and a Motion to Reconsider was filed and denied.

20. Before the reformation action was called for trial for the first time in June of 2010, cousin Miriam Fabian filed two lawsuits against the Trust and the Trustees. In her first action (Miriam Fabian v. Marilyn K. Fabian and Walter Pikul, Civil Action 2010-CP-22-512), Miriam sought to be awarded her attorneys fees over the decision by trustees Marilyn Fabian and Walter Pikul to concur in the reformation case that the subject trust was ambiguous and should be reformed. That case was tried before the Honorable Larry B. Hyman, Jr. in August of 2011 and the Court denied Miriam's relief and ordered that she pay the attorney's fees incurred by the defendants Marilyn and Walt Pikul.

## Arguments

### I. A Client's Intended Third-party Beneficiary of a Will or Estate Plan Should Have Standing to Sue When the Drafting Lawyer's Error Defeats or Diminishes the Client's Intent.

This case presents an opportunity, not available in *Henkle v. Winn,*[1] *Rydde v. Morris,*[2] *Moore v. Weinberg,*[3] or *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions,*[4] for South Carolina to join the vast majority of states allowing intended third-party beneficiaries of what turned out to be a defective will or estate plan to bring claims against the lawyer who prepared the defective instrument. Otherwise, the original client's intent to benefit the third-party would be defeated by the lawyer's errors, the loss would fall on the innocent third-party, and usually no one will have standing to seek redress because the client is deceased. Lawyers, on the other hand, can prevent those losses by exercising adequate diligence or implementing precautionary procedures intended to discover negligence before any resulting harm, and therefore are in a much better position to bear

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[1] 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001), *re'hg denied* (2001), *cert. denied*, (2002). Ms. Henkle was also a client of the lawyer who drafted her husband's will, unlike Erika. The *Henkle* opinion notes that South Carolina case law is silent as to whether an intended beneficiary has standing to bring an action for legal malpractice.

[2] 381 S.C. 643, 675 S.E.2d 431 (2009). Because the will was never drafted by Ms. Morris, unlike the trust agreement actually prepared and executed in this case, other policy grounds forestalled South Carolina's recognition of third-party standing in a legal malpractice context.

[3] 383 S.C. 583, 681 S.E.2d 875 (2009). Mr. Weinberg's duties to the third-party arose out of his role as an escrow agent separate from his role as lawyer for one of the parties.

[4] 388 S.C. 394, 400-01, 697 S.E.2d 551, 554-55 (2010). Because Ms. Argoe had executed a Durable Power of Attorney in favor of her son that included powers to convey real property, the lawyer retained by the son to convey property belonging to Ms. Argoe owed duties only to the son.

the loss. Relaxing or eliminating the strict privity rule in a legal malpractice context should result in more careful legal representation, a higher degree of professional care, greater diligence, and will place lawyers under the same standard as other professionals and contracting parties.

Assuming a lawyer's negligence in preparing an estate / testamentary document, there are three classes of potential plaintiffs: the client, the decedent's estate, and the intended beneficiaries. As a result, of the three possible plaintiffs, only the beneficiaries have the motivation and sufficient damages to bring a malpractice claim. The client is deceased and the estate lacks a cause of action or damages or both. Indeed, because the beneficiaries were supposed to be the beneficial owners of estate assets, only the beneficiaries suffer directly due to the lawyer's negligence. If no cause of action is available to the beneficiaries, the negligent drafting lawyer is effectively immune from liability. Therefore, only the beneficiaries suffer the loss caused by the lawyer's negligence.

As noted by many authorities and commentators, the prevailing modern rule is that a lawyer preparing a will, estate plan, or trust for a client can be liable for negligence to the intended beneficiary or heirs even though no client-lawyer relationship had been formed. *See e.g.,* 4 RONALD E. MALLEN AND JEFFERY M. SMITH, LEGAL MALPRACTICE, § 36:5, p. 1186-1190 (West 2012) (citing numerous state and federal cases from at least thirty-two (32) jurisdictions, including, perhaps mistakenly until the ruling in this case, South Carolina); 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 (2007); Joan Teshima, J.D., Annotation, *Attorney's liability, to one other than immediate*

*client, for negligence in connection with legal duties,* 61 A.L.R.4th 615 (1988). In these jurisdictions, the lawyer may be liable to a third party where the third party was an intended beneficiary of the lawyer's services or where it was reasonably foreseeable that negligent service or advice to or on behalf of the client could cause harm to others. *See, generally, Jenkins v Wheeler,* 69 N.C.App. 140, 316 S.E.2d 354, 61 A.L.R. 4th 605, *rev' denied*, 311 N.C. 758, 321 S.E.2d 136 (1984); *Young v. Williams*, 285 Ga. App. 208, 645 S.E.2d 624 (2007); *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961) (*en banc*); *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958) (*en banc*); *Stowe v. Smith*, 441 A.2d 81, 84 (Conn. 1981); *Licata v. Spector*, 225 A.2d 28, 31 (Conn. C.P. 1966); *Ogle v. Fuiten*, 466 N.E.2d 224, 227 (Ill. 1984); *Jewish Hosp. v. Boatmen's Nat'l Bank*, 633 N.E.2d 1267, 1276 (Ill. App. Ct. 1994); *Walker v. Lawson*, 514 N.E.2d 629 (Ind. Ct. App. 1987), *vacated*, 526 N.E.2d 968 (Ind. 1988); *Desire Narcotics Rehab. Ctr., Inc. v. White*, 732 So. 2d 144, 146 (La. Ct. App. 1999); *Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C.*, 958 S.W.2d 42, 48 (Mo. Ct. App. 1997); *Hesser v. Ctr. Nat'l Bank & Trust Co. of Enid*, 956 P.2d 864, 868 (Okla. 1998); *Hale v. Groce*, 730 P.2d 576, 577 (Or. Ct. App. 1986), *rev'd on other grounds*, 744 P.2d 1289 (Or. 1987); *Persche v. Jones*, 387 N.W.2d 32, 35-36 (S.D. 1986); *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501 (9th Cir. 1993); *Schirmer v. Nethercutt*, 288 P. 265, 267-68 (Wash. 1930); *Auric v. Cont'l Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983). Only six or seven states remain in the strict privity minority.[5]

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[5] Nebraska, New York, Texas, Maryland, Ohio, Virginia, and maybe Alabama. *See* Radford, Mary F., 1 GA. WILLS & ADMINISTRATION § 4:11 (7th ed.); Begleiter, Martin D., *First Let's Sue all the Lawyers–What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L. J. 325 (2000); Fogel, Bradley E.S., *Attorney v. Client–Privity, Malpractice and the Lack of Respect for the Primacy of the Attorney–Client Relationship in Estate Planning*, 68 TENN. LAW REV. 261 (2001); Price,

There are jurisdictions allowing the personal representative of a lawyer's client to have standing to bring a legal malpractice action against the drafting lawyer for negligence, but those jurisdictions generally limit the available damages to the legal fees paid to the drafting lawyer, *see Mieras v. DeBona,* 452 Mich. 278, 297, 550 N.W.2d 202, 210 (1996) and *Walker v. Lawson*, 514 N.E.2d 629, 634 (Ind. App. 1987), and for any increased tax consequences to the estate. *See e.g., Estate of Schneider v. Finmann*, 15 N.Y.3d 306, 907 N.Y.S.2d 119 (2010) (Personal representative of decedent's estate had sufficient privity with drafting lawyer to bring, on behalf of estate, legal malpractice action for damages resulting from negligent representation in estate tax planning that allegedly caused enhanced estate tax liability). Drafting errors, however, generally cause substantially different injuries to the beneficiaries as compared to injuries suffered by the estate. As such, courts have held that personal representatives do not have standing to assert claims on behalf of the beneficiaries. *Karam v. Law Offices of Ralph J. Kliber*, 253 Mich. App. 410, 429, 655 N.W.2d 614, 625 (2002) ("[B]ecause the beneficiaries, not the estate, suffered the real loss, the personal representatives have no standing to assert a cause of action.").

As to the intended third-party beneficiaries' claims, the source of the duty by the lawyer to a third-party arises by implication when and because that is the mutual intent of the lawyer and the client. The scope of that duty to the third-party, therefore, is limited to that owed by the lawyer to the client. *See Boranian v. Clark*, 123 Cal. App. 4th 1012, 20 Cal.

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John R., *Duties of Estate Planners to Non–Clients: Identifying, Anticipating, and Avoiding the Problems*, 37 S. TEX. L. REV. 1063 (1996); Vallario, Angela M., *Shape Up or Ship Out: Accountability to Third Parties for Patent Ambiguities in Testamentary Documents*, 26 WHITTIER L. REV. 59 (2004); and Volkmer, Ronald R., *Liabilities of Attorneys in Estate Planning Context*, 22 ESTATE PLANNING 185 (May/June 1995).

Rptr. 3d 405 (2d Dist. 2004); *Leak-Gilbert v. Fahle*, 2002 OK 66, 55 P.3d 1054, 1058 (Okla. 2002); *Donohue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995). This limitation resolves several of the concerns expressed in some of the out-dated opinions applying a strict privity rule based on a fear that duties to the client to effect the client's testamentary intent might somehow conflict with duties to the intended third-party beneficiary. The majority of the courts' opinions reflect an understanding that because the lawyer's duties to the client and non-client intended beneficiaries–at the time the testamentary instrument is to take effect–are mirror images of one another, there is no conflict. The looming questions regarding ascertaining the client's intent are addressed in Argument III.

The concept of imposing third-party liability on a lawyer who drafted a defective will or trust plan that was actually executed by the client is not contrary to the public policy concerns addressed in *Rydde*. In *Rydde*, the Supreme Court rejected the imposition of third-party liability on a lawyer for alleged negligent delay in completing estate planning documents on public policy grounds. 675 S.E.2d at 433-34. Agreeing with the courts in Connecticut, New Hampshire, and Florida, the Supreme Court acknowledged the public policy concerns expressed by those courts that imposing liability for the delay "would not comport with a lawyer's duty of undivided loyalty to the client." *Id.* (citing *Krawczyk v. Stingle,* 208 Conn. 239, 543 A.2d 733, 735 (1988)). Those courts all recognized third-party liability in that context would motivate lawyers to "exert pressure on the client to complete and execute estate planning documents summarily" and contrary to the lawyer's "primary responsibility" to ensure that the proposed estate plan "effectuates the client's wishes and that the client understands the available options in the legal and practical implications of

whatever course of action is ultimately chosen." *Id.* None of those public policy concerns are present in this case or others where the will, trust, or other estate plan documents were actually executed by the lawyer's client.

Jurisdictions that have allowed non-client intended third-party beneficiaries standing to bring claims against lawyers for alleged errors in preparing wills also have allowed standing for alleged negligent trust or estate planning preparation. *See e.g., Bucquet v. Livingston*, 57 Cal. App. 3d 914, 129 Cal. Rprt. 514 (1st Dist. 1976); *Pizel v. Zuspann*, 247 Kan. 54, 795 P.2d 42, 10 A.L.R. 5th 1098 (1990), *modified on denial of reh'g*, 247 Kan. 699, 803 P.2d 205 (1990); *Datwani v. Netsch*, 562 So. 2d 721 (Fla. D.C.A. 3d 1990); *Charleston v. Hardesty*, 108 Nev. 878, 839 P.2d 1303 (1992).

The antiquated strict privity rule, referenced in *Henkle* and *Ryyde,* was premised upon two basics concerns: First, "absent a requirement of privity, parties to a contract for legal services could easily lose control over their agreement." *Schriener v. Scotbille*, 410 N.W. 2d 679, 681 (Iowa 1987). Second, "imposing a duty to the general public upon lawyers would expose lawyers to a virtually unlimited potential for liability." *Id.* The contours of the duty and the various standards imposed by the majority of states allowing third-party standing resolve most, if not all, of the concerns and policies behind the strict privity rule. As stated earlier, because the lawyer's duties to the non-client beneficiary mirror the duties to the client, both the lawyer and client maintain control over their agreement. Similarly, intended third-party beneficiaries are a known, identifiable, and a definite subset of "the general public." In other words, like Erkia's status as to Dr. Denis Fabian's client-lawyer relationship with Lindsay, an intended third-party beneficiary is not a stranger to the client's relationship with the lawyer: It was Erika (and her other cousins)

who Dr. Fabian intended to benefit when he engaged and contracted with Lindsay to prepare the subject trust agreement. (Amended Complaint at pp. 2-4, ¶¶ 6-7, 12(a); ROA ___).

Like the courts in *MacPherson v. Buick Motor Co.*[6] and *Young v. Tide Craft, Inc.* [7], regarding product liability claims[8], the fundamental philosophy expressed by the courts eviscerating or relaxing strict privity for professional malpractice claims focuses on the foreseeability of harm. In the client-lawyer context, by the lawyer preparing wills, trusts, and other estate planning documents not intended to operate until sometime in the future (typically after the death of the client) assumes a responsibility, resting not upon contract or a direct relationship, but rather upon the foreseeability of harm in the absence of due care. The lawyer knows or should know that the client is relying *and* the ultimate beneficiaries of lawyer's services would rely upon the competency of the drafting lawyer.

> When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client, but also with the client's intended beneficiaries.

*Heyer v. Flaig*, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P.2d 161 (1969).

The lawyer's liability should not be dependent upon strict privity of contract, but rather on the presence or absence of a client's intent that a third-party benefit from or rely upon the lawyer's services. *See Meighan v. Shore*, 34 Cal. App. 4th 1025, 40 Cal. Rptr. 2d

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[6] 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.).

[7] 270 S.C. 453, 242 S.E.2d 671 (1978).

[8] *See Ultramares Corp. v. Touche, Niven & Co.*, 255 N.Y. 170, 174 N.E. 441 (1931), one of the first modern opinions addressing relaxation of privity standards for professional malpractice claims.

744 (2d Dist. 1995); *Moore v. Anderson, Zeigler, Disharoon, Gallager & Gray*, 109 Cal. App. 4th 1287, 135 Cal. Rptr. 2d 888 (1st Dist. 2003) (lawyer owes a duty of care to nonclient when and to the extent that a) lawyer knows that the client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient, b) such duty would not significantly impair the lawyer's performance of obligations to the client, and c) the absence of such duty would make enforcement of those obligations to the client unlikely).

Intended third-party beneficiaries of defective wills, trust agreements, or estate plans should have standing to bring claims against the lawyer who prepared the instrument if it fails to accomplish or diminishes the original client's intent. Public policy weighs heavily in favor of ensuring the original client's intent is not defeated by the lawyer's errors, ensuring the loss falls on the party responsible for the error, ensuring someone has standing to seek redress, ensuring the public's confidence in lawyers and the judicial system,[9] ensuring that negligence is punished,[10] ensuring that remedies are available for tortious conduct,[11] and "ensuring that justice is available to all citizens . . ." as sworn by each lawyer in this State.[12] Prospective loss prevention measures are available for the drafting lawyers to discover procedural and substantive drafting errors before the

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[9] *See e.g., Weatherford v. Price,* 340 S.C. 572, 532 S.E.2d 310, 314-16 (Ct. App. 2000) (public policy issues implicated by propriety of a legal fee).

[10] *See Kelly v. Logan, Jolley, & Smith, L.L.P.,* 383 S.C. 626, 682 S.E.2d 1, 4 (Ct. App. 2009).

[11] *See Cole Vision Corp. v. Hobbs,* 394 S.C. 144, 152, 714 S.E.2d 537, 541 (2011) (civil remedies available for spoliation of evidence).

[12] Rule 402(k), SCACR.

instrument or instruments are executed, which should result in superior legal representation and professional care, and greater diligence by the drafting lawyers.

In this case, Erika should have standing to maintain legal malpractice claims for professional negligence and breach of contract against Lindsay for his negligence that resulted in defeating the intent of his client, Dr. Fabian causing damages to her. Lindsay knew of Dr. Fabian's specific intent to provide for Erika and made drafting errors that defeated that intent. Since Dr. Fabian is deceased and because Dr. Fabian's Personal Representative did not sustain the same damages, Erika respectfully requests this Court recognize her standing as an intended third-party beneficiary to sue Lindsay for damages caused by his errors. The trial court's Order dismissing her Amended Complaint with prejudice should be reversed.

## II. Erika Was in Privity of Contract with Lindsay as an Intended Third-party Beneficiary of Lindsay's Contract to Provide Legal Services to Accomplish Dr. Denis Fabian's Testamentary Intent.

It is settled law in South Carolina that intended third-party beneficiaries of a contract have standing to assert claims for breach of that contract. In other words, the law places the third-party in privity with the original contracting parties. And there is no legitimate public policy basis to create an exception when one of the original contracting parties is a lawyer.

> It has been held by this court in numerous cases that where a contract is made between two persons, and there is in it a provision that enures to the benefit of a third person not a party to the contract, and perhaps ignorant of its execution, he acquires an enforceable interest in the contract so far as the provision of his interest is concerned.

*Johnson v. American Ry. Express Co.*, 163 S.C. 191, 161 S.E. 473 (1931) (citing *Crum v.*

*Jenkins*, 145 S.C. 177, 143 S.E. 21 (1928); *Standard Oil Co. v. Powell Pav. & Contracting Co.*, 139 S.C. 411, 138 S.E. 184, *reh'g denied* 140 S.C. 39, 138 S.E. 544 (1927); *Walker v. Queen Ins. Co.*, 136 S.C. 144, 134 S. E. 263 (1926); *General M. Acceptance Corp. v. Hutto*, 136 S.C. 207, 134 S.E. 232 (1926); *Mack Mfg. Co. v. Massachusetts, Co.*, 103 S.C. 55, 87 S.E. 439 (1915); *Thomas v. Atkinson*, 94 S.C. 125, 77 S.E. 722 (1913); *Ancrum v. Camden Water, Light & Ice Co.*, 82 S.C. 284, 64 S.E. 151 (1909); *Mims v. Seaboard Air Line Ry. Co.*, 69 S.C. 338, 48 S.E. 269 (1904); *Butler v. Western Union Tel. Co.*, 62 S.C. 222, 40 S.E. 162, 89 Am. St. Rep. 893 (1901); *Harris v. Richmond & D. R. Co.*, 31 S.C. 87, 9 S.E. 690 (1889); *Thompson v. Gordon*, 34 S.C.L. 196, 3 Strob. 196, 1848 WL 2499 (S.C.App.L. 1848); *Brown v. O'Brien*, 1 Rich. 268, 30 S.C.L. 268, 1845 WL 2651 (S.C.App.L. 1845); *Duncan v. Moon*, Dud. 332, 23 S.C.L. 332, 1838 WL 1638 (S.C.App.L. 1838); 2 Corp. J. 86). *See also Wise v. Picow*, 232 S.C. 237, 101 S.E.2d 651 (1958) (contract between two persons for the benefit of a third person can be enforced by the third person, even if he is not named in the contract.); *Pharr v. Canal Ins. Co.*, 233 S.C. 266, 104 S.E.2d 394 (1958) (same).

> Generally, a third person not in privity of contract with the contracting parties has no right to enforce a contract. However, when the contract is made for the benefit of the third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person.

*Wogan v.* Kuntz, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005) (*citing* Goode *v. St. Stephens United Methodist Church*, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App.1997) and *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)). "Privity means a mutual or successive relationship to

the same rights of property." *First Nat. Bank of Greenville v. U. S. Fid. & Guar. Co.*, 207 S.C. 15, 26, 35 S.E.2d 47, 57 (1945).

In South Carolina, a "third-party beneficiary" is defined as a party whom the contracting parties intend to directly benefit. *Touchberry v. City of Florence*, 295 S.C. 47, 48-49, 367 S.E.2d 149, 150 (1988). To qualify as a third-party beneficiary under a contract, a third party must show "that the intent of the contracting parties was to confer a direct and substantial benefit on the third party. In the absence of a clear intent to benefit the third person, he cannot sue on the contract." *TCX, Inc. v. Commonwealth Land Title Insurance Co.*, 928 F. Supp. 618 (D.S.C. 1995) (applying South Carolina law) (citing *United States v. Chester Heights Assocs.*, 406 F. Supp. 600, 604 n. 2 (D.S.C. 1975); *see also* 17A AM.JUR.2d Contracts § 440, at 463-64 ("As a general proposition, the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract . . .. Absent intent to benefit [the] third person, such third person is merely an incidental beneficiary with no right to enforce the contract.").

The main guide to interpret a contract is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract. *See Gilbert v. Miller*, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) (citing *United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.*, 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)). If a contract's language is clear and capable of legal construction, the court's function is to can be interpret its lawful meaning and the intent of the parties as found in the agreement. *Smith-Cooper v. Cooper*, 344 S.C. 289, 543 S.E.2d 271 (Ct. App. 2001). The third-party's rights are, of course, governed by the terms of the contract. *See Kingman v. Nationwide Mut. Ins. Co.*, 243 S.C. 405, 134 S.E.2d 217, 221 (1964).

The factual allegations in Erika's Amended Complaint establish that she was a party who the contracting parties–Dr. Denis Fabian and Lindsay–intend to directly benefit. (Amended Complaint, pp. 2-4, ¶¶ 6-7 B12(a); ROA ___). *See also Touchberry v. City of Florence*, 295 S.C. at 48-49, 367 S.E.2d at 150. Without carving out an exception because the at-fault contracting party, Lindsay, is a lawyer, Erika's Amended Complaint states facts sufficient to constitute a cause of action against Lindsay under South Carolina law. This should be true notwithstanding that Erika was not a party to the contract and not Lindsay's client, because Erica was an intended third-party beneficiary, which provides her privity under South Carolina contract law. The trial court's Order should be reversed.

## III. South Carolina Should Apply a Modified Balancing Test In Tort and An Intended Third-Party Beneficiary Test in Contract to Determine a Plaintiff's Standing to Maintain a Legal Malpractice Claim.

### A. Modified Balancing Test In Tort.

In the hopeful event this Court rejects strict privity between an intended third-party beneficiary and the drafting lawyer, the approach or test applied to ascertain standing should involve a review of multiple factors with emphasis on determining whether the client had a *specific intent to benefit* the alleged intended third-party beneficiary, which would allow claims in tort law and in contract law. *See Blair v. Ing*, 195 Hawai'i 247, 254-660, 21 P.3d 452, 459-464 (2001) (analyzing jurisdictions employing a) "balancing factors" approach under a negligence theory, b) third party beneficiary theory of contract, and c) negligence versus third party beneficiary theory); ("[W]e we believe that the remedies available in tort that are generally over and above those available in contract, e.g., punitive damages and emotional distress, do not place an unreasonable burden upon the legal profession."); (allowing claims under either negligence or contract theories of recovery).

Utilizing the specific intent factor, among others, should resolve contra arguments suggesting that allowing suits by those not in privity would extend liability to unlimited classes of potential plaintiffs and would infringe upon the client-lawyer relationship. *See, e.g., Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995).

As to the determination of a lawyer's duty to non-clients, other jurisdictions weigh the following factors in what has been described as "the modified balancing test":

1. the existence of a specific intent by the client that the purpose of the lawyer's services were to benefit the plaintiff;
2. the foreseeability of the harm to the plaintiff as a result of the lawyer's negligence;
3. the degree of certainty that the plaintiff will suffer injury from lawyer's misconduct;
4. the closeness of the connection between the lawyer's conduct and the injury;
5. the policy of preventing future harm; and
6. the burden on the profession of recognizing liability under the circumstances.

*See France v. Podleski*, 303 S.W.3d 615 (Mo. App. 2010); *Grimes v. Saikley*, 388 Ill.App.3d 802, 904 N.E.2d 183 (Ill. App. 2009); *Chang v. Lederman*, 172 Cal. App. 4th 67, 90 Cal. Rptr. 3d 758 (2009); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 629 (Mo. 1995); *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1268, 266 Cal.Rptr. 483 (1990). *See also, Lucas v. Hamm*, 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962); *Pizel v. Zuspann*, 247 Kan. 54, 795 P.2d 42, 50, *clarified by*, 247 Kan. 699, 803 P.2d 205 (1990) (holding that whether an attorney may be liable to a non-client would be determined by the six-factor balancing

test set out in *Lucas*).

Courts have held that a lawyer's knowledge that third parties will or may be affected by the representation of the client is not in and of itself sufficient to create a duty of care to the third party. *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (1997). An essential predicate for establishing a lawyer's duty of care under an "intended beneficiary" theory is that both the lawyer and the client must have intended for the third party to be a beneficiary of legal services that the lawyer was to render. *Id.* The clear absence of mutual intent on the part of the lawyer and the client is critical to whether the third party can maintain a viable legal malpractice claim. A lawyer's undertaking of a duty to the third party must be the result of a conscious decision. *See Zenith Ins. Co. v. O'Connor*, 148 Cal. App. 4th 998, 55 Cal. Rptr. 3d 911 (2007); *Donahue*, 900 S.W.2d at 629 (the first factor a non-client must demonstrate includes a showing that it cannot be characterized as an incidental or indirect beneficiary).

**B. Intended Third-Party Beneficiary Test in Contract.**

This test used for professional negligence tort claims is similar in many respects to South Carolina's third-party beneficiary contract law discussed in Argument II above because the focus is on whether "the contract [was] made for the benefit of the third person, . . .." *Wogan v. Kuntz*, 366 S.C. at 604 623 S.E.2d at 118. *Accord Pelham v. Griesheimer*, 440 N.E.2d 96, 100 (Ill. 1982) ("[F]or a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party. Under such proof, recovery may be allowed, provided that the other elements of a negligence cause of action can be proved."); *Guy v. Liederbach*, 501 Pa. 47, 60, 459 A.2d 744, 751 (1983)

(plurality) (holding that RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979) provides proper two part test for determining whether plaintiff is an intended third party beneficiary of client's contract with lawyer: "(1) the recognition of the beneficiary's right must be 'appropriate to effectuate the intention of the parties,' and (2) the performance must 'satisfy an obligation of the promisee to pay money to the beneficiary' or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.'").

Erika respectfully urges this Court to allow claims under both negligence and contract theories of recovery.

**C. The Restatement of Law Governing Lawyers Approach.**

The analysis under the intended third-party beneficiary test in contract is similar in many respects to that employed negligence actions by RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51(3) (2000). That Section and its Comments impose the following duties of care on lawyers:

> RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 51 - Duty Of Care To Certain Nonclients:
>
> For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:
>
> (3) to a nonclient when and to the extent that:
>
> (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
> (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
> (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; . . ..
>
> Comment *f.* A nonclient enforcing a lawyer's duties to a client (Subsection

(3)). When a lawyer knows (see Comment h hereto) that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died.

A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation. A duty to a third person hence exists only when the client intends to benefit the third person as one of the primary objectives of the representation, as in the Illustrations below and in Comment *g* hereto. Without adequate evidence of such an intent, upholding a third person's claim could expose lawyers to liability for following a client's instructions in circumstances where it would be difficult to prove what those instructions had been. Threat of such liability would tend to discourage lawyers from following client instructions adversely affecting third persons. When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third person must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document. *See* RESTATEMENT THIRD, PROPERTY (DONATIVE TRANSFERS) §§ 11.2 and 12.1 (Tentative Draft No. 1, 1995) (preponderance of evidence to resolve ambiguity in donative instruments; clear and convincing evidence to reform such instruments).

*See also Friske v. Hogan*, 2005 S.D. 70, 698 N.W.2d 526, 530-31 (S.D. 2005) (citing Restatement § 51(3) and cmt. *f*) (nonclient beneficiaries under a will could maintain a malpractice action against lawyer who drafted will, when lawyer knew that client intended as primary objective that lawyer's services benefit nonclients, such a duty would not significantly impair lawyer's performance of his obligations to client, and absence of such duty would make enforcement of those obligations unlikely).

**D. The Florida-Iowa Rule Should Be Rejected.**

The test adopted should also recognize that oftentimes certain drafting errors result in a will, trust agreement, or estate plan that omits key evidence of the client's actual

testamentary intent. As a result, limiting the analysis to the four corners of the instrument to ascertain the typically deceased client's intent, as employed by the Florida-Iowa approach,[13] would defeat the very purpose of the analysis and would frequently lead to inconsistent results. *See O'Neill v. Sacher,* 526 So. 2d 771, 772 (Fla. Dist. Ct. App. 1988) ("Although the beneficiary's costly lawsuit was spawned by an ambiguity in the testamentary instruments, it was not established that [the] imprecision in draftsmanship caused a frustration of the testator's intent as expressed in the will and trust documents.");*Ginther v. Zimmerman*, 491 N.W.2d 282, 286 (Mich. Ct. App. 1992) (intended beneficiary had no cause of action against lawyer who neglected to include an intended bequest to the plaintiff in the testator's will); and *Simpson v. Calivas*, 650 A.2d 318, 322 (N.H. 1994) (noting that the Florida-Iowa rule leads to "inconsistent results"). This rule limiting the focus to the client's testamentary intent "as expressed in the will," precludes an intended beneficiary standing to bring malpractice actions against drafting lawyers for legal fees the beneficiaries incurred to resolve ambiguities in trusts. *O'Neill v. Sacher,* 526 So. 2d 771, 772 (Fla. Dist. Ct. App. 1988) ("[W]here an ambiguity in testamentary instruments drafted by an attorney does not result in a frustration of testamentary intent there is no liability to a non-client.") and *O'Neill v. Sacher*, 451 So. 2d 1032 (Fla. Dist. Ct. App. 1984) (beneficiary of a pour over trust brought legal malpractice claim against lawyer who drafted

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[13] The Florida-Iowa rule is followed by Colorado, Florida, Iowa, Michigan, and maybe Maryland. *See Glover v. Southard*, 894 P.2d 21, 24 (Colo. Ct. App. 1994); *Shriners Hosp., Inc. v. Southard*, 892 P.2d 417, 419 (Colo. Ct. App. 1994); *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987); *Mieras v. DeBona*, 550 N.W.2d 202, 207 (Mich. 1996); and *Kirgan v. Parks*, 478 A.2d 713, 714 (Md. Ct. Spec. App. 1984) (It was "a definite maybe" that Maryland would follow the Florida-Iowa rule, if presented with appropriate facts).

mother's trust to recover legal fees and costs incurred in a lawsuit filed to clarify an ambiguity in the trust).

The fundamental flaw in the Florida-Iowa rule is that it focuses on the testamentary documents prepared by the lawyer rather than the source of the beneficiary's claim, which is not the allegedly defective will or trust document, but instead is client-lawyer agreement that was intended to satisfy the client's testamentary intent. The proper approach in cases like this one where latent ambiguities exist in the will, trust agreement, or estate plan would be to allow the admission of extrinsic evidence to establish the client's intent as is generally allowed in a typical will contest. *See e.g., Kemp v. Rawlings*, 358 S.C. 28, 594 S.E.2d 845 (2004) (court may admit extrinsic evidence to determine whether latent ambiguity exists; once the court finds latent ambiguity, extrinsic evidence is also permitted to determine testator's intent; latent ambiguity is one in which the uncertainty arises, not upon the words of the instrument as looked at in themselves, but upon those words when applied to the object or subject which they describe); *Bob Jones University v. Strandell*, 344 S.C. 224, 230-31, 543 S.E.2d 251, 254 (Ct. App. 2001).

The *Henkle* court in dicta, however, seemed to indicate that proof of the client's intent would be limited to examination of the will itself. *Henkel,* 346 S.C. at 18, 550 S.E.2d at 579. ("Moreover, the testator's intent must be determined from the will itself."). As noted earlier, such a rule applied in a legal malpractice context would defeat the very purpose of the analysis and would frequently lead to inconsistent results.

## CONCLUSION

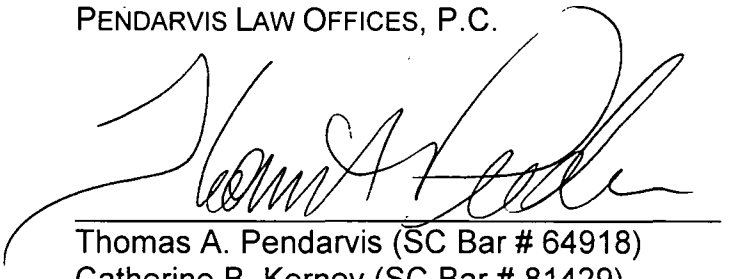
Appellant, Erika Fabian, respectfully requests this Court to reverse the trial court's ruling dismissing her Amended Complaint with prejudice allowing her as an intended third-

party beneficiary to maintain her legal malpractice claims against Respondents, Ross M. Lindsay, III, and LINDSAY & LINDSAY, LLC, arising from the defects in the trust agreement the Respondents prepared for her uncle, Dr. Denis Fabian for the benefit of Appellant and others.

A rule is needed to balance on one hand, between a fair allocation of damages between negligent lawyers and innocent beneficiaries, and on the other, to maintain the fidelity of the client-lawyer relationship. Allowing a cause of action for frustrated beneficiaries, like Erkia, will not eviscerate client-lawyer relationships or open the floodgates for liability to estate planning lawyers. An intended third-party beneficiary will have causes of action in tort and contract based on a claim that she received less than the testator or settlor intended and will have the burden of proof to establish that she was, in fact, an intended beneficiary, what the testator or settlor intended, and that the lawyer was negligent in satisfying the testator or settlor's intent in order to recover. These are heavy burdens given that generally the lawyer is the only living witness to the meetings and communications that led to the creation of the testamentary instrument. The modified multi-factor balancing test proposed charts a safe course to justice for all affected parties, including innocent intended third-party beneficiaries like Erika.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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