

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2012-213726
Lower Case No. 2012-CP-22-01056

RECEIVED

APR 08 2013

SC Court of Appeals

Erika Fabian. Appellant,

vs.

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

REPLY BRIEF OF APPELLANT

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It is an equitable maxim that equity will not suffer a wrong without a remedy.

Lane v. New York Life Ins. Co., 147 S.C. 333, 369, 145 S.E. 196, 207 (1928) (internal quotes omitted); see also *State ex rel. Daniel v. Strong*, 185 S.C. 27, 43, 192 S.E. 671, 678 (1937) (“[E]quity abhors a wrong without a remedy.”).

I. Multiple public policy based grounds support the elimination of strict privity requirement for third party standing in a legal malpractice case.

The strength, vitality, and benefits of the public policy grounds supporting elimination of the strict privity rule as described in Appellant’s Brief were not challenged in Respondents’ Brief. Those public policy grounds that support eliminating or relaxing strict privity in cases against lawyers brought by non-clients alleging professional negligence are worthy of repeating:

- The original client’s intent to benefit the third party would be defeated by the lawyer’s errors unless the strict privity requirement is removed.
- The loss would fall on the innocent third party.
- Usually no one will have standing to seek redress because the client is deceased. (Equity abhors a wrong without a remedy.)
- Professional negligence in these circumstances would, in all likelihood, not be discovered until after the death of the client, at which time it would become irremediable.¹
- Lawyers can prevent those losses by exercising adequate diligence or

¹ In the circumstances of an irrevocable trust, as is the circumstance in this appeal, the harm from negligence is immediate and generally not able to be corrected.

implementing precautionary procedures intended to discover drafting errors before any resulting harm.

- Lawyers are in a better position to bear the loss of their own mistakes as compared to the intended beneficiary.
- South Carolina's public policy requires that lawyers exercise their position of trust and superior knowledge responsibly, so as not to adversely affect persons whose rights and interest are certain and foreseeable.
- Relaxing or eliminating the strict privity rule in legal malpractice cases should encourage lawyers to be more careful resulting in a higher degree of professional care and greater diligence to prevent future harm.
- Relaxing or eliminating the strict privity rule will place lawyers under the same standard as other professionals and contracting parties.

Rather than challenging the policy grounds supporting the elimination of privity, Respondents simply reiterated only three antiquated concerns cited by the shrinking minority of states clinging to strict privity. (Respondents' Brief, pp. 13-16).² Namely, the belief that strict privity 1) protects a lawyer's duty of loyalty and effective advocacy for the client, 2) protects against the potential for unlimited liability, and 3) protects client-lawyer confidentiality. All three of those concerns are either resolved or greatly minimized by the

² Lindsay's string cites on pp. 12-13 of their Brief lists several cases from jurisdictions that have subsequently issued opinions retreating or indicating a willingness to retreat from the strict privity rule. *Compare Shoemaker v. Gindlesberger*, 118 Ohio St. 3d 226, 887 N.E.2d 1167 (Ohio 2008) with *Berkmyer v. Serra*, 2011 WL 5561636 (Ohio Ct. App. Nov. 11, 2011) (commenting on dissent *Shoemaker* but declining to issue opinion, as a Court of Appeals, changing the law under the theory of *stare decisis*).

proposed modified balancing test in tort, the intended third party beneficiary test in contract, or the Restatement approach discussed on pages 25-26 in Appellant's Brief, together with the battery of remedies available for filing unfounded or frivolous claims. It is time, and this case presents the opportunity, to ensure that the beneficiaries of the lawyer's client are given the opportunity to ensure that his testamentary wishes were carried out as he intended. In fact, even New York, a state long recognized as holding steadfast to the strict privity requirement, has retreated from that obsolete position. In *Estate of Schnieder v. Finmann*, 907 N.Y.S.2d 119, 121, 933 N.E.2d 718, 721 (N.Y. 2010), the very first case Lindsay used in their string cites, the New York Court of Appeals held that "privity, or a relationship sufficiently approaching privity, exists between the personal representative of an estate and the estate planning attorney." *Id.*

Lawyers in our State – consistent with our goals to provide quality legal services to all of our clients – are able easily to accommodate the elimination of a strict privity requirement for several reasons, all of which are consistent with the policy based statements in our Lawyer's Oath ("To my clients, I pledge faithfulness, competence, . . .") and in the Preamble to the Rules of Professional Conduct.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. --- Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Preamble, RPC, Rule 407, SCACR. In addition, our laws already allow third party standing for claims against professionals, including lawyers, under certain circumstances. See *e.g.*, *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49,

463 S.E.2d 85, 88 (1995). And, our laws already provide third party standing for claims against lawyers by those in privity with the lawyer's client. See e.g., *Gaar v. North Myrtle Beach Realty, Inc.*, 287 S.C. 525, 339 S.E.2d 887, 889 (Ct. App. 1986). But absent having to establish a "special relationship" or "breach of an independent duty," this case presents the Court with an opportunity to provide redress for the limited circumstances where a lawyer's client is not available to seek redress for the lawyer's mistake and where the intended beneficiary would be without a remedy, otherwise, lawyers will continue to have protections from liability unavailable to other professionals. The proposition to eliminate the strict privity requirement for legal malpractice cases presented in this appeal is in harmony with our public policy goals to resist "parochial or self-interested concerns" benefitting only lawyers.

The true grounds of decision are consideration of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof.

Simmons v. Tuomey Reg'l Med. Ctr., 330 S.C. 115, 124, 498 S.E.2d 408, 412-13 (Ct. App. 1998) aff'd as modified, 341 S.C. 32, 533 S.E.2d 312 (2000), citing (Shriver, THE JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES, page 65) (holding that "it is public policy, and not traditional rules of the law of agency or the law of torts, which should underlie the decision to hold hospitals liable for malpractice which occurs in their emergency rooms"). See also *Jeffery Minnich v. Med-Waste, Inc., and Incendere, Inc.*, 349 S.C. 567, 575, 564 S.E.2d 98, 102 (2002) (rejecting "firefighter's rule" from other states) ("The more sound public policy—and the one we adopt—is to decline to promulgate a rule singling out police officers

and firefighters for discriminatory treatment.”).

The law relied upon by the trial court should be reversed to remove the strict privity requirement for legal malpractice cases brought by intended beneficiaries of a lawyer’s client when the client is no longer available to enforce and prosecute those claims.

A. No interference with duties of loyalty because lawyer’s duties to client are the same to third party once client’s intent is final.

In these circumstances, there are no concerns about interfering with a lawyer’s duty of loyalty to the client because the client’s “intent” is not final until what could be described as the “execution of documents” phase of the client’s relationship with the lawyer. At that point, the lawyer’s duties to non-parties/intended beneficiaries is effectively a duplicate of the lawyer’s duties to carry out the client’s intent. It is important, therefore, to consider the timing at which the lawyer’s duties to the third party would attach or accrue. In the early phases of a lawyer’s consultation with the client about estate planning matters, for example, it would be fairly common for the client’s decisions about what assets are going to whom and in what manner are undetermined and subject to the advice and recommendations received from the lawyer. But by the time the lawyer had a clear and sufficient understanding of the client’s intent such that the lawyer has prepared a will, trust, or other testamentary instrument reflecting the client’s intent to benefit the third-party, the lawyer effectively has assumed a duty to ensure that the client’s intent is carried out. In other words, the lawyer’s duties to the intended third party beneficiary attach or accrue at the point in time when the lawyer has prepared documents for the client to sign to give effect to the client’s intent. Because all three of the proposed approaches require the person claiming to be an intended beneficiary to establish he or she was, indeed, the

client's intended beneficiary at the time the instruments were executed, there is no conflict or other interference with the lawyer's loyalty to the client.

To establish a claim against the drafting lawyer, the non-client would have to establish that the intent of the client to benefit the non-client was a direct purpose of the transaction or relationship with the lawyer. In fact, the lawyer's loyalties to the client are consonant with the client's intent that the lawyer's services benefit the non-client. See e.g., *Friske v. Hogan*, 2005 S.D. 70, 698 N.W.2d 526, 530-31 (2005) (“[T]he duty that [the lawyer] owed to [the client] and his children [as intended beneficiaries] is, at least in part, the same.”). The concern that eliminating the strict privity requirement might somehow interfere with a lawyer's loyalty to the client all boils down to matters of evidence to establish what was the client's intent.

Eliminating or relaxing the strict privity requirement for a malpractice claim changes nothing concerning the lawyer's loyalty to the client and professional duties to provide legal services to carry out that intent.

B. No “unlimited liability” because necessary elements of proof to establish standing, requirement for an expert affidavit, and abundant remedies for frivolous proceedings.

Any concerns about the potential for unlimited liability are resolved by a combination of the elements of proof required under the three proposed tests and the existing remedies for frivolous or unfounded proceedings, such as Rule 11, SCRCP, or the South Carolina Frivolous Civil Proceedings Sanctions Act, or the mandate that an expert affidavit is now required for the filing of a malpractice case. In 2005, to protect against frivolous professional malpractice claims the South Carolina Code was amended to impose a

requirement that parties bringing malpractice claims, including claims against lawyers, file with the complaint an affidavit of an expert in the field identifying at least one negligent act. The standards of proof required under all three of the proposed tests in combination with Rule 11, SCRPC, the South Carolina Frivolous Civil Proceedings Sanctions Act, and the expert affidavit filing requirement provide generous protection against any frivolous or unfounded claims by an alleged intended third party beneficiary.

The necessary elements of proof to establish standing, the requirement for an expert affidavit, and the abundant remedies for frivolous proceedings sufficiently guard against any risk of unlimited liability.

C. No interference with client-lawyer confidences because intended beneficiaries are within scope of client's confidentiality with the lawyer and such beneficiaries are in privity with the client.

Allowing non-client intended beneficiaries to maintain a cause of action against the client's lawyer for breaching the duty of care to draft testamentary documents in accordance with client's intent will not create a conflict of interest between the lawyer and client or adversely affect client-lawyer privilege or confidentiality. Any effect upon privilege or confidentiality would be minimal as the client's intended beneficiaries are effectively within the scope of the client's confidentiality with the lawyer. To the extent there is any minimal effect, such would be outweighed by the fact that beneficiaries would otherwise be left without a remedy. See *Blair v. Ing*, 95 Haw. 247, 261-62, 21 P.3d 452, 466-67 (2001). Furthermore, courts have held that heirs contesting the client's grant of a deed could waive the client-lawyer privilege as to communications between decedent and his lawyer. See *Walton v. Van Camp*, 283 S.W.2d 493 (Mo. 1955).

This issue goes ultimately into whether South Carolina will, joining with the growing majority of other jurisdictions, permit the use of extrinsic evidence in a legal malpractice action brought by a non-client. See, e.g., *Hale v. Groce*, 304 Or. 281, 744 P.2d 1289 (1987) (holding that the complaint sufficiently alleged a negligence claim where the will and related trust instrument did not include reference to plaintiff's gift permitting use of extrinsic evidence to establish claim); *Teasdale v. Allen*, 520 A.2d 295, 296 (D.C. 1987); *Simpson v. Calivas*, 139 N.H. 1, 650 A.2d 318, 322 (1994); *Ogle v. Fuiten*, 102 Ill.2d 356, 80 Ill.Dec. 772, 466 N.E.2d 224, 227 (1984) (only remedy for intended beneficiaries who are negligently omitted from a testamentary document due to drafting lawyer's error is through malpractice claim).

Removing the strict privity requirement in cases against lawyers brought by non-clients alleging professional negligence would effectively place the non-client / intended beneficiary in the shoes of the client. In those circumstances, the lawyer would be able to reveal information related to the representation of the client to establish a defense per Rule 1.6(b)(6), RPC, Rule 407, SCACR.

D. Intended third party beneficiaries of a lawyer's client have a "special relationship" with the lawyer.

South Carolina has long recognized that in professional negligence cases, except for legal malpractice cases brought by clients, a plaintiff must establish that there is a duty that arises outside of a contract. See *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85, 88 (1995) ("A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action."). Often, this duty arises out of a special relationship between the tortfeasor-

professional and the injured party. See *id.* (“When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.”) (citing *South Carolina State Ports Auth. v. BoozAllen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986)). See also *Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888 (1981) (lawyer for corporation liable for economic loss to non-client corporate shareholder when lawyer breached duty to corporation); *Georganne Apparel v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1991) (accountant malpractice dismissed for failure to prosecute).

The established facts in this case show a “special relationship” between Fabian and Lindsay because as alleged in ¶¶ 8 and 10 in the Amended Complaint, 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” and “informed Erika . . . that she was *no longer* a beneficiary of her uncle’s Trust by the operation of this language in the Trust.” (Amended Complaint, p. 3; ROA 23) (emphasis added). First, without a “special relationship,” why would Lindsay bother to send a letter to a non-client? Next, Lindsay’s statement acknowledges that she was an intended beneficiary.

The facts in this case demonstrate that Lindsay recognized the “special relationship” between him and Erika. As a result of that “special relationship.” Lindsay owed Erika a duty of care to carry out Dr. Fabian’s testamentary intent for her benefit.

II. Erika was in privity with Dr. Fabian.

For more than twenty years, the South Carolina appellate courts have recognized that a person in privity *with the lawyer's client* has standing to bring claims against the lawyer. In *Gaar v. North Myrtle Beach Realty, Inc.*, 287 S.C. 525, 339 S.E.2d 887, 889 (Ct. App. 1986), the South Carolina Court of Appeals held that a lawyer in their professional capacity can be liable “to his client *and those in privity with his client*, for injury allegedly arising out of the performance of his professional activities.” *Id.* (citing *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op.3d 397 (1976)) (emphasis added). See also *Brinkman v. Doughty*, 140 Ohio App. 3d 494, 748 N.E.2d 116 (2d Dist. Clark County 2000) (lawyer can be liable to third persons arising from legal services provided to client when third person is in privity with client or lawyer acts maliciously).

Based on the undisputed facts before the trial court in this matter and for the purposes of the irrevocable trust at issue, Erika was in privity with Dr. Fabian because, with regard to the intended gift to Erika, there was a substantial “identity of parties.” See *Whaley v. Slater*, 202 S.C. 182, 24 S.E.2d 266 (1943) (plaintiffs’ claim as heirs of decedent sufficient to establish privity for “identity of parties” requirement for standing to maintain action).

Mutual or successive relationship to the same rights of property. In its broadest sense, “privity” is defined as mutual or successive relationships to the same right of property, or such an indication of interest of one person with another as to represent the same legal right. Derivative interest founded on, or growing out of, contract, connection, or bond of union between parties; mutuality of interest. Thus, the executor is in privity with the testator, the heir with the ancestor, the assignee with assignor, the donee with the donor, and the lessee with the lessor.

BLACK'S LAW DICTIONARY 1079 (5th ed. 1979).

In that regard, South Carolina courts have recognized that heirs are generally in privity with their ancestors. See *Thompson v. Hudgens*, 161 S.C. 450, 463, 159 S.E. 807, 812 (1931) (explaining that heirs are generally in privity with their ancestor). “The concept of privity rests not on the relationship between the parties asserting it, but rather on each party's relationship to the subject matter of the litigation.” *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) citing, e.g. *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986) (“The term ‘privity’ when applied to a judgment or decree means one so identified in interest with another that he represents the same legal rights.”). See also *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994).

Under *Gaar* and because Erika, as his niece, was in privity with Lindsay's client Dr. Fabian, the trial court's ruling that Erika did not have standing to maintain a claim against Lindsay was in error and should be reversed.

III. Because it was foreseeable that Dr. Fabian's intended beneficiaries would be harmed if Lindsay created defective trust instruments, Lindsay assumed a duty to the intended beneficiaries, including Erika, to prepare those documents correctly.

Notwithstanding the lack of actual “contractual privity” between Lindsay and Erika, the allegations in the Amended Complaint establish that Lindsay assumed a duty of care to the beneficiaries of Dr. Fabian—via his direct duties to Dr. Fabian—to ensure Dr. Fabian's testamentary intent was accomplished. See *Johnson v. Jackson*, 401 S.C. 152, 735 S.E.2d 664, 668 (Ct. App. 2012) (“We find a genuine issue of material fact exists as to whether Palmetto Health assumed a duty of due care to ensure Johnson's safety on the

day of the accident, despite Johnson's lack of contractual privity with Palmetto Health.”).

Lindsay's assumption of duties to the beneficiaries is consistent with the way South Carolina courts have treated the liability of other professionals to third parties based on the foreseeability of harm to third parties arising from those professional services provided to their patient or client. See e.g., *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006). The Supreme Court's referenced its holding in *Hardee* in the *Rydde v. Morris* opinion when it declined to impose liability on a lawyer for failure to timely prepare a will for a client. The Supreme Court noted that the professional's "duty owed to third parties is identical to the duty owed to the patient" and was thus "inextricably connected to a breach of duty to the patient." *Rydde v. Morris*, 381 S.C. 643, 650, 675 S.E.2d 431, 435 (2009). The *Rydde* opinion recognized the conflicts between the lawyer and client that would arise if – before the client's intent was finally determined and before the documents the lawyer prepared for the purpose of executing the client's intent were created – some duty arose between the lawyer and a potential host of possible third party beneficiaries. Because at that preliminary point, the client's true intended third party beneficiaries are unknown until the client actually signs the document. Such circumstances are absent in the present matter. Parallel to the doctor's duties of care to third parties foreseeably flowing from direct duties to the doctor's patient should be a lawyer's duties of care foreseeably flowing from the lawyer's direct duties to the client.

Lindsay assumed a duty to the intended beneficiaries, including Erika, to prepare those documents correctly because it was foreseeable that Dr. Fabian's intended beneficiaries would be harmed if Lindsay created defective trust instruments.

IV. The allegations in the Amended Complaint state a claim for breach of contract by a third party beneficiary.

The law does not require Dr. Fabian's contract with Lindsay to specifically include Erika's name as an express intended beneficiary in order for Erika to maintain a claim as an intended third party beneficiary for breach of that contract. And Lindsay cites no authority to support such a bald contention. As Lindsay notes in their Brief, the contract between Dr. Fabian and Lindsay was referenced in the Amended Complaint and that reference together with the other allegations all taken as true and construed in the light most favorable to Erika is more than sufficient to survive a motion to dismiss pursuant to Rule 12(b)(6), SCRPC.

A motion to dismiss based on Rule 12(b)(6) should be granted only when it appears the plaintiff can prove no set of facts in support of a cause of action that would entitle plaintiffs to relief based on that cause of action. See *Murrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 373 S. E.2d 701 (Ct. App. 1988). "The motion [Rule 12(b)(6) motion] cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." *Brown v. Leverette*, 291 S.C. 364, 353 S.E. 2d 697 (1987). Erika's Amended Complaint states a claim for breach of that contract by an third party beneficiary; therefore, the trial court's Order granting Respondents' motion to dismiss should be reversed.

Conclusion

Appellant, Erika Fabian, respectfully requests this Court reverse the trial court's ruling dismissing her Amended Complaint with prejudice allowing her to maintain legal malpractice claims against Respondents. These claims arise from the defects in an

irrevocable Trust Agreement the Respondents prepared for her uncle, Dr. Denis Fabian, for the benefit of Appellant and others, which immediately vested rights in its beneficiaries upon execution and was immune from subsequent efforts to correct any errors. Dr. Fabian was deceased when the error was discovered and therefore was unavailable to pursue these claims. Dr. Fabian's estate, on the other hand, did not suffer the financial harms suffered by Erika, and therefore could not pursue Erika's claims and, even if the Personal Representative had tried, the estate would be in virtually the same position. The pleading requirements for professional negligence claims coupled with the variety of remedies for frivolous or unfounded lawsuits will adequately protect lawyers from any frivolous or unfounded claims. And without relief in this appeal, Erika (and similarly situated intended third party beneficiaries) will suffer a wrong without a remedy.

Respectfully submitted,

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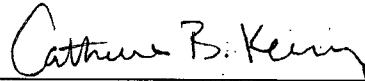
Certificate of Counsel

The undersigned, as counsel for Appellant, hereby certifies that, to the best of my knowledge and belief, the Brief of Appellant and the Reply Brief of Appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.

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I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the BRIEF OF APPELLANT; (1) copy of the REPLY BRIEF OF APPELLANT and (1) copy of the CERTIFICATE OF COUNSEL 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 4th day of April, 2013 addressed to Curtis W. Dowling, J.D., BARNES, ALFORD, STORK & JOHNSON, LLP, P.O. Box 8448, Columbia, SC 29202.

Respectfully submitted,

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April 4, 2013

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