

June 2015

# Another Missed Opportunity in Shoemaker v. Gindlesberger: Strict Privity Lives On in Ohio Legal Malpractice Cases

C. Chase Senk

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## Recommended Citation

Senk, C. Chase (2010) "Another Missed Opportunity in Shoemaker v. Gindlesberger: Strict Privity Lives On in Ohio Legal Malpractice Cases," *Akron Law Review*: Vol. 43 : Iss. 1 , Article 8.

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**ANOTHER MISSED OPPORTUNITY IN *SHOEMAKER V. GINDLESBERGER*: STRICT PRIVACY LIVES ON IN OHIO LEGAL MALPRACTICE CASES**

*C. Chase Senk*

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## I. INTRODUCTION

“We decline to change the rule of law in this state that bars an action for negligence against a lawyer by a plaintiff who is not in privity with the client.”<sup>1</sup>

With those words in *Shoemaker v. Gindlesberger*,<sup>2</sup> the Ohio Supreme Court upheld its antiquated strict-privity rule for legal-malpractice actions and remained in the minority of jurisdictions that still adhere to the rule that an attorney owes a duty of care only to her own client.<sup>3</sup> However, “[t]he assault upon the citadel of privity is proceeding in these days apace.”<sup>4</sup> Today, the majority of states have abandoned the strict-privity rule in favor of permitting a third party to state a claim against a negligent attorney in the estate planning context.<sup>5</sup> Some have adopted a “balance of factors” test while the majority of jurisdictions have focused on the intent of the testator for an intended beneficiary to take under the will.<sup>6</sup> However, in the minority of jurisdictions, including Ohio, third parties not in privity with the attorney or the client<sup>7</sup> may not state a claim against a negligent attorney. In these states, attorneys remain the exception—among other professionals including doctors, accountants, appraisers, engineers, and architects—to liability from third parties for negligence, notwithstanding privity of contract.<sup>8</sup>

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1. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1172 (Ohio 2008).

2. 887 N.E.2d 1167 (Ohio 2008).

3. Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U. L. REV. 277, 350 (2003).

4. *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 445 (N.Y. 1931). Although the New York Court of Appeals made this statement back in 1931, it is still relevant today.

5. Begleiter, *supra* note 3.

6. *See id.*

7. Throughout American jurisprudence and in the minority of jurisdictions that have maintained strict privity, the question of whether a contractual relationship existed has always focused on whether privity existed between the negligent professional and a third party. However, in *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987) [hereinafter *Zipperstein*], the Ohio Supreme Court maintained its strict-privity rule focusing on whether privity existed between the client and a third party.

8. Jody M. Offutt, Student Works, *Expanding Attorney Liability to Third Party Adversaries for Negligence*, 107 W. VA. L. REV. 553, 553 (2005).

In *Shoemaker*, the Ohio Supreme Court reaffirmed its 1987 decision, *Simon v. Zipperstein*,<sup>9</sup> which held that “an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice.”<sup>10</sup> However, in *Simon*, the Ohio Supreme Court reaffirmed a strict-privity rule that was substantially different from the strict-privity rule that courts have traditionally employed in Anglo-American law.<sup>11</sup> The rule in *Simon* focused on privity between the attorney’s client and the third party rather than privity between the attorney and the third party.<sup>12</sup>

In *Shoemaker*, the Ohio Supreme Court missed an opportunity to correct its misstatement of the strict-privity rule and conform to the majority of states that have relaxed strict privity in the estate planning context. The Court failed to relax its antiquated rule and refused to hold attorneys accountable for their negligence. *Shoemaker* was an ideal case in which to overrule *Simon* and the concern of the concurring judges that *Shoemaker* did not contain the apposite facts to overrule *Simon* was misguided.<sup>13</sup>

This Note surveys the development of the strict-privity rule in Ohio and other jurisdictions and will argue that the Ohio Supreme Court missed yet another opportunity to modify its outmoded strict-privity rule. This Note only suggests that the Ohio Supreme Court should again reevaluate its strict-privity rule to at least provide relief to intended beneficiaries of negligently prepared wills. Part II provides a brief overview of the development of the strict-privity rule in legal malpractice cases in Anglo-American law, particularly Ohio, as well as a few of the arguments for and against the strict-privity rule.<sup>14</sup> Part III provides the statement of facts, the procedural history, and the Ohio Supreme Court’s decision in *Shoemaker*.<sup>15</sup> Finally, Part IV examines the decision in *Shoemaker* and argues that the Ohio Supreme Court missed a valuable opportunity to overrule the misstated holding of *Simon* and

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9. 512 N.E.2d 636 (Ohio 1987).

10. *Id.* at 638 (citing *Scholler v. Scholler*, 462 N.E.2d 158 (Ohio 1984); *Petrey v. Simon*, 447 N.E.2d 1285 (Ohio Ct. App. 1983); *Pournaras v. Hopkins*, 463 N.E.2d 67 (Ohio Ct. App. 1983); *Strauch v. Gross*, 462 N.E.2d 433 (Ohio Ct. App. 1983); *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, No. 76AP-366, 1976 WL 190343 (Ohio Ct. App. Nov. 4, 1976)).

11. Joseph F. Edwards, Note, *The Negligent Drafting of Wills and Simon v. Zipperstein: A Step Backward in Ohio Jurisprudence?*, 20 U. TOL. L. REV. 133, 134 (1988).

12. *Id.*

13. See *infra* Part III.E. and Part IV.C.

14. See *infra* Part II.

15. See *infra* Part III.

bring attorneys and other professionals under the same standard of liability.<sup>16</sup> It further discusses why a relaxing of strict privity is the accepted standard among the majority of jurisdictions.<sup>17</sup> It concludes with why *Shoemaker* was the ideal case in which to overrule *Simon* and discusses a federal estate tax issue in the *Shoemaker* opinion.<sup>18</sup>

## II. BACKGROUND

### A. Development of the Strict-Privity Rule in Legal-Malpractice Cases

One of the major developments in the law over the last half century has been the increase in the number of malpractice claims against attorneys in the estate planning context.<sup>19</sup> However, according to the American Bar Association, only 9 percent of malpractice claims from 1996 to 1999 occurred in estate planning.<sup>20</sup> Although this figure seems to imply that the volume of negligent estate planning cases is insignificant, that is not the case. Throughout American jurisprudence, legal malpractice cases have involved some of the most foundational aspects of the law, particularly privity of contract.<sup>21</sup>

Generally, in a suit for legal malpractice, a plaintiff must prove four elements: (1) the attorney owed a duty of care to the plaintiff, (2) the attorney violated that duty of care, (3) the attorney was the proximate cause of injury to the plaintiff, and (4) the attorney's negligence resulted in damages to the plaintiff.<sup>22</sup> Whether an attorney owes a duty of care to the plaintiff depends on whether there is privity of contract between the attorney and the plaintiff.<sup>23</sup>

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16. See *infra* Part IV.

17. *Id.*

18. *Id.*

19. See generally Begleiter, *supra* note 3..

20. Tracy M. Mason, *Privity, Duty, and Loss: In Swanson v. Ptak*, 268 Neb. 265, 682 N.W.2d 225 (2004), *The Nebraska Supreme Court Again Endorses Privity in Legal-malpractice actions*, 84 NEB. L. REV. 369, 370-71 (2005) (citing AM. BAR ASS'N, STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS, 1996-1999, at 7 (2001)). This figure seems even smaller when compared to malpractice claims arising from personal injury cases (24 percent of legal malpractice claims) and claims arising from real estate transactions (17 percent of legal malpractice claims). *Id.*

21. *Id.*

22. Bradley E.S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261, 267 (2001) (citing *Charleson v. Hardesty*, 839 P.2d 1303, 1307 (Nev. 1992)); 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.1, at 555 (4th ed. 1996)).

23. Lief Kjehl Rasmussen, Note and Comment, *Abolishing the Privity Doctrine in Texas—Just Do It!*, 2 TEX. WESLEYAN L. REV. 559, 565 (1996). Traditionally, whether a plaintiff had standing to sue in negligence depended on whether that plaintiff was in privity of contract with the defendant. *Id.* In general, privity of contract is the “connection or relationship between two parties,

The earliest American statement that regarded privity as a requirement for any legal-malpractice action was the United States Supreme Court's opinion in *Savings Bank v. Ward*<sup>24</sup> in 1879.<sup>25</sup> In *Ward*, a client retained an attorney to examine and report on the title to a particular parcel of land.<sup>26</sup> The attorney concluded that the property was free from encumbrances, and the client presented the title as security to a third party for a loan of money.<sup>27</sup> The client ultimately defaulted on the loan, and the third party discovered that the property was in fact encumbered.<sup>28</sup> The third party sued the client's attorney for negligence despite a lack of privity between the third party and the attorney.<sup>29</sup> The Court held that in the absence of privity of contract, fraud, collusion, or falsehood, the attorney did not owe the third party a duty of care.<sup>30</sup> The Supreme Court stated "that the obligation of the attorney is to his client and not to a third party . . . unless there is something in the circumstances . . . to take it out of that general rule."<sup>31</sup> As a result, American common law entered the twentieth century with a general rule

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each having a legally recognized interest in the same subject matter," allowing the two parties "to sue each other but preventing a third party from doing so." BLACK'S LAW DICTIONARY 565-66 (3d pocket ed. 2006).

24. 100 U.S. 195, 200 (1879).

25. Michael P. Morley, Note, *Privity as a Bar to Recovery in Negligent Will-Preparation Cases: A Rule Without a Reason*, 57 U. CIN. L. REV. 1123, 1124 (1989). Prior to the American courts adopting the privity requirement in *Ward*, the English courts had firmly adopted the privity rule, although not in the context of a legal malpractice claim, by 1842 in the case of *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Exch. 1842). Rasmussen, *supra* note 23, at 566. In *Winterbottom*, a mail carrier, while driving a mail coach for his employer, suffered personal injuries when the mail coach broke down due to a latent defect in manufacturing. *Winterbottom*, 152 Eng. Rep. at 403. Although the mail carrier had no direct business relationship with the manufacturer of the mail coach, the mail carrier sought damages from the mail coach manufacturer for his injuries. *Id.* The court held that the mail carrier could not maintain an action against the manufacturer because there was no privity of contract between the two parties. *Id.* at 405. The court reasoned that permitting the mail carrier to sue in this case would open the door to "absurd and outrageous" consequences of which there would be no limit. *Id.*

26. *Ward*, 100 U.S. at 196.

27. *Id.*

28. *Id.*

29. *Id.* The third party argued that he detrimentally relied on the attorney's verification of the title in the property. *Id.* The third party argued that a mere lack of privity should not serve as a bar to recovery for damages. *Savings Bank v. Ward*, 100 U.S. 195, 199 (1879).

30. *Id.* at 205-06. The Supreme Court reasoned that there is seldom any difficulty in determining whether a client has a cause of action when the relation of attorney and client exists. *Id.* at 199. However, this case presented a different issue. *Id.* The Supreme Court reasoned that this case is one where a third party contends that an attorney is liable for negligence although the third party did not employ the attorney and the attorney had no knowledge that the client was going to use the title to secure a loan. *Id.*

31. *Savings Bank v. Ward*, 100 U.S. 195, 200 (1879).

of privity for legal malpractice claims.<sup>32</sup> In addition, the strict-privity rule also applied in other tort contexts, such as actions sounding in negligence and third-party beneficiary suits.<sup>33</sup>

The general rule of strict privity for claims sounding in negligence remained black-letter law until the landmark decision of *MacPherson v. Buick Motor Co.*<sup>34</sup> in 1916.<sup>35</sup> In *MacPherson*, a car owner filed suit against an automobile manufacturer after suffering personal injuries resulting from a defective wheel.<sup>36</sup> The Court of Appeals of New York held that the owner, despite being a third party, had standing to bring suit against the manufacturer, and the court ultimately held the automobile manufacturer liable to the car owner.<sup>37</sup> Subsequent cases stayed true to the holding in *MacPherson*, and it became well accepted that a lack of privity of contract was not a bar to personal injury suits sounding in negligence.<sup>38</sup>

#### B. *The Eroding of the Privity Requirement in Negligent Estate Planning*

The first court to apply the privity rule in the context of estate planning was the California Supreme Court in *Buckley v. Gray*<sup>39</sup> in 1895.<sup>40</sup> The California Supreme Court held that the privity rule barred intended beneficiaries of a will from suing the attorney who negligently drafted the will.<sup>41</sup> Since *Buckley*, forty-one states have relaxed the strict-

32. Mary Elizabeth Phelan, *Unleashing the Limits on Lawyers' Liability? Mieras v. Debona: Michigan Joins the Mainstream and Abrogates the Privity Requirement in Attorney-Malpractice Cases Involving Negligent Will Drafting*, 72 U. DET. MERCY L. REV. 327, 332 (1995).

33. *Id.*

34. 111 N.E. 1050 (N.Y. 1916).

35. Susan Lorde Martin, *If Privity is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentation*, 28 AM. BUS. L.J. 649, 652 (1991).

36. *MacPherson*, 111 N.E. at 1051. *MacPherson* was not in privity of contract with the defendant Buick Motor Company. *Id.* Buick Motor Company had sold the automobile in question to a retailer, who ultimately sold the automobile to *MacPherson*. *Id.*

37. *Id.* at 1053. The court reasoned that a manufacturer's duty may be extended to third parties if the "nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made." *Id.* The court concluded that an automobile is a thing of danger and privity may be extended to third parties. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916). Furthermore, the court reasoned that "[t]here is nothing anomalous in a rule which imposes upon *A*, who has contracted with *B*, a duty to *C* and *D* and others according as he knows or does not know that the subject-matter of the contract is intended for their use." *Id.* at 1054.

38. Phelan, *supra* note 32, at 333. See Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1532 (1985).

39. 42 P. 900 (Cal. 1895).

40. Jason D. Pinkall, Comment, *From Barcelo to McCamish: A Call to Relax the Privity Barrier in the Estate-Planning Context in Texas*, 37 HOUS. L. REV. 1275, 1280 (2000).

41. *Buckley*, 42 P. at 901-02.

privity requirement for suits sounding in negligent estate planning.<sup>42</sup> The general rule in most of these jurisdictions is that a third party may sue an attorney in tort for negligence if the client intended for the attorney's services to benefit the third party and the attorney knew or should have known that the third party would rely on the attorney's services.<sup>43</sup> Several theories have emerged in many of these jurisdictions to examine legal malpractice cases, including the balance of factors test, the intended beneficiary theory, and the approach of the Restatement (Third) of the Law Governing Lawyers.<sup>44</sup>

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42. See Offutt, *supra* note 8, at 556. In particular, most jurisdictions now permit a third party to sue an attorney for negligence in estate planning. See, e.g., *Simpson v. Calivas*, 650 A.2d 318, 322 (N.H. 1994) (identified third-party beneficiary of testator may sue attorney for negligence), *but see* *Sisson v. Jankowski*, 809 A.2d 1265, 1270 (N.H. 2002) (requiring privity in the execution of the decedent's will); *Blair v. Ing*, 21 P.3d 452, 463 (Haw. 2001) (intended beneficiaries of trust may sue attorney for negligence); *Powers v. Hayes*, 776 A.2d 374, 375 (Vt. 2001) (decedent's daughter, an intended beneficiary, may sue attorney for negligence); *McLane v. Russell*, 546 N.E.2d 499, 501-02 (Ill. 1989) (non-client intended beneficiary may sue attorney for negligence); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) (identified beneficiaries in testamentary instruments may sue attorney for negligence); *Hale v. Groce*, 744 P.2d 1289, 1292 (Or. 1987) (third party who testator had directed the attorney to include in will may sue attorney for negligence), *but see* *Caba v. Jones*, 145 P.3d 175, 177-78 (Or. 2006) (holding that plaintiffs failed to show that attorney owed a duty to them with an implied promise to make will invulnerable to will contest); *Guy v. Liederbach*, 459 A.2d 744, 746 (Pa. 1983) (named legatee of a will may sue drafting attorney for negligence); *Auric v. Continental Casualty Co.*, 331 N.W.2d 325, 328 (Wis. 1983) (intended beneficiary may sue attorney for negligence), *but see* *Tensfeldt v. Haberman*, 768 N.W.2d 641 (Wis. 2009) (holding that because the decedent attorney's drafting did not violate the testator's intent, the omitted beneficiaries had no negligence claim against the attorney); *Woodfork v. Sanders*, 248 So. 2d 419, 425 (La. Ct. App. 1971) (intended beneficiary may sue attorney for negligence because privity is not a bar), *but see* *Evans v. Evans*, 410 So. 2d 729, 731 (La. 1982) (stating that *Woodfork v. Sanders* was overruled by subsequent legislation, La. R.S. § 9:2442, repealed, Acts 1997, No. 1421, § 8 (1999)); *Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42, 49 (Mo. Ct. App. 1997) (an attorney owes a duty to a third-party intended beneficiary); *Stowe v. Smith*, 441 A.2d 81, 83 (Conn. 1981) (intended beneficiary may sue attorney for negligence); *Francis v. Piper*, 597 N.W.2d 922, 924 (Minn. Ct. App. 1999) (third-party intended beneficiary may sue attorney for negligence, but was unable to in this case because the plaintiff was not able to show that she was a third-party beneficiary).

For examples of cases from the nine states that have upheld strict privity in legal-malpractice actions, see, e.g., *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987); *Robinson v. Benton*, 842 So. 2d 631, 637 (Ala. 2002); *Pettus v. McDonald*, 36 S.W.3d 745, 751 (Ark. 2001); *Nevin v. Union Trust Co.*, 726 A.2d 694, 701 (Me. 1999); *Noble v. Bruce*, 709 A.2d 1264, 1278 (Md. 1998); *Lilyhom v. Dier*, 335 N.W.2d 554, 555 (Neb. 1983); *Viscardi v. Lerner*, 510 N.Y.S.2d 183, 185 (N.Y. App. Div. 1986); *Barcelo v. Elliott*, 923 S.W.2d 575, 577 (Tex. 1996); *Copenhaver v. Rogers*, 384 S.E.2d 593, 595 (Va. 1989). See *Begleiter*, *supra* note 3, at 282 n.34.

43. See *generally* Offutt, *supra* note 8, at 556. In many cases, a devisee may not even know she was a devisee until the testator's death. *Id.* It is sufficient here to say that a devisee's reliance is satisfied if the devisee would have relied on the attorney's services had the devisee known she was a devisee under the testator's will. *Id.*

44. *Id.* at 557; *Pinkall*, *supra* note 40, at 1280-84.

### 1. The Balance of Factors Test

California became the first jurisdiction to abandon the privity requirement for attorney negligence when its Supreme Court adopted the balance of factors test in the 1958 case *Biakanja v. Irving*.<sup>45</sup> The *Biakanja* court held that the question of whether an attorney may be held liable in professional negligence to a third party was a matter of policy and involved the balancing of several factors, which were (1) “the extent to which the transaction was intended to affect the plaintiff,” (2) “the foreseeability of harm to [the plaintiff],” (3) “the degree of certainty that the plaintiff suffered injury,” (4) “the closeness of the connection between the defendant’s conduct and the injury suffered,” (5) “the moral blame attached to the defendant’s conduct,” and (6) “the policy of preventing future harm.”<sup>46</sup>

Only three years after its decision in *Biakanja*, the California Supreme Court again applied the balance of factors test in *Lucas v. Hamm*.<sup>47</sup> The California Supreme Court held that third-party beneficiaries may file a claim against attorneys who are negligent in drafting wills that contain invalid terminology relating to restraints on alienation and the rule against perpetuities, notwithstanding a lack of privity.<sup>48</sup> The California Supreme Court reasoned that the mere lack of privity should not preclude the plaintiffs from maintaining a legal-malpractice action against the attorney.<sup>49</sup>

45. 320 P.2d 16 (Cal. 1958); Offutt, *supra* note 8, at 557. In *Biakanja*, a notary public prepared a will for the plaintiff’s brother that left all of his property to the plaintiff. *Biakanja*, 320 P.2d at 17. The court denied probate of the will for lack of sufficient attestation or signature of witnesses. *Id.* As a result, the plaintiff received only one-eighth of her brother’s estate through intestate succession. *Id.* The plaintiff sued the notary public in negligence. *Id.* at 18. The court found that the notary public agreed and undertook to prepare a valid last will and testament for the plaintiff’s brother, which permitted the plaintiff to sue the notary public for professional negligence. *Id.*

46. *Biakanja*, 320 P.2d at 19.

47. 364 P.2d 685, 687 (Cal. 1961).

48. *Id.* at 686-90. In *Lucas*, an attorney prepared a will and codicils by which the plaintiffs were to be designated beneficiaries of a trust. *Id.* at 686. In violation of the testator’s instructions and in breach of his contract with the testator, the attorney negligently used invalid terminology according to the California Civil Code. *Id.* Following the testator’s death, the will was admitted to probate and as a result of the attorney’s negligence, the plaintiffs were forced to enter into a settlement agreement under which they received a lesser share than they would have received under the trust if validly executed. *Id.* at 687.

49. *Lucas v. Hamm*, 364 P.2d 685, 687 (Cal. 1961). The California Supreme Court compared *Lucas* to its holding in *Biakanja*:

As in *Biakanja*, one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became uncertain, upon the death of the testator without change of the

## 2. The Intended Beneficiary Theory

Numerous jurisdictions have followed California's lead and applied the balance of factors test in professional negligence cases.<sup>50</sup> However, California's balance of factors approach has also been widely criticized. For example, the Pennsylvania Supreme Court, in *Guy v. Liederbach*, noted that "the rule of *Lucas v. Hamm* . . . has proved unworkable, and has led to *ad hoc* determinations and inconsistent results as the California courts have attempted to refine the broad *Lucas* rule."<sup>51</sup> The Pennsylvania Supreme Court feared the interpretative problems that *Lucas* posed and was concerned that legal malpractice would expand to include a substantial class of injured plaintiffs.<sup>52</sup>

That fear led the Pennsylvania Supreme Court to adopt the intended beneficiary theory.<sup>53</sup> The intended beneficiary theory holds that "third parties suing for negligence [must] establish that they are intended beneficiaries of the attorney-client contract in order to extend the attorney's duty to the third party."<sup>54</sup> In *Guy*, the Pennsylvania Supreme Court permitted an intended beneficiary to sue an attorney in negligence so long as the intent of the testator for the beneficiary to take under the will appeared on the face of the instrument.<sup>55</sup>

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will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired.

*Id.*

50. See MALLEY & SMITH, *supra* note 22, § 7.13, at 528 n.6 (listing the jurisdictions that have applied and adopted the balance of factors test). See, e.g., *Fickett v. Superior Court of Pima County*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976); *Bohn v. Cody*, 832 P.2d 71, 76 (Wash. 1992) (en banc).

51. *Guy v. Liederbach*, 459 A.2d 744, 749 (Pa. 1983).

52. Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties – At What Cost?*, 23 COLUM. J.L. & SOC. PROBS. 1, 11-12 (1989) (citing *Guy v. Liederbach*, 459 A.2d 744, 750 (Pa. 1983)).

53. Offutt, *supra* note 8, at 559. In *Guy*, an intended beneficiary who lost her bequest under a will filed suit against the drafting attorney who failed to properly direct the witnessing of the will. *Guy*, 459 A.2d at 747.

54. Offutt, *supra* note 8, at 558. Claims based on the intended beneficiary theory often arise when the attorney's negligence injures a named beneficiary under the will. *Id.* The cause of action arises from the attorney's duty to the client and the client's clear intent to make a gift to a third-party named in the will. Pinkhall, *supra* note 40, at 1282.

55. *Guy*, 459 A.2d at 750-51. The Pennsylvania Supreme Court reasoned that limiting the scope of the rule to only those beneficiaries that appear on the face of the instrument served the policy against unlimited liability for negligent attorneys. *Id.* Furthermore, the Pennsylvania Supreme Court adopted the principles of the RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981), which recognized a remedy to an intended beneficiary if the right of the beneficiary is "appropriate to effectuate the intention of the parties," and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Pinkhall, *supra*

### 3. The Restatement (Third) of the Law Governing Lawyers

Finally, a third approach appears in the Restatement (Third) of the Law Governing Lawyers, which provides that a lawyer owes a duty of care to a third party when “(a) the lawyer knows that a client intends . . . 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.”<sup>56</sup> In general, such a theory would imply that an attorney is held to a duty of care to his client and to fulfill the promise to act for the benefit of that client.<sup>57</sup>

#### *C. Arguments For and Against Application of the Strict-Privacy Rule in Legal-Malpractice Actions*

It is important to understand the various arguments that support strict privacy in legal-malpractice actions and those that support a relaxing of strict privacy. The primary ethical considerations that underlie the various arguments for and against strict privacy are (1) the duty of loyalty owed to the client and (2) the concept of avoiding conflicts of interest.<sup>58</sup>

#### 1. Principal Arguments against Strict Privacy

First, opponents of the strict-privacy rule argue that the most significant policy in favor of abandoning the outmoded strict-privacy rule is that otherwise, “the injury or property loss would fall to the victim, his or her family members, or the taxpayers.”<sup>59</sup> In other words, the loss to

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note 40, at 1283 (quoting *Leiderbach*, 459 A.2d at 751). Closely related to this theory is the Florida-Iowa rule, which states that “privity of contract will bar a beneficiary’s malpractice action unless the beneficiary can show that the attorney’s negligence frustrated the testator’s intent as expressed on the face of the will.” Begleiter, *supra* note 3, at 384 (citing *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So. 2d 1378, 1380 (Fla. 1993); *DeMaris v. Asti*, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983); *Schreiner v. Scoville*, 410 N.W.2d 679, 683 (Iowa 1987)). Under the Florida-Iowa rule, a third party must show that its (1) “interest in the estate is either lost, diminished, or unrealized,” and that (2) “the testator’s intent as expressed in the testamentary instruments is frustrated in whole or in part” as (3) a “direct result of the lawyer’s professional negligence.” Mason, *supra* note 20, at 380 (quoting *Holsapple v. McGrath*, 575 N.W.2d 518, 521 (Iowa 1998)).

56. Pinkall, *supra* note 40, at 1283-84 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (1998) (defining attorney liability to third parties)).

57. See Cifu, *supra* note 52, at 14.

58. Begleiter, *supra* note 3, at 343.

59. Mason, *supra* note 20, at 394 (“The theoretical foundations of tort law stress shifting loss away from the innocent party, because an important function of tort actions ‘is to restore plaintiffs

the intended beneficiary would be a loss without a remedy. They argue that an attorney is clearly the least cost avoider because the attorney can prevent the loss by exercising adequate diligence or implementing precautionary procedures designed to discover negligence before any resulting harm.<sup>60</sup> Damage to an intended beneficiary in the estate planning context is clearly foreseeable because the intended beneficiary is the one whom the transaction was expected to benefit.<sup>61</sup> Protection of third parties is a valuable goal because the Model Rules of Professional Conduct indicate that attorneys should strive to “be competent, prompt and diligent” advocates for their clients.<sup>62</sup> In order to be “competent, prompt and diligent”<sup>63</sup> and carry out the wishes of the client, an attorney, especially in the estate planning context, must be mindful that her actions directly affect third parties.

Second, particularly in negligent estate-planning cases, those who support abandoning the strict-privy rule argue that strict privy has resulted in attorneys becoming effectively immune from liability for malpractice.<sup>64</sup> Negligent estate-planning cases involve situations in which the actual client will have no incentive to bring an action because a beneficiary generally does not discover the malpractice until after the client has died.<sup>65</sup> Its advocates argue that although some courts have

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to the position they were in prior to the injury by awarding monetary damages.”) (quoting THOMAS H. KEONIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 1 (2001)).

60. Fogel, *supra* note 22, at 310-11. The least-cost avoider is the “individual who, through the exercise of due care, could have prevented the damage at the lowest cost.” *Id.* at 310.

In contrast, it would be difficult for the client to uncover and rectify the attorney’s negligence. In order to do so, the client would likely need to retain a second attorney to review the work of the first. Obviously, this is wasteful and doubles the cost to the client of estate planning services. Further, the client would be forced to reconcile the differences between the attorneys’ advice—a difficult task for a layperson.

*Id.* at 311. In particular, the California Supreme Court concluded in 1961, in *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961), “that the elimination of strict privy ‘does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.’” Mason, *supra* note 20, at 394 (quoting *Lucas*, 364 P.2d at 688). “Failure to expand liability deprives deserving plaintiffs of a source of compensation for what may well be substantial injuries. Often, the attorney will be the only one in a position to make the plaintiff ‘whole.’ Erecting an impenetrable wall of privy denies those plaintiffs relief.” Lucia Ann Silecchia, *New York Attorney Malpractice Liability to Non-Clients: Toward a Rule of Reason & Predictability*, 15 PACE L. REV. 391, 445-46 (1995).

61. *Lucas*, 364 P.2d at 689.

62. Mason, *supra* note 20, at 394 (quoting MODEL RULES OF PROF’L CONDUCT pmb1. ¶¶ 2-4 (2003)).

63. *Id.*

64. See Fogel, *supra* note 22, at 308; Silecchia, *supra* note 60, at 446-47.

65. Silecchia, *supra* note 60, at 446-47.

There are also situations in which the actual client will have no incentive to bring an action in law or before a disciplinary board against the attorney for his conduct. This

held that the client's estate succeeds to the interest of the client against the negligent attorney, this does not provide an adequate remedy:

[O]f the three possible plaintiffs, [the client, the beneficiary, and the executor,] only the beneficiaries are, as a practical matter, able 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 are the beneficial owners of estate assets, only the beneficiaries suffer directly due to the attorney's negligence. If the beneficiaries are denied a cause of action, the negligent attorney is effectively immune from liability. Therefore, the beneficiaries, but not the negligent attorney, suffer the loss caused by the attorney's negligence.<sup>66</sup>

The only remedy adequate enough to compensate for the beneficiary's loss would be to recognize a cause of action by that intended beneficiary against the negligent attorney.<sup>67</sup>

Third, advocates of a liberal privity rule argue that increasing attorney liability will result in more careful legal representation, a higher degree of professional care, and greater diligence.<sup>68</sup> The role of an attorney should be more like that of an advisor and consultant rather than a mere scrivener.<sup>69</sup> Furthermore, expanding liability for attorneys will

occurs most often in the trust and estate fields where the malpractice is often not discovered until the actual client has died. Therefore, the only one who will be in a position to bring suit will be a third party. Not only does expanded liability provide an avenue for that third party to seek redress; it also provides a financial incentive—the possibility of recovery—for such claims and may foster more vigorous litigation by those with an incentive to do so.

*Id.*

66. Fogel, *supra* note 22, at 310 (arguing that this remedy is inadequate because in many cases, the attorney's negligence may not cause any damage to the estate and executors have little motivation to pursue attorney malpractice claims).

67. *Id.* at 310. If a beneficiary were to have a cause of action, it would increase the quality of representation of estate attorneys. *Id.* It is unreasonable to deprive the intended beneficiary of a remedy because the client-testator is deceased. *Id.* This is especially true when, in the estate planning context, both damages and negligence will not be discovered until after the client-testator's death. *Id.* at 311.

68. See Offutt, *supra* note 8, at 568; Cifu, *supra* note 52, at 23; Silecchia, *supra* note 60, at 448:

Just as the spectre of a malpractice action may be an added incentive for attorneys to exercise a high degree of professional care, so too may the possibility of added liability be an impetus for ever greater diligence. If one of the goals of a liability scheme is, in fact, to be deterrence of the conduct in question, then "raising the stakes" on committing the offense rather than eliminating liability seems the wiser course.

*Id.*

69. Fogel, *supra* note 22, at 312 ("The estate planning attorney must assist the client in balancing the complexities of federal and state taxes (including the estate, gift, generation skipping transfer, and income taxes) with the testator's personal family situation."). A client's reliance on an estate planning attorney is arguably higher than for other forms of representation because it deals

bring all professionals under the same standard, eliminating the special privileges that attorneys enjoy above other professionals like physicians and accountants.<sup>70</sup> In the minority of states, lawyers remain immune from liability to third parties, unlike other professionals such as physicians and accountants, who may be held liable for negligence by third parties.<sup>71</sup>

## 2. Principal Arguments for Strict Privivity

First, proponents of strict privivity argue that greater attorney liability could adversely affect the overall approach of how a lawyer counsels her client.<sup>72</sup> They argue that relaxing strict privivity would create conflicts of interest among clients and third parties, ultimately exposing attorneys to broad potential liability.<sup>73</sup> They argue that the strict-privivity

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with matters of a more personal nature, such as to whom the client's estate will be distributed upon death. *Id.*

70. Silecchia, *supra* note 60, at 447-48 ("Although 'there are distinctive aspects of lawyer-client relationships for courts to consider,' these may not justify completely different treatment for members of the legal profession vis-à-vis their colleagues in other professions.").

71. *See id.* at 447 n.324.

72. Cifu, *supra* note 52, at 15. The leading case adopting ethical arguments in favor of strict privivity was *Noble v. Bruce*, 709 A.2d 1264 (Md. 1998). Begleiter, *supra* note 3, at 346. The court discussed the policy reasons for strict privivity:

First, the strict-privivity rule protects the integrity and solemnity of the will. The beneficiaries are in effect requesting this Court to reform the wills so that the attorney will be responsible for the payment of taxes. If such liability were allowed, the attorney would be paying out-of-pocket for an additional bequest to the beneficiaries not expressed in the will. Although not a persuasive argument, we do note that the attorney's liability is also disproportionate to the cost of the will. The loss to the client is very different from the loss to the beneficiary that may occur as a result of an attorney's negligence in will drafting or estate planning; the client's loss is the cost of redrafting the will, whereas the beneficiary's loss [in this action] is the amount of taxes that could have been avoided.

In addition, the strict-privivity rule protects the attorney-client relationship. Adopting a new rule that would subject an attorney to liability to disappointed beneficiaries interferes with the attorney's ability to fulfill his or her duty of loyalty to the client and compromises the attorney's ability to represent the client zealously . . . . [A] potential conflict of interest may exist between the client's interests and the interests of the beneficiaries . . . .

The strict-privivity rule also protects attorney-client confidentiality . . . . An attorney . . . should not be placed in the position where he or she would have to reveal a testator/client's confidences in an attorney malpractice action asserted by a nonclient beneficiary . . . . Allowing a nonclient beneficiary to maintain a cause of action against an attorney for professional malpractice may require the attorney to reveal confidences the testator would never want revealed.

*Id.* at 346-49 (quoting *Noble*, 709 A.2d at 1277-78).

73. *See* Begleiter, *supra* note 3, at 342; Silecchia, *supra* note 60, at 441. This argument is the traditional one in favor of strict privivity. *Id.*

rule is efficient in that it limits would-be plaintiffs and removes the fear of potential liability.<sup>74</sup>

Second, adherents to the strict-privacy requirement argue that because an attorney's primary purpose is to zealously represent his or her client's interests, if courts relax strict-privacy rules then conflicts between a duty to a client and duties to third parties will result.<sup>75</sup> They argue that attorneys cannot maintain the same standard of care to a third party as the attorney maintains to a client.<sup>76</sup> As a result, expanding liability may cause attorneys to adopt overprotective practices and conservative approaches in dealing with their clients out of a fear of potential liability.<sup>77</sup>

Third, expanding an attorney's liability to third parties may result in a large financial burden for the legal profession.<sup>78</sup> Attorneys would be forced to turn to malpractice insurers to cover the increased risk of loss, which would cause the already-difficult-to-obtain insurance premiums to skyrocket.<sup>79</sup> As a result, the attorney's clients ultimately will bear any increases in malpractice insurance.<sup>80</sup>

74. *Id.*

75. See Cifu, *supra* note 52, at 17; Fogel, *supra* note 22, at 312; Silecchia, *supra* note 60, at 441.

76. Cifu, *supra* note 52, at 18-19 (explaining that attorneys may not be aware of the identities of all of the parties to a complex transaction and that an attorney may counsel clients not to proceed with certain transactions out of fear of liability).

77. Silecchia, *supra* note 60, at 442.

Rather than being the "zealous advocates" for their clients that the Code of Professional Responsibility requires, it is argued attorneys will become cautious of certain client requests or transactions that could potentially expose them to malpractice liability. It is also argued that once the privacy rule is relaxed, the number of persons a lawyer can be accountable to could be limitless. Furthermore, it is believed that the threat of malpractice liability will damage the confidentiality central to the attorney-client relationship because the attorney will be concerned with his or her own liability rather than his or her client's interests.

Offutt, *supra* note 8, at 567.

Third parties may be better served by having their own lawyer who is concerned only with the client's interests and not malpractice liability handle the transaction. Cifu, *supra* note 52, at 24. However, this approach may increase transaction costs due to increased attorneys' fees. *Id.*

78. See Silecchia, *supra* note 60, at 442; Mason, *supra* note 20, at 394; Cifu, *supra* note 52, at 23; Offutt, *supra* note 8, at 568.

79. See Cifu, *supra* note 52, at 23 ("Legal malpractice insurance has been increasingly difficult to obtain and, as with other types of professional insurance, premiums have skyrocketed over the last five years. Increased insurance premiums will likely be borne by clients eventually in the form of higher fees.")

80. Mason, *supra* note 20, at 394; Cifu, *supra* note 52, at 23; Silecchia, *supra* note 60, at 442-43 ("For example, if *A* intends to leave an estate worth \$200,000 to *B* and her attorney drafts the will negligently, the \$200,000 may go to *C*, the beneficiary of an earlier valid will. If *B* is allowed to recover \$200,000 from *A*'s negligent attorney, then \$400,000 has been distributed as a result of *A*'s death rather than the true value of her estate.")

Fourth, advocates of the strict-privy rule note that there is a fundamental difference between lawyers and other professions: “[T]he attorney-client relationship demands secrecy.”<sup>81</sup> Advocates argue that unlike an accountant, “a lawyer being sued by a nonclient third party faces a dilemma as to revealing privileged information obtained in the course of the attorney-client relationship, but necessary to properly defend against the malpractice suit.”<sup>82</sup>

*D. Development of the Privy Requirement in Negligent Estate Planning in Ohio*

The first Ohio court to address the issue of whether a third party, not in privity with an attorney, has standing to sue the attorney in negligence was in 1976, when the Tenth District Court of Appeals issued its decision in *W.D.G., Inc. v. Mutual Manufacturing & Supply Co.*<sup>83</sup> In *W.D.G.*, the court followed Ohio’s general rule that only clients in privity with an attorney or third parties in privity with the attorney’s client had standing to sue in malpractice actions against the attorney.<sup>84</sup> The court reasoned that “[t]o allow indiscriminate third-party actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to afford proper representation to his client in fear of some third-party action against the attorney himself.”<sup>85</sup>

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81. Cifu, *supra* note 52, at 22.

82. *Id.* Cifu explains the dilemma that an attorney faces in such situations: Disciplinary Rule 4-101(C)(4) of the Model Code of Professional Responsibility provides that an attorney may reveal a client’s confidences “to defend himself or his employees or associates against an accusation of wrongful conduct.” However, this exception contemplates the situation where the client had sued the attorney for negligence or malpractice and “it became necessary for the attorney to show what his instructions were, or what was the nature of the duty which the client expected him to perform.” Allowing a lawyer to reveal a client’s confidences during the course of a malpractice suit brought by the client makes sense because the client, having initiated the action, is aware that the lawyer may reveal confidences. When a third party brings suit, however, the client has not given such an implicit waiver of the privilege and may suffer as the information is revealed.

*Id.*

83. No. 76AP-366, 1976 WL 190343, at \*3 (Ohio Ct. App. Nov. 4, 1976).

84. *Id.* (citing 45 A.L.R. 3D 1181) (A.L.R. authority has been superseded).

85. *Id.* The court continued, reasoning “[a]n attorney does have an obligation to the public and to his profession to act honestly, competently, in good faith, and without malice in all of the activities he undertakes.” *Id.* at \*3.

### 1. Scholler v. Scholler

In 1984, the Ohio Supreme Court addressed the issue of third-party claims against an attorney in *Scholler v. Scholler*.<sup>86</sup> In *Scholler*, a mother sued her former husband and his attorney on behalf of her and her minor child, an intended beneficiary of child support.<sup>87</sup> The mother alleged that her former husband fraudulently withheld information concerning his assets during the negotiation of the separation agreement.<sup>88</sup> Further, the mother alleged that the attorney negligently failed to investigate the financial circumstances of the parties and negligently failed to require a full disclosure of her former husband.<sup>89</sup> The trial court granted the attorney's motion for summary judgment and the Court of Appeals affirmed.<sup>90</sup> On appeal, the Ohio Supreme Court also affirmed.<sup>91</sup> The Ohio Supreme Court reasoned that an attorney representing a parent in a divorce proceeding does not automatically and simultaneously also represent the interests of a minor child of the

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86. 462 N.E.2d 158, 162 (Ohio 1984). The Ohio Supreme Court also considered the issue in a prior case, *Petrey v. Simon*, 447 N.E.2d 1285 (Ohio Ct. App. 1983), which *Scholler* affirmed. *Id.* at 163-64.

87. *Id.* at 160. Alyce and Michael Scholler had one child, Philip Scholler. *Id.* Alyce and Michael filed for dissolution of marriage, which resulted in a separation agreement that required Michael to pay Alyce \$55 per week in child support. *Id.*

88. *Scholler v. Scholler*, 462 N.E.2d 158, 160 (Ohio 1984). Subsequent to the separation agreement, Alyce filed a motion for modification of child support, alleging that Michael fraudulently withheld information concerning Michael's assets during the negotiation of the separation agreement between Alyce and Michael. *Id.* The court denied Alyce's motion. *Id.* Alyce sought a subsequent modification and the court increased the child support to fifty-five dollars per week. *Id.*

89. *Id.* Alyce filed a complaint individually and on behalf of Philip alleging fraud and misrepresentation on the part of Michael and alleging that Michael's attorney "negligently failed to make a complete investigation of the financial circumstances of the parties . . . [and] negligently failed to require a full disclosure of . . . Michael Scholler, during the course of negotiation of the aforesaid separation agreement." *Scholler v. Scholler*, 462 N.E.2d 158, 160 (Ohio 1984).

90. *Id.* at 161. The trial court reasoned that the doctrine of collateral estoppel was not available to the attorney, but that no genuine issue of fact existed as to the attorney's negligence. *Id.* Further, the trial court observed that the statute of limitations barred Alyce's claims. *Id.* On appeal, the court affirmed but reasoned that there existed a genuine issue of fact as to the attorney's negligence. *Id.* The court reasoned that the statute of limitations barred Alyce's claim and the attorney owed no duty to Philip because Philip was not in privity with Alyce during the negotiation of the separation agreement. *Scholler v. Scholler*, 462 N.E.2d 158, 160 (Ohio 1984).

91. *Id.* at 164. The Ohio Supreme Court reaffirmed the general rule in Ohio that "[a]n attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously." *Id.* at 163.

marriage.<sup>92</sup> As a result, the Ohio Supreme Court reaffirmed the strict-privity rule in attorney negligence actions.<sup>93</sup>

## 2. *Simon v. Zipperstein*

In 1987, the Ohio Supreme Court faced the issue of privity again in *Simon v. Zipperstein*.<sup>94</sup> However, this time, the Ohio Supreme Court faced this issue in the context of negligent estate planning.<sup>95</sup> In *Zipperstein*, attorney Zipperstein prepared an antenuptial agreement for Dr. Simon and his fiancée Mildred whereby half of Dr. Simon's real and personal property interests would pass to Mildred.<sup>96</sup> Three years later, Zipperstein prepared a last will and testament for Dr. Simon which bequeathed one-third shares of his estate to Mildred, certain designated charities, and Zachary, Dr. Simon's son from a former marriage.<sup>97</sup> The last will and testament made no reference to the antenuptial agreement.<sup>98</sup>

Upon Dr. Simon's death, Mildred instituted a declaratory judgment action to determine her rights to receive property through both the antenuptial agreement and the last will and testament.<sup>99</sup> The probate court held that the antenuptial agreement was without force but the Court of Appeals reversed.<sup>100</sup> The Court of Appeals held that the antenuptial agreement created a valid debt against the estate, and

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92. *Id.* at 164.

93. *Id.* at 166. Chief Justice Celebrezze referred to this general rule a year before *Scholler*, in the case of *Petrey v. Simon*. 447 N.E.2d 1285, 1289 (Ohio 1983) (Celebrezze, C.J., dissenting). In his dissent, Chief Justice Celebrezze restated the general rule of privity from *W.D.G.*, and quoted from Ohio's Code of Professional Responsibility, EC 5-1, "The professional judgment of a lawyer should be exercised, within the bounds of the law, *solely* for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, *nor the desires of third persons* should be permitted to dilute his loyalty to his client." *Id.* at 1289 (emphasis added).

94. 512 N.E.2d 636, 638 (Ohio 1987).

95. *Id.* at 636.

96. *Id.* at 636-37. In 1973, Doris Simon and Dr. Simon divorced. *Id.* Doris and Dr. Simon had one son, Zachary. *Id.* In 1974, Dr. Simon planned to marry Mildred and sought the legal services of Zipperstein for the preparation of an antenuptial agreement. *Simon v. Zipperstein*, 512 N.E.2d 636, 636-37 (Ohio 1987). The antenuptial agreement provided that upon Dr. Simon's death, Mildred's survivorship interests in Dr. Simon's real and personal property would be limited to one half the value of the real and personal property from the date of marriage until Dr. Simon's death. *Id.* at 637.

97. *Id.*

98. *Id.*

99. *Id.* Following Dr. Simon's death, the last will and testament named Zipperstein executor of Dr. Simon's estate. *Simon v. Zipperstein*, 512 N.E.2d 636, 637 (Ohio 1987).

100. *Id.*

because the last will and testament did not refer to the antenuptial agreement, Mildred was entitled to take under both instruments.<sup>101</sup>

Doris, Zachary's mother and legal guardian, filed a suit for malpractice against Zipperstein, alleging negligence.<sup>102</sup> The trial court barred the complaint pursuant to collateral estoppel.<sup>103</sup> On appeal, the court reversed the trial court holding and remanded the case back to the trial court.<sup>104</sup> On remand, the trial court held that, absent privity, Doris was unable to sue for legal malpractice.<sup>105</sup> Again, the Court of Appeals reversed, holding this time that the privity requirement was discredited and that Doris alleged sufficient facts to state a cause of action against Zipperstein as a third-party beneficiary.<sup>106</sup>

However, the Ohio Supreme Court reversed the decision of the Court of Appeals, upholding Ohio's long history of the privity requirement and reiterating the Court's holding in *Scholler*.<sup>107</sup> The Ohio Supreme Court reasoned that an attorney's obligation is to the needs of the client, not to the needs of a third party.<sup>108</sup> The Ohio Supreme Court

101. *Id.*

102. *Id.* The suit sought damages resulting from Zipperstein's purported failure to renounce the antenuptial agreement. *Id.*

103. *Simon v. Zipperstein*, 512 N.E.2d 636, 637 (Ohio 1987). The trial court reasoned that the probate court previously litigated the issue of Dr. Simon's intent in the declaratory judgment action to which Zachary was a party. *Id.*

104. *Id.*

105. *Id.*

106. *Simon v. Zipperstein*, No. 9655, 1986 WL 8531, at \*14 (Ohio Ct. App. July 29, 1986). The Court of Appeals reasoned,

The one-hundred-forty-year old justification for the privity of contract limitation, that unlimited liability could be prevented in no other way, has now been discredited in many instances. Justice demands that with regard to the privity requirement, as with any other rule, "when the reason for the rule ceases, the rule also ceases."

*Id.*

107. *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987). The Ohio Supreme Court held that "an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice." *Id.* (citing *Scholler v. Scholler*, 462 N.E.2d 158 (Ohio 1984); *Petrey v. Simon*, 447 N.E.2d 1285 (Ohio Ct. App. 1983); *Pourmaras v. Hopkins*, 463 N.E.2d 67 (Ohio Ct. App. 1983); *Strauch v. Gross*, 462 N.E.2d 433 (Ohio Ct. App. 1983); *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, No. 76AP-366, 1976 WL 190343 (Ohio Ct. App. November 4, 1976)).

108. *Simon*, 512 N.E.2d at 638. The Ohio Supreme Court quoted *W.D.G.*:

Some immunity from being sued by third persons must be afforded an attorney so that he may properly represent his client. To allow indiscriminate third-party actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to offer proper representation to his client in fear of some third-party action against the attorney himself.

*Id.* (quoting *W.D.G.*, No. 76AP-366, 1976 WL 190343, at \*3 (Ohio Ct. App. November 4, 1976)).

further reasoned that no special circumstances such as collusion, malice, or bad faith existed in the instant case.<sup>109</sup>

In his dissent, Justice Brown argued that the majority opinion in *Zipperstein* virtually guaranteed to attorneys immunity from liability for malpractice.<sup>110</sup> Justice Brown contended that “in drafting a will, the attorney knows that (1) the client has employed him or her for the specific purpose of benefiting third persons, and (2) the consequences of an error . . . will most likely fall upon those intended beneficiaries.”<sup>111</sup>

#### *E. Ohio’s Relaxed Privity Rule Regarding Other Professionals*

Despite Ohio’s continued adherence to strict privity in attorney malpractice actions, Ohio has relaxed the strict-privity requirement for other professions, including physicians and accountants.<sup>112</sup> In addition, Ohio has extended privity to those with whom an attorney’s client owes a fiduciary obligation,<sup>113</sup> as well as limited partners within a partnership

109. *Simon*, 512 N.E.2d at 638.

110. *Id.* at 639 (Brown, J., dissenting). Justice Brown used the example that if an attorney negligently fails to direct proper attestation of a will, the majority’s rule would mean that no action can be brought against the attorney. *Id.* Justice Brown argued that “[t]his is so because the client, the testator, must die before the will becomes operative.” *Id.* Justice Brown also argued that the privity requirement in legal malpractice should be buried in order to bring attorney malpractice into line within the body of tort law. *Id.*

111. *Simon v. Zipperstein*, 512 N.E.2d 636, 639 (Ohio 1987) (Brown, J., dissenting). Justice Brown argued that if an attorney fails to carry out the testator’s intent, resulting in an intended beneficiary receiving less than the client intended, surely the client, if he or she were still alive, would want the intended beneficiary to have the ability and the standing to bring an action against the negligent attorney. *Id.*

112. *See Shaweker v. Spinell*, 181 N.E. 896, 896 (Ohio 1932) (a husband may sue a physician to recover for the loss of his wife’s services); *Kocisko v. Charles Shutrump & Sons Co.*, 488 N.E.2d 171, 173 (Ohio 1986) (third-party may sue architects for negligence in design and construction of a church building). This case was a reversal of summary judgment, finding that the trial court had erred in applying the ten-year tort statute of limitations; because the archbishop was a party to the contract, and this was a breach of contract suit, the fifteen-year statute of limitations applied, so the case was not time-barred. *See also Temple v. Wean United, Inc.*, 364 N.E.2d 267, 270 (Ohio 1977) (third-party plaintiffs permitted to sue manufacturers of a punch press); *Haddon View Inv. Co. v. Coopers & Lybrand*, 436 N.E.2d 212, 215-16 (Ohio 1982) (third party may sue accountant for professional negligence when the third party is a member of a limited class whose reliance is specifically foreseen); *Perpetual Fed. Savings & Loan Ass’n v. Porter & Peck, Inc.*, 609 N.E.2d 1324, 1328 (Ohio App. Ct. 1992) (third party may sue an appraiser for professional negligence); *Merrill v. William E. Ward Ins.*, 622 N.E.2d 743, 748-49 (Ohio App. Ct. 1993) (an insurance agent could be held liable for negligence to children of insured who claimed that they were intended beneficiaries).

113. *Elam v. Hyatt Legal Services*, 541 N.E.2d 616, 618 (Ohio 1989) “It is the duty of a fiduciary of an estate to serve as representative of the entire estate. Such a fiduciary, in the administration of an estate, owes a duty to beneficiaries to act in a manner which protects the beneficiaries’ interests.” *Id.* The court in *Elam* noted that its decision did not contradict the holding in *Simon v. Zipperstein*, because *Elam* involved a case where remaindermen’s interests were vested.

that the attorney represents.<sup>114</sup> Ohio courts have stated that relaxed privity in these circumstances are in “accord with reason and justice.”<sup>115</sup>

However, Ohio has maintained its strict-privity requirement in attorney malpractice actions in the face of pleas by Ohio appellate courts and Ohio Supreme Court justices to review the issue.<sup>116</sup> The Ohio

*Id.* “A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney’s negligent performance.” *Id.*

114. *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335, 1339 (Ohio 1994) (holding that the attorney-client relationship extends to limited partners of a partnership, and not simply to the general partner) (*abrogated by statute*, O.R.C. ANN. § 1705.61 (2009), *as stated in* *Fornshell v. Roetzel & Andress L.P.A.*, Nos. 92132, 92161, 2009 WL 1629715.

[A]bsent an express agreement to the contrary, a person providing goods to or performing services for a limited liability company owes no duty to, incurs no liability or obligation to, and is not in privity with the members or creditors of the limited liability company by reason of providing goods to or performing services for the limited liability company.

*Id.*

115. *See Haddon View Inv. Co.*, 436 N.E.2d at 214-15 (permitting “recovery by a foreseen plaintiff, or one who is a member of a limited class whose reliance on the accountant’s representation is specifically foreseen”).

[T]he services of the accountant were not extended to a faceless or unresolved class of persons, but rather to a known group possessed of vested rights, marked by a definable limit and made up of certain components . . . . In such circumstances, assumption of the task of auditing and preparing the returns was the assumption of a duty to audit and prepare carefully for the benefit of those in the fixed, definable and contemplated group whose conduct was to be governed since, given the contract and the relation, the duty is imposed by law and it is not necessary to state the duty in terms of contract or privity . . . .

*Id.* at 214 (quoting *White v. Guarente*, 372 N.E.2d 315, 318 (N.Y. 1977)). “To require a plaintiff in such a situation to be in privity with the . . . accountant ignores the modern verity that accountants make reports on which people other than their clients foreseeably rely in the ordinary course of business.” *Haddon View Investment Co.*, 436 N.E. 2d at 214. *See also Merrill*, 622 N.E.2d at 749 (holding that an insurance agent could be held liable for negligence to children of insured “based upon [the children’s] special relationship to decedent and to the underlying transaction as intended beneficiaries of their father’s life insurance proceeds, and because [the children] have presented credible evidence of reliance by the decedent . . . .”). In *Merrill*, the court stressed that the purpose of the relationship between the insurance agent and the decedent in contracting for life insurance was for the purpose of benefiting specific individuals. *Id.*

The court also quoted language from the Law of Torts by Professors Prosser and Keeton:

By entering into a contract with *A*, the defendant may place himself in such a relation toward *B* that the law will impose upon him an obligation, sounding in tort and not in contract, to act in such a way that *B* will not be injured. The incidental fact of the existence of the contract with *A* does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person.

*Id.* (quoting PROSSER & KEETON, LAW OF TORTS § 93, at 667-68 (5th ed. 1984)).

116. *See Dykes v. Gayton*, 744 N.E.2d 199, 201 (Ohio App. Ct. 2000) (inviting the Ohio Supreme Court to review its decision and balance the public policy that supports the testator’s intent

Supreme Court received another chance in 2008 when the Supreme Court reviewed *Shoemaker*.<sup>117</sup>

### III. STATEMENT OF THE CASE

#### A. *Statement of the Facts*

In 1986, attorney Thomas Gindlesberger (Gindlesberger) prepared the last will and testament of Margaret Schlegel (Margaret).<sup>118</sup> In 1990, Gindlesberger prepared a general warranty deed for Margaret that retained a life estate for Margaret in the family dairy farm (Hanna Farm) and transferred a joint life estate in the Hanna Farm to Margaret's son Roy Schlegel (Roy) and his wife with joint right of survivorship.<sup>119</sup> Margaret died on June 30, 2003.<sup>120</sup>

The court admitted Margaret's will to probate in July 2003 and her children discovered that the estate was responsible for state and federal estate tax liabilities owed on the transfer of the Hanna Farm to Roy.<sup>121</sup> The taxes depleted Margaret's entire estate and left Margaret's two other children, Robert Schlegel (Robert) and Anna Mae Shoemaker (Anna) with nothing.<sup>122</sup> Robert, as a beneficiary and executor of Margaret's

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with the public policy that favors some immunity for attorneys, as against third-party lawsuits); *Simon v. Zipperstein*, 512 N.E.2d 636, 639-40 (Ohio 1987) (Brown, J., dissenting).

117. 887 N.E.2d 1167 (Ohio 2008).

118. *Id.* at 1168. Gindlesberger also drafted two codicils for Margaret. *Id.* The two codicils were executed between 1994 and 1997. *See* Merit Brief of Appellants Robert E. Schlegel, Executor, et al., at 3, *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167 (Ohio 2008) (No. 07-113). Gindlesberger's office notes also reveal that on May 31, 1996, he consulted with and reviewed Margaret's estate plan with her, Anna, and Robert. *Id.*

119. *Id.* Margaret owned two tracts of land including the Hanna Farm and her home, which Margaret referred to as the "home place." *Id.* Roy operated a dairy business on the Hanna Farm. *Schlegel v. Gindlesberger*, No. 04-CV-076, 2005 WL 6113389, at 3 (Ohio Ct. Com. Pl. Dec. 1, 2005). Roy wished to make improvements on the Hanna Farm in order to increase milk production and wanted to secure a mortgage loan to finance the project. *Id.* Margaret refused to sign a mortgage on the Hanna Farm, and Roy sought financing elsewhere. *Id.* Prior to any expansion, Roy wanted to ensure that he would receive the Hanna Farm upon Margaret's death. *Id.* Margaret conveyed a general warranty deed with joint right of survivorship in the Hanna Farm to Roy, while also retaining a life estate for herself. *Id.* A general warranty deed warrants against any and all defects in title, whether they arose before or after the grantor took title. *JESSE DUKEMINIER ET AL., PROPERTY* 514 (6th ed. 2006). Joint right of survivorship is that "joint tenants together are regarded as a single owner" so "when one joint tenant dies *nothing passes* to the surviving joint tenant or tenants." *Id.* at 276.

120. *Schlegel v. Gindlesberger*, No. 05 CA 10, 2006 WL 3783537, ¶ 3 (Ohio Ct. App. Dec. 26, 2006).

121. *Shoemaker*, 887 N.E.2d at 1169.

122. *Schlegel*, No. 05 CA 10, 2006 WL 3783537, ¶ 3. Roy still would have received his portion of Margaret's estate, which was the Hanna Farm, but the state and federal estate taxes owed

estate, and Anna, as a beneficiary, claimed that Gindlesberger was negligent because he failed to advise Margaret of the tax implications of an inter vivos transfer to Roy of most of her interest in the Hanna Farm.<sup>123</sup>

*B. The Court of Common Pleas of Ohio, Holmes County*

On June 29, 2004, Robert and Anna filed a complaint in the Court of Common Pleas of Ohio, Holmes County (Common Pleas Court) alleging legal malpractice against Gindlesberger which resulted in unjust enrichment for Roy.<sup>124</sup> Robert and Anna argued that Gindlesberger failed to advise Margaret of the tax liabilities of the transfer of the Hanna Farm, constituting legal malpractice.<sup>125</sup> Robert and Anna contended that depleting Margaret's estate precluded Margaret's intention of dividing her estate equally among her three children.<sup>126</sup>

Roy filed a cross-claim against Gindlesberger that also alleged negligence.<sup>127</sup> Roy claimed that Gindlesberger's lack of tax law knowledge was the reason for the depletion of the assets of Margaret's estate.<sup>128</sup> Robert, Anna, and Roy argued that special circumstances existed that would justify a departure from the rule of attorney immunity to third-party claims.<sup>129</sup>

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on the transfer of the Hanna Farm depleted Robert and Anna's share in the estate. *Schlegel v. Gindlesberger*, No. 04-CV-076, 2005 WL 6113389, at 4 (Ohio Ct. Com. Pl. Dec. 1, 2005).

123. *Schlegel*, No. 05 CA 10, 2006 WL 3783537, ¶ 3. An inter vivos transfer is a transfer of property or gift made during the testator's lifetime. BLACK'S LAW DICTIONARY 729 (3d pocket ed. 2006).

124. *Schlegel v. Gindlesberger*, No. 05 CA 10, 2006 WL 3783537, ¶ 3 (Ohio App. 5th Dist. Dec. 26, 2006). Robert and Anna argued that Roy knew of Margaret's intention for all of her children to share equally in her estate, and that Roy should be responsible to pay the estate taxes on the Hanna Farm. *Schlegel v. Gindlesberger*, No. 04-CV-076, 2005 WL 6113389, at 7-8 (Ohio Ct. Com. Pl. Dec. 1, 2005). Otherwise, Robert and Anna argued that Roy would receive all of Margaret's estate without any tax burden. *Id.* at 8.

125. *Id.* at 7.

126. *Id.* at 8. As a result, Robert and Anna argued that Gindlesberger's negligence resulted in unjust enrichment for Roy to the detriment of Robert and Anna. *Id.* at 4.

127. *Schlegel v. Gindlesberger*, No. 05 CA 10, 2006 WL 3783537, ¶ 5 (Ohio Ct. App. Dec. 26, 2006). Roy's cross-claim alleged that Gindlesberger's negligence caused Robert and Anna to sue Roy. *Schlegel v. Gindlesberger*, No. 04-CV-076, 2005 WL 6113389, at 4 (Ohio Ct. Com. Pl. Dec. 1, 2005).

128. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1169 (Ohio 2008).

129. *Schlegel*, No. 04-CV-076, 2005 WL 6113389, at 7. The general rule in Ohio was "that an attorney may not be held liable to third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for who the legal services were performed, or unless the attorney acts with malice." *Id.* at 6 (quoting *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987)). "In *Simon*, the court determined that the administrator of the estate and the beneficiary lacked the requisite privity to sustain a malpractice action against the

Gindlesberger responded that because there was no privity between Margaret's children and himself, Margaret's children lacked standing<sup>130</sup> to bring suit.<sup>131</sup> All parties moved for summary judgment.<sup>132</sup> On December 1, 2005, Common Pleas Court issued a judgment entry denying Roy's and Anna's motion for summary judgment on the unjust enrichment claim and granting Gindlesberger's motion for summary judgment, thereby dismissing the legal malpractice claims.<sup>133</sup> The court held that there was "no evidence that an attorney-client relationship or sufficient privity with an attorney-client relationship existed between [Gindlesberger and Margaret's children]."<sup>134</sup>

### C. *The Court of Appeals of Ohio, Fifth District*

On December 22, 2005, Roy filed a notice of appeal in the Court of Appeals of Ohio, Fifth District (Fifth District) alleging that the trial court erred in overruling Roy's motion for summary judgment on the unjust enrichment claim and erred in dismissing the malpractice claim against Gindlesberger.<sup>135</sup> Roy argued that the Fifth District should abandon the general rule of attorney immunity to third-party claims regarding a will because attorneys are aware that their actions affect not only the client but also the testator's intended beneficiaries.<sup>136</sup>

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decedent's attorney unless there was a finding of malicious behavior." *Id.* at 7 (citing *Simon*, 512 N.E.2d at 638).

130. Standing is one's "right to make a legal claim or seek judicial enforcement of a duty or right." BLACK'S LAW DICTIONARY 671 (3d pocket ed. 2006).

131. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1169 (Ohio 2008). Privity is defined as "the connection or relationship between two parties, each having a legally recognized interest in the same subject matter." *Id.* at 1170 (quoting BLACK'S LAW DICTIONARY 1237 (8th ed. 2004)). Gindlesberger testified that he advised Margaret to consult her accountant regarding the potential tax liability for the transfer of the Hanna Farm. *Schlegel v. Gindlesberger*, No. 04-CV-076, 2005 WL 6113389, at 6 (Ohio Ct. Com. Pl. Dec. 1, 2005). Gindlesberger argued that an attorney-client relationship would be necessary in order for Margaret's children to bring suit. *Shoemaker*, 887 N.E.2d at 1169. Gindlesberger contended that Margaret was the only individual in privity with Gindlesberger in the instant case, and therefore the only individual with standing to sue. *Id.* As a result, Gindlesberger argued that the court should dismiss the case. *Id.*

132. *Schlegel v. Gindlesberger*, No. 04-CV-076, 2005 WL 6113389, at 1 (Ohio Ct. Com. Pl. Dec. 1, 2005).

133. *Id.* at 7. The court stated the necessary elements of a legal malpractice claim: "(1) an attorney-client relationship; (2) a professional duty arising from that relationship; (3) breach of that duty; (4) proximate cause; and (5) damages." *Id.* at 5-6 (citing *Vahila v. Hall*, 674 N.E.2d 1164 (Ohio 1996); *Krahn v. Kinney*, 538 N.E.2d 158 (Ohio 1989)).

134. *Schlegel*, No. 04-CV-076, 2005 WL 6113389, at 6. The trial court reasoned that Margaret paid Gindlesberger for his services, and Margaret's children admitted they were not clients of Gindlesberger. *Id.*

135. *Schlegel v. Gindlesberger*, No. 05 CA 10, 2006 WL 3783537, ¶¶ 6-8 (Ohio Ct. App. Dec. 26, 2006). On Dec. 29, 2005, Robert and Anna also filed a notice of appeal. *Id.* ¶ 6.

136. *Id.* ¶ 31.

The Fifth District held that Roy's appeal of the trial court's denial of summary judgment on the unjust enrichment claim was not a final appealable order and not subject to immediate appeal.<sup>137</sup> The Fifth District also held that Roy's assignment of error regarding the malpractice claim was without merit.<sup>138</sup> The Fifth District reasoned that precedent bound the court and Margaret was the only individual with standing to sue.<sup>139</sup> However, the Fifth District invited the Ohio Supreme Court to revisit the issue because "there should be a remedy to any wrong."<sup>140</sup>

#### D. The Ohio Supreme Court

The Ohio Supreme Court accepted the case as a discretionary appeal.<sup>141</sup> However, Anna, as beneficiary and executor of Margaret's estate, and Nola Schlegel (Nola), executor of Robert's estate, brought this appeal because Robert had died in the years since the trial court decision.<sup>142</sup>

Anna and Nola argued that the Ohio Supreme Court should adopt a new rule that would allow third-party intended beneficiaries to sue an attorney who is negligent in preparing a will.<sup>143</sup> Anna and Nola argued that Ohio's strict-privity requirement in legal malpractice cases was an "antiquated rule," noting that several jurisdictions permitted beneficiaries to bring such actions.<sup>144</sup> As a matter of policy, Anna and

137. *Id.* ¶ 20. The Fifth District reasoned that "a judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order." *Id.* ¶ 10. A denial of a motion for summary judgment generally is not an appealable order. *Schlegel v. Gindlesberger*, No. 05 CA 10, 2006 WL 3783537, ¶ 23 (Ohio Ct. App. Dec. 26, 2006).

138. *Id.* ¶ 24. The Fifth District reviewed the trial court's decision *de novo*. *Id.* ¶ 25.

139. *Id.* ¶ 31. The Fifth District referenced the general rule in Ohio that "in the absence of fraud, collusion or malice, an attorney may not be held liable in a malpractice action by a beneficiary or purported beneficiary of a will where privity is lacking." *Id.* ¶ 30 (citing *Simon v. Zipperstein*, 512 N.E.2d at 638). The Fifth District reasoned that Gindlesberger acted on behalf of Margaret and privity was only with Margaret. *Schlegel v. Gindlesberger*, No. 05 CA 10, 2006 WL 3783537, ¶ 31 (Ohio Ct. App. Dec. 26, 2006). In addition, Roy failed to allege fraud, collusion or malicious conduct that would justify a departure from the rule in *Simon*. *Id.*

140. *Id.* at ¶ 32. The Fifth District noted that "[w]ithout relaxing the concept of privity, intended beneficiaries may suffer damages without any remedy and an attorney who negligently drafts a will is immune from liability to those persons whom the testator intended to benefit under his or her will." *Id.*

141. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1169 (Ohio 2008).

142. *Id.* at 1169 n.2. Anne and Nola still proposed that a third-party intended beneficiary of a will may maintain a legal-malpractice action against the attorney who negligently created the will. *Id.* at 1169.

143. *Id.*

144. *Id.* at 1170. The Brief of Amicus Curiae Ohio Association for Justice cited cases from twenty-two jurisdictions that changed their method of approach to issues of negligence in drafting a

Nola argued that intended beneficiaries of a will needed to hold negligent attorneys accountable because negligence normally is discovered only after the death of the testator, resulting in harm to the beneficiaries.<sup>145</sup>

Gindlesberger argued that the Ohio Supreme Court should not expand the strict rule of privity in Ohio.<sup>146</sup> As a matter of policy, Gindlesberger argued that the strict-privity rule provided for certainty in estate planning.<sup>147</sup> Gindlesberger contended that he did exactly what Margaret wished and that it was conceivable “that a testator may not wish to optimize tax liability, instead seeking to further a different goal.”<sup>148</sup>

The Ohio Supreme Court affirmed the lower court decisions and held that “a beneficiary of a decedent’s will may not maintain a negligence action against an attorney for the preparation of a deed that results in increased tax liability for the estate.”<sup>149</sup> The Ohio Supreme

will. Brief for Ohio Association for Justice as Amicus Curiae Supporting Appellants, at \*6 n.10; *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167 (Ohio 2008) (No. 07-113). The Ohio Association for Justice further argued that “[w]hen an attorney undertakes to fulfil[] 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.” *Id.* at \*8.

145. *Shoemaker*, 887 N.E.2d at 1170-71. The Merit Brief in support of Anna and Nola argued that an attorney in drafting a will must be aware that a will’s purpose is for the “benefit of third-parties” and that an error in drafting or execution “befalls the intended beneficiaries” and does not “result in harm upon the immediate client, who will likely be deceased at the time that the error is discovered . . . .” Merit Brief of Appellants Robert E. Schlegel, Executor, et al., *supra* note 118, at 10. In order to make an attorney accountable for his negligence, it is reasonable to grant third-party beneficiaries standing to file suit. *Id.* After all, the negligence damages both the decedent and the intended beneficiaries. Reply Brief of Appellants Robert E. Schlegel, Executor, et al., at \*5, *Shoemaker*, 887 N.E.2d 1167 (No. 2007-0113).

146. *Shoemaker*, 887 N.E.2d at 1169. The Merit Brief of Gindlesberger argued that, according to the Ohio Supreme Court in *Westfield Insurance Company v. Galatis*, 797 N.E.2d 1256 (Ohio 2003), the Ohio Supreme Court “may overrule its previous decisions only where (1) the decision was wrongly decided at that time, or changes in the circumstances no longer justify the continued adherence to that decision, (2) the decision defies practical workability and (3) abandoning the precedent would not create an undue hardship for those that relied upon it.” Merit Brief of Appellee Thomas D. Gindlesberger, Esq. at 12; *Shoemaker*, 887 N.E.2d 1167 (No. 07-113) (quoting *Westfield Ins. Co.*, 797 N.E.2d at 1259 syllabus). The brief argued that neither of the three conditions was present in the instant case. *Id.* at 12-13.

147. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1172 (Ohio 2008). The Merit Brief of Gindlesberger argued that the strict-privity rule protects the solemnity and integrity of the will, and the attorney/client relationship. Merit Brief of Appellee Thomas D. Gindlesberger, Esq., *supra* note 146, at 10.

148. *Shoemaker*, 887 N.E.2d at 1172. The Merit Brief of Gindlesberger argued that “[t]he principles of loyalty and independent judgment are fundamental to the attorney/client relationship and . . . [n]either the lawyer’s personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer[‘s] loyalty to the client.” Merit Brief of Appellee Thomas D. Gindlesberger, Esq., *supra* note 146, at 8.

149. *Shoemaker*, 887 N.E.2d at 1168.

Court reasoned that the strict-privy rule was rooted in the special relationship between attorney and client, and that an attorney had an obligation to fulfill only the needs of his clients.<sup>150</sup> Further, the Ohio Supreme Court reasoned that no special circumstances were present in the instant case that would justify a departure from the strict-privy rule.<sup>151</sup> As a matter of policy, the Ohio Supreme Court reasoned that the privy rule protected the attorney's duties of loyalty and advocacy for the client, provided certainty, and protected confidentiality.<sup>152</sup>

However, the Ohio Supreme Court noted that other courts have permitted a personal representative of an estate to stand in the shoes of the decedent in an action for legal malpractice in order to meet the strict-

150. *Id.* at 1170. The Ohio Supreme Court reasoned that Margaret's children were not in privy with Margaret or Gindlesberger and that their rights as intended beneficiaries did not vest until Margaret's death. *Id.* The majority summarized its public policy justifications for the strict-privy rule:

Primarily, the rule is used to protect the attorney's duty of loyalty and the attorney's effective advocacy for the client. The strict-privy rule ensures that attorneys may represent their clients without the threat of suit from third parties who may compromise that representation. Otherwise, an attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client's interests against the possibility of third-party lawsuits.

Second, without the strict-privy rule, the attorney could have conflicting duties and divided loyalties during the estate planning process. Third, there would be unlimited potential liability for the lawyer . . . .

The comment to Ohio's conflict-of-interest rule, Prof.Cond.R. 1.7, states: "The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict-of-interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client." The rules of professional responsibility, therefore, also underscore the need to ensure that a lawyer is not liable to parties who are not in privy with the lawyer's client.

*Id.* at 1171 (citations omitted).

151. *Id.* at 1170.

152. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1171-72 (Ohio 2008). The Ohio Supreme Court stated that the strict-privy rule "ensures that attorneys may represent their clients without the threat of suit from third parties who may compromise that representation." *Id.* at 1171 (citing *Barcelo v. Elliot*, 923 S.W.2d 575, 578-79 (Tex. 1996)). Otherwise, fear of third-party negligence claims might thwart the attorney's duty of zealous representation for the client. *Id.* "[T]he only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." *Id.* (quoting *Sav. Bank v. Ward*, 100 U.S. 195, 203 (1879)).

In the instant case, according to the majority, Margaret received exactly what she intended—a transfer of the Hanna Farm to Roy while retaining a life estate for herself. "It is conceivable that a testator may not wish to optimize tax liability, instead seeking to further a different goal. *Id.* The Ohio Supreme Court declined to extend privy from clients to intended beneficiaries because doing so "could lead to significant difficulty and uncertainty, a breach in confidentiality, and divided loyalties." *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1172 (Ohio 2008).

privity requirements.<sup>153</sup> The Ohio Supreme Court stated that this “may well be a solution to the problem, but it is a question for another day.”<sup>154</sup>

#### *E. Chief Justice Moyer’s Concurrence*

In his concurring opinion, Chief Justice Moyer agreed with the majority decision but noted that if this case presented different facts, there may be special circumstances that would warrant a departure from the strict-privity rule.<sup>155</sup> Chief Justice Moyer noted that if the case had involved negligence in the preparation of the will rather than negligence in a financial transaction separate from the will, then Anna and Nola may have had standing to sue.<sup>156</sup> Chief Justice Moyer also noted that harm to intended beneficiaries was more foreseeable in the preparation of a will rather than in a financial transaction independent of a will.<sup>157</sup> Chief Justice Moyer concluded his concurring opinion by stating there was a strong need to hold attorneys accountable in negligence for improperly drafting wills.<sup>158</sup>

### IV. ANALYSIS

#### *A. The Miscalculated Precedential Value of Simon v. Zipperstein*

In *Shoemaker*, the Ohio Supreme Court held that “a beneficiary of a decedent’s will may not maintain a negligence action against an attorney for the preparation of a deed that results in increased tax liability for the estate.”<sup>159</sup> In doing so, the Court followed its 1987 decision in *Simon* and maintained the strict-privity rule in Ohio for legal-malpractice actions.<sup>160</sup> “To reach this undesirable result, the majority

153. *Id.* at 1171.

154. *Id.* at 1172.

155. *Id.* at 1172-73 (Moyer, C.J., concurring). Justices Pfeifer and Lundberg Stratton joined in the concurrence. *Id.*

156. *Id.* at 1173. Chief Justice Moyer noted the difference between the instant case and the *Simon* case in which the strict-privity rule applied. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1173 (Ohio 2008). In the instant case, Anna and Nola sought to hold Gindlesberger liable for negligence in a financial transaction that was independent of the will, whereas in *Simon*, the beneficiary sought to hold the attorney liable for negligence in preparation of the will. *Id.* at 1172-73 (citing *Simon*, 512 N.E.2d 636).

157. *Id.*

158. *Id.* at 1174. Chief Justice Moyer reasoned that holding lawyers accountable for negligently prepared wills makes good sense, especially when Ohio has abrogated the strict-privity rule with respect to other professionals, such as accountants and architects. *Id.*

159. *Shoemaker*, 887 N.E.2d at 1172.

160. Alan Newman, Esq., *Shoemaker v. Gindlesberger: The Lack of Privity Defense Survives, but Just Barely*, 18 OHIO PROB. L.J. 214 (2008).

[trotted] out that old chestnut, privity.”<sup>161</sup> However, the Supreme Court in *Shoemaker* miscalculated the precedential value of *Simon* in a few respects.

### 1. A Misstated Rule

In *Shoemaker*, the Ohio Supreme Court reaffirmed the holding in *Simon*, which held that “an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, *unless the third party is in privity with the client* for whom the legal services were performed, or unless the attorney acts with malice.”<sup>162</sup> However, *Simon* reaffirmed an Ohio rule that required privity between the third party and the client, rather than privity between the third party and the negligent attorney.<sup>163</sup> In fact, the Ohio Supreme Court is the only court to have interpreted the privity rule in such a way.<sup>164</sup>

Inasmuch as the Ohio Supreme Court resolved *Simon* on misstated privity grounds, it is reasonable to claim that *Simon*, and those cases which have held the same, should have little precedential value within Ohio.<sup>165</sup> In all of the cases outside of Ohio that have addressed privity in the legal malpractice context, the fundamental issue has always been whether privity existed between the *third party and the negligent attorney*, not whether privity existed between the *third party and the attorney’s client*.<sup>166</sup> For example, in *Ward*, the earliest American

161. *Simon v. Zipperstein*, 512 N.E.2d 636, 639 (Ohio 1987) (Brown, J., dissenting) (“To reach this undesirable result, the majority trots out that old chestnut, privity.”).

162. *Simon*, 512 N.E.2d at 638 (citing *Scholler v. Scholler*, 462 N.E.2d 158 (Ohio 1984); *Petrey v. Simon*, 447 N.E.2d 1285 (Ohio Ct. App. 1983); *Pournaras v. Hopkins*, 463 N.E.2d 67 (Ohio Ct. App. 1983); *Strauch v. Gross*, 462 N.E.2d 433 (Ohio Ct. App. 1983); *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, No. 76AP-366, 1976 WL 190343 (Ohio Ct. App. Nov. 4, 1976)).

163. *Edwards*, *supra* note 11, at 146.

164. *Id.* at 145. *Edwards* writes that *Simon* begs the question:

The question is typically posed as follows: in the absence of privity between the attorney and third parties, will liability be imposed against the attorney as to those third parties who have been harmed by his negligence? To this question, the Ohio Supreme Court has responded: no, because there is no privity between the third party and the attorney’s client. This response comes as close to question-begging as is possible in legal reasoning. The court has attempted to justify this position by reliance on a misstatement of the privity rule. Reasoning that since the privity rule requires privity between the third party and the *attorney’s client* for liability to be imposed, and since there is no such privity, liability will not be imposed.

*Id.* at 145-46.

165. *Id.* at 146.

166. *Edwards*, *supra* note 11, at 145. *See supra* notes 19-58 and accompanying text. *See generally* Barbara Morgan Theberge, Note, *Attorney Negligence in Real Estate Title Examination and Will Drafting: Elimination of the Privity Requirement as a Bar to Recovery by Foreseeable*

statement that regarded privity as a requirement for any legal-malpractice action, the United States Supreme Court held that, in the absence of privity of contract, fraud, collusion, or falsehood, the attorney did not owe the third party a duty of care.<sup>167</sup> Although subsequent cases have eroded the privity requirement in most jurisdictions,<sup>168</sup> the question of whether privity existed between the attorney and a third party remains the central issue.<sup>169</sup> Why would it matter whether the client and a third party are in privity with one another? If it did, then surely attorneys would have conflicts of interest because the attorney would have no idea with whom the client is in privity. Whether an attorney is in privity with a third party is the proper inquiry, as stated throughout American jurisprudence.

The misstatement of the rule is important. In upholding strict privity in *Shoemaker*, the Ohio Supreme Court relied heavily on precedent, particularly *Simon*.<sup>170</sup> However, cases such as *Simon* have adopted a rule in Ohio that is inconsistent with Anglo-American law and tradition concerning privity, and are undeserving of any significant precedential value.<sup>171</sup> In his concurring opinion in *Shoemaker*, Chief Justice Moyer discussed the importance of holding attorneys accountable in negligence for improperly drafting wills and the Court's willingness to reconsider Ohio's privity rule if a case with the appropriate facts presented itself.<sup>172</sup> Perhaps the *Shoemaker* court would have been willing to overturn its strict-privity rule if it accorded more weight to policy and less weight to precedent.

## 2. The Need for Attorney Accountability

In *Simon*, Justice Brown's dissent recognizes the need for a relaxing of strict privity.<sup>173</sup> In the same regard, in *Shoemaker*, Chief Justice Moyer was hesitant to agree with the majority and wrote a

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*Third Parties*, 17 NEW ENG. L. REV. 955 (1982); Barbara L. Walker, Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48 (1981); Joan Teshima, J.D., *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client*, 61 A.L.R.4TH 464 (1988), *superseded by* Joan Teshima, J.D., *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R.4TH 615 (1988).

167. See *supra* notes 19-33 and accompanying text.

168. See *supra* notes 34-58 and accompanying text.

169. *Id.*

170. See *supra* notes 141-55 and accompanying text.

171. See *supra* notes 162-73 and accompanying text.

172. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1174-75 (Ohio 2008) (Moyer, C.J., concurring).

173. See *supra* notes 110-12 and accompanying text.

separate, concurring opinion, which Justices Pfeifer and Lundberg Stratton joined, adopting many of the arguments of the dissent in *Simon*.<sup>174</sup> Arguing to relax strict privity in Ohio, both the dissent in *Simon* and the concurrence in *Shoemaker* recognized that an attorney who negligently prepares a will is essentially immune from liability for malpractice in Ohio.<sup>175</sup> In this situation, “[t]he only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim.”<sup>176</sup> In other words, the testator, who is in privity with the attorney, has standing to sue, but did not suffer any loss; whereas the intended beneficiary, who is not in privity with the attorney, did suffer a loss, but has no standing to sue because of a lack of privity. Otherwise, “the injury or property loss would fall to the victim, his or her family members, or the taxpayers.”<sup>177</sup> The loss to the intended beneficiary would be one without a remedy. The attorney is the least cost avoider because the attorney can prevent the loss by exercising adequate diligence in seeking the advice of an attorney well-versed in the point of law at issue or implementing precautionary procedures designed to discover negligence before any resulting harm.<sup>178</sup> Damage

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174. *Shoemaker*, 887 N.E.2d at 1173 (Moyer, C.J., concurring). Moyer wrote that “there is a strong need for attorney accountability in preparing wills.” *Id.* at 1174.

175. *Simon v. Zipperstein*, 512 N.E.2d 636, 639 (Ohio 1987) (Brown, J., dissenting); *Shoemaker*, 887 N.E.2d at 1174 (Moyer, C.J., concurring). See Morley, *supra* note 25, at 1138. Morley writes:

No valid public policy is served by this immunity. In fact, by shielding attorneys from the consequences of their negligence, the majority has undermined the strong policy of encouraging attorneys to represent their clients competently. While providing absolute immunity to attorneys for negligent will preparation is of some benefit to the practicing bar, it does an immense disservice to the public at large.

*Id.* at 1138-39.

176. Newman, *supra* note 160 (citing *Ross v. Caunters*, 3 All E.R. 580, 582 (Ch. 1980)).

177. Mason, *supra* note 20, at 393 (“The theoretical foundations of tort law stress shifting loss away from the innocent party, because an important function of tort actions ‘is to restore plaintiffs to the position they were in prior to the injury by awarding monetary damages.’”).

178. Fogel, *supra* note 22, at 310-11. The least-cost avoider is the “individual who, through the exercise of due care, could have prevented the damage at the lowest cost.” *Id.* at 310.

In contrast, it would be difficult for the client to uncover and rectify the attorney’s negligence. In order to do so, the client would likely need to retain a second attorney to review the work of the first. Obviously, this is wasteful and doubles the cost to the client of estate planning services. Further, the client would be forced to reconcile the differences between the attorneys’ advice—a difficult task for a layperson.

*Id.* at 311. In particular, the California Supreme Court concluded in 1961, in *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961), “that the elimination of strict privity ‘does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.’” Mason, *supra* note 20, at 394 (quoting *Lucas*, 364 P.2d at 688). “[F]ailure to expand liability deprives deserving plaintiffs of a source of compensation for what may well be substantial injuries. Often, the attorney will be the only one in a position to make

to an intended beneficiary in the estate planning context is clearly foreseeable because the intended beneficiary is the one whom the transaction was expected to benefit.<sup>179</sup>

There is a need for attorney accountability in the preparation of wills because without such a sanction, there is little incentive for estate-planning attorneys to exercise reasonable care.<sup>180</sup> In most cases, the attorney's negligence is not discovered until after the death of the testator.<sup>181</sup> Because a will operates only upon the death of the testator, no malpractice claim may be brought because the only individual with a valid claim is dead.<sup>182</sup> The malpractice claim dies with the testator. Therefore, most jurisdictions, except for nine states including Ohio, have been unwilling to use strict privity to immunize attorneys from malpractice liability for negligent estate planning.<sup>183</sup>

The dissent in *Simon* and the concurrence in *Shoemaker* also point out that there is no real conflict of interest in negligent estate planning cases.<sup>184</sup> In drafting a will, the attorney is mindful that the testator has employed the attorney in order to benefit a third party, and that the intended beneficiary, not the client, will experience the consequences of any negligence in the preparation of the will.<sup>185</sup> The sanctity of the attorney-client relationship can be maintained because the interests of a third party will mirror that of the attorney's client. At the very least, it is unlikely to threaten the attorney's zealous representation of her client.<sup>186</sup>

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the plaintiff 'whole.' Erecting an impenetrable wall of privity denies those plaintiffs relief." Silecchia, *supra* note 61 at 445-46.

179. Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961).

180. Ellen S. Eisenberg, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126, 127 (1982).

181. Silecchia, *supra* note 60, at 446-47.

182. *Id.*

183. *Simon v. Zipperstein*, 512 N.E.2d 636, 639 (Ohio 1987) (Brown, J., dissenting). These courts have recognized the absolute immunity that would otherwise result for negligent attorneys.

184. *Id.* at 640; *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1174 (Ohio 2008) (Moyer, C.J., concurring).

185. *Simon*, 512 N.E.2d at 639. Opposing this argument, advocates for the strict-privity rule argue that a relaxing of strict privity will hinder attorneys' zealous representation of clients and open the door to massive malpractice liability. Cifu, *supra* note 52, at 14-20. However, in the estate planning context, the expectations of third parties likely mirror that of the testator and both desire the same outcome. Morley, *supra* note 25, at 1136-37.

186. The majority opinion in *Simon* held that the obligation of an attorney is to represent the needs of the client, not those of a third party not in privity with the client. *Simon*, 512 N.E.2d at 638. In response, Justice Brown, in his dissent, agreed but remarked:

Where the attorney's job is to draft a will, however, the needs of the client simply require the attorney to competently construct an instrument that will carry out the client's intentions as to the distribution of his or her property upon death. If the attorney negligently fails to fulfill those needs, with the result that an intended beneficiary receives less than the client desired, surely the client, if he or she were still alive, would

Therefore, permitting a third-party claim in the negligent estate planning context is unlikely to have the same deleterious effects on an attorney's representation of her client as a third-party claim in an adversarial proceeding.<sup>187</sup> This is because testators take the time to properly dispose of their property by will according to their wishes. Absent fraud, duress, or undue influence, wills are the final embodiment of how a testator wants to have their property distributed after death. Unlike adversarial proceedings, where the interests of a third party may not be in line with the attorney's client, intended beneficiaries of wills likely share the same desires as the attorney's client.<sup>188</sup> In the estate planning context, the attorney assumes a relationship not only with the client, but also with the intended beneficiary, because harm to both is equally foreseeable.<sup>189</sup>

For example, in *Shoemaker*, was it likely that Margaret desired to have her estate liquidated in order to pay the estate taxes on the Hanna Farm at the expense of her other two children?<sup>190</sup> Was it equally likely that Margaret would not have searched for an alternative mode of disposition, perhaps a trust, had she been made aware of the tax consequences of her transfer of the Hanna Farm? The answer is likely "no" because Margaret took the time to see an attorney and dispose of her property equally to her children upon her death.<sup>191</sup> If Margaret desired her other two children to receive nothing from her estate, she could have disinherited them. Yet, she did not.<sup>192</sup> Margaret wished for her three children to share equally, and her wishes were thwarted when

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want the intended beneficiary to bring an action against the attorney.

*Id.* at 640 (Brown, J., dissenting).

187. Morley, *supra* note 25, at 1136-37.

188. *Id.* at 1137.

189. *Id.* (citing *Heyer v. Flaig*, 70 Cal. 2d 223, 228 (1969), *superseded by statute on other grounds*, CAL. CIV. PROC. CODE § 340.6 (West 1977), *amended by* 2009 Cal. Legis. Serv. Ch. 432 (A.B. 316) (West), *as recognized in* *Laird v. Blacker*, 2 Cal. 4th 606, 611 (Cal. 1992)). In *Heyer*, the California Supreme Court explained:

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. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests.

*Id.* at 228-29.

190. *See supra* note 122 and accompanying text.

191. *See supra* notes 118-24 and accompanying text.

192. *Id.*

one child took essentially *everything* due to attorney malpractice.<sup>193</sup> Attorney negligence depleted the bequests to two of Margaret's three children in order to pay estate taxes, and neither of the two children had standing to sue because neither was in privity with the attorney or Margaret.<sup>194</sup> Not only did the children lose their inheritance, but also the right to state a claim and have their day in court.<sup>195</sup> Therefore, the need for attorney accountability in the preparation of wills is too great to ignore.<sup>196</sup>

### 3. The Lone Profession: Ohio Lawyers Should No Longer be the Exception to the Liberal Privity Rule for Professionals

In Ohio, courts have virtually eliminated the privity rule in every context except legal malpractice.<sup>197</sup> Ohio has relaxed strict privity in the fields of medicine, accounting, manufacturing, insurance, appraising, and architecture.<sup>198</sup> For example, in Ohio, a physician whose negligence results in a patient's death is responsible to the patient's spouse for loss of consortium or loss of services, notwithstanding a lack of privity.<sup>199</sup> Likewise, an accountant may be held liable by a third party for professional negligence if the third party's reliance on the accountant was foreseeable.<sup>200</sup> Yet, the strict-privity rule remains in the legal

193. In *Shoemaker*, there was evidence that the attorney never considered the federal or state estate tax consequences of the transfer of the Hanna Farm. Merit Brief of Appellants Robert E. Schlegel, Executor, et al., *supra* note 118, at 3. In fact, Gindlesberger admitted in his deposition that he did not learn of the existence of such consequences until after Margaret's death. *Id.*

194. *See supra* note 122 and accompanying text.

195. Mason, *supra* note 20, at 390 (advocating an elimination of the privity requirement in Nebraska because there is "potentially too much to be lost by beneficiaries--namely the right to state a claim and have their day in court—to completely preclude them from recovery simply because they lack a contractual relationship.")

196. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1174 (Ohio 2008) (Moyer, C.J., concurring).

197. Morley, *supra* note 25, at 1135. "In the law of torts, the use of privity as a tool to bar recovery has been riddled (and rightly so) to the extent that we are left with legal malpractice as, perhaps, the only surviving relic." *Simon v. Zipperstein*, 512 N.E.2d 636, 639 (Ohio 1987) (Brown, J., dissenting).

198. *See supra* notes 112-18 and accompanying text.

199. *See Shaweker v. Spinell*, 181 N.E. 896 (Ohio 1932) (holding that a spouse could bring an action against physicians who performed a fatal hysterectomy upon the spouse's wife, but collect damages only for the time between the malpractice and the wife's death). However, because Rose Spinell died immediately, A.T. Spinell was unable to collect damages. *Id.*

200. *See Haddon View Inv. Co. v. Coopers & Lybrand*, 436 N.E.2d 212, 215 (Ohio 1982) (holding that "an accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen.").

profession.<sup>201</sup> Why is the legal profession different from other professionals in Ohio? After all, people have the same right to choose their lawyer as they do their doctor. In particular, why does strict privity remain in Ohio's estate planning context, where there is little, if any, conflict of interest?<sup>202</sup> In fact, most jurisdictions that have considered the question have recognized a limited exception to strict privity for malpractice in the areas of negligent estate planning and non-adversarial transactions.<sup>203</sup> Expanding liability for attorneys will bring all professionals under the same standard in Ohio, eliminating the special privileges that attorneys enjoy above other professionals like physicians and accountants.<sup>204</sup>

Ohio's liberal rule of privity for professionals other than attorneys is a slippery slope, particularly when it excludes the negligent estate planning and non-adversarial transactions of attorneys, because not all professionals are under the same standard. Just as it is foreseeable that a third party will rely on the services of an accountant or that a husband will suffer a loss as a result of a physician's negligent care of his wife, it is equally foreseeable that an intended beneficiary will suffer harm from a negligently prepared will.<sup>205</sup>

Although in *Shoemaker* there was no conflict of interest in the will and codicil preparation as both the client and the intended beneficiary had the same expectations and desires, there will likely be instances where a conflict of interest will exist between the attorney, the client, and third parties.<sup>206</sup> However, notwithstanding privity, a third party should be able at the very least to assert a malpractice claim if the attorney was negligent. Just as all malpractice cases are fact-intensive and highly circumstantial, it should be left to the judge and jury to decide whether there was in fact negligence and whether a conflict of interest did exist. "Obviously the main purpose of a contract for the drafting of a will is to accomplish the future transfer of the estate of the testator to the beneficiaries named in the will . . . ."<sup>207</sup> The testator communicates her wishes to the attorney of how she would like her

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201. See *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167 (Ohio 2008).

202. See *supra* note 186 and accompanying text.

203. See *Morley*, *supra* note 25, at 1135-36.

204. *Silecchia*, *supra* note 60, at 447-48. ("Although 'there are distinctive aspects of lawyer-client relationships for courts to consider,' these may not justify completely different treatment for members of the legal profession vis-à-vis their colleagues in other professions.")

205. See *supra* notes 198-200 and accompanying text.

206. See *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167 (Ohio 2008).

207. *Lucas v. Hamm*, 364 P.2d 685, 688 (Cal. 1961).

property distributed after her death and the intended beneficiary of the will expects the testator's intent to be carried out.<sup>208</sup>

If intended beneficiaries of wills were not permitted to bring an action against the negligent attorney, there would be a wrong without a remedy and a frustration of the testator's intent.<sup>209</sup> Though *Shoemaker* suggests that a claim could be brought in the name of the estate,<sup>210</sup> this is unlikely. In negligent estate planning cases, it is the beneficiaries that suffer the loss. Although oftentimes a beneficiary of a will is also the executor of the estate, there is no guarantee that the executor will bring a claim. In *Shoemaker*, the estate taxes on the transfer of the Hanna Farm were paid out of Anna and Robert's shares.<sup>211</sup> Although Robert was the executor of Margaret's estate and may have pursued a claim on behalf of the estate, Anna would have been left with no remedy had Robert not chosen to do so.<sup>212</sup> In cases like *Shoemaker*, the client employs the attorney for the sole purpose of benefiting others, and the attorney knows that negligence on her part will fall upon those intended beneficiaries of the estate. As a matter of public policy, the one who commits the error and causes the loss should provide the remedy.<sup>213</sup>

#### *B. Shoemaker Implicated Two Internal Revenue Code Provisions Regarding the Transfer of the Hanna Farm*

In *Shoemaker*, the transfer of the Hanna Farm to Roy implicated two Internal Revenue Code provisions, I.R.C. § 2036 and I.R.C. § 2207. First, I.R.C. 2036 states that the value of a decedent's gross estate shall include, namely, any and all inter vivos transfers of which the decedent enjoyed possession of or retained the right to income.<sup>214</sup> In *Shoemaker*, the Ohio Supreme Court invoked I.R.C. § 2036 because the transfer of

208. *See id.*

209. *See supra* note 60 and accompanying text.

210. *Shoemaker*, 887 N.E.2d at 1171-72.

211. *See supra* note 122 and accompanying text.

212. *See supra* notes 124-34 and accompanying text.

213. *See supra* note 60 and accompanying text.

214. I.R.C. § 2036(a) (2006). The Code Provision reads:

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

*Id.*

the Hanna Farm to Roy retained a life estate for Margaret.<sup>215</sup> As a result, the probate court included the Hanna Farm in Margaret's gross estate upon her death and the estate was charged taxes on its transfer.<sup>216</sup> Although there is evidence that Gindlesberger was unaware of these tax implications,<sup>217</sup> the transfer still resulted in negligence on the part of Gindlesberger and a depletion of Anna and Robert's shares of the estate.<sup>218</sup> Perhaps, if Gindlesberger would have sought the advice of another attorney and used an alternative means of transferring the Hanna Farm to Roy while retaining a life estate in Margaret by way of trust or alternative instrument, the Ohio Supreme Court would not have had to invoke I.R.C. § 2036.

Second, I.R.C. § 2207 states:

Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate . . . . , the executor shall be entitled to recover from the person receiving such property . . . . such portion of the total tax paid as the value of such property bears to the taxable estate.<sup>219</sup>

For example, in *Shoemaker*, the executor Robert would be able to recover the value of taxes paid by the estate on the transfer of the Hanna Farm to Roy. If I.R.C. § 2207 applied in *Shoemaker*, then Anna and Robert would not have suffered any loss at all (excluding legal fees) because they could recover the estate taxes from Roy, thus saving Gindlesberger.<sup>220</sup> If, however, I.R.C. § 2207 did not apply in

215. See *supra* note 119 and accompanying text.

216. *Id.*

217. See *supra* note 118 and accompanying text.

218. See *supra* note 121 and accompanying text.

219. I.R.C. § 2207 (2006). The Code Provision reads:

Unless the decedent directs otherwise in his will, if any part of the gross estate on which the tax has been paid consists of the value of property included in the gross estate under section 2041, the executor shall be entitled to recover from the person receiving such property by reason of the exercise, nonexercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the taxable estate. If there is more than one such person, the executor shall be entitled to recover from such persons in the same ratio. In the case of such property received by the surviving spouse of the decedent for which a deduction is allowed under section 2056 (relating to marital deduction), this section shall not apply to such property except as to the value thereof reduced by an amount equal to the excess of the aggregate amount of the marital deductions allowed under section 2056 over the amount of proceeds of insurance upon the life of the decedent receivable by the surviving spouse for which proceeds a marital deduction is allowed under such section.

*Id.*

220. See *id.*

*Shoemaker*, perhaps due to a statute of limitations issue, then Gindlesberger was unquestionably negligent in failing to address the estate tax apportionment issue with Margaret.<sup>221</sup> Gindlesberger would have been negligent in this regard because the inter vivos transfer of the Hanna Farm to Roy ultimately depleted the shares of Anna and Robert.<sup>222</sup>

Furthermore, an additional argument could be made regarding the appreciation in value of the Hanna Farm. There is no doubt that any competent wills and trusts attorney is aware of the payment of estate taxes due at the death of the decedent. At the time that Gindlesberger prepared the codicils, Gindlesberger should have been aware that the Hanna Farm would appreciate in value, particularly with the improvements that Roy made on the property.<sup>223</sup> At this time, Gindlesberger should have discussed with Margaret the possibility that the Hanna Farm may appreciate in value to the point where estate taxes would be due at death, which would ultimately raise the apportionment issue.

*C. Was the General Warranty Deed in Preparation of the Will or a Financial Transaction Independent of the Will?*

In *Shoemaker*, Chief Justice Moyer's concurrence acknowledged that "in a case with different facts, there would be compelling reasons for adopting the exception we rejected in *Simon*."<sup>224</sup> The main premise of Moyer's concurrence was that *Shoemaker* involved beneficiaries seeking to hold the testator's attorney liable for negligence in a *financial transaction independent from the will*, whereas *Simon* involved a beneficiary seeking to hold the testator's attorney liable for negligence *in the preparation of the will*.<sup>225</sup> However, when one takes a closer look at

221. *See id.*

222. *See supra* notes 121-22 and accompanying text.

223. *See supra* note 119 and accompanying text.

224. *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1172-73 (Ohio 2008). The exception rejected in *Simon* was that "an attorney could be liable to his client's beneficiaries for negligence in connection with a large and loosely defined group of transactions." *Id.* at 1172. Chief Justice Moyer wrote separately in order to distinguish the *Simon* exception from the one proposed by Margaret's children in the *Shoemaker* case. *Id.*

225. *Id.* at 1173.

In the present case, the beneficiaries seek to hold the decedent's attorney liable for negligence *in a financial transaction independent of the will*. In particular, the beneficiaries alleged negligence in the attorney's preparation of a deed that transferred the decedent's property to her son and reserved a life estate for the decedent. In *Simon*, the beneficiary sought to hold the decedent's attorney liable for negligence *in the preparation of the will*. Among other things, the beneficiary sought damages for the

the facts of *Shoemaker*, one may make the argument that the attorney's negligence in *Shoemaker* did in fact occur in the preparation of the will. According to Ohio Revised Code § 2107.01, a codicil to a will is part of the original will.<sup>226</sup> Further, a subsequent codicil to a will may republish a prior will as of the date of the codicil, if consistent with the testator's intent.<sup>227</sup> This doctrine is known as republication by codicil.<sup>228</sup>

In *Shoemaker*, attorney Gindlesberger prepared the last will and testament of Margaret in 1986.<sup>229</sup> In 1990, Gindlesberger prepared the general warranty deed for Margaret that retained a life estate for Margaret in the Hanna Farm and transferred a joint life estate in the Hanna Farm to Margaret's son Roy and his wife with joint right of survivorship.<sup>230</sup> Subsequent to the general warranty deed, Gindlesberger also prepared two codicils for Margaret between 1994 and 1997.<sup>231</sup> Gindlesberger prepared the first of the codicils for Margaret on October 17, 1994.<sup>232</sup> There is also evidence in the record, according to Gindlesberger's office notes, that on May 31, 1996, Gindlesberger consulted with and reviewed Margaret's estate plan with her, Anna, and Robert.<sup>233</sup>

According to the doctrine of republication by codicil, a subsequent codicil to a will republishes the will as of the date of the subsequent codicil.<sup>234</sup> Margaret's original will and testament was republished on October 17, 1994, the date of the first codicil and four years subsequent to the general warranty deed.<sup>235</sup> As a result, although the deed was a

attorney's failure to include a provision in the will renouncing an existing antenuptial agreement.

*Id.*

226. OHIO REV. CODE ANN. § 2107.01 (LexisNexis 1992) (“[A] ‘will’ includes codicils to wills admitted to probate, lost, spoliated, or destroyed wills . . . but ‘will’ does not include inter vivos trusts or other instruments that have not been admitted to probate.”).

227. See RESTATEMENT (THIRD) OF PROP.: WILLS & DON. TRANS. § 3.4 (T.D. No. 2, 1998) (“A will is treated as if it were executed when its most recent codicil was executed, whether or not the codicil expressly republishes the prior will, unless the effect of so treating it would be inconsistent with the testator's intent.”). See also *Trull v. Patrick*, 22 Ohio N.P. (n.s.) 385 (1920); *In re Estate of Stormont*, 517 N.E.2d 259 (Ohio Ct. App. 1986); *In re Will of Stocker*, 26 Ohio N.P. (n.s.) 112 (1926). This doctrine is referred to as republication by codicil.

228. *Id.*

229. See *supra* note 118 and accompanying text.

230. See *supra* note 119 and accompanying text.

231. See *supra* note 118 and accompanying text.

232. See *id.*

233. See Merit Brief of Appellants Robert E. Schlegel, Executor, et al., *supra* note 118, at 3.

234. See *supra* notes 226-28 and accompanying text.

235. Furthermore, a second codicil republished Margaret's will and testament yet again either on May 31, 1996 or July 3, 1997 (the record is unclear). Merit Brief of Appellants Robert E. Schlegel, Executor, et al., *supra* note 119, at 3. In either case, Margaret's will was republished following the date of the general warranty deed. *Id.*

financial transaction independent from the original will, *it was no longer independent from the republished will*.<sup>236</sup> The deed may now be considered in preparation of the will.<sup>237</sup>

In *Shoemaker*, Chief Justice Moyer was hesitant in upholding Ohio's privity rule and seemed willing to revisit the decision of *Simon* only if presented with a different set of facts.<sup>238</sup> However, the concurrence overlooked the facts that were present before them. Just as the *Simon* majority based its holding on a misstatement of the privity rule,<sup>239</sup> the concern of the concurring judges in *Shoemaker* that the general warranty deed was not in preparation of the will was misguided. In fact, the general warranty deed was in preparation of the will because it occurred before the codicils republished the will.<sup>240</sup> Therefore, the will was duly executed as of the date of the last codicil and Gindlesberger was negligent for failing to discuss with Margaret the apportionment of the estate tax liability attributable to the transfer of the Hanna Farm with the retained life estate. In reality, the concurrence did not need to wait for a different set of facts to revisit *Simon*.<sup>241</sup> The court could have revisited *Simon* in *Shoemaker*.

In *Shoemaker*, the lack of privity defense survived, but just barely.<sup>242</sup> Two other justices joined Chief Justice Moyer's concurrence, making the holding in *Shoemaker* not to overrule *Simon* a four-to-three decision.<sup>243</sup> The three justices who joined in the concurrence were ready and willing to overrule Ohio's longstanding adherence to strict privity, and should have done so in *Shoemaker*. Had the concurrence taken a closer look at the facts, the Ohio Supreme Court would have been able to abandon its strict-privity rule.

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236. See *supra* notes 226-28 and accompanying text.

237. *Id.*

238. *Shoemaker*, 887 N.E.2d at 1174-75 (Moyer, C.J., concurring).

239. See *supra* notes 155-58 and accompanying text.

240. See *supra* notes 226-28 and accompanying text.

241. See *Shoemaker*, 887 N.E.2d at 1174-75 (Moyer, C.J., concurring) ("For this reason, if presented with a different set of facts, I would be in favor of revisiting our decision in *Simon* in the context of the holding of *Westfield Ins. Co. v. Galatis*." (citations omitted). In *Westfield Insurance Company*, the Ohio Supreme Court highlighted the importance of precedent in the American judicial system:

Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

*Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1260 ¶ 1 (Ohio 2003).

242. See generally Newman, *supra* note 160.

243. *Id.*

## V. CONCLUSION

In *Shoemaker*, the Ohio Supreme Court held that “a beneficiary of a decedent’s will may not maintain a negligence action against an attorney for the preparation of a deed that results in increased tax liability for the estate.”<sup>244</sup> With its decision, the Ohio Supreme Court “[trotted] out that old chestnut, privity,”<sup>245</sup> maintaining its strict-privity rule for legal malpractice cases. Yet, the Court reaffirmed a rule that was misstated and incorrectly applied when compared to the Anglo-American legal tradition.<sup>246</sup> Ohio is the only jurisdiction to have interpreted the strict-privity rule to mean privity between the client and a third party rather than privity between the client and the attorney.<sup>247</sup> Further, the concurring judges in *Shoemaker* expressed willingness to revisit its strict-privity rule if presented with an alternative set of facts.<sup>248</sup> However, the concurrence’s unwillingness to dissent in *Shoemaker* and vote to reverse *Simon* was based on a misguided reservation.<sup>249</sup> *Shoemaker* did present the Ohio Supreme Court with the proper set of facts to overrule *Simon*. When the doctrine of republication by codicil is applied, the deed becomes *in preparation of the will*, rather than a *financial transaction apart from the will*.<sup>250</sup> Although strict privity in legal malpractice cases lives on in Ohio, the Ohio Supreme Court in *Shoemaker* barely reaffirmed the rule.<sup>251</sup> Next time, the lawyer facing the malpractice suit may not be so fortunate.

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244. *Shoemaker*, 887 N.E.2d at 1168.

245. *Simon v. Zipperstein*, 512 N.E.2d 636, 639 (Ohio 1987) (Brown, J., dissenting) (“To reach this undesirable result, the majority trots out that old chestnut, privity.”).

246. *See supra* notes 159-72 and accompanying text.

247. *See id.*

248. *See supra* notes 155-58 and accompanying text.

249. *See supra* notes 159-72 and accompanying text.

250. *See supra* notes 224-43 and accompanying text.

251. *See supra* notes 242-43 and accompanying text.



