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Gallagher Sharp Newsflash: Legal Malpractice: Third Party Liability

Today, May 7, 2008, the Supreme Court of Ohio announced its decision in *Shoemaker v. Gindlesberger*, 2008-Ohio-2012, an important legal malpractice case. The Supreme Court of Ohio accepted review of the question of whether a beneficiary of a decedent's will may maintain a professional negligence action against an attorney for the preparation of a deed leading to increased tax liability for the estate. Declining the invitation to overrule *Simon v. Zipperstein* (1987), 32 Ohio St. 3d 74, 512 N.E.2d 636, Justice Lanzinger, writing for the Court, concluded that the "bright-line rule of privity" should remain the law in Ohio even though it is the minority rule.

The facts of *Shoemaker* are straightforward. Margaret Schlegel, the decedent, retained attorney Thomas Gindlesberger for estate planning. In 1986, Gindlesberger prepared a will, and later drafted two codicils. Her three children were beneficiaries under the will. In 1990, Schlegel contacted Gindlesberger for assistance with the transfer of certain real property to one of her children. When Schlegel died in 2003, the Schlegel children learned that estate assets would have to be sold to pay state and federal estate taxes owed on the transferred property. The Schlegel children sued Gindlesberger for professional negligence, arguing that Gindlesberger committed malpractice in preparing the document for the real estate transfer and in failing to advise their mother of the tax consequences of the transfer.

The Holmes County Court of Common Pleas granted summary judgment for the defendant-attorney. On appeal to the Fifth District Court of Appeals, the Schlegel children argued that the general rule of privity applied by the trial court should be abandoned in favor of a rule that allows beneficiaries to sue an attorney allegedly negligent in creating an estate plan. The appellate court disagreed, holding that the only person having an attorney-client relationship with Gindlesberger was their deceased mother, citing *Zipperstein* in affirming the decision of the trial court.

In the discretionary appeal to the Supreme Court of Ohio, the appellants again advocated a change in what some refer to as Ohio's antiquated rule on privity, arguing that Ohio law should grant beneficiaries standing to sue an attorney allegedly negligent in providing services to the decedent (thereby bringing Ohio in step with the majority of jurisdictions). Citing public policy considerations, the Supreme Court declined to relax the strict privity rule. First, the strict privity rule ensures that attorneys may represent their clients without the threat of suit from third parties who may compromise their representation. Second, without the strict privity rule, the attorney could have conflicting duties and divided loyalties during the estate planning process. Finally, there would be unlimited potential liability for the lawyer.

The concurring opinion of Chief Justice Moyer is important. The Chief Justice drew a "distinction with a difference," in his opinion between the facts presented in this case and those presented in *Zipperstein*. In *Zipperstein*, the beneficiary sought to hold the decedent's attorney liable for negligence in the preparation of the will. Here, the beneficiaries sued the decedent's attorney for negligence in a financial transaction independent of the will. Chief Justice Moyer

stated that if presented with facts analogous to those in *Zipperstein*, (i.e., a suit by a beneficiary against an attorney for the negligence in drafting a will), he would be in favor of revisiting that decision in the context of the holding of *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849. In other words, Chief Justice Moyer, along with concurring Justices Pfeifer and Lundberg Stratton, would overturn *Zipperstein* and find that privity exists for a beneficiary of a will, thus permitting a malpractice claim against a decedent's attorney by that beneficiary.

The *Shoemaker* case is the first decision in a series of three cases recently accepted by the Supreme Court of Ohio for review in the area of legal malpractice. On September 19, 2007, the Court heard oral arguments in *Paterek v. Peterson & Ibold*, Ohio Supreme Court Case No. 2006-1811, on the issue of collectibility in a legal malpractice case. Additionally, on April 22, 2008, oral arguments were heard in *Environmental Network Corp., et al. v. Goodman Weiss Miller, L.L.P., et al.*, Ohio Supreme Court Case No. 2007-0739. *Environmental*, as well as *Paterek*, provide the Court the opportunity for much needed clarification and guidance regarding the standard of proof required in legal malpractice claims in Ohio under *Vahila v. Hall*, 77 Ohio St. 3d 421, 1997.

The *Shoemaker* decision can be found at:

<http://www.sconet.state.oh.us/rod/docs/pdf/0/2008/2008-ohio-2012.pdf>

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