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## Shoemaker V. Gindlesberger: The Lack of Privity Defense Survives, But Just Barely

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# ***Shoemaker v. Gindlesberger: The Lack of Privity Defense Survives, but Just Barely***

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In *Shoemaker v. Gindlesberger*, decided in May of this year, 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>1</sup> In doing so, the Court approved and followed<sup>2</sup> its 1987 decision in *Simon v. Zipperstein*.<sup>3</sup> Under *Zipperstein*, an attorney who prepares a will for a client can not be liable in negligence to a third person the client intended to benefit under the will unless (i) the third person was in privity with the client<sup>4</sup> or (ii) there are special circumstances present, such as fraud, bad faith, collusion or other malicious conduct.

## **Facts and Lower Court Decisions**

As recounted in the Supreme Court’s opinion in *Shoemaker*, in 1986, attorney Thomas Gindlesberger prepared a will for Margaret Schlegel that devised her estate to her three children. Four years later, Gindlesberger prepared a deed for Ms. Schlegel that conveyed her farm to one of her children and his wife, while retaining a life estate for Ms. Schlegel. When Ms. Schlegel died in 2003, the transfer of the farm resulted in federal and state estate tax liabilities and necessitated the sale of estate assets to pay the taxes. The Schlegel children sued Gindlesberger for negligence.<sup>5</sup> He responded with a motion for summary judgment asserting that because he did not have an attorney client relationship with the children, they lacked standing to bring a claim of negligence against him.<sup>6</sup>

The Holmes County Court of Common Pleas granted Gindlesberger’s motion for summary judgment and the Fifth District Court of Appeals affirmed.<sup>7</sup> Both lower court decisions relied on the Supreme Court’s decision in *Zipperstein*, the holding of which is summarized above. In affirming the trial court’s decision, the Court of Appeals acknowledged that it was bound by *Zipperstein*, but “invited” the Supreme Court to revisit the issue “because there should be a remedy to any wrong.”<sup>8</sup>

## **The Supreme Court’s Decision**

As summarized in the Supreme Court's opinion, the Schlegel children argued that *Zipperstein* should be overruled for two reasons. First, in recent years courts in a number of other jurisdictions have abandoned the lack of privity defense.<sup>9</sup> Not persuaded, the Court acknowledged that the *Zipperstein* strict privity rule is the minority rule, but noted that that also was the case when *Zipperstein* was decided in 1987.<sup>10</sup>

Second, and more important, the children argued that injury to intended beneficiaries from an estate planner's negligence is foreseeable, and that abandoning the privity defense is necessary to hold estate planners accountable.<sup>11</sup> In response, the Supreme Court noted that courts from other jurisdictions have suggested that the personal representative of a decedent's estate might be able to pursue a malpractice claim against the decedent's lawyer without running afoul of the privity rule, and stated: "This may well be a solution to the problem, but it is a question for another day."<sup>12</sup> (Although it may be a question for another day for the Ohio Supreme Court, a 2000 Court of Appeals decision allowed a claim by a decedent's personal representative to proceed against the decedent's estate planning attorney for the attorney's alleged negligence that resulted in the payment of federal estate taxes that arguably could have been avoided.<sup>13</sup>)

In that regard, an interesting aspect of *Shoemaker* is that the claims against Gindlesberger were brought not only by the children individually, but also by one of them as executor of Ms. Schlegel's estate.<sup>14</sup> Given the Court's discussion of the possibility of an estate being able to pursue a malpractice claim against a decedent's estate planning lawyer, it seems unlikely that the Court would have affirmed a lower court grant of summary judgment with respect to the estate's claim, at least without discussing it. Further, in its summary of the background of the case, the Court stated: "The trial court granted Gindlesberger's motion for summary judgment, dismissing the negligence claims filed by the Schlegel children."<sup>15</sup> That statement arguably indicates that the Court viewed the trial court's ruling as applying only to the claims of the children, individually. However, as mentioned, one of the children was the executor of the estate and a party to the action against Gindlesberger in that capacity, and the statement could thus also have been referring to the negligence claim of that child, as executor. Moreover, the Court's majority opinion concludes by stating "we affirm the judgment of the Court of Appeals of Holmes County."<sup>16</sup> While it is not clear from the Court of Appeals' opinion that its judgment affirmed a grant of summary judgment by the trial court against the estate as well as against the children individually,<sup>17</sup> that may have been the case. (In that regard, the heading of the Court of Appeals' opinion identifies one of the parties as "Robert E. Schlegel, Executor of the Estate of Margaret E. Schlegel, et. al., Plaintiffs-Appellees."<sup>18</sup>)

At any rate, with respect to the possibility of a claim being brought by an executor of a decedent's estate against the decedent's estate planning lawyer, often the estate will not have incurred a loss. Rather, if an attorney's negligence does not result in a loss of estate assets, but results in one or more of the decedent's intended beneficiaries receiving less than intended (with one or more others receiving more than intended), the estate would not have suffered damages to be recovered. In such a circumstance, with the lack

of privity defense, “[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>19</sup>

Perhaps that is the case in *Shoemaker*, as the farm Ms. Schlegel gave to one of her children and his wife would have been included in Ms. Schlegel’s taxable estate if she had not made the gift. While that result could have been avoided if she had made an outright gift,<sup>20</sup> she apparently wanted to retain a life estate. Perhaps a claim could have been made by the estate’s executor that Ms. Schlegel was not advised of the tax consequences of the transaction and would have taken other more tax-wise action had she been so informed (such as making a series of annual exclusion gifts of interests in the farm to her son and his wife, without retaining a life estate). Such a claim, however, would have been speculative.

With respect to the basic issue addressed by *Shoemaker* – whether lack of privity should bar a claim by an intended beneficiary of a decedent’s will against the lawyer who drafted the will – the Supreme Court acknowledged that there are policy reasons both in favor of and against the lack of privity defense. It concluded, however, that the policy considerations supporting the rule outweigh those against it. Relying on decisions from other jurisdictions that recognize the lack of privity defense, as well as its decision in *Zipperstein*, the Court summarized its rationale for the privity rule:

Primarily, the rule is used to protect the attorney's duty of loyalty and the attorney's effective advocacy for the client. *Lewis v. Star Bank, N.A., Butler Cty.* (1993), 90 Ohio App.3d 709, 712-713, 630 N.E.2d 418. The strict privity rule ensures that attorneys may represent their clients without the threat of suit from third parties who may compromise that representation. *Barcelo v. Elliott* (Tex.1996), 923 S.W.2d 575, 578-579. 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. See *Zipperstein*, 32 Ohio St.3d at 76, 512 N.E.2d 636.

Second, without the strict privity 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. See generally *Sav. Bank v. Ward* (1879), 100 U.S. 195, 203, 25 L.Ed. 621 (without privity of contract, “absurd consequences to which no limit can be seen” will ensue). In *Ward*, the United States Supreme Court, in its seminal case discussing privity, noted that “[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.* Rather than expose the lawyer to the fifty, we conclude that lawyers should know in advance whom they are representing and what risks they are accepting.

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 privity with the lawyers [sic] client.<sup>21</sup>

Moreover, what the Court characterized as the “bright-line rule of privity”<sup>22</sup> furthers the attorney’s loyalty to the client. As noted by the Court, according to Gindlesberger Ms. Schlegel received exactly what she intended – a transfer of her farm with a retained life estate. While the transfer was not advantageous from a tax perspective, a client “may not wish to optimize tax liability, instead seeking to further a different goal.”<sup>23</sup> In sum, the Court declined to impose on estate planners a duty to beneficiaries because doing so “could lead to significant difficulty and uncertainty, a breach in confidentiality, and divided loyalties.”<sup>24</sup>

### **Justice Moyer’s Concurrence**

In *Shoemaker*, the focus of the children’s claims against Gindlesberger was not his preparation of their mother’s will, but was instead his preparation of the deed by which she conveyed her farm, while retaining a life estate, and the estate tax consequences associated with that transfer. According to Justice Moyer’s separate concurring opinion, which was joined by Justices Pfeifer and Lundberg Stratton, the children “cite no case in any jurisdiction [that] allows beneficiaries to sue the decedent’s attorney for negligence in a financial transaction independent of the will.”<sup>25</sup> Unwilling to impose a duty on a lawyer to third persons in such circumstances, Justices Moyer, Pfeifer and Lundberg Stratton concurred with the majority’s decision.

Instead of simply joining the majority opinion, Justice Moyer issued a separate concurrence to state his view “that there would be compelling reasons to recognize a cause of action by an intended beneficiary against the decedent’s attorney for negligence in preparation of the will.”<sup>26</sup> The opinion notes that courts in many other jurisdictions have allowed such claims and adopts the arguments of the dissent in *Zipperstein*:

I am persuaded that, as Justice Brown argued [in *Zipperstein*], the issue of an attorney's conflict of interest does not arise if an intended beneficiary has a cause of action in negligence for an attorney's preparation of a will. I am also persuaded that there is a strong need for attorney accountability in preparing wills. It serves no purpose to continue to invoke a strict rule of privity to protect the malpractice of a lawyer when we have abrogated that rule with respect to the liability of other professionals, such as accountants and architects. For this reason, if presented with a different set of facts, I would be in favor of revisiting our decision in *Zipperstein* in the context of the holding of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.<sup>27</sup>

Again, two other justices joined Justice Moyer's concurrence, making the holding in *Shoemaker* not to overrule *Zipperstein* a four to three decision.

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<sup>1</sup> \_\_\_ N.E.2d \_\_\_, 118 Ohio St. 3d 226, 2008 WL 2001969, \*1 (Ohio 2008).

<sup>2</sup> *Id.*

<sup>3</sup> 512 N.E.2d 636 (Ohio 1987).

<sup>4</sup> The rule allowing a malpractice claim to be asserted against an attorney when the plaintiff was in privity with the attorney's client served as the basis for allowing a beneficiary of a decedent's estate to sue the attorney for the personal representative of the estate in *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989). *See also* *Arpadi v. First MSP Corp.*, 628 N.E.2d 1335 (Ohio 1994) (allowing claims by limited partners against the general partner's attorney). Under R.C. §1339.18, however, which was enacted in response to *Arpadi*, and renumbered as §5815.16 in connection with the recent enactment of the Ohio Trust Code:

(A) Absent an express agreement to the contrary, an attorney who performs legal services for a fiduciary, by reason of the attorney performing those legal services for the fiduciary, has no duty or obligation in contract, tort, or otherwise to any third party to whom the fiduciary owes fiduciary obligations.

(B) As used in this section, "fiduciary" means a trustee under an express trust or an executor or administrator of a decedent's estate.

*See* Robert G. Dykes, "Scope of Lawyer's Duties in Estates and Trusts Clarified," 9 PROB. L. J. OF OHIO 44 (Jan./Feb. 1999); Wayne C. Dabb, Jr., "Bad News for Lawyers of Fiduciaries: The Arpadi Decision," 5 PROB. L. J. OF OHIO 73 (July/Aug. 1995).

<sup>5</sup> The Supreme Court's opinion summarizes the claims of the two children who were not grantees of the farm under the deed: "Gindlesberger was negligent in preparing the document for the transfer of the ... farm and in failing to advise their mother of the tax consequences of the transfer," and the transfer "increased the estate's tax liability." *Shoemaker* at \*1. The child who received the gift of the farm also sued Gindlesberger, alleging that his siblings' "lawsuit claiming depletion of their inheritance was caused by Gindlesberger's lack of knowledge of tax law." *Id.* at \*2. Presumably the farm was included in Ms. Schlegel's taxable estate under section 2036 of the Internal Revenue Code because of her retained life estate. The opinion indicates that Ms. Schlegel's will did not equitably apportion the estate tax liability to the transfers that generated the tax, but instead provided for all estate taxes due as a result of her death to be paid from the residue of her estate. Thus, it appears that the two children who did not receive an interest in the farm their mother gave to their brother may have effectively paid two-thirds of the estate tax attributable to it, or if the estate assets were not sufficient to pay the estate taxes, that their inheritances were completely depleted. At the date of this writing, litigation between the siblings over the estate is pending.

<sup>6</sup> Because the children did not allege that Gindlesberger had engaged in fraud, bad faith, collusion or other malicious conduct, that exception to the privity rule was not applicable. *Shoemaker* at \*3.

<sup>7</sup> *Shoemaker* at \*2. As discussed in notes 14-18 and the accompanying text, the personal representative of Ms. Schlegel's estate also was a party to the suit against Gindlesberger, and the status of that claim is not clear.

<sup>8</sup> *Schlegel v. Gindlesberger*, 2006 WL 3783537, at \*4.

<sup>9</sup> The Schlegel children presented "a survey of several jurisdictions that allow beneficiaries to bring malpractice claims." *Shoemaker* at \*3. An *amicus curiae* brief filed by the Ohio Association for Justice (OAJ) that urged the Court to reject the privity defense cites cases from 22 jurisdictions it claims have done so. (The brief states that the OAJ was previously known as the Ohio Academy [of] Trial Lawyers and "is comprised of approximately 1,715 attorneys practicing personal injury and consumer law in the State of Ohio.")

<sup>10</sup> *Shoemaker* at \*3.

<sup>11</sup> *Id.* at \*4.

<sup>12</sup> *Id.*

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<sup>13</sup> See *Hosfelt v. Miller*, 2000 WL 1741909 (Ohio. App.). See also *Belt v. Oppenheimer, Blend, Harrison & Tate*, 192 S.W.3d 780 (Tex. 2006).

<sup>14</sup> Shoemaker at \*1 and footnote 2.

<sup>15</sup> Shoemaker at \*2.

<sup>16</sup> Shoemaker at \*5.

<sup>17</sup> The Court of Appeals' opinion states: "The trial court granted Appellee Gindlesberger's motion for summary judgment dismissing the legal malpractice claims filed by appellant and appellees." *Schlegel v. Gindlesberger*, 2006 WL 3783537 at \*1. "Appellant" is identified in the opinion as one of the children, individually. "Appellees" are identified in the opinion only as "Robert Schlegel, et. al." *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Ross v. Caunters*, 3 All Eng. Rep. 580, 582 (Ch. 1980). Note that with the right set of facts, an alternative would be to reform the will to carry out the decedent's intent, to prevent an intended beneficiary from suffering a loss, to prevent one or more other beneficiaries from receiving a windfall, and to avoid the need for a malpractice case against the decedent's attorney. Under one of the new Restatements, a will, "though unambiguous, may be reformed to conform the text to the [testator's] intention if it is established by clear and convincing evidence" that (i) a mistake has occurred in the will and (ii) what the testator's intention was. RESTATEMENT (THRID) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS §12.1 (2003). While that rule has not been adopted in Ohio in the context of a will, the terms of a revocable trust may be reformed under such a rule under the recently enacted Ohio Trust Code. See R.C. §5804.15.

<sup>20</sup> If Ms. Schlegel had made an outright gift, the value of the gift, less any applicable annual exclusion, would have been an adjusted taxable gift that would have increased the amount on which estate tax was owed, but any appreciation in the value of the farm between the date of the gift and her date of death would have avoided estate tax.

<sup>21</sup> Shoemaker at \*4.

<sup>22</sup> *Id.* at \*5.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*6.

<sup>26</sup> *Id.* at \*7.

<sup>27</sup> *Id.* at \*8.