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4-13

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 79,085

MARTA ESPINOSA, et al.,

Appellants,

vs.

SPARBER, SHEVIN, SHAPO, ROSEN, etc., et al.

Appellees.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

LOWER TRIBUNAL CASE NUMBER 90-00006

ANSWER BRIEF OF APPELLEE ROSKIN

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STATEMENT OF THE CASE AND FACTS

Procedural Backsround

This case originated as an appeal from the dismissal with prejudice, on motions for summary judgment and dismissal for failure to state a cause, of a legal malpractice action brought by a family, the plaintiffs/appellants/petitioners wife ("Marta" or "Wife") and four children ("Lissette," "Natalie," "Gabriel" and "Patricia") of Rene Azcunce, deceased (the "Client"). The defendants/appellees/respondents are Howard Roskin ("Roskin"), a lawyer, and his employer at the relevant time period, the law firm of Sparber, Shevin, Rosen, Shapo & Heilbronner, P.A., n/k/a Sparber, Shevin, Shapo & Heilbronner, P.A. ("SSSH"). Collectively, the plaintiffs/appellants/petitioners will be referred to herein as the "Client's Family," and defendants/appellees/respondents will be referred to herein as the "Lawyers."

The alleged legal malpractice (RI 1-28)[1] is the supposed failure of the Lawyers to prepare a will and/or codicil on behalf of the Client which would treat his fourth and youngest daughter, Patricia, equally with the three older children (e.g., Amended Complaint, ¶'s 7, 8, 9 and 10), or to advise the Client of the need to revise his will to provide for equal treatment of the four children, as was allegedly "his intent at all relevant times" (AC ¶ 11). Patricia was born after the Client's execution of the will

[1] References to the Record on Appeal will be indicated as "RI" or "RII" for the volume number of the record, followed by the appropriate page numbers.

and first codicil, but before the execution of the second codicil.

The Lawyers, after discovery was conducted, moved for dismissal for failure to state a cause of action and for summary judgment (RI 29-73) based upon the grounds of lack of privity and lack of damage. Marta and Roskin both testified in the related will construction case before the Probate Court which was the subject of the appeal among the Client's Family members in Case Number 89-02234 in the Third District. Azcunce v. Estate of Azcunce, 586 So.2d 1216 (Fla. 3rd DCA 1991)(affirming the probate court). The transcript of the testimony in that case by Roskin (RII 5-36) and Marta (RII 36-40) and exhibits (including Roskin's April 4, 1986 letter and attachments in evidence as Exhibit 1, RI 41-71) were utilized by consent of all of the parties as the record for summary judgment purposes in the lower tribunal in this case.[2]

The Client's Family filed no opposing affidavits or other papers prior to the day of the hearing in the lower tribunal. The Client's Family only filed at the hearing itself its legal arguments in a response to the motions which made essentially the very same legal arguments urged before the Third District. The trial court then granted the motions to dismiss and the motions for summary judgment filed by the Lawyers, entered final judgment (RI 85-86), and the Client's Family appealed to the Third District. The Third District affirmed in part, reversed in part, and remanded

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[2] The probate Court, by Order, Findings of Fact and Conclusions of Law dated August 18, 1989 (RI 37-40), had determined that the testamentary documents prepared by the Lawyers clearly and unambiguously reflectedthe Client's intent and did not provide for Patricia to inherit.

the case to the trial court. Espinosa V, Sparber, Shevin, etc., et al., 586 So.2d 1221 (Fla. 3rd DCA 1991). Rehearing was denied November 6, 1991 (RI 103), and, pursuant to Article V, Section 3(b)(4) of the Florida Constitution, the Third District certified to this Court the question whether "Under the facts of this case, may a lawsuit alleging professional malpractice be brought , on behalf of Patricia Azcunce, against the draftsman of the second codicil. Essentially, the Third District concluded that (a) none of the Client's Family had the requisite privity to sue in their own right, (b) the Estate itself had privity to sue for a refund of the attorneys fees paid by the testator for drafting the will and codicils and the litigation expense it incurred in connection with the probate case, but not for the allegedly omitted bequest (which did not diminish the Estate), and (c) Lissette, Natalie and Gabriel suffered no damage because their bequests were increased to the extent Patricia would not share in the Estate.

The Will dated May 4, 1983

The gravamen of the claims of the Client's Family is that Patricia, the youngest daughter, is never mentioned -- by name or as a beneficiary in a class of born and unborn children -- in the Client's testamentary documents as an intended beneficiary of his estate when it was "really" the Client's intent to make her an equal beneficiary with the other children.

Roskin, an experienced probate and estate planning practitioner who has been practicing for 27 years (RII 5-6) prepared and supervised the preparation of the testamentary

documents which are the subject of this litigation. The original will and the two codicils were attached to the Amended complaint (RI 1-28). The original will was executed May 4, 1983 and provided (Article Fourth) for a marital trust taking full advantage of the maximum amount of property available through the "Unified Credit" under federal estate tax laws (approximately one half of the estate, subject to various adjustments). Significantly, paragraphs (a)(1)(a) and (a)(3) of Article Fourth allowed under certain circumstances for distributions of trust income or corpus to the three children then living (Lissette, Natalie and Gabriel) "without regard to equality of distribution" (emphasis added). This is what Roskin referred to as a **sprinkle trust" (RII 22) (the income being, presumably, like water which might be "sprinkled" irregularly upon different flowers, depending upon their watering needs).

Article Fifth of the original will provided for a residuary trust known by estate tax lawyers as a "QTIP Trust," which when properly drawn "qualifies you for a marital deduction under the federal [estate] tax laws" (RII 12), providing you meet "one of the requirements ... that the surviving spouse must receive all the income from that trust" that is distributable to her. Paragraph (a) of Article Fifth did indeed provide that "all of the net income from said [QTIP] Trust" would be paid to Marta "so long as my wife may live" which would have appeared to be satisfactory for federal estate tax purposes under'then current law. Only upon the death of Marta, which has not yet occurred (and if, as occurred here, she survived the Client), did the original will require equal

distribution of trust assets and income to Lissette, Natalie and Gabriel under Article Fourth and Fifth.

It is absolutely clear and unambiguous under Article Seventeenth of the original will that the term "my children" in the will meant Lissette, Natalie and Gabriel, and the term "my issue" meant Lissette, Natalie and Gabriel and their descendants. There was no "open-ended" or "class" definition by the use of those terms which would have included children to be born in the future. Roskin, as the experienced practitioner and drafter of testamentary documents, explained (RII 10, 11) his preference for using specific definitions rather than class terminology wherever possible with a "continuing client": "we use the people involved at the time, and just like anything, like death, divorce, additional children, marriage, we always assume he would come back and make the changes necessary at that time." The Client in this case was a "continuing client" who regularly used SSSH for corporate and other business matters on a continuing basis (RII 8, 18, 26 and 35), and who executed a will and two codicils (RI 5-28) and declined to sign a revised proposed will (Exhibit 1) over the 37 month period prior to his death.

Also of importance for determining this action is the fact that it is entirely speculative as to what portion of trust income or assets, if any, would have been or may in the future be available any point in time to Lissette, Natalie and Gabriel. Thus, the value of Patricia's putative bequest, were she have to been included within a class definition of children or issue, is

likewise entirely speculative. Examination of the distribution provisions of the Will make this clear.

As noted, the trust income "sprinkle" provisions referenced above for the marital trust make it impossible to determine, until Marta's death (which has not occurred), exactly what income would have been payable to any of the children during Marta's lifetime, and the residuary trust provides that all income belongs to Marta during her life (Will, Article Fifth, ¶(a)).

Thus, the children's interest in income during Marta's life is impossible to determine. Furthermore, the interests of Lissette, Natalie and Gabriel (and, inferentially, perhaps, the value of Patricia's putative bequest, were she have to been included within a class definition of children or issue) in the trust corpus is entirely speculative because of the power of the Trustees to invade trust corpus for Marta's benefit. The marital and residuary trusts provide that the Trustees "shall also distribute to my wife, Marta, ... such sums of trust corpus as the Trustees ... deem necessary to provide for her medical care and to support and maintain her at the standard of living which she enjoyed during the last three (3) years of our marriage, in the event her own assets are not adequate for said purposes" (Will, Article Fourth, ¶(a)(2), and Article Fifth, ¶(b). Thus, it is entirely possible that Marta's medical needs or her standard of living will leave no trust corpus[3]

[3] Indeed, Roskin and the Client later actually considered the possibility that the assets of the expected Estate were expected to be inadequate to fund the plan under the original Will, giving rise to the proposal of a new will being suggested for that very reason. See discussion, infra.

whatsoever available to her children on her death, and that no income will be payable to the children during Marta's lifetime -- whether or not Patricia was included or excluded from the Will or any other testamentary instrument executed by the Client. Accordingly, the value of the interests of the children are entirely too speculative a ground for a malpractice lawsuit.

The First Codicil dated August 8, 1983

As a result of "rumblings" that the IRS was possibly going to deny the favorable estate tax treatment to QTIP trusts that "left out the accrued income between the last payment and the date of death" as part of the required distribution of income to the surviving spouse, SSSH proposed to all clients of the firm a revision of the standard QTIP Trust provisions among its clients' wills to avoid any untoward tax-planning result (RII 12).[4]

The procedure followed by SSSH to implement the necessary changes was as follows (RII 11-14). Roskin drafted the form language necessary to assure the required income distribution of the arguable gap in income distribution (income which accrued after the last income distribution made to the surviving spouse through the date of death of the second-to-die spouse) by requiring payment thereof to the second-to-die spouse's estate. Paralegals then followed up with notification to the hundreds of estate planning clients of SSSH of the recommended changes. Roskin reviewed the

[4] Roskin's judgment concerning the "rumblings" and the need to amend the QTIP Trust language was vindicated when in 1988 "the tax court said if you didn't have that [the additional language for the gap period of accrued income] in there, you lose the marital deduction" (RII 12).

specific changes for his own clients' wills and may have reviewed those of other clients of the firm. Based on his notes, he specifically knew that he reviewed these changes as they applied to the Client in this case, with the changes being those reflected in the First Codicil dated August 8, 1983.

Roskin did not remember any discussion ("not on this one") with the Client or Marta concerning "new children that might be coming" "in connection with the execution of this codicil (the First Codicil]" (RII 14). He repeated "no" to another question about whether he recalled any discussion at August 1983 of an expected baby (when Marta's lawyer proposed Marta was seven weeks pregnant) (RII 15).[5] On the other hand, while Marta testified that she allegedly knew she was about two months pregnant with Patricia at August 1983 (RII 39), that the Client also allegedly knew she was pregnant (RII 39-40) and that she was present at "some" of the meetings with Roskin (RII 37), Marta never was asked to dispute, and the Client's Family never disputed in the Third District or in their initial brief in this Court, Roskin's claim that he had no recollection of ever being told of her then two-month pregnancy in connection with the preparation and execution of the First Codicil.

Nothing in the First Codicil purported to change Article Seventeenth of the original will (which was expressly republished

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[5] Roskin's first recollection concerning an after-born child, Patricia, was not until the 1986 time period (nearly three years later) in connection with the unsigned, revised proposed will submitted to the Client in April 1986 (Exhibit 1) and the Second Codicil (which was signed June 25, 1986) when Patricia was two years old (RII 15-17).

by the First Codicil) with respect to the definition of "my children" or "my issue" generally or to refer in any way to the pregnancy allegedly then known to the Client and Marta (but not to Roskin).

The Proposed April 4, 1986 Will and the Second Codicil dated June 25, 1986

Patricia was born March 14, 1984 (RII 37). Sometime thereafter, but prior to April 4, 1986, the Client telephoned Roskin about Patricia, and Roskin indicated that there was a need to "redo your will anyway" because of the decrease in the Client's assets available to fund the estate plan under the original will (RII 16). Roskin explained (RII 16):

> A. (Roskin): In my dealings with [h]is business, it appeared that there wasn't going to be much for the support of the wife if everything went into the trust the way it did.
>
> Q. The marital trust would be small?
>
> A. So we decided to redo the entire will, leave everything in QTIP form, and add Patricia, which I did.

Accordingly, Roskin prepared a revised estate plan for the Client (and Marta as well) encompassing those changes[6] and forwarded them to them for review by letter dated April 4, 1986 (RII 17-21; Exhibit 1 at RI 41-71), asking them to make an appointment to execute the documents. However, the new proposed wills were never executed (RII 17, 23). When the Client came in with the original documents to meet with Roskin on June 25, 1986

[6] Article Fifteenth of the revised proposed will would have, if executed by the Client, specifically included Patricia in the definition of children, along with Lissette, Natalie and Gabriel (RI 56; RII 25-26).

(RII 17, 24), a problem issue surfaced.

First, Roskin explained (RII 24) the proposed new wills would place everything in trust for Marta "because the assets had declined in value, and that using the bypass trust might not afford enough assets for the spouse during her lifetime." The Client responded (RII 24) that "he wasn't going to sign it that way, because he felt he had more life insurance," and "he was going to go back and check on that to make sure that he had the insurance." Roskin's information, however, was that the assets were not sufficient for the original plan and that the documents prepared were "what you need" (RII 25), which Roskin confirmed on his own thereafter with the Client's accountant, Mr. Jacobson (RII 27).

However, while the issue of the amount of assets available to fund the trusts and, therefore, what type of trust was most advisable could not be immediately resolved, the Client had a more urgent problem that he required be handled that same day. The original will provided (Article Tenth) that Maria B. Llerena, the Client's cousin, was a co-trustee and co-personal representative with Marta. One of the other changes desired (RII 25, 29) by the Client was to remove Llerena from the will as co-trustee and co-personal representative. Llerena had been in business with the Client, but the business had been split up, with the Client being bought out and the Client no longer got along well with Llerena. Therefore, when it became apparent that the proposed will could not be signed until the Client determined whether his assets were adequate (as he thought) or inadequate (as Roskin and the Client's

accountant thought), there was still a pressing need to remove Llerena from any possible role. Thus, the Second Codicil was prepared while the Client, Marta and two other relatives took a walk for an hour or so (RII 29), and the Second Codicil was executed on the Client's return. The Second Codicil deleted Llerena from Article Tenth of the original will and Marta and a sister of the Client were named co-trustees and co-personal representatives (RI 26-28).

Although the Second Codicil expressly republished the terms of the original will and the First Codicil, nothing in the Second Codicil expressly references anything about the definition in Article Seventeenth of the original will for "my children" or "my issue" generally or mentions Patricia in particular.

The Client died unexpectedly a few months thereafter in an automobile accident (RII 27) without ever executing the revised trust plan from the will proposed on April 4, 1986 or otherwise determining whether his assets were sufficient to make the original trust plan advisable.

The Client's Family is trying to tug on the "heart strings" of the Court by seeking a remedy for Patricia that simply was the result of the Client's failure to execute a new will and failure to determine who exactly was right concerning the extent of his assets. In fact, Roskin was presented with reconciling a veritable Hobson's choice of totally incompatible desires of the Client when the Client declined to execute the new will. The execution of the Second Codicil on June 25, 1986 was the best compromise under the

circumstances. If the Client had executed the new will proposed by Roskin (because he promptly determined Roskin was correct about his assets), or promptly established the extent of his assets were such that another will should have been prepared by Roskin, all problems could have been avoided. The problem was that the Client wanted to immediately rid his Estate of the possibility of Llerena serving as personal representative without waiting for these other matters being resolved. That required something to be executed immediately -- if not a will, at least a codicil removing Llerena. The Client's Family feels that if the Second Codicil had not been executed at all, then Patricia would have, as a minimum, received her intestate share under the pretermitted child statute, F.S. §732.302. However, such a share would have been received outright, which would not have been consistent with (a) the Client's expressed interest at all times to provide far his children only through a trust (whether a Q-tip or sprinkle trust) that first provided for Marta, and (b) might well have exceeded (or, on the other hand, fallen short) of the amount, if any, which the Client would have desired as appropriate for Patricia to receive under the language of those trusts. Alternatively, if the Second Codicil also added Patricia to the trust established by the original Will, that would very possibly have increased the problems concerning whether a Q-tip, sprinkle or other form of trust would have served the Client's interests best. Given all of these conflicting possibilities, the Second Codicil was obviously the least disruptive document. One can only speculate as to why the Client

never attended to completing the analysis of his financial affairs and coming back to Roskin to complete the process of executing the appropriate papers.

SUMMARY OF TEE ARGUMENT

Under the privity doctrine established by Ansel. Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987), DeMaris v. Asti, 426 So.2d 1153 (Fla. 3rd DCA 1983), and Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., 467 So.2d 315 (Fla. 3rd DCA 1985), the Client's Family, including Patricia, cannot sue the Lawyers for malpractice due to lack of privity with the Client and the Lawyers. The exception to the privity requirement in inheritance cases is inapposite because their claims are no more than those of disappointed beneficiaries who may not wove, by evidence extrinsic to the will, that the Client's intent was other than that expressed in the will. This exception is still sound on policy grounds. The recent trend toward expansion of the exceptions to the privity requirement which may be appropriate in other areas of the law (e.g., accounting, abstracting) is inappropriate in this area because the element of detrimental reliance by a third party upon the professional's advice or opinion is absent.

Furthermore, the Client had in his possession a proposed revised will prepared by the Lawyers which would have effectuated the alleged extrinsic intent which the Client chose not to execute. Under Boyd v. Brett-Major, 449 So.2d 952 (Fla. 3rd DCA 1984), the Lawyers were not required to force the Client to execute the revised will although they may have believed it best for the Client.

Finally, this Court should, in the interests of justice,

consider the entire ruling of the Third District, Fla.R.App.P. 9.040(a), and hold that in this case the Client's Family has failed to show requisite proof or allegations of proximately caused, non-speculative damages, even if the privity requirement were held not to bar any of their claims. Davenport v. Stone, 528 So.2d 45 (Fla. 3rd DCA 1988); and Lorraine, supra. The argument that the attorneys fees incurred in the drafting of the documents involved should be refunded (which was never pleaded below), or incurred by the Estate in the probate litigation, provides the requisite damage element is legally inadequate under Dayton v. Conger, 448 So.2d 609 (Fla. 3rd DCA 1984), State Farm & Casualty Co. v. Pritcher, 546 So.2d 1060 (Fla. 3rd DCA 1989), and Amisub of Florida, Inc. v. Billington, 560 So.2d 1271 (Fla. 3rd DCA 1990).

STATEMENT OF THE ISSUES PRESENTED

I. Should the privity requirement for a legal malpractice action be modified to allow a child not mentioned in a testamentary instrument to sue?

II. Was Arnold V. Carmichael decided incorrectly, or is it distinguishable?

III. Did the Estate demonstrate sufficient pleading and proof to satisfy the damage requirement for a legal malpractice action?

ARGUMENT

THE TRIAL COURT CORRECTLY ENTERED JUDGMENT FOR THE LAWYERS

I. Failure to Demonstrate Privity

This Court has authoritatively stated that legal malpractice against an attorney may only be brought by the client in privity with that attorney, with only certain limited exceptions. Ansel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So.2d 192 (Fla. 1987). Clearly, the decedent, Rene Azcunce, was the client, and thus his wife and four children are not in privity with Roskin and SSSH for purposes of being entitled to sue them for legal malpractice.

The only exception to the privity doctrine which might otherwise apply (but does not in this case) is the limited exception for heirs to sue lawyers when the "testamentary intent as expressed in the will must be frustrated by the attorney's negligence, and the beneficiary's legacy is lost or diminished as a direct result of such negligence." Ansel, Cohen & Rogovin, supra, 512 So.2d at 194 (emphasis supplied). Accord, Essinosa v. Ssarber, Shevin, etc. et al., 586 So.2d at 1222-1223; DeMaris v. Asti, 426 So.2d 1153, 1154 (Fla. 3rd DCA 1983); Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A., 467 So.2d 315, 317-319 (Fla. 3rd DCA 1985). Under this doctrine, however, "a disappointed beneficiary may not move, by evidence extrinsic to the will, that the testator's intent was other than that expressed in the will." Lorraine, supra, 467 So.2d at 318 (citing, DeMaris, supra, 426

So.2d at 1154) (emphasis added).

Applied to the contentions herein, the case law demonstrates that plaintiffs can state no cause of action. The intent as expressed in the will and codicils clearly and unambiguously includes only Lissette, Natalie and Gabriel, but not Patricia. Rather, the Client's Family complains that they wanted the Client to execute another document (that he never executed) expressly mentioning Patricia and treating her equally with the other three children, or establishing a class of then-living and afterborn children. Thus, the Client's Family seeks to prove through evidence extrinsic to the testamentary documents (contrary to DeMaris, Lorraine, and Cohen) what decedent "really" would have done had he been advised during his lifetime Patricia would not share equally in his estate with the three other children.

Notwithstanding the allegations of the Client's Family that the Client wanted equal treatment for his children[7], the Client intentionally failed to sign, as noted, the proposed April 4, 1986 testamentary document (see Exhibit 1 at RI 41-57) prepared by Roskin. This document was given to the Client to review and execute within an adequate time period before his death that would have treated the four children equally. Thus, to the extent Patricia was excluded from the Client's estate plans by the express documents he had executed, Patricia would have been included if the Client had expressed an intent to do so by executing the new will.

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[7] This contention is belied, as noted above, however, by the original will which under certain circumstances expressly did not require equal treatment of the oldest three children.

But the Lawyers had no obligation to pester or force the Client into executing the new will. See, Boyd v. Brett-Maior, 449 So.2d 952, 954 (Fla. 3rd DCA 1984)(a lawyer may not force a client to pursue a given course although the lawyer may believe it best for his client, as long as the client acts within the limits of the law).

The Client's Family implicitly recognizes in Point I of its brief that it cannot directly meet the exception for the will-drafting exception to the privity requirement (as enunciated by the Third District and the cases it relied upon). So it fashions a two-prong argument: (1) the spouse and children of a decedent, i.e., the decedent's closest relatives, occupy a special and elevated position under the "public policy" recognized by various provisions of the Florida Statutes relating to estate administration (a tautology with which one cannot disagree), and (2) "public policy" is an appropriate reason to extend into the will drafting arena the recent relaxation of the privity requirement for malpractice actions in certain other areas of the law, such as First Fla. Bank, N.A. v. Max Mitchell and Co., 558 So.2d 9 (Fla. 1990)(accounting)("First Fla. Bank")[8]. The only safeguard proposed by the Client's Family for the increased and open-ended risk resulting from their proposal is to require "clear

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8 Although not mentioned in the Initial Brief, First Fla. Bank also recognized that the privity requirement was relaxed for abstracter's liability for negligence to a customer known to be contracting for abstracting services intended to be relied upon by a prospective purchaser of the customer's property. First American Title Ins. Co. v. First Title Service Co., 457 So.2d 467, 473 (Fla. 1984)("First American Title").

and convincing parol evidence" in suits by spouses or children not mentioned in the will who claim they were harmed incidentally by the lawyer's alleged malpractice.

There is, however, no principled reason to expand the limited will-drafting exception that allows only persons expressly mentioned in the will to sue for the draftsman's negligence (which has served well for years), based upon the irrelevant accounting or abstracting cases. The key to understanding the abstracting and accounting cases is that they involve two levels of purely contractual, voluntary, contemporaneous business relationships: (1) a contract between the professional and a consumer of the professional's services where the professional knows or should know that the professional's work product is intended to be disseminated to a particular third party or a defined group of third parties, and (2) a contractual relationship between the consumer of the professional's services and the third party who in fact relies upon the professional's work product to his detriment. First Fla. Bank, 558 So.2d at 15; First American Title, 457 So.2d at 473. Indeed, in the usual case, if the third party determines the professional's work product satisfies his purposes, he completes the closing of the transaction in reliance upon that work product.

In no realistic sense, however, can a beneficiary who is omitted entirely from being mentioned in a will be said to have been an "intended" recipient of the lawyer's work product and that such beneficiary was intended by the testator to rely upon the will to close a transaction. These concepts simply do not fit. The

allegedly omitted beneficiaries of a will may not have even seen the testamentary instrument (and often do not even know the decedent's intent) prior to his death. Even if they do know of such intent, how can it be said that they in any sense were intended to "rely" upon the lawyer's work product?' Moreover, the results of the lawyer's work product is not a "closing" of a business transaction shortly after review of the work product, but the distribution of an estate, usually years (and perhaps decades) after the performance of the lawyer's services in drafting the will.

The real policy behind the limitation of the will-drafting exception to persons whose interests are expressed in the will is to provide an all-important, evidentiary safeguard. To make a lawyer defend his work product in these circumstances is just plain unfair. The person who knew best what was intended (the client) is dead and unavailable to testify. The relevant events may be litigated years after-the-fact when memories have faded or been subject to the foibles of inaccurate or incomplete recollection and documentary evidence may be slim or non-existent. The temptation and motivation is high to manufacture false evidence which may be incapable of being adequately rebutted. Further, there is a

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[9] This case involves only the claims of a decedent's heirs-at-law. It does not involve a creditor's claim where a third party contractually provides property, services, or other consideration to the decedent in return for an interest in the estate. If it did, however, the claimant would be required to have a written agreement with the estate to make a claim in that regard. F.S. §732.701(1) (No agreement ... to give a devise ... shall be binding or enforceable unless the agreement is in writing and signed by the agreeing party in the presence of two attesting witnesses.").

serious question of when the statute of limitations would start to run (when the will is drafted incorrectly or when the decedent dies and the will is probated, possibly decades after the performance of the services?). These problems are even more acute in cases like the instant case, where a lawyer drafted a will to include the youngest child -- but the decedent did not sign that will despite ample opportunity to do so before he died. Why didn't the Client ultimately sign the April 1986 will proposed by Roskin, or fail to return to Roskin to draft another instrument? Who knows with reasonable certainty what the decedent actually intended? A lawyer "can lead his client to water", but he "cannot make him drink". Yet, the lawyer is sued here far what the client did not do, though the lawyer recommended action he deemed appropriate based upon the facts then at hand which, if acted upon, would have precluded the very claim now made against him. Nor are these problems surmounted by elevating the standard of proof in malpractice cases from the usual "preponderance of the evidence" standard to the "clear and convincing" standard proposed by the Client's Family for cases of this type; the evidentiary handicaps confronting the lawyer in these circumstances would nonetheless likely be overwhelming.

The privity requirement for a legal malpractice action in will-drafting cases should not be modified to allow a child who is unmentioned in a testamentary instrument to sue the decedent's lawyer.

11. Arnold v. Carmichael was decided incorrectly or is distinguishable.

The Client's Family urges Arnold v. Carmichael, 524 So.2d 464

(Fla. 1st DCA), rev. denied, 531 So.2d 1352 (Fla. 1988)("Arnold") as a fall back position to circumvent the privity requirement. Arnold cannot be squared with the existing law on the will drafting exception. The cases require that the interests of a beneficiary actually be **expressedin the will" to have standing to sue the decedent's lawyer for malpractice. The First Circuit instead fashioned a holding (much like the parol evidence rule of contract law) that the plaintiff need only claim a beneficial interest in the estate which is not expressly "in conflict" with the will. Thus, if a will is silent upon a certain subject, a party may sue a will-drafting lawyer for malpractice under Arnold without being mentioned in the will at all. There is no justification for such an extension of the law which is ripe with all of the potential problems discussed in Point I, supra.

Moreover, Arnold is readily distinguishable. In that case, the omission of a residuary clause from the will drafted by the lawyer defendant resulted in the distribution of a part of the estate by intestacy, rather than by the will. In other words, the lawyer only completed half his job, and the estate was partially distributed as if the lawyer had not been retained by the decedent at all. Because the persons which the testator desired to exclude from inheritance (except for a nominal dollar bequest) were allowed to take shares by intestacy, the putative residuary beneficiaries were allowed to sue. Significantly, in Arnold, the lawyer freely admitted his mistake in the probate proceedings by affidavit. There were thus no evidentiary disputes which the lawyer was being

unfairly asked to rebut. In this case, Roskin attempted to get the Client to execute another document which would have carried out the his intent to include Patricia, but it would be wholly speculative to determine why the Client declined to sign such document (if his assets were as Roskin believed) or failed to ask Roskin to draft a different document (if his assets were as the Client believed). Furthermore, the original will and the new will proposed by Roskin contained appropriate residuary clauses such that nothing would have passed by intestacy.

Arnold is inconsistent with the prevailing law on the will-drafting exception to the privity requirement, is unsound and is distinguishable.

111. Failure to Demonstrate Damage[10]

The claims of the Client's Family against Roskin fail for another reason, lack of cognizable, non-speculative damage. Proximately caused damage is a required element to establish a cause of action for legal malpractice. E.g., Davenport V. Stone, 528 So.2d 45, 46 (Fla. 3rd DCA 1988)(plaintiff in a legal malpractice case must show "proof that such negligence resulted in and was the proximate cause of the loss to plaintiff").

The Estate suffered no loss (the same total legacy simply being split differently). The only damage argument made by the

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[10] Roskin asks the Court to exercise its discretionary power under Fla.R.App.P. 9.040(a) "as may be necessary for a complete determination of the cause" by reviewing the damage theories of the Third District with respect to the claims asserted by the Estate against Roskin, and with respect to Patricia's damage theories (which were not reached because of the Third District's holding upon the privity issue).

Client's Family below was that the (totally artificial) contest among the numerous attorneys in the probate case (in litigating what should have been agreed to in the first place) resulted in attorneys fees which somehow constitute damage for tort purposes. No case was cited for such a proposition, and we are aware of none that is remotely in point. The two cases cited by the Third District's decision below, 586 So.2d at 1224, were misapplied.

In Dayton V. Conser, 448 So.2d 609 (Fla. 3rd DCA 1984),[11] there was litigation in the probate court, as here, among competing children concerning the distribution of the estate. The particular dispute involved the interpretation and effectiveness of the exercise of an intervivos power of appointment by a mother (the surviving spouse) purportedly allowed under the decedent's will. One of the children, a son, prevailed after extensive litigation by obtaining a declaration invalidating his mother's exercise of the power upon grounds of lack of capacity, undue influence and construction of the testator's intent. The prevailing son obtained a judgment for attorneys fees of $50,000 against the other children. The theory urged in that case to support the attorneys fees and costs claimed in the trial court, analogously to that claimed here, was that tortious conduct of others caused the aggrieved party to expend attorneys fees to litigate with others to vindicate his distribution rights in the estate. In Conger, the

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[11] The undersigned is intimately familiar with Conger because he was the attorney of record in that case who unsuccessfully pressed the very same "attorneys fees as damages" argument asserted by the Client's Family in this case.

conduct complained of was that of the other children who procured their incompetent mother's improper exercise of the power through undue influence causing the son to litigate with his mother, whereas here it is allegedlythe Lawyers draftsmanship which caused the Client's Family to litigate with each other. The Third District reversed (448 So.2d at 611), concluding that, absent contract or statute, such probate-related litigation over the parties relative interests in the proper distribution of an estate was not a recognized exception to the general rule prohibiting a judgment for attorneys fees against the losing parties' general assets. (The Third District did affirm as to a point unrelated to this appeal, allowing a surcharge of the losing parties' interest in the estate under a specific statute authorizing same.)

The second case concerning the doctrine authorizing pursuit of attorneys fees as damages for causing "litigation with others" is State Farm & Casualty Co. v. Pritcher, 546 So.2d 1060 (Fla. 3rd DCA 1989). State Farm made clear (546 So.2d at 1061-62) that the "wrongful act doctrine does not create an independent cause of action," and the claimant's own wrongful conduct in causing litigation can not be used as the basis for such a claim. Here, if all of the Client's Family members agreed, as they should, to the equal treatment they claim was intended, no litigation would have been necessary at all (and all the lawyers fees would have been avoided). We do not think the result should be any different simply because the minors' guardians ad litem chose to litigate (when common sense dictates that settlement should have been agreed

to at the outset in the probate case).

The result of the decisions in Espinosa (malpractice action) and Azcunce (probate case) appears to be that (a) the Estate, Marta, Lissette, Natalie and Gabriel successfully established that the claims of the omitted heir respectively against them were not legally correct, yet (b) the Estate can legally seek to be indemnified through a malpractice claim for its attorneys fees and costs incurred in connection with its successful defense. Where, as here, both the allegedly active (e.g., Estate beneficiaries other than Patricia) wrongdoers and derivatively liable wrongdoers (e.g., the Estate) obtain judgment in their favor as to a third-party's claims, the allegedly derivatively liable party cannot seek indemnity for the litigation fees and costs from the allegedly active wrongdoer. Amisub of Florida, Inc. V. Billington, 560 So.2d 1271, 1272-1273 (Fla. 3rd DCA 1990)("there is no indemnity claim for fees and costs when both the active alleged tortfeasor and the allegedly derivatively liable one have been exonerated and judgment entered in their favor"; the rule is "so clearly established" that a contrary ruling should be rejected "for reasons of judicial stability alone") (emphasis in original).[12]

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[12] See also, Daytona Development Corp. V. McFarland, 505 So.2d 464, 467 (Fla. 2nd DCA 1987)(the fact that an attorney's "work was challenged, that litigation ensued and that the [client] lost ... do not by themselves establish a violation by the attorney of the requisite standard of care and that an attorney who drafts documents is not ipso facto a guarantor that the documents will be litigation free or will accomplish everything the client might want"). In this case, of course, the Opinion reflects that the client (Estate) won, rather than lost, the third-party litigation, unlike the client in Daytona.

Patricia, too, has no damage claim against Roskin. Her claim is wholly speculative for the reasons stated in detail in the statement of facts above. Patricia, even if she were to have been included in the Second Codicil or the unexecuted will, might never have received a single penny from the trusts established by the decedent. Therefore, any claim that her exclusion from the decedent's testamentary instruments was harmful simply cannot, as a matter of law, be established. The Client did not hire the Lawyers to draft an instrument designed to treat Patricia as a pretermitted heir -- clearly he desired some form of trust in which Patricia might receive an interest in his Estate (subject to the various contingencies referenced above)..

Finally, the holding below, 586 So.2d at 1223-1224, that "the testator's estate should be entitled to a return of the attorney's fee paid by the testator to the lawyer" should be reversed. Nowhere in the pleadings, evidence or argument or other parts of the record below, and nowhere in the briefs and argument in this Court, was there ever a claim that such a theory of damage was being asserted. Moreover, no citation was given by the Third District for such a proposition of law. This conclusion is erroneous and unfair because: (a) points not briefed or argued by the appellant are deemed abandoned or waived, (b) the Lawyers were never given an opportunity to brief or argue that point, which would be a denial of due process, and (c) the conclusion is legally erroneous on any theory of law which can remotely be

applied to the facts and pleadings in this case[13].

CONCLUSION

No malpractice case exists against Roskin due to lack of allegations and proof of privity and damages. This Court should (a) affirm the dismissal of Patricia's action due to lack of privity and (b) hold that all damage claims against the Lawyers

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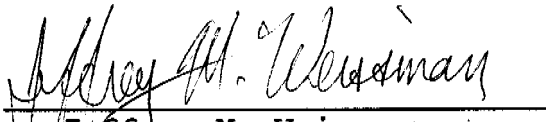
[13] For example, an attorney might be paid a $10,000 fee for legal advice which was used by the client, and the client might as a result of such use suffer proximately caused damages of $5,000 or $20,000. The damages would be respectively $5,000 or $20,000, but the $10,000 fee is not a proper measure of any proximate damage. If the hypothetical fee had not been paid and the attorney sued for the $10,000, the client should be able to assert the $5,000 or $20,000 claim as the case may be as an offset or counterclaim, but not as an avoidance,of the fee. See, Storchwerke. GMBH v. Mr. Thiessen's Wallpapering Supplies, Inc., 538 So.2d 1382, 1383 (Fla. 5th DCA 1989)(a party's damage claim or counterclaim against another "does not constitute an affirmative defense barring or voiding" the other's action, even though it "may be used as an offset against the amount" due). While there are certain instances of extreme wrongdoing, breach of fiduciary duty, blatantly unethical conduct or conflict of interest involving an attorney which have resulted in the barring of any right to a fee, the facts of such cases have no possible connection to this action which is a simple claim of supposed negligence. Appellees have not been -- and in good faith, could not be -- alleged to have committed any act so egregious that a fee should be forfeited. Our research could locate no Florida case where a fee was declared forfeited simply because an attorney had committed malpractice with respect to part of his legal advice, independent of the amount of actual damage or lack of damage proximately caused by the alleged malpractice. Examples of the type of extreme conduct which have been found in which there was a forfeiture of a fee, in whole or in part, are: Hill v. Douglass, 271 So.2d 1 (Fla. 1973)(fee earned after conflict of interest arose was forfeited; however, fee earned before such conflict was not forfeited); Adams v. Montgomery, Searcy & Denney, 555 So.2d 957, 958 (Fla. 4th DCA 1990)("An attorney's right to a fee terminated when the attorney realizes or should realize that he or she cannot ethically represent his or her client"); Jackson V. Griffith, 421 So.2d 677 (Fla. 4th DCA 1982)(attorney guilty of coercion, duress and threats in procuring client's signature on an instrument to pay a $4,000 fee was not entitled to any fee under the terms of the instrument or in quantum meruit).

suffer from an absence of any cognizable, non-speculative damages as required for a malpractice action.

Respectfully submitted,

WEISSMAN, LICHTMAN & DERVISHI, P.A.

By: 
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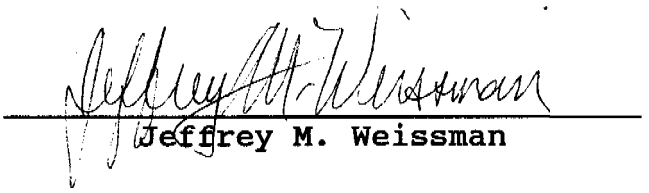
CERTIFICATE OF BERVICE

I hereby certify that the foregoing was mailed to Fred E. Glickman, Esq., 9200 South Dadeland Boulevard, Dadeland Towers, Suite 508, Miami, FL 33156, and Lenard H. Gorman, Esq., 1444 Biscayne Boulevard, Suite 208, Miami, FL 33132 on March 19, 1992.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