IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,085

MARTA ESPINOSA, et al.,

Petitioners,

vs.

SPARBER, SHEVIN, SHAPO, ROSEN, et al.

Respondents.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL

CASE NO. 90-00006

INITIAL BRIEF OF PETITIONERS ON THE MERITS

FRED E. GLICKMAN, ESQ.
Fla. Bar No. 340766
9200 So. Dadeland Blvd.
Suite 508
Miami, Florida 33156
(305) 665-4852

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FRED E. GLICKMAN, P.A
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

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FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite *508* / Miami, Florida **33156** / (305) 665-4852

QUESTION PRESENTED

Did the Third District Court of Appeal err when it affirmed the dismissal by the trial court of Patricia Azcunce's claim against the Respondents?

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

STATEMENT OF THE CASE AND OF THE FACTS

This is an appeal brought pursuant to the provisions of Rule 9.020(a)(2)(A)(v) from a final order entered by the Third District Court of Appeal, rendered November 6, 1991. This order affirmed the final order entered by Circuit Court Judge Maria M. Korvick, of the 11th Judicial Circuit in and for Dade County, Florida, dismissing with prejudice the Petitioners' lawsuit for malpractice against the law firm of Sparber, Shevin et al. and its employee, attorney Howard Roskin ("Roskin").

This lawsuit arose out of the same circumstances as another case decided by the Third District Court of Appeal, Patricia Azcunce V. The Estate of Rene Azcunce et al., Case No. 89-02234 (Probate File No. 87-793 (04) in the lower court). The Patricia Azcunce case was an attempt by her Guardian ad Litem to secure benefits for her as a pretermitted child under the estate of her late father, Rene R. Azcunce ("Rene"). The only live testimony in the Patricia Azcunce case was a hearing before Judge Edmund W. Newbold, of the Dade County Probate Court, on June 15, 1989.

All parties in this case (Espinosa et al. v. Sparber, Shevin et al.) agreed to make the transcript of that hearing a part of the record in this case. All references in this brief to that transcript are denoted (Tr. ___). All

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

references to the record are denoted (R. ___). All references to the opinion of the Third District Court of Appeal in this case are denoted (O. ___).

At the time of his death on December 30, 1986, Rene was married to Marta Azcunce ("Marta"). (She has since remarried and is now known as Marta Espinosa.) Rene signed his Will on May 4, 1983 after consultations with his attorney, Roskin. The Will was prepared by Roskin, who was at all times relevant an employee of the law firm of Sparber, Shevin, et al.

At the time of the signing of this Will, Rene had three children, Lissette, Natalie, and Gabriel, who were specifically named in the Will. Article Seventeenth of the Will (T. 21) provided that:

> (a) References in this, my Last Will and Testament, to my children, shall be construed to mean my daughters, LISSETE (sic) AZCUNCE and NATALIE AZCUNCE, and my son, GABRIEL AZCUNCE.
>
> (b) References in this, my Last Will and Testament, to my "issue," shall be construed to mean my children (as defined in Paragraph (a), above) and their legitimate natural born and legally adopted lineal descendants.

There were no provisions in the Will for after-born children.

Article Fourth of the Will established a Trust for the benefit of Lissette, Natalie and Gabriel, as well as for Marta. It also granted to Marta a power of appointment to appoint all or a portion of the Trust to the children and

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

their issue. However, this power was limited by the language of the above Article Seventeenth. The Will provided that upon the death of Marta, the Trust was to be divided into equal shares for each of the three children, with no provisions for after-born children.

On August 8, 1983, when Rene executed a First Codicil to his Will, he and Marta both knew they were expecting a fourth child (T. 39-40). That child, Patricia Azcunce, was born on March 14, 1984. However, the First Codicil, like the Will, had no provisions for after-born children.

On June 25, 1986, Rene executed a Second Codicil (T. 26) prepared by Sparber, Shevin, et al. that changed the identity of the co-trustee and co-personal representative, but that likewise did not provide for the after-born child, Patricia. This occurred although the Respondents knew of the birth of Patricia, and of Rene's intent to include her in his Will (T. 16). Rene intended in his Will to treat her equally with his 3 other children (T. 38). When Rene died on December 30, 1986, he died without ever executing any document that specifically provided for Patricia or evidenced any intent to disinherit her.

Patricia brought suit in Probate Court to be classified as a pretermitted child, which would have entitled her to a share of Rene's estate. Her mother and older sister, Lissette (who was of age at the time) consented to Patricia's

FRED E. ELICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami. Florida 33156 / (305) 665-4852

petition being granted. The probate court judge appointed one Guardian ad Litem for Patricia, and another for Patricia's two minor siblings, Gabriel and Natalie. The Guardian ad Litem for Gabriel and Natalie opposed the Petition, and the trial court ruled that the Second Codicil destroyed Patricia's status as a pretermitted child. The case was appealed and the Third District Court of Appeals unanimously upheld the trial court's ruling, on September 17, 1991.

The Petitioners had requested that the appeal of the Patricia Azcunce case be consolidated with the appeal of the malpractice case, but the Third District Court of Appeals declined to do so.

The Petitioners filed suit against the Respondents for legal malpractice. The complaint was dismissed with prejudice for lack of privity pursuant to the Respondents' Motion far Summary Judgment. The Third District Court of Appeals reversed the Dismissal with regard to the estate, affirmed it with regard to Patricia, and certified the question as to whether, under the facts of this case, Patricia's malpractice action could be sustained.

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami. Florida 33156 / (305) 665-4852

SUMMARY OF THE ARGUMENT

As a matter of public policy, the privity requirement should not be imposed in this situation. This requirement has been relaxed for other professionals (such as certified public accountants). It is especially inappropriate when the intended beneficiary is a surviving dependent child, a category of beneficiaries afforded special protection in numerous other instances involving decedents' estates.

A review of the Florida cases in this area, especially the case of Arnold v. Carmichael, 524 So. 2d 464 (Fla. 1st DCA 1988), review denied 531 So. 2d. 1352 (Fla. 1988), provides support for the argument that the privity rule should not be applied in this case. Further, the Supreme Court case of Angel, Cohen & Rogovin V. Oberon Investment, N.V., 512 So. 2d 192 (Fla. 1987), which the Respondents claim imposes the privity rule upon the facts of this case, had nothing to do with Wills, or intended beneficiaries of Wills.

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

ARGUMENT

I. As a Matter of Public Policy The Privity Requirement Should Not Be Imsosed

In his special concurrence below, Judge Levy recognized that Patricia Azcunce has fallen through a monumental abyss in the legal system. The abyss is the result of an unduly restrictive exception to the privity rule. That exception limits access to the courts to those who can show that the testator's intent as expressed in the Will was frustrated by the negligence of the testator's lawyer, resulting in the loss or diminishment of a beneficiary's legacy. While the court must be concerned that a further erosion of the privity requirement may result in the possible inundation of numerous and/or fraudulent claims, the fear of additional litigation should not deter courts from granting relief in meritorious cases.

Judge Levy, quoted, in his opinion, (O., pp. 12 - 13), Stewart v. Gilliam, 271 So.2d 466 (Fla. 4th DCA 1973):

> The fundamental concept of justice under the law would reject any rule that measures the availability of a forum on the nebulous principal of "a floodtide of litigation" or "a virtual avalanche of cases." There is no more bedrock principal of law than that which declares that for every legal wrong there is a remedy and that every litigant is entitled to have his cause submitted to the arbitrament of the law. Tidwell v. Witherspoon, 1885, 21 Fla. 359. The principle that for every wrong there is a remedy is embodied in the Declaration of Rights of the Florida Constitution which provides that the Florida courts are to be open so that every person shall have a remedy by due course of law

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

(Section 21). It is far more consistent with justice to be concerned with the availability of a judicial forum for the adjudication of individual rights than to deny access of our courts because of speculation of an increased burden.

In light of that principle, an attorney who knows that the direct affect of his inaction results in substantial damage to an intended beneficiary, like Patricia, should not be permitted to stand behind the shield of privity. This is especially true in the area of Will drafting. Due to the strict formality associated with the validity of a beneficiary's claim, under the present state of the law, an intended beneficiary who can prove by clear and convincing parol evidence that she was omitted from the document by virtue of attorney negligence is left with no remedy. She can make neither a claim under the Will nor can she make a claim against the testator's attorney.

As this Court recognized in First Florida Bank, N.A. v. Max Mitchell and Company, 558 So.2d 9 (Fla. 1990), the doctrine of privity has undergone substantial erosion in Florida. This Court noted that the liability of a lawyer in the absence of privity has been limited to cases where the legal service negligently performed was apparently initiated by the lawyer's client to benefit a third party such as in the drafting of a Will Angel, Cohen et al., supra and McAbee v. Edwards, 340 So.2d 1167 (Fla. 4th DCA, 1976). In citing Angel, the First Florida court did not include the further

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

language requiring that testamentary intent as expressed in the Will be frustrated by the attorney's negligence. Should the court below have limited its focus to whether it was Rene's apparent intent to benefit Patricia when he retained the Respondents to prepare the second codicil, the doctrine of privity would not have barred Patricia's claim. To avoid such injustice and permit those like Patricia who have been wronged to seek a remedy, this Court must recognize that the limitation mentioned in Angel requiring frustration of the testamentary intent as expressed in the Will serves no valid purpose. A modification of the privity doctrine will maintain the integrity of the attorney-client relationship while recognizing the substantial harm which can be caused by attorney negligence resulting in the loss of an intended beneficiary's claim.

This Court should adopt a standard similar to the accountant's standard established in First Florida. Where, as a direct result of an attorney's negligence, an intended beneficiary, known to the attorney, is either not included in the Will or suffers a loss or diminishment of her bequest or devise, the attorney must be held responsible to that known third party. This standard would substantially shrink the monumental abyss while not resulting in a floodtide of litigation. Lawyers must be held accountable for their negligence in situations like those presented here ta the

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

same extent that other individuals, especially professionals, are held accountable.

In this situation an alternative approach could be ta waive the privity requirement for beneficiaries who receive special treatment under Florida law, namely, surviving spouses and dependent children, in the area of decedents' estates. There are numerous instances of this special treatment. If an individual dies intestate, under FS Sec. 732.101 et seq., all assets are divided among the surviving spouse and lineal descendants.

A surviving spouse has the right to elect 30% of the net probate estate. FS Sec. 732.201. He or she is entitled to automobiles, household furniture, furnishings, appliances and personal effects, up to certain dollar limits. FS Sec. 732.204. If there is no surviving spouse, minor children are entitled to the same exemptions. See FS Sec. 732.402. A family allowance is provided for the surviving spouse and the decedent's lineal heirs whom the decedent was obligated to support or who were in fact being supported by the decedent. FS Sec. 732.403.

Homestead property is not subject to devise if the owner is survived by a spouse or minor child, except that it may be devised to the owner's spouse if there is no minor child. Florida Constitution Article X, Sec. 4(c). If the decedent is survived by a spouse and lineal descendants, the surviving

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

spouse takes a life estate in the homestead, with a vested remainder to the lineal descendants in being at the time of the decedent's death. FS Sec. 732.401(1).

Protection is also provided for **pretermitted** spouses and children. Where a testator has executed a Will before his marriage, and then, marries the pretermitted spouse will inherit as provided in the Probate Code regardless of the prior Will. FS Sec.732.507(1). When a testator fails to provide in his Will for any children born or adopted after making **the** Will, and the child has not received a part of **the** testator's property equivalent to a child's part by way of advancement, **the** child receives the share of the estate he would have received if the testator had died intestate. (This inheritance is not awarded if it appears from the Will that the omission was intentional, or the testator had one or more children when the Will was executed and devised substantially all of his estate to the other parent of the pretermitted **child.)** FS Sec. **732.302.**

It is this right to be treated **as** a pretermitted child that the Respondents destroyed. The Respondents drafted the Will so that, instead of providing for a residuary trust to benefit all of the children, the beneficiaries were limited to the specific persons alive when the Will was drafted. When Patricia was born, she became a pretermitted child. However, when the second codicil was executed after her

FRED E. ELICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (3051665-4852

birth, it destroyed her status as a pretermitted child, by republishing the language of the Will, which limited to the specific individuals alive at the time the Will was drafted. See the District Court of Appeal opinion in the Patricia Azcunce case, pages 4 - 5.

The privity requirement arises from the case law, not the statutes. By refusing to impose it far a limited class of beneficiaries, this court will be setting forth a doctrine consistent with Florida's strong public policy, as expressed by the legislature, and in the Florida Constitution, of favoring inheritances by the surviving spouse or children.

As stated by Judge Pearson in his dissent in Lorraine V. Grover, Ciment et al., 467 So. 2d **315, 322,** (Fla. 3d **DCA,** 1985) in quoting Needham v. Hamilton, 459 A.2d **1060, 1062-3** (D.C. 1983), neither of the rationales supporting privity is present in the case of Wills. This is not a case in which the ability of a nonclient to impose liability affects the control over the contractual agreement held by the attorney and his client, for the interests of the testator and the intended beneficiary are one and the same. Further, this duty does not extend to the general public, but only to a person who was the direct and intended beneficiary of the attorney-client relationship. This is, after all, the main purpose of drafting a Will.

FRED E. GLICKMAN, **P.A.**
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami. Florida 33156 / (305) 665-4852

11. Angel, Cohen, as Construed in Arnold v. Carmichael, Does Not Support The Opinion of The Third District Court of Appeal

The Florida law on this topic begins with McAbee v. Edwards, susra. Here, the plaintiff brought a malpractice action against her mother's attorney and his insurer arising out of preparation of her mother's Will. The court held that the attorney owed the plaintiff, as a beneficiary of the estate, a duty to properly advise her mother of the need to change the Will after her marriage. The Will purported to leave the entire estate to the daughter, but the result was not accomplished as the mother married soon after the Will was executed. The mother's husband claimed, successfully, a share as a pretermitted spouse. The Court ruled that the amended complaint did state a cause of action, citing extensively from Yeter v. Flaig, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P. 2d 161 (1969).

In DeMaris v. Asti, 426 So. 2d 1153 (Fla. 3d DCA, 1983), the court held that liability for legal malpractice to the testamentary beneficiary can arise only if the testamentary intent, as expressed in the Will, is frustrated, and the beneficiary's legacy is lost of diminished as a direct result of that negligence. The only authority cited is Ventura County Humane Society et al. v. Hollowav, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974), which involved an alleged ambiguity in the Will concerning charitable beneficiaries.

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

There is no indication in this opinion what relationship the plaintiff in Demaris had to the decedent.

In Lorraine v. Grover, Ciment et al., supra, the first resistance to the rule of DeMaris appeared, in the form of a dissent by Judge Pearson. In Lorraine, the beneficiary under the testator's will sued the testator's attorney, his law firm, and the insurer when the devise of the testator's residence failed because it was homestead property. The action failed, because the court ruled that an attorney is generally not liable to third parties for negligence or misadvice concerning an inter vivos transfer of property. It was the Florida law, said the court, not poor draftsmanship, that defeated the devise.

In his dissent, Judge Pearson stated as follows, on page 321:

> The only possible justification for the requirement that the testamentary intent be 'expressed in the will,' see DeMaris v. Asti, 426 So.2d 1153, 1154 (Fla. 3d DCA 1983), is to guard against the onslaught of fraudulent claims. But here, as here, the claim is made by a person 'whose benefit is so direct and substantial and so closely connected with that of the promisee (testator) that it is economically desirable to let (him or her) enforce it,' Stowe v. Smith, 184 Conn. 194, 197, 441 A.2d 81, 83 n. 1 (1981) (quoting 4 A. Corbin, Contracts Section 786 (Supp. 1971), and, a fortiori, where, again as here, the will on its face shows an intent by the testator to provide shelter or its equivalent for his mother during her lifetime in the event of his death, the envisioned horribles are of no concern, and there is thus no justification whatsoever to preclude the mother's action. (footnotes omitted)

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

Judge Pearson took the position that the restriction based upon testamentary intent as expressed in the Will "should not prevail in all situations, especially when the intended beneficiary had such a close relationship to the testator."

In Angel, Cohen et al, supra, this Court noted that the privity rule had been relaxed in the area of Will drafting. In Angel, this Court was asked in a case unrelated to Will drafting to expand the exception. Angel involved a law firm preparing documents for a corporate fiduciary. The issue was whether or not the corporation was the intended beneficiary of the legal services.

This Court observed that, in a Will drafting case, for the beneficiary's action in negligence to fall within the exception to the privity requirement, testamentary intent as expressed in the Will must be frustrated by the attorney's negligence, and as a direct result of such negligence, the legacy must be lost or diminished. However this statement was a summary of the existing Florida law, and not a ruling on a Will case before this Court.

In Arnold v. Carmichael, supra, the Court greatly narrowed the meaning of the "testamentary intent as expressed in the Will" requirement. Here, the plaintiffs were the niece and grandniece of the testatrix, Evelyn A. Barker. Barker hired an attorney to change her Will so as to leave

FRED E. GLICKMAN. P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

one dollar to each of four named individuals, and so as to delete the requirement that Frankenberg, as personal representative, use the services of Barker's former attorney. This was accomplished but, by error, the residuary clause was deleted from the redrafted Will. Under it, the niece and grandniece had been beneficiaries in equal shares. Without the residuary clause, the residuary estate passed by intestacy to eleven heirs.

The Court grappled with the requirement that for there to be a valid cause of action, the testamentary intent, as Dressed in the Will, must be frustrated. The Court then stated that the real goal in these cases "appears to be simply to limit or prevent liability (under the privity exception) based on evidence of testamentary intent in conflict with the express terms of a validly executed Will," (p. 467). No such conflict was present in Arnold, as the Will was silent on the issue of the disposition of the residuary. The Court then further noted that it is customary that there be a residuary clause, and that its absence is "internal evidence within the will itself that something may be awry."

The above analysis is similar to what should have been the Court's analysis in this case. The second codicil, executed after Patricia's birth, did not, on its face, express any testamentary intent that Patricia should or should

FRED E. GLICKMAN, P.A
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

not be a beneficiary of the estate. It was only because of the codicil's republishing the Will and first codicil that Patricia's status as a pretermitted child was destroyed. (See O. pp. 4-5.)

The mere fact that the testator executed a codicil when Patricia was four years old, and neither took any steps to disinherit her (e.g. "I deliberately leave nothing to Patricia") or to include her in the estate plan, is likewise evidence that something indeed "may be awry."

The Arnold court also noted the appellant's affidavit supplied evidence independent of the testimony of the intended beneficiaries to show that the testatrix's intent was frustrated. Similarly, in our case, the evidence of the testator's intent regarding Patricia was substantiated by both her mother and Roskin, the attorney who drafted the Will, a co-defendant along with his law firm. (T. 16, 38).

FRED E. GLICKMAN, P.A.
ATTORNEYS AT LAW

Dadeland Towers / 9200 South Dadeland Boulevard / Suite 508 / Miami, Florida 33156 / (305) 665-4852

CONCLUSION

The Third District Court of Appeal erred when it affirmed, with regard to Patricia Azcunce's claim, the trial Court's Order of Dismissal With Prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 14th day of January, 1992 to Jeffrey M. Weissman, Esq., 3111 Stirling Road, Suite B, Fort Lauderdale, Florida 33312-6525 and Lenard H. Gorman, Esq., 1444 Biscayne Boulevard, Suite 208, Miami, Florida 33132.

FRED E. GLICKMAN, P.A.
Attorneys for Petitioners
9200 So. Dadeland Boulevard
Suite 508
Miami, Florida 33156
(305) 665-4852

By: _____
Fred E. Glickman

espinosa.sup