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

REPLY BRIEF *OF* PETITIONERS

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ARGUMENT

In this Reply Brief, the Petitioners will adopt the nomenclature used by the Respondents in their Answer Brief, referring *to* MARTA AZCUNCE as "MARTA," RENE AZCUNCE, Deceased, as the "CLIENT," PATRICIA AZCWNE a6 "PATRICIA," and the Respondents collectively as the "LAWYERS."

The LAWYERS claim, in their statement of the Case and Facts, that the alleged legal malpractice results from their failure to prepare a Will and/or Codicil on behalf *of* the CLIENT that would treat PATRICIA equally with the three older children, or to advise the CLIENT of the need to revise his Will to provide for equal treatment of his four children. This is only part of the story. As noted on pages 11 to 12 of the Initial Brief, the LAWYERS, in addition to failing to act as stated above, destroyed PATRICIA'S status as a pretermitted child when they drafted the Second Codicil, This document, by republishing the Language of the Will, limited the definition of the term "children" to those who were alive when the Will was drafted, long before PATRICIA'S birth.

PATRICIA is not suing the LAWYERS for the CLIENT'S failure to execute a document. She does, however, hold the LAWYERS responsible for not inserting in the Second Codicil, which they did prepare and which was signed, language that

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included her as a beneficiary in the CLIENT'S Will. Roskin's testimony was that the CLIENT did, at that time, intend to include her, and that Roskin knew this (T 25-6). The LAWYERS' argument that there was only a brief period of time to prepare the Second codicil is unpersuasive, for it would not have taken very long to draft a single sentence to include PATRICIA along with the other children. In any event, as the opinion of the Third District Court of Appeal stated, for purposes of the appeal, the facts of the case were entirely undisputed.

The LAWYERS are correct in stating that there is nothing in the record that qualifies PATRICIA'S damages from being excluded as a beneficiary of RENE'S Trust. However, the LAWYERS prevailed in the trial court on their Motions to Dismiss and Motions for Summary Judgment. All four of these motions were granted on the privity issue. None of these motions argued that PATRICIA's damages were speculative or did not exist, nor could they have in view of the absence of a record on damages (RI 29-73). In Roskin's Motion to Dismiss, in paragraph 6, the LAWYERS argued that the Estate, and all of its beneficiaries except PATRICIA, suffered no damages. But it was not argued that PATRICIA'S damages were speculative or did not exist. The same approach was taken in Roskin's Motion for Summary Judgment, in paragraph 6. Sparber Shevin adopted Roskin's two motions in full.

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In a Motion to Dismiss or a Motion for Summary Judgment, it is the burden of the Defendants to create a record proving that there can be no damages. Surely, on the undisputed facts of the case, there could be provable damages. In the Third District Court of Appeal Opinion, there was no reference to the damage issue. In fact, as was stated in the opinion on page 3:

> Upon the Defendants' Motion, the trial court dismissed this complaint with prejudice for lack of privity, and, based in part on the trial record in the companion probate case, see Azcunce v. Estate of Azcunce, _____ so. 2d _____ (Fla. 3rd DCA 1991) (Case No. 89-2234, Opinion filed _____), which the parties proffered, enter Final Summary Judgment for the Defendants.

Thus, the decision of the Third District Court of Appeal, like that of the trial court, was based entirely on the question of privity. The LAWYERS should not be permitted to raise the issue of the allegedly speculative nature of PATRICIA'S damages for the first time an appeal, See United Services Auto Association v. Porras, 214 So. 2d 749 (Fla. 3d DCA 1968). Fla. R. App. P. 9.040(a), invoked by the LAWYERS, has no relationship to the issue of raising an argument far the first time an appeal. In any case, by the loss of her status as a pretermitted child, PATRICIA certainly did suffer provable and quantifiable damages.

The LAWYERS defend their having the CLIENT execute the Second Codicil on June 25, 1986 by calling it "the best compromise under the circumstances." What the LAWYERS forget

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is that if a single sentence had been inserted in the Second Codicil, recognizing PATRICIA'S existence as a child to be treated like her siblings, all of this litigation would have been avoided. The LAWYERS claim that if the Second Codicil had added PATRICIA to the Trust "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." There is no justification for this conclusion. The mechanism of a sprinkle Trust, which the LAWYERS describe in their Answer Brief in great detail, will work just as well with four children as with three.

The LAWYERS say that if the Second Codicil had not been executed at all, then PATRICIA would have received her pretermitted share outright, which might have been mare or less than she would have gotten under the Trust, This is true, but at least PATRICIA would have received some inheritance.

The LAWYERS claim that the accounting and abstracting cases cited in the Initial Brief are irrelevant, It is submitted by the PETITIONERS that they are not. In a Will drafting situation, the beneficiary is completely at the mercy of the attorney, far the beneficiary has no other options. In the accounting and abstracting situations the third party at least has the option of hiring his or her own professional to check the work of the first accountant and/or

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abstracter. Thus, the intended beneficiary who is left out of the Will, like PATRICIA, is more at the mercy of the drafter than a third party relying upon the accountant or abstracter's work product. While the beneficiary does not rely upon the Will to close a transaction, he or she is wholly dependent upon the lawyer to accurately reflect the Testator's intentions.

Baskerville-Donovan Engineers, Inc. v. Pensacola Executive House Condominium Association, Inc., 581 So. 2d 1301 (Fla. 1991) was a case brought against an engineering corpor-ation for professional malpractice. Here, this Court noted that lack of privity does not necessarily foreclose liability if a duty of care is otherwise established, citing First Florida Rank. N.A. v. Max Mitchell & Co., 558 So. 2d 9 (Fla. 1990) and McAbee v. Edwards, 340 So. 2d 1167 (Fla. 4th DCA 1976). It may be argued that an intended beneficiary of a Will, especially the child of the testator, can claim such a duty of care running to her from the attorney preparing her father's estate plan. In McAbee, supra, this Court recog-nized the right of an intended beneficiary to rely upon the attorney hired by the testator, when it stated, quoting from Heyer v. Flaig, 70 Cal. 2d 223, 74 Cal. Rptr. 225, 449 P. 2d 161 (1969) as follows:

> In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary

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scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests. (p. 1169)

The LAWYERS claim that there is a serious question as to when the statute of limitations would start to run if the PETITIONERS prevailed. The PETITIONERS submit that there is an extensive body of cases on the issue of statute of limitations, especially in the area of professional malpractice. This should not be a source of undue concern to the court.

The privity rule as expressed in Angel Cohen & Rogovin v. Oberon Investment, N.V., 512 So. 2d 192 (Fla. 1987) exists to provide an evidentiary safeguard. But when weighed against the need to provide a remedy for every wrong, as discussed in Judge Levy's concurring opinion in the Third District Court of Appeal, this evidentiary safeguard should not prevail. Neither the LAWYERS nor anyone else is entitled to complete protection in all cases even though certain cases involving fraud might be brought. If the reasoning of the LAWYERS is correct, then there should be no cause of action for breach of an oral contract, because such cases have an inherently higher risk of being grounded in fraud than do cases based upon a written contract.

Under the wrongful act doctrine, when a Defendant has committed a wrong toward the Plaintiff, and the wsangful act has caused the Plaintiff to litigate with third persons, the Plaintiff may recover, as an element of damages, its third

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party litigation expenses. See State Farm Fire & Casualty Co. v. Pritcher, 546 So, 2d 1060 (Fla, 3d DCA, 1989). This is exactly what happened in this case, when PATRICIA was in litigation with the Court appointed Guardians Ad Litem for two of her siblings. Her third sibling was an adult, and freely consented to PATRICIA'S request for relief, as did MARTA, but the Guardians for the two minor siblings would not consent, and the litigation ensued,

The LAWYERS claim that the wrongful act doctrine does not apply to our case, arguing that the claimant's own wrongful conduct in causing the litigation cannot be used as the basis for a claim. The alleged wrongful conduct in our case, according to the LAWYERS, was the unwillingness of the two Guardians Ad Litem to consent to reforming the Will to deem PATRICIA to be a beneficiary, Even if the Guardians Ad Litem were wrong (and PATRICIA argued that they were), it was not PATRICIA or the Estate which engaged in such wrongful conduct, MARTA, as PATRICIA'S mother, and also as Personal Representative of the Estate, always took the position that the Will should have been reformed to include PATRICIA. The LAWYERS, in analyzing the ruling of the Third District Court of Appeal, insist on referring to MARTA and her three other children as allegedly active wrongdoers. No reason is submitted as to why MARTA and the adult sibling, LISSETTE, who did consent to the reformation of the Will, can be deemed

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to be wrongdoers,

The LAWYERS incorrectly assert that the Estate, MARTA, and her three other children established that PATRICIA had no claim against them. It was, in fact, the two Guardians Ad Litem for PATRICIA'S two minor siblings that accomplished this. The LAWYERS' reliance on Amisub of Florida, Inc. v. Billington, 560 So. 2d 1271, 1272-3 (Fla. 3d DCA 1990) is misplaced. This case involved a common law indemnity claim, not the wrongful act doctrine discussed above. As stated by that Court, common law indemnity arises when an employer is held liable for the vicarious wrongdoing of another,

The LAWYERS devote a great deal of time *to* discussing State Farm, supra. This is a more recent case than Dayton v. Conger, 448 So, 2d 609 (Fla. 3d DCA 1984), and should, accordingly, take precedence. State Farm, supra held that if a Defendant has committed a wrong toward the Plaintiff, and the wrongful act has caused the Plaintiff to litigate with third persons, the wrongful act doctrine permits the Plaintiff to recover, as an additional element of damages, Plaintiff's third party litigation expenses. This would apply to both the Estate and PATRICIA, with regard to the Litigation expenses in the probate court case and the appeal which followed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 4th day of May, 1992 to Jeffrey M. Weissman, Esq., 3111 Stirling road, Suite B, Fort Lauderdale, Florida 33312-6525 and Lenard H. Gorman, Eaq., 1444 Biscayne Boulevard, Suite *208*, Miami, Florida 33132.

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