ATTORNEY'S LIABILITY FOR PROFESSIONAL NEGLIGENCE OUTSIDE THE ATTORNEY-CLIENT RELATIONSHIP

I. INTRODUCTION

Due to the basic principle that no action for breach of contract could be brought by one not in privity of contract, courts for many years held that attorneys could not be found liable to persons other than their immediate clients who claimed to be damaged by the attorneys' alleged negligence in the performance of their professional duties, in the absence of fraud or collusion.\(^1\) Courts, in prohibiting one not in privity of contract from recovering for the attorney's alleged professional negligence, relied primarily on two arguments: (1) to allow such liability would deprive the parties to the contract of control of their own agreement, and (2) a duty to the general public could impose too large of a potential burden of liability on the attorney.\(^2\) While many courts still maintain that no cause of action against an attorney is possible for one not in privity of contract with the attorney, the privity requirement is becoming increasingly less important as courts continue to ease the requirement in many situations.\(^3\) Courts have created three major theories upon which one not in privity of contract can rely when bringing a cause of action against an attorney for alleged professional negligence: (1) third-party beneficiary theory, (2) negligence theory, and (3) balancing of factors theory.\(^4\) These three major theories have been utilized by the courts to extend attorney liability to parties with whom there is no contractual privity in primarily seven subject areas: (1) will drafting, (2) estate administration, (3) trusts and guardianship, (4) domestic relations litigation, (5) real property transactions, (6) debtor-creditor relations, and (7) securities transactions.\(^5\)

The third-party beneficiary theory recognizes that a party not in privity of contract with an attorney can state a cause of action against an

---

5. See id.
attorney for the negligent performance of professional duties if the party is a beneficiary of the attorney-client relationship. For instance, the court in Rosenstone v. Satchell held that an attorney contracted to draft a testator’s will owed a duty of care to the intended beneficiaries of the will. While acknowledging that courts have traditionally limited attorney liability for negligence in the performance of professional duties to clients with whom the attorney shares contractual privity, the court recognized an exception to the privity requirement where it can be demonstrated that the apparent intent of the client in engaging the services of the attorney was to benefit another.

The negligence theory establishes that a party not in privity of contract with an attorney can state a cause of action against an attorney for the negligent performance of professional duties or negligent misrepresentation if the harm to the party is reasonably foreseeable to the attorney. The court in In re Rexplore, Inc. Securities Litigation, for example, found that an attorney contracted by a corporation to provide legal services owed a duty of care to investors, where the attorney should reasonably have known that his legal advice could harm the investors of the corporation.

The balancing of factors theory is another method whereby an attorney may be liable to a party with whom he shares no contractual privity for the negligent performance of professional duties. The court in Biakanja v. Irving, for instance, held a notary public who had negligently prepared a will for a testator liable to the intended beneficiary for such professional negligence. The court observed that whether recovery would be allowed to a party not in privity was a matter of public policy, involving the balancing of various factors. Such factors include the extent to which the transaction was intended to effect the plaintiff, the

8. See id.
9. See id.
12. See id.
14. See id.
15. See id.
16. See id. at 19.
foreseeability of harm to him, the degree of certainty that he would suffer injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the conduct, and the policy of preventing future harm.\textsuperscript{17}

As the courts’ willingness to base attorney liability to parties with whom they are in no privity for negligent performance of professional duties on the aforementioned theories has increased, so too has their willingness to find such liability in a wide variety of subject areas. Courts have thus far found attorneys potentially liable for negligence to parties with whom they share no contractual privity in primarily seven subject areas: (1) will drafting, (2) estate administration, (3) trusts and guardianships, (4) domestic relations litigation, (5) real property transactions, (6) debtor-creditor relations, and (7) securities transactions.\textsuperscript{18}

In cases involving will drafting, courts have typically used the negligence theory of liability to find attorneys potentially liable for improper attestation, post-testamentary spouse and community property problems, residuary clause omissions, beneficiary naming errors, and invalid attempts to bequeath interests.\textsuperscript{19} In \textit{Licata v. Spector},\textsuperscript{20} for example, the court held an attorney liable to the intended beneficiaries under the will when his negligent failure to procure the proper number of witnesses to his client’s signing of her will resulted in the will being denied probate.\textsuperscript{21} Reasoning that the injury to the intended beneficiaries was clearly foreseeable and was proximately caused by the attorney’s negligence, the court relied on the negligence theory of liability to hold that the attorney owed a duty of care to the beneficiaries.\textsuperscript{22}

While courts have been reluctant to hold attorneys liable in cases involving estate administration, they have nevertheless allowed a cause of action to be stated under the balancing of factors theory of liability in cases dealing with an estate administrator’s duty to remaindemen, advice concerning wrongful death actions as assets of estates, advice concerning transfer of real property assets of estates, and advice concerning distribution, investment, or settlement of estates.\textsuperscript{23} For example, the court in

\textsuperscript{17} See \textit{id}.

\textsuperscript{18} See Teshima, \textit{supra} note 4.


\textsuperscript{20} 225 A.2d 28 (Conn. C.P. 1966).

\textsuperscript{21} See \textit{id}.

\textsuperscript{22} See \textit{id}.

Wisdom v. Nealf found there to be a cause of action stated by the decedent’s niece and nephew against an attorney who incorrectly determined the distribution of an estate where the niece and nephew received less of the estate than they would have had the estate been correctly distributed. Upon applying the balancing of factors theory of liability, the court found that the attorney owed a duty of care to the niece and nephew.

The balancing of factors theory of liability has also been widely used to establish a cause of action for attorney negligence in cases involving trust instrument drafting and guardianship administration. The court in Pizel v. Zuspann held, for instance, that intended beneficiaries stated a cause of action against an attorney who drafted an inter vivos trust agreement where the attorney allegedly failed to record the deed to the trust property or otherwise put the deed out of the grantor’s control and failed to advise the settlor of the necessity of having the trustees take control of the trust during the settlor’s lifetime. The court held that the beneficiaries were the intended beneficiaries of the trust, it was foreseeable that they would be harmed if the trust failed, they suffered injury, the attorney drafted the amendment to the trust, the beneficiaries had no means of recovery other than the negligence claim against the attorney, and the legal profession would not be unduly burdened by requiring attorneys to act in a reasonably competent manner in representing clients.

In domestic relations litigation, the adverseness of the third party and the attorney is generally the reason courts do not allow a cause of action for attorney negligence to be stated. In cases involving procedural conduct of domestic relations litigation, or involving an originally retained divorce attorney bringing a cause of action against a succeeding divorce attorney, courts have uniformly ruled that a cause of action is not possible. Courts, however, are more willing to find an attorney liable in

25. See id.
26. See id.
29. See id.
30. See id.
31. See Teshima, supra note 4.
domestic relations cases involving property interests incident to marriage and divorce, and child custody and support. For example, the court in *Pelham v. Griesheimer* recognized the possibility that an attorney could be found liable for attorney negligence under the third-party beneficiary theory in a case involving child support. Although the court held that the plaintiff children failed to state a cause of action against their mother’s attorney for his failure to enforce a provision in the divorce decree that provided that their father would maintain them as prime beneficiaries in his life insurance policies, its decision was premised on the fact that an indispensable element of the third-party beneficiary theory of recovery was lacking. Here, the children did not allege and prove that the primary or direct purpose of their mother’s relationship with the defendant attorney was to benefit them.

Courts have yet to find an attorney for a seller or builder liable to a buyer or an attorney for a buyer liable to a seller in cases involving real property transactions. Likewise, no attorney liability has been found in cases involving attorneys who have represented a junior mortgagee bank, foreclosed a mortgage, represented executors, drafted joint-tenancy deeds, or recorded a deed in connection with a divorce. However, courts have found that a cause of action may be stated in cases involving the liability of an attorney for a mortgagee bank or lender or cases involving an attorney for a borrower. For instance, the court in *Kirby v. Chester* held that the attorney for a borrower who allegedly certified title negligently on two parcels of real property used for collateral for a loan owed a duty of care to the lender under the negligence theory of liability. The court reasoned that the attorney knew that the purpose of his title search and subsequent certification was to assure the lender sufficient collateral for the proposed loan, and thereby should have known that the lender could be harmed.

34. 440 N.E.2d 96 (Ill. 1982).
36. See id.
37. See id.
38. See Teshima, supra note 4.
39. See id.
43. See id.
In cases involving debtor-creditor relations, courts have used the third-party beneficiary theory of liability to find attorneys liable to creditors.\(^4\) In *Donald v. Garry*,\(^5\) for instance, an attorney, employed by a collection agency to bring an action for the collection of a debt owed to a client-creditor of the collection agency, was held liable to the creditor.\(^6\) The court found that the transaction in which the attorney’s negligence occurred was intended primarily for the benefit of the creditor.\(^7\)

Cases involving securities transactions typically involve situations where stock purchasers sue the attorneys for the corporate issuer of the stock.\(^8\) Both the negligence theory and the third-party beneficiary theory are generally used by courts to find that no cause of action can be stated by purchasers of securities against attorneys for the corporate issuers of the securities for attorney negligence.\(^9\) For example, the court in *Bush v. Rewald*\(^10\) found that, unless an attorney knew or should have known that his advice would be relied upon by investors in his client’s firm or unless the investors were intended beneficiaries of the advice, the attorney owes no legal duty to them.\(^11\) Courts, however, are split on the liability of an attorney for a limited partnership to the limited partners, and the liability of an attorney for a corporate issuer of stock to the corporation’s officers and directors in securities transaction cases.\(^12\) For example, the court in *Koehler v. Pulvers*\(^13\) held an attorney for a limited partnership liable under the negligence theory of recovery.\(^14\) The court reasoned that the effect on the limited partners was apparent and foreseeable to the attorney, as the attorney knew and intended for the limited partners to rely on his opinion.\(^15\) The court in *Hackett v. Village Court Associates*,\(^16\) however, refused to hold an attorney for a limited partner-

\(^6\) See id.
\(^7\) See id.
\(^8\) See Teshima, supra note 4.
\(^11\) See id.
\(^14\) See id.
\(^15\) See id.
\(^16\) 602 F. Supp. 856 (E.D. Wis. 1985).
ship liable to its limited partners for alleged negligence.\textsuperscript{57} Basing its ruling on the balancing of factors theory of recovery, the court found that no sufficiently compelling public policy existed to justify the extension of liability to the attorney.\textsuperscript{58}

Even though many courts still find attorneys not liable to those parties with whom they share no privity of contract for their alleged negligent performance of professional duties, there is a discernible trend toward relaxing the privity requirement as a prerequisite to bringing suit for attorney negligence.\textsuperscript{59} Courts have adopted three major theories upon which attorney liability may be based, and have utilized these theories to find attorney liability in an ever-increasing number of situations. As the courts appear increasingly receptive to expanding attorney liability in a wide variety of situations, practicing attorneys would be well advised to familiarize themselves with the situations in which courts have found causes of action for attorney negligence to lie.

\textit{Scott Jason Nabors}

\textsuperscript{57} \textit{See id.}

\textsuperscript{58} \textit{See id.}

\textsuperscript{59} \textit{See Teshima, supra note 4.}