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Professional Responsibility - Two's Company, Three's a Crowd - The Implications of Attorney Liability to Non-Client Beneficiaries

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CASE NOTE

PROFESSIONAL RESPONSIBILITY – Two's Company, Three's a Crowd? The Implications of Attorney Liability to Non-Client Beneficiaries, *Connely v. McColloch* (*In re* Estate of Drwenski), 83 P.3d 457 (Wyo. 2004).

INTRODUCTION

Joining the national trend to provide protection to non-client plaintiffs injured by attorney negligence, the Wyoming Supreme Court's decision in *Connely v. McColloch* represents a departure from its traditionally over-protective approach toward attorney liability.[1] The court's adoption of possible attorney liability to non-client third party beneficiaries effectively creates an exception to the old safeguard of the "strict privity" rule.[2] Thus, attorneys in Wyoming now owe a duty of care to non-client intended beneficiaries under certain circumstances.[3] If the transaction is meant to benefit a third party, the practicing attorney must look beyond the known duty of care already owed to the client and consider whether the exposure of liability to the third party outweighs the benefits of the transaction with the client.[4]

In 1999, Vernon Drwenski, suffering from cirrhosis of the liver, hired attorney M. Scott McColloch to handle various legal matters.[5] In April of that year, at the bequest of Drwenski, McColloch filed a divorce action, seeking to sever the marriage between Drwenski and his third wife, Trudy.[6] At that time, Drwenski's daughter, Rian Smith, was the principal beneficiary of his estate.[7] In September 1999, Drwenski changed his will, naming

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1. Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457, 462 (Wyo. 2004) (citing R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 81, at 161 (2d ed. 1981)). *See* John M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND & WATER L. REV. 79, 95 (2000) (citing Boller v. W. Law Assocs., P.C., 828 P.2d 1184, 1185-87 (Wyo. 1992), and Brooks v. Zebre, 792 P.2d 196, 200-01 (Wyo. 1990)).

2. The "strict privity" rule imposes a duty of care only toward one in privity of contract, thus, a third party or non-client is unable to prove negligence which requires duty as the first element. Melissa Hutcheson Brown, *Estate Planning Malpractice: A Guide for the Alabama Practitioner*, 45 ALA. L. REV. 611, 613-16 (1994).

3. *Connely*, 83 P.3d at 464.

4. 1 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.8, at 702 (5th ed. 2000) [hereinafter MALLEN].

5. *Connely*, 83 P.3d at 464.

6. Opening Brief of Appellants Erin Marie Connely as Personal Representative of the Estate of Vernon R. Drwenski and Erin Marie Connely, Individually at 5, Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457 (Wyo. 2004) (No. 03-29) [hereinafter Appellant's Opening Brief].

7. *Id.* at 5.

daughter Erin Marie Connely as the principal beneficiary.[8] The new will provided twenty-five percent of the estate was to go to Trudy unless the divorce was final at the time of Drwenski's death, in which case Trudy would receive nothing.[9] In September 1999, Trudy offered to settle the divorce for $145,000, but Drwenski refused.[10] Drwenski died before the divorce was finalized and Trudy inherited money under the new will that would have gone to Connely had the divorce been finalized.[11] Connely then sued McCulloch, accusing him of a breach of his duty of care to both the estate and Connely individually, as a third party beneficiary.[12] The Wyoming Supreme Court previously had held an "attorney-client relationship is the essential element . . . for maintenance of a legal malpractice lawsuit . . . ."[13] Because McColloch and Connely did not have an attorney-client relation-

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8. *Id.* The disinheritance of Rian Smith probably stemmed from a lawsuit filed by McColloch on Drwenski's behalf against Smith's husband for assault. *Id.*

9. *Id.* at 6. The new will specified:

> 1. I hereby leave unto my estranged wife, Trudy Drwenski, who at the time of this will I am in the process of divorcing, one quarter (1/4) of the property which will be subject to disposition under this will . . . .
>
> 2. In the event my wife and I are divorced at the time of my demise, I leave her nothing.

Id. This will was not drafted by McColloch. Brief of Appellees at 2, Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457 (Wyo. 2004) (No. 03-30) [hereinafter Brief of Appellees].

10. Brief of Appellees at 2-3. Drwenski counter offered $100,000.00, later withdrawn, while Connely, under Durable Power of Attorney, directed McColloch to accept Trudy's offer. Brief of Appellees at 2-3; Appellant's Opening Brief at 6.

11. *Connely*, 83 P.3d at 460. Mrs. Drwenski received twenty-five percent of an estate valued over three million dollars, around $600,000.00 or more. Appellant's Opening Brief at 6. Wyoming's statute ensures that a will can not deprive a spouse of property by statutorily creating an elective share of property of "[o]ne fourth (1/4), if the surviving spouse is not the parent of any surviving issue of the decedent." WYO. STAT. ANN. § 2-5-101(a)(ii) (1999). Thus, as long as Trudy was married to Drwenski, she was entitled to twenty-five percent of his property. No will could change this, so a divorce was the only option unless Trudy waived her right of election. Appellant's Opening Brief at 8.

12. *Connely*, 83 P.3d at 460 (Wyo. 2004). The court specified:

> The gravamen of [Connely's] . . . complaint was that Mr. McColloch failed to do anything to obtain the divorce from the time he was retained in April 1999 until the time of Mr. Drwenski's death six months later. . . . The complaint . . . alleged, as evidence of Mr. McColloch's breach of his duty, that no discovery was undertaken, Mr. Drwenski's deposition was never taken, no request for scheduling conference or trial date was ever made, and essentially no action was taken at all to further the progress of the divorce proceeding.

Id.

13. Bowen v. Smith, 838 P.2d 186, 196 (Wyo. 1992).

ship, the district court concluded that McColloch owed no legal duty to Connely, a third party, under Wyoming law.[14]

On appeal, the Wyoming Supreme Court adopted a modified six-part balancing test to determine under which circumstances an attorney might owe a duty to a non-client.[15] The test begins with a threshold inquiry into "the extent to which the transaction was intended to *directly benefit* the plaintiff."[16] If the court finds the requisite intent to benefit a third party, the analysis continues.[17] However, the *Connely* court found the primary purpose for the transaction between Drwenski and his attorney, McColloch, was not to directly benefit Connely, but rather to get a divorce.[18] Hence, as Connely's argument failed the threshold inquiry, there was no need to apply the six-factor balancing test.[19] Importantly, however, the *Connely* court adopted a new law that creates an attorney's duty to non-clients in certain circumstances.

This case note examines the history, development, and adoption of attorney liability to non-clients in Wyoming under certain circumstances, and explores the policy and practical implications of this new law. The Background section examines the development of this third party duty in other states and outlines what the law was in Wyoming before *Connely*. The Principal Case section presents the *Connely* decision by reviewing the Wyoming Supreme Court's rationale in deciding to change the law, and stating what the new law is today for non-client duty. The Analysis section explores the effect of the *Connely* rule on the attorney-client relationship and the scope of an attorney's increased liability in estate planning and drafting of testamentary documents, assignments and subrogation, corporations and partnerships, application of the statute of limitations, and considers how an attorney might avoid incurring liability to non-clients. Although attorneys will now have to consider their duty to third parties when undertaking a transaction intended to benefit these non-clients, such a consideration is neither so onerous nor so impossible as to justify a continuation of absolute immunity for attorneys that negligently harm third parties.

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14. *Connely*, 83 P.3d at 460.

15. Id. at 464. The court chose to implement the test from Lucas v. Hamm, 364 P.2d 685 (Cal. 1961). For a complete discussion of *Lucas*, *see infra* notes 37-46 and accompanying text.

16. *Connely*, 83 P.3d at 464. Although the threshold inquiry is basically an emphasis of the first factor in the balancing test, unless such an intent to benefit a third party is found there is no need to then weigh it alongside the other five factors. *Id.*

17. *Id.* at 465.

18. *Id.* at 467.

19. *Id.*

BACKGROUND

Traditionally, the scope of liability for attorneys was limited to those with whom the attorney was in privity of contract.[20] In *Savings Bank v. Ward*, the United States Supreme Court dismissed an attorney's general duty to a third party with the following:

> Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.[21]

Following *Savings Bank v. Ward*, the privity of contract requirement for attorney liability ruled for almost eighty years.[22]

Today, however, "[t]he modern trend in the United States is to recognize the existence of a duty beyond the confines of those in privity to the attorney-client contract. Whatever the legal theory . . . there must be a duty of care owed by the attorney to the plaintiff."[23] There are two main theories under which various courts determine the existence of such a duty.[24] The first theory is grounded in tort and grew out of a triumvirate of California decisions that eroded privity's strict application and developed a balancing test to determine if a duty exists to a third party intended beneficiary.[25] The second theory is based on "the concept of a third party beneficiary contract" and seeks to effectuate the intent of the attorney and client to directly benefit a third party.[26] Under both theories, "the predominant inquiry usually has focused on one criterion: Was the principal purpose of the attorney's retention to provide legal services for the benefit of the plaintiff?"[27]

The California Supreme Court's move toward a relaxation of the privity standard began with *Biakanja v. Irving*.[28] In *Biakanja*, the defendant will-preparer improperly obtained witness signatures to a new will which

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20. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 6.2 (1980) [hereinafter MEISELMAN]. Privity of contract is "[t]he relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so." BLACK'S LAW DICTIONARY 1217 (7th ed. 1999).

21. Savings Bank v. Ward, 100 U.S. 195, 200 (1880).

22. MEISELMAN, *supra* note 20, § 6.2.

23. MALLEN, *supra* note 4, § 7.8, at 693.

24. *Id.* at 694.

25. *See* Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961); Heyer v. Flaig, 449 P.2d 161 (Cal. 1969).

26. MALLEN, *supra* note 4, § 7.8, at 694, 700. The third party beneficiary contract model is drawn from RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981). *Id.*

27. MALLEN, *supra* note 4, § 7.8, at 701.

28. *Biakanja*, 320 P.2d at 16.

caused the will to be invalidated.[29] As a result, the intended beneficiary received only one-eighth, rather than all, of the estate.[30] The will-preparer in *Biakanja* was a notary public and California precedent held "that a notary public who prepared a will was not liable to the beneficiary for failing to have it properly executed."[31] Despite the precedent set in *Savings Bank*, the *Biakanja* court found the defendant liable to the intended beneficiary for the injury caused by the invalidated will.[32] Thus, the California Supreme Court relaxed the strict privity rule by holding that "a will preparer may be liable to the intended beneficiaries for negligent preparation of the will, despite the absence of privity."[33]

The *Biakanja* court's rationale drew on decisions from other courts that had allowed recovery in other areas of law despite a lack of privity.[34] To aid in deciding whether the defendant in future cases would be liable without privity, the *Biakanja* court adopted the following balancing test:

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.[35]

Applying this test to the defendant notary whose negligent will preparation resulted in a substantial loss to the intended beneficiary, the court found the defendant liable to the beneficiary, a third party who was not in privity.[36]

The next case in the series of California decisions which built on the *Biakanja* holding and further relaxed the privity standard came just three

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29. *Id.* at 17.
30. *Id.*
31. *Id.* at 18 (citing Mickel v. Murphy, 305 P.2d 993 (Cal. Ct. App. 1957)).
32. *Id.* at 19.
33. *Id.* at 16.
34. *Id.* at 18. The court analogized and applied the reasoning from decisions such as MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) and its progeny, which allowed recovery for third parties from manufacturers and suppliers of negligently made goods notwithstanding lack of contractual privity. *Biakanja*, 320 P.2d at 18-19.
35. *Biakanja*, 320 P.2d at 19. This balancing test forms the base of the test adopted by *Connely* with a deletion of the moral blame aspect and a substitution of a factor assessing the possible burden a new duty would place on the profession, taken from *Lucas*, the next case discussed in this case note. For a complete discussion of the *Connely* rule, *see infra* notes 105-12 and accompanying text.
36. *Id.*

years later in *Lucas v. Hamm*.[37] Whereas *Biakanja* dealt with a notary's liability, *Lucas* involved an attorney whose preparation of a will included a trust intended to benefit the plaintiffs but which violated the rule against perpetuities.[38] As a result, plaintiff beneficiaries were forced into a settlement that reduced their share of the estate.[39] A previous California decision, *Buckley v. Gray*, held that an intended beneficiary could not maintain an action against an attorney's negligent will preparation and execution because of the lack of privity between the lawyer and the non-client.[40] The California Supreme Court in *Lucas* reasoned that the strict privity required by *Buckley*—in order to hold a will-preparer liable for negligence—had been discarded and replaced with the *Biakanja* balancing test.[41] Before deciding whether the balancing test should apply to attorneys, however, the *Lucas* court briefly considered whether such a liability would create an undue burden on the profession.[42] The *Lucas* court concluded "that the extension of [an attorney's] . . . liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss."[43] Thus, for the first time, a court found a lack of privity between an attorney and an intended beneficiary did not preclude tort liability.[44] Despite the new rule being applied to their attorney, plaintiffs in *Lucas* were not allowed recovery based on attorney negligence because the court found the defendant could not be held liable "for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers."[45] The *Lucas* decision began the nationwide trend to im-

37. Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).
38. *Id.* at 686-87.
39. *Id.*
40. *See* Buckley v. Gray, 42 P. 900 (Cal. 1895).
41. *Lucas*, 364 P.2d at 687.
42. *Id.* at 688. The *Lucas* court reasoned that despite exposure to "large and unpredictable" liability, an attorney already faces these same liabilities as to the client. *Id.*
43. *Id.*
44. *Id.* ("It follows that the lack of privity between plaintiffs and defendant does not preclude plaintiffs from maintaining an action in tort against the defendant."). The *Lucas* court also ruled that an action in contract could be pursued by third party beneficiaries "who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator . . . ." *Id.* at 689.
45. *Id.* The *Lucas* court found the rule against perpetuities to be a particularly murky area:

> Professor Gray . . . stated: "There is something in the subject which seems to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar . . . . A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it."

pose a duty on attorneys who negligently draft a will and injure third party beneficiaries.[46]

In 1969, the California Supreme Court handed down its decision in *Heyer v. Flaig*.[47] In *Heyer*, the attorney defendant drafted a will which negligently excluded the necessary statutory language to bar a new husband's claim to the estate.[48] While the issue in both *Biakanja* and *Lucas* was whether a duty was owed to a third party, the issue in *Heyer* was determining what time the statute of limitations would begin to run, either the time of drafting or the time of discovery (i.e., at the testator's death).[49] If the statute of limitations began at the time of drafting, an attorney's liability would be limited to two years.[50] If, however, the statute of limitations began at discovery, an attorney's liability could continue indefinitely because the cause of action might not arise until the client's death years down the road.[51] The *Heyer* court decided the action accrued and the statute of limitations would begin to run at the death of the testator in order to protect the interests of the intended beneficiaries.[52] *Heyer* not only followed, but explained the previous *Lucas* decision, clarifying that attorney liability to non-clients flows from the duty of care owed to the client, not from the contractual relationship.[53] The *Heyer* court reasoned "public policy requires that the attorney exercise his position of trust and superior knowledge responsibly so as not to affect adversely persons whose rights and interests are *certain* and *foreseeable*."[54] Because it is reasonably foreseeable that one who negligently drafts

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Id. at 690 (quoting JOHN C. GRAY, THE RULE AGAINST PERPETUITIES 11 (Roland Gray ed., 4th ed. 1942)). *See also* W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954) (describing the rule as a "technicality-ridden legal nightmare" and a "dangerous instrumentality in the hands of most members of the bar"). The *Lucas* court went on to find the defendant liable for negligent conduct committed while acting as attorney for the executors. *Lucas*, 364 P.2d at 691.

46. MALLEN, *supra* note 4, § 7.8, at 694 ("The balancing test has been cited with approval and accepted, sometimes with modifications, by most jurisdictions that have examined the issue."). Jurisdictions that have adopted the *Lucas* balancing test include Arizona, California, Connecticut, D.C., Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Mississippi, Missouri, Montana, North Carolina, New Jersey, New Mexico, Oklahoma, Utah, Washington, and Wisconsin. *Id.* at 694-97.

47. Heyer v. Flaig, 449 P.2d 161 (Cal. 1969).

48. *Id.* at 161.

49. *Id.* at 165-68.

50. *Id.* at 166-67.

51. *Id.*

52. *Id.* at 167-68.

53. *Id.* at 164 ("When an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries.").

54. *Id.* at 165 (emphasis added).

a will could cause injury to the intended beneficiary, an attorney owes a duty of care to that third party.[55]

While *Biakanja* set the stage for liability to an intended beneficiary of a negligently crafted testament, *Lucas* applied that standard to attorneys despite the possibility of an increased burden on the profession.[56] *Heyer* solidified these decisions by stressing that the cause of action lies in tort, arising out of the attorney-client duty of care and the foreseeability of injury to an intended beneficiary.[57] From its origin as primarily a duty to draft wills so as not to injure third party beneficiaries, the *Lucas* doctrine thus grew to include other areas of law.[58]

The second theory used to establish a lawyer's duty to non-clients is based on an extension of the Restatement of Contracts approach from the field of contract law to that governing the attorney-client relationship.[59] Under this contract theory, to find a duty to a non-client, the main inquiry is whether the "intent of the client to benefit the non-client was a direct purpose of the transaction or relationship. In this regard, the test for third party recovery is whether the intent to benefit actually existed, not whether there could have been an intent to benefit the third party."[60] Thus, the purpose of the attorney-client relationship must have been to benefit the non-client third

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55. *Id.* at 164-65.

56. *See* Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685, 689 (Cal. 1961).

57. *Heyer*, 449 P.2d at 165.

58. *See* Ronald E. Mallen, *Duty to Nonclients: Exploring the Boundaries*, 37 S. TEX. L. REV. 1147 (1996) (exploring cases involving an attorney's duty to a third party beneficiary in family law, subrogation, assignment, and partnerships).

59. MALLEN, *supra* note 4, § 7.8, at 700. The Restatement provides:

> § 302 Intended and Incidental Beneficiaries
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> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

60. Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985).

party directly, not incidentally.[61] Arkansas, Illinois, Maryland, Oregon, and Pennsylvania follow this approach to determine an attorney's duty to a non-client.[62]

At the time *Connely* was decided in 2004, New York, Texas, Ohio, and Nebraska still required privity of contract to hold an attorney liable for negligence; thus, third party claims in these states still fail for lacking a cause of action.[63] Wyoming had yet to consider the issue.[64]

Prior to 2004, the Wyoming Supreme Court's decisions regarding attorney liability to non-clients upheld the privity requirement.[65] In *Brooks v. Zebre*, Zebre was an attorney whose representation of the lessors/buyers of a ranch resulted in what the district court found to be an unconscionable contract.[66] Brooks, the owner of the ranch, had just lost her husband and entered into the lease/purchase on Zebre's advice, even though he represented the buyers.[67] Although the district court ordered recission and restitution of the contract, it granted summary judgment to Zebre on Brook's claim of negligence.[68] On appeal, Brooks claimed damages due to Zebre's alleged negligence in his treatment of her as an adverse party.[69] Reasoning that a legal duty as a question of law does not exist between an attorney and an *adverse* party, the Wyoming Supreme Court affirmed the summary judgment.[70] Justice Urbigkit, however, in his dissent argued "[t]he solution here is mismatched with the rationale because this case does not involve the adversarial process."[71] Justice Urbigkit observed that Brooks was far from an

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61. Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457, 462 (Wyo. 2004).

62. *Id.* In 1987, Arkansas codified its theory of determining a duty to a non-client, which incorporates part of RESTATEMENT (SECOND) CONTRACTS § 302. MALLEN, *supra* note 4, § 7.8, at 694 n.6. *See* ARK. CODE ANN. § 16-22-310 (Michie 2005).

63. *Connely*, 83 P.3d at 463. *See, e.g.*, Conti v. Polizzotto, 243 A.D.2d 672, 672 (N.Y. App. Div. 1997) ("The well established rule in New York with respect to attorney malpractice is that absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence."); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987) ("It is by now well-established in Ohio that an attorney may not be held liable by third parties as a result of having performed services on behalf of a client unless the third party is in privity with the client for whom the legal services were performed . . . ."); St. Mary's Church v. Tomek, 325 N.W.2d 164, 165 (Neb. 1982) ("[A] lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this duty does not extend to third parties.").

64. *Connely*, 83 P.3d at 464.

65. *See, e.g.*, Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990); Bowen v. Smith, 838 P.2d 186 (Wyo. 1992); Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002).

66. *Brooks*, 792 P.2d at 200.

67. *Id.* at 199-200.

68. *Id.* at 200.

69. *Id.*

70. *Id.* at 200-02 (holding "an attorney owes no actionable duty to an adverse party emanating from the zealous representation of his own client").

71. *Id.* at 203 (Urbigkit, J., dissenting). Justice Urbigkit explained:

adverse party as Zebre gave advice to her and she relied upon his advice to her detriment.[72] Nonetheless, the majority holding that an attorney owes no duty of care to an adverse party became Wyoming law.[73]

In a continuing effort to protect the privity requirement, the Wyoming Supreme Court in *Bowen v. Smith* found that attorneys for the majority shareholder of a corporation did not owe a duty of care to the minority shareholders who were separately represented by counsel.[74] The *Bowen* court established "the attorney/client relationship is the essential element under the circumstances for maintenance of a legal malpractice lawsuit."[75]

The next Wyoming Supreme Court case to examine whether an attorney owed a duty to a non-client came in 2002 with *Bevan v. Fix*.[76] In 1992, the defendant attorney, Fix, represented Bevan on a criminal battery charge against Jenni Jones.[77] Bevan and Jones were subsequently married.[78] Fix then represented Jones in a 1997 divorce from Bevan.[79] The Wyoming Supreme Court stated, "[i]t is true that this court has consistently rejected legal malpractice claims by 'nonclient' plaintiffs of the alleged negligent attorney . . . ."[80] However, because the *Bevan* court found Bevan to be a former client rather than a non-client, Bevan could maintain an action for malpractice.[81]

> I cannot accept the majority's rationale that: (1) the duty to zealously represent a client frees an attorney from actionable duty to others; [and] (2) willfully violating the rule for professional responsibility by negotiating directly with another attorney's client, to the detriment of that client, creates no cause of action for the harmed individual . . . .

Id. (Urbigkit, J., dissenting).

72. *Id.* (Urbigkit, J., dissenting). The allegedly bad advice included urgings not to consult with her attorney about the lease/sale agreement and to rely on Zebre's guidance. *Id.* (Urbigkit, J., dissenting).

73. *Id.* at 200.

74. Bowen v. Smith, 838 P.2d 186, 195-97 (Wyo. 1992) ("Nothing in this record reveals justification to attribute any intended or agreed representation by the law firm for the minority shareholders individually and as a group.").

75. *Id.* at 196.

76. Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002).

77. *Id.* at 1016.

78. *Id.*

79. *Id.* Fix ultimately removed himself as Jones's attorney after the two commenced a sexual relationship. *Id.*

80. *Id.* at 1027 (referring to Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990), and *Bowen*, 838 P.2d 186).

81. *Id.* The *Bevan* court noted an attorney could become privy to certain information from representing a client for a domestic battery charge which could be used later in a divorce "to the detriment of the former client . . . thus breaching the attorney's duties of confidentiality and loyalty." *Id.* at 1032. The case was remanded as the court had insufficient information to determine the issue. *Id.* at 1033.

PRINCIPAL CASE

The Wyoming Supreme Court's decision to abandon the long-held privity requirement and hold an attorney may be held liable for negligence to a third party came over forty years after the *Lucas* doctrine began to sweep the nation.[82] Like the *Biakanja*, *Lucas*, and *Heyer* testate cases, *Connely v. McColloch* grew out of a disputed will.[83] The unanimous opinion written by Justice Kite discussed the history of an attorney's duty to third parties, explained the rationale for adopting a new duty of care, announced the new rule itself, and applied that rule to the *Connely* case.[84]

Both appellant Connely and appellee McColloch asked the court whether (1) an attorney owes a duty of care to an intended beneficiary, and (2) an estate has a cause of action for legal malpractice in the absence of damage.[85] Essentially, Connely wished to bring actions in negligence

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82. Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457 (Wyo. 2004).
83. *Id.* at 459-60.
84. *Id.* at 461-64.
85. *Id.* at 459. The exact issues were as follows:

> Ms. Connely raises the following issues:
>
> 1. Were there adequate facts in the record below to show that Connely individually, as a third-party beneficiary of her father, had a legal right to [make a] claim against Attorneys for legal malpractice occurring during the lifetime of her father?
>
> 2. Did Connely, as Personal Representative of the Estate, have a cause of action to pursue the attorney malpractice case under the Wyoming survival statute?
>
> 3. Should this matter be remanded in that the existence of a duty in a complex case such as this is a mixed issue of fact and law?
>
> Mr. McColloch rephrases the issues as:
>
> 1. Whether a lawyer who represents a client in a divorce owes a duty to his client's child?
>
> 2. Whether an estate may pursue a claim where it has no damages?
>
> In her reply brief, Ms. Connely raises the following issues:
>
> 1. The duty of an attorney to an intended third-party beneficiary has yet to be decided in Wyoming and its acceptance would be consistent with good public policy and past Wyoming precedent.
>
> 2. The cause of action for legal malpractice accrued prior to the client's death and thus the claims survive in his estate.

against McColloch, individually, in her capacity as an intended beneficiary and on behalf of Drwenski's estate.[86] Basing her arguments for a third-party duty on both the *Lucas* balancing test and the Restatement intended beneficiary theory, Connely contended that she fit the elements of both and urged the reversal of the district court's summary judgment in favor of McColloch.[87] For the cause of action on behalf of the estate, Connely argued that McColloch's failure to obtain the divorce prior to Drwenski's death resulted in a twenty-five percent loss to the estate.[88]

In contrast, McColloch asserted that under Wyoming case law, an attorney did *not* owe a legal duty to a non-client and asked the court to maintain the privity requirement.[89] In fact, adoption of such a duty in Connely's case would present "the kind of insupportable conflict foreseen in the [child beneficiary of divorce] cases."[90] McColloch contended, "'[t]o conclude that an attorney representing one of the spouses [in a divorce] also owes a legal duty to the children of the two litigants would clearly create conflict-of-interest situations.'"[91] Furthermore, McColloch argued the estate had no cause of action because it had not been damaged.[92]

The *Connely* court began its analysis with a discussion of an attorney's duty to a third party.[93] Reiterating the 120-year-old *Savings Bank v. Ward* decision requiring privity for liability to a third party, the discussion focused on the development of the California balancing test in *Biakanja* and

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Id.

86. Appellant's Opening Brief at 13, 20.

87. Reply Brief of Appellants Erin Marie Connely as Personal Representative of the Estate of Vernon R. Drwenski and Erin Marie Connely, Individually at 6, Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457 (Wyo. 2004) (No. 03-29) [hereinafter Appellant's Reply Brief].

88. *Id.* at 9 (listing McColloch's alleged negligent acts as "the failure to diligently prosecute the [divorce] . . ., the failure to diligently pursue settlement offers, the failure to acknowledge the direction of the attorney-in-fact to settle, and the failure to set the matter for hearing, knowing that the client was in imminent risk of death.").

89. Brief of Appellees at 6-7.

90. *Id.* at 11. The brief continued:

> Trudy Drwenski offered to settle the divorce for $145,000.00. Connely stood to inherit an extra hundreds of thousands of dollars if her father accepted. Connely [with a Durable Power of Attorney] instructed her father's lawyer to settle. Now she sues the lawyer for listening to his client instead. This cannot be; duties to both the client-litigant and his beneficiary are irreconcilable.

Id.

91. *Id.* at 11 (quoting Pelham v. Griesheimer, 440 N.E.2d 96, 101 (Ill. 1982)).

92. *Id.* at 11-12 ("McColloch's alleged mishandling of the divorce will only affect the distribution of the estate's assets, not the extent of those assets.").

93. Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457, 461 (Wyo. 2004).

Lucas.[94] Acknowledging that the balancing test relaxed the privity prerequisite, the court then examined the expansion of attorney liability to third parties under the third party beneficiary contract theory.[95] The analysis stated "[i]nterestingly, commentators have suggested that even in those jurisdictions that apply California's balancing approach, the predominate inquiry is generally whether a principal purpose of the attorney's retention to provide legal services was to provide a specific benefit to the plaintiff—in other words, the third party beneficiary test."[96] While the justices paid scant attention to reasons put forth by other jurisdictions not to adopt this rule, some reasons were mentioned in summary fashion:

> There are several reasons courts are reluctant to relax the rule of privity in attorney malpractice cases. First, the rule preserves an attorney's duty of loyalty to and effective advocacy for the client. Second, adding responsibilities to nonclients creates the danger of conflicting duties. Third, once the privity rule is relaxed, the number of persons a lawyer might be accountable to could be limitless. Fourth, a relaxation of the strict privity rule would imperil attorney-client confidentiality.[97]

Rather than addressing the merits of these concerns directly, the court glossed over their importance by merely stating, "[c]ourts that have refrained from adopting a duty to a nonclient are quickly becoming part of a thinning minority and some would say are being overprotective of the legal profession."[98]

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94. *Id.* at 461-62. The *Connely* court pointed out that "California's balancing test requires the weighing of specific public policy considerations and closely mirrors the factors we adopted in Gates v. Richardson, 719 P.2d 193 (Wyo. 1986), to be utilized in considering whether new tort duties should be recognized." *Id.* at 462. The *Gates* factors are:

> (1) [T]he foreseeability of harm to the plaintiff, (2) the closeness of the connection between the defendant's conduct and the injury suffered, (3) the degree of certainty that the plaintiff suffered injury, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden upon the defendant, (7) the consequences to the community and the court system, and (8) the availability, cost and prevalence of insurance for the risk involved.

Id. at 462 n.4.

95. *Id.* at 462-63. For a discussion of this approach, *see supra* notes 59-62 and accompanying text.

96. *Id.* at 462 (citing R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 81, at 161 (2d ed. 1981)).

97. *Id.* at 463 (quoting Chem-Age Industries, Inc. v. Glover, 652 N.W.2d 756, 769 (S.D. 2002) (internal citations omitted)).

98. *Id.*

The *Connely* court then examined existing Wyoming case law, stating "we have not yet been presented with the precise question of whether there are any circumstances in which an attorney owes a duty to a nonclient."[99] The *Connely* court took great care to explain its holdings in *Brooks*, *Bowen*, and *Bevan*, finding the facts in this case distinguishable from the previous cases because the attorney in *Connely* did owe a duty to a non-client.[100] *Brooks* held an attorney owed no duty to an adversary, *Bowen* held an attorney owed no duty to minority shareholders who were separately represented, and *Bevan* held an attorney did owe a duty to a former client, not a non-client.[101]

Finally, the court examined its decisions holding other professionals liable to third parties in certain circumstances.[102] After reviewing its own precedent, the Wyoming Supreme Court offered its rationale for a new rule holding an attorney does owe a duty to a non-client in certain circumstances:

> This case presents the first opportunity we have had to address the question of an attorney's duty to a third party whom, it is alleged, was intended to benefit from the attorney's retention. Given the obvious trend around the country and this Court's willingness to hold other professionals liable to nonclients in appropriate circumstances, we conclude it is time to apply the law equally to attorneys and recognize they can also be found to owe a duty to nonclients in limited circumstances. We see no reason why attorneys deserve absolute immunity when their clients intend their services to directly benefit a nonclient. "The law of professional malpractice should be uniform, unless it can reasonably be

99. *Connely*, 83 P.3d at 463-64.

100. *Id.* (citing Brooks v. Zebre, 792 P.2d 196 (Wyo. 1990); Bowen v. Smith, 838 P.2d 186 (Wyo. 1992); Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002)).

101. *Id.* at 463. Explaining *Bowen*, the *Connely* court noted that "we held attorneys for a corporation and its majority shareholder who undertook litigation to recover money for the corporation did not represent the minority shareholders, who were separately represented, and owed no duty to them." *Id.* (referring to *Bowen*, 838 P.2d 186). Explaining *Brooks*, the court observed that "we held no cause of action for negligence exists against the attorney for an adversary." *Id.* (referring to *Brooks*, 792 P.2d 196). Distinguishing *Bevan*, the court stated that "the question . . . was whether an attorney owed a duty to *former client* rather than a *nonclient*." *Id.* at 464 (referring to *Bevan*, 43 P.3d 1013).

102. *Id.* at 464. *See, e.g.*, Sundown, Inc. v. Pearson Real Estate Co., 8 P.3d 324 (Wyo. 2000) (duty of broker to non-client); Fowler v. Westair Enterprises, Inc., 906 P.2d 1053 (Wyo. 1995) (duty of broker to non-client); Rauh v. Kornkven, 852 P.2d 328 (Wyo. 1993) (duty of real estate agents to non-client buyers); Century Ready-Mix Co. v. Campbell County School District, 816 P.2d 795 (Wyo. 1991) (duty of architects to non-clients); Erpelding v. Lisek, 71 P.3d 754 (Wyo. 2003) (no duty owed by counselor under the circumstances, but recognizing duty may be owed under some circumstances).

> shown that one profession is more deserving of protection than another for valid policy or social reasons."[103]

Thus, the Wyoming Supreme Court adopted the new rule, holding an attorney may owe a duty to a non-client for two reasons: first, to follow a national trend in this direction, and, second, to remove an immunity that attorneys enjoyed which was denied to other professionals.[104]

The New Rule

Combining both the threshold inquiry from the Restatement third party beneficiary of contract theory and the California balancing test, the Wyoming Supreme Court ruled that an attorney does owe a duty to a non-client under certain circumstances.[105] The court's formulation of the test consists of a two-part inquiry.[106] First, "the threshold inquiry must be whether the plaintiff is an intended beneficiary of the transaction; if not, no further inquiry need be made."[107] Second, if the initial inquiry that "the transaction was intended to *directly benefit* the plaintiff" is satisfied, the *Lucas* test is applied to determine if a duty exists.[108] The six factors from *Lucas* are as follows:

> (1) [T]he extent to which the transaction was intended to directly benefit the plaintiff; (2) the foreseeability of harm; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) whether expansion of liability to the nonclient would place an undue burden on the

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103. *Connely*, 83 P.3d at 464 (quoting Steven K. Ward, *Developments in Legal Malpractice Liability*, 31 S. TEX. L. REV. 121, 142-43 (1990)).

104. *Id.*

105. *Id.* at 464-65.

106. *Id.*

107. *Id.* at 464. The court explained the significance of the initial inquiry:

> Put another way, if the plaintiff was not an intended beneficiary of the transaction, the plaintiff lacks standing to sue the attorney for legal malpractice. An "intended beneficiary" of the transaction . . . means just that—the transaction must have been intended to benefit the plaintiff; it is not enough that the plaintiff may be an incidental beneficiary of the transaction.

Id. (quoting Strait v. Kennedy, 13 P.3d 671 (Wash. Ct. App. 2000) (internal citations omitted)).

108. *Id.* at 464-65. As the court explained in a subsequent case, if duty is established, the plaintiff would still have to prove "the accepted standard of legal care; . . . that the attorney departed from the accepted standard of care; . . . [and] that the attorney's conduct was the legal cause of the injuries suffered." Gayhart v. Goody, 98 P.3d 164, 169 (Wyo. 2004).

> legal profession; and (6) the policy of preventing future harm.[109]

If the transaction was not intended to directly benefit the plaintiff, no duty would be established and no further analysis would be required.[110]

Adding additional safeguards to protect the attorney-client relationship, the Wyoming Supreme Court made it clear that it "will not impose a duty on an attorney to a nonclient if such an independent duty would potentially conflict with the duty the attorney owes to his or her client."[111] Furthermore, echoing its decision in *Brooks*, the *Connely* court added "[a]n attorney owes no actionable duty to an adverse party emanating from the zealous representation of his own client."[112]

After announcing the new rule, the Wyoming Supreme Court then applied it to the facts in the *Connely* case.[113] Beginning with the threshold inquiry, the court found the primary purpose for the transaction between Drwenski and McColloch was *not* to directly benefit Ms. Connely, but rather to obtain a divorce.[114] The court explained:

> While we recognize that a divorce client's children will be affected by the divorce, that fact alone is not sufficient to support a finding that the attorney hired to obtain the divorce owes a duty to the children. . . . [I]t is not enough that the plaintiff may be an "incidental beneficiary" of the transaction.[115]

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109. *Connely*, 83 P.3d at 464-65.
110. *Id.*
111. *Id.* at 465. The court elaborated on the rationale for this safeguard:

> The policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney's ethical obligations to the client. This occurs if a duty to a third person creates a material risk of divided loyalties because of a conflicting interest or a breach of a confidence. The potential for a conflict of interest is encompassed in the fifth policy consideration [of the *Lucas* test], whether expansion of liability to the nonclient would place an undue burden on the legal profession.

Id. (internal citation omitted).
112. *Id.* (quoting Brooks v. Zebre, 792 P.2d 196, 201 (Wyo. 1990)).
113. *Id.* at 465-66.
114. *Id.*
115. *Connely*, 83 P.3d at 465.

Hence, there was no need to go through the six-factor *Lucas* test.[116] McColloch did not owe a duty to Connely as an indirect beneficiary of the divorce.[117] Without duty, Connely's claim of negligent malpractice could not be sustained.[118] As there was no damage to the estate, simply a redistribution of its assets, the estate also had no cause of action against McColloch for negligence.[119] As a result of the *Connely* decision, attorneys in Wyoming may owe a duty of care to a non-client third party if the transaction between the attorney and client was meant to directly benefit the third party and the application of the six-factor balancing test weighs in the third party's favor.[120]

ANALYSIS

The Wyoming Supreme Court got it right. The *Connely* decision removes the unnecessary absolute immunity that attorneys previously enjoyed from negligence lawsuits instituted by third parties.[121] Although the *Connely* court could have chosen the Restatement/contract beneficiary approach, the choice to adopt the *Lucas* rule affords more protection to beneficiaries while protecting the attorney-client relationship as reflected in two main policy considerations that flow from the *Connely* rule: First, it allows a cause of action in tort to innocent third party beneficiaries injured by an attorney's negligence; second, it provides safeguards to protect the attorney from conflicting interests and unlimited liability while promoting zealous representation.[122] In addition to these policy considerations, practical considerations flow from the choice to adopt the *Connely* rule allowing for a possible attorney duty to third parties in areas of law such as estate planning and drafting of testamentary documents, assignments and subrogation, corporations and partnerships, application of the statute of limitations, and how to avoid incurring liability to non-clients.[123]

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116. *Id.* at 467. Ironically, while the *Connely* court seemed to have been persuaded by Connely's arguments to adopt an attorney duty to non-clients, the court found, nonetheless, that no duty existed toward Connely. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 467-68. Thus, the court agreed with Appellee's argument. *See supra* note 92 and accompanying text.

120. *Id.* at 464-65.

121. *Id.*

122. *See, e.g.*, Blair v. Ing, 21 P.3d 452, 464 (Haw. 2001); Francis v. Piper, 597 N.W.2d 922, 925 (Minn. Ct. App. 1999); Donahue v. Shugart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 628 (Mo. 1995).

123. *See* Mallen, *supra* note 58, at 1147 (discussing third party duty as applied to adoption, corporate entities, personal injury and spousal rights, and subrogations and assignments). *See also* Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4th 615 (2005); Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R. 4th 464 (2005).

I. Policy Considerations

Third party plaintiffs injured by an attorney's negligence may now be able to establish an attorney's duty under the *Connely* rule, thereby enabling a lawsuit grounded in tort.[124] The Wyoming Supreme Court implemented the following rationale from *Lucas* to care for injured third parties:

> One of the main purposes which the transaction between [the attorney] . . . and the testator intended to accomplish was to provide for the transfer of property to [the beneficiaries] . . . . [I]f persons such as [the beneficiaries] are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired.[125]

In order to protect the beneficiary and prevent future harm, the Wyoming Supreme Court faced a choice between the *Lucas* policy balancing approach or the Restatement third party beneficiary theory of contract.[126] While the *Connely* opinion does not detail the court's rationale for choosing the *Lucas* balancing test, providing a remedy in tort rather than in contract directly impacts the damages available to the plaintiff beneficiary.[127] In Wyoming, the basis for a legal malpractice action usually lies in contract despite the standard of care lying in tort.[128] Generally, damages for breach of contract are limited to direct or actual damages (such as the value of the lost benefit due to the attorney's negligence) and consequential damages (such as the

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124. *Connely*, 83 P.3d at 464-65.
125. Lucas v. Hamm, 364 P.2d 685, 688 (Cal. 1961).
126. *Connely*, 83 P.3d at 461-64.
127. *Id.* at 464. The justices simply stated:

> We find the California balancing test adopted in *Lucas v. Hamm* an appropriate approach to take with regard to this issue. As noted above, that test is similar to the test we adopted in *Gates v. Richardson*, albeit more narrowly tailored to fit its objective of determining an attorney's duty to a nonclient. The public policy considerations of the balancing test appropriately require attorneys to exercise their position of trust and superior knowledge responsibly so as not to adversely affect persons whose rights and interests are certain and foreseeable.

Id. See Heyer v. Flaig, 449 P.2d 161, 165 (Cal. 1969); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961); Gates v. Richardson, 719 P.2d 193 (Wyo. 1986).
128. Kolschefsky v. Harris, 72 P.3d 1144, 1146 (Wyo. 2003) (citing Bowen v. Smith, 838 P.2d 186, 196 (Wyo. 1992); Brooks v. Zebre, 792 P.2d 196, 201 (Wyo. 1990)).

cost of the malpractice action).[129] Usually, for extra-contractual damages to be awarded, the plaintiff bears the burden of proving an independent tort.[130]

While damages for contract actions are limited; exemplary, punitive, or emotional distress damages may be available in tort actions.[131] Thus, by grounding the *Connely* rule in tort, the Wyoming Supreme Court is potentially providing additional protection to non-clients exceeding that available to the attorney's client. While the *Connely* court did not explain their choice, in *Blair v. Ing* the Hawaii Supreme Court explained the preference for an action in tort because "the remedies available in tort that are generally over and above those available in contract, e.g., punitive damages and emotional distress, do not place an unreasonable burden upon the legal profession."[132] The *Connely* rule gives a non-client beneficiary, injured by an attorney's negligence, the opportunity to pursue a cause of action in tort, which allows punitive damages with the attendant possibility of higher damages than a breach of contract claim.[133]

In addition to providing recourse to third party beneficiaries injured by attorney negligence, the *Connely* rule safeguards the attorney-client relationship in three ways: it protects against potential conflicting interests, limits liability, and promotes zealous representation of the client.[134] The threshold inquiry into the client's intent to directly benefit the third party puts to rest the criticisms against relaxing the strict privity rule and allowing an injured third party to pursue a legal action against a negligent attorney.[135]

The threshold inquiry into the intent to benefit the third party disallows recognition of a duty in the event of a conflict of interest because the

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129. MALLEN, *supra* note 4, § 20.1, at 120; § 20.14, at 152.

130. Long-Russell v. Hampe, 39 P.3d 1015, 1019 (Wyo. 2002) (citing with approval the Minnesota Supreme Court's decision in Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 559 (Minn. 1996)).

131. Blair v. Ing, 21 P.3d 452, 464 (Haw. 2001).

132. *Id.* at 463.

133. *Id.*

134. *See, e.g.*, Francis v. Piper, 597 N.W.2d 922, 925 (Minn. Ct. App. 1999); *Blair*, 21 P.3d at 464-66; Donahue v. Shugart, Thompson & Kilroy, P.C., 900 S.W.2d 624, 628 (Mo. 1995).

135. Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457, 463 (Wyo. 2004). The *Connely* court explained the criticisms:

> There are several reasons courts are reluctant to relax the rule of privity in attorney malpractice cases. First, the rule preserves an attorney's duty of loyalty to and effective advocacy for the client. Second, adding responsibilities to nonclients creates the danger of conflicting duties. Third, once the privity rule is relaxed, the number of persons a lawyer might be accountable to could be limitless. Fourth, a relaxation of the strict privity rule would imperil attorney-client confidentiality.

Id. (internal citations omitted).

client's intent and the third party's intent *must* be the same.[136] The Minnesota Court of Appeals clarified this limitation in *Francis v. Piper* by stressing that "the ability of a nonclient to impose liability would [not] . . . affect the control over the contractual agreement held by the attorney and his client, as the interests of the testatrix and the intended beneficiary with regard to the proper drafting and execution of the will are the same."[137] If the client's intent and the beneficiary's intent differ, the Wyoming Supreme Court "'will not impose a duty of reasonable care on an attorney [to a nonclient] if such an independent duty would potentially conflict with the duty the attorney owes to his or her client.'"[138] Therefore, the safeguards in the *Connely* rule protect the attorney-client relationship from possible conflicting interests.

In addition to concerns over conflict of interest, the *Connely* rule protects an attorney against unlimited liability. The Missouri Supreme Court has explained "liability is not extended to an unlimited class . . . . A benefit that is merely incidental or indirect will not satisfy the [threshold inquiry] . . . . Neither will a benefit to one in an adversarial relationship to the client be sufficient . . . ."[139] Because the initial inquiry is the extent to which the attorney-client transaction is meant to directly benefit the third party, liability is limited only to those *intended* non-clients.[140] Unlimited liability is impossible.

The threshold inquiry promotes an attorney's zealous representation of the client by requiring the attorney to thoroughly pursue and put into effect the client's intent to benefit the third party.[141] The *Connely* rule promotes effective advocacy by extending the duty to effectuate the client's intent to the intended beneficiary. The Missouri Supreme Court described that the extension of a duty to the beneficiary advances the client's interests because "the potential for liability to intended beneficiaries is likely to encourage attorneys to exercise care in drafting and executing testamentary instruments."[142] The *Connely* rule provides incentive to the attorney to be careful and fully execute testamentary documents.[143] Without this duty of care to non-client beneficiaries, the client's intent to benefit the third party could be totally frustrated by the attorney's negligence.[144] Without the *Connely* rule, an attorney would escape responsibility for negligent acts, espe-

136. *Francis*, 597 N.W.2d at 925.
137. *Id.*
138. *Connely*, 83 P.3d at 465 (quoting Lamare v. Basbanes, 636 N.E.2d 218, 219 (Mass. 1994)).
139. *Donahue*, 900 S.W.2d at 628 (internal citations omitted).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

cially if the client has died.[145] The policy safeguards in the *Connely* rule make absolute immunity for the attorney unnecessary.[146] As in other professions, attorneys may now have to answer for wrongs committed.[147]

II. Practical Considerations

The practical ramifications from the adoption of the *Connely* rule fall into several categories: estate planning and drafting of testamentary documents, assignments and subrogation, corporations and partnerships, application of the statute of limitations, and how to avoid incurring liability to non-client intended beneficiaries.[148] Although the *Connely* decision did not specifically address these possible ramifications, the relaxation of strict privity has bled into these areas in other jurisdictions.[149] While the context of estate planning and will drafting is necessarily and logically the area most impacted by the *Connely* rule, because most of these transactions involve a client intending to benefit a third party, an attorney could be liable to third party intended beneficiaries in other areas of law mentioned above.[150] A review of case law from other states that have adopted the rule as embraced by *Connely* sheds light on how the *Lucas* balancing test may be applied to future cases in Wyoming.

A. Estate Planning and Drafting of Testamentary Documents

Most non-client legal malpractice suits based on the *Lucas* balancing test have arisen out of alleged negligence in either the drafting or execution of estate planning or testamentary documents because legal services in this area of law tend to have identifiable intended beneficiaries who would foreseeably be injured due to an attorney's negligence.[151] As the following cases point out, the plaintiff must be an intended beneficiary, not a former beneficiary or one with adverse interests to the client.[152] Also, the attorney's error

145. *Id.*
146. *Id.*
147. *Id.*
148. Mallen, *supra* note 58, at 1147. *See also* Joan Teshima, Annotation, *Attorney's Liability, To One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4th 615 (2005); Joan Teshima, Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other Than Immediate Client*, 61 A.L.R. 4th 464 (2005).
149. *See supra* note 148.
150. *See supra* note 148.
151. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C. 135 Cal. Rptr. 2d 888, 898 (Cal. Ct. App. 2003).
152. Francis v. Piper, 597 N.W.2d 922, 923 (Minn. Ct. App. 1999); Johnson v. Wiegers, 46 P.3d 563, 568 (Kan. Ct. App. 2002); Donahue v. Shugart, Thompson & Kilroy, 900 S.W.2d 624, 629 (Mo. 1995).

usually will lie in the execution or drafting of documents, not in determining a client's capacity.[153]

In the Minnesota Court of Appeals case *Francis v. Piper*, attorney Piper drafted a will for client Heine which resulted in Heine's sister, Francis, receiving less of Heine's estate.[154] Francis sued Piper, alleging that "[i]f Heine had not executed a will, Francis would have been Heine's sole heir under the intestacy laws."[155] The court found that Francis could not establish she was the intended beneficiary because "the evidence in the record shows Heine knew that execution of a will would be detrimental to Francis."[156] Because Heine's intent and Francis's intent conflicted, Francis could not be the intended beneficiary and could not bring a malpractice suit.[157]

In the Kansas Court of Appeals case *Johnson v. Wiegers*, Neva Johnson had hired attorney Wiegers to change an IRA beneficiary designation removing her husband Louis and making her daughter Ruth the only beneficiary.[158] A jury later found the change to be invalid as Neva was under Ruth's undue influence and not competent to order the change in beneficiary.[159] Louis brought suit as an injured third party beneficiary against attorney Wiegers alleging negligence.[160] The Kansas Court of Appeals explained why Louis was an adverse party rather than an intended beneficiary by stating "[t]he relationship between Louis . . . and Ruth . . . was adversarial. Although the jury found that Wiegers did not provide any independent legal advice to Neva, he certainly was acting as an attorney for Ruth; it was Ruth's clear purpose to affect Louis negatively, not positively."[161] As an adversary, Louis was not an intended beneficiary and the lawsuit was dismissed.[162]

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153. *Moore*, 135 Cal. Rptr. 2d at 898.
154. *Francis*, 597 N.W.2d at 922-23.
155. *Id.*
156. *Id.* at 925.
157. *Id.* at 925-26.
158. Johnson v. Wiegers, 46 P.3d 563, 564 (Kan. Ct. App. 2002).
159. *Id.* at 564-65.
160. *Id.* at 565.
161. *Id.* at 568. The *Wiegers* court actually added the following three-step analysis to aid in determining the existence of a duty:

> First, if the client of the attorney and the third party are adversaries, no duty arises . . . . Second, if the attorney and client never intended for the attorney's work to benefit the third party, then no duty arises . . . . Third, if it is possible to conclude that the attorney and client intended for the attorney's work to benefit the third party, then the reviewing court must strike the [*Lucas*] . . . balance to determine whether a duty arose in the particular circumstances at hand.

Id.
162. *Id.*

In *Donahue v. Shugart, Thompson & Kilroy, P.C.*, the Missouri Supreme Court found that attorney Stamper and his firm were unable to effectuate client Stockton's wishes, holding that the transfers to the intended beneficiaries of checks drawn on a trust were invalid.[163] The *Donahue* court applied all six Lucas factors, easily finding foreseeability of harm to be met because "[n]egligent advice or preparation of testamentary documents was almost certain to cause plaintiffs injury."[164] Finding all six factors to be met enabled the plaintiff beneficiaries to establish the existence of a duty and, thus, to bring a cause of action in negligence.[165]

In *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, a beneficiary of a trust brought suit against the attorneys who drafted the amendments to an estate plan which reduced the amount the beneficiary received.[166] The beneficiary claimed that the client lacked testamentary capacity to execute the changes.[167] The California Court of Appeals drew a distinction between cases in which a negligently drafted document results in damage to an intended beneficiary and this case where "the will . . . is effective to carry out the presumed intention of the testator."[168] The *Moore* court declined to expand malpractice liability to non-clients by imposing a duty to test for capacity.[169] Negligence suits based on the *Lucas* balancing test will most likely require attorney negligence in drafting or executing the document in estate matters rather than negligence in testing a client's capacity.[170]

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163. Donahue v. Shugart, Thompson & Kilroy, 900 S.W.2d 624, 629 (Mo. 1995).
164. *Id.* at 629.
165. *Id.*
166. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C. 135 Cal. Rptr. 2d 888, 889-90 (Cal. Ct. App. 2003).
167. *Id.*
168. *Id.* at 897.
169. *Id.* at 897-98. The *Moore* court explained:

> It may be that prudent counsel should refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity or should take steps to preserve evidence regarding the client's capacity in a borderline case. However, that is a far cry from imposing malpractice liability to nonclient potential beneficiaries for the attorney's alleged inadequate investigation or evaluation of capacity or the failure to sufficiently document that investigation.

Id. at 902.

170. *Id.* While errors in drafting and execution make up the bulk of third party intended beneficiary claims, other negligent acts are possible. The Oregon Court of Appeals in Caba v. Barker held (under a Restatement/contract approach) that a beneficiary could pursue a negligence claim against the attorney who promised an invulnerable will that was subsequently successfully contested. Caba v. Barker, 93 P.3d 74 (Or. Ct. App. 2004). In Rushing v. Bosse, the Florida District Court of Appeals held that an adopted child could pursue a negligence claim against the attorney who instituted the adoption because the child to be adopted is the intended beneficiary. Rushing v. Bosse, 652 So. 2d 869, 873 (Fla. Dist. Ct. App. 1995).

As the foregoing cases highlight, the third party plaintiff must be an intended beneficiary with interests akin to the client's, not just a disgruntled, disinherited, or former beneficiary.[171] Furthermore, the attorney's alleged negligence would have to stem from error in drafting or executing a testamentary document.[172] Thus, an attorney should pay careful attention to the drafting and execution of estate plans and wills.

B. Assignments and Subrogation

An intended beneficiary with a claim of possible legal malpractice against an attorney may wish to voluntarily transfer or assign the right to that claim to another who would then pursue the action against the attorney.[173] Subrogation differs from assignment in that it is "an equitable remedy in which one steps into the place of another and takes over the right to a claim for monetary damages to the extent that the other could have asserted it."[174] Possible assignment or subrogation of third party legal malpractice claims raises serious public policy questions including "constraining an attorney's zeal with the concern that a present adversary may become the holder of the client's alleged legal malpractice claim if the client suffers an unsatisfactory result."[175] Further, allowing assignment or subrogation could have the unintended consequence of increasing litigation and placing an undue burden on the profession.[176] Persuaded by these concerns over the factoring of legal malpractice claims, increased litigation, and hindering the attorney's zeal, most courts have held that a legal malpractice cause of action is not assign-

171. *See supra* notes 151-170 and accompanying text.

172. *Moore*, 135 Cal. Rptr. 2d 888.

173. 6 AM. JUR. 2d *Assignments* § 1 (2004) ("Ordinarily . . . 'assignment' is limited in its application to a transfer of intangible rights, including contractual rights, choses in action, and rights in or connected with property, as distinguished from a transfer of the property itself.").

174. *Id.* § 2.

175. Mallen, *supra* note 58, at 1164. *See* MALLEN, *supra* note 4, § 7.12, at 730.

176. Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83, 87 (Cal. Ct. App. 1976). The *Goodley* court's oft-quoted language stated:

> The almost certain end result of merchandizing [sic] such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Id.

able.[177] Likewise, subrogation of a third party legal malpractice claim generally has not been allowed, although some courts in Texas have allowed subrogation by an insurer.[178]

However, critics argue that these policy concerns may merely mask self-dealing by the legal profession where malpractice claims against other professions are allowed.[179] Nevertheless, specifically because the *Connely* rule only allows a possible claim by an intended beneficiary, to permit assignment or subrogation would further relax the strict attorney-client privity and allow claims to be pursued by parties not intended to benefit from the transaction.[180] Such an expansion of the *Connely* rule would eviscerate its underlying rationale of permitting a method of redress only to those direct beneficiaries injured by an attorney's alleged negligence.

C. Corporations and Partnerships

In general, an attorney representing a corporation or partnership represents that entity and does not create an attorney-client relationship with the individuals of that entity.[181] However, with the adoption of the *Connely* rule, an attorney representing a corporate entity could become liable to those individuals within the corporation if "the client's . . . purpose in retaining an attorney is to benefit directly [that] third party."[182]

In a recent decision from the United States District Court for the District of Wyoming, *Jones v. Bass*, the District Court applied the *Connely* rule and found a bank's attorney owed no duty to the bank's depositor.[183] Upon the advice of attorney Gerald Goulding, Ron Thomas, the branch president of First National Bank in Afton, Wyoming, honored an IRS notice of levy against Maurice and Dorenda Jones.[184] While the Jones's cause of

177. 6 AM. JUR. 2d *Assignments* § 65 (2004). *See also* Clement v. Prestwich, 448 N.E.2d 1039, 1041-42 (Ill. App. Ct. 1983), and 1 MALLEN, *supra* note 4, § 7.12, at 720-22.

178. MALLEN, *supra* note 4, § 7.12, at 730-36; Mallen, *supra* note 58, at 1164-65 (noting that the Texas courts did not discuss policy concerns and that "if subrogation is allowed, defense counsel might advise the insured to settle a defensible claim within the primary policy limits to avoid a personal risk of suit by the excess insurer."); Beaty v. Hertzberg & Golden, P.C., 571 N.W.2d 716 (Mich. 1997).

179. Michael Sean Quinn, *On the Assignment of Legal Malpractice Claims*, 37 S. TEX. L. REV. 1203 (1996) (noting the extreme unlikelihood of the *Goodley* court's policy concerns becoming a reality were assignment of legal malpractice claims allowed).

180. MALLEN, *supra* note 4, § 7.12, at 718-32.

181. John M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND & WATER L. REV. 79, 131 (2000); Bowen v. Smith, 838 P.2d 186, 189 (1992) ("The representation of the parent corporation . . . did not create an attorney/client relationship with the minority shareholders in the same corporation.").

182. Holmes v. Winners Entertainment, Inc., 531 N.W.2d 502, 505 (Minn. Ct. App. 1995). *See also* Ellen A. Pansky, *Between an Ethical Rock and a Hard Place: Balancing the Duties to the Organizational Client and Its Constituents*, 37 S. TEX. L. REV. 1167, 1181 (1996).

183. Jones v. Bass, 343 F. Supp. 2d 1066 (D. Wyo. 2004).

184. *Id.* at 1067.

action against Goulding was somewhat nebulous, the District Court found that the Joneses were not intended beneficiaries of Goulding's advice to Thomas, but rather, that the advice was *directly adverse* to the Jones's interests.[185] As such, attorney Goulding owed no legal duty to the Joneses.[186]

Whether an attorney representing an entity would be held liable to non-client third party beneficiaries will depend upon the extent to which the representation was intended to benefit the non-client, whether the interests were akin or adverse, and the foreseeability of harm.[187] In short, a *Connely* analysis of the six-factor balancing test would be needed.[188] As *Jones v. Bass* demonstrates, an attorney duty to a constituent would not arise where the interests of the entity and constituent are adverse.[189] However, application of the *Connely* rule between an attorney representing a corporate entity and those intended to directly benefit from that representation is appropriate.[190]

D. Statute of Limitations

Another practical consideration from the *Connely* rule concerns the application of the statute of limitations on legal malpractice.[191] Prior to the *Connely* rule, a cause of action against an attorney who may have improperly drafted a testamentary document would have died with the death of the client, the only one with privity that could have brought suit.[192] Now, the cause of action against such an attorney may well last decades, exposing the drafting attorney to indeterminable liability.[193] Although not addressed in *Connely*, the running of the statute of limitations on professional negligence will determine the length of an attorney's liability.[194]

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185. *Id.* at 1069.

186. *Id.* at 1069-70 ("In such an adversarial situation, an attorney can not have a legal duty to the opposing party, as it would 'violate the primary duty' owed to the attorney's own client.").

187. *See* Navellier v. Sletten, 262 F.3d 923 (9th Cir. 2001); Kurker v. Hill, 689 N.E.2d 833 (Mass. App. Ct. 1998); Atlantic Paradise Assocs. v. Perskie, Nehmad & Zeltner, 666 A.2d 211 (N.J. Super. Ct. App. Div. 1995). *See also* Pansky, *supra* note 182, at 1188-89 (suggesting a twelve-factor checklist should a potential conflict between a constituent and the entity arise).

188. Connely v. McColloch (*In re* Estate of Drwenski), 83 P.3d 457, 464-65 (Wyo. 2004).

189. Pansky, *supra* note 182, at 1180-81.

190. *Connely*, 83 P.3d at 464-65. If the representation was meant to directly benefit the third party, then a *Connely* analysis of the six-factor balancing test should follow *before* a duty is found. *Id.* The plaintiff would still need to establish breach, causation and harm. *See supra* note 108.

191. Blair v. Ing, 21 P.3d 452, 469-72 (Haw. 2001).

192. *Id.*

193. *Id.*

194. Rawlinson v. Greer, 64 P.3d 120, 123 (Wyo. 2003). *See* Heyer v. Flaig, 449 P.2d 161 (Cal. 1969). *See* notes 47-55 and accompanying text.

In the Wyoming Supreme Court case *Boller v. Western Law Associates*, the directors of a bank filed "third-party complaints against [the attorneys] . . .," alleging that the directors' "actions or inactions were a result of negligence on the part of [the attorneys] . . . consisting of [the attorneys'] . . . failure to furnish proper legal advice . . . ."[195] The court applied the two year statute of limitations on professional negligence to bar the complaint.[196] The *Boller* court acknowledged "Wyoming is a 'discovery state,' which means that the statute of limitations is not triggered until the plaintiff *knows or has reason to know* the existence of the cause of action."[197] Despite this acknowledgment, the *Boller* court assumed the plaintiffs should have known of their cause of action within two years of the bank closing.[198] In *Murphy v. Housel & Housel*, the Wyoming Supreme Court applied the two year statute of limitations and held that it started to run when the plaintiff was informed of a potential claim for legal malpractice.[199]

Given these cases in Wyoming, the statute of limitations on attorney negligence to a third party beneficiary will be two years from the discovery of the alleged negligent act. Discovery may take many years as some beneficiaries will not be aware of the plans or documents made in their favor until the death of the client.[200] The rationale for allowing such a potential burden on the profession was explained by the Hawaii Supreme Court, which stated "one should be held in fault for failing to timely exercise a right only if he knows, or by the exercise of reasonable diligence should have

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195. Boller v. W. Law Assocs., 828 P.2d 1184, 1184 (Wyo. 1992).

196. *Id.* at 1188. The statute provides in part:

> § 1-3-107. Act, error or omission in rendering professional or health care services.
>
> (a) A cause of action arising from an act, error or omission in the rendering of licensed or certified professional or health care services shall be brought within the greater of the following times:
>
> (i) Within two (2) years of the date of the alleged act, error or omission, except that a cause of action may be instituted not more than two (2) years after discovery of the alleged act, error or omission, if the claimant can establish that the alleged act, error or omission was:
>
> (A) Not reasonably discoverable within a two (2) year period; or
>
> (B) The claimant failed to discover the alleged act, error or omission within the two (2) year period despite the exercise of due diligence.

WYO. STAT. ANN. § 1-3-107 (2004).

197. *Boller*, 828 P.2d at 1185.

198. *Id.* at 1185-88. Interestingly, the *Boller* court took it upon itself to apply the statute of limitations which was not raised by the pleadings. *Id.*

199. Murphy v. Housel & Housel, 955 P.2d 880, 883-84 (Wyo. 1998).

200. Blair v. Ing, 21 P.3d 452, 467-68 (Haw. 2001).

known, that such right existed."[201] Without the discovery rule, an intended beneficiary's cause of action which ripened at the testator's death would be barred because an attorney's negligent drafting may have occurred decades earlier, before the beneficiary even knew of the error.[202] While the discovery rule results in an increased exposure to an attorney for errors committed years in the past, it does protect those parties the client intended to benefit and provides an opportunity for a non-client to seek redress for an injury.

E. How to Avoid Incurring Liability to a Non-Client

Normally, an attorney can avoid incurring unknown liability to a client by limiting the scope of the representation and conveying that information to the client in such a manner to ensure the client is adequately informed.[203] However, because the possible duty owed an intended non-client beneficiary arises in tort, the attorney is unable to contractually limit that duty.[204] Thus, a practicing attorney will need to determine to what extent the contractual undertaking with the client is meant to directly benefit a third party.[205] Because the intent of a transaction determines liability to a third party, "[a]n attorney's undertaking should be the result of a conscious decision so that the consequences of a duty to a third person can be considered and the undertaking declined if the conflicts or financial exposure is too great."[206] Thus, the best way to avoid incurring liability would be to make a cost/benefit analysis of a transaction meant to benefit a third party. Further, since most third party suits under the *Lucas* rule concern the execution and drafting of testamentary documents, an attorney undertaking such a transaction should be absolutely certain to verify the validity of such documents.[207]

CONCLUSION

The Wyoming Supreme Court appropriately created the possibility of an attorney duty to non-client beneficiaries. The *Connely* rule provides redress to third parties while protecting the attorney-client relationship. The *Lucas* balancing test and the threshold inquiry into intent provide important safeguards that protect against possible conflicts of interest and unlimited

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201. *Id.* at 471.

202. *Id.* at 467-68.

203. *See* MALLEN, *supra* note 4, §§ 2.1-3.8 (suggesting the prevention of legal malpractice through general principles and legal education).

204. *Id.*

205. The threshold inquiry under the *Connely* rule is whether the plaintiff was the intended beneficiary of the transaction between the attorney and client. *See supra* notes 107-10 and accompanying text.

206. MALLEN, *supra* note 4, § 7.8, at 702.

207. Many of the successful suits against attorneys under the *Lucas* rule have been based on the failure to prepare valid documents. *See* Donahue v. Shugart, Thompson & Kilroy, 900 S.W.2d 624, 629-30 (Mo. 1995). *See also* John R. Price, *Duties of Estate Planners to Nonclients: Identifying, Anticipating and Avoiding the Problems*, 37 S. TEX. L. REV. 1063 (1996).

liability while encouraging an attorney to give effect to the client's interests. Once the decision to protect innocent beneficiaries had been made, the *Connely* court correctly chose the tort approach. This new duty grounded in tort best protects third parties harmed by an attorney's negligence by allowing damages in excess of contract damages. While an attorney should endeavor to avoid negligence, the *Connely* rule protects those directly hurt by an attorney's errors or omissions. This should encourage heightened care on an attorney's part to be certain that the client's wishes are carried out because negligence could result in liability years down the road when the intended beneficiary discovers the error.

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