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Expanding Attorney Liability to Third Party Adversaries for Negligence

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Editor's Note
from Volume 107, Issue 2


The above student note should have given proper attribution to materials filed as part of the pending litigation of Clark v. Druckman, No. 32577 (W. Va. 2005). In the interest of full disclosure, the author developed this student note while affiliated with a law firm involved in the above litigation.

Correction
from Volume 107, Issue 2


The sentence on page 509 referencing footnote 68 should read as follows: Also, a national survey by the Justice at Stake Campaign found that seventy-six percent of the respondents believed that contributions exert at least some influence on the judges who receive them.
EXPANDING ATTORNEY LIABILITY TO THIRD PARTY ADVERSARIES FOR NEGLIGENCE

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I. INTRODUCTION

Today, most professionals including accountants, architects, engineers, physicians, and other healthcare professionals, are subject to liability from third parties they harm as a result of their negligence. However, attorneys continue to remain immune from third party liability, except in very limited circumstances. The extent that an attorney can be liable to a non-client for negligence is a controversial issue, and the present state of the law governing it is far from settled. Recently, there has been a significant increase in the number of cases brought against attorneys by third parties for professional negligence. Therefore, this is an issue of great significance to attorneys who find themselves threatened with the same expansion of liability that they have brought to other professionals.
In the past, attorneys and other professionals were completely immune from suits brought by non-clients due to the requirement of privity. In the interest of justice, American courts began to move away from the strict privity requirement in many negligence cases by recognizing exceptions to the general rule of nonliability. Today, most professionals are subject to liability to non-clients for negligence and attorneys are increasingly facing this liability.

Although attorneys have traditionally owed a duty of care only to their client, they should also owe a duty to non-clients to conduct a reasonable investigation prior to filing a lawsuit. Frivolous litigation has become way too common in American jurisprudence, congesting court dockets and causing economic and emotional harm to the victims of these lawsuits who do not have any adequate recourse available to them. As a result of these baseless lawsuits, defendants are left with unnecessary attorney fees and expenses associated with litigation, lost time defending the suit, increases in insurance premiums, annoyance, inconvenience, emotional distress, and damage to their reputations. However, attorneys who file these baseless lawsuits out of incompetence or greed continue to do so because there are no consequences. Often, these attorneys benefit financially from their conduct because defendants will settle to avoid the cost of litigation and/or the time and emotional effort involved in successfully defending a lawsuit. It is time for American courts to correct this injustice and recognize a cause of action against attorneys brought by third party adversaries for negligence.

This article surveys the present law on attorney liability to adversaries and proposes that attorneys should be liable to non-clients for their professional negligence. Section II of this article explores the development of the law of privity, and how courts are increasingly eroding it in order to achieve fair out-

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1 See Nat'l Sav. Bank v. Ward, 100 U.S. 195 (1879). In National Savings Bank, the Supreme Court held that the doctrine of privity of contract barred suit by a bank against a bank's adverse counsel who were professionally negligent in conducting title examinations, despite the fact that the attorney's neglect really occasioned the bank's loss. Id. at 198.


5 This is especially true for physicians who are forced to leave the practice of medicine because they are unable to afford their insurance premiums. See Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979).
comes. Section III discusses the causes of action that are currently available to third parties to take action against attorneys for legal malpractice. Section IV provides an in depth discussion of professional negligence actions brought against attorneys by non-clients and concludes that American courts should adopt a cause of action against attorneys by third parties for professional negligence.

II. BACKGROUND ON PRIVITY

Traditionally, attorneys and other professionals were completely immune from lawsuits filed by non-clients. In early cases, an action for economic loss was barred in the absence of a contractual agreement because of the privity requirement. Winterbottom v. Wright, an English case, established that privity of contract was a necessary requirement to maintain an action for negligence. The United States Supreme Court adopted this rule in 1879 in National Savings Bank v. Ward, holding that without privity there can be no duty owed to a third party, and therefore, no cause of action for negligence.

Recognizing that this rule did not always produce just results, American courts began to move away from the strict privity requirement in negligence cases in order to avoid the harsh result of barring an injured plaintiff from recovery. The movement away from strict privity began in cases involving fraud or collusion and then spread to the area of products liability. Eventually, this movement reached most professions resulting in recovery by non-clients for negligence despite the absence of privity. This movement evolved more slowly in the area of attorney negligence, and was first recognized in cases con-

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6 See Nat'l Sav. Bank, 100 U.S. at 195.
7 See id. at 200.
9 In Winterbottom, the court held that the manufacturer of a mail coach was not liable to the driver of the coach who suffered injuries as a result of a latent defect in the coach's construction since no privity of contract existed between the driver and the manufacturer. Id. at 405.
10 100 U.S. at 195.
11 Id. at 206. Cases where fraud and collusion were proven were an exception to this rule. Id. at 203.
12 See MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916). In MacPherson, the court held that responsibility is owed to third parties who are injured by negligent activity, based on the foreseeability of harm in the absence of due care. Id. at 1053.
13 See id.
14 See supra note 3 and accompanying text.
cerning negligently drafted wills and trusts arising when the person in privity was no longer alive to sue for negligence.\textsuperscript{15}

Although a few jurisdictions continue to strictly adhere to the privity requirement in the context of attorney malpractice,\textsuperscript{16} most have expanded the scope of liability.\textsuperscript{17} Just as courts have dismantled the privity requirement in most areas of professional negligence, some courts have recognized the need to extend attorneys' duties.\textsuperscript{18} As the privity bar has declined, most courts have adopted negligence as the appropriate doctrine to analyze cases dealing with attorney liability to third parties.\textsuperscript{19} Generally, under most current case law, an attorney may only be liable to a non-client for negligence if the client intended the attorney's services to benefit the non-client or the attorney knew or should have known that the non-client would rely on his or her actions.\textsuperscript{20} Therefore, third party beneficiaries have been the most successful in obtaining redress for


\textsuperscript{16} See, e.g., Sachs v. Levy, 216 F. Supp. 44, 46 (E.D. Pa. 1963) (alleging negligence of attorney toward someone other than client is not actionable under Pennsylvania law); Weigel v. Hardesty, 549 P.2d 1335, 1337 (Colo. Ct. App. 1976) (holding that an attorney was not liable to third party for negligence); Bloomer Amusement Co. v. Eskanazi, 394 N.E.2d 16, 18 (Ill. App. Ct. 1979) (applying a strict privity rule, the court found that an attorney was not liable to a third party for negligence); Friedman v. Dozorc, 312 N.W.2d 585, 588 (Mich. 1981) (holding that attorneys are not liable to third parties for negligence); McDonald v. Steward, 182 N.W.2d 437, 440 (Minn. 1970) (declaring that attorneys are immune from third party suits in absence of fraud).

\textsuperscript{17} See, e.g., Stowe v. Smith, 441 A.2d 81, 83-84 (Conn. 1981) (citing California authorities in allowing third party to recover from attorney); McBee, 340 So. 2d at 1170 (holding that privity was not a bar to recovery when a plaintiff is the intended beneficiary); Woodfork v. Sanders, 248 So. 2d 419, 425 (La. Ct. App. 1971) (allowing recovery by an intended beneficiary against an attorney despite lack of privity); Prescott v. Coppage, 296 A.2d 150, 156 (Md. 1972) (holding that an attorney was liable to a primary creditor for allowing assets to be paid to lower priority creditors); Steward v. Sbarro, 362 A.2d 581, 588-89 (N.J. Super. Ct. App. Div. 1976) (holding an attorney liable to an adverse party in a sale of property when he undertook a duty to complete transactions for the adverse party).


\textsuperscript{19} See Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982); Leak-Gilbert v. Fahle, 55 P.3d 1054 (Okla. 2002); Guy, 459 A.2d at 748.

\textsuperscript{20} This principle is often seen in the area of will drafting. See, e.g., Elam v. Hyatt Legal Servs., 541 N.E.2d 616 (Ohio 1989) (holding that beneficiaries whose interest in an estate had vested were in privity with attorney who administered estate); Copenhagen v. Rogers, 384 S.E.2d 593 (Va. 1989) (declaring that it is possible for the beneficiary of a will to be an intended beneficiary of the contract between the attorney and the client).
legal malpractice. In relaxing the privity requirement, courts have employed two methods to analyze attorney malpractice cases, the balance of factors test and the intended beneficiary theory, which are discussed below.

A. The Balance of Factors Test

The balance of factors test is one method used by courts to determine whether an attorney can be liable for negligence to a third party. The Supreme Court of California was the first court to abandon the strict privity requirement for professional negligence in *Biakanja v. Irving*. This case involved a notary public who negligently drafted a will. Under the strict privity requirement, the intended beneficiaries were not entitled to recover. The court concluded that the determination of whether a defendant will be held liable to a third person not in privity is a matter of public policy and involves the balancing of several factors. The factors to be balanced in each case include: (1) the extent to which the transaction was intended to affect 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) the moral blame attached to the defendant’s conduct, and (6) the policy of preventing future harm.

This test has become key in analyzing attorney liability cases. It was first applied to attorney negligence in *Lucas v. Hamm*, which also involved a negligently drafted will. As a result of the attorney’s drafting error, the plaintiffs received a smaller share of the estate than the testator intended. After balancing the factors set forth in *Biakanja*, the court concluded that the lack of privity did not preclude the intended beneficiaries from recovering.

The balance of factors test has been used extensively in California cases and has also been applied and discussed in many cases from other jurisdic-

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22 320 P.2d 16 (Cal. 1958).
23 Id. at 17.
24 Id. at 19.
25 Id.
26 Id.
28 Id. at 686.
29 Id. at 687.
30 Id. at 688.
tions. However, several courts have struggled with its application. Although the flexibility of the test satisfies the policy of recognizing an injured party’s right to redress, it is inadequate. Courts have criticized this test as being vague and unworkable. The uncertainty inherent in this approach “diminishes the deterrent effect gained by extending liability to a broad class of third parties.” Without clear boundaries of liability, an attorney may restrict his or her services in risk-prone areas rather than exercising greater care in performing those services. Therefore, this test is not effective in analyzing attorney malpractice to third parties.

B. Intended Beneficiary Theory

The second theory utilized in evaluating malpractice cases involving attorney liability to third parties is the intended beneficiary theory. This analysis requires that third parties suing for negligence establish that they are intended beneficiaries of the attorney-client contract in order to extend the attorney’s duty to the third party. These claims arise most often when an attorney’s negligent drafting injures a named beneficiary of a will.


33 In Guy v. Liederbach, 459 A.2d 744 (Pa. 1983), the court stated that the balance of factors test “has proved unworkable, and has led to ad hoc determinations and inconsistent results as the California courts have attempted to refine the broad Lucas rule.” Id. at 749. “The California courts have not adopted a simple negligence standard, but . . . have applied a six part balancing test on a case-by-case basis.” Id. at 749-50.


35 Id.

36 See, e.g., Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985); see also Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982) (intent to benefit the third party must be the primary or direct purpose of the transaction or relationship). Under the third party beneficiary test, a third party must show that he or she is the intended beneficiary of the contract between the attorney and client. See Flaherty, 492 A.2d at 625.

The leading case applying this approach is *Guy v. Leiderbach*, which involved an action brought by a will beneficiary against an attorney for improperly directing the witnessing of a will. As a result of the attorney's negligence, the beneficiary lost her bequest. The Pennsylvania Supreme Court limited the class of persons who could bring an action in negligence to those who could establish that they are intended beneficiaries of the attorney-client contract. Thus, under the third party beneficiary theory, the plaintiff was entitled to recovery from the negligent attorney.

Other jurisdictions have also adopted the intended beneficiary approach. In these cases, the third party beneficiary theory bypasses the privity requirement by establishing a relationship between the immediate client and the third party on whose behalf the actions are taken. This approach restricts liability for negligence to contract principles, thus failing to recognize a third party's right to recovery. Additionally, it defines the scope of duty in legal malpractice too narrowly by requiring a third party to show that he or she is an intended beneficiary. Furthermore, third parties are unable to recover unless the primary purpose of the contract is to benefit them. This requirement excludes a large number of victims of attorney negligence. Therefore, by limiting the class of injured third parties, this test fails to adequately deter attorney negligence. Because only intended beneficiaries are entitled to relief, negligent conduct resulting in injury to other third parties is not deterred. Accordingly, it is not the most effective method for courts to use in evaluating attorney negligence.

**III. COMMON TORT CAUSES OF ACTION AGAINST AN ATTORNEY**

**A. Malicious Prosecution**

Courts often cite malicious prosecution as the appropriate avenue for a third party to take action against an attorney for wrongfully filing a lawsuit. In most jurisdictions, the elements that are necessary to the maintain an action for

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38 459 A.2d at 744.
39 Id. at 747.
40 Id.
41 Id. at 752-53.
42 Id.
44 Peterson, *supra* note 34, at 775.
45 Id.
46 See *Guy*, 459 A.2d at 751-52.
malicious prosecution are that the prosecution was malicious, that it was without reasonable or probable cause, and that it was terminated favorably to the plaintiff. In order to make it more difficult for a plaintiff to succeed in a malicious prosecution action, some jurisdictions have added an additional requirement of proving special injury. These courts require a plaintiff to suffer a "special injury" beyond those injuries that are normally incurred as a result of being named in a lawsuit. The element of special injury is defined as "injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action." Damage to reputation, mental anguish, loss of time defending the action, and increases in insurance premiums are all considered injuries common to litigation; therefore these injuries do not constitute a "special injury."

The theory behind the requirement of favorable termination is that it indicates the innocence of the accused. In satisfying this requirement, courts find that it is not enough for a plaintiff to show that a proceeding was merely dismissed. Therefore, if the dismissal is on technical grounds, for procedural reasons, or any other reason inconsistent with guilt, it does not constitute a "favorable termination." Legal malice in a malicious prosecution action refers to "any sinister or improper motive other than a desire to punish the party alleged to have committed the offense."

Historically, the doctrine of malicious prosecution has not been favored in the law. Public policy requires that people be able to freely resort to courts for redress of a wrong, and the law should protect them when they commence a

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51 Stopka, 402 N.E.2d at 783 (quoting Schwartz v. Schwartz, 8 N.E.2d 668 (Ill. 1937)).

52 See id.

53 See Jaffe v. Stone, 114 P.2d 335, 338 (Cal. 1941).

54 See id.

55 See id.


civil suit or criminal action in good faith and on reasonable grounds.58 Courts, therefore, have taken the position that this policy necessitates a strict adherence to the elements comprising an action for malicious prosecution.59 A suit for malicious prosecution cannot be prosecuted merely as retaliation for a bona fide civil action.60 Because the malicious prosecution tort is intended to protect an individual's interest in freedom from unjustifiable and unreasonable litigation, if the court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold.61

However, when an attorney violates his or her professional duty to execute an action in good faith or on reasonable grounds, he or she should be liable to a third party for negligence. Malicious prosecution is not the most effective method of deterring attorney malpractice because a plaintiff is rarely successful in the suit as a result of the court's strict adherence to the elements of the cause of action.62 Most often, the plaintiff's cause of action fails because he or she is unable to prove the elements of special injury and malice.63

For example, the plaintiff was unsuccessful in bringing a malicious prosecution action against the defendant attorney in Stopka v. Lesser.64 The underlying case in Stopka involved a professional medical negligence action filed by an attorney against a hospital and a treating emergency room physician.65 Approximately five months later, the attorney amended the complaint to add an allegation of medical negligence against Dr. Stopka.66 However, Dr. Stopka was an inactive hospital staff member with no connection to the plaintiff's treatment.67 Finally, seventeen months after he was named as a defendant he was dismissed from the action.68 Subsequent to the dismissal, Dr. Stopka

60 McCammon, 516 S.E.2d at 38.
64 402 N.E.2d at 781.
65 Id. at 782.
66 Id.
67 Id.
68 Id.
brought a malicious prosecution action against the attorney. In support of his claim, Dr. Stopka argued that the statute of limitations was not an issue in filing the initial case, and that if the attorney reviewed the hospital records he would know that Dr. Stopka was not involved in the plaintiff’s treatment. Therefore, as a result of the malicious prosecution, Dr. Stopka suffered a tarnished reputation, mental anguish, unnecessary time devoted to his defense, and as a result of merely being named a defendant in the lawsuit, his medical malpractice insurance premiums increased. Despite the egregious underlying facts, the court found that Dr. Stopka’s complaint failed to state a cause of action for malicious prosecution because his injuries were only “ordinary damages” normally expected in litigation.

Malice is another element plaintiffs have difficulty proving. In Spencer v. Burglass, the court found that the plaintiff failed to state a cause of action for malicious prosecution because “the allegation of ‘frivolously filing suits’ cannot be construed as an allegation of malice.” In that case, a physician filed a malicious prosecution action against an attorney alleging that the attorney was not justified in filing a lawsuit against her. The hospital records showed that the four doctors who examined the patient found no damage to him and that neither of the witnesses produced at trial were consulted prior to the trial. The physician alleged that her embarrassment, discomfort, and lost time were caused by the attorney’s failure to consult witnesses prior to trial and the failure to consult with competent medical professionals regarding her patient’s condition. The court held that the attorney’s actions did not constitute “malice” but merely showed that the attorney did not know enough about his case, was negligent or inept, and went to trial with a poor case. “If that constitutes malice,” the court remarked, “the courtrooms are full of malicious attorneys.”

These cases exemplify the need for courts to adopt negligence as a cause of action against attorneys who file meritless suits against innocent third

69 Id.
70 Id.
71 Id.
72 Id. at 783.
74 Id. at 599.
75 Id. at 598.
76 Id.
77 Id.
78 Id. at 599.
79 Id. at 600.
parties. Justice is in no way furthered in either of these cases. The offending attorney is neither punished nor deterred from bringing future frivolous actions due to the court’s strict adherence to the elements of malicious prosecution. Typically, a plaintiff is only going to have suffered “ordinary damages,” and it is a rare occasion that an attorney acts with true malice when filing a lawsuit. In many instances, a lawsuit is filed in the hopes that the defendant will settle quickly rather than deal with the hassle and expense of litigating the claim. Additionally, limiting recovery in these situations to a malicious prosecution claim protects attorneys from suffering any consequences for their conduct and does not discourage or limit the practice of filing baseless lawsuits, which harms society in general. Therefore, malicious prosecution is an inadequate deterrent to attorney negligence, and it essentially leaves innocent victims who have suffered harm as a result of the attorney’s negligence without any recourse.

B. Abuse of Process

Another method available to third parties seeking redress against an adverse attorney for negligence is abuse of process. “The critical concern in abuse of process cases is whether process was used to accomplish an end unintended by law, and whether the suit was instituted to achieve a result not regularly... obtainable.”80 The first prerequisite of an abuse of process claim is that the attorney had an ulterior purpose underlying the filing of the lawsuit or in the use of the process employed.81 Second, it is necessary to have a willful act in the use of process that is not proper in the course of the regular conduct of the proceeding.82 An ulterior purpose includes any improper motive that underlies the issuance of the legal process.83 In Tappen v. Ager,84 evaluating an abuse of process claim, the court stated that “[g]enerally, where a [plaintiff] considers a malpractice action vexatious, harassing and brought merely as a nuisance suit to coerce a settlement, he will be unable to recover for abuse of process.”85 Therefore, even though the attorney filed a baseless lawsuit, there was no cause of action for abuse of process.86 Essentially, there is no liability when a defendant has done nothing more than carry out the process to its conclusion even though it is with bad intentions. Courts normally cite malicious prosecution as the ap-
appropriate cause of action if an original action lacks merit and has been instituted solely to coerce a settlement.\(^8\)

In *Morowitz v. Marvel*,\(^8\) a group of physicians brought an action in small claims court to collect money from a patient for delinquent medical bills.\(^8\) The patient counterclaimed and alleged medical malpractice but eventually withdrew the claim.\(^9\) In turn, the physicians brought an action against the patient and his attorney for malicious prosecution, abuse of process, and professional negligence.\(^9\) The court found no showing that the process was used to accomplish an end “not regularly or legally obtainable.”\(^9\) Despite the fact that the patient filed the counterclaim with the ulterior motive of coercing settlement, there was no cause of action against his attorney.\(^9\)

In *Dutt v. Kremp*,\(^9\) the court held that an attorney did not harbor an ulterior motive in filing a lawsuit; therefore a cause of action for abuse of process did not exist.\(^9\) In *Dutt*, the defendant attorney filed a “thoroughly inadequate complaint against numerous doctors and a hospital two days before the effective date of a statute that . . . required [him] to file a complaint with a medical-legal screening panel” to determine the merit of the claim.\(^9\) All of the attorney’s research indicated that there was no negligence and that he should not file the lawsuit, however, he filed it anyway in order to avoid the new statute.\(^9\) The court held this did not constitute abuse of process.\(^9\)

Both of these cases demonstrate that the tort of abuse of process is ineffective because it is too narrow in scope. As a result, it is insufficient to deter baseless lawsuits. As the cases above demonstrate, a cause of action will rarely exist for abuse of process. The possibility of an abuse of process action does not deter attorneys from filing baseless lawsuits and provides no relief to those in-

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\(^{87}\) See supra Part III.A.

\(^{88}\) 423 A.2d 196 (D.C. 1980).

\(^{89}\) Id. at 197.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id. at 198-99.

\(^{93}\) Id.


\(^{95}\) Id. at 360.

\(^{96}\) Id. at 361.

\(^{97}\) Id. at 357.

\(^{98}\) Id. at 360.
jured as a result. Thus, an abuse of process cause of action is completely inadequate to solve the legal malpractice problem in the United States.

IV. NEGLIGENCE

A. Background

In order for a plaintiff to be successful in a negligence action, he or she must show that: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached the duty of care, (3) the defendant's conduct caused the plaintiff harm, and (4) damages occurred.\(^9\) Undoubtedly, when an attorney files a frivolous lawsuit against an innocent person, the defendant suffers damages as a result. Courts most often struggle with the element of duty when analyzing negligence claims filed by third party adversaries against attorneys.\(^10\) Whether a defendant owes a duty to the plaintiff depends on several factors including: risk, foreseeability, the likelihood of injury weighed against the social utility of the actor's conduct, and the magnitude of the burden of guarding against injury.\(^11\) The applicable standard in attorney malpractice cases should be the same as in all negligence actions. Hence, the duty an attorney owes to a third party adversary is the duty to exercise the care that would be exercised by a reasonable prudent attorney under the same or similar circumstances to avoid or minimize the risk of harm to others.

Although a claim for negligence brought against an attorney by a third party adversary has never been successful in the United States, courts are increasingly addressing the issue. Most courts remain reluctant to recognize it as a viable cause of action, but some opinions suggest a negligence cause of action should exist against an attorney in some situations.\(^12\) For example, a Kentucky Court of Appeals addressed the issue of attorney negligence in *Hill v Willmott*.\(^13\) Although the court ultimately refused to recognize negligence as the appropriate cause of action in this case, it suggested that in some circumstances liability may extend to an adversarial attorney.\(^14\)

In *Hill*, a physician brought an action against an attorney alleging he was negligent in instituting a medical malpractice action against him.\(^15\) He


\(^13\) 561 S.W.2d at 331.

\(^14\) Id. at 334.

\(^15\) Id. at 332.
alleged that the attorney failed to exercise the degree of skill, care, and learning ordinarily possessed by an average qualified attorney acting in the same or similar circumstances.\textsuperscript{106} Specifically, the complaint alleged that the defendant attorney was negligent because prior to filing suit, he did not consult with the plaintiff who was the treating physician, or any other physicians concerning the skill, care, and technique normally used by a physician in this type of situation.\textsuperscript{107} Additionally, the attorney did not review any of the medical charts, did not consult with the state or county health department in determining the accuracy of the physician's report, and was not even authorized to file a suit on the patient's behalf.\textsuperscript{108}

The plaintiff in \textit{Hill} urged the court to recognize a negligence cause of action against the attorney for failing to conduct a reasonable investigation prior to filing suit.\textsuperscript{109} Essentially, the basis for his claim was that an attorney owes a duty to an adversary to act in accordance with the Code of Professional Responsibility that requires an attorney to act in a manner that "promotes public confidence in the integrity and efficiency of the legal system and [in] the legal profession."\textsuperscript{110} This duty was allegedly violated when the attorney filed an unauthorized suit against the physician that resulted in damages amounting to $250,000.\textsuperscript{111} The court found that the Code of Professional Responsibility does not establish a cause of action against an attorney for professional negligence.\textsuperscript{112} Therefore, in this case there was no cause of action because the basis of the complaint relied upon the Code of Professional Responsibility.\textsuperscript{113} Although the court refused to recognize negligence as a cause of action in this particular case, it explained:

\begin{quote}
[t]his is not to say that a cause of action cannot be asserted for negligence on the part of an attorney. All we are holding is that the duty set forth in the Code and the Rules establishes the minimum level of competency for the protection of the public and a violation thereof does not necessarily give rise to a cause of action.\textsuperscript{114}
\end{quote}

\textsuperscript{106} \textit{Id.}\textsuperscript{107} \textit{Id.} at 332-33.\textsuperscript{108} \textit{Id.}\textsuperscript{109} \textit{Id.} at 333.\textsuperscript{110} \textit{Id.}\textsuperscript{111} \textit{Id.}\textsuperscript{112} \textit{Id.}\textsuperscript{113} \textit{Id.} at 333.\textsuperscript{114} \textit{Id.} at 334.
EXPANDING ATTORNEY LIABILITY

Therefore, the court did suggest that a negligence cause of action brought by a third party against an attorney may be acceptable under the right circumstances.

B. Policy Arguments Against Extending Negligence to Adversaries

Although third party victims of attorney negligence are increasingly urging the court to adopt negligence as a cause of action, there are several reasons courts and commentators attribute to the refusal to relax the rule of privity and extend liability to adversaries. The main concern is "[e]xpanding the scope of legal malpractice to include a growing number of non-client third parties may result in a fundamental change in the traditional attorney-client relationship." Rather than being the "zealous advocates" for their clients that the Code of Professional Responsibility requires, it is argued attorneys will become cautious of certain client requests or transactions that could potentially expose them to malpractice liability. It is also argued that once the privity rule is relaxed, the number of persons a lawyer can be accountable to could be limitless. Furthermore, it is believed that the threat of malpractice liability will damage the confidentiality central to the attorney-client relationship because the attorney will be concerned with his or her own liability rather than his or her client's interests.

Most courts cite the most fundamental and key consideration of public policy as a plaintiff's right to free access to the courts as a means of settling claims and disputes. Therefore, it can be argued that courts should be open to


119 See, e.g., (cite to Cifu too-FN 114), Goodman v. Kennedy, 556 P.2d 737, 744 (Cal. 1976) (extending liability beyond third parties to whom advice is foreseeably transmitted or relied upon "would inject undesirable self-protective reservations into the attorney's counseling role"); Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998) (requiring strict privity protects attorney-client confidentiality); Guy v. Liederbach, 459 A.2d 744, 752 (Pa. 1983) (allowing such suits would perhaps lower the quality of legal services rendered to clients); Chem-Age Industries, Inc. v. Glover, 652 N.W.2d 756, 774 (S.D. 2002) ("Holding attorneys liable for aiding and abetting the breach of a fiduciary duty in rendering professional services poses both a hazard and a quandary for the legal profession.").

these litigants for the settlement of their rights without fear of prosecution for calling upon the courts to determine such rights. Courts often conclude that this public interest demands the rejection of any effort to extend tort liability for the wrongful filing of a lawsuit beyond the realm of malicious prosecution and abuse of process. Additionally, it can be argued that even if a negligence cause of action existed against attorneys, it is unlikely they will improve the quality of their work. Rather, they will turn to malpractice insurers to cover the increased risk of loss, which will lead to increasing insurance premiums likely to be borne by clients in the form of higher fees.

C. Arguments For Expanding Liability: Schunk v. Zeff & Zeff, P.C.

In spite of these arguments, expanding liability for attorney malpractice will generate attorneys who are more careful to avoid causing injury to non-clients. Although the overwhelming weight of authority holds that an attorney owes no legal duty to his or her client's adversary for negligence, a compelling dissenting opinion in Schunk v. Zeff & Zeff, P.C. argued an attorney should be liable under certain circumstances for negligence to his or her client's adversary. These circumstances include an attorney's "breach of his [or her] duty to conduct a reasonable investigation before instituting suit where it is reasonably foreseeable that a breach of such duty would injure the adversary."

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121 See id. The Hines court expelled the view that most courts have:

The attorney owes a duty to his client to present his case vigorously in a manner as favorable to the client as the rules of law and professional ethics will permit. He is an advocate and an officer of the court. He is cognizant of the public policy that encourages his clients to solve their problems in a court of law. In our opinion, when representing his client in the initiation of a lawsuit, he should not be judged by a different standard... Against attorneys, however, [the adverse litigant] proceeds on a cause of action for simple negligence which requires a different and less demanding standard of proof. We believe the public policy of favoring free access to our courts is still viable. However, if... [his] cause of action against attorneys for negligence is permitted, this policy will be subverted. The attorney must have the same freedom in initiating his client's suit as the client. If he does not, lawsuits now justifiably commenced will be refused by attorneys, and the client, in most cases, will be denied his day in court.


124 Id. at 327 (MacKenzie, J., dissenting).

125 Id.
EXPANDING ATTORNEY LIABILITY

Schunk involved a negligence action brought by a physician against an attorney alleging that the attorney failed to investigate the merits of a medical malpractice claim prior to commencing the action against the physician. In a dissenting opinion, it was suggested that the majority erred in finding that a negligence cause of action did not exist against the adverse attorney. The dissenting opinion concluded that attorneys should be liable for negligence to their clients' adversaries for breach of their duty to conduct a reasonable investigation before filing suit where it is reasonably foreseeable that a breach of such a duty would injure the adversary.

1. An Attorney Has a Duty to Investigate

"[W]hile the adversary system requires that an attorney be devoted to the cause of his client, justice requires that one who has suffered a wrong have access to the courts to seek his remedy."

According to the ABA Model Rules of Professional Conduct, an attorney shall not file a suit, assert a position, or take any other action on behalf of his client unless there is a basis in both law and fact. Additionally, an attorney shall not knowingly proceed with a claim or defense unless it can be supported by a good faith argument for "an extension, modification or reversal of existing law."

According to the Schunk dissent,

[i]t]he meritoriousness of the action is a matter that must always be carefully considered by the attorney. It is his duty to advise a client fully and completely on the merits of his case [and] [i]f he finds that there is not merit in the contemplated action, it is his duty to advise his client to that effect and not to represent him in court if the client refuses . . . such advice.

Furthermore, when an attorney appears in court, he or she is representing to the court that he or she examined their client's claim, that there is merit in it, and that the claim is not being asserted for the purpose of delay or harass-

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126 Id. at 323.
127 Id. at 327-33 (MacKenzie, J., dissenting).
128 Id. at 332. The majority opinion concluded that there was no cause of action against an attorney by a third party for negligence. Id. at 327.
129 Id.
131 Id.
132 Schunk, 311 N.W.2d at 327 (MacKenzie, J., dissenting) (quoting GILMORE, 1 MICHIGAN CIVIL PROCEDURE BEFORE TRIAL § 1.3(D) (2d. ed. 1975)).
ment. Lawyers are required by the Code of Professional Responsibility to moderate their zeal in fulfilling their obligations as officers of the court. However, an attorney's duty to represent his client with zeal does not reduce the attorney's obligation to treat all persons involved in the legal process "with consideration . . . and to avoid the infliction of needless harm." Therefore, requiring a duty of reasonable investigation prior to initiating a lawsuit would neither conflict with nor restrict an attorney's duty and obligations to his client, but would complement it.

Additionally, the Schunk dissent emphasized that cases that have interpreted Rule 11 of the Federal Rules of Civil Procedure unanimously hold that the rule places "an affirmative obligation on the attorney who signs a pleading to conduct a reasonable investigation prior to . . . filing . . . [the] pleading." The purpose of the signature rule is to impose a duty on attorneys to preclude the filing of frivolous and baseless claims by requiring that attorneys conduct a reasonable investigation enabling them to represent in good faith that it is his or her honest belief that there are both facts and law supporting the claim. Thus, the attorney-client relationship imposes an affirmative obligation by an attorney to conduct a reasonable investigation prior to filing a suit to determine whether a viable claim exists.

2. Liability Should be Based on Foreseeability

An attorney's liability should not end with being accountable to his or her client. Attorneys should also answer to third parties who have suffered an injury or loss as a result of negligent conduct on the attorneys' part. As discussed in Section II, the privity doctrine has been abandoned in the areas of general negligence, products liability, and in most areas of professional liability in order to avoid harsh results. Absent privity through a contractual relationship, liability for negligent legal advice or actions is only created where: "(1) the law imposes a duty of care on the attorney with respect to the plaintiff, (2) it is foreseeable that [the] plaintiff will be harmed by the attorney's negligence, and (3) the plaintiff actually suffers harm as a result of the attorney's negligence."
EXPANDING ATTORNEY LIABILITY

The law imposes an affirmative duty on attorneys to investigate a claim by making reasonable inquiries and examining all the evidence that is accessible and reasonably available to make a good faith determination that a factual and legal basis for their claim exists, and withdrawing from the litigation as soon as it becomes clear that there is no basis for liability. Undoubtedly, this duty extends to persons who become defendants to groundless lawsuits. Certainly, it is foreseeable to an attorney that a person who is subjected to a groundless lawsuit will suffer damages. Where an attorney files a lawsuit without undertaking an adequate investigation in order to form a good faith belief a valid claim is involved, it is unreasonable to conclude that harm to a client's potential adversary is not foreseeable. The potential harm to the adversary is significant. It includes economic harm in the form of legal fees, lost time spent defending the claim, and a potential increase in the cost of malpractice insurance or even the cancellation of malpractice insurance. Additionally, the third party adversary will likely suffer emotional distress and a tarnished reputation that can potentially lead to further financial loss. This potential harm to a third party adversary is foreseeable to a reasonable attorney when he or she engages in a substandard investigation. This risk coupled with the social policies discussed herein favor that courts enforce an affirmative duty on attorneys to conduct an adequate investigation prior to filing claims on behalf of their clients. The potential for harm "outweighs the competing considerations favoring an unrestrained legal profession." Thus, an attorney's conduct is not entitled to absolute protection under the law.

3. Policy Concerns Revisited

Attorneys should not be deterred from zealously representing the claims of their clients. No inconsistency exists between an attorney's affirmative duty to zealously advocate his or her client's interests and the recognition of a duty to

142 Id.
143 Id.
144 Id.
145 Id. at 331.
146 Id.
147 Id.
148 Id.
149 Id.
150 Id.
151 Id.
their client's adversary to investigate a claim prior to filing suit.\textsuperscript{152} Attorneys already bear the duty of representing their clients "within the bounds of the law."\textsuperscript{153} According to the dissent in \textit{Schunk},

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[\textit{t}he bounds of the law can and should require counsel to fulfill his [or her] professional trust and responsibility to the court, the public, and potential adversary parties by conducting ... a reasonable investigation under the circumstances ... [that] is necessary and appropriate to form a good faith belief that his [or her] client has a tenable claim.
\end{small}
\end{quote}

The recognition and enforcement of a duty to third party adversaries does not diminish the principle of zealous representation.\textsuperscript{155} In fact, a duty to an adversary is consistent with the duties that already exist under the rules of professional responsibility.\textsuperscript{156} An attorney has an obligation to his or her client and to all others involved in the legal process.\textsuperscript{157} Accordingly, requiring a duty of reasonable investigation to a client's adversary is coextensive with an attorney's existing ethical duties.\textsuperscript{158} Another argument offered to preclude negligence actions brought by third parties against attorneys is that it would undermine the public policy of favoring free access to the courts.\textsuperscript{159} Although courts most often cite this argument, it is not compelling because under the Canons of Professional Responsibility, an attorney has a duty to exercise professional judgment in analyzing the facts and applicable law to determine whether their client has a tenable claim or a groundless one.\textsuperscript{160} Therefore, an attorney is already required to assess the merits of the claim in relation to available facts even if the client is intent on filing suit.\textsuperscript{161} Presumably, an attorney licensed to practice law is capable of determining what facts are fundamentally relevant to determine if a bona fide claim exists.\textsuperscript{162} Although minds may differ regarding the likelihood of success

\begin{footnotes}
\item[152] \textit{Id.}
\item[153] \textit{Id.}
\item[154] \textit{Id.}
\item[155] \textit{Id.}
\item[156] \textit{Id.}
\item[157] \textit{See id.}
\item[158] \textit{See id.}
\item[159] \textit{See id. at 332.}
\item[160] \textit{See id.}
\item[161] \textit{See id.}
\item[162] \textit{Id.}
\end{footnotes}
of a case, minds should not differ in evaluating whether an attorney satisfied the minimal requirement of advancing only plausible claims and in determining whether the preliminary investigation into the facts was sufficient. Because the legal duty called for does not extend beyond the attorney’s existing obligations, free access would not be restricted.

The duty of an attorney to conduct a reasonable preliminary investigation into relevant facts creates no additional burdens on the attorney that he or she will not have to bear eventually in the course of the litigation if he or she genuinely intends to present a convincing case to the court and the jury. Unless an attorney is under the pressure of the statute of limitations, he or she has no excuse for failing to review readily available material before filing suit against a possibly innocent or even an uninvolved party.

V. CONCLUSIONS AND RECOMMENDATIONS

Fairness and integrity are the core of the American judicial system. Attorneys and judges pride themselves on being honorable advocates of justice. However, the profession has been plagued by a growth in the number of frivolous lawsuits. As discussed in Section III, malicious prosecution and abuse of process are rarely successful, even under egregious circumstances. Thus, neither provides adequate redress for an injured third party, nor serves as an effective deterrent against unfounded lawsuits. Why should attorneys who are negligent be insulated from their own carelessness or incompetence?

Negligence is the only appropriate cause of action that will deter attorneys from filing baseless lawsuits and punish them for their incompetence. The purposes underlying negligence law are to redress wrongs by shifting the losses caused by negligent conduct to the culpable party and to deter culpable behavior. Therefore, future public harm will be prevented, and the quality of legal services will be enhanced if liability for legal malpractice is expanded.

It is true an attorney’s primary purpose is to zealously serve his or her client’s interests. However, this general rule does not mean an attorney may act fraudulently or deceitfully in dealing with third party adversaries. The relaxation of the privity requirement needs to also extend to the adversary relationship. An attorney owes a duty to the client’s adversary to conduct a reasonable investigation, and the applicable standard should be that an attorney is answerable in negligence to his or her client’s adversary for the failure to conduct a reasonable

163 See id.
164 See id.
165 See id.
166 Id.
167 See supra Part III.
investigation that allows the attorney to make a good-faith determination that there are legal and factual grounds to support the allegations contained in the complaint. An attorney has grounds to represent a client in litigation when, after a reasonable investigation and search of legal authority, he or she has an honest belief the client's claim is tenable. The attorney must not only have a subjective belief that the claim merits litigation, but that belief must also satisfy an objective standard. As long as the attorney does not abuse the duty of zealous representation by prosecuting a claim a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his or her determination to proceed, his or her client's adversary has no right to assert a negligence cause of action.

Courts that have refrained from adopting a duty to a non-client are being overprotective of the legal profession. Courts are willing to hold other professionals liable to non-clients, but consistently refuse to extend this liability to attorneys. However, attorneys should not enjoy special protection from third party liability. It is time to apply the law equally to attorneys and recognize they also owe a duty to non-clients.

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