

## ATTORNEY LIABILITY TO NONCLIENTS: THE NEED TO RE-EXAMINE NEBRASKA'S PRIVACY RULE

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### INTRODUCTION

Over fifty years ago, Professor William Sternberg, in an article entitled "Nebraska Against the Weight of Authority,"<sup>1</sup> called attention to "some points of law on which Nebraska is against the weight of authority."<sup>2</sup> In addition to pointing out the minority status of the Nebraska Supreme Court's position, Professor Sternberg also stated the reasons or rationales given by the Nebraska court, as well as the reasons or rationales given by other courts. In the fashion of the Sternberg model, this Article will likewise examine one area in which the Nebraska Supreme Court's position is against the weight of authority.

The broader topic of this Article is the potential liability of attorneys to nonclients. The more specific inquiry is the potential liability for malpractice in the estate planning context. The prototypical case in this scenario is one in which the attorney drafts a will for a client and, due to the alleged negligence of the drafting attorney, the devise fails in whole or in part. Under these circumstances, the liability of the attorney to the "disappointed beneficiary" would depend, under traditional analysis, upon the so-called "privity" defense.

Existing Nebraska case law is well-settled in accepting the so-called "privity" defense.<sup>3</sup> This Article will examine applicable Nebraska case law in detail and will contrast Nebraska law with the approaches taken by other courts in recent judicial decisions. This Article will then discuss the pertinent policy issues surrounding the "privity" debate. After analysis and discussion of the "privity" defense and the state of the law nationally, this Article concludes that the Nebraska Supreme Court's position is in serious need of re-examination and re-thinking.

Like Professor Sternberg, this author believes strongly that the fact that the Nebraska court is in the minority does not necessarily

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1. 17 NEB. L. BULL. 347 (1938).

2. William P. Sternberg, *Nebraska Against the Weight of Authority* 17 NEB. L. BULL. 347 (1938).

3. See *infra* notes 49-144 and accompanying text.

indicate that the Nebraska position is wrong.<sup>4</sup> There is no virtue in blind obeisance to the "weight of authority"<sup>5</sup> or in mechanically following a recent trend.<sup>6</sup> Not every decision may be expected to produce unanimous support; indeed, the judges of an appellate court may strongly disagree among themselves as to what the law should be. However, particularly when an important issue of public policy is at stake, what the public may rightfully demand from the judiciary is a reasoned opinion, carefully crafted. Unfortunately, the Nebraska decisions relating to the "privity" defense have not contained a reasoned analysis, just a general rule that is deemed applicable to and decisive in the case.<sup>7</sup> Given the fact that the Nebraska Supreme Court has just recently declined an opportunity to re-visit the issue of privity, the status of Nebraska law is not likely to change.<sup>8</sup> This circumstance leaves Nebraska law, in this author's view, in an unsatisfactory state.

## I. ATTORNEY LIABILITY TO NON-CLIENTS — AN OVERVIEW

The question of liability of attorneys to non-clients and the privity defense is part of much larger and more pervasive body of law that has been a subject of continuing controversy and development for over one hundred fifty years.<sup>9</sup> The discussion has been couched primarily in

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4. One area where the Nebraska Supreme Court staked out a clear minority position was in the area of direct restraints on alienation. At one time, the Nebraska court, joined only by the Kentucky Supreme Court, employed a "reasonableness" test in determining the validity of a direct restraint on a fee simple interest. Then, in 1953, the Nebraska court abandoned its former position, partly in deference to the "weight of authority." In a previous article, I have indicated my disagreement with the Nebraska court's change of position, particularly in regard to the court's reliance upon a theory of "repugnancy." See Ronald R. Volkmer, *The Law of Future Interests*, 18 CREIGHTON L. REV. 601, 639-42 (1985). The Nebraska court's reasonableness test was simply ahead of its time. See: RESTATEMENT (SECOND) PROPERTY, DONATIVE TRANSFERS § 4.2 (1983) cmt. m (validity of forfeiture restraint).

5. No one, in my opinion, has stated it better than Judge James R. Dean, of the Nebraska Supreme Court, dissenting in *McGinley v. Forrest*, 107 Neb. 309, 186 N.W. 74 (1921):

I respectfully submit that the rule to which the majority opinion commits the court has been adopted, not because it appeals to reason or to conscience, nor because it is right, but merely because the weight of authority is said to be on that side. The weight of the evidence is not determined by counting the witnesses, and by the same token the better rule is not always determined by counting the authorities.

*McGinley*, 107 Neb. at 315, 186 N.W. at 76 (Dean, J., dissenting).

6. This is one of the problems I have with the Nebraska court's treatment of the "rule of repugnancy" in *Stern v. Nelson*, 210 Neb. 358, 314 N.W.2d 263 (1982). See DEBORAH DEVERE MCCARNEY, *STERNER V. NELSON: THE REPUGNANCY RULE IN THE CONSTRUCTION OF WILLS* (discussing the repugnancy rule); Volkmer, 18 CREIGHTON L. REV. at 634-38 (discussing the repugnancy rule).

7. See *infra* notes 49-144 and accompanying text.

8. *Schiebe v. Brogan*, No. A-93-600, A-93-601, 1995 WL 382752 (Neb. App. 1995).

9. The body of literature on point is vast. See *infra* notes 289-310 and accompanying text for a discussion of the major works, primarily focusing on the most recent.

terms of tort law, and, yet, contract law has been, and continues to be, part of the mix.<sup>10</sup> Even today, the debate continues as to whether this topic is grounded in contract law or in tort law.

In a recently published book, Professor Jay M. Feinman argues that "there is a contemporary need to construct a new field of law."<sup>11</sup> This new field of law, which Professor Feinman calls the "law of economic negligence," addresses "the liability that a party to a contract owes to a third person when that party's breach or negligent performance of the contract causes economic loss to the third person."<sup>12</sup> In summarizing the state of the law, Feinman notes that, "Until recently, privity reigned as the dominant principle in the law of economic negligence, and recovery by a nonprivity third party for pure economic loss was rare."<sup>13</sup> In short, until recently, there was no recognized "law of economic negligence" because the doctrine of privity reigned supreme.

What is the doctrine of privity? According to Feinman, "The privity bar prohibited an action by a plaintiff for economic loss in the absence of a contractual relationship with the defendant."<sup>14</sup> The leading common law cases enunciating this doctrine were: *Winterbottom v. Wright*,<sup>15</sup> decided in England in 1842, and a decision of the United States Supreme Court in 1879, *National Savings Bank of District of Columbia v. Ward*.<sup>16</sup>

Three famous decisions of the New York Court of Appeals in the early part of the twentieth century were influential in modifying the strictures of the privity rule. In the *MacPherson Buick Motor Co.*<sup>17</sup> case, Judge Cardozo announced a foreseeability rule in the context of the liability of a manufacturer for personal injury.<sup>18</sup> In the economic loss area, the New York court in *Glanzer v. Shepard*<sup>19</sup> allowed the purchaser of beans to sue the bean weigher who was under contract to the seller when the defendant certified an erroneous weight for the beans.<sup>20</sup> The "end and aim" of the transaction was to provide a service to the buyer, a fact known to the defendant.<sup>21</sup> According to Cardozo, under such circumstances "the law imposes a duty toward buyer as

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10. See *infra* notes 208-28 and accompanying text.

11. JAY M. FEINMAN, *ECONOMIC NEGLIGENCE* 5 (1995) [hereinafter FEINMAN]. Professor Feinman's lucid, in-depth analysis is highly recommended by this author.

12. FEINMAN, *supra* note 11, at 3.

13. *Id.* at 63.

14. *Id.* at 64.

15. 152 Eng. Rep. 402 (1842).

16. 100 U.S. 195 (1879).

17. 111 N.E. 1050 (N.Y. 1916).

18. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

19. 135 N.E. 275 (N.Y. 1922).

20. *Glanzer v. Shepard*, 135 N.E. 275, 275-77 (N.Y. 1922).

21. *Glanzer*, 135 N.E. at 275.

well as seller."<sup>22</sup> Nine years later, in 1931, the New York Court of Appeals decided the case of *Ultramares Corp. v. Touche*<sup>23</sup> which even today, maintains Feinman, "still remains a defining case for the subject."<sup>24</sup> In *Ultramares*, the defendants were an accounting firm that prepared and certified a balance sheet for its client, Fred Stern & Co.<sup>25</sup> Stern supplied the certified balance sheets to banks, creditors, and others.<sup>26</sup> The plaintiff, Ultramares, Stern's creditor, relied on the balance sheet.<sup>27</sup> However, Stern falsified certain financial information and, when the company collapsed and Ultramares suffered economic loss, the accountants were sued on a misrepresentation theory.<sup>28</sup> The New York court distinguished *Glanzer*, expressed concern over the unlimited nature of liability that might be created by allowing recovery, and denied Ultramares recovery.<sup>29</sup> According to Feinman, the *Ultramares* decision had the effect of leaving the privity rule "substantially intact."<sup>30</sup>

With regard to the duty owed by an attorney to someone other than the attorney's client, the application of the privity rule yields a clear answer: "[A]n attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care, to his client alone. . . ."<sup>31</sup> This became the "accepted rule" that lasted until the middle of the twentieth century.<sup>32</sup>

## II. THE PRIVITY RULE AND ATTORNEY LIABILITY — THE LAW CHANGES

Just as the New York Court of Appeals took the lead in the early 20th century in defining the limits of the privity doctrine, the California Supreme Court revolutionized the privity doctrine in three landmark cases from 1958 to 1969. The first of these cases, *Biakanja v. Irving*,<sup>33</sup> involved a will negligently drafted by a notary public.<sup>34</sup> In

22. *Id.* at 275-76.

23. 174 N.E. 441 (N.Y. 1931).

24. FEINMAN, *supra* note 11, at 35.

25. *Ultramares Corp. v. Touche*, 174 N.E. 441, 442 (N.Y. 1931).

26. *Ultramares Corp.*, 174 N.E. at 442.

27. *Id.* at 443.

28. *Id.* at 442-43.

29. *Id.* at 446-47.

30. FEINMAN, *supra* note 11, at 34-37.

31. *Buckley v. Gray*, 42 P. 900 (Cal. 1895), *overruled by*, *Biakanja v. Irving*, 320 P.2d 16, 18 (Cal. 1958). In *Biakanja*, the court stated that the rule in *Buckley* "has been greatly liberalized, and the courts have permitted a plaintiff not in privity to recover damages in many situations for negligent performance of a contract." *Biakanja*, 320 P.2d at 18.

32. Gerald P. Johnston, *Legal Malpractice in Estate Planning — Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 645-46 (1982).

33. 320 P.2d 16 (Cal. 1958).

34. *Biakanja v. Irving*, 320 P.2d 16, 17 (Cal. 1958).

*Biakanja*, the California Supreme Court re-examined the status of the privity doctrine, noting that the privity doctrine had been "greatly liberalized" since the turn of the century.<sup>35</sup> In determining whether a duty to the third party (the intended will beneficiary in this case) arose, the court enunciated a new 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.<sup>36</sup>

This test, sometimes called the "balance of factors" test, proved to be very influential, not only in California, but across the country. The California Supreme Court applied the *Biakanja* test to attorneys in the 1961 case of *Lucas v. Hamm*.<sup>37</sup> In *Lucas*, the court indicated that the disappointed beneficiaries might also sue as third-party beneficiaries of a contract.<sup>38</sup>

Eight years later in *Heyer v. Flaig*,<sup>39</sup> another attorney malpractice case involving faulty will drafting, the California Supreme Court clarified its earlier position in *Lucas* by noting that the contract action was "conceptually superfluous since the crux of the action must lie in tort."<sup>40</sup> The question of whether negligence or third-party beneficiary contract doctrine is the proper theory has proved to be a topic of continuing debate.<sup>41</sup>

The shock waves of these California decisions were felt across the country and are still reverberating today. In 1980, one commentator noted that, even though the "weight of authority may support the strict privity rule, the trend is to the contrary."<sup>42</sup> By 1993, another commentator acknowledged that the strict privity rule may be a majority rule as reflected by "the holdings and dictum of the majority of

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35. *Biakanja*, 320 P.2d at 18.

36. *Id.*

37. 364 P.2d 685, 687-88 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

38. *Lucas v. Hamm*, 364 P.2d 685, 689 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

39. 449 P.2d 161 (Cal. 1969), *overruled by*, *Laird v. Blacker*, 828 P.2d 691, 698 (1992). In *Laird*, the court stated that "we conclude that to the extent . . . *Heyer* . . . conflict[s] with our decision in this case, [it] is disapproved." *Laird*, 828 P.2d at 698.

40. *Heyer v. Flaig*, 449 P.2d 161, 163-64 (Cal. 1969), *overruled by*, *Laird v. Blacker*, 828 P.2d 691, 698 (1992).

41. See *infra* notes 208-28 and accompanying text.

42. DAVID J. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE 105 (1980).

the decisions under particular facts, but [the strict privity rule] does not accurately characterize the state of the law in the United States."<sup>43</sup> This commentator remarked that "[t]he modern trend in the United States is to recognize the existence of a duty beyond the confines of those privity to the attorney-client contract."<sup>44</sup> By the early 1990s, the tide had turned in such dramatic fashion that one writer, reflecting upon recent case law, declared that "a majority of the states that have considered the issue [of strict privity] hold that the beneficiaries of a defectively drafted will or trust should be considered the defendant estate planning attorney's 'indirect' clients for purpose of the foregoing analysis."<sup>45</sup> In this same author's review of the case law nationwide, other than California, the author noted that:

In recent years, many jurisdictions have affirmed the standing to sue of an heir or beneficiary allegedly disappointed through the negligence of a deceased testator's attorney despite the lack of contractual privity between the plaintiff and the attorney drafter. Some courts have adopted California's "balancing of factors" test, others have utilized a third-party beneficiary contractual theory of recovery, and others have simply assumed without discussion that lack of contractual privity is no defense to an attorney drafter.<sup>46</sup>

By the 1990s, the debate over the "majority" versus the "minority" status of the "strict privity" rule seemed rather pointless. What had occurred was unmistakable: State courts nationwide re-examined the "strict privity" rule and found the rule wanting. The "modern trend," the new assault upon the citadel of privity, was proceeding "apace" once more. Against this onslaught stood a lonely outpost of state court decisions, clinging to the bar of privity.<sup>47</sup> No state court stood out so starkly and lonely as the Nebraska Supreme Court. According to Professor Feinman, "The Nebraska Supreme Court is the only court in recent years to articulate and adhere to the privity bar in its pure form."<sup>48</sup> How the Nebraska court reached its unique status is the next subject for discussion.

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43. RONALD E. MALLIN & JEFFREY M. SMITH, *LEGAL MALPRACTICE* 378 (3d. ed. 1993).

44. *Id.* at 381.

45. Bruce Ross, *Legal Malpractice in Estate Planning and Administration*, 18 ACTEC NOTES 248, 249 (1993).

46. Ross, 18 ACTEC NOTES at 250.

47. *Id.* at 251 (citing decisions from Ohio, Missouri, Nebraska, New York, and Texas as representing the "minority view").

48. FEINMAN, *supra* note 11, at 67.

## III. THE NEBRASKA CASE LAW

From 1980 to 1995, six Nebraska Supreme Court cases and one Nebraska Court of Appeals case have dealt with the topic of a lawyer's potential liability to nonclients.<sup>49</sup> Four of the seven cases arose in an estate planning context.<sup>50</sup> Of the seven cases, three are significant in that rulings in these cases set precedents or broke new ground.<sup>51</sup> The remaining four cases simply re-affirmed existing precedent.<sup>52</sup> The seven cases will first be reviewed in chronological order, and, second, a discussion of the more significant cases will follow.

## A. THE FACTS AND HOLDINGS

1. Ames Bank v. Hahn<sup>53</sup> (1980)

The plaintiff, Ames Bank ("Bank"), lent money to E.G. Miller Realty Company, evidenced by a promissory note.<sup>54</sup> Defendant Hahn represented a partner in the Minnesota Candlewood Company.<sup>55</sup> According to the Bank's allegations, Hahn was to prepare two mortgages from Minnesota Candlewood to the Bank, intended to secure the promissory note.<sup>56</sup> According to the Bank, the mortgages prepared by Hahn described land not owned by Candlewood.<sup>57</sup> A subsequent deed prepared by Hahn, from E.G. Miller Enterprises to Minnesota Candlewood, likewise failed to convey property the deed was intended to convey.<sup>58</sup> The Bank was unable to collect on its note and sued Hahn

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49. *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995); *Earth Science Lab., Inc. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994); *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988) (per curiam); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam); *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980); *Schiebe v. Brogan*, Nos. A-93-600, A-93-601, 1995 WL 382752 (Neb. App. 1995).

50. See *Gravel*, 247 Neb. at 404, 527 N.W.2d at 199; *Lilyhorn*, 214 Neb. at 728, 335 N.W.2d at 554; *St. Mary's Church of Schuyler*, 212 Neb. at 728, 325 N.W.2d at 164 (per curiam); *Schiebe*, 1995 WL 382752.

51. See *Landrigan*, 227 Neb. at 835, 420 N.W.2d at 313 (per curiam) (redefining the privity rule); *St. Mary's Church of Schuyler*, 212 Neb. at 728, 325 N.W.2d at 164 (applying the privity rule in the estate planning context); *Ames Bank*, 205 Neb. at 353, 287 N.W.2d at 687 (defining the privity rule).

52. *Gravel*, 247 Neb. at 404, 527 N.W.2d at 199; *Earth Sciences Lab., Inc.*, 246 Neb. at 798, 523 N.W.2d at 254; *Lilyhorn*, 214 Neb. at 728, 335 N.W.2d at 554; *Schiebe*, 1995 WL 382752.

53. 205 Neb. 353, 287 N.W.2d 687 (1980).

54. *Ames Bank v. Hahn*, 205 Neb. 353, 354, 287 N.W.2d 687, 688 (1980).

55. *Ames Bank*, 205 Neb. at 354, 287 N.W.2d at 688.

56. *Id.* The note was for \$153,358.60. *Id.*

57. *Ames Bank*, 205 Neb. at 354, 287 N.W.2d at 688.

58. *Id.*

under two theories: (1) misrepresentation and (2) negligence.<sup>59</sup> The trial court sustained the Hahn demurrer as to both counts.<sup>60</sup>

On appeal, the Nebraska Supreme Court affirmed.<sup>61</sup> As to the misrepresentation theory, the supreme court simply noted that the Bank had not made the proper allegations to sustain its cause of action based upon misrepresentation.<sup>62</sup> As to the second cause of action, the court stated:

The issue in regard to the second cause of action is whether the amended petition alleged facts sufficient to establish any duty owed by Hahn to the [Bank]. A cause of action for negligence depends upon the breach of a duty by the defendant to use due care to avoid injury to the plaintiff. 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.<sup>63</sup>

## 2. *St. Mary's Church of Schuyler v. Tomek*<sup>64</sup> (1982)

This case involved litigation arising in the estate of Emil Kavan.<sup>65</sup> The defendants, William Tomek and John Tomek, were lawyers who had drafted Kavan's will.<sup>66</sup> Upon Kavan's death, his will was admitted to probate and a dispute arose as to the proper disposition of his estate.<sup>67</sup> This legal dispute centered on the interpretation of the following language in Kavan's will:

After the payment of all taxes, expenses of administration and proper charges allowed against my estate that have been paid I direct that the rest residue and remainder of the money in my bank account be paid equally among Saint Mary's Church, Schuyler, Nebraska and Saint Anthony's Church, Columbus, Nebraska.<sup>68</sup>

The county court ruled that the language in question was not a true residuary clause and ordered that the residuary estate pass to

59. *Id.* at 354-55, 287 N.W.2d at 688-89.

60. *Id.* at 354, 287 N.W.2d at 688.

61. *Id.* at 357, 287 N.W.2d at 689.

62. *Id.* at 356, 287 N.W.2d at 689.

63. *Id.* at 356, 287 N.W.2d at 687 (citing 7 AM. JUR. 2d, *Attorneys at Law*, § 167, p. 146, § 196, p. 161; 7 C.J.S. *Attorney and Client* § 52b p. 834; *Sav. Bank v. Ward*, 100 U.S. 195 (1879)).

64. 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam).

65. *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 729, 325 N.W.2d 164, 165 (1982) (per curiam).

66. *St. Mary's Church of Schuyler*, 212 Neb. at 729, 325 N.W.2d at 165 (per curiam).

67. *Id.* (per curiam).

68. *Id.* (per curiam).

the heirs.<sup>69</sup> On appeal, the district court reversed and ordered that the residue pass to the two churches.<sup>70</sup> The heirs "threatened an appeal" and a settlement was reached in which the heirs were paid \$60,000 in satisfaction of their claim.<sup>71</sup> The churches then brought suit against the lawyers to recover the \$60,000 and litigation expenses.<sup>72</sup>

On appeal, a panel decision of the Nebraska Supreme Court unanimously affirmed.<sup>73</sup> The supreme court's per curiam opinion summarily disposed of the case in two sentences:

We have recently held that 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. We conclude that this rule is applicable to the facts of this case.<sup>74</sup>

The court cited *Ames Bank v. Hahn* in support of its analysis.<sup>75</sup>

### 3. Lilyhorn v. Dier<sup>76</sup> (1983)

The plaintiff, F. Gary Lilyhorn, was the son and one of the heirs of Luella Lilyhorn, whose will was drafted by the defendant, John E. Dier.<sup>77</sup> This will purported to devise certain land to the plaintiff, but inasmuch as Luella owned only a life estate in the subject property, the plaintiff did not receive any of the real estate through the will.<sup>78</sup> The plaintiff sued Dier, alleging that Dier's malpractice resulted in his receiving a smaller share of Luella's estate than Luella had intended.<sup>79</sup> The Nebraska Supreme Court affirmed a summary judgment in favor of Dier.<sup>80</sup>

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69. *Id.* (per curiam). The residuary estate was approximately \$410,000. *Id.* (per curiam).

70. *St. Mary's Church of Schuyler*, 212 Neb. at 729-30, 325 N.W.2d at 165 (per curiam).

71. *Id.* at 730, 325 N.W.2d at 165 (per curiam).

72. *Id.* (per curiam).

73. *Id.* at 730, 326 N.W.2d at 165 (per curiam). The panel consisted of three Nebraska Supreme Court judges: Chief Justice Norman Krivosha, Judge William Hastings, and Judge D. Nick Caporale as well as District Court Judge William Rist and Judge William Colwell. *Id.* at 728, 325 N.W.2d at 165 (per curiam).

74. *St. Mary's Church of Schuyler*, 212 Neb. at 730, 325 N.W.2d at 165 (per curiam).

75. *Id.* (per curiam) (citing *Ames Bank*, 205 Neb. 353, 287 N.W.2d 687 (1980) (per curiam)).

76. 214 Neb. 728, 335 N.W.2d 554 (1983).

77. *Lilyhorn v. Dier*, 214 Neb. 728, 729, 335 N.W.2d 554, 555 (1983).

78. *Lilyhorn*, 214 Neb. at 729, 335 N.W.2d 555.

79. *Id.*

80. *Id.* at 730, 335 N.W.2d at 555.

In reaching this decision, the supreme court passed over a statute of limitations issue and went directly to the privity issue.<sup>81</sup> The court stated:

In his answer the defendant alleged, in defense of the plaintiff's claim, that no attorney client relationship existed between the defendant and the plaintiff with respect to the drafting or execution of Luella M. Lilyhorn's will, which allegation was specifically admitted in his reply. In *St. Mary's Church v. Tomek*, we said that as a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties. Such is the case here, and is sufficient reason to support the action taken by the trial court.<sup>82</sup>

#### 4. *Landrigan v. Nelson*<sup>83</sup> (1988)

Patrick and Paul Landrigan executed a restaurant lease.<sup>84</sup> Patrick, Paul, and other family members executed real estate mortgages to secure the lease payments.<sup>85</sup> Upon default by Patrick and Paul, the mortgages were foreclosed.<sup>86</sup> The family members then sued defendant Nelson, an attorney who represented Patrick and Paul, for legal malpractice.<sup>87</sup> Sustaining Nelson's motion for summary judgment, the trial court found that no duty was owed.<sup>88</sup>

On appeal, the Nebraska Supreme Court affirmed, citing *Ames Bank and Lilyhorn*.<sup>89</sup> The supreme court stated:

We have reviewed the record and find no evidence that either defendant Nelson or his law firm and the members thereof, the other defendants herein, acted as attorneys for appellants. The rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them. As no attorney-client relationship existed between appellants and defendants, and as no other facts or circumstances were shown which establish a duty to appellants, we determine the action of the trial court was correct.<sup>90</sup>

81. *Id.* at 729-30, 335 N.W.2d at 555.

82. *Id.* at 730, 335 N.W.2d at 555 (citing *St. Mary's Church of Schuyler*, 212 Neb. at 728, 325 N.W.2d at 164 (per curiam)).

83. 227 Neb. 835, 420 N.W.2d 313 (1988) (per curiam).

84. *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988) (per curiam).

85. *Landrigan*, 227 Neb. at 835-36, 420 N.W.2d at 313-14 (per curiam).

86. *Id.* at 836, 420 N.W.2d at 314 (per curiam).

87. *Id.* at 835-36, 420 N.W.2d at 313-14 (per curiam).

88. *Id.* at 836, 420 N.W.2d at 314 (per curiam).

89. *Id.* (per curiam) (citing *Ames Bank*, 205 Neb. at 353, 287 N.W.2d at 687; *Lilyhorn*, 214 Neb. at 728, 335 N.W.2d at 554).

90. *Id.* (per curiam) (citing *Ames Bank*, 205 Neb. at 353, 287 N.W.2d at 687; *Lilyhorn*, 214 Neb. at 728, 335 N.W.2d at 554).

5. *Earth Science Laboratories, Inc. v. Adkins & Wondra*,<sup>91</sup> (1994)

This case arose out of the bankruptcy of Sorber Chemical, Inc. and the subsequent purchase of all of Sorber Chemical's assets by the plaintiff, Earth Sciences.<sup>92</sup> The sale included all of Sorber's "claims, causes of actions, and rights or choses in action."<sup>93</sup> Earth Science then sued the defendant law firm, Adkins & Wondra, P.C., for malpractice arising out of the attorney-client relationship between the defendants and Sorber.<sup>94</sup> The trial court sustained Adkins & Wondra's demurrer.<sup>95</sup>

On appeal, the issue on appeal was whether a cause of action for legal malpractice was assignable.<sup>96</sup> The Nebraska Supreme Court affirmed.<sup>97</sup> In affirming the trial court, the supreme court held that such cause of action was not assignable.<sup>98</sup> In the course of its opinion, the court detoured through the privity rule, stating that "[i]n this jurisdiction, [t]he rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them."<sup>99</sup> In support of this analysis, the court cited *Landrigan*, *Lilyhorn*, and *Ames Bank*.<sup>100</sup>

6. *Gravel v. Schmidt*<sup>101</sup> (1995)

Upon Helen Gravel's death, her daughter, Roberta Schmidt, qualified as personal representative of the estate of Helen Gravel.<sup>102</sup> Schmidt then retained the defendant, William Tomek, as attorney for the estate.<sup>103</sup> Plaintiff Tim Gravel had a conversation with Tomek regarding his inheritance from his mother's estate.<sup>104</sup> Based upon the

91. 246 Neb. 798, 523 N.W.2d 254 (1994).

92. *Earth Science Lab., Inc. v. Adkins & Wondra*, 246 Neb. 798, 798-99, 523 N.W.2d 254, 255 (1994).

93. *Earth Science Lab., Inc.*, 246 Neb. at 798, 523 N.W.2d at 255.

94. *Id.* at 799, 523 N.W.2d at 255.

95. *Id.* at 799, 523 N.W.2d at 256.

96. *Id.* at 799-801, 523 N.W.2d at 256.

97. *Id.* at 802, 523 N.W.2d at 257.

98. *Id.* at 801-02, 523 N.W.2d at 257.

99. *Id.* at 801, 523 N.W.2d at 257 (citing *Landrigan*, 227 Neb. at 835, 420 N.W.2d at 313 (per curiam); *Lilyhorn*, 214 Neb. at 728, 335 N.W.2d at 554; *Ames Bank*, 205 Neb. 353, 287 N.W.2d 687)).

100. *Id.* (citing *Landrigan*, 227 Neb. at 835, 420 N.W.2d at 313 (per curiam); *Lilyhorn*, 214 Neb. at 728, 335 N.W.2d at 554; *Ames Bank*, 205 Neb. at 353, 287 N.W.2d at 687)).

101. 247 Neb. 404, 527 N.W.2d 199 (1995).

102. *Gravel v. Schmidt*, 247 Neb. 404, 405-06, 527 N.W.2d 199, 201 (1995).

103. *Gravel*, 247 Neb. at 406, 527 N.W.2d at 201. This is the court's characterization. Technically, the attorney is employed by the personal representative of the estate. While it is commonplace to refer to the "attorney for the estate," the "estate" cannot hire an attorney; that is the responsibility of the personal representative.

104. *Gravel*, 247 Neb. at 405-06, 527 N.W.2d at 201.

estimated value of certain mutual fund shares held by the estate and Tim Gravel's share of the estate, Tomek allegedly told Tim Gravel that he would inherit between \$50,000 and \$100,000.<sup>105</sup> According to Tim Gravel's complaint, Gravel then entered into a contract for the purchase of certain property.<sup>106</sup> Gravel actually received approximately \$15,000 from the Helen Gravel estate.<sup>107</sup> After he subsequently defaulted on the land contract, Tim Gravel sued Tomek for breach of contract.<sup>108</sup> The trial court granted summary judgment in Tomek's favor, and the Nebraska Supreme Court affirmed.<sup>109</sup>

The supreme court ruled that Gravel's complaint, though pled in contract, was in fact a malpractice claim, or, as the court styled it, "a professional negligence action."<sup>110</sup> The court then reviewed the elements of a legal malpractice action and concluded, "A lawyer's duty is to his or her client and does not extend to third parties absent some facts which establish a duty."<sup>111</sup>

Arguably, Schmidt as personal representative, was Tomek's client, not Gravel. However, even assuming without deciding that Tomek owed a duty as an attorney to Gravel, Gravel failed to allege and prove that Tomek acted negligently in relying on SMR's information that Helen Gravel had 20,000 shares in her SMR account or that Tomek negligently calculated the amount of money to be received from those shares.<sup>112</sup>

#### 7. *Schiebe v. Brogan*<sup>113</sup> (1995)

When Emma Ziegenbein died, her valid will, drafted by defendant Thomas F. Brogan was admitted to probate.<sup>114</sup> The devisees of Emma's will included her son, plaintiff Schiebe, and various charities.<sup>115</sup> Rudolph Ziegenbein, the surviving widower, elected to assert his elective share rights against Emma's estate.<sup>116</sup> This resulted in

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105. *Id.* at 406, 527 N.W.2d at 201.

106. *Id.*

107. *Id.*

108. *Id.* at 405-06, 527 N.W.2d at 201.

109. *Id.* at 406-10, 527 N.W.2d at 201-03.

110. *Id.* at 408, 527 N.W.2d at 202. This would trigger the short statute of limitations. NEB. REV. STAT. § 25-222 (Reissue 1989) (two year statute for professional negligence).

111. *Gravel*, 247 Neb. at 409, 527 N.W.2d at 203.

112. *Id.* at 409, 527 N.W.2d at 202-03 (citing *Earth Science Lab., Inc.*, 246 Neb. at 798, 523 N.W.2d at 254; *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1995); *McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim*, 237 Neb. 451, 466 N.W.2d 499 (1991)).

113. No. A-93-600 and No. A-93-601, 1995 WL 382752 (Neb. App. 1995).

114. *Schiebe v. Brogan*, Nos. A-93-600, A-93-601, 1995 WL 382752 at \*3 (Neb. App. 1995).

115. *Schiebe*, 1995 WL 382752 at \*3.

116. *Id.* at \*2.

plaintiff Schiebe and the charities receiving less from Emma's estate than they would have received had Rudolph not elected against the will.<sup>117</sup> Schiebe filed two actions against the attorney who drafted his mother's will and his stepfather — one in his own right as beneficiary under Emma's will, and the second as assignee of any claim Emma's estate might have against the attorney.<sup>118</sup> Schiebe suits against the attorney were pled as malpractice claims based on Brogan's representation of Emma and as attorney for the personal representative.<sup>119</sup> The theories underlying the malpractice claims were negligence as a third-party beneficiary and violation of the Code of Professional Responsibility.<sup>120</sup> The trial court sustained the attorney's demurrers on both suits.<sup>121</sup> On appeal, the Nebraska Court of Appeals affirmed.<sup>122</sup>

One portion of the court's opinion dealt with the duty owed by the attorney to the plaintiff, "directly."<sup>123</sup> The court stated only that:

[i]n this jurisdiction, '[t]he rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them.' In support of that rule, the Supreme Court cited *Lilyhorn v. Dier*. *Lilyhorn* involved a claim by a son who received nothing from his mother's estate, allegedly because the defendant attorney had failed to tell her that she owned only a life estate in land which she attempted to devise to the plaintiff in her will. The plaintiff argued that the defendant knew the provision for him could not be given effect, and as a result, the plaintiff received a lesser share than his mother intended. In affirming a summary judgment for the lawyer in *Lilyhorn*, the [s]upreme [c]ourt cited *St. Mary's Church v. Tomek*, a case in which a beneficiary of a will claimed to have been damaged because an attorney incorrectly drafted the will. In that case, the [s]upreme [c]ourt stated that as a general rule, the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties.

From the above authority, we conclude that a beneficiary that received a lesser benefit from a will as a result of legal services rendered by an attorney to the testator does not have a cause of action against the attorney who drafted the will. Schiebe's attorneys cite extensive authority from other jurisdictions which apparently have recognized different rules than our [s]upreme [c]ourt has seen fit to adopt. We decline

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117. *Id.*

118. *Id.*

119. *Id.* at \*4.

120. *Id.*

121. *Id.*

122. *Id.* at \*9.

123. *Id.* at \*6-7.

to discuss this authority, because we recognize a duty to follow long-established and maintained rules of the [s]upreme [c]ourt, particularly when the rule has been recently reapplied.<sup>124</sup>

## B. SOME INITIAL COMMENTARY ON THE CASE LAW

All of the Nebraska cases discussed above involved attorneys as defendants. In every case, the actions against the attorneys were dismissed either by a sustained demurrer or a grant of a motion for summary judgment. None of the cases went beyond the pleading stage; the plaintiffs never received the opportunity to take their cases to juries. In each of the cases, the court commented on an attorney's duty to "third parties" — persons who were not in an attorney-client relationship with the defendant attorney.

Four of the cases involved a question of an attorney's duty to a third party in the context of estate planning, although the circumstances of the four cases vary.<sup>125</sup> Of the three remaining cases not involving estate planning, only *Ames Bank v. Hahn*<sup>126</sup> is truly significant for the obvious reason that the case plants the seed that achieves full bloom in *St. Mary's Church of Schuyler v. Tomek*<sup>127</sup> and its progeny. The court in *Landrigan v. Nelson*<sup>128</sup> makes a slight change in the "privity" rule established in *Ames Bank* and reiterated in *St. Mary's Church of Schuyler* and *Lilyhorn v. Dier*.<sup>129</sup> The latter three cases had endorsed the following rule: "A lawyer owes a duty to his client to use reasonable care and skill in the discharge of his duties, but ordinarily this does not extend to third parties."<sup>130</sup> In *Landrigan*, the court dropped the adverb "ordinarily" from the rule and added: "absent

124. *Id.* at \*6-7.

125. See *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995) (addressing an attorney's liability for representations made regarding the amount of the inheritance); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983) (addressing a will that failed to devise the intended land to the plaintiffs); *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam) (addressing the question of whether language in the will was a residuary clause); *Schiebe v. Brogan*, Nos. A-93-600, A-93-601, 1995 WL 382725 (Neb. App. 1995) (addressing an attorney who did not inform the client about the spouse's claim of an elective share).

126. 205 Neb. 353, 287 N.W.2d 687 (1980).

127. 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam). The court cited *Ames Bank* in support of its analysis. *St. Mary's Church v. Tomek*, 212 Neb. 728, 325 N.W.2d 164, 165 (1982) (per curiam) (citing *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980)).

128. 227 Neb. 835, 420 N.W.2d 313 (1988) (per curiam).

129. 214 Neb. 728, 335 N.W.2d 554 (1983).

130. *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554, 555 (1983); *St. Mary's Church of Schuyler*, 212 Neb. at 730, 325 N.W.2d at 165 (per curiam); *Ames Bank*, 205 Neb. at 356, 287 N.W.2d at 689.

facts establishing a duty to them."<sup>131</sup> Both *Earth Science Laboratories, Inc. v. Adkins & Wondra, P.C.*<sup>132</sup> and *Gravel v. Schmidt*<sup>133</sup> quoted this newer version of the privity rule.<sup>134</sup> In *Earth Sciences*, the court addressed the issue of assignability of a legal malpractice claim — the privity rule's relevancy is highly dubious and, at best, dictum.

### C. THE ESTATE PLANNING CASES

The fountain head case in this area is *St. Mary's Church of Schuyler v. Tomek*<sup>135</sup> and its one sentence holding and rationale. There is no discussion of the policy issues presented, no recognition that other courts have decided this issue differently, and nothing to suggest *why* the court concluded that the strict privity rule of *Ames Bank v. Hahn*<sup>136</sup> was applicable to the facts of the case.<sup>137</sup> The facts of *St. Mary's Church of Schuyler* create a compelling case for the court to re-examine its commitment to the strict privity rule.<sup>138</sup>

In the other three estate planning cases, the courts simply closed the door to the plaintiffs by invoking the strict privity rule enunciated in *St. Mary's Church of Schuyler*.<sup>139</sup> Abolishing the privity rule does not automatically make lawyers liable, and some of the plaintiffs in these cases might not have been successful *even if* the privity barrier was lifted.<sup>140</sup> In *Schiebe v. Gravel*,<sup>141</sup> the Nebraska Court of Appeals referred to "long-established and maintained rules of the Supreme Court," presumably including the strict privity rule.<sup>142</sup> The strict

131. *Landrigan v. Nelson*, 227 Neb. 835, 836, 420 N.W.2d 313, 314 (1988) (per curiam).

132. 246 Neb. 798, 523 N.W.2d 254 (1994).

133. 247 Neb. 404, 527 N.W.2d 199 (1995).

134. *Gravel v. Schmidt*, 247 Neb. 404, 409, 527 N.W.2d 199, 203 (1995) (citations omitted); *Earth Science Lab., Inc. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 801, 523 N.W.2d 254, 257 (1994) (citations omitted). In *Gravel*, the court cited *Earth Sciences Lab. Inc.*, 246 Neb. at 796, 523 N.W.2d at 254; *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); and *McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim*, 237 Neb. 451, 466 N.W.2d 499 (1991). The citation to the *St. Paul Fire & Marine Ins. Co.* case is ironic, given that the analysis adopted by the court in that case regarded an accountant's liability to "third parties."

135. 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam).

136. 205 Neb. 353, 287 N.W.2d 687 (1980).

137. *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 730, 325 N.W.2d 164, 165 (1982) (per curiam).

138. See *infra* note 307 and accompanying text.

139. *Gravel v. Schmidt*, 247 Neb. 404, 408-10, 527 N.W.2d 199, 202-03 (1995) (citations omitted); *Lilyhorn v. Dier*, 214 Neb. 728, 730, 335 N.W.2d 554, 555 (1983) (citations omitted); *Schiebe v. Brogan*, Nos. A-93-600 and A-93-601, 1995 WL 382752 at \*6 (Neb. App. 1995) (citations omitted).

140. See *infra* notes 289-310, 315 and accompanying text.

141. Nos. A-93-600 and A-93-601, 1995 WL 382752 (Neb. App. 1995).

142. *Schiebe v. Gravel*, Nos. A-93-600 and A-93-601, 1995 WL 382752 at \*6-7 (Neb. App. 1995) (citing *Earth Sciences Lab., Inc. v. Adkins & Wondra, P.C.*, 246 Neb. 798,

privity rule had its birth in Nebraska in 1980.<sup>143</sup> While it is true that this rule has been recently reapplied and that it has been maintained, fifteen years is not exactly "long established." The *Gravel* case is worthy of a closer look because it addresses the basis for an attorney's liability.<sup>144</sup>

#### IV. THE NEW HAMPSHIRE AND MISSOURI APPROACHES COMPARED

Within the past year, the New Hampshire Supreme Court and the Missouri Supreme Court have considered the strict privity rule in the context of alleged attorney malpractice in estate planning.<sup>145</sup> The opinions of these courts stand in stark contrast to the Nebraska approach, both in result and in the manner in which the courts addressed the privity issue.<sup>146</sup> This "clash of opinion" is offered in the hopes that the comparison will lead to "the complete triumph of the better and sounder rule."<sup>147</sup>

##### A. *SIMPSON v. CALIVAS*:<sup>148</sup> AN EXCEPTION TO THE PRIVACY RULE

The New Hampshire case of *Simpson v. Calivas*<sup>149</sup> arose out of a dispute involving the estate of Robert H. Simpson, Sr.<sup>150</sup> Simpson, Sr.'s validly executed will devised his entire estate to his son Robert Simpson Jr., except for a life estate devised to Roberta Simpson, Robert Sr.'s widow and Robert Jr.'s stepmother.<sup>151</sup> The will used the term "homestead" to describe the property devised to Roberta.<sup>152</sup> A dispute arose between Robert Jr. and Roberta as to what property was included within the term "homestead."<sup>153</sup> The probate court construed the term to include all of the real property owned by Robert Sr.<sup>154</sup>

523 N.W.2d 254 (1994); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *St. Mary's Church of Schuyler*, 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam)).

143. See *Ames Bank v. Hahn*, 205 Neb. 353, 356, 287 N.W.2d 687, 689 (1980) (articulating the privity rule).

144. See *infra* notes 216-28 and accompanying text.

145. The opinions also addressed issues beyond the privity rule. See *infra* notes 148-201 and accompanying text.

146. See *infra* notes 148-201 and accompanying text.

147. William D. Sternberg, *Nebraska Against the Weight of Authority*, 17 NEB. L. BULL. 347 (1938). I freely acknowledge my indebtedness to Professor Sternberg's stirring sentence: "The clash of opinion and the mutual criticism of competent men, although resulting temporarily in lack of harmony must tend in the long run to the complete triumph of the better and sounder rule." *Id.*

148. 650 A.2d 318 (N.H. 1994).

149. 650 A.2d 318 (N.H. 1994).

150. *Simpson v. Calivas*, 650 A.2d 318, 320-21 (N.H. 1994).

151. *Simpson*, 650 A.2d at 320.

152. *Id.*

153. *Id.*

154. *Id.*

Rather than appealing this ruling, Robert Jr. negotiated to buy out his stepmother's interest.<sup>155</sup> Robert Jr. then sued Christopher Calivas, the attorney who drafted his father's will in a malpractice action.<sup>156</sup> At trial, Robert Jr. introduced evidence of his father's intent to devise the family business and the bulk of the real estate to Robert Jr.<sup>157</sup> This evidence was admitted, but the trial court sustained objections to Robert Jr.'s three attempts to introduce evidence as to damages.<sup>158</sup> With no evidence of damages, the trial court directed a verdict for Calivas.<sup>159</sup> According to the New Hampshire Supreme Court, the "critical" issue presented on appeal was "whether an attorney who drafts a testator's will owes a duty of reasonable care to intended beneficiaries."<sup>160</sup>

The New Hampshire Supreme Court first acknowledged the general principles that a duty arises out of a relation between the parties and that the scope of such duty is limited to those in "privity of contract."<sup>161</sup> However, the court noted, "[T]he privity rule is not ironclad."<sup>162</sup> The court cited examples of exceptions to the privity rule, recognized by the court, when "the risk to persons not in privity [was] apparent."<sup>163</sup> Because this issue was a matter of first impression, the court sought "guidance" from other jurisdictions.<sup>164</sup> The court stated that the "overwhelming majority of courts . . . have found that a duty runs from an attorney to an intended beneficiary of a will."<sup>165</sup> The court then noted a theme common to the cases it cited — "an emphasis on the foreseeability of injury to the intended beneficiary."<sup>166</sup> The court quoted the California Supreme Court's analysis in *Heyer v. Flaig*,<sup>167</sup> regarding the foreseeability of injury to an intended beneficiary.<sup>168</sup> The court concluded that, "although there is no privity be-

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155. *Id.* Robert Jr. bought Roberta's interest for \$400,000. *Id.*

156. *Simpson*, 650 A.2d at 320.

157. *Id.*

158. *Id.* at 320-21.

159. *Id.* at 321.

160. *Id.*

161. *Id.* (citations omitted).

162. *Id.*

163. *Id.* (citations omitted).

164. *Id.*

165. *Id.* (citing R. MALLEN & J. SMITH, *LEGAL MALPRACTICE* 3d § 26.4 at 595 (1989 & Supp. 1992); *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981); *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983); *Ogle v. Fuiten*, 466 N.E.2d 224 (Ill. 1984); *Hale v. Groce*, 744 P.2d 1289 (Or. 1987)).

166. *Id.* (citing R. MALLEN AND J. SMITH, *LEGAL MALPRACTICE* 3d § 26.4 at 595 (1989 & Supp. 1992); *Stowe*, 441 A.2d at 81; *Needham*, 459 A.2d at 1060; *Ogle*, 466 N.E.2d at 224; *Hale*, 744 P.2d 1289).

167. 449 P.2d 161 (Cal. 1969).

168. *Simpson*, 650 A.2d at 321-22 (quoting *Heyer v. Flaig*, 449 P.2d 161, 164-65 (Cal. 1969)).

tween a drafting attorney and an intended beneficiary, the obvious foreseeability of injury to the beneficiary demands an exception to the privity rule."<sup>169</sup>

B. *DONAHUE v. SHUGHART, THOMSON & KILROY, P.C.*:<sup>170</sup> THE MODIFIED BALANCING TEST

In *Donahue v. Shughart, Thomson & Kilroy, P.C.*,<sup>171</sup> the facts involved a situation a bit out of the ordinary from the usual "disappointed beneficiary" case. The plaintiffs, Mary Donahue and Sandy McClung, claimed that they were the intended donees of a gift causa mortis from one Gerald E. Stockton.<sup>172</sup> The alleged malpractice of the defendant attorney and his law firm led to a lawsuit over whether the gifts causa mortis were legally effective.<sup>173</sup> Donahue and McClung alleged that Gerald E. Stockton, the settlor and trustee of a "living trust," directed his attorney to effectuate certain transfers from the trust to Donahue and McClung.<sup>174</sup> The plaintiffs alleged that these directions were given just before Stockton entered the hospital for surgery.<sup>175</sup> The plaintiffs also alleged that, just prior to his death, Stockton delivered a \$100,000 check to his attorney, with the understanding that the attorney would effectuate a transfer to Mary Donahue.<sup>176</sup> After Stockton's death, litigation continued over the validity of the gifts causa mortis.<sup>177</sup>

The trial court dismissed the malpractice action against Stockton's attorney and his law firm.<sup>178</sup> This judgment was affirmed by the Missouri Court of Appeals, Western District.<sup>179</sup> The Missouri Supreme Court considered the plaintiffs' petition from two perspectives: (1) the cause of action pleading that the plaintiffs were in an attorney-client relationship with the defendants; and (2) the cause of action pleading that, although there was no attorney-client relationship between plaintiffs and defendants, the plaintiffs had standing to bring the action by showing they were the intended beneficiaries of

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169. *Id.* at 322.

170. 900 S.W.2d 624 (Mo. 1995) (en banc).

171. 900 S.W.2d 624 (Mo. 1995) (en banc).

172. *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 625 (Mo. 1995) (en banc).

173. *Id.* (en banc).

174. *Id.* (en banc).

175. *Id.* (en banc).

176. *Id.* (en banc).

177. *Id.* at 624-25 (en banc). As in *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam) and *Simpson v. Calivas*, 650 A.2d 318 (N.H. 1994), there was an apparent settlement of the underlying lawsuit relating to the validity of the gifts causa mortis. *Donahue*, 900 S.W.2d at 625-26 n.1 (en banc).

178. *Donahue*, 900 S.W.2d at 625 (en banc).

179. *Id.* (en banc).

the client's action.<sup>180</sup> The latter cause of action raised the strict privity issue.<sup>181</sup>

The Missouri Supreme Court began its analysis by noting that, although there were recognized prior cases wherein an attorney was "held liable to third parties for the attorney's unprofessional conduct . . . no Missouri case has held that intended beneficiaries of a will have a cause of action against the attorney when the intended beneficiary is damaged as a result of attorney negligence."<sup>182</sup> The court then indicated that, "in comparable circumstances," the privity bar was not applied in a case involving an indemnitor of a surety suing an architect.<sup>183</sup> In that 1967 case, the court applied a "case-by-case balancing of factors test" taken from the landmark California case, *Biakanja v. Irving*.<sup>184</sup>

Next, the court discussed how courts of other states viewed the privity bar and stated, "[T]he vast majority of modern decisions have favored expanding privity beyond the confines of the attorney-client relationship where the plaintiff was intended to be the beneficiary of the lawyer's retention."<sup>185</sup>

The court then explored the theories other courts used to establish liability to those not in strict privity.<sup>186</sup> This discussion included references to *Lucas v. Hamm*<sup>187</sup> that employed a modified "balancing of the factors test" as well as to decisions from other states adopting a third-party beneficiary theory.<sup>188</sup> These approaches, said the court, "do not appear to be irreconcilable."<sup>189</sup> The court then proceeded to modify the first factor of the balancing test to accommodate the third-party beneficiary theory.<sup>190</sup> The Missouri court took note of the two primary arguments for the privity rule: (1) the possibility that liability may extend to an unlimited class of people, and (2) the concern that the possible liability will interfere with an attorney-client rela-

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180. *Id.* at 626-27 (en banc).

181. *Id.* at 627 (en banc).

182. *Id.* (en banc) (citing *Williams v. Bryan, Cave, McPheeters, McRoberts*, 774 S.W.2d 847 (Mo. Ct. App. 1989) (en banc)). Some authorities have classified Missouri as a jurisdiction following the privity rule. See Helen Bishop Jenkins, *Privity — A Texas-Size Barrier to Third Parties for Negligent Will Drafting — An Assessment and Proposal*, 42 BAYLOR L. REV. 687, 697 (1990).

183. *Donahue*, 900 S.W.2d at 627 (en banc) (citing *Westerhold v. Carroll*, 419 S.W.2d 73 (Mo. 1967) (en banc)).

184. *Id.* (en banc) (citing *Westerhold*, 419 S.W.2d at 73; *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958) (en banc)).

185. *Id.* at 627 (en banc) (quoting MALLEN & SMITH, *LEGAL MALPRACTICE* § 7.10 at 379 (3d ed. 1993)).

186. *Id.* at 627-28 (en banc).

187. 364 P.2d 685 (Cal. 1961).

188. *Donahue*, 900 S.W.2d at 627-28 (en banc) (citations omitted).

189. *Id.* at 628 (en banc).

190. *Id.* (en banc).

tionship.<sup>191</sup> In response, the court maintained that the modified balancing of interest test would address both of these legitimate concerns.<sup>192</sup> The court determined:

The question of legal duty of attorneys to non-clients will be determined by weighing the factors in a modified balancing test. The factors are:

(1) the existence of a specific intent by the client that the purpose of the attorney's services were to benefit the plaintiffs.

(2) the foreseeability of harm to the plaintiffs as a result of the attorney's negligence.

(3) the degree of certainty that the plaintiffs will suffer injury from attorney misconduct.

(4) the closeness of the connection between the attorney's conduct and the injury.

(5) the policy of preventing future harm.

(6) the burden on the profession of recognizing liability under the circumstances.<sup>193</sup>

Applying the above test to the facts pled in the plaintiffs' petition, the court concluded that a cause of action was stated for lawyer malpractice.

### C. REPRISE

Both the New Hampshire and Missouri courts faced a case of first impression in deciding whether, and under what circumstances, the intended beneficiaries of a will have a cause of action against an attorney when the intended beneficiary is damaged as a result of the attorney's alleged negligence.<sup>194</sup> Both courts were willing to look at the privity issue, first, in a broad context in situations not involving an attorney-client relationship, and, second, in the context of what other state courts had decided.<sup>195</sup>

The New Hampshire court in *Simpson v. Calivas*<sup>196</sup> spoke in terms of an "exception to the privity" rule, a somewhat cautious approach to the privity issue. The *Simpson* court's emphasis on the obvious foreseeability of injury to the beneficiary does not sound that far removed from the traditional "duty" analysis in tort, pre-eminently exemplified by Judge Cardozo in *Palsgraf v. Long Island R.R. Co.*<sup>197</sup>

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191. *Id.* (en banc).

192. *Id.* (en banc).

193. *Id.* at 629 (en banc).

194. *Donahue v. Shughart, Thomson v. Kilroy, P.C.*, 900 S.W.2d 624, 627 (Mo. 1995) (en banc); *Simpson v. Calivas*, 650 A.2d 318, 321 (N.H. 1994).

195. *Donahue*, 900 S.W.2d at 627 (en banc); *Simpson*, 650 A.2d at 321.

196. 650 A.2d 318 (N.H. 1994).

197. 162 N.E. 99 (N.Y. 1928).

This form of reasoning — reasoning by analogy — is well recognized in our judicial tradition.

The Missouri court in *Donahue v. Shughart, Thomson & Kilroy, P.C.*<sup>198</sup> took a bolder approach with its “modified balancing test.” At the same time, however, the court acknowledged the long-standing concerns and fears over abolishing the strict privity rule.<sup>199</sup> Mindful of the legitimate concerns that have been voiced from the beginning as to a spectre of “unlimited liability,” the court responded with scholarly analysis. Likewise, in *Donahue*, the court responded to the specific concerns of the legal profession as related to the potential “interference” with the attorney-client relationship and the “undue burden” the profession might bear.<sup>200</sup> Again, the Missouri court explained why those legitimate fears would be unfounded even if the “modified balancing test” were in place.<sup>201</sup>

In *St. Mary's Church of Schuyler v. Tomek*,<sup>202</sup> the Nebraska court mustered up but one sentence for its “reasoning,” a sentence that might qualify as a major premise for a syllogism, but was hardly the kind of treatment this troublesome and knotty issue deserves.<sup>203</sup>

## V. PLEADING AROUND THE BAR OF PRIVACY?

As previously noted, the Nebraska Supreme Court's formulation of the privity rule began with the statement that a lawyer's duty is to his client and does not “ordinarily” extend to “third parties.”<sup>204</sup> Under what circumstances might this duty extend to third parties? According to Professor Feinman, the situation involving the disappointed will beneficiary is the most telling example of whether a court is committed to a strict privity rule.<sup>205</sup> Since Nebraska case law has not yet recognized a cause of action in the disappointed will beneficiary case, in this particular area the adverb “ordinarily” appears to be a mirage, disappearing upon closer inspection.

The more recent Nebraska cases articulating the privity rule do not use the “ordinarily” format.<sup>206</sup> Since 1988, the privity rule in Nebraska has been stated as follows: “[A] lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to

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198. 900 S.W.2d 624 (Mo. 1995) (en banc).

199. *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624, 628 (Mo. 1995) (en banc).

200. *Donahue*, 900 S.W.2d at 628 (en banc).

201. *Id.* (en banc).

202. 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam).

203. See *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 730, 325 N.W.2d 164, 165 (1982) (per curiam).

204. See *supra* notes 74, 125-34 and accompanying text.

205. FEINMAN, *supra* note 11, at 301-06.

206. See *supra* notes 125-34 and accompanying text.

them."<sup>207</sup> What facts might be pled to establish that duty? Once again, we may be dealing with a mirage.

A discussion of the facts well pled brings into play, inseparably, the cause of action being pled.<sup>208</sup> Jurisdictions other than Nebraska, grappling with the standard scenario of the "disappointed will beneficiary," have struggled with the underlying legal theory employed as the basis for the defendant attorney's liability. The two main theories are: negligence (liability in tort) and third-party beneficiary (from the law of contract).<sup>209</sup> Owing to the influence of the landmark California decisions, the negligence theory has been more widely accepted. On the other hand, there is an occasional decision in which a court, rejecting the privity defense, relies solely on a third-party beneficiary theory.<sup>210</sup> As might be expected, lawyers pleading the cases for their clients have oftentimes pled *both* theories as separate causes of actions.<sup>211</sup> The results have been mixed: the New Hampshire court in *Simpson v. Calivas*<sup>212</sup> found that both theories of liability were viable, whereas the Missouri court in *Donahue v. Shughart, Thomson & Kilroy, P.C.*<sup>213</sup> rejected the third-party beneficiary theory.<sup>214</sup> Rejection of the contract theory takes us back to the most recent pronouncement of the Nebraska Supreme Court in *Gravel v. Schmidt*.<sup>215</sup>

The *Gravel* case involved a plaintiff who was the beneficiary of an estate and the defendant lawyer who represented the personal representative of the estate.<sup>216</sup> The plaintiff's petition alleged that the defendant "promised" that the plaintiff would receive an inheritance of a certain value from the estate.<sup>217</sup> In actuality, the plaintiff received

207. *Landrigan v. Nelson*, 227 Neb. 835, 836, 420 N.W.2d 313, 314 (1988) (per curiam).

208. See NEB. REV. STAT. § 25-804 (Reissue 1989) which provides in pertinent part:

The petition must contain (1) the name of the court and county in which the action is brought, and the names of the parties, plaintiff and defendant; (2) a *statement of the facts constituting a cause of action*, in ordinary and concise language, and without repetition; and (3) a demand for relief to which the party supposes himself entitled. If recovery of money be demanded, the amount of special damages shall be stated but the amount of general damages shall not be stated; and if interest thereon be claimed, the time from which interest is to be compiled shall also be stated.

NEB. REV. STAT. § 25-804 (Reissue 1989) (emphasis added).

209. See *Jenkins*, 42 BAYLOR L. REV. at 691-94 (discussing these theories).

210. *Id.* at 691-93.

211. See, e.g., *Ogle v. Fuiten*, 466 N.E.2d 224 (Ill. 1984) (alleging contract and tort theories); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995) (en banc) (alleging tort and contract theories); *Simpson v. Calivas*, 650 A.2d 318 (N.H. 1994) (alleging contract and tort theory).

212. 650 A.2d 318 (N.H. 1994).

213. 900 S.W.2d 624 (Mo. 1995) (en banc).

214. *Simpson*, 650 A.2d at 322-23; *Donahue*, 900 S.W.2d at 629 (en banc).

215. 247 Neb. 404, 527 N.W.2d 199 (1995).

216. *Gravel v. Schmidt*, 247 Neb. 404, 405-06, 527 N.W.2d 199, 201 (1995).

217. *Gravel*, 247 Neb. at 405, 527 N.W.2d at 201.

from the estate far less than he was allegedly promised.<sup>218</sup> Relying on this alleged promise, the plaintiff entered into a land contract and subsequently defaulted.<sup>219</sup> As a result of the broken promise, the plaintiff alleged that he suffered damages.<sup>220</sup> The Nebraska Supreme Court noted that the plaintiff sued "for breach of contract," but the supreme court went out of its way to point out:

Even though Gravel frames his cause of action as a breach of contract case, it arises out of Tomek's conduct as an attorney and, therefore, cannot be labeled as anything other than a professional negligence action.

While it is true that an attorney client relationship rests in contract . . . , an attorney's alleged professional misconduct does not give rise to a breach of contract action, but, rather, gives rise to a professional negligence action.<sup>221</sup>

It would appear, therefore, that the road to liability in Nebraska, if there is one, is the tort/negligence route. Does privity still bar the path or is there a method by which an adroit pleader can produce "facts which establish a duty"? Continuing with the court's discussion in *Gravel*, after the court enunciated the modified privity rule with its "absent some facts which establish the duty" statement, the court stated:

Arguably, Schmidt as personal representative is Tomek's client, not Gravel. However, even assuming, without deciding, that Tomek owed a duty as an attorney to Gravel, Gravel has failed to allege and prove that Tomek acted negligently in relying on SMR's information that Helen Gravel had 20,000 shares in her SMR account or that Tomek negligently calculated the amount of money to be received from those shares. . . . Gravel alleges in his fourth amended petition that Tomek assured him he would receive a certain amount of money and that Gravel did not receive that amount, but he does not allege any negligence on Tomek's part proximately caused the diminution of the amount Gravel was to inherit.<sup>222</sup>

Presumably Gravel did not plead specific acts of negligence because the pled legal theory was contract, not negligence.<sup>223</sup> The summary

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218. *Id.* at 406, 527 N.W.2d at 201.

219. *Id.*

220. *Id.*

221. *Id.* at 408, 527 N.W.2d at 202 (citations omitted).

222. *Id.* at 409, 527 N.W.2d at 203 (citations omitted).

223. The reference to "legal theory," not "cause of action," was deliberate. Under Nebraska law, it appears, "cause of action" is the "set of facts on which a recovery may be had." *Lewis v. Craig*, 236 Neb. 602, 605, 463 N.W.2d 318, 320 (1990) (citations omitted). Whether or not Gravel framed his cause of action as a breach of contract case depends upon the facts he pled. In *Lewis*, the court went on to say that "[t]wo or more

judgment motion was reviewed in the context of a negligence theory, a theory that the plaintiff did not plead.<sup>224</sup>

If a contract-based theory is doomed from the beginning, where does that leave the plaintiff, the "disappointed will beneficiary?" *Gravel* indicates that the attorney's liability can only be considered and will only be considered as "a professional negligence action."<sup>225</sup> And, as to legal malpractice, the elements are well settled: the plaintiff must allege and prove (1) a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting damage.<sup>226</sup>

When, if ever, can the Nebraska plaintiff, who is the "disappointed will beneficiary," allege facts that establish a duty to the plaintiff? Given the strict privity rule in Nebraska, the fact that the will beneficiary is a "nonclient" ends the matter. Unless the Nebraska court is willing to reconsider its position, there are no facts which can be pleaded to "establish the duty."

In *Donahue*, the plaintiffs argued that by pleading that they were the intended beneficiaries of the client's action, they "established" the duty.<sup>227</sup> But, of course, this duty is not "established" by the plaintiff's pleading. It is the court's recognition of the alleged duty owed that is the critical step under standard tort analysis. How far that duty might extend and under what circumstances it exists is another difficult matter for the courts to decide.<sup>228</sup> Unless the Nebraska courts reconsider this matter, the disappointed will beneficiary's petition is doomed to failure, for there is no chance, under existing law, of even pleading "facts establishing a duty."

## VI. ACCOUNTANTS' AND OTHER PROFESSIONALS' LIABILITY COMPARED

### A. ACCOUNTANTS AND ATTORNEYS

As noted previously, Professor Feinman's review of the privity doctrine includes the statement that the landmark case of *Ultramares*

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claims in a petition arising out of the same operative facts and involving the same parties constitute separate legal theories, either of liability or damages, and not separate causes of action." *Lewis*, 236 Neb. at 605, 463 N.W.2d at 318 (citations omitted). So, under Nebraska law, the disappointed will beneficiary has only one cause of action, and, according to *Gravel*, one theory of liability — namely, negligence.

224. *Gravel*, 247 Neb. at 405-10, 527 N.W.2d at 201-03.

225. *Id.* at 408, 527 N.W.2d at 202.

226. *Earth Science Lab., Inc. v. Wondra & Atkins, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994).

227. *Donahue*, 900 S.W.2d at 627 (en banc).

228. In *Donahue*, the court established a balancing test to address this second step. See *Donahue*, 900 S.W.2d at 627-29 (en banc) (holding that an attorney's legal duty will be determined by the balancing test).

*Corp. v. Touche*<sup>229</sup> “still remains a defining case on the subject.”<sup>230</sup> The *Ultramares* case involved the question of accountant liability to “third parties,” and its effect, according to Feinman, was to leave the privity doctrine “substantially intact.”<sup>231</sup>

As might be suspected, there has been, since the 1931 *Ultramares* decision, a great deal of case law and commentary on the topic of accountants’ liability to third parties.<sup>232</sup> These national developments will not be reviewed, although in passing one might note that courts and commentators have differing views as to whether the standards should be the same for attorneys and accountants with regard to a duty to “third parties.”<sup>233</sup> Be that as it may, what is the position of the Nebraska Supreme Court with regard to accountant liability to third parties? Cases decided by the Nebraska Supreme Court in 1989 and 1993 explore this issue, and it is to these cases we now turn.

The 1989 case, *Citizens National Bank of Wisner v. Kennedy and Coe*,<sup>234</sup> involved a standard factual scenario. The plaintiffs — three banks — had loaned money to one of their clients, relying, they alleged, upon a financial compilation prepared by the defendant accountants.<sup>235</sup> Upon default of the loan, the banks sued the accountants, alleging fraudulent misrepresentation and negligence.<sup>236</sup> The trial court ruled against the plaintiffs, although the trial court found “that where an accountant knows a third party is relying on statements prepared by him, an accountant has a duty of care to that third party.”<sup>237</sup> On appeal, the Nebraska Supreme Court

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229. 174 N.E. 441 (N.Y. 1931).

230. FEINMAN, *supra* note 11, at 35 (1995).

231. *Id.* at 34-37.

232. *See id.* at 211-74 (discussing an accountant’s liability). *See generally* Feinman, *supra* note 11.

233. Compare *Crossland Sav. FSB v. Rockwood Ins. Co.*, 700 F. Supp. 1274 (S.D.N.Y. 1988) (stating that an attorney should be subject to different standards) with *Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.*, 715 S.W.2d 408 (Tex. Ct. App. 1986) (stating that professionals should be subject to the same standards).

234. 232 Neb. 477, 441 N.W.2d 180 (1989).

235. *Citizens Nat’l Bank of Wisner v. Kennedy and Coe*, 232 Neb. 477, 478, 441 N.W.2d 180, 181 (1989).

236. *Citizens Nat’l Bank of Wisner*, 232 Neb. at 478, 441 N.W.2d at 181.

237. *Id.* The supreme court found that this definition of duty was an interpretation of RESTATEMENT (SECOND) OF TORTS § 551 (1977). *Citizens Nat’l Bank of Wisner*, 232 Neb. at 479-78, 441 N.W.2d at 182. If the trial court was indeed laying down a rule regarding privity, it is surprising that the trial court would utilize Section 551. That section appears to be directly applicable to the plaintiffs’ first pleaded theory — fraudulent misrepresentation. According to the plaintiffs, the fraudulent misrepresentation issue concerned whether the defendants had fraudulently misrepresented the condition of the borrower to the plaintiffs. Brief for Appellant at 1, *Citizens Nat’l Bank of Wisner v. Kennedy and Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989) (No. 87-856); Reply Brief for Appellant at 4, *Citizens Nat’l Bank of Wisner v. Kennedy and Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989) (No. 87-856). “The Defendants-Appellees actually, physically, and personally made representations to the Appellant banks.” *Id.* at 4. Thus, the fraudu-

reversed the trial court's ruling with regard to the fraudulent misrepresentation theory.<sup>238</sup> Because the case was being remanded, the supreme court also discussed the negligence issue, noting that "this court has not decided the extent of an accountant's duty of care to third parties."<sup>239</sup>

The supreme court first rejected the trial court's "interpretation" that the governing rule was that enunciated in Section 551 of the Restatement (Second) of Torts.<sup>240</sup> The court continued as follows:

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lent misrepresentation theory fits squarely within Section 551 regarding one party's duty to another in a business transaction. Privity is not at issue with regard to this theory of liability. Section 551 provides in pertinent part:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
  - (a) Matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
  - (b) Matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
  - (c) Subsequent acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
  - (d) The falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
  - (e) Facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of the facts.

RESTATEMENT (SECOND) OF TORTS § 551 (1977).

238. *Citizens Nat'l Bank of Wisner*, 232 Neb. at 478-79, 441 N.W.2d at 181-82.

239. *Id.* at 479, 441 N.W.2d at 182.

240. *Id.* at 479-80, 441 N.W.2d at 182. The title of Section 551 is "Liability for Non-disclosure." It is under the general heading "Misrepresentation" and the subheading "Concealment and Nondisclosure." Section 551 is the last one in a discussion of the tort of fraudulent misrepresentation (deceit). This section is appropriately applied in the discussion of the first theory — fraudulent misrepresentation — but not with regard to the negligence count and the privity issue. Because it was an inappropriate section to rely upon, the supreme court understandably declined to adopt it.

With regard to the negligence count and the privity issue, it is RESTATEMENT OF TORTS (SECOND) § 552 (1977) — "Information Negligently Supplied for the Guidance of Others" — that is the relevant section. This was recognized in the brief of the Appellees, which cited (1) the *Ultramares* standard, and (2) Section 552 and the "reasonably foreseeable standard." Brief for Appellee at 42-45, *Citizens Nat'l Bank of Wisner*, (No. 87-856). After citing these three standards, the Appellee then called to the court's attention the privity rule existing in attorney negligence cases and urged the court to apply that standard. *Id.* at 44-47. As indicated in the text, that is what the court opted to do, without discussion of the other three tests. Section 552 provides in pertinent part:

- (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for guidance of others in their business transactions, is subject to liability

[We] decline to adopt the trial court's rule. Rather, [the] court's ruling regarding an attorney's duty of care to third parties is extended to accountants.

The rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them.

We now hold that an accountant's duty of reasonable care is to his client and generally does not extend to third parties absent fraud or other facts establishing a duty to them. . . .<sup>241</sup>

Four years later, the Nebraska Supreme Court revisited the topic of accountant liability in *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*<sup>242</sup> The plaintiff, St. Paul, was a surety for Commonwealth

for pecuniary loss caused to them by justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) Through reliance upon it in a transaction that he intends the information to influence or knows the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whom the duty is created, in any of the transactions in which it is intended to protect them.

RESTATEMENT SECOND OF TORTS § 552 (1977).

This ruling, according to Feinman, puts Nebraska in the unique status of adhering to the privity bar in its "pure form" in an accountant liability case. FEINMAN, *supra* note 11, at 67. Professor Feinman has an entire chapter devoted to accountant liability to third parties. *Id.* at 211-74. Feinman's research reveals that the "majority of jurisdictions" employ Section 552 as the "appropriate standard to measure the liability of accountants to third parties." *Id.* at 233. For further discussion of the accountant liability issue see Susan Martin, *If Privity is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentation*, 28 AM. BUS. L.J. 649, 660-63 (1991).

241. *Citizens Nat'l Bank of Wisner*, 232 Neb. at 480, 441 N.W.2d at 182 (citing *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988) (per curiam); *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983); *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980)). The court's analysis is similar to the analysis in *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam). The court states the rule adopted by prior cases, then, without further discussion, states that the rule applies. *Citizens Nat'l Bank of Wisner*, 232 Neb. at 480, 441 N.W.2d at 182. In *Citizens Nat'l Bank of Wisner*, the court goes on to cite *First Florida Bank, N.A. v. Max Mitchell & Co., P.A.*, 541 So. 2d 155 (Fla. Dist. Ct. App. 1989) and *Howard v. Dun & Bradstreet, Inc.*, 220 S.E.2d 702 (Ga. Ct. App. 1975), which adopt a strict privity rule. *Citizens Nat'l Bank of Wisner*, 232 Neb. at 480, 441 N.W.2d at 182 (citing *First Florida Bank, N.A.*, 541 So. 2d at 155; *Howard*, 220 S.E.2d at 702).

242. 244 Neb. 408, 507 N.W.2d 275 (1993). This was the second appearance of the case in supreme court. The plaintiff's original petition, filed in 1987, resulted in an appeal to the supreme court after the trial court had sustained the defendant's demurrer. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 790, 452 N.W.2d 746, 748 (1990). The supreme court held that the petition failed to state a cause

Company, Inc., issuing surety bonds over a period of years during the early 1980's.<sup>243</sup> The defendant was Commonwealth's accountant and had performed audits and prepared financial statements for Commonwealth.<sup>244</sup> According to the plaintiff, these audits and financial statements were relied upon by the plaintiff in deciding to issue the surety bonds.<sup>245</sup> The plaintiff's "operative petition" alleged that the plaintiff suffered damages as a result of the defendant's "negligent" examination and that the various documents prepared by the defendant constituted "negligent misrepresentation."<sup>246</sup> In its petition, the plaintiff pleaded specific acts of negligence.<sup>247</sup> The plaintiff also alleged a "usual standard and customary practice" whereby the surety is furnished opinions and certificates by its clients and further alleged that, in the particular situation at bar, the defendant had a direct involvement with the plaintiff.<sup>248</sup> The trial court sustained the defendant's demurrer on the ground that no cause of action was stated and that, if any cause of action was stated, it was time-barred.<sup>249</sup> Upon the plaintiff's refusal to amend its petition, the trial court dismissed the lawsuit and an appeal was taken.<sup>250</sup>

The first assigned error on appeal was whether the "operative petition failed to plead facts imposing upon Touche a duty to exercise due care toward St. Paul."<sup>251</sup> In discussing this issue under the heading of "Negligence Aspect of Cause," the Nebraska Supreme Court stated the issue in a slightly different form, noting that the first assigned error was whether "the district court incorrectly determined that as Touche was not in privity with St. Paul, the latter was under no duty to act with due care toward the former."<sup>252</sup>

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of action, but that it should have been granted leave to amend its pleading. *St. Paul Fire & Marine Ins. Co.*, 234 Neb. at 792-93, 452 N.W.2d at 749. A subsequent petition, filed in August of 1990, became the subject of the second appeal. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 411, 507 N.W.2d 275, 278 (1993).

243. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 411, 507 N.W.2d at 278.

244. *Id.* at 411-12, 507 N.W.2d at 278.

245. *Id.* at 412, 507 N.W.2d at 278-79.

246. *Id.* at 411-12, 507 N.W.2d at 278.

247. *Id.* at 412, 507 N.W.2d at 278-79. Specifically, the failure of the defendant to follow generally accepted accounting principles and an allegation that the documents prepared by the defendant "overrecognized the margins from contracts in progress and grossly overstated the net worth position and the net quick position of Commonwealth and its subsidiaries." *Id.* at 412, 507 N.W.2d at 279.

248. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 412, 507 N.W.2d at 279. The allegation was that the defendant met with and communicated directly with the plaintiff and that the defendant delivered its audit opinions directly to the plaintiff. *Id.*

249. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 409, 507 N.W.2d at 277.

250. *Id.*

251. *Id.* at 409, 507 N.W.2d at 277.

252. *Id.* at 413, 507 N.W.2d at 279.

The supreme court began its analysis under the subheading "Duty" and first reviewed the issue from a historical and then a national perspective.<sup>253</sup> The discussion of history naturally centered upon the *Ultramares* decision and its refusal "to relax the requirement of privity, even in the face of evidence that the accounting firm knew its client's balance sheet would be shown to banks, creditors, and stockholders."<sup>254</sup> According to the court, in the aftermath of *Ultramares*, the state courts across the country took different approaches.<sup>255</sup> Judge D. Nick Caporale then identified four views: (1) a strict privity rule;<sup>256</sup> (2) liability in the absence of privity in accordance with the test set forth under Section 552 of the Restatement (Second) Torts;<sup>257</sup> (3) liability for "negligence to those who might reasonably have been foreseen as relying upon the accountant's work product";<sup>258</sup> and (4) the "balancing of factors" test enunciated in *Biakanja v. Irving*.<sup>259</sup>

The court then turned to Nebraska law and its holding in *Citizens National Bank of Wisner*.<sup>260</sup> According to Judge Caporale, *Citizens National Bank* established that "even in the absence of fraud, there exist circumstances under which an accountant who negligently performs a service for the accountant's client may become liable to a third party."<sup>261</sup>

The court continued its discussion, stating:

What the limits of those circumstances may prove to be will necessarily be established on a case-by-case basis. It is sufficient to note that the allegations at hand state a negligence cause of action in favor of St. Paul against Touche under the theories that Touche negligently performed its services and made negligent misrepresentations. Particularly significant are the allegations that despite its representation to the contrary, Touche did not perform in accordance with generally

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253. *Id.* at 413-16, 507 N.W.2d at 279-81 (citations omitted).

254. *Id.* at 413, 507 N.W.2d at 279 (citing *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931)).

255. *Id.* at 414-15, 507 N.W.2d at 279-80 (citations omitted).

256. *Id.* at 414, 507 N.W.2d at 279 (citations omitted). Absent fraud, "the lack of privity between a third party and an accountant precludes the imposition of liability on the accountant." *Id.* (citations omitted).

257. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 414, 507 N.W.2d at 280 (citations omitted).

258. *Id.* at 414, 507 N.W.2d at 280 (citations omitted).

259. 320 P.2d 16 (Cal. 1958). *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 414-15, 507 N.W.2d at 280 (citing *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958)). See *supra* notes 33-36 and accompanying text.

260. 232 Neb. 477, 441 N.W.2d 180 (1989). *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 415, 507 N.W.2d at 280 (citing *Citizens Nat'l Bank of Wisner*, 232 Neb. at 477, 441 N.W.2d at 180).

261. *Id.*

accepted accounting standards, that Touche met and communicated directly with St. Paul and made Touche's products available to the former for its use in dealing with Commonwealth, and that Touche intended that St. Paul rely on the documents Touche prepared for Commonwealth.

As held by the Florida Supreme Court in *First Florida Bank v. Max Mitchell & Co.*, when an accountant fails to exercise reasonable and ordinary care in preparing financial statements for its client and personally delivers and presents those statements to a third party to induce the third party to loan or invest in the client, the accountant is liable to [the] third party in negligence. That is to say, a duty arises by virtue of the contract implied from the contract of the parties.<sup>262</sup>

The Nebraska court did not specifically align itself with any of the four approaches previously outlined.<sup>263</sup> Note in particular that the court rejected the invitation to adopt the standard set forth in Section 552, which defines the tort of negligent representation.<sup>264</sup> In 1991, the Nebraska Supreme Court recognized the tort of negligent misrepresentation in a case where no "third party" was involved.<sup>265</sup> Even though the court in *St. Paul Fire & Marine Ins. Co.* was discussing the issue of "negligence" and the question of "duty," the court's reference to Section 552 in the context of that discussion is confusing. Section 552 is the "negligent representation" theory; the case was pleaded on a

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262. *Id.* at 415-16, 507 N.W.2d at 280-81 (citing *First Florida Bank, N.A.*, 558 So. 2d at 9; *McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim*, 237 Neb. 451, 466 N.W.2d 499 (1991)).

263. *Id.* at 415-16, 507 N.W.2d at 280-81 (citations omitted).

264. *Id.* at 414-16, 507 N.W.2d at 279-81 (citations omitted).

265. See *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991). *Flamme* involved the liability of an insurance agent for allegedly negligent statements regarding a policyholder's undersinsured motorist coverage. *Flamme*, 239 Neb. at 466, 476 N.W.2d at 804. The court stated that it is "well established that an insurance agent or broker may be held liable for a negligent representation to an insured." *Id.* at 471, 476 N.W.2d at 807 (citations omitted).

Judge Shanahan's concurring opinion pointed out the far-reaching impact of the court's ruling: A cause of negligent misrepresentation was being explicitly recognized by the court for the first time. *Id.* at 474-75, 476 N.W.2d at 808 (Shanahan, J., concurring). Moreover, indicated Judge Shanahan, this cause of action might make an accountant liable "for careless financial misrepresentation relied upon by actually foreseen and limited classes of people." *Id.* at 477, 476 N.W.2d at 410 (Shanahan, J., concurring) (quoting *Ryan v. Kanne*, 170 N.W.2d 395 (Ia. 1969)). Furthermore, the court stated that, in *Ryan*, the same rule may be applied to other professionals, including attorneys. *Id.* (Shanahan, J., concurring) (citing *Ryan*, 170 N.W.2d at 395. Finally, Judge Shanahan also cited Section 552 of the Restatement (Second) Torts. *Id.* (Shanahan, J., concurring) (citations omitted).

Since *Flamme* did not involve the "third party" question, the sticky issue relating to lack of privity did not need to be addressed. However, Judge Shanahan was prophetic in pointing out that the theory of negligent misrepresentation, in many circumstances, is likely to raise the traditional "privity" issue. *Id.* at 475-78, 476 N.W.2d at 808-10 (Shanahan, J., concurring).

theory of "negligent misrepresentation."<sup>266</sup> The court's division of the plaintiff's theories into the categories of "negligence" and "fraud" conveniently skips over the negligent misrepresentation theory. Had the court examined the negligent misrepresentation issue, the court would have had to face its prior ruling recognizing that the tort of negligent misrepresentation existed. Next the court would have had to confront Section 552 and decide whether to accept the test this rule sets forth and its end-run around strict privity.<sup>267</sup> As indicated, there is bit more going on here than meets the eye when the court cites Section 552 and then conveniently dismisses it.

What test did the *St. Paul Fire & Marine Ins. Co.* court enunciate? The "case-by-case" remark suggests that the court is unwilling to commit itself to a well-defined rule; a duty will arise when the court says so. But the last quoted sentence is revealing: "[A] duty arises by virtue of a contract implied from the conduct of the parties."<sup>268</sup> If this analysis applies to situations involving attorneys' alleged liability to nonclients,<sup>269</sup> to what extent, if any, has the Nebraska court changed the law first enunciated in *St. Mary's Church of Schuyler v. Tomek*<sup>270</sup> and most recently articulated in the *Gravel v. Schmidt*<sup>271</sup> case? The answer is unclear.

If the duty to the third party arises "by virtue of contract implied from the conduct of the parties," is the "contract" referred to between (1) the defendant accountant/attorney and the third party, or (2) the defendant accountant/attorney and the accountant/attorney's client, with the third party having the status of a third-party beneficiary under contract law? If the former, then the privity requirement is satisfied and the status of the plaintiff as a "third party" or a "nonclient" is not factually correct. If the latter interpretation is the correct one, the duty to the third party arises out of a well-recognized doctrine: third-party beneficiary under contract law.<sup>272</sup> The theory then shifts

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266. See RESTATEMENT (SECOND) OF TORTS § 552 (1977). See *supra* note 238 and accompanying text. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 412, 507 N.W.2d at 278.

267. See RESTATEMENT (SECOND) OF TORTS § 552 (1977) (establishing liability for loss suffered by a limited group when a person supplies information to one party who then passes the information on to the third party, and the third party suffers injury because of justified reliance on the information).

268. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 415, 507 N.W.2d at 280.

269. There is a big "if" involved here: the standards governing attorney liability and accountant liability should be the same. This is debatable proposition, one worthy of discussion by the court. See *Citizens Nat'l Bank of Wisner*, 232 Neb. at 480, 441 N.W.2d at 182 (citations omitted) (extending the rule regarding an attorney's duty to nonclients to accountants).

270. 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam).

271. 247 Neb. 404, 527 N.W.2d 199 (1995).

272. Some courts recognize this theory as the governing one in attorney malpractice cases. See *supra* notes 206-15 and accompanying text.

from tort to contract. But the court in *Gravel* suggests that attorney liability can only be viewed from the standpoint of tort law — professional negligence.<sup>273</sup> Thus the dilemma: the plaintiff has to plead facts that give rise to a duty, facts that must show an implied contract, but the predicate of the defendant's liability is negligence, not breach of contract.

The latest attorney liability case, *Gravel*, decided two years after *St. Paul Fire & Marine Ins. Co.*, cited *St. Paul Fire & Marine Ins. Co.* only in passing; the court in *Gravel* did not refer to a duty arising out of a contract.<sup>274</sup> What effect *St. Paul Fire & Marine Ins. Co.* might have on the existing body of law pertaining to attorney's liability to third parties is unclear.

#### B. OTHER PROFESSIONALS

A case decided by the Nebraska Court of Appeals three months prior to the *St. Paul* case and another case decided by the Nebraska Supreme Court some six months after *St. Paul* discussed the "privity" rule in the context of professional negligence. In *John Day Company v. Alvine & Associates, Inc.*,<sup>275</sup> the plaintiff, John Day, contracted with an architectural firm for the design and construction of a building. That firm in turn subcontracted with defendant Alvine & Associates to provide mechanical engineering design services. Alvine prepared the specifications for the design and construction of the building's heating, ventilating, and air-conditioning system. A year after the building's completion, the plaintiff had to replace the carbon steel piping system. The plaintiff sued Alvine in both contract and tort, alleging its status as a third party beneficiary of the contract between the prime contractor and the defendant. The trial court sustained the defendant's demurrer, and the court of appeals affirmed.

In the course of its decision, the Nebraska Court of Appeals, under the heading "No Liability Without Privity," discussed prior Nebraska case law:

The Nebraska Supreme Court has held that barring proof of fraud or other extraordinary facts, lawyers and accountants are liable only to their clients, with whom they are in privity of contract, and not to third parties. See, *Citizens Nat. Bank of Wisner v. Kennedy & Coe.*, 232 Neb. 477, 441 N.W.2d 180 (1989); *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1993); *Ames Bank v. Hahn*, 205 Neb. 353, 287

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273. *Gravel v. Schmidt*, 247 Neb. 404, 408, 527 N.W.2d 199, 202 (1995) (citations omitted). See *supra* notes 216-24 and accompanying text.

274. *Gravel*, 247 Neb. at 408-09, 527 N.W.2d at 202-03 (citations omitted).

275. 1 Neb. App. 954, 410 N.W.2d 462 (1993).

N.W.2d 687 (1980). The Supreme Court has applied this rule of law to cases involving architects. See *Overland Constructors v. Millard School Dist.*, 220 Neb. 220, 369 N.W.2d 69 (1985).<sup>276</sup>

The court then decided that architects are "professionals" and that the "Nebraska Supreme Court precedent has evolved in a direction that [professionals] are not liable to third parties with whom they are not in privity of contract."<sup>277</sup>

A Nebraska Supreme Court case decided after *St. Paul, Lawyers Title Insurance Corporation v. Hoffman*,<sup>278</sup> discussed the potential liability of a surveyor to a third party. The factual setting for the *Hoffman* case was quite complicated, involving a "fourth-party action" against a defendant surveyor. The gist of the cause of action against the surveyor was based upon the allegation that the defendant surveyor in 1980 had "incorrectly placed pins on the boundary of the property."<sup>279</sup> The lower court had sustained the defendant surveyor's demurrer. The Nebraska Supreme Court reversed, finding that the fourth-party plaintiff ought to have been allowed the opportunity to amend its petition and remanded the case for that purpose.

Regarding the issue of the establishment of a duty owed the plaintiff, the Nebraska Supreme Court noted:

We have not previously dealt with the duty of a surveyor to third parties not in privity with the surveyor or the party for whom the survey was performed. In other situations, we have held that the duty of reasonable care generally does not extend to third parties absent fraud or other facts establishing such a duty. See, *Citizens Nat. Bank of Wisner v. Kennedy & Coe*, 232 Neb. 477, 441 N.W.2d 180 (1989) (accountant's duty of reasonable care did not extend to third parties absent fraud); *Landrigan v. Nelson*, 227 Neb. 835, 420 N.W.2d 313 (1988) (lawyer's duty to clients did not extend to third parties absent facts establishing a duty to them).<sup>280</sup>

The court then reviewed the fourth-party plaintiff's petition and noted that because the fourth party plaintiff did not plead the existence of a contractual relation with the defendant, "no privity of contract" existed between the parties. The court said that the absence of such pleading "would not support a cause of action for negligent performance of a contract." The court also noted that the petition did not allege fraud, nor did the petition allege that "damages were reasonably

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276. *Id.* at 960, 510 N.W.2d at 466.

277. *Id.* at 961, 510 N.W.2d at 467.

278. 245 Neb. 507, 513 N.W.2d 521 (1994).

279. *Id.* at 510, 513 N.W.2d at 523.

280. *Id.* at 514, 513 N.W.2d at 525.

foreseeable." The supreme court considered the fourth-party plaintiff's allegations as to subsequent harm as a mere conclusion, unsupported by any facts. As noted above, however, the fourth-party plaintiff's action was incorrectly dismissed by the trial court. The fourth-party plaintiff's petition should have been dismissed with leave to amend.

What light, if any, do these cases shed upon the status of the "privity" rule in Nebraska? The *John Day* case simply borrows the established rule regarding the duty of accountants/lawyers to third parties and applies it to a mechanical engineering firm. This is not surprising, given what the Nebraska Court of Appeals interpreted as the clear precedent of the Nebraska Supreme Court.<sup>281</sup> The *Hoffman* case is a bit more intriguing. It arose after the *St. Paul* case, yet never cited *St. Paul*.<sup>282</sup> In *Hoffman*, the Nebraska Supreme Court seems to point in the direction of a "reasonably foreseeable" test, somewhat similar to the *St. Paul* case. On the other hand, the court continued to speak in terms of the petition alleging facts establishing a duty "either in contract or in tort." In the tort context a duty arises because a court recognizes that a duty is owed; the facts either give rise to a duty or they do not.

## VII. THE FUTURE OF THE PRIVITY RULE IN NEBRASKA

In order to speculate where the Nebraska court is or should be going in the area of the privity rule, one must first consider where the court has been and where it is currently is. The previous discussion in this Article has focused on that task — examining carefully the Nebraska decisions and, along the way, comparing the approach of those decisions with other approaches. What impact the most recent cases, *Gravel v. Schmidt*<sup>283</sup> and *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*,<sup>284</sup> are likely to have is difficult to predict.

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281. One of the court's pronouncements should not be taken at face value; namely, the statement that the privity rule has been extended to architects. The *John Day* court cited *Overland Constructors v. Millard School Dist.* for this proposition. See note 276 *supra*. That case does not involve privity or the statute of limitations. It is a straight two-party liability case in which the court discussed the necessity of expert testimony. *Overland Constructors* did discuss the definition of a "profession"; it also recognized architects as professionals. However, the *Overland Constructors* case has nothing to do with privity.

282. Oddly enough, the court did cite the first *St. Paul* case, *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990), regarding the rule pertaining to amendment after a demurrer is sustained. *Hoffman*, 245 Neb. at 515, 513 N.W.2d at 526.

283. 247 Neb. 404, 527 N.W.2d 199 (1995).

284. 244 Neb. 408, 507 N.W.2d 275 (1993).

The *St. Paul Fire & Marine Ins. Co.* case may signal a slight departure from a strict privity approach. Precisely what doctrine and what legal test should apply is not susceptible to an easy answer. There are too many policies involved and too many factual variants that enter into such a consideration. If and when the Nebraska Supreme Court re-examines the issue of attorney liability to third parties, hopefully, the court will engage in a thorough analysis of the relevant policies, as the Missouri court did in *Donahue v. Shughart, Tomson & Kilroy, P.C.*<sup>285</sup> In that event, the author offers some thoughts as to how the privity rule might be re-crafted to deal with the complexities of the modern business world.

First, in the area of attorney liability to the disappointed will beneficiary, the prototypical "privity" case, the Nebraska court should *not* follow the approach adopted by Florida and Maryland.<sup>286</sup> According to the case law of these states, to maintain a malpractice action against the drafter of the will, the beneficiary must show that the testator's intent is expressed on the face of the will.<sup>287</sup> To adopt this approach is to relax the privity requirement only very slightly and to render an attorney immune in many of the will drafting cases.<sup>288</sup>

Various commentators and authorities who have examined the topic of professional liability and duty to third parties have struggled to come up with a workable test.<sup>289</sup> In examining the existing state of the law nationally, these commentators noted that the decline of the strict privity rule has forced courts to create a body of law that has identifiable boundaries and rules that are capable of being applied on a consistent basis.<sup>290</sup> One recent commentator, in a survey of decisions nationwide, concluded that four theories have replaced the strict

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285. 900 S.W.2d 624 (Mo. 1995) (en banc). See *supra* notes 170-93 and accompanying text.

286. See Martin D. Begleiter, *Attorney Malpractice in Estate Planning — You've Got to Know When to Hold Up, Know When to Fold Up*, 38 KAN. L. REV. 193, 198-204 (1990) (citations omitted) (describing the approach of Florida and Maryland).

287. Begleiter, 38 KANS. L. REV. at 198-204. Feinman refers to this approach as the "four corners" approach. FEINMAN, *supra* note 11, at 303.

288. However, if this test had been followed in Nebraska, the result in *St. Mary's Church of Schuyler* would likely have been different. In *St. Mary's Church of Schuyler*, the plaintiffs were expressly named as beneficiaries in the residue clause. *St. Mary's Church of Schuyler*, 212 Neb. at 729, 325 N.W.2d at 165 (per curiam).

289. See *infra* notes 290-310 and accompanying text.

290. See, e.g., Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties — At What Cost?* 23 COLUM. J.L. & SOC. PROBS. 1 (1989) (exploring the theories that courts have used to hold attorneys liable); Helen Bishop Jenkins, *Privity — A Texas-Size Barrier to Third Parties for Negligent Will Drafting — An Assessment and Proposal*, 42 BAYLOR L. REV. 687 (1990) (describing the decline of the privity rule and the theories of liability that have replaced it); Susan Martin, *If Privity is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentations*, 28 AM. BUS. L.J. 649 (1991) (discussing the decline of privity and the theories that have replaced it).

privity requirement: 1) "limited privity"; 2) Section 552 of the Restatement (Second) of Torts; 3) "balancing"; and 4) "foreseeability."<sup>291</sup> This diversity of response confirms that there is no easy answer to be found, unless one were to conclude that Nebraska's adherence to a strict privity rule is the best policy.<sup>292</sup> Those commentators who have examined these approaches have responded by favoring one approach over the other or proposing a new test.

For example, Susan Lorde Martin has proposed that a single standard, "limited privity," be used for all professionals.<sup>293</sup> Martin states that this limited privity standard should be fashioned so as to require a plaintiff to be in contractual privity with the professional or have a relationship so close as to approach privity.<sup>294</sup>

In an extensive analysis of New York law, the privity rule, and attorneys' liability, Lucia Ann Silecchia has proposed an "ideal rule"

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291. Martin, 28 AM. BUS. L.J. at 654-75. The "balancing" and "foreseeability" approaches are illustrated by *Donahue v. Shughart, Thomson, & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995) (en banc) and *Simpson v. Calivas*, 650 A.2d 318 (N.H. 1994). See *supra* notes 148-201 and accompanying text.

292. Douglas Cifu examined the ramifications of expanding attorney liability to third parties and concluded that "some courts have gone too far in extending attorney malpractice to nonclient third parties." Cifu, 23 COLUM. J.L. & SOC. PROBS. at 3. The result is that the attorney's duty of loyalty to his client is undermined and attorney-client confidentiality is threatened. *Id.* at 17-23. Cifu further argues that expanding malpractice liability will not ultimately benefit nonclient third parties. *Id.* at 23-24.

Cifu raises legitimate concerns and is correct in pointing out that accountant and attorney malpractice duties are not necessarily grounded in the same considerations. *Id.* at 22. But see *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 408, 507 N.W.2d at 275 (discussing an accountant's liability). However, Cifu's proposed rule would end up with the same ruling as *St. Mary's Church of Schuyler*; it is difficult for the author to see how a contrary ruling in that case would undermine or interfere with the goal of zealous representation of a client without any conflicting interests. This author believes that finding the attorney liable under such circumstances would have the effect of promoting lawyer competency. See Gerald P. Johnston, *Legal Malpractice in Estate Planning — Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629, 710 (1982). Cf. James Holman Comment, *Attorney Malpractice — A "Greenian" Analysis*, 57 NEB. L. REV. 1003, 1009 (1978) (stating that the "privity requirement fulfills the function of protecting attorneys from an undue burden of liability").

Also, this author believes that elementary notions of fairness and justice dictate a contrary result. See *Jenkins*, 42 BAYLOR L. REV. at 703 (stating that the privity rule "serves to tolerate a critical wrong without a compensating remedy").

293. Martin, 28 AM. BUS. L.J. at 675-80.

294. *Id.* at 680. This "limited privity" test is reflective of the "end and aim" test in *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922), in which the limited privity test looks to see if there was "actual conduct" linking the professional with the plaintiff. Martin, 28 AM. BUS. L.J. at 680. Martin crafts a couple of exceptions to her rule. *Id.* One exception would seemingly cover the situation in *St. Mary's Church of Schuyler*. Martin's limited privity definition would seem expansive enough to cover the situation in *Citizens Nat'l Bank of Wisner*, where the plaintiff alleged that there was "actual conduct" linking the plaintiffs and the defendants. See *Citizens Nat'l Bank of Wisner*, 232 Neb. at 478, 480, 441 N.W.2d 180, 181 (1989).

making the attorney liable to the third party for negligent acts only if the following conditions exist:

1. The injured party was a member of an identified class whose injury could be foreseen by a reasonable attorney exercising due care. . . .
2. The plaintiff can bear the burden of proving that negligence was actually committed against the original client. . . .
3. The plaintiff can bear the burden of proving that there is no conflict between the plaintiff's claim and any interest or potential interest of the actual client.<sup>295</sup>

This is a thoughtful response to a most difficult problem and is worthy of respectful consideration.

The American Law Institute is currently circulating drafts for a proposed Restatement of the Law Governing Lawyers.<sup>296</sup> Under the heading "Lawyer Civil Liability — Liability for Malpractice," the Tentative Draft of Section 73 sets forth "limited circumstances in which a lawyer owes a duty of care to a non-client."<sup>297</sup> The relevant portions of Sections 73 are:

§ 73 Duty to Certain Non-Clients

For purposes of liability under § 71, a lawyer owes a duty to use care within the meaning of § 74:

- (1) To a prospective client, as stated in § 27;
- (2) To a non-client when and to the extent that the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of legal services, the non-client so relies, and the non-client is not, under applicable law, too remote from the lawyer to be entitled to protection;
- (3) To a non-client when and to the extent that the lawyer knows that a client intends the lawyer's services to benefit the non-client, and such a duty substantially promotes enforcement of the lawyer's obligations to the client and would not create inconsistent duties significantly impairing the lawyer's performance of those obligations; . . . .<sup>298</sup>

Once again, this test has much to commend it. Subsection (2) pays deference to the age-old concern over "indeterminate liability," voiced in classic cases such as *Winterbottom v. Wright*,<sup>299</sup> *National Savings Bank of District of Columbia v. Ward*,<sup>300</sup> and *Ultramares Corp. v.*

295. Lucia Ann Silecchia, *New York Attorney Malpractice Liability to Nonclients: Toward a Rule of Reason & Predictability*, 15 *PAGE L. REV.* 391, 452 (1995).

296. *RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS* § 73 (Tentative Draft No. 7, 1994).

297. *Id.* at § 73 cmt. a.

298. *Id.* at § 73.

299. 152 Eng. Rep. 402 (1842).

300. 100 U.S. 195 (1879).

*Touche*.<sup>301</sup> According to *comment e*, the "too remote" test is designed to account for "jurisdictional differences."<sup>302</sup> Subsection (3) is mindful of the harm that might arise by making lawyers liable to non-clients, namely, the tendency such liability might have to discourage lawyers from vigorous representation of the client.<sup>303</sup> According to *comment f*, the nonclient may be better situated to enforce the obligation, as in a case where the client has died.<sup>304</sup> Not surprisingly, the illustration chosen is the "disappointed will beneficiary" situation.<sup>305</sup>

The most innovative and, in the author's view, the most promising, perspective to assist the courts in grappling with the privity problem is to broaden the scope of inquiry along the lines suggested by Professor Jay Feinman in his recent book, *Economic Negligence*.<sup>306</sup> Feinman finds that the traditional approaches to economic negligence cases — third-party beneficiary, negligence, misrepresentation — are inadequate.<sup>307</sup> Feinman then discusses what he terms "the relational approach" and how this approach differs from the traditional doctrines.<sup>308</sup> Feinman's central thesis is then made clear: the relational approach is a superior method to use in analyzing economic negligence problems.<sup>309</sup>

Feinman's work is stimulating, challenging, and wide-sweeping. It extracts from the hundred of cases of economic negligence three central themes: "(1) the decline of privity as a prerequisite to liability, based on the need to serve fundamental tort policies; (2) the threat of indeterminate liability; and (3) the protection of private ordering through contract."<sup>310</sup> With its emphasis on the empirical and policy dimensions, Feinman's relational approach strikes a proper balance between practice and theory in the formulation of rules.

## CONCLUSION

In a recent article on the increasing liability of will drafters, Professor William McGovern began his discussion of "Privity" by noting:

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301. 174 N.E. 441 (N.Y. 1931).

302. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 73 cmt. e (Tentative Draft No. 7, 1994).

303. *Id.* at § 73 cmt. f.

304. *Id.*

305. *Id.* at § 73 cmt. f, illus. 2. *Comment f* rejects the "four corners" test in favor of the standard that the intent to benefit the client must be "clearly established." See *id.*, cmt. f, illus. 3 (discussing when the non-client who is to benefit is not named in the will).

306. JAY M. FEINMAN, *Economic Negligence* (1995) [hereinafter FEINMAN].

307. *Id.* at 81-174.

308. *Id.* at 177-208.

309. *Id.* at 205.

310. *Id.* at 13.

Prior to the 1960's, lawyers who drafted [w]ills were virtually immune from liability for negligence because they were in "privity" only with the testator who had retained the lawyer and who was invariably dead when the mistake came to light.<sup>311</sup>

As to the concept of "privity" itself, McGovern commented that "[p]rivity" appears to be a label which courts use to reach results which they consider desirable for other reasons.<sup>312</sup>

A review of Nebraska case law since the 1982 *St. Mary's Church of Schuyler v. Tomek*<sup>313</sup> case indicates that Nebraska lawyers have enjoyed "virtual immunity" for negligent will drafting and other estate planning related activities. Professor Feiman refers to two "polar situations" in which an attorney's liability to a nonclient is asserted:

At one pole, liability is usually imposed in an action by a will beneficiary against an attorney who prepared the will or supervised its execution in such a manner that an intended beneficiary loses the bequest to which it would otherwise be entitled. At the other pole, liability is never imposed in an action by one litigant against the other party's attorney for negligence in bringing an unmeritorious claim. Between these poles is a wide range of other transactions having various results.<sup>314</sup>

One can argue that the facts in *St. Mary's Church of Schuyler* fit near the polar extreme, in which the case for departing from the privity rule is the strongest.<sup>315</sup> Since the Nebraska court in *St. Mary's Church of Schuyler* chose not to budge from the strict privity rule declared in *Ames Bank v. Hahn*,<sup>316</sup> it is not surprising that the court has gone down a path that has led to "virtual lawyer immunity."

311. William McGovern, *The Increasing Malpractice Liability of Will Drafters*, TRUSTS AND ESTATES 10 (Dec. 1994) [hereinafter MCGOVERN].

312. *Id.*

313. 212 Neb. 728, 325 N.W.2d 164 (1982) (per curiam).

314. FEINMAN, *supra* note 297, at 301.

315. It may be conceded that the facts of *St. Mary's Church of Schuyler* do not present the strongest possible case: If the will failed due to failure to comply with the formalities of the wills statute, the testator's estate then would have gone to his heirs. Under this scenario, the plaintiffs would have received nothing — thus becoming the prototypical "disappointed will beneficiaries."

Given the facts of *St. Mary's Church of Schuyler*, it might still be possible to hold the lawyer immune on the ground that the settlement reached by the plaintiffs with the heirs barred the malpractice suit. See MCGOVERN, *supra* note 303, at 18 (noting a split of authority on the issue). Interestingly enough, in *Donahue v. Shughart*, Thomson & Kilroy, the case was complicated by the fact that the "underlying lawsuit" was settled. See *Donahue v. Shughart*, Thomson & Kilroy, 900 S.W.2d 624, 625-26 n.1 (Mo. 1995) (en banc).

316. 205 Neb. 353, 287 N.W.2d 687 (1980).

It may be possible to defend a rule that results in the "virtual immunity" of attorneys engaging in estate planning activities.<sup>317</sup> But, with due respect, simply pointing to "lack of privity" is not, in this day and age, responsible decision-making. "Privity" or "lack of privity," is indeed, as McGovern put it, just a label "to reach results which [the court] considers desirable for other reasons."<sup>318</sup> Reducing a complex and difficult problem to a matter of labelling does not do justice to the litigants or their counsel.

If the rule of virtual immunity applies to attorneys, what rule is to be applied to other professionals? In the wake of *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*,<sup>319</sup> one could argue that the Nebraska court has raised the privity bar, however slightly, with regard to accountant liability.<sup>320</sup> Regardless of the precise dimensions of *St. Paul Fire & Marine Ins. Co.* regarding accountant liability, the public will insist that, if special rules are being crafted for the benefit of a particular profession, the grounds for such special treatment must be justified. The existing rule in Nebraska as to abstractor liability does not follow the strict privity test.<sup>321</sup> In this particular case, the disparity of treatment may be explained by a legislative act.<sup>322</sup> It is at least worth considering once more the justice issue that is raised by having differing rules for the various professions. At some point, the legislature may step in, either leveling the playing field<sup>323</sup> or creating special rules for professionals<sup>324</sup> or a particular profession.<sup>325</sup>

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317. See *supra* note 292 and accompanying text.

318. MCGOVERN, *supra* note 311, at 10.

319. 244 Neb. 408, 507 N.W.2d 275 (1993).

320. See *supra* notes 242-71 and accompanying text.

321. See *Seedkem, Inc. v. Safranek*, 466 F. Supp. 340, 344 n.4 (Neb. 1979) (describing how an abstractor's liability in Nebraska does not follow the strict privity test).

322. NEB. REV. STAT. § 76-556 (Reissue 1990) provides in pertinent part:

A registered abstractor shall show each link in the chain of title, and failure to do so shall render him or her liable to any person injured by such omission. In adding extensions to an old abstract, a registered abstractor shall not be deemed to certify to or verify accuracy of entries prior to the first date given in the certificate of extension. When a registered abstractor relies upon the numerical index alone to refer him or her to all entries upon the records affecting the title to property, such reliance shall be made at his or her peril. A registered abstractor shall be liable for omission of notice of encumbrance in an abstract.

NEB. REV. STAT. § 76-556 (Reissue 1990).

323. Taking the privity bull by its proverbial horns, the Mississippi legislature passed the following statute:

In all causes of actions for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the Uniform Commercial Code, privity shall not be a requirement to maintain said action.

MISS. CODE ANN. § 11-7-20 (Supp. 1995).

324. A classic example of this approach is the "professional negligence" statute of limitations, as exemplified by NEB. REV. STAT. § 25-222 (Reissue 1989). Section 25-222 provides in pertinent part:

Where Nebraska law should be heading beyond simply abolishing the strict privity rule is not easy to say. As a beginning point, the author earnestly recommends that the "economic negligence" doctrine, as articulated by Professor Feinman's recent book, be given serious consideration. Feinman's treatise is specifically designed to "address" the problems and to "improve" the analysis; it does not purport to resolve problems or dictate results.<sup>326</sup> All students of the law, judges and lawyers included, would do well to consider the "relational" approach Professor Feinman advocates.

Finally, one particular point made by Professor Feinman merits emphasis: the increasingly important role of the theory of negligent representation.<sup>327</sup> According to Feinman, virtually all jurisdictions adopt the test of the Restatement (Second) of Torts § 552 as the vehicle for using the negligent representation theory in economic negligence cases.<sup>328</sup> In *St. Paul Fire & Marine Ins. Co.*, the Nebraska Supreme Court rejected the invitation to adopt Section 552 as a gov-

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Any action to recover damage based on professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of facts which would reasonably lead to such discovery whichever is earlier, *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional services more than ten years after the date of rendering or failure to render such professional services which provides the basis for the cause of action.

NEB. REV. STAT. § 25-222 (Reissue 1990). When the cause of action accrues is a very important issue in lawyer malpractice cases, particularly those involving the "disappointed will beneficiary." The topic has been explored, in varying degrees, by other writers. See Gerald Johnston, *Legal Malpractice in Estate Planning — Perilous Times Ahead for Practitioner*, 67 IOWA L. REV. 629, 648-50 (1982) (describing the importance of the statute of limitations); Bruce Ross, *Legal Malpractice in Estate Planning and Administration*, 18 ACTEC NOTES 248, 261-62 (1993) (discussing the statute of limitations).

325. Feinman notes that, in four states, statutes have been enacted that have the effect of limiting accountants' liability. FEINMAN, *supra* note 305, at 71 n.32 (citations omitted). Arkansas has statutes relating to accountant and attorney liability. ARK. CODE ANN. §§ 16-114-302 & -03 (Supp. 1993).

In the most recent session of the Nebraska legislature, two accountant liability bills were introduced. See LB 220, Neb. Unicameral, 94th Leg., 1st Sess. (1995) (providing for accountant liability); LB 261, Neb. Unicameral, 94th Leg., 1st Sess. (1995) (providing for accountant liability). Presumably, the *St. Paul Fire & Marine Ins. Co.* decision of the Nebraska Supreme Court had something to do with this flurry of legislative activity.

326. FEINMAN, *supra* note 297, at 8.

327. Feinman calls the doctrine of negligent representation "crucial" to the law of economic negligence. *Id.* at 149.

328. RESTATEMENT (SECOND) OF TORTS § 552 (1965); FEINMAN, *supra* note 297, at 161.

erning rule.<sup>329</sup> However, the tort of negligent misrepresentation was recognized by the court in 1991.<sup>330</sup> In 1994, the Nebraska Supreme Court again confronted the "negligent misrepresentation" theory in a case that contains some interesting language with regard to the privity issue.

In *Gibb v. Citicorp Mortgage, Inc.*,<sup>331</sup> the essential facts related to sale of real estate and a claim by a purchaser that the seller's agent made negligent misrepresentations upon which he relied and suffered damages.<sup>332</sup> The *Gibbs* court performed a short review of the history of negligent misrepresentation in Nebraska.<sup>333</sup> The court noted that the prior cases involved insurance agents' negligent misrepresentations, most recently in *Flamme v. Wolf Ins. Agency*.<sup>334</sup> With regard to *St. Paul*, the court observed:

Subsequently, in the course of holding that an accountant may become liable to a third party for a negligently performed service to the accountant's client, we, in *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.* noted the position of Restatement (Second) of Torts § 552 regarding negligent representation as a basis for liability.<sup>335</sup>

The court then went on to specifically discuss the particulars of Section 552 and quoted Section 552 in its entirety.<sup>336</sup> The court concluded:

As noted in *St. Paul Fire & Marine Ins. Co.*, "even in absence of fraud, there exist circumstances under which an accountant who negligently performs a service for the accountant's client may become liable to a third party."

329. *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 415-16, 507 N.W.2d at 280-81 (citations omitted). Note that the discussion in *St. Paul Fire & Marine Ins. Co.* occurred in the context of a "duty-privity" analysis. See *supra* notes 242-71 and accompanying text.

In *Seedkem Inc. v. Safranek*, 466 F. Supp. 340 (Neb. 1979), Judge Robert V. Denney expressed the view that the Nebraska Supreme Court would accept Section 552. *Seedkem, Inc.*, 466 F. Supp. at 344 (Neb. 1979).

330. *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991). See *supra* notes 265-67 and accompanying text.

331. 246 Neb. 355, 518 N.W.2d 910 (1994).

332. *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 359-60, 518 N.W.2d 910, 915-16 (1994). The plaintiff also pleaded fraud theories and a contract theory. *Gibb*, 246 Neb. at 360-73, 518 N.W.2d at 916-22.

333. *Gibb*, 246 Neb. at 369-73, 518 N.W.2d at 920-22.

334. 239 Neb. 465, 476 N.W.2d 802 (1991); *Gibb*, 246 Neb. at 369, 518 N.W.2d at 921 (citing *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991)).

335. *Gibb*, 246 Neb. at 369-370, 518 N.W.2d at 921 (citing *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 408, 507 N.W.2d at 275); RESTATEMENT (SECOND) OF TORTS § 552 (1977).

336. *Id.* at 370-71, 518 N.W.2d at 921 (citing RESTATEMENT (SECOND) OF TORTS § 552 (1977)).

While we have not heretofore specifically enumerated the elements of negligent misrepresentation, other jurisdictions have adopted the language of § 552 of the Restatement. . . .

We follow suit and now specifically adopt the definition of the negligent misrepresentation cause of action found in § 552. . . .<sup>337</sup>

If the Nebraska court is adopting the entirety of Section 552, the court has abandoned the privity rule enunciated *Citizens National Bank of Wisner v. Kennedy and Coe*<sup>338</sup> and *St. Paul Fire & Marine Ins. Co.* Moreover, the court is abandoning the privity rule in a case not involving accountants or lawyers or even in a case in which a "third party" liability issue was addressed. This would be a significant and remarkable step in the development of the "privity" rule in Nebraska. Whether the court meant to limit its holding by referring to the "definition" of negligent misrepresentation in Section 552 is unclear. Section 552 states:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whom the duty is created, in any of the transactions in which it is intended to protect them.<sup>339</sup>

Is the "definition" or "elements" of negligent misrepresentation contained only in Subsection (1)? If so, in *Gibbs*, the court has not changed any privity rules in this state. On the other hand, one can refer to the syllabus of the court in *Gibbs*, relating to negligent mis-

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337. *Id.* at 371-72; 518 N.W.2d at 921-22 (citations omitted).

338. 232 Neb. 477, 441 N.W.2d 180 (1989).

339. RESTATEMENT (SECOND) OF TORTS, § 552 (1977).

representation,<sup>340</sup> and find an indication that the court *does* adopt a rule that *includes* the exact language of subsections (2) and (3) of Section 552.<sup>341</sup>

Given this recognition of the tort of negligent misrepresentation, the Nebraska court should re-evaluate its decisions in the attorney/malpractice cases. Likewise, attorneys should realize the tremendous breakthrough that might be possible by relying upon the negligent representation doctrine. Had this doctrine been recognized since 1980, the course of Nebraska law in lawyer malpractice cases might have taken an entirely different track.<sup>342</sup> But the recognition of the

340. Syllabus Fifteen by the court erroneously refers to "Fraud: Liability" in articulating its rule as to negligent misrepresentation. *Gibb*, 246 Neb. at 357, 518 N.W.2d at 914.

341. *Gibb*, 246 Neb. at 357, 370-71, 518 N.W.2d at 914, 921-22; RESTATEMENT (SECOND) OF TORT § 552 (1977).

342. The fountainhead case in Nebraska, the case that set the strict privity rule in motion, was *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980). The second theory addressed by the court in *Ames Bank* was "negligence," prompting the "duty-privity" analysis of the court. *Ames Bank*, 205 Neb. at 354-56, 287 N.W.2d at 688-89. In retrospect, the test of Section 552 seems a more appropriate method of approaching the defendant lawyer's liability in that case.

In the most recent case, *Gravel v. Schmidt*, 247 Neb. 404, 527 N.W.2d 199 (1995), the concept of negligent misrepresentation seems apropos as well, although, given the prior decisions of the court, it is understandable that the plaintiff utilized a breach of contract theory. The Nebraska court rejected the contract theory and focused on "professional negligence," setting up, once again, the "duty-privity" analysis. *Gravel*, 247 Neb. at 408, 527 N.W.2d at 202. Once again, the theory of negligent representation seems most appropriate on the facts of *Gravel*.

The gist of *Gravel's* cause of action was that the lawyer for the estate made a false representation to the plaintiff. *Id.* at 406, 527 N.W.2d at 201. In comparison to how the Nebraska Supreme Court characterized the proper legal theory, consider the often-quoted remark of Judge Richard Posner:

Legal malpractice based on a false misrepresentation, and negligent representation by a lawyer, are such similar legal concepts, however, that we have great difficulty both in holding them apart in our minds and in understanding why the parties are quarreling over the exact characterization. . . .

*Greycas, Inc. v. Proud*, 826 F.2d 1560, 1563 (7th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988). If Judge Posner's analysis is correct, *Gravel* is a negligent misrepresentation case. The fact that the defendant was a lawyer is not significant.

A final parting shot regarding *Gravel*: Even assuming that the proper analysis is "duty-privity," Nebraska's privity rule might not necessarily bar the devisee's claim against the attorney for the personal representative. Consider two cases from the Ohio Supreme Court. In *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987), the Ohio court held that lack of privity barred a suit by a disappointed will beneficiary against the drafter of the will. See Michael P. Morely, *Privity as a Bar to Recovery in Negligent Will Preparation Cases: A Rule Without A Reason*, 57 U. CIN. L. REV. 1123 (1987). However, in *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989), the same court allowed a suit by a devisee of the estate against the attorney for the executor. Commentators find these decisions inconsistent, suggesting the Ohio court has *sotto voce* softened its strict privity rule. If this is true, it would appear that the only state supreme court that is as protective of lawyers in the estate planning context as the Nebraska Supreme Court is the Virginia Supreme Court. See *Copenhaver v. Rogers*, 384 S.E.2d 593 (Va. 1989) (discussing the narrow situation where third party beneficiary analysis could be applied to an intended will beneficiary).

tort of negligent representation as enunciated in Section 552 does not solve all "privity" problems. There is still the classic "disappointed will beneficiary" case, like the *St. Mary's Church of Schuyler* case, that is not necessarily solved with the negligent misrepresentation theory. And so we come back to the author's particular point of concern — the *St. Mary's Church of Schuyler* case.

An important issue of public policy was decided in the *St. Mary's Church of Schuyler* case without adequate explanation as to why the rule enunciated serves the public interest.<sup>343</sup> A reasoned analysis of the purposes to be served by a strict privity approach is long overdue. If Nebraska attorneys are, under the law, entitled to "virtual immunity" for errors in will drafting, there must a principled reason. That rationale has yet to be articulated.

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The only other jurisdiction usually denominated as a strict privity state is Texas. However, the decisions enunciating this rule have come from the Texas Court of Appeals, not the Texas Supreme Court. See Helen Bishop Jenkins, *A Texas Size Barrier to Third Parties for Negligent Will Drafting — An Assessment and Proposal*, 42 BAYLOR L. REV. 687 (1990).

343. See *supra* notes 74-75, 202-03 and accompanying text.

