

# Missouri Court of Appeals Declines to Extend Exception to Privity Requirement for Non-Clients to Pursue Legal Malpractice Claim against Attorney

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The Missouri Court of Appeals, Western District recently affirmed dismissal of a legal malpractice claim brought by non-clients against a law firm, declining to extend the exception to the general rule requiring privity to impose on attorneys a duty to prospective beneficiaries of undrafted, unexecuted testamentary documents.

In *Alberts v. Turnbull Conway, P.C.*, Wanda Alberts and others (“Plaintiffs”) brought suit against attorney Stephen Conway and his law firm Turnbull Conway P.C. (collectively “Attorney”), alleging the Attorney negligently failed to timely draft and secure execution of amendments to Howard L. Walz’s (“Client”) existing trust to provide certain distributions to Plaintiffs before Client’s death. In 2018, Client engaged Attorney to provide estate planning services to effectuate changes to his estate and instructed Attorney to draft amendments to an existing trust agreement to provide for specific distributions to Plaintiffs. Attorney agreed to undertake Client’s requested changes. Thereafter, the Client’s health deteriorated and he died about three months after Client’s retention of Attorney, but before his trust agreement was amended.

Plaintiffs claimed Attorney was negligent in failing to act with reasonable diligence and promptness in effectuating amendments to the trust agreement which would have resulted in specific distributions to Plaintiffs, including failure to timely draft the amendments and secure their execution. Further, Plaintiffs argued they were intended beneficiaries of the anticipated amendments to Client’s trust agreement and it was foreseeable they would be damaged by Attorney’s failure to effectuate the amendment. Attorney moved to dismiss Plaintiffs’ suit, arguing Missouri law did not recognize a cause of action for legal malpractice by non-clients who claimed they would have been named beneficiaries if an estate or trust document had been executed. After the trial court sustained Attorney’s motion, Plaintiffs appealed.

On appeal, Plaintiffs claimed Attorney's agreement to perform services intended by the Client to benefit Plaintiffs created a legal duty owed to Plaintiffs. Plaintiffs cited to the seminal decision in *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. banc 1995) to support their standing to pursue a legal malpractice claim. The *Alberts* court closely examined *Donahue*, where the Missouri Supreme Court permitted a non-client to bring a legal malpractice action against an attorney when "an attorney-client relationship existed in which the attorney-defendant performed services specifically intended by the client to benefit [non-client] plaintiffs" and examination of six factors weighed in favor of imposing a duty to a non-client. Likewise, the *Alberts* court detailed the subsequent decision in *Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C.*, 958 S.W.2d 42, 48 (Mo. App. W.D. 1997), which determined direct statements from a client were not necessary to infer an intent to retain an attorney to benefit named beneficiaries, as intent could be inferred from their inclusion as beneficiaries in executed documents. Under *Donahue* and *Johnson*, intended beneficiaries, as evidenced by executed testamentary documents, were permitted to bring actions for legal malpractice against the attorneys based on allegations the attorney's negligence caused the testamentary transfers or instruments to fail and caused the beneficiaries to lose the intended bequest.

The *Alberts* court distinguished the case before it, noting it did not involve a failed but executed testamentary instrument, in which Plaintiffs were intended beneficiaries, but rather *unexecuted* testamentary documents. As such, the *Alberts* court found "[w]here the relevant testamentary documents are never executed (like this case), issues related to the testator's intent are far more tenuous than where (as in *Donahue* and *Johnson*) the testator's intent has been manifested in an executed document." The court emphasized it is the testator's intent at the time of executing the failed testamentary documents that is relevant, not at some prior point in time.

Ultimately, the *Alberts* court declined to extend the exception to the general rule requiring privity to create a duty to prospective beneficiaries of undrafted and unexecuted testamentary documents, which "introduces rampant speculation into the analysis," citing decisions in other jurisdictions reaching the same conclusion. The court reasoned imposing such a duty "would not comport with an attorney's duty of undivided loyalty to the client and would create a potential conflict of interest to the testator and the prospective beneficiaries" and "invite claims premised on improper speculation regarding the testator's intent." In sum, the Missouri Court of Appeals declined to extend the *Donahue* exception to the requirement of privity and Attorney owed no duty of care to Plaintiffs regarding the proposed amendments to Client's trust, thereby defeating an essential element to their legal malpractice claim.

Please note this case has not yet been published. Plaintiffs have filed a motion for rehearing/transfer to the Supreme Court of Missouri, which remains pending at the time of this post. The Court of Appeals opinion may be subject to modification.