NEW JERSEY STATE BAR ASSOCIATION
New Jersey Law Center / One Constitution Square
New Brunswick, New Jersey 08901
Tel.: (732) 937-7505

| | |
|---|---|
| DESPINA ALICE CHRISTAKOS AND HELEN ALEXANDRA CHRISTAKOS,<br><br>Plaintiffs<br><br>vs.<br><br>ANTHONY A. BOYADJIS, ESQ.,<br><br>Defendant. | SUPREME COURT OF NEW JERSEY<br>DOCKET NO.: 090214<br><br>APPELLATE DIVISION<br>DOCKET NO. A-1107-23/AM-142-23<br><br>SAT BELOW:<br>Hon. Francis J. Vernoia, P.J.A.D<br>Hon. Kay Walcott-Henderson, J.A.D.<br>(Temporarily Assigned) |
| ANTHONY A. BOYADJIS, ESQ.,<br><br>Plaintiff<br><br>vs.<br><br>AMERICAN ALTERNATIVE INSURANCE CORPORATION<br><br>Defendant. | CIVIL ACTION ON APPEAL FROM:<br>SUPERIOR COURT OF NEW JERSEY<br>LAW DIVISION: MORRIS COUNTY<br>DOCKET NO. MRS-L-59-20/731-21<br><br>SAT BELOW:<br>Hon. Louis S. Sceusi, J.S.C.<br>(Retired T/A on Recall) |

# BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

OF COUNSEL:
Christine A. Amalfe, Esq., President
New Jersey State Bar Association
New Jersey Law Center / One Constitution Square
New Brunswick, New Jersey 08901
Attorney ID: 020981985

DATE SUBMITTED:
May 28, 2025

ON THE BRIEF:
Benjamin J. DiLorenzo, Esq. / Attorney ID: 030782002
Diana C. Manning, Esq./Attorney ID: 018021993
Kyle A. Valente, Esq./Attorney ID: 245702020

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Rules**



**Miscellaneous**

## PRELIMINARY STATEMENT

This case involves questions of law that are of significant importance to the New Jersey State Bar Association (NJSBA), its members, and the public. The issues before this Court are clearly defined: (1) whether the scope of attorney liability for malpractice should be extended to include a duty to third parties outside of those identified in existing case law; and (2) whether a non-client may be awarded Saffer fees in connection with a successful malpractice suit not involving an intentional breach of a fiduciary duty. The NJSBA respectfully submits that the answer to both questions is no. This conclusion is supported by this Court's jurisprudence as well as sound public policy.

Under well-settled New Jersey law, the duty an attorney owes in a malpractice context is generally confined to the client. This Court has repeatedly emphasized that the grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship are "exceedingly narrow," Green v. Morgan Props., 215 N.J. 431, 458 (2013), and whether such a duty extends to non-clients is necessarily fact-dependent. As a general rule, a duty has been recognized between an attorney and a third party if the attorney's actions are intended to induce that non-client third party's reasonable reliance on the attorney's representations. A lawyer may also owe a duty of care to a non-client when the lawyer knows that a client intends as one

of the primary objectives of the representation that the lawyer's services benefit the non-client.

As it relates to the potential for a non-client to recover attorney's fees in a successful legal malpractice action, this Court has declined to adopt a bright-line rule prohibiting such an award. Nevertheless, this Court has purposefully confined the availability of such a fee award to circumstances where an attorney acting in a fiduciary capacity for the benefit of a non-client *intentionally* breached the fiduciary duty owed. New Jersey courts have "never held that a non-client is entitled to a fee-shifting award for an attorney's negligence." Innes v. Marzano-Lesnevich, 224 N.J. 584, 597 (2016). Where a fee award is permitted, courts are required to undertake a detailed analysis of the factors set forth in Rule of Professional Conduct (RPC) 1.5 to ensure the application for attorneys' fees is reasonable.

Here, the NJSBA submits this Court should apply the well-established framework set forth above for determining whether and under what "limited circumstances" a lawyer may owe a duty of care to a non-client, and reject any invitation to recognize a duty to third parties outside of those identified in existing case law. The NJSBA also submits that there is no basis upon which to expand an award of Saffer fees beyond those limited exceptions involving non-clients that are identified in existing case law. Saffer fee awards should continue

to be limited in application to malpractice cases brought by non-clients, and any such fees must be reasonable and in accord with RPC 1.5.

## LEGAL ARGUMENT

### POINT I

### THIS COURT'S PRECEDENT AND EXISTING CASE LAW ESTABLISH THE LIMITED PARAMETERS BY WHICH A LAWYER MAY OWE A DUTY TO A NON-CLIENT.

Traditionally, the existence of an attorney-client relationship creating a duty is "essential to the assertion of a cause of action for legal malpractice." Froom v. Perel, 377 N.J. Super. 298, 310 (App. Div. 2005) (citing Conklin v. Hannoch Weisman, 145 N.J. 395, 416 (1996)). Although courts have recognized a duty between an attorney and a non-client "in limited circumstances," Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213 (App. Div. 2014), this Court has repeatedly emphasized that "the grounds on which any plaintiff may pursue a malpractice claim against an attorney with whom there was no attorney-client relationship are exceedingly narrow," Green, 215 N.J. at 458, and whether such a "duty extends to non-clients is 'necessarily fact-dependent.' " Estate of Albanese v. Lolio, 393 N.J. Super. 355, 368 (App. Div. 2007) (quoting Estate of Fitzgerald v. Linnus, 336 N.J. Super. 458, 473 (App. Div. 2001)); see also Barner v. Sheldon, 292 N.J. Super. 258 (Law Div. 1995), aff'd, 292 N.J. Super. 157 (App. Div. 1996) (duty to non-clients impressed in "limited situations").

This Court has affirmed its reluctance to permit non-client third-party claims against attorneys. Green, 215 N.J. at 460; Innes, 435 N.J. Super. at 212, aff'd, 224 N.J. 584 (2016) (noting that New Jersey courts "are generally reluctant to permit a non-client to sue an adversary's attorney"). As this Court has noted:

> We have traditionally been reluctant to permit a nonclient to sue an adversary's attorney, and with good reason. We have long recognized that an attorney owes a duty of zealous representation to his or her client, and although we have commented on the tension that fidelity to that duty may create, we have endeavored to make certain that an advocate will be able to faithfully, fully and zealously represent his or her client without fear of reprisal from others. Our reluctance to permit nonclients to institute litigation against attorneys who are performing their duties is grounded on our concern that such a cause of action will not serve its legitimate purpose of creating a remedy for a nonclient who has been wrongfully pursued, but instead will become a weapon used to chill the entirely appropriate zealous advocacy on which our system of justice depends.

LoBiondo v. Schwartz, 199 N.J. 62, 100-101 (2009) (internal citations omitted). While there are "circumstances in which an attorney may be liable to third parties, each instance in which we have so held has been carefully circumscribed." Green, 215 N.J. at 458. This Court's "ordinary reluctance to permit non-clients to sue attorneys remains unchanged." Id. at 460.

In New Jersey, "the invitation to rely and reliance are the linchpins of attorney liability to third parties." Banco Popular North America v. Gandi, 184

N.J. 161, 181 (2005). For example, courts have permitted extension of the duty in circumstances in which a non-client relies upon an adversarial attorney to record a mortgage, LaBracio Family P'ship v. 1239 Roosevelt Ave., Inc., 340 N.J. Super. 155 (App. Div. 2001); where a non-client tenant relies upon the representations of a landlord's attorney in agreeing to a long-term lease, Davin, L.L.C. v. Daham, 329 N.J. Super. 54 (App. Div. 2000); or where an attorney included inaccurate information in a public offering statement intended to be relied upon by the public, Atlantic Paradise Associates, Inc. v. Perskie, Nehmad & Zeltner, 284 N.J. Super. 678 (App. Div. 1995). In each of these cases, there was both the invitation and actual reliance mandated by this Court's jurisprudence.

"If the attorney's actions are intended to induce a specific non-client's reasonable reliance on his or her representations, then there is a relationship between the attorney and the third party." Banco Popular N. Am., 184 N.J. at 180. In such situations, "attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys (sic) representations and the non-clients are not too remote from the attorneys to be entitled to protection." Petrillo v. Bachenberg, 139 N.J. 472, 483 (1995).

On the other hand, "if the attorney does absolutely nothing to induce reasonable reliance by a third party, there is no relationship to substitute for the

privity requirement." Banco Popular N. Am., 184 N.J. at 179. Again, the crux of attorney liability to third parties is "the invitation to rely and reliance." Id. at 181. See also Petrillo, 139 N.J. at 486 (noting that although the attorney did not prepare the opinion letter at issue, he "extracted information from existing percolation-test reports, created the composite report, and delivered the report to a real estate broker" knowing that it might be given to a prospective purchaser).

Courts have recognized additional circumstances where a duty to a non-client can be found that is not dependent on the non-client's reliance on the attorney's actions. For example, the Appellate Division elucidated in Estate of Albanese that "[p]rivity between an attorney and a non-client is not necessary for a duty to attach 'where the attorney had reason to foresee the specific harm that occurred.'" 393 N.J. Super. at 368-69 (quoting Albright v. Burns, 206 N.J. Super. 625, 633 (App. Div. 1986)).

In Pivnick v. Beck, the Appellate Division recognized an attorney who drafts a testamentary document that is inconsistent with the decedent's intent breaches a legal duty owed to a beneficiary who claims damage as a result of the attorney's error. 326 N.J. Super. 474, 482 (App. Div. 1999), aff'd, 165 N.J. 670, 671 (2000) (citing Petrillo, 139 N.J. at 483-84). This Court affirmed the Appellate Division's holding and identified as "one additional source of

authoritative support" the Restatement (Third) of the Law Governing Lawyers § 51(3)(a) (Am. Law Inst. 1998) which provides, in pertinent part, that a lawyer owes a duty of care to a nonclient when "the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient." Pivnick v. Beck, 165 N.J. 670, 671 (2000). Conversely, no duty to beneficiaries was found where an attorney representing the estate in its administration did not advise the beneficiaries of their right to disclaim, resulting in certain tax consequences. Barner, 292 N.J. Super. 258 (Law Div. 1995), aff'd, 292 N.J. Super. 157 (App. Div. 1996). The Court cautioned there is a "potentially adversarial relationship between the estate's interest in administering the estate and the interests of the beneficiaries of the estate." Id. at 264 (citing Jewish Hosp. v. Boatmen's Nat. Bank, 633 N.E.2d 1267 (1994)).

Here, this Court's analysis should be guided by the well-established framework for determining whether and under what "limited circumstances" a lawyer may owe a duty of care to a non-client. While such a determination is "necessarily fact-dependent," precedent affirms that the grounds on which a non-client may pursue a legal malpractice claim against an attorney "are exceedingly narrow." Green, 215 N.J. at 458. For this reason, the NJSBA respectfully submits this Court should reject any invitation to recognize a duty to third parties outside of those identified in existing case law.

## POINT II

### THIS COURT'S JURISPRUDENCE PROPERLY LIMITS AN AWARD OF SAFFER FEES IN MALPRACTICE CASES BROUGHT BY NON-CLIENTS.

In the field of civil litigation, "New Jersey courts historically follow the 'American Rule,' which provides that litigants must bear the cost of their own attorneys' fees." Innes, 224 N.J. at 592 (citing Litton Indus., Inc. v. IMO Indus. Inc., 200 N.J. 372, 404 (2009) (Rivera-Soto, J., concurring)). This Court has recognized that "[t]he purposes behind the American Rule are threefold: (1) unrestricted access to the courts for all persons; (2) ensuring equity by not penalizing persons for exercising their right to litigate a dispute, even if they should lose; and (3) administrative convenience." Ibid. (alteration in original) (quoting In re Niles Trust, 176 N.J. 282, 294 (2003)).

Counsel fee awards, as exceptions to the American Rule, fall under four general categories. Litton, 200 N.J. at 404. "The primary and most readily recognized form are those counsel fee awards granted pursuant to a fee-shifting statute." Ibid. The second "category of counsel fee awards consists of those allowed by court rule." Id. at 405. The third category of exceptions "presents a tightly circumscribed common law exception to the American Rule that … may be titled loosely as fiduciary malfeasance cases; . . . " Id. The fourth category in which an award of attorneys' fees is authorized as an exception to the American

Rule is rooted in contract law. Id. at 405-06. In recognizing the discrete exceptions to the American Rule, this Court has consistently "reaffirm[ed] its commitment to 'New Jersey's 'strong public policy against the shifting of attorney's fees.'" Innes, 224 N.J. at 597 (quoting Niles Trust, 176 N.J. at 293).

The third category enunciated above consists of a "narrow category of decisions ari[sing] in settings involving breaches of fiduciary duties." Gannett Satellite Info. Network, LLC v. Twp . of Neptune, 254 N.J. 242, 259 (2023). In Saffer v. Willoughby, this Court recognized that the legal fees of a former client prosecuting an action for legal malpractice against an attorney constitute "consequential damages that are proximately related to the malpractice" necessary to put the client in as favorable a position as the client would have been absent the malpractice. 143 N.J. 256, 271-72 (1996). This Court later held, in an action against an attorney for intentional misconduct arising from the attorney-client relationship, that such an award is consistent with the principle that "a client should be able to recover for losses proximately caused by the attorney's improper performance of legal services." Packard- Bamberger & Co. v. Collier, 167 N.J. 427, 443 (2001).

Other fee-shifting cases this Court decided discuss the underpinnings of Saffer and Packard-Bamberger and conclude counsel fees may be appropriate in cases of breach of a fiduciary duty. For example, In re Estate of Lash v. Lopez

authorized an attorneys' fee award as an element of damages, recoverable under the terms of a surety bond, in an action premised on an estate administrator's malfeasance. 169 N.J. 20, 28-35 (2001). The Court explained, however, that Lash was distinguishable from, and thus not an extension of, Saffer and Packard-Bamberger because the holdings in Saffer and Packard-Bamberger depended upon the attorney-client relationship. This Court later decided Niles Trust, holding that in an action against an attorney executor or trustee for undue influence, "an exception to the American Rule is created that permits the estate to be made whole by the assessment of all reasonable counsel fees against the fiduciary that were incurred by the estate." Id. at 298-99. Thus, Niles Trust extended the American Rule to trustee undue influence cases "based on the fiduciary's intentional misconduct regardless of his or her professional status." Id. at 299-300.

Departures from the "American Rule" are the exception. Innes, 224 N.J. at 597. This Court has "awarded counsel fees to a prevailing plaintiff in a legal malpractice action premised upon professional negligence because of the unique nature of the attorney-client relationship." Id.; see also Saffer, 143 N.J. at 272 (describing the case as "exceptional"). This Court has "*never held that a non-client is entitled to a fee-shifting award for an attorney's negligence*." Innes, 224 N.J. at 597 (emphasis added). The cases of Packard-Bamberger, Lash, and

Niles Trust involved fiduciaries who, by their intentional misconduct, violated their fiduciary duties and inflicted damage upon the beneficiaries. As this Court later reaffirmed in Innes, "a prevailing beneficiary may be awarded counsel fees incurred to recover damages arising from an attorney's intentional violation of a fiduciary duty" and,

> consistent with our post-Saffer jurisprudence, [plaintiff] would be entitled to counsel fees if there had been a finding that defendants, as attorneys, intentionally breached their fiduciary responsibility to [plaintiff], regardless of the existence of an attorney-client relationship.

224 N.J. at 598.

Since Innes, this Court has refused to adopt a bright-line rule precluding non-clients from recovering attorney's fees in legal malpractice actions. Instead, this Court has deliberately limited the availability of such a fee award to those cases enunciated above and where an attorney acting in a fiduciary capacity for the benefit of a non-client *intentionally* breached the fiduciary duty owed.

Any such fee award must also be reasonable and in accord with RPC 1.5 ("A lawyer's fee shall be reasonable"). A detailed analysis of the RPC 1.5 factors is required in connection with applications for attorneys' fees to ensure the fee charged is reasonable. See, e.g., S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J. Super. 82, 91 (App. Div. 1998) (noting that the trial judge should "make specific findings as to the reasonableness of the legal services provided and the

fees charged" and not "broad [conclusory] statements regarding the legal services performed"). RPC 1.5(a), in turn, provides that “[a] lawyer's fee shall be reasonable” and the "factors to be considered in determining the reasonableness of a fee" include (1) the time, labor, difficulty level and skill required, (2) whether "acceptance of the particular employment will preclude other employment," (3) customary fees for similar legal services, (4) "the amount involved and the results obtained," (5) time limitations imposed, (6) the nature and length of the relationship with the client, (7) the experience, reputation, and ability of the lawyer, and (8) whether the fee is fixed or contingent. Here, the NJSBA respectfully submits that there is no cognizable imperative for the expansion of an award of Saffer fees beyond those limited exceptions identified in existing case law. The award of Saffer fees should be limited in application to malpractice cases brought by non-clients, and any such fees must be reasonable and consistent with the mandate of RPC 1.5.

## CONCLUSION

The NJSBA respectfully requests the Court review the issues presented in this matter by applying the well-established framework set forth above to determine whether and under what "limited circumstances" a lawyer may owe a duty of care to a non-client and reject any invitation to recognize a duty to third parties outside of those identified in existing case law. The NJSBA also respectfully requests the Court to analyze any request for Saffer fees in this case against the limited exceptions involving non-clients that are already identified in existing case law, factoring in the reasonableness standards contained in RPC 1.5, without expanding the availability of Saffer fees to non-clients beyond those limited exceptions.

Respectfully submitted,

New Jersey State Bar Association

By: *s/Christine A. Amalfe*
Christine A. Amalfe, Esq.
President, New Jersey State Bar Association
Attorney ID No.: 020981985

Dated: May 28, 2025