

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

CASE NOS. 4D06-1594 and  
4D06-1624 (consolidated)

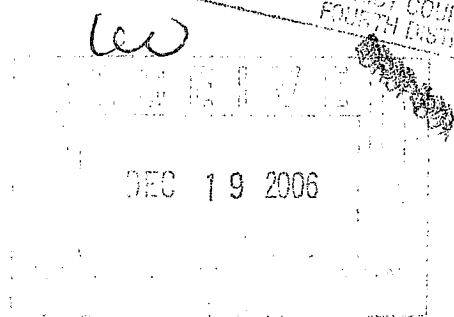
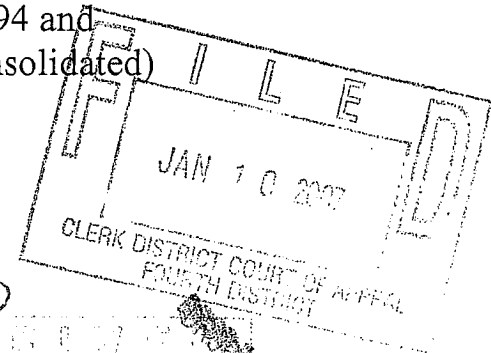
GUNSTER, YOAKLEY & STEWART  
and DANIEL HANLEY,

Appellants,

vs-

CHARLES V. McADAM, III and  
FRANK GANNETT McADAM, et al.,

Appellees.



APPENDIX TO BRIEF OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF SERVICE

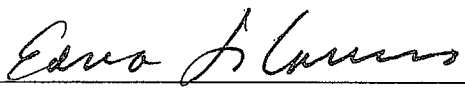
I HEREBY CERTIFY a true copy of the foregoing was furnished to: **L. Louis Mrachek, Esq.** and **Alan B. Rose, Esq.**, PAGE, MRACHEK, FITZGERALD &

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IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CHARLES V. McADAM, III and  
FRANK GANNETT McADAM,  
Individually, as Personal Representatives  
of the Estate of Charles V. McAdam, Jr.,  
and as Trustees of The Charles V. McAdam, Jr.  
Revocable Trust under Agreement dated June 5,  
1998, The Trust created for the lifetime benefit  
of Charles V. McAdam, Jr., under Section  
Eleventh of the Last Will and Testament of  
Sarah Gannett McAdam dated December 31,  
1981 and The Trust created for the lifetime  
benefit of Charles V. McAdam, Jr. under  
Article First, Section II of the Sarah Gannett  
McAdam Revocable Trust dated October 25, 1985

Plaintiffs,

vs.

GUNSTER, YOAKLEY & STEWART,  
J.P. MORGAN TRUST COMPANY, N.A.  
and DANIEL HANLEY,

Defendants.

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**PLAINTIFFS' MOTION FOR PARTIAL REHEARING ON DEFENDANTS'  
SECOND AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT  
WITH INCORPORATED MEMORANDUM OF LAW**

Plaintiffs, Charles V. McAdam, III, and Frank Gannett McAdam ("Frank"),  
individually and in their representative capacities, hereby move this Court for a partial  
rehearing on Defendants' Second Amended Motion for Partial Summary Judgment and state  
as follows:

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## I. INTRODUCTION

Plaintiffs seek a rehearing on the sole issue of this Court's Order granting summary judgment in the Defendants' favor with respect to the Defendants' liability for failing to create a family limited partnership ("FLP"). This Court found that "there is no record evidence that the decedent ever instructed Gunster and Hanley to form and fund a family limited partnership." The Court erred.

There is record evidence to support the fact that the Decedent directed the Defendants to prepare a FLP. The Plaintiffs provided record evidence from Terry Boyle ("Boyle"), an independent third party witness, whereby Boyle testified that there was "no doubt" that the Decedent wanted and expected a FLP to be formed. Indeed, Boyle stated that the Decedent informed him that he liked the idea of a FLP and that he wanted it done. Further, Hanley told Boyle that he would prepare the FLP for the Decedent. Thus, this evidence supports the fact that the Decedent directed the Defendants to prepare a FLP.

Moreover the Plaintiffs provided record evidence that Hanley received a phone call from Frank informing Hanley the Decedent was near death, and was questioned by Frank whether or not any action needed to be taken with respect to his father's estate planning. Frank was informed that no action needed to be taken, and no action was taken. Hanley's

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failure to advise the Decedent to prepare a FLP after this call, especially in light of the fact that the QPRT drafted by the Defendants would provide absolutely no benefit to the Decedent, also constitutes negligence.

Where a plaintiff produces additional evidence to support their claim, a rehearing of a summary judgment is proper. *See Bridgeport Inc. v. Rinker Materials Corp.*, 849 So.2d 1193, 1195 (Fla. 4<sup>th</sup> DCA 2003). In an overabundance of caution, the Plaintiffs' pursuant to *Fla. R. Civ. P.* 1.530(a) ask this Court to open the judgment to take additional evidence in support of their FLP claim. As explained in more detail below, Plaintiffs have submitted an affidavit from Boyle stating that Hanley was directed by the Decedent to prepare a FLP. Plaintiffs are also submitting an affidavit from Mario Bernardo ("Bernardo"), the Decedent's accountant, stating that the Decedent always followed professional advice provided to him, and never questioned such advice. Moreover, Hanley after his meeting with the Decedent regarding his conversation with Boyle wrote a memorandum stating that the Decedent's "big question" was the size of the discount for the FLP.

In addition, the Court erred in relying upon *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1380 (Fla. 1993) and *Lorraine v. Grover, Ciment, Weinstein, & Strauber, P.A.*, 467 So.2d 315, 318 n.6 (Fla. 3<sup>d</sup> DCA 1985), two cases

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involving the "*face of the will*" doctrine. The issue in the instant case is whether the Defendants failed to prepare a FLP. These cases are inapposite because the doctrine is used to determine whether an intended beneficiary has standing in a matter. As this Court correctly held on page 3 of its Order, the Plaintiffs do have standing. Further, the *face of the will* doctrine is inapplicable to pre-death estate planning because the Decedent's intent to save taxes would never be found in testamentary documents. If so, the very purpose of a FLP, for example, would be defeated.

Because there is record evidence that the Decedent directed the Defendants to prepare a FLP, and because this Court held that the Plaintiffs have standing in this matter, Plaintiffs respectfully request a partial rehearing and that this Court vacate that portion of its order granting the Defendants Summary Judgment on the FLP issue.

## II. STANDARD FOR REHEARING AND SUMMARY JUDGMENT

"While the grant or denial of a motion for rehearing is a matter within the sound discretion of the trial court it is never an arbitrary discretion. Only after it is conclusively shown that the party against whom summary judgment has been entered cannot offer proof to support its position on the genuine and material issues in the cause should its right to trial

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be foreclosed.” *Bridgeport Inc.*, 849 So.2d at 1193 (quoting *Sapphire Condo. Ass’n. v. Amerivend Corp.*, 691 So.2d 600, 601 (Fla. 4<sup>th</sup> DCA 1997)).

Summary judgment should be cautiously granted in negligence or malpractice suits. See *Davis v. Lyall & Lyall Veterinarians, P.A.*, 506 So.2d 1072, 1073 (Fla. 5<sup>th</sup> DCA 1987) (and cases cited therein). “The purpose of summary judgment is to determine whether there is sufficient evidence to justify a trial, and it should be sparingly granted so as not to deny parties their constitutional right to a jury trial.” *Id.* “[I]f the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, that doubt must be resolved against the moving party and summary judgment must be denied.” *Moore v. Morris*, 475 So.2d 666, 668 (Fla. 1983). See also *Khasrow Maleki, P.A. v. Hajianpour, M.D., P.A.*, 2000 WL 275947 (Fla. 2000); *Albelo v. Southern Bell*, 682 So.2d 1126 (Fla. 4<sup>th</sup> DCA 1996) (the trial judge must draw every possible inference in favor of the party against whom summary judgment is sought.); *Hervey v. Alfonso*, 650 So.2d 644, 646 (Fla. 2<sup>d</sup> DCA 1995).

“A party moving for final summary judgment has the burden of irrefutably establishing that the non-moving party cannot prevail.” *Hervey*, 650 So.2d at 645-646. “It is only after the moving party has met this heavy burden that the non-moving party is called

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upon to show the existence of genuine issues of material fact." *Id.* at 646 (emphasis in original). Summary judgment is improper where there is circumstantial evidence supporting an inference of negligence on the part of a defendant. *Foltz v. Meinke*, 541 So.2d 178, 179 (Fla. 4<sup>th</sup> DCA 1989).

**III. ISSUES OF MATERIAL FACT PRECLUDING SUMMARY JUDGMENT  
ON THE FLP ISSUE**

**A. Liability**

- The Decedent was the type of client that would always follow the advice of the professionals he hired and would never question such advice. *See Ex. "A"* (Bernardo's Affidavit at ¶ 3).
- Frank handled and largely controlled his father's finances for many years. *See Ex. "B"* (Frank's Affidavit at ¶ 4).
- When the Decedent retained the services of the Defendants, one of his main concerns was saving money on estate taxes. *See Ex. "C"* (Hanley's Depo., p. 79, ll. 1-25, p. 80, ll. 1-5).
- On or about August 1999, the Decedent inquired from the Defendants what options were available to him in order to reduce estate taxes. *See*

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*id.* at p. 354, ll. 4-25, p. 355, ll. 1-10 and *Ex. "D"* (Hanley's Memorandum to Schneider dated 8/24/99). During this time, the Decedent also provided the Defendants with a summary of all his brokerage accounts and the values of the accounts. *See Ex. "D."*

- On September 8, 1999, Mr. Thom, one of the trustees for the QTIP Trusts wrote a letter to Hanley to inquire as to whether the QTIP Trusts could be included in the Decedent's estate plan. *See Ex. "E"* (Thom's letter to Hanley dated 9/8/99).
- On September 18, 2001, Hanley spoke with Boyle, Charles III's attorney, about preparing a FLP for Charles. *See Exs. "C"* (Hanley's Depo., p. 157, ll. 13-25, p. 156, ll. 1-12) and *"F"* (Hanley's Memorandum to file dated 9/18/01).
- With respect to his conversation with Hanley, Boyle stated the following:

MR. BOYLE: **Now my understanding is, the McAdams want a family partnership. If there's anything I can do to help let me know. And Dan's response was, Absolutely, we're doing it, there's nothing – thanks for your help, but we don't need it. We're familiar with this mechanism. And we're doing that. So I left**

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that conversation. And I called Tim.<sup>1</sup> And I essentially told Tim, It's under control. They are doing the family partnership...

*See Ex. "G"* (Boyle's Depo., p. 15, ll. 20-25). (Emphasis added).

- Boyle additionally testified to the following;

MR. KATZMAN: Okay. From your conversation with Tim and Charlie McAdam together, **was there any doubt in your mind that Charlie McAdam wanted and expected a family partnership to be formed?**

MR. BOYLE: **No I had no doubt.**

MR. KATZMAN: That was clear?

MR. BOYLE: That was clear.

MR. KATZMAN: And was it your belief that Mr. Hanley, in fact, did prepare one?

MR. BOYLE: Well, as a result of my conversation with Dan Hanley, I reached the conclusion that he was preparing one, yes.

*Id.* at p. 16, ll. 1-5. (Emphasis added).

- Boyle also testified as follows:

MR. KATZMAN: Was it important to Charles McAdam – Charlie – to get the family partnership done?

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<sup>1</sup> Charles McAdam III's nickname is Tim.

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MR. FITZGERALD: Form

MR. BOYLE: You know, I don't – I don't know. My impression was that it – it was a foregone conclusion. I mean, it wasn't something that was being thought about. It was something that was being done.

MR. KATZMAN: Okay. And let me go to that. Why do you say that it was a foregone conclusion that the family partnership was being done for him in late 2001

MR. FITZGERALD: Form

MR. BOYLE: Because that's what he said. He – he didn't say, This is something I'm thinking about. **He said, This is something I like and this is something we're doing.**

*Id.* at p. 27 ll. 11-25, p. 28, ll. 1-3 (Emphasis added).

• Moreover, Boyle testified as follows:

MR. KATZMAN: Just to be crystal clear, what did Mr. Hanley tell you with respect to whether or not he was preparing the family partnership?

MR. BOYLE: He left me with the very clear impression that it was – he was doing it. He needed no help from me. And it was under control. **He was doing it.** It was going forward. Because if he had said to me –

MR. KATZMAN: I'm sorry. Go ahead

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MR. BOYLE: – I know I can't do this or I don't know how to do it or it's too complicated for me, I had three people who could do it.

*Id.* at p. 29, ll. 7-20 (Emphasis added).

- Boyle also states that Hanley knew that the Decedent directed that a FLP be prepared. Moreover, the purpose of Boyle's conversation with Hanley was to determine who would be drafting the FLP for the Decedent. *See Exhibit "H"* (Boyle's Affidavit at ¶s 2 and 3).
- In his September 18, 2001 memorandum to the file, Hanley documented his conversation with Boyle. *See Ex. "F"* (Hanley Memorandum dated 9/18/01). In this memorandum, Hanley claims he had given the Decedent information on a FLP and was going to follow up with him concerning that idea. *See id.* Hanley also wrote that securities and other assets could be placed into a FLP. *See id.*
- On September 19, 2001, Hanley wrote a memorandum to the file regarding his conversation with the Decedent on the FLP issue. Hanley writes that he discussed the availability of a discount and "the big

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question was what would be the size of the discount." *Exhibit "F"*  
(Hanley's Memorandum dated 9/19/01).

- Hanley and Schneider admit that in order for the Decedent to have received tax savings from the QPRT prepared by him, the Decedent had to have survived a five year term. *See Ex. "C"* (Hanley's Depo.) P. 165, ll. 23-25, p. 166, l. 1) and *Ex. "J"* (Schneider's Depo., p. 92, ll. 20-25, p. 93, ll. 1-4).
- Hanley also admits, unlike the QPRT prepared by him, that there was not a requirement for a FLP that the Decedent survive its creation in order to receive benefits from the FLP. *See Ex. "C"* (Hanley's Depo. at p. 166, ll. 2-6).<sup>2</sup> Further, Hanley admits that as soon as the FLP was funded, the Decedent would have achieved the benefits of the discount and tax savings. *See id.* at p. 166, ll. 7-12.
- "By and large" it was Hanley's practice to keep notes of his meetings with his clients. *Id.* at p. 88, ll. 17-19. Further, Hanley testified that

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<sup>2</sup> Unfortunately, Charles did not survive the five year term of the QPRT. The QPRT therefore became useless and a waste of money to prepare.

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he tries to put important discussions in writing in his attorney file. *See id.* at p. 458, ll. 9-11.

- In the notes of the meeting where Hanley claims the Decedent informed him that he did not want a FLP, Hanley **did not make any notes whatsoever** of the Decedent's alleged decision directing Hanley not to prepare a FLP. *See id.* at pp. 454-456. and *Ex. "K"* (Hanley's notes from the 1/3/02 meeting with the Decedent). Notably, Hanley wrote a page of notes relating to the Decedent's signing of an amendment to his estate planning documents, a Connecticut notice, the Decedent's QPRT and his condition.
- A FLP is a tax saving vehicle prepared for an individual before death and should never be created post mortem as the individual would not receive the discount for which the FLP was designed. *See Ex. "L"* (Raymond's Aff. at ¶ 3). Thus, the intent to form a FLP should never be found in a will. *See id.*
- It is the Defendants practice to fund their clients different estate planning vehicles. Hanley admits that the Defendants often transfers

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their clients' assets to fund trusts when they are charged with that responsibility. *See Ex. "C"* (Hanley's Depo., p. 170, ll. 10-14, p. 174, ll. 22-25, p. 175, ll. 1-6). More importantly, the Defendants typically funds their clients' FLPs. *See id.* at p. 174, ll. 22-25, p. 175, ll. 1-6. In fact, the Decedent's QPRT was funded by Gunster. *See id.* at p. 170, ll. 23-25, p. 171, ll. 1-4.

- Hanley received a phone call from Frank that Charles was near death, and was questioned by Frank whether or not any action needed to be taken with respect to his father's estate planning. Frank was informed that no action needed to be taken, and no action was taken. *See Ex. "M"* (Frank's Depo., p. 72, ll. 1-15, p. 101, ll. 9-25, p. 102, ll. 1-10) and *See Ex. "C"* (Hanley's Depo., p. 205, ll. 14-23, p. 479, ll. 21-25).

**B. Damages.**

- Hanley contemplated putting the assets contained in the Decedent's personal brokerage account in the FLP. *See id.* at p. 444, ll. 9-16.
- Hanley admits that the QTIP Trusts could have been placed in a FLP. *See id.* at p. 374, ll. 7-11. Moreover, Hanley and Mr. Raymond, the

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Plaintiffs' expert, state that there are specific tax cases that would have allowed the Decedent to fund a FLP with the QTIP Trusts and his Revocable Trust. *See id.* at p. 372, ll. 21-25, p. 373, ll. 1-16 and *Ex. "N"* (J. Raymond's Depo., p. 427, ll. 22-25, p. 428).

- Mr. Raymond has testified that the Defendants should have advised the Decedent to place his interests in the QTIP Trusts in the FLP as well as his individual account. This would have maximized the tax savings that family limited partnerships are designed to achieve. *See Ex. "N"* (J. Raymond's Depo., p. 149 ll. 15 - 19, pp. 150 - 152) and *Ex. "O"* (Valuation Report).
- The valuation report prepared by the Plaintiffs' expert specifically quantifies the amount of damages relating to the failure to fund the FLP. *See Ex. "O."* Moreover, the valuation report identifies the damages resulting from the discount that would have been provided from the Decedent's individual account and each QTIP Trust. *See id.*

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#### IV. MEMORANDUM OF LAW

**A. Plaintiffs have Submitted Record Evidence that the Decedent Directed the Defendants to Prepare a FLP.**

Because the Plaintiffs have provided record evidence that the Decedent directed the Defendants to create a FLP, this Court's Order with respect to the FLP issue should be vacated. As listed in more detail above, Boyle's Affidavit states that the Decedent directed Hanley to prepare a FLP. *See Ex. "H"* (Boyle Affidavit at paragraph 3). Further, Boyle testified that he had "no doubt" that Hanley would prepare the FLP. *See Ex. "G"* (Boyle's Depo., p. 16, ll. 1-5). In fact, in his memorandum regarding his meeting with the Decedent, Hanley wrote that he had discussed the FLP concept with the Decedent and that "the big question was what would be the size of the discount." *Exhibit "F"* (Hanley's Memorandum

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dated 9/18/01). This evidence alone is enough to overcome a motion for summary judgment.<sup>3</sup>

Hanley also testified that "by and large" it was Hanley's practice to keep notes of his meetings with his clients. *Ex. "C"* (Hanley's Depo., p. 88, ll. 17-19). Further, Hanley testified that he tries to put important discussions in writing in his attorney file. *Id.* at p. 458, ll. 9-11. Importantly, in the notes of the meeting where Hanley claims the Decedent informed him that he did not want a FLP, **Hanley did not make any notes whatsoever of the Decedent's alleged decision directing Hanley not to prepare a FLP.** *See id.* at pp. 454-456. and *Ex. "J"* (Hanley's notes from the 1/3/02 meeting with the Decedent). With

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<sup>3</sup> Defendants incorrectly argued to this Court that the reason the Decedent probably did not want a FLP was because he would have lost complete control over his assets by placing them in a FLP. First and foremost, this is not true. As mentioned above, Boyle testified that Hanley would be drafting the FLP. Further, the standard FLP used by Gunster as well as the Trust documents required that income be distributed to the Decedent. *See Ex. "P"* (The 1981 QTIP Trust, Article 11), *"Q"* (The 1985 QTIP Trust, Article 1), *Ex. "R"* (Revocable Trust, Article Four) and *Ex. "S"* (Defendant's FLP, Article V, p. 24). In fact, Mr. Raymond testified that the Decedent would have received approximately \$6 million per year from the FLP if his assets would have been used to fund the FLP. *See Ex. "N"* (J. Raymond's Depo, p. 425, ll. 1-5, p. 428, ll. 1-6). Second, such reasoning contradicts the direct evidence in this case. The record evidence demonstrates that the Decedent heavily relied upon the advice of his professionals. As stated by Frank in his affidavit, Frank handled and largely controlled his father's finances for many years. *See Ex. B* (Frank's Affidavit at ¶ 4). This is true as the majority of the Decedent's funds were held in trusts and in a brokerage account that were controlled by Frank.

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respect to the funding of the trust, it is the Defendants' practice to assist their clients with the funding of the FLPs. *See Ex. "C"* (Hanley's Depo., p. 174, ll. 22-25, p. 175, ll. 1-6).

Thus, because the Decedent directed that a FLP be prepared, and because the evidence demonstrates that the Decedent would have received a significant amount of income from the FLP, there is ample evidence that the Decedent wanted a FLP. Accordingly, a jury can reasonably find that the record evidence supports Plaintiffs' claim that the Decedent directed Hanley to prepare a family limited partnership.

**B. The "Face of the Will" Doctrine is Inapplicable.**

As succinctly stated by the *Sorkowitz* Court:

In this day and age, clients go to estate planning experts not only to have valid testamentary documents prepared, but also to have an estate plan that will minimize the amount transferred to the donor's intended beneficiaries at the intended times and intervals. We would be ignoring reality on the basis of the fiction that one cannot know the decedent's intent unless it is apparent within the four corners of the estate planning documents, and without regard to common sense and expert opinion on estate planning matters. We should not ignore as judges what we know as lawyers and as men and women. It is far more likely that the decedents here intended to minimize taxes payable upon their deaths than that they were indifferent to the amount of taxes payable, and it is virtually certain that they did not intend to pay more taxes than necessary.

*Sorkowitz v. Lakritz, Wissbrun & Associates, P.C.*, 683 N.W.2d 210, 215 (Mi. App. Ct. 2004).

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The "face of the will" or "four corners" doctrine is used to determine whether the privity exception in malpractice actions should be applied where the client in engaging the services of a professional intended to benefit a third party. *See Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, 612 So.2d 1378, 1379 (Fla. 1993). In applying the doctrine, courts look to the four corners of a testamentary instrument to determine whether the Decedent expressed an intent to benefit the third party. *See id.* at 1280 and *Kinney v. Shinholser*, 663 So.2d 643, 645 (Fla. 5<sup>th</sup> DCA 1995). The doctrine should only apply where the Defendant is being sued for malpractice in the drafting of a will or trust. *See Kinney*, 663 So.2d at 646.

The doctrine also should not be applied to a claim that "seeks recovery for diminution in the pot or pie left by the Decedent alleged to have been caused by the negligence of the defendants who provided estate planning." *Sorkowitz*, 683 N.W.2d at 216. This is particularly true where the interests of the deceased client, the estate, and all the beneficiaries are aligned on the same side, because there is no danger that the defendant attorneys will be wrongly held accountable to a third-party for properly implementing the desires of their client. *See id.* Where there is a claim that the decedent engaged an attorney for estate planning which encompasses tax advice, and the defendants either failed to advise of or

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failed to prepare documents that would have prevented the tax deficiencies, "[s]uch claims will rarely be apparent on the face of the estate planning documents, without resort to extrinsic evidence." *Id.* "There is no reason to exempt estate planning lawyers from liability for malpractice simply because the damages often accrue after their client's death." *Id.*

In the Order Denying in Part and Granting in Part Defendants Gunster and Hanley's Second Amended Motion for Partial Summary Judgment ("the Order"), this Court held that the Plaintiffs did not provide any "record evidence that the decedent ever instructed Gunster and Hanley to form and fund a family limited partnership." In support of the Order, this Court relied upon *Espinosa* and *Lorraine v. Grover, Ciment, Weinstein & Stauber, P.A.*, 467 So.2d 315, 318 n.6 (Fla. 3d DCA 1985), two cases interpreting the *face of the will* doctrine.

In *Lorraine*, the beneficiary, the testator's mother, sued her son's attorney for the negligent drafting of a will. *See id.* at 316. The mother sued her son's attorneys because they were negligent when they drafted a provision in the will which left her a life estate and later failed because it was considered as the son's homestead. *See id.* The Third District found that an attorney's "liability to the testamentary beneficiary can arise only if, due to the attorney's professional negligence, the testamentary intent, *as expressed in the will*, is frustrated, and the beneficiary's legacy is lost or diminished as a direct result of that

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negligence.” *Id.* at 317-18. While the mother attempted to argue that the son wished to leave her a different property interest, the court found that there was no such intent in the son’s will. *See id.* In reaching this decision, the court noted that while the plaintiff was an intended beneficiary of the will, to permit the plaintiff to prove that the testamentary intent was other than that expressed in the will not only would run contrary to the avowed purpose of the statute, but also would open the door to “the fabled triplets of conjecture, speculation and surmise.” *Id.* at 318 n. 6. The court further noted that it would make no determination as to whether the attorney’s action amounted to a breach of duty owed to his client, and therefore allowed the son’s estate to proceed with a claim. *See id.* at 317 n. 4. Because *Lorraine* involves the negligent drafting of a will, *Lorraine* is inapplicable.

Similarly, in *Espinosa*, the Plaintiff sued her father’s attorneys for the negligent preparation of a will. *See Espinosa*, 612 So.2d at 1379. The Plaintiff alleged that her father had contacted his attorney to include her in his will, and due to a disagreement with his attorney, the father did not execute the new will. *See id.* The Supreme Court held that an attorney’s liability in the performance of his or her professional duties is limited to clients with whom the attorney shares a privity of contract. *See id.* at 1380. Because the father had not expressed an intention in his will to include the Plaintiff, the Supreme Court refused to

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allow extrinsic evidence to support the Plaintiff's claim that she was an intended beneficiary of the attorney's services. *See id.* The Supreme Court, however, did agree with the district court that the father's estate could maintain a legal malpractice action against his attorney. *See id.*

This is a case of negligent estate planning; it is not a will contest. There is no disagreement over who the beneficiaries of the testamentary documents are, nor over the various proportional percentages of ownership in the Decedent's various interests. Indeed, this Court correctly held on p. 3 of its Order that the Plaintiffs had standing to pursue this case. Notwithstanding this fact, if this Court applies *Espinosa* and *Lorraine*, then the Decedent's estate should still be permitted to sue the Defendants for negligence in failing to form and fund a FLP and rely on extrinsic evidence in support of their claim.<sup>4</sup>

It is important to note that a FLP is a tax saving vehicle prepared for an individual during its lifetime and should never be created post mortem as the individual would not receive the tax saving discount for which the FLP was designed. Thus, the intent to form a FLP should never be found in a will.

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<sup>4</sup> Notably, the Court in *Coln v. Bush*, 2004 WL 909430 (Cal. 2d DCA 2004), allowed a Decedent's son to proceed with a negligence claim against his father's attorney due to the attorney's failure to follow his instruction to create a FLP for his father.

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**C. The Defendants Were Negligent in Advising the Decedent to Form a QPRT and in Failing to Advise the Decedent to He Should Form a FLP Prior to His Death.**

It is undisputed that the Decedent retained the services of the Defendants in order to save taxes. The fact that the Defendants initially recommended a QPRT instead of a FLP constitutes negligence. A QPRT is a tax planning vehicle which allows a person to transfer one or more residences into a trust and receive a discount for gift tax purposes while still living in those residences for a term of years. *See Ex. "C"* (Hanley's Depo., p. 81, ll. 16-25, p. 82, ll. 1-10). Hanley and Schneider admit that in order for the elderly Charles to have received a tax savings from the QPRT, Charles had to have survived the five year term selected for the QPRT. *See id.* at p. 165, ll. 23-25, p. 166, l. 1 and *Ex. "J"* (Schneider's Depo., p. 92, ll. 20-25, p. 93, ll. 1-4). Hanley also admits that there was not a requirement for a FLP that the decedent survive its creation in order to receive the full benefits from the FLP. *See id.* at p. 166, ll. 2-6. Indeed, had Gunster drafted a FLP for Charles, the assets he could have transferred into the FLP were not limited to just his residence. *See Ex. "T"* (Gunster's FLP Overview). Further, Hanley admits that as soon as the FLP was funded, Charles would have achieved the benefits of the discount and tax savings. *See Ex. "C"* (Hanley's Depo., p. 166, ll. 7-12). Sadly, Charles did not survive the five year term. *See id.*

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at p. 82, ll. 13-14. Therefore, in contrast to the FLP which should have been formed and funded, Charles received no benefit whatsoever from the expensive QPRT prepared and funded by Gunster.

“An attorney who gives improper or erroneous advice to a client who suffers damage as a result may be subject to a malpractice action for compensatory damages.” *Solodky v. Wilson*, 474 So.2d 1231, 1232 (Fla. 5<sup>th</sup> DCA 1985), *Kinney*, 663 So.2d at 646, and *Sauer v. Flanagan and Maniotis, P.A.*, 748 So.2d 1079, 1080 (Fla. 4<sup>th</sup> DCA 2000). In the instant case, the Defendants concede that the Decedent did not achieve the benefits of the QPRT, and would have achieved tax saving benefits if the Decedent had a FLP. The Defendants advice in initially recommending a QPRT instead of a FLP also constitutes negligence.

Moreover, the Defendants negligence is exacerbated by the fact that Hanley received a phone call from Frank informing Hanley that the Decedent was near death, and was questioned by Frank whether or not any action needed to be taken with respect to his father's estate planning. Frank was informed that no action needed to be taken, and no action was taken.

It is well settled that “[a]n attorney may not “neglect [] to perform the service which he agrees to perform or which by implication he agrees to perform when he accepts

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employment.” *Atkin v. Tittle & Tittle*, 730 So.2d 376, 378 (Fla. 3d DCA 1999) (citing to *Dykema v. Godfrey*, 467 So.2d 824, 825 (Fla. 1<sup>st</sup> DCA 1985) and *Maillard v. Dowdell*, 528 So.2d 512, 515 (Fla. 1<sup>st</sup> DCA 1985) There is no doubt that the Decedent retained the Defendants to advise him as to how to reduce his estate taxes. Further, as stated in Bernardo’s Affidavit, the Decedent was the type of person that would follow the advice provided to him without question. Hanley’s failure to advise the Decedent to prepare a FLP or inquire as to whether the Decedent wanted a FLP at the time he received Frank’s call, especially in light of the fact that the QPRT drafted by the Defendants would provide absolutely no benefit to the Decedent, also constitutes negligence. Accordingly, summary judgment on the FLP issue is not proper.

**D. Damages.**

“As a general proposition, once a negligent act occurs, the actor will be liable for injury flowing therefrom, unless an act unforeseeable to him and independent of his negligence intervenes to cause loss.” *Mitrani v. Druckman*, 576 So.2d 406, 408 (Fla. 3d DCA 1991). Moreover, whether a plaintiff is an intended beneficiary of the attorneys’ estate planning professional services and whether the attorneys’ alleged negligence **caused damage**

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**to the plaintiff are questions of fact that preclude summary judgment.** *See, Winston v. Brogan*, 844 F.Supp. 753, 756 (S.D. Fla. 1994) (Emphasis added).

In the instant case, Plaintiffs' expert testified that the Defendants should have advised the Decedent to place his interests in the QTIP trusts and his individual brokerage account in the FLP. This would have maximized the tax savings that family limited partnerships are designed to achieve. *See Ex. "N"* (J. Raymond's Depo., p. 149 ll. 15 - 19, pp. 150 - 152) and *Ex. "O"* (Valuation Report). In fact, the record evidence shows that during August and September 1999, the time when the Decedent was discussing the FLP concept with the Defendants, the Decedent was providing the Defendants with information and the values of his personal brokerage account and the QTIP Trusts accounts. *See Ex. "D"* (Hanley's Memo to Schneider dated 8/24/99). This evidence demonstrates that the Decedent was providing the Defendants with information in order to determine the applicable discounts that a FLP would provide him.

Moreover, Mr. Thom, one of the Trustees of the QTIP Trusts, also inquired as to what could be done with respect to the QTIP Trusts and the Decedent's estate plan. *See Ex. "E"* (Thom's letter to Hanley dated 9/8/99). In a memorandum dated August 24, 1999 from Hanley to Schneider, Hanley wrote that the Decedent had inquired as to "what the rules are

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and what he can do relative to each trust so that he can consider what options are available to them in connection with any possible estate planning changes that would result in reduced estate taxes." *See Ex. "D"* (Hanley's Memorandum to Schneider dated 8/24/99). Whether the Decedent would have placed these assets in the FLP had he been so advised by the Defendants, at best, raises a disputed issue of material fact.

More importantly, as demonstrated in the valuation report, the damages resulting from the Defendants' failure to form and fund the FLP has been specifically quantified for each asset that would have been placed in the FLP (i.e. the Decedent's brokerage account, and his interests in the QTIP trusts). *See Ex. "O"* (Valuation Report). Thus, a jury will easily be able to quantify Plaintiffs' damages as a result of any of these accounts not being funded in the FLP. At a bare minimum, Hanley testified that he was contemplating funding the FLP with the Decedent's personal brokerage account.<sup>5</sup> Accordingly, this Court should vacate that portion of the Order addressing the Plaintiffs' FLP claims.

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<sup>5</sup> When questioned by this Court about the damage issue, counsel for the Defendants, Mr. Mrachek, conceded at the hearing on the Defendants Second Amended Motion for Partial Summary Judgment that perhaps the Plaintiffs' Expert should be allowed to testify at trial and that the issue may be revisited in a Motion for Directed Verdict after the Plaintiffs' Expert had the opportunity to support his damage analysis.

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**V. CONCLUSION**

For all of the foregoing reasons, Plaintiffs' respectfully request that this Court vacate that portion of the Order Granting in Part Defendants Gunster and Hanley's Second Amended Motion for Partial Summary Judgment with respect to the family limited partnership issue.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to L. Louis Mrachek, Page, Mrachek, Fitzgerald & Rose, P.A., 505 South Flagler Drive, Suite 400, West Palm Beach, Florida 33401, this 19 day of May, 2005.

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