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Casenotes: Attorney Malpractice — under Third Party Beneficiary Theory, Nonclient Can Sue Attorney for Negligent Misrepresentation without Proof of Privity of Contract. Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618 (1985)

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CASENOTES

ATTORNEY MALPRACTICE — UNDER THIRD PARTY BENEFICIARY THEORY, NONCLIENT CAN SUE ATTORNEY FOR NEGLIGENT MISREPRESENTATION WITHOUT PROOF OF PRIVITY OF CONTRACT. *Flaherty v. Weinberg*, 303 Md. 116, 492 A.2d 618 (1985).

Mortgagors purchased a house, relying upon the assurance of the mortgagee's attorney that the lot was described correctly in the sales contract.[1] The mortgagors built a swimming pool on their lot and, contemplating further improvements, obtained a new survey.[2] This survey indicated that the sales contract had identified incorrectly the boundaries of their lot.[3] Although the mortgagors had not employed the attorney, they asserted that they were the intended beneficiaries of the contractual relationship between the mortgagee and the attorney.[4] Based upon this third party beneficiary theory, the mortgagors brought suit against the attorney for malpractice, alleging breach of warranty, negligence, and negligent misrepresentation.[5]

The Circuit Court of Maryland for Frederick County sustained the attorney's demurrer because the mortgagors failed to allege facts sufficient to prove that they were in privity of contract with the attorney or that they were the intended beneficiaries of the contract between the mortgagee and the attorney.[6] On certiorari, the Court of Appeals of Maryland[7] reversed and held that under a third party beneficiary theory, a nonclient can sue an attorney for negligent misrepresentation without

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1. Flaherty v. Weinberg, 303 Md. 116, 132, 492 A.2d 618, 626 (1985). Aware that the mortgagors did not retain separate counsel, the attorney assured them, "they were purchasing the property as described in the contract of sale, and that a dwelling and well were located on the property." *Id.* at 132-33, 492 A.2d at 626.
2. *Id.* at 132-33, 492 A.2d at 626. After moving into their house, the mortgagors built a swimming pool and used a well that, according to the original survey, was on their property. The mortgagors, planning further improvements, ordered another survey which revealed that the well was not on their property and that the swimming pool, driveway, and retaining wall encroached upon their neighbor's property. *Id.*
3. *Id.* As part of the settlement, the mortgagors received a survey that indicated incorrect boundaries. The mortgagee had ordered another survey that contained the correct boundaries, but it was not completed until approximately four weeks after settlement. *Id.*
4. *Id.* at 133, 492 A.2d at 626-27. The mortgagors did not employ the attorney, but they did pay for the survey and ultimately paid the attorney's fee as part of the settlement costs. *Id.* at 132, 137 n.8, 492 A.2d at 626, 629 n.8.
5. *Id.* at 133, 492 A.2d at 626-27. The first declaration was filed against the attorney and the surveyor, claiming negligence and breach of warranty against each party. The attorney's demurrer to this declaration was sustained with leave to amend. The mortgagors subsequently filed an amended declaration and then a second amended declaration containing an additional count for negligent misrepresentation against the attorney. The suit against the surveyor was dismissed voluntarily by the mortgagors so they could proceed to an immediate appeal against the attorney. *Id.* at 133-34, 492 A.2d at 626-27.
6. *Id.* at 133, 492 A.2d at 626-27.
7. The mortgagors appealed to the Court of Special Appeals of Maryland, but the

proof of privity of contract.[8]

Whether an attorney malpractice action is based upon a contract theory or a negligence theory,[9] the plaintiff must prove that the attorney owed him a duty of care.[10] Traditionally, this duty of care required proof that there was privity of contract between the two parties.[11] If the plaintiff was not the attorney's client or employer, he could not bring an attorney malpractice action.[12] There were two principal reasons for the traditional privity requirement: (1) to allow liability without contractual privity would deprive the parties to the contract control over their own agreement; and (2) a duty to the general public would impose a great potential burden of liability on the contracting parties.[13] A minority of jurisdictions still adhere to this traditional rule without exception.[14]

A growing trend among jurisdictions, however, is to find a duty of care owed by an attorney based upon a third party beneficiary theory even if the plaintiff is not the attorney's client or employer.[15] Generally,

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court of appeals granted certiorari prior to a decision by that court. *Id.* at 134, 492 A.2d at 627.

8. *Id.* at 137, 492 A.2d at 628.
9. Attorney malpractice actions have been based on both contract and negligence theories of recovery. *See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (contract), *cert. denied*, 368 U.S. 987 (1962); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983) (contract); Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982) (negligence). For a discussion of the choice between contract and tort in Virginia, see Comment, *Legal Malpractice in Virginia: Tort or Contract?* 16 U. RICH. L. REV. 907 (1982).
10. Mumford v. Staton, Whaley & Price, 254 Md. 697, 706, 255 A.2d 356, 364 (1969); R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 101, at 171-76 (2d ed. 1981) [hereinafter MALLEN & LEVIT]; D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE § 1.1, at 1-3 (1980) [hereinafter MEISELMAN]; W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 93 (5th ed. 1984) [hereinafter PROSSER & KEETON].
11. National Sav. Bank v. Ward, 100 U.S. 195 (1880) (establishing the traditional rule requiring privity in attorney malpractice); MALLEN & LEVIT, *supra* note 10, §§ 71-72, at 142-43 (the strict requirement of privity defines the parameters of an attorney's duty).
12. *See* MALLEN & LEVIT, *supra* note 10, §§ 71-73, at 142-46; *see also* Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943); Wlodarek v. Thrift, 178 Md. 453, 13 A.2d 774 (1940).
13. Annotation, *Attorney's Liability, to One Other Than His Immediate Client, for Consequences of Negligence in Carrying Out Legal Duties*, 45 A.L.R.3d 1181, 1184 (1972) [hereinafter Annotation].
14. *See, e.g.*, Lilyhorn v. Dier, 214 Neb. 728, 335 N.W.2d 554 (1983); Calamari v. Grace, 98 A.D.2d 74, 469 N.Y.S.2d 942 (1983); First Mun. Leasing Corp. v. Blankenship, Potts, Aikman, Hagin & Stewart, 648 S.W.2d 410 (Tex. Ct. App. 1983).
15. MALLEN & LEVIT, *supra* note 10, § 80, at 156-60; Annotation, *supra* note 13, at 1190-91. *See, e.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P.2d 685 (1961); Stowe v. Smith, 184 Conn. 194, 441 A.2d 81 (1981); Needham v. Hamilton, 459 A.2d 1060 (D.C. 1983); Lorraine v. Grover, Ciment, Weinstein & Stauber, 467 So. 2d 315 (Fla. Dist. Ct. App. 1985); Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Succession of Killingsworth, 292 So. 2d 536 (La. 1973); Simon v. Zipperstein, No. 86-9655 (Ohio Ct. App. July 29, 1986) (LEXIS, Genfed library, Omni file); Guy v. Liederbach, 501 Pa. 47, 459 A.2d 744 (1983).

a third party beneficiary contract arises when two parties enter into a contract with the intent to confer a direct benefit on a third party.[16] Although governed by principles of contract law, the third party beneficiary theory has been used by analogy to prove the duty element in negligence actions.[17] Whether the malpractice action is based upon a contract theory[18] or a negligence theory,[19] the plaintiff can allege third party beneficiary status as an exception to the privity requirement, provided he is one of a class of persons specifically intended to benefit from the attorney's employment.

Under the third party beneficiary theory, the plaintiff must prove that the client's actual purpose for employing the attorney was to benefit the plaintiff.[20] For example, named beneficiaries to a will can bring an attorney malpractice action against the testator's attorney.[21] Accordingly, the third party beneficiary theory does not apply in an adversary context because an attorney can owe no duty to an adverse party.[22] In determining whether the plaintiff is an intended third party beneficiary, the Supreme Court of Pennsylvania relied upon the Restatement (Second) of Contracts which defines intended beneficiaries:[23]

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
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> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.[24]

The third party beneficiary theory is governed, not by negligence law, but by traditional, well-recognized principles of contract law.[25] Thus, if the

16. 2 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 347 (3d ed. 1959); RESTATEMENT (SECOND) OF CONTRACTS §§ 302, 304 (1981).
17. *See Pelham*, 92 Ill. 2d 13, 440 N.E.2d 96.
18. *See Lucas*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821; *Stowe*, 184 Conn. 194, 441 A.2d 81; *Guy*, 501 Pa. 47, 459 A.2d 744.
19. *See Pelham*, 92 Ill. 2d 13, 440 N.E.2d 96.
20. *See id.*; *see also* Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978); Marker v. Greenberg, 313 N.W.2d 4 (Minn. 1981).
21. *See, e.g.*, *Stowe*, 184 Conn. 194, 441 A.2d 81; Needham v. Hamilton, 459 A.2d 81 (D.C. 1983); *Pelham*, 92 Ill. 2d 13, 440 N.E.2d 96; Succession of Killingsworth, 292 So. 2d 536 (La. 1973); *Guy*, 501 Pa. 47, 459 A.2d 744.
22. MALLEN & LEVIT, *supra* note 10, § 79, at 154.
23. *Guy*, 501 Pa. at 59-61, 459 A.2d at 751.
24. RESTATEMENT (SECOND) OF CONTRACTS § 302(1) (1981).
25. *Guy*, 501 Pa. at 62, 459 A.2d at 752. *See* Annotation, *supra* note 13, at 1186 ("this [third party beneficiary] approach has the merit of being a well-recognized concept with considerable case authority"); Note, *Attorney Malpractice — Third Party Beneficiaries — Named Beneficiaries Under a Will May Bring a Cause of Action in Assumpsit Against the Drafting Attorney*, 88 DICK. L. REV. 535, 546 (1984) [hereinafter Note, *Attorney Malpractice*] (because liability is governed not by negli-

client's intent to benefit the plaintiff was not actual, but merely foreseeable, the exception is not satisfied.

Nevertheless, under a "balancing test" theory, a minority of courts hold that if a client's intent to benefit the plaintiff is merely foreseeable, liability to a third party may be found.[26] The Supreme Court of California identified foreseeability as one of six factors considered to determine whether a duty to a third party exists:[27]

(1) the extent to which the transaction was intended to affect the plaintiff;
(2) the foreseeability of harm to the plaintiff;
(3) the degree of certainty that the plaintiff suffered injury;
(4) the closeness of the connection between the defendant's conduct and the injuries suffered;
(5) the extent to which third party suits impose a burden on the legal profession; and,
(6) the policy of preventing future harm.[28]

Although each factor is considered, none is determinative.[29] Under this approach an attorney may owe a duty to a person not intended to benefit from his services, but who foreseeably may be injured by his negligence.[30] The factors involve policy considerations that are imprecise and balanced inconsistently.[31] This approach, therefore, is less predictable than the third party beneficiary exception adopted by a majority of

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gence principles, but by contract principles, the class of persons to whom the attorney may be liable is more restrictive).

26. *See, e.g.*, Travelers Ins. Co. v. Breese, 138 Ariz. 508, 675 P.2d 1327 (Ct. App. 1983); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); McAbee v. Edwards, 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976); Auric v. Continental Casualty Co., 111 Wis. 2d 507, 331 N.W.2d 325 (1983).
27. *See Lucas*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (overruling Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895) (requiring strict privity for an attorney malpractice action)). The attorney in *Lucas*, however, was found not guilty of negligently drafting a will that violated the Rule Against Perpetuities because the rule was too difficult even for attorneys to understand. *Lucas*, 56 Cal. 2d at 592, 364 P.2d at 690, 15 Cal. Rptr. at 826.
28. *Id.* at 588-89, 364 P.2d at 687-88, 15 Cal. Rptr. at 823-24. The original balancing test, as set forth in Biakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1958), included as a factor the moral blame attached to the defendant's conduct. The *Lucas* court replaced the "moral blame" factor with a consideration of the burden imposed on the profession. *Lucas*, 56 Cal. 2d at 588-89, 364 P.2d at 687-88, 15 Cal. Rptr. at 823-24. Subsequent decisions have considered the moral blame factor. *See* Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).
29. *See* Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126, 144 (1982) (test fails to indicate whether a duty exists if any one of the factors is not met).
30. *See id.*; *see also* MALLEN & LEVIT, *supra* note 10, § 81, at 161.
31. *See* Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L. J. 48, 60-61 (1981) [hereinafter Note, *Attorney's Liability*]; Note, *Attorney Malpractice*, *supra* note 25, at 543-44.

jurisdictions.[32]

Whether courts follow the third party beneficiary theory or the balancing test theory to determine a nonclient's standing to sue, an attorney malpractice action based upon a negligence theory may be alleged in terms of negligence[33] or negligent misrepresentation.[34] Negligence is alleged more often than negligent misrepresentation because a cause of action for negligence exists regardless of whether there was an error of judgment, inadvertance, or misrepresentation.[35] Liability in negligence generally requires proof of a duty and damage caused by a breach of that duty.[36] In Maryland, however, the plaintiff also must prove an employment relationship between the plaintiff and the attorney.[37]

Liability for negligent misrepresentation generally requires, in addition to the traditional elements of negligence, a negligent statement or representation as well as a rightful reliance upon that negligent representation.[38] Consequently, in an adversary context, negligent misrepresentation is unavailable because reliance upon an opponent's attorney is unjustifiable.[39] In Maryland, unlike an attorney malpractice action in ordinary negligence, proof of an employment relationship between the plaintiff and the attorney is unnecessary if the action is based upon negligent misrepresentation.[40]

The Court of Appeals of Maryland has followed the majority view

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32. *See* Guy v. Liederbach, 501 Pa. 47, 57, 459 A.2d 744, 749 (1983) (rejecting the *Lucas* approach because it "has led to *ad hoc* determinations and inconsistent results"). For an example of the inconsistent results of the balancing test, compare Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (attorney held not liable to stock purchasers who relied upon erroneous advice given to his client about the stock) with Roberts v. Ball, Hunt, Hort, Brown & Baerwitzs, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976) (attorney held liable to lender who the attorney knew would rely upon erroneous advice given to his client about a partnership's status).

33. *See* MALLEN & LEVIT, *supra* note 10, § 44, at 93-94.

34. *Id.* § 111, at 204-06.

35. *Id.* § 44, at 93.

36. *Id.* § 100, at 169; PROSSER & KEETON, *supra* note 10, § 30, at 164-65.

37. Kendall v. Rogers, 181 Md. 606, 611-12, 31 A.2d 312, 315 (1943). The Court of Appeals of Maryland adopted a three-part test from Maryland Casualty Co. v. Price, 231 F. 397, 401 (4th Cir. 1916):

> (1) the attorney's employment;
> (2) his neglect of a reasonable duty; and
> (3) loss to the client proximately caused by that neglect of duty.

Kendall, 181 Md. at 611-12, 31 A.2d at 315.

38. RESTATEMENT (SECOND) OF TORTS § 552 (1977); MALLEN & LEVIT, *supra* note 10, § 44, at 93-94.

39. *See* MALLEN & LEVIT, *supra* note 10, § 44, at 94.

40. A negligent misrepresentation action in Maryland requires proof of five elements:

> (1) The defendant, owing a duty of care to the plaintiff, negligently asserts a false statement;
> (2) The defendant intends that his statement will be acted upon by the plaintiff;
> (3) The defendant has knowledge that the plaintiff will probably rely on the statement, which, if erroneous, will cause loss or injury;

in permitting a third party beneficiary exception to the privity requirement for attorney malpractice actions. In *Prescott v. Coppage*,[41] the court found that a preferred creditor was a third party beneficiary of the relationship between an attorney and a debtor's receiver.[42] The court held that the preferred creditor had standing to sue the attorney representing the debtor's receiver because the attorney improperly distributed the debtor's assets.[43]

The Court of Special Appeals of Maryland, however, in *Clagett v. Dacy*,[44] interpreted the exception recognized in *Prescott* to apply only to actions based upon a contract theory, not a negligence theory.[45] The *Clagett* court recognized that the third party beneficiary theory relaxed the privity requirement, but found that the plaintiff's declaration did not state a cause of action because it failed to allege that the plaintiff was part of a class of persons specifically intended to benefit from the attorney's employment.[46] Recently, the same court expressly declined to decide whether a will beneficiary can maintain a legal malpractice action against the testator's attorney for the negligent preparation or execution of a will.[47] The court rejected the beneficiary's cause of action because the asserted testamentary intention was not apparent on the face of the will.[48] Consequently, the question of whether an attorney is liable to a third party beneficiary under a negligence theory was left unresolved.[49]

In *Flaherty v. Weinberg*,[50] the Court of Appeals of Maryland addressed this issue and held, "although [the third party beneficiary exception] is 'peculiarly applicable' to contract actions, . . . the scope of duty concept in negligence actions may be analogized to the third party beneficiary concept in the context of attorney malpractice cases."[51] The court explained, "the test for third party recovery is whether the [client's] intent to benefit [the nonclient] actually existed, not whether there could

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(4) The plaintiff, justifiably, takes action in reliance on the statement; and

(5) The plaintiff suffers damage proximately caused by the defendant's negligence.

Martens Chevrolet v. Seney, 292 Md. 328, 337, 439 A.2d 534, 539 (1982).

41. 266 Md. 562, 296 A.2d 150 (1972).
42. Prescott v. Coppage, 266 Md. 562, 574-76, 296 A.2d 150, 156-57 (1972) (the attorney knew or should have known that the debtor owed a continuing obligation to a preferred creditor).
43. *Id.* at 574, 296 A.2d at 156-57.
44. 47 Md. App. 23, 420 A.2d 1285 (1980).
45. Clagett v. Dacy, 47 Md. App. 23, 28, 420 A.2d 1285, 1289 (1980).
46. *Id.* at 30, 420 A.2d at 1290.
47. Kirgan v. Parks, 60 Md. App. 1, 12, 478 A.2d 713, 718, *cert. denied*, 301 Md. 639, 484 A.2d 274 (1984).
48. *Id.* at 3, 478 A.2d at 714.
49. The *Kirgan* court answered the question of whether an attorney is liable to a testamentary beneficiary for the negligent drafting of a will with a "definite maybe." 60 Md. App. at 3, 478 A.2d at 714.
50. 303 Md. 116, 492 A.2d 618 (1985).
51. Flaherty v. Weinberg, 303 Md. 116, 130, 492 A.2d 618, 625 (1985).

have been an intent to benefit [the nonclient]."[52] If the third party alleges and proves the remaining elements of a cause of action, he can recover against the attorney in negligence.[53]

The action for breach of warranties was rejected because the plaintiffs failed to allege a contractual relationship or a statute that would extend a warranty under the circumstances.[54] The action for negligence also was rejected because the plaintiffs failed to "establish an employment relationship between [themselves] and the attorney."[55] The action for negligent misrepresentation, however, was sufficient under the third party beneficiary exception because the plaintiffs alleged, "the hiring of [the attorney] was intended to benefit the [mortgagees] as well as the [mortgagor] in that both had identical interests in the property."[56] The court explained that the third party beneficiary exception ordinarily is inapplicable in the adversarial context[57] and discussed the potential for conflicting interests between mortgagor and mortgagee in real estate transactions.[58] Notwithstanding, the *Flaherty* court found that the pleaded facts gave rise to an inference that the mortgagor and mortgagee had identical interests; accordingly, the declaration withstood a demurrer.[59]

Flaherty clarifies Maryland's position on the application of the third party beneficiary exception in attorney malpractice cases. The court recognized that the court of special appeals interpreted the *Prescott* holding to be "peculiarly applicable"[60] to contract actions. Nevertheless, the *Flaherty* court found that the third party beneficiary theory has a broader

52. *Id.* at 131, 492 A.2d at 625.
53. *Id.*
54. *Id.* at 135, 492 A.2d at 627 (express or implied warranties arise only as provided by law or as they are established under a contractual relationship).
55. *Id.* at 134, 492 A.2d at 627. Relying upon the test adopted in *Kendall*, the *Flaherty* court held that an employment relationship was a prerequisite to a legal malpractice action in negligence. The employment agreement, however, need not be express in all cases. *Id.* (citing Central Cab Co. v. Clarke, 259 Md. 542, 549, 270 A.2d 662, 666 (1970)).
56. *Flaherty*, 303 Md. at 138-39, 492 A.2d at 629-30.
57. *Id.* at 131, 492 A.2d at 626.
58. *Id.* at 137-38, 492 A.2d at 629. Real estate transactions are conducive to conflicts of interest. *See* Durfee, *Third Party Malpractice Claims Against Real Estate Laywers*, 13 COLO. LAW. 996 (1984).
59. *Flaherty*, 303 Md. at 138-39, 492 A.2d at 629-30. The *Flaherty* court held that the claim of negligent misrepresentation was sufficient to withstand a demurrer. To withstand a demurrer, a party need only allege facts that, if proven, would entitle him to relief. Demurrers were abolished in Maryland when the revised Maryland Rules became effective on July 1, 1984. *Id.* at 135 n.7, 492 A.2d at 628 n.7; MD. R. 2-302. Under the revised rules, a party can now bring a motion for failure to state a claim upon which relief can be granted. MD. R. 2-322(b)(2). The court discussed two inconclusive factors to determine whether the buyers were intended third party beneficiaries: (1) the buyers' election to go to settlement without retaining separate counsel; and (2) the differing interests of the mortgagor and the mortgagee throughout the mortgage process, causing a possible conflict of interest if one attorney represents both. *Id.* at 136-38, 492 A.2d at 628-29.
60. *Flaherty*, 303 Md. at 130, 492 A.2d at 625.

range of application than contract actions.[61] If the attorney malpractice claim is based upon a negligence theory, the plaintiff may allege that the attorney owed him the same duty as that owed to a third party beneficiary based upon a contract theory.[62] The court stated that it essentially had adopted this test in *Prescott*.[63]

The *Flaherty* court implicitly rejected the balancing test theory for the more predictable third party beneficiary theory approach.[64] In adopting the third party beneficiary exception, the court adhered to the policy reasons underlying the privity requirement; the contractual parties are neither deprived of control over their own agreement, nor burdened with a duty to the general public.[65] The third party beneficiary exception is also consistent with the Maryland Rules of Professional Conduct: an attorney should have an undivided loyalty to his client unless the client clearly intended his hiring to benefit a third party.[66] The third party beneficiary exception is not satisfied unless the client's intent to benefit the plaintiff is actual.[67] The balancing test theory, on the other hand, may be satisfied if, after consideration of the other factors, the effect of the attorney's undertaking on the nonclient was foreseeable.[68] Consequently, the third party beneficiary theory applies to intended third parties; the balancing theory applies to foreseeable third parties.[69] Limiting an attorney's duty in terms of the client's actual intent to benefit, instead of in terms of foreseeability, provides a more predictable guideline for determining attorney liability to a third party and prevents litigation brought by those who may benefit indirectly from an attorney's performance.[70]

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61. *Id.* at 130, 492 A.2d at 625.
62. MALLEN & LEVIT, *supra* note 10, § 80, at 159-60.
63. *Flaherty*, 303 Md. at 131, 492 A.2d at 625.
64. *Id.* at 123-26, 130, 492 A.2d at 621-23, 625 (implicitly rejecting the balancing test theory by discussing both theories and adhering to the third party beneficiary exception). The court identified two other theories, the assumption of duty theory and the fiduciary or agency theory, but expressed no opinion as to their validity in Maryland. *Id.* at 123 n.4, 492 A.2d at 621 n.4.
65. *Id.* at 130-31, 492 A.2d at 625. The test as articulated by *Flaherty* requires that the client have actual intent to benefit the third party. This requirement ensures that contractual parties have control over their agreement. For the policy reasons underlying the privity requirement, see *supra* text accompanying note 13.
66. *See* MARYLAND RULES OF PROFESSIONAL CONDUCT (1986), Rule 1.7 (loyalty to a client prohibits undertaking representation directly adverse to a client without client's consent), Rule 1.3 (an attorney must represent his client zealously within the bounds of the law). The Maryland Rules of Professional Conduct were adopted on May 23, 1986, and took effect on January 1, 1987, replacing the Code of Professional Responsibility. 13:11 Md. Reg. 3 (May 23, 1986).
67. *Flaherty*, 303 Md. at 131, 492 A.2d at 625-26.
68. *See supra* note 30 and accompanying text. Commentators have suggested, however, that the predominant inquiry under the balancing test theory generally has been whether the services were intended to benefit the plaintiff. *See* MALLEN & LEVIT, *supra* note 10, § 80, at 157.
69. *See* Note, *Attorney's Liability*, *supra* note 31, at 60-61; Note, *Attorney Malpractice*, *supra* note 25, at 543-44.
70. *Flaherty*, 303 Md. at 131, 492 A.2d at 626.

Nevertheless, the *Flaherty* court's application of the third party beneficiary exception is inconsistent with the third party beneficiary exception as applied by other jurisdictions. In other jurisdictions, an ordinary negligence action requires proof that the attorney owed the plaintiff a duty.[71] Proof that the plaintiff is a third party beneficiary establishes this duty.[72] Therefore, the third party beneficiary exception is applicable to ordinary negligence actions in other jurisdictions.[73] In Maryland, however, an ordinary negligence action requires proof, not only that the attorney owed the plaintiff a duty, but also that the attorney was employed by the plaintiff.[74] Although proof that the plaintiff is a third party beneficiary establishes the general duty, it does not establish the employment relationship with the plaintiff.[75] Therefore, the third party beneficiary exception, in effect, is inapplicable to ordinary negligence actions in Maryland.

Although insufficient to prove an ordinary negligence action, the third party beneficiary exception is sufficient to prove a negligent misrepresentation action. Negligent misrepresentation in Maryland does not require proof that the plaintiff employed the attorney.[76] Nevertheless, the plaintiff must prove that the defendant's statement was false and that he intended the plaintiff to act upon it with knowledge that the plaintiff's reliance would cause injury.[77] Furthermore, the third party beneficiary exception is applicable only to nonadversarial transactions.[78] As applied in Maryland, the third party beneficiary exception is only available to those plaintiffs who can prove that they suffered injury in a nonadversarial context from a misrepresentation, not from mere negligence.[79] This exception will be available to a very narrow class of potential plaintiffs.

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71. *See supra* text accompanying note 36.
72. MALLEN & LEVIT, *supra* note 10, § 80, at 156.
73. *See, e.g.*, Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982); Woodfork v. Sanders, 248 So. 2d 419 (La. Ct. App.), *cert. denied*, 259 La. 757, 252 So. 2d 455 (1971); Auric v. Continental Casualty Co., 111 Wis. 2d 507, 331 N.W.2d 325 (1983).
74. *Flaherty*, 303 Md. at 134, 492 A.2d at 627 (citing Kendall v. Rodgers, 181 Md. 606, 612, 31 A.2d 312, 315 (1943)).
75. *Flaherty*, 303 Md. at 134, 492 A.2d at 627.
76. *See supra* text accompanying note 40. The tort of negligent misrepresentation is of fairly recent origin. The Court of Appeals of Maryland first recognized a cause of action separate from one in fraudulent misrepresentation or deceit in 1938. Virginia Dare Stores v. Schuman, 175 Md. 287, 1 A.2d 897 (1938) (cited in Ward Dev. Co. v. Ingrao, 63 Md. App. 645, 493 A.2d 421 (1985)). This action has been applied when the special relationship between the parties justifies the plaintiff's reliance upon the truth of the defendant's statements, as well as to arms-length commercial transactions. In Maryland, this action was not applied in an attorney malpractice setting until *Flaherty*.
77. *See supra* note 40.
78. *Flaherty*, 303 Md. at 137, 492 A.2d at 629.
79. *Id.* at 131, 492 A.2d at 626 (exception limited to nonadversarial actions brought in negligent misrepresentation). *But see* Pelham v. Griesheimer, 92 Ill. 2d 13, 440 N.E.2d 96 (1982) (nonclient recovery allowed in negligence).

Notwithstanding, the third party beneficiary exception should be available to those plaintiffs who can prove ordinary negligence. The employment relationship element necessary to prove negligence was adopted by the Court of Appeals of Maryland forty-two years ago when privity was the rule without exception in attorney malpractice cases.[80] Arguably, the employment relationship initially was required to establish privity between the parties.[81] Once a duty is established, the policy reasons for the privity requirement are satisfied. Today, the third party beneficiary theory can establish that duty. Nevertheless, the *Flaherty* court found that, aside from a duty, an employment relationship was a prerequisite for maintaining a negligence action in attorney malpractice.[82] The requirement is unnecessary because the third party beneficiary theory was intended to act as an exception to the privity requirement.[83] By retaining the employment requirement, the *Flaherty* court has prevented any nonclient or plaintiff who has not hired the attorney from maintaining an attorney malpractice action in ordinary negligence. Thus, although purporting to recognize the same third party beneficiary exception as recognized by other jurisdictions, the *Flaherty* court's application of the exception is a continuation of the strict privity requirement in ordinary negligence actions.

The *Flaherty* court's recognition of the third party beneficiary exception to the strict privity requirement in attorney malpractice cases based on negligence will not expose Maryland attorneys to a flood of malpractice claims by nonclients. The court has limited the class of potential plaintiffs to intended beneficiaries whose interests are the same as those of the attorney's client and who can show a misrepresentation. The Court of Appeals of Maryland, however, should remove the attorney's employment element in negligence claims so that the third party beneficiary exception as applied in Maryland is consistent with its purpose.

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80. Kendall v. Rogers, 181 Md. 606, 612, 31 A.2d 312, 315 (1943) (adopting tripartite test from Maryland Casualty Co. v. Price, 231 F. 397 (4th Cir. 1916)).

81. MEISELMAN, *supra* note 10, § 2.1, at 13 (the employment contract gives rise to the legal duty); MALLEN & LEVIT, *supra* note 10, § 101, at 171 (the duty arises from, and because of, the attorney-client relationship). Aside from establishing the attorney's duty, it is unclear what other purpose the "attorney's employment" requirement serves.

82. *Flaherty*, 303 Md. at 134, 492 A.2d at 627.

83. *Id.* at 125, 492 A.2d at 622.