№ 2010-10-0298 ORIGINAL

In the Supreme Court of Ohio

NEW DESTINY TREATMENT CENTER, INC., et al.,

Plaintiff-Appellee,

v.

E. MARIE WHEELER, et al.,

Defendants-Appellants.

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SUPREME COURT OF OHIO

DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE № 24404

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT RODERICK LINTON, LLP

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I.
EXPLANATION OF WHY THE ISSUES RAISED IN THIS CASE ARE OF PUBLIC AND GREAT GENERAL INTEREST

"He who controls the present, controls the past.
He who controls the past, controls the future."
~George Orwell, from his novel, 1984

The desire to control is fundamental to human existence. Battles and struggles for control are part of everyday life, in family and personal relationships, in the workplace, and in groups of every kind and character. Everyone wants to be in control. This case arises out of a bitterly fought battle for control of a corporation. The Court of Appeals has held that a lawyer who represented the losing faction in that battle may be held liable for legal malpractice in a lawsuit brought by the prevailing faction after the right to control was judicially determined. The Appellate Court's decision is contrary to general principles of Ohio law and the policy considerations upon which they are based. In addition, an important component of the Court of Appeals analysis is an erroneous interpretation of the doctrine of judicial estoppel – a doctrine designed to protect the integrity of the judicial system.

One of the purposes served by a system of laws is the orderly and civilized resolution of certain disputes for control. The law provides a substantive and procedural framework for analyzing and adjudicating disputes. Attorneys are fundamental to the process, serving as advocates and champions for those they represent, and also as pillars of the legal system itself. Our system of laws requires each attorney to be faithful and loyal to his client, to advance the interests of the client, and to present all reasonable arguments on the client's behalf, even when they may be contrary to existing law, or unpopular, or when the chances of prevailing seem slim. The Court of Appeals opinion

here diminishes the role of attorneys in the legal process.

To encourage and permit attorneys to do their duty, the law affords certain protections. Statements made by an attorney in legal proceedings are absolutely privileged from defamation claims. Clients have the right to be represented by an attorney of their choosing, making disqualification of one's chosen counsel a rarity. An attorney's communications with a client are privileged from discovery or compulsory testimony. An attorney may not be sued for malpractice by one who is not a client or in privity with a client. All of these legal protections are undermined by the Court of Appeals opinion, at least in the situation where an attorney undertakes representation of a person or group seeking to challenge control of a corporation or similar legal entity.

Where factions assert competing claims for control of a corporation (or other legal entity), each faction may claim to possess the authority to speak for the corporation and to take actions on its behalf. Those factions are often represented by legal counsel. Shareholders, who file derivative lawsuits, claim to act on behalf of the corporation to enforce a right of a corporation. Members of corporate boards and officers can be sued by those who claim an interest in the affairs of the corporation. Dissident owners or stakeholders oftentimes turn to the courts for the appointment of a receiver to take control of a corporation or other entity. When competing factions dispute which has the lawful right to control the affairs of the entity, their respective attorneys may simultaneously claim to represent "the corporation." Each competing claim of control begs the question, of course, until there is judicial resolution. Where factions cannot agree on the issue of control, the court and a system of laws will make the ultimate decision. But in the meantime, who really is in control is undetermined.

The protections that an attorney receives should not depend upon whether his client's position prevails in the dispute in question. Attorneys should not, for example, lose the protection of the privity rule established in *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, and other cases, merely because a position advanced was not accepted by a court and control was given to an opponent. Nor should any litigant be awarded as a bonus for merely prevailing in litigation the opportunity to sue opposing counsel. But that bonus is what the Court of Appeals opinion has allowed.

The case at hand arises from a battle between two factions for control of the Barberton Rescue Mission ("BRM"), a not-for-profit, church-based charitable corporation. A board of directors was in place at BRM, led by Howard Russell and Richard Lupton. A dissident faction was formed by Bruce Hawthorn, whose family was instrumental in founding BRM. For years Hawthorn served as president of BRM, and while he continued to hold the title of "president" at the time he formed the dissident faction, he had been stripped of authority and placed on leave of absence while claims of financial wrongdoing within BRM and the misappropriation of its assets were being investigated.

Seeking to return Hawthorn to control, his dissident group purported to convene a meeting of the board and purported to elect a different slate of directors. The established Russell/Lupton board repudiated the meeting and the election. Each faction asserted the right to control BRM. Each retained counsel to represent the corporation. The Hawthorn faction retained Defendant-Appellant E. Marie Wheeler. Each faction was active in *quo warranto* litigation filed in the Ninth District Court of Appeals to settle the issue of control and in other litigation as well. The established Russell/Lupton board prevailed, and among the arguments it raised successfully in prevailing were that

the election of the Hawthorn faction to the board of BRM was invalid and actions taken by the Hawthorn faction were void. See, *State ex rel. Montgomery v. Hawthorn*, Summit App. No. 20391, 2001-Ohio-1404, pp. 6-7. The Russell/Lupton board maintained throughout the underlying litigation that Wheeler never represented BRM, and that Hawthorn was not authorized to hire counsel for BRM. Actions and filings made by Wheeler purportedly as counsel for BRM in the underlying litigation were not recognized or enforced by the courts.

Thereafter, the corporation sued Wheeler and Roderick Linton, LLP, a law firm with which she was affiliated during a portion (but only a portion) of the dispute. The complaint alleged legal malpractice. The corporation alleged that because Wheeler claimed in the past that she was representing the corporation, a legal malpractice claim could be maintained. The corporation made these allegations even though it had previously - and successfully - argued in other legal proceedings, including the *quo warranto* litigation, that Wheeler did not and never did represent the corporation. The corporation now argues in the malpractice case that Hawthorn, as the nominal "president" of BRM, had inherent authority to hire counsel, notwithstanding its position in the *quo warranto* and other proceedings that Mr. Hawthorn lacked such authority and that all actions by the Hawthorn faction were void *ab initio*. The corporation makes the allegations of malpractice even though members of the established board of BRM conceded they never considered Wheeler to have represented the corporation and never sought or relied upon her legal counsel or advice.

The propositions of law advanced in this matter address important and timely issues relating to matters of governance and control of corporations and other legal entities, the

engagement of legal counsel for those organizations, and counsel's potential liability for legal malpractice. What analysis is to be employed in determining whether an attorney-client relationship existed between a corporation and an attorney who represented only an unsuccessful dissident faction? Can an attorney-client relationship be formed with a putative corporate client that disavowed the authority of the persons who engaged the attorney's services? Is an attorney-client relationship to be imposed when the trust and confidence that serve as the essence of the relationship are nonexistent? Do members of the prevailing and established board speak for the corporation? Is the corporation bound by admissions of the board? Does an attorney soil his hands merely because he advanced a position on behalf of a client that was not accepted in litigation? Does the doctrine of judicial estoppel play a role in the analysis? If it does, is the party that prevailed in the dispute for control judicially estopped from advancing a contrary position (consistent with the general application of the doctrine), or is the attorney for the unsuccessful opposition faction somehow barred from accepting the conclusion reached by a court in the prior litigation? Do the usual policy considerations that have resulted in rules of law encouraging attorneys to represent their clients forcefully and aggressively apply in struggles for control, or do other policy interests demand a contrary conclusion? Can the corporation control the facts that control the legal analysis, changing them from case to case? Does the power to control the present carry with it the power to control the past?

Situations in which parties or factions vie for control or contest authority are not limited to non-profit, charitable organizations. Identical disputes and situations can obviously arise in any corporation, partnership, or business entity. Business owners or

shareholders can resist the appointment of receivers or contest a receiver's control, ostensibly on behalf of the entity. Attorneys who represent trustees or other fiduciaries often encounter situations in which the fiduciary's authority is questioned or in which its role or duty is unclear. If an attorney asked to provide legal representation in any of these situations is required to face the risk that an unsuccessful argument concerning control or the right to control will lead to a malpractice claim from the victors, whom he never represented but opposed, that risk should be defined and articulated by this Court. If advancing any position unsuccessfully leads to the conclusion that an attorney has acted with unclean hands and is therefore deprived of certain privileges and immunities, that rule of law should also emanate from this Court.

This appeal presents important and far-reaching questions concerning the potential liability of attorneys who represent unsuccessful litigants (or unpopular causes) and is deserving of review by this Honorable Court.

II.
STATEMENT OF THE CASE AND OPINIONS BELOW

A. Battle for Control of BRM.

BRM was founded by members of the Hawthorn Family. Reverend Bruce Hawthorn was the president of BRM, and he and members of his family sat on the board of trustees. In the mid-1990's, questions arose concerning whether Hawthorn and members of his family were abusing their positions at BRM. Ohio's Attorney General, Summit County authorities, and the IRS commenced investigations into Hawthorn and his family's use of BRM for their personal benefit. These investigations caused a faction of the board opposed to Hawthorn to seek control of BRM and to seek Hawthorn's ouster.

That faction was led by Howard Russell and Richard Lupton, and they succeeded in taking control of BRM's board of trustees. They selected the law firm of Vorys, Sater, Seymour & Pease to serve as legal counsel to BRM and to represent its interests in the legal proceedings. Hawthorn took a leave of absence as president. Once in control, the Russell/Lupton faction continued to use Vorys Sater as BRM's counsel.

B. The Hawthorn Faction Engages Wheeler.

Hawthorn later decided that he wished to reassert himself as the individual in control of BRM and its board. On December 4, 2000 Hawthorn asked Wheeler, then at Roderick Linton, to advise and represent the Hawthorn faction in its efforts to regain control of BRM. The Hawthorn faction issued a notice scheduling a meeting of BRM's board of trustees for December 11, 2000. At the meeting, a slate of trustees supportive of Hawthorn was "elected" to the board. Hawthorn was reinstated as president and then formally engaged Wheeler to be counsel for BRM. Thereafter, the Hawthorn board and the Russell/Lupton board competed to control BRM. Each faction was represented by its own legal counsel. Ms. Wheeler purported to represent BRM as well as Hawthorn and others aligned with him. Vorys Sater purported to represent BRM as well as the Russell/Lupton board.

C. BRM and Its Board Repudiate That Wheeler Was BRM's Attorney.

On December 11, 2000, the Ohio Attorney General sued Hawthorn and his associates for their alleged financial misdeeds at BRM.[1] BRM, Howard Russell (Trustee and Chairman of the Board), and Richard Lupton (Trustee) – all represented by Vorys

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[1] *Barberton Rescue Mission, d/b/a/ Christian Brotherhood Newsletter, et al., v. Bruce Hawthorn, et al.*, Summit County Court of Common Pleas, Case No. 2000-12-5496.

Sater – joined in the complaint. On December 22, 2000 the Ohio Attorney General also filed a *quo warranto* action in the Ninth District Court of Appeals which addressed directly the battle for control over BRM's board.

On February 16, 2001 – about two months after the filing of the *quo warranto* proceeding – Wheeler ended her association with Roderick Linton. After leaving Roderick Linton and opening her own law office, Wheeler continued to assert that she was counsel for BRM in the underlying litigation, and she also continued to represent Hawthorn and others in the Hawthorn faction in the *quo warranto* proceeding.

R. Scott Haley was appointed in the Summit County litigation as operating receiver for the Mission in April 2001. Mr. Haley terminated Wheeler as counsel for BRM in late April, 2001. Any purported attorney-client relationship between BRM and Roderick Linton or any other attorneys associated with Roderick Linton terminated even earlier – on February 16, 2001 – the date of Wheeler's departure from the firm. By February 20, 2001, the court and all counsel had been formally advised that no attorney associated with Roderick Linton represented any party in the Summit County litigation.

The Court of Appeals in the *quo warranto* action determined in October 2001 that the December 11, 2000 board meeting called by Hawthorn and his board was invalid because it lacked a quorum and, therefore, the election conducted at the meeting "was invalid" and "any and all actions taken at that meeting are void," and "Respondents' positions as members, trustees, and Board members of the Mission are void as a matter of law." *State ex rel. Montgomery*, 2001-Ohio-1404, p. 6. The Court further held that, ". . . any actions of the Board taken or purportedly taken subsequent to December 11, 2000, that are or were dependent upon the presence and/or vote of Richard Smith,

Abraham Wright, Mae Dobbins, or Ferris Brown, are accordingly void." Id., pp. 6-7. The effect of the *quo warranto* decision was to establish the Russell/Lupton faction as the legitimate board for BRM. The import of the Court's decision served to void any purported retention of Wheeler as BRM's counsel.

D. BRM Reverses Course and Files A Complaint for Legal Malpractice.

This legal malpractice lawsuit was then filed after the battle for control was concluded. BRM's complaint, filed on April 24, 2002 – two months after the statute of limitations expired as to Roderick Linton – asserted claims of legal malpractice even though BRM had argued successfully in the *quo warranto* proceeding that Wheeler and Roderick Linton never served as legal counsel to BRM. BRM's complaint actually alleges that any purported attorney-client relationship was determined to be "invalid and illegal," and that any efforts by the Hawthorn board to hire Wheeler as BRM's attorney were "void and without any force and effect." Throughout discovery, BRM, its corporate representatives, and the Attorney General's Office all testified unequivocally that Wheeler was not counsel for BRM.[2]

E. Finding No Attorney-Client Relationship, The Trial Court Enters Summary Judgment.

The Trial Court granted summary judgment, observing that "Defendants have provided extensive evidence indicating that the prevailing faction – the Plaintiffs in this case – never recognized Defendants as their attorneys and never relied upon Defendants'

[2]Testimony that Wheeler and Roderick Linton were not BRM's attorneys may be found in BRM's interrogatory answers verified under oath by its duly authorized corporate representatives R. Scott Haley (Receiver), Roger A. Kittelson (Chief Financial Officer) and Howard Russell (Chairman of the Board of Trustees), and in the deposition testimony of Howard Russell and Richard Lupton (Trustees); the deposition testimony of Philip Downey, John Winship Read and Anthony O. Calabrese, III. (BRM's attorneys at Vorys Sater); and the deposition testimony of Sherry Phillips (from the Ohio Attorney General's Office).

representations." (Summ. Judg. Op., p. 6, Apx. p. 20). The Trial Court agreed that it was disingenuous for BRM to "now allege that they had an attorney-client relationship with Defendants after having previously disavowed that any such relationship existed." (Id., p. 3, Apx. p. 17). The Trial Court concluded that there was never an attorney-client relationship and, in fact, "the opposite is true."[3]

> Two factions were warring over control of the Rescue Mission. The factions had separate interests, separate boards, and separate attorneys. Both factions claimed to be the one true and legitimate Board. However, only one faction prevailed. Plaintiffs, as the prevailing faction, are asserting a malpractice claim against the attorneys for the losing faction. This claim must fail because there was never an attorney-client relationship between the Defendants and the prevailing faction.

Id., p. 4, Apx. p. 18. The Trial Court reasoned that Wheeler, as a zealous advocate of her client, was necessarily taking positions against the interests of the adversarial opponent but, "the mere fact that said opponent ultimately prevailed as *the* Barberton Rescue Mission does not open the door for a lawsuit against the opposing faction's attorneys." Id., p. 7, Apx. p. 21.

F. The Court of Appeals Reverses.

Rejecting the judicial estoppel argument, the Court of Appeals reversed the Trial Court's decision, concluding that Wheeler and Roderick Linton did not "come to this court with clean hands." Because Wheeler had asserted during the fight for control that she represented BRM, the Court of Appeals concluded that Wheeler and Roderick Linton

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[3]The Court of Appeals concluded that, "[t]he trial court's reliance on Reverend Lupton's opinion of who he considered to be the attorney for the Mission is misplaced because Reverend Lupton is not an expert qualified to offer an opinion on the same." (App. Op., ¶22, Apx. p. 10). But the Trial Court did not rely upon Lupton's "expert opinion" but rather on the "extensive evidence" that BRM never recognized Wheeler/Roderick Linton as their lawyers and never relied upon advice or representations of Wheeler/Roderick Linton. (Summ. Judg. Op., p.6, Apx. p. 20).

"are foreclosed from asserting the defense of judicial estoppel." (App. Op., ¶29, Apx. p. 12).

III.
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: No attorney-client relationship, necessary to support a legal malpractice claim, exists between a nonprofit corporation and an attorney who has been engaged by a dissident group of individuals to provide legal advice and representation in connection with the dissident group's legal challenge to the composition of the nonprofit corporation's board of trustees and to contest the legitimacy and authority of that board to act on behalf of the nonprofit corporation.

An attorney's representation of a corporation does not make that attorney counsel to the corporate officers and directors as individuals. *Fornshell v. Roetzel & Andress, L.P.A.*, Cuyahoga App. Nos. 92132 and 92161, 2009-Ohio-2728, ¶50; *Nilavar v. Mercy Health System* (S.D. Ohio 2001), 143 F. Supp.2d 909, 913. See also, Prof.Cond. Rule 1.13(a). The converse is equally true. An attorney-client relationship with constituents of an organization, i.e., dissident shareholders, directors or officers, is not a relationship with the organization itself. See, e.g., *Evans v. Artek Sys. Corp.* (C.A.2 1983), 715 F.2d 788, 792; Restatement of Law, Third, The Law Governing Lawyers, §96, comment *b*. An attorney-client relationship can be formed with a corporate entity only when approval has been duly given by those with authority to do so on behalf of the corporation. *Osborn v. Bank of the United States* (1824), 22 U.S. 738, 829. The Court of Appeals opinion here eradicates these well-established principles of law.

The existence of an attorney-client relationship in general is dependent upon the putative client's reasonable belief that the relationship has been formed. *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, ¶ 10; *Henry Filters, Inc.*

v. Peabody Barnes, Inc. (1992), 82 Ohio App.3d 255, 261; *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1992), 79 Ohio App.3d 786, 798. This has been unchallenged law in Ohio, at least until now.

The Court of Appeals found an attorney client-relationship existed between Wheeler/Roderick Linton and BRM because Hawthorn "in his capacity as president of the Mission" hired defendants to represent the Mission and that, as president, "Hawthorn had the actual authority to enter into an attorney-client relationship" on BRM's behalf. (App. Op., ¶26, Apx. p. 11). But the *quo warranto* proceedings established conclusively that all actions of the Hawthorn board "are void as a matter of law." Thus, the Hawthorn board had no authority to reinstate Hawthorn as president and Hawthorn could not have established an attorney-client relationship between BRM and Wheeler/Roderick Linton, a relationship repudiated by the legitimate board. See, *Flarey v. Youngstown Osteopathic Hosp.*, 151 Ohio App.3d 92, 2002-Ohio-6899, ¶11.

According to the Court of Appeals' holding here, an attorney-client relationship can be established by nothing more than a retrospective application of the doctrine of unclean hands. The Court of Appeals has held that an attorney-client relationship can be deemed to exist with a corporation whose board members disavowed that relationship, if those same board members later determine that they wish to claim that a relationship existed after all. There is great mischief in this holding. In Ohio "[t]he attorney-client relationship is a relationship based on trust." *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, ¶6. Trust and the sharing of confidences are the bases for the attorney-client privilege. *Landis v. Hunt* (1992), 80 Ohio App. 3d 662, 669. Here, all such elements are lacking. A claim of unclean hands – even were it supportable –

cannot serve as a surrogate for the essential trust and confidence that must be present in order to establish an attorney-client relationship. But that is what the Court of Appeals has held. The rationale of the decision should not be the law in Ohio.

> Proposition of Law No. II: **A nonprofit corporation is judicially estopped from claiming the existence of an attorney-client relationship with an attorney for purposes of pursuing a legal malpractice claim where the corporation successfully contended in prior litigation that it had no attorney-client relationship with the attorney and where individuals who constitute the judicially recognized board of trustees concede in sworn testimony that no attorney-client relationship ever existed between the corporation and the attorney.**

The Court of Appeals refused to apply the doctrine of judicial estoppel, which "forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding." *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶25, citing *Teledyne Industries, Inc. v. Natl. Labor Relations Bd.* (C.A. 6, 1990), 911 F.2d 1214, 1217. Judicial estoppel preserves the integrity of the courts. Judicial estoppel prevents a party from abusing the judicial process through gamesmanship, achieving success on one position, then arguing the opposite to meet an exigency of a different moment. Gamesmanship has happened here. BRM, through the Lupton/Russell board, maintained *successfully* in prior litigation that the Hawthorn board had no authority to control and direct the affairs of BRM or to hire Wheeler as its counsel. Now, BRM takes a contrary position.

The Court of Appeals refused to apply the doctrine of judicial estoppel, concluding instead that Wheeler/Roderick Linton "have not come to this Court with clean hands" because defendants "represented themselves as attorneys for this Mission." (App. Op., ¶29, Apx. p. 12). For there to be unclean hands, one must be guilty of "reprehensible

conduct." *Basil v. Vincello* (1990), 50 Ohio St.3d 185, 190. Unclean hands has nothing to do with application of judicial estoppel. Until now, the equitable doctrine of unclean hands has never been applied to create an attorney-client relationship or to allow a legal malpractice claim against an attorney who represented the opposition.

The Court of Appeals holding allows BRM to take a position contrary to that maintained throughout the *quo warranto* proceeding and, in doing so, allows BRM to pursue a malpractice suit against the attorney representing the faction that had tried to wrest control from the existing board. The doctrine of judicial estoppel is intended to protect and preserve the integrity of the courts and to prevent precisely what the Court of Appeals has endorsed. Judicial estoppel should turn on BRM's conduct in the prior litigation, not on Wheeler's advocacy of her client's position.

This Court has not had occasion to address the doctrine of judicial estoppel in the context of a legal malpractice action. But two appellate courts have. See, *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter, LPA.*, 148 Ohio App.3d 440, 2002-Ohio-3328; *Wloszek v. Westin, Hurd, Fallon, Paisley & Howley, LLP*, Cuyahoga App. No. 82412, 2004-Ohio-146. The refusal of the Court of Appeals in this case to apply the doctrine of judicial estoppel exposes Ohio lawyers to malpractice suits not otherwise permitted and will undoubtedly have a chilling effect upon the diligent representation of clients who dare to challenge those in control.

<u>Proposition of Law No. III</u>: Because an appellate court is not authorized to reverse a correct judgment when the trial court's articulated reason or rationale for the judgment is found to be erroneous, an appellate court is duty-bound to address any alternative grounds for affirmance of the judgment that are preserved in the record and properly raised in the briefs before remanding the case to the trial court.

As this Court has noted, "it is the definitely established law of this state that where the judgment is correct, a reviewing court is *not authorized* to reverse such judgment merely because erroneous reasons were assigned as the basis thereof." *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284 (emphasis added). That has been the law in Ohio for no less than 165 years. *McClintock v. Inskip* (1844), 13 Ohio 21, 25. This rule applies *even if the lower court did not consider those grounds.* See, e.g., *Baumgartner v. Duffey*, 121 Ohio St.3d 356, 2009-Ohio-1218, ¶4; *Bridge v. Park Natl. Bank*, 179 Ohio App.3d 761, 2008-Ohio-6607, ¶11.

The Court of Appeals disregarded this established rule by failing to address the statute of limitations defense afforded by R.C. 2305.11(A). The statute of limitations argument was raised and preserved by Roderick Linton in its appeal brief as an alternative basis to affirm summary judgment and pursuant to R.C. 2505.22.[4] Roderick Linton properly raised the limitations defense "as a shield to protect the judgment of the lower court." *Parton v. Wilnau* (1959), 165 Ohio St. 145, 171.

Proposition of Law No. III addresses the legal authority of all appellate courts in Ohio. The Court should accept jurisdiction over this case to require that an appellee's alternative bases to affirm must be addressed before a judgment may be reversed.

IV.
CONCLUSION

WHEREFORE, Appellant Roderick Linton, LLP respectfully requests and moves the Supreme Court of Ohio to accept jurisdiction over this appeal.

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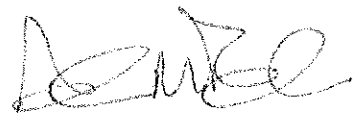
[4] R.C. 2505.22 provides, in relevant part, that an appellee, like Roderick Linton, can assert an assignment of error in order to secure affirmance of the final judgment or order being appealed and such "assignments *shall* be passed upon by a reviewing court before the final order, judgment or decree is reversed in whole or in part." (Emphasis added)

Respectfully submitted,



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A copy of the foregoing *Memorandum in Support of Jurisdiction of Defendant-Appellant Roderick Linton, LLP* was sent by regular U.S. Mail, postage pre-paid, this 15th day of February, 2010 to the following:

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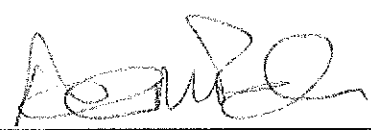

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THERESA A. RICHTHAMMER (#0068778)

APPENDIX

COURT OF APPEALS
SUMMIT COUNTY, OHIO
2009 DEC 30 AM 8:41
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NINTH APPELLATE DISTRICT

NEW DESTINY TREATMENT CENTER, INC., ET AL.	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
E. MARIE WHEELER, ET AL.	:	
Defendant-Appellees	:	Case No. 24404

For the reasons stated in our accompanying Opinion, the Judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with our opinion and the law. Costs to Appellees.

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

COURT OF APPEALS
SUMMIT COUNTY, OHIO
NINTH APPELLATE DISTRICT

COURT OF APPEALS
DANIEL M. HORRIGAN
2009 DEC 30 AM 8:41
SUMMIT COUNTY
CLERK OF COURTS

NEW DESTINY TREATMENT CENTER, INC., ET AL.

Plaintiffs-Appellants

-vs-

E. MARIE WHEELER, ET AL.

Defendant-Appellees

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.
(Fifth District Judges Sitting by Assignment)

Case No. 24404

OPINION

CHARACTER OF PROCEEDING: Appeal from the Summit County Court of Common Pleas, Case No. 2006-12-8593

JUDGMENT: Affirmed in part, Reversed in part and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Hoffman, J.

{¶1} Plaintiff-appellant New Destiny Treatment Center, Inc. appeals the August 7, 2008 Final Order-Summary Judgment entered by the Summit County Court of Common Pleas, granting summary judgment in favor of defendants-appellants E. Marie Wheeler and Roderick Linton, LLP.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant New Destiny Treatment Center, Inc., fka Barberton Rescue Mission, and Christian Brotherhood Newsletter are not-for-profit corporations organized under the laws of the State of Ohio. Originally, Christian Brotherhood Newsletter was a division of Barberton Rescue Mission. The Christian Brotherhood Newsletter is not a party to this Appeal.

{¶3} The Barberton Rescue Mission ("the Mission") was founded by members of the Hawthorn family. By the early 1990s, Reverend Bruce Hawthorn was the President of the Mission, and he and members of his family sat on the board of trustees. In the mid- 1990s, questions arose as to whether Hawthorn and his family were abusing their positions at the Mission. The Ohio Attorney General, Summit County authorities, and the IRS commenced, more or less simultaneously, investigations into Hawthorn and his family's use of the Mission for their personal benefit, including payment of excessive compensation, and the purchase of homes, vehicles, and other personal items. As a result, Reverend Howard Russell and Reverend Richard Lupton, represented by the law firm of Vorys Sater Seymour & Pease, successfully took control of the Mission's board of trustees. Hawthorn was relieved of his duties and placed on a leave of absence on

May 15, 2000. The board extended Hawthorn's leave of absence on November 17, 2000.

{¶4} Hawthorn subsequently decided he wished to reassert himself as the individual in control of the Mission and its board. On December 4, 2000, Hawthorn retained Appellee E. Marie Wheeler and her law firm Appellee Roderick Linton, LLP to represent the Mission. The Mission paid Appellees a retainer of $25,000. A board of trustees meeting led by the Russell/Lupton board was scheduled for December 4, 2000. Appellee Wheeler presented for the meeting, but was denied access thereto. On December 11, 2000, Appellee Wheeler prepared a special meeting agenda. Items on the agenda included the reporting of the hiring of Appellees under the terms of a retention contract; removal of Russell from the board; expansion of the board to include Richard Smith, Ferris Brown, Abraham Wright, and May Dobbins; and granting authority to Hawthorn to terminate Vorys Sater Seymour & Pease. The special meeting was held, during which Hawthorn approved retention of Appellees on behalf of the Mission. The Hawthorn board approved the remaining items on the special meeting agenda. Neither Reverend Russell or Lupton nor their followers attended this meeting.

{¶5} Thereafter, both the Hawthorn board and the Russell/Lupton board purported to control the Mission. On December 11, 2000, the Ohio Attorney General sued Hawthorn and his board in the Summit County Court of Common Pleas, to recover money damages resulting from their financial misdeeds with the Mission's money. The Mission and the Russell/Lupton board – all represented by Vorys Sater– joined the complaint. By written correspondence dated December 12, 2000, Appellee Wheeler notified the Attorney General not to have any contact with Mission employees without

her approval, noting such employees were employees of her client. Via a December 13, 2000 correspondence, Appellee Wheeler informed Vorys Sater she was general counsel for the Mission. Appellee Wheeler filed a voluntary notice of dismissal of the common pleas lawsuit. The Russell/Lupton board filed a motion to strike. The trial court never ruled on the motion.

{¶6} On December 22, 2000, the Ohio Attorney General also filed a quo warranto action in the Ninth District Court of Appeals, which directly addressed the battle for control over the Mission's board. The Mission, Russell, and Lupton – all represented by Vorys Sater – joined the action. Appellee Wheeler represented Hawthorn, et al. in the quo warranto matter. The Ninth District found the Mission, Russell and Lupton did not have standing to sue. Via Decision filed October 3, 2001, the Ninth District found the December 11, 2000 meeting called by Hawthorn and his board was invalid because it lacked a quorum. The Ninth District further found the election conducted at that meeting was void as a matter of law. The effect of the decision was to reestablish the Russell/Lupton board as the legitimate board for the Mission.

{¶7} On March 22, 2001, in the Summit County Court of Common Pleas action, the trial court appointed Attorney R. Scott Haley as a non-operating receiver for the Mission. In April, 2001, Attorney Haley became the operating receiver, exercising day-to-day authority over the Mission. Attorney Haley immediately informed Appellee Wheeler, both orally and in writing, she did not represent the Mission. The case proceeded to trial in May, 2004, and resulted in a multi-million dollar verdict against Hawthorn.

{¶8} On April 24, 2002, Attorney Haley, as the receiver, filed a Complaint in the Summit County Court of Common Pleas, naming Appellees as defendants, and asserting claims of legal malpractice. The original action was voluntarily dismissed on March 16, 2006, while Appellee Wheeler's and Appellee Roderick Linton's motions for summary judgment were pending. The case was re-filed on December 29, 2006, asserting claims of legal malpractice, fraudulent misrepresentation, and unjust enrichment. Appellees again filed motions for summary judgment. Appellees maintained no attorney/client relationship existed between them and Appellant. Appellant filed a memorandum in opposition. Via Final Order filed August 7, 2008, the trial court granted summary judgment in favor of Appellees. The trial court found an attorney/client relationship never existed between the parties. The trial court further found Appellant's claims for negligent/fraudulent misrepresentation and unjust enrichment were without merit.

{¶9} It is from this judgment entry, Appellant appeals, raising the following assignments of error:

{¶10} "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARIE WHEELER AND RODERICK LINTON, LLP ON PLAINTIFF'S CLAIM OF LEGAL MALPRACTICE.

{¶11} "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARIE WHEELER AND RODERICK LINTON, LLP ON PLAINTIFF'S CLAIM OF NEGLIGENT MISREPRESENTATION.

{¶12} "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARIE WHEELER AND RODERICK LINTON, LLP ON PLAINTIFF'S CLAIM OF UNJUST ENRICHMENT."

STANDARD OF REVIEW

{¶13} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

{¶14} Civ. R. 56(C) provides, in pertinent part:

{¶15} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

{¶16} Pursuant to the above rule, a trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw

different conclusions from the undisputed facts. *Houndshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427. The court may not resolve ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301.

{¶17} The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

{¶18} It is based upon this standard we review Appellant's assignments of error.

I

{¶19} In the first assignment of error, Appellant contends the trial court erred in granting summary judgment in favor of Appellees on the legal malpractice claim. Appellant submits the trial court's finding no attorney-client relationship existed was erroneous.

{¶20} In order to establish a legal malpractice claim relating to civil matters under Ohio law, a plaintiff must prove three elements: (1) existence of an attorney-client

relationship giving rise to a duty, (2) breach of that duty, and (3) damages proximately caused by the breach. Krahn v. Kinney (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058.

{¶21} In the case sub judice, the trial court concluded the Mission could not succeed on its legal malpractice claim as it was unable to satisfy the first element: the existence an attorney-client relationship between Appellees and Appellant. The trial court reasoned, "the opposite is true: the current parties had an adversarial relationship during the time period in question. Two factions were warring over control of the Rescue Mission. The factions had separate interests, separate Boards, and separate attorneys. Both factions claimed to be the one true and legitimate Board. However, only one faction prevailed. Plaintiffs, as the prevailing faction, are asserting a malpractice action against the attorneys for the losing faction. This claim must fail because there was never an attorney-client relationship between [Appellees] and the prevailing faction." Final Judgment-Summary Judgment at 4, unpaginated. The trial court noted although plaintiff below (Appellant herein) is a corporate entity, Appellant "may also be characterized, however, as the prevailing faction in the prior litigation", or the Russell/Lupton Board. By such characterization, the trial court viewed the deposition testimony of Reverend Richard Lupton, in which he states he never considered Appellee Wheeler to be the attorney for the Mission, as determinative of the issue of the existence of an attorney-client relationship. We disagree with the trial court's reasoning.

{¶22} A corporation is an entity separate and apart from the individuals who compose it; it is a legal fiction for the purpose of doing business. *Ohio Bur. of Workers' Comp. v. Widenmeyer Elec. Co.* (1991), 72 Ohio App.3d 100, 105. Although a board of directors is the group of persons vested with the authority to conduct the affairs of a

non-profit corporation, the board is not the non-profit corporation. This presumption is statutorily supported by R.C. 1702.55(B), in which a board of directors may be held liable to the non-profit corporation, and R.C. 1702.12(I), which permits members of the non-profit corporation to sue in derivative actions on behalf of the non-profit corporation. To find a non-profit corporation and its board of directors to be one and the same would render these statutes meaningless. As such, we find the trial court's determination the prevailing board is, in essence, the Mission for purposes of determining the existence of an attorney-client relationship was erroneous. The trial court's reliance on Reverend Lupton's opinion of who he considered to be the attorney for the Mission is misplaced because Reverend Lupton is not an expert qualified to offer an opinion on the same.

{¶23} We now turn to the issue of whether an attorney-client relationship existed between Appellees and the Mission.

{¶24} Neither a formal contract nor the payment of a retainer is necessary to trigger the creation of the attorney-client relationship. See, e.g., *In re Disciplinary Action Against Giese* (N.D.2003), 662 N.W.2d 250. While it is true an attorney-client relationship may be formed by the express terms of a contract, it "can also be formed by implication based on conduct of the lawyer and expectations of the client." *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, at ¶ 10 (Citation omitted).

{¶25} In deciding whether an attorney-client relationship exists, "the ultimate issue is whether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client." *Henry Filters, Inc. v. Peabody Barnes, Inc.* (1992), 82 Ohio App.3d 255, 261, 611 N.E.2d 873;

see also *Hardiman*, supra at para. 10. (The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the prospective client"); *Lillback v. Metro. Life Ins. Co.* (1994), 94 Ohio App.3d 100, 108, 640 N.E.2d 250; *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1992), 79 Ohio App.3d 786, 798, 607 N.E.2d 1173. Existence of an attorney-client relationship will vary from case to case. *Henry Filters, Inc.*, supra at 261.

{¶26} Upon review of the entire record, we find sufficient evidence to establish the existence of an attorney-client relationship between Appellees and the Mission. Bruce Hawthorn, in his capacity as President of the Mission, hired Appellees to represent the Mission. As President, Hawthorn had the actual authority to enter into an attorney-client relationship with Appellees on the Mission's behalf. Further, Appellees were paid a retainer by the Mission, and sent periodic billing statements to the Mission. Appellee Wheeler purported to represent the Mission. After the Ohio Attorney General filed a damages action in December, 2000, Appellee Wheeler notified the Attorney General not to have any contact with Mission employees without her approval, noting such employees were employees of her client. Appellee Wheeler also contacted Vorys Sater, and informed the law firm she was general counsel for the Mission. Appellee Wheeler filed a voluntary notice of dismissal of the common pleas lawsuit representing herself to be counsel for the Mission.

{¶27} Appellees contend the Mission is judicially estopped from arguing the existence of an attorney-client relationship because, in both prior proceedings, the Mission and the Russell/Lupton board advanced the position Appellee Wheeler was not the Mission's attorney.

{¶28} Under the doctrine of judicial estoppel, a party cannot espouse one position in a court and then subsequently take a contrary position in another court. *Hildreth Mfg., L.L.C. v. Semco, Inc.*, 151 Ohio App.3d 693, 2003-Ohio-741; *Fraley v. Fraley*, 2d Dist. No. 19178, 2002-Ohio-4967, *Smith v. Dillard Dept. Stores, Inc.* (2000), 139 Ohio App.3d 525. "Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Teledyne Indus., Inc. v. Natl. Labor Relations Bd.* (C.A.6, 1990), 911 F.2d 1214, 1218. In order to assert such a defense, a party must comport with the maxim "he who seeks equity must do equity and that he must come into court with clean hands." See, *Christman v. Christman* (1960), 171 Ohio St. 152, 154; *McPherson v. McPherson* (1950), 153 Ohio St. 82, 91. Under this maxim, equitable relief is not available to a person who has "violated conscience or good faith" or is guilty of reprehensible conduct. See, *Greer-Burger v. Temesi,* 116 Ohio St. 3d. 324, 2007-Ohio-6442, citing *Marinaro v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45; *Kettering v. Berger* (1982), 4 Ohio App.3d 254, 261-2.

{¶29} We find Appellees have not come to this Court with clean hands. In the two prior actions, Appellees represented themselves as attorneys for the Mission, both in words and in actions. In the case sub judice, however, Appellees claim the absence of an attorney-client relationship. Accordingly, we find Appellees are foreclosed from asserting the defense of judicial estoppel.

{¶30} Appellant's first assignment of error is sustained.

II, III

{¶31} In the second assignment of error, Appellant argues the trial court erred in granting summary judgment in favor of Appellees on the claims of fraudulent and negligent misrepresentation. In the third assignment of error, Appellant asserts the trial court erred in granting summary judgment in favor of Appellees on the unjust enrichment claim. The trial court found the fraudulent and negligent misrepresentation claims could not stand as Appellant failed to establish the essential element of "reliance". The trial court determined the unjust enrichment claim also could not stand as payments made to Appellees were the result of Hawthorn's decisions, and not any misrepresentations by Appellees to Appellant.

{¶32} We note "an action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Management Co.* (1982), 4 Ohio App.3d 89, 90.

{¶33} Appellant's claim for fraudulent and negligent misrepresentation as well as the claim for unjust enrichment are founded upon the manner in which Appellees conducted themselves while representing the Mission. Because we found, supra, an attorney-client relationship existed between Appellees and the Mission, we find Appellant's remaining claims, which arise from that relationship, merge with the legal malpractice claim. Accordingly, we affirm the trial court's granting summary judgment in Appellees' favor on these claims.

{¶34} Appellant's second and third assignments of error are overruled.

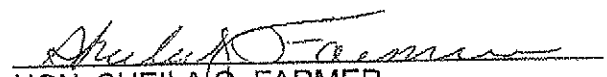
{¶35} The Judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part and remanded.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

HON. WILLIAM B. HOFFMAN



HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

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IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

NEW DESTINY TREATMENT CENTER, INC., fka BARBERTON RESCUE MISSION, et al.,	)	CASE NO. CV 2006-12-8593
Plaintiffs,	)	JUDGE THOMAS A. TEODOSIO
-vs-	)	
E. MARIE WHEELER, et al.,	)	**FINAL ORDER** **Summary Judgment**
Defendants.	)	

This cause came before the Court upon Defendant Roderick Linton, LLP's Motion for Summary Judgment, Defendant E. Marie (Wheeler) Seiber's Motion for Summary Judgment, Plaintiff's Response in Opposition, and Defendant's Reply Brief. Upon consideration thereof, this Court finds Defendants' Motions for Summary Judgment well taken.

Pursuant to Civ. R. 56(C), summary judgment is proper if: (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 327 (1977). The party seeking summary judgment initially bears the burden of informing the trial court of the basis for the motion and identifying portions of the record demonstrating an absence of genuine issues of material fact as to the essential elements of the nonmoving party's claims. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293 (1996). The movant

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must point to some evidence in the record of the type listed in Civ. R. 56(C) in support of his motion. *Id.* Once this burden is satisfied, the nonmoving party has the burden, as set forth in Civ. R. 56(E), to offer specific facts showing a genuine issue for trial. *Id.*

Plaintiffs New Destiny Treatment Center, Inc., fka Barberton Rescue Mission and the Christian Brotherhood Newsletter have brought claims for legal malpractice, negligent/fraudulent misrepresentation, and unjust enrichment against Defendants E. Marie Seiber, fka E. Marie Wheeler, and the firm of Roderick, Myers & Linton for their representation of Reverend Bruce Hawthorn in his attempt to takeover and install a new Board of Trustees for the Barberton Rescue Mission.

Reverend Hawthorn and the "Hawthorn Group" attempted to take control of the Barberton Rescue Mission by installing themselves as the organization's Board of Trustees. The Board already in place was led by Reverend Howard Russell and Reverend Richard Lupton. The Hawthorn Group hired Ms. Seiber to represent their interests. Thus, two factions were competing for control of the Barberton Rescue Mission.

The dispute was resolved by the Ninth District in *State of Ohio, ex rel. Betty D. Montgomery v. Hawwthorn*, Case No. 20391, where the Court determined that the Russell/Lupton Board was the true Board and that any actions taken by the Hawthorn Group were null and void. The Russell/Lupton Board, as the prevailing faction, is essentially the Plaintiff in the present lawsuit. The Barberton Rescue Mission also prevailed in a lawsuit brought against Rev. Hawthorn in Summit County Case No. CV 2000-12-5496.

Legal Malpractice

Defendants argue that Plaintiffs' legal malpractice claim must fail as a matter of law because no attorney-client relationship existed between Defendant Seiber and the Plaintiffs.

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To plead a cause of action for attorney malpractice, a plaintiff must allege (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Vahila v. Hall* (1997), 77 Ohio St. 3d 421. "The rendering of legal advice and legal services by an attorney and the client's reliance on the advice and services is therefore the benchmark of an attorney-client relationship." *Sayyah v. Cutrell* (12th Dist. 2001), 143 Ohio App. 3d 102.

Defendants argue that because the Lupton/Russell Board is essentially the Plaintiff in this action, suing as New Destiny Treatment Center, Inc. and the Christian Brotherhood Newsletter, it is disingenuous for them to now allege that they had an attorney-client relationship with Defendants after having previously disavowed that any such relationship existed. Defendant Seiber argues that she only represented the Hawthorn Group, which failed in its attempt to take over the Board, and the actions of which were found null and void by the Ninth District.

The question is whether or not Defendant had entered into an attorney-client relationship with the current Plaintiff. Plaintiff is a corporate entity. Plaintiff may also be characterized, however, as the prevailing faction in the prior litigation.

Plaintiff's Complaint states "[t]hat the board of trustees . . . that purported to employ Defendants has been determined to have been invalid and illegal . . . ." The Complaint also states "[t]hat the employment of the Defendants was . . . void and invalid. This idea is conveyed most succinctly in the testimony of Richard Lupton:

> Q. Did you ever consider that Marie Wheeler was your attorney?
> A. No.
> Q. Did you ever consider that she represented the true board of Barberton Rescue Mission?
> A. She did not.
> Q. And did she ever represent Barberton Rescue Mission as an attorney?
> A. No.

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The facts of this case do not provide for a legal malpractice cause of action because there was never an attorney-client relationship between Defendants and Plaintiffs. In fact, the opposite is true: the current parties had an adversarial relationship during the time period in question. Two factions were warring over control of the Rescue Mission. The factions had separate interests, separate Boards, and separate attorneys. Both factions claimed to be the one true and legitimate Board. However, only one faction prevailed. Plaintiffs, as the prevailing faction, are asserting a malpractice claim against the attorneys for the losing faction. This claim must fail because there was never an attorney-client relationship between the Defendants and the prevailing faction. "Since no attorney-client relationship existed between defendant and plaintiff, there was no duty owed by defendant to plaintiff. Unless there is a breach of duty, there can be no liability in either negligence or contract." Strauch v. Gross (10th Dist. 1983), 10 Ohio App. 3d 303.

Negligent/Fraudulent Misrepresentation

"The elements of negligent misrepresentation are as follows: 'One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.'" *Delman v. City of Cleveland Heights* (1989), 41 Ohio St. 3d 1. Plaintiffs claim Defendants "made representations to Plaintiffs that they were attorneys for NDTC and CBN and authorized to act as such and that the Board which hired them was valid and legally proper," and that Defendants "made false representations to Plaintiffs about information upon which Plaintiffs relied in their business transactions. Specifically Defendants represented that

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the Board was valid and legal and that pursuant to Board action Defendants were hired and authorized to act as legal counsel for Plaintiffs."

Defendants argue this claim must fail because Plaintiffs never relied on information supplied by the Defendants. Defendants state that no individual or attorney involved in pursuing claims against the Hawthorn Group ever accepted, conceded or relied upon Ms. Seiber's statements that she was counsel for the Rescue Mission, and that to the contrary, Plaintiffs contested Ms. Seiber's status as counsel for the Rescue Mission.

The testimony of Reverend Richard Lupton provides:

> Q. You didn't consider Marie Wheeler to be your lawyer at the time of the deposition, did you?
> A. Neither then or ever.
> Q. Or any other time. And you never relied upon anything that she told you, did you?
> A. No.

And also:

> Q. And did you ever accept her assertion that she was counsel for Barberton Rescue Mission?
> A. No, I did not.
> Q. Did you ever rely upon any advice that she gave as counsel for Barberton Rescue Mission?
> A. Not that I'm aware of.
> Q. Did you ever rely upon any statements that she made about anything?
> A. Well, it seems to assume she was a total liar. I spent about six hours with her in a deposition and I assume that she's a competent attorney and so forth. But as far as my personal relying on her advice or direction as an attorney, no.
> Q. It's fair to say, isn't it, Mr. Lupton, that you always considered Marie Wheeler to be the attorney for Bruce Hawthorn and his dissident factions?
> A. I think that's a fair statement.
> Q. And you always considered John Read and the other attorneys at Vorys Sater to be your lawyers and the lawyers representing BRM?
> A. Yes.

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Plaintiffs argue that the most compelling evidence of their reliance is the fact that New Destiny paid Roderick Linton for the service that Marie Seiber provided. Plaintiffs further argue that there is evidence of reliance because Seiber made court appearances for New Destiny and filed documents in litigation on its behalf and consented to the appointment of a receiver on behalf of New Destiny. Plaintiffs provide evidence in the form of the Affidavit of R. Scott Haley, who was appointed receiver of the Barberton Rescue Mission during the prior litigation. Haley acknowledges that the Barberton Rescue Mission paid invoices for legal fees to Defendants.

Plaintiffs' arguments are unconvincing. There is no question that during all relevant times, two factions were fighting for control of the Barberton Rescue Mission. Defendants have provided extensive evidence indicating that the prevailing faction—the Plaintiffs in this case—never recognized Defendants as their attorneys and never relied upon Defendants representations.

The Court finds that payment to Defendants for services rendered cannot be characterized as meeting the "reliance" factor in a negligent representation claim. Defendants had represented the losing faction for control of the Barberton Rescue Mission. The fact that Barberton Rescue Mission paid for Defendants' services does not amount to reliance on a misrepresentation. On the contrary, the contentious nature of the competing factions was common knowledge to those involved. The payment of legal fees to Defendants by the Barberton Rescue Mission was not based upon any misrepresentation by Defendants, but was rather a deliberate decision made by Rev. Hawthorne and the losing faction. The fact that Defendants were paid by Barberton Rescue Mission at a time when they represented a faction struggling for control of the organization does not involve any misrepresentation. They

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purported to represent the organization because their client was in fact one of the competing Boards of said organization. Any misuse of organization funds to pay for legal counsel was a result of the misconduct of Bruce Hawthorn and the losing faction. The Court notes that the Barberton Rescue Mission received a jury verdict against Bruce Hawthorne in CV 2000-12-5496 awarding it $1,450,000.00 in actual damages and 1,500,000.00 in punitive damages.

"As a general rule, an attorney is immune from liability to third persons arising from the performance of the attorney's professional activities as an attorney on behalf of, and with the knowledge of, his client, unless such third person is in privity with the client." *W.D.G., Inc. v. Mutual Mfg. & Supply Co.* (10th Dist. 1976), 1976 Ohio App. LEXIS 7773. "Some immunity from being sued by third persons must be afforded an attorney so that he may properly represent his client. To allow indiscriminate third-party actions against attorneys of necessity would create a conflict of interest at all times, so that the attorney might well be reluctant to afford proper representation to his client in fear of some third-party action against the attorney himself." *Id.*

Defendant Seiber had represented one of the warring factions in the prior litigation and the takeover attempt. Plaintiffs' faction prevailed. Defendant, as a zealous advocate of her client, was necessarily taking positions against the interests of the adversarial opponent. The mere fact that said opponent ultimately prevailed as *the* Barberton Rescue Mission does not open the door for a lawsuit against the opposing faction's attorneys.

Unjust Enrichment

Plaintiffs seek to recover the legal fees paid to Defendants under a theory of unjust enrichment. The Court finds this argument unconvincing.

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Defendants were paid legal fees for the representation of the losing faction. The payment of legal fees to Defendants by the Barberton Rescue Mission was not based upon any misrepresentation by Defendants, but was rather a deliberate decision made by Rev. Hawthorne and the losing faction. If Rev. Hawthorne and company misused funds, the action lies against them and not the current Defendants. The Court again notes that the Barberton Rescue Mission was granted judgment and a substantial monetary award against Bruce Hawthorne in CV 2000-12-5496.

Conclusion

From the evidence provided, it appears that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of Plaintiffs, that conclusion is adverse to the Plaintiffs. No genuine issue as to any material fact remains to be litigated and Defendants are entitled to judgment as a matter of law. Therefore Defendants' Motions for Summary Judgment are hereby granted.

IT IS SO ORDERED.

JUDGE THOMAS A. TEODOSIO

Pursuant to Civ.R. 58(B), the Clerk of Courts shall serve upon all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal.

JUDGE THOMAS A. TEODOSIO

cc: Attorney Michael J. Moran
Attorney John P. O'Neil
Attorney Alan M. Petrov