

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 10-0298

On Appeal from the Ninth Appellate District  
Summit County, Ohio

Court of Appeals Case No. 24404

**NEW DESTINY TREATMENT CENTER, INC., et al.**  
Plaintiff-Appellee

vs.

**E. MARIE WHEELER, et al.**  
Defendant-Appellant

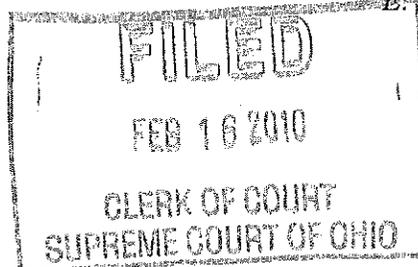
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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT E. MARIE WHEELER**

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I. **EXPLANATION OF WHY ISSUES RAISED IN THIS CASE ARE OF PUBLIC OR GREAT GENERAL INTEREST**

The existence of the attorney client relationship is the foundation upon which our legal system is built. In a civilized society – a society in which disputes between citizens are resolved through a civil justice system - the ability to obtain legal representation is essential. It is through vigorous advocacy by attorneys that a client’s interest is protected and represented and justice obtained. The court of appeals decision, if permitted to stand, subjects an attorney to a legal malpractice claim by an adverse party who admittedly did not consider the attorney as representing it and did not seek, obtain or rely upon and legal advice rendered by the attorney. Such a result will have a chilling effect on the practice of law in Ohio and create significant liability for any lawyer representing a losing faction in a dispute over corporate control.

The essence of this lawsuit is an attempt by New Destiny Treatment Center, Inc. fka Barberton Rescue Mission and Christian Brotherhood Newsletter (collectively referred to as “Plaintiffs” or “BRM”) to maintain a legal malpractice action against the attorney who represented the interests of a group of members of the board of directors who attempted to take control of the nonprofit corporation. Plaintiffs successfully defeated the insurgent faction and maintained control of the organization. Plaintiffs now seek through this action to hold the attorney representing the loser in the struggle for corporate control liable for legal malpractice.

This Court has consistently held that attorneys in Ohio are not liable to a third party for the good-faith representation of a client, unless the third party is in privity with the client for whom the legal services were performed. *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012; *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, paragraph one of the syllabus. The justification for this limitation on an attorney’s liability is so that attorneys may represent

their clients without the threat of suit from a third party which may compromise their representation. This Court has rightly recognized that “an attorney’s preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client’s interests against the possibility of third-party lawsuits.” *Shoemaker*, 2008-Ohio-2012 ¶ 14, citing *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 76. Consequently, the best interests of the client should be paramount to the attorney’s interest in avoiding liability.

Moreover, an essential element of effective legal representation is a lawyer’s uncompromised duty of loyalty and independent judgment. Rule 1.7 of the Rules of Professional Conduct recognize that “neither the lawyer’s personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer’s loyalty to the client.” The Rules of Professional Conduct, above all, are an embodiment of principles governing the conduct of lawyers. The court of appeals decision frustrates the precepts promulgated in the Rules and will drive a wedge between a lawyer’s ethical obligation to his client and his concern over potential malpractice liability to an adverse party.

The court of appeals decision will not only have a chilling effect on the legal profession – subjecting attorneys to liability to a prevailing party in a dispute over corporate control – but will result in lawyers becoming less likely to accept engagements involving disputes over corporate governance. Simply stated, if lawyers face the prospect of being held liable for legal malpractice when the officer, director or shareholder they are hired to represent in a dispute over corporate control loses, the lawyer in many instances will refuse to undertake the representation. Such a result would leave dissident factions dissatisfied with corporate actions without meaningful access to the legal system and reduce corporate accountability.

Given these significant principles, this case present issues of public and great general interest and the Court should exercise its discretionary jurisdiction and review the propositions of law.

## **II. STATEMENT OF THE CASE AND FACTS**

This action was originally filed by plaintiffs in the Summit County Court of Common Pleas on April 24, 2004. In the original complaint, plaintiffs alleged that E. Marie Wheeler (nka Marie Seiber) “provided advice to certain members of the board of BRM that purported to result in her retention as counsel for the BRM and the Christian Brotherhood Newsletter \* \* \* .” The complaint went on to allege that the board of trustees that purportedly employed Ms. Wheeler had been adjudicated invalid and illegal and that Ms. Wheeler’s retention was void. Plaintiffs alleged that dcfendants deviated from the standard of care ordinarily and customarily provided by attorneys performing legal services in the community and, as such, were liable for legal malpractice. Plaintiffs also alleged that the firm where Ms. Wheeler was employed, Roderick, Myers and Linton, nka Roderick Linton, LLP (“Roderick Linton”) was liable for her conduct. The original complaint was dismissed and re-filed on December 29, 2006.

Significantly, in the re-filed action, plaintiffs never alleged that an attorney/client relationship existed between them and Ms. Wheeler. Rather, the complaint again alleged that Ms. Whcecler provided advice to certain members of the board of BRM. Additionally, plaintiffs alleged that “the board of trustees that purported to employ [Ms. Wheeler] has been determined to have been invalid and illegal and all actions taken by said board are void and without any force and effect.” Plaintiffs once again alleged that Ms. Wheeler was liable for legal malpractice.

Ms. Wheeler moved for summary judgment asserting that plaintiffs' legal malpractice claim failed as a matter of law because no attorney/client relationship existed between her and plaintiffs. Specifically, Ms. Wheeler presented a plethora of evidence demonstrating that she performed legal services on behalf of those individuals on the board of trustees who were attempting to assert control over BRM. She further presented evidence that BRM continually and repeatedly represented and argued that they did not consider Ms. Wheeler their legal representatives. Additionally, Ms. Wheeler asserted that plaintiffs' legal malpractice claim was barred by the statute of limitations as plaintiffs failed to commence the original action within one year of the cognizable event or termination of the purported attorney/client relationship.

Similarly, on December 31, 2007, Roderick Linton filed its motion for summary judgment. Roderick Linton also asserted that plaintiffs' legal malpractice claim failed as a matter of law because no attorney/client relationship existed between plaintiffs and defendants. Roderick Linton detailed voluminous testimony and pleadings submitted on behalf of plaintiffs in various lawsuits wherein they affirmatively represented that defendants did not represent them. Consequently, Roderick Linton asserted that plaintiffs were estopped from asserting that an attorney/client relationship existed between them and defendants. Roderick Linton also asserted that plaintiffs' claim for legal malpractice was time barred.

In response to defendants' motions for summary judgment, plaintiffs asserted that an attorney/client relationship existed between them and defendants because Ms. Wheeler was hired by the leader of the dissident faction, Reverend Bruce Hawthorn, who had attempted to act as president of the BRM. They argued that, Reverend Hawthorn, as purported president of the charitable organization had the actual, implied and/or apparent authority to retain her services on behalf of plaintiffs. Plaintiffs failed to present any evidence, however, demonstrating that

Reverend Hawthorn had the authority to retain defendants on behalf of plaintiffs in light of the fact that Reverend Hawthorn had been placed on a leave of absence during the relevant time period. Moreover, plaintiffs ignored defendants' assertion that the doctrine of judicial estoppel precluded them from now attempting to assert that an attorney/client relationship existed.

On August 7, 2008, the trial court granted defendants' motion for summary judgment on the basis that no genuine issues of material fact existed and plaintiffs failed to establish the existence of an attorney/client relationship between them and defendants. Indeed, the court concluded that the overwhelming evidence demonstrated the absence of an attorney/client relationship:

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 adversary relationship between 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 plaintiffs. Unless there is a breach of duty, there can be no liability in either negligence or contract."

R. 4, Final Order, p. 4. On appeal, the Ninth District Court of Appeals reversed the trial court's determination finding that evidence existed establishing an attorney/client relationship.

### III. ARGUMENTS IN SUPPORT OF PROPOSITION OF LAW

#### **PROPOSITION OF LAW NO. 1**

**A PREVAILING PARTY IN A CORPORATE GOVERNANCE DISPUTE CANNOT MAINTAIN A LEGAL MALPRACTICE ACTION AGAINST THE ATTORNEY ENGAGED TO REPRESENT THE UNSUCCESSFUL DISSIDENT GROUP BECAUSE NO ATTORNEY-CLIENT RELATIONSHIP WAS ESTABLISHED WHERE THE PREVAILING**

**PARTY DID NOT SEEK, OBTAIN OR RELY UPON ANY ADVICE FROM THE ATTORNEY.**

It is axiomatic that a precondition to a successful legal malpractice claim is the existence of an attorney/client relationship. In order to establish a cause of action for legal malpractice a plaintiff must establish: (1) the existence of an attorney/client relationship giving rise to a professional duty; (2) a breach of that duty; and (3) damages proximately caused by that breach. *Vahilla v. Hall*, (1997), 77 Ohio St.3d 421. Simply stated, absent an attorney/client relationship, there can be no claim for legal malpractice. *Id.*

The benchmark of the existence of an attorney/client relationship is a recognition that an attorney renders legal advice and services to a client and that the client relies upon the advice and services of the attorney. *Sayyah v. Curtell* (2001), 143 Ohio App.3d 102, 111. In order to have an attorney/client relationship formed, a client must reasonably believe that it entered into a confidential relationship with the attorney. *Lillback v. Metro Life Ins. Co., LPA*, (1994), 94 Ohio App.3d 100.

The undisputed evidence presented to the trial court demonstrated unequivocally that plaintiffs never relied upon the advice and counsel of Ms. Wheeler. To the contrary, Reverend Russell and Reverend Lupton testified at length that they never considered Ms. Wheeler to be the attorney for BRM. At all relevant times they understood that attorneys from another law firm represented their interests and the interests of the charitable organization. Specifically, Attorney Downey, counsel for BRM in both the *quo warranto* litigation and the civil action against Reverend Hawthorn, testified in no uncertain terms that he was counsel for BRM and Ms. Wheeler was not. He further testified that Ms. Wheeler was not counsel for BRM. Further, the Receiver for BRM, Attorney Scott Haley testified that he informed Ms. Wheeler that she was not the attorney for the charitable organization that he had never hired her to represent the interests

of the organization. There was simply no evidence presented within to demonstrate that plaintiffs looked to Ms. Wheeler for legal counsel or otherwise relied upon her advice.

According to the Court of Appeals' holding here, an attorney-client relationship can be found to exist, not based upon the reasonableness of a putative client's beliefs or expectation or by sharing confidential privileged information with an attorney, but by a retrospective application of the doctrine of unclean hands. The Court of Appeals held that an attorney-client relationship can be deemed to exist with a corporate client even though the existing Board members disavowed that relationship, if those same board members later determine that they wish to claim that a relationship existed at all. 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 for there to be an attorney-client relationship. The rationale of the decision should not be the law in Ohio.

## **PROPOSITION OF LAW NO. II**

**A PARTY IS JUDICIALLY ESTOPPED FROM CLAIMING THE EXISTENCE OF AN ATTORNEY-CLIENT RELATIONSHIP FOR PURPOSES OF PURSUING A LEGAL MALPRACTICE CLAIM WHERE THE PARTY SUCCESSFULLY CONTENTED IN PRIOR LITIGATION THAT IT HAD NO ATTORNEY-CLIENT RELATIONSHIP WITH THE ATTORNEY.**

The doctrine of judicial estoppel prohibits a party who has successfully advanced a position in a judicial proceeding from taking an inconsistent position in a subsequent proceeding. *Smith v. Dillard Dept. Stores, Inc.*, (2000), 139 Ohio App.3d 525, 533. A litigant is forbidden from taking a position inconsistent with one he or she has successfully unequivocally asserted in

a prior judicial proceeding. *Id.* As such, judicial estoppel will preclude a claim if a defendant can establish that a plaintiff: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court. *Smith*, at 139 Ohio App.3d at 533.

Judicial estoppel is not limited to situations where a party's position is reflected in a journalized court order. The doctrine applies even in the absence of a court order, as it requires only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Hildreth Mfg., LLC v. Semoco, Inc.*, 151 Ohio App.3d 693, 2005-Ohio-741 ¶ 59. As previously indicated, Ms. Wheeler attempted to dismiss plaintiffs' claim for money damages against Reverend Hawthorn. The day after filing this pleading, plaintiffs filed a Motion to Strike the Notice of Dismissal on the basis that Ms. Wheeler was not and had never been counsel for BRM. The trial court disregarded Ms. Wheeler's Notice of Dismissal and permitted the action to proceed to trial wherein a jury rendered a verdict against Mr. Hawthorn.

Moreover, the Court of Appeals decision in the *quo warranto* matter settled the representation issue in precisely the same manner as advanced by BRM. In determining that the December 11, 2000 meeting failed to lack a quorum and the elections of the insurgent board members was void, Reverend Hawthorn lacked the authority to engage Ms. Wheeler on behalf of the charitable organization. The inescapably conclusion flowing from the Court of Appeals decision in the *quo warranto* was that Ms. Wheeler did not represent and never represented BRM, the position they asserted throughout the litigation. The faction that purported to hire her did not have the authority to do so and therefore an attorney/client relationship never existed between her and the charitable organization.

In light of plaintiffs' successful assertion in both the *quo warranto* and claim for money damages against Reverend Hawthorn that Ms. Wheeler was not the attorney for BRM, they should be judicially estopped from claiming in this case that there is evidence sufficient to support a genuine issue of fact concerning the existence of the attorney/client relationship.

### **PROPOSITION OF LAW NO. III**

**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**

Revised Code Section 2305.11(a) provides that an action for legal malpractice must be commenced within one year of the accrual of the cause of action. The statute of limitations for legal malpractice claims begins to run at the later occurrence of two dates: (1) the cognizable event of a possible claim, which is when the plaintiff is put on notice of questionable conduct that may support a possible legal malpractice claim; or (2) the termination of the attorney/client relationship. *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54. In this case, the undisputed evidence demonstrated that both the accrual date for the potential legal malpractice claim and the termination of the purported attorney/client relationship occurred more than one year before the filing of the first underlying complaint. The determination of when a cause of action for legal malpractice accrues is generally a question of law. *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420.

The cognizable event that would have triggered the running of the statute of limitations is when BRM would have had reason to believe that Ms. Wheeler gave erroneous advice to the insurgent board thus resulting in her retention as counsel. The cognizable event, therefore,

occurred at or around the time Ms. Wheeler became engaged by Reverend Hawthorn to represent his interest and the interests of his supporters. The evidence leaves no doubt that BRM was aware of the conduct it now complains during December, 2000 shortly after Ms. Wheeler was retained. Further, BRM was advised by its tax attorney, Frank Sommerville that Ms. Wheeler had an alleged irreconcilable conflict of interest. Mr. Sommerville's comments were communicated to BRM attorneys at Vorys Sater.

Moreover, the purported termination of the alleged attorney/client relationship occurred at the latest on April 21, 2001. As previously indicated, Scott Haley was appointed Receiver for BRM on March 22, 2001. From that time onward, Mr. Haley exercised day to day authority. On April 21, 2001, Mr. Haley was appointed Operating Receiver for the charitable organization and he terminated any alleged attorney/client relationship between BRM and Ms. Wheeler. Mr. Haley made clear in a subsequent correspondence to Ms. Wheeler that "since the time of my appointment as the Operating Receiver of BRM dba Christian Brotherhood Newsletter effective April 21, 2001, I have not and will not be retaining your services to represent that entity." Consequently, any alleged attorney/client relationship that existed between Plaintiffs and Ms. Wheeler was terminated by April 21, 2001. Plaintiffs' original action for malpractice, however, was not filed until April 24, 2004, several days after the expiration of the one year statute of limitations. Consequently, plaintiffs' claim for legal malpractice is barred.

#### **IV. CONCLUSION**

WHEREFORE, this case presents issues of public or great general interest. As such, appellant respectfully requests this Court exercise its discretionary jurisdiction to review the propositions of law.

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant E. Marie Wheeler has been forwarded by ordinary U.S. Mail this 16 day of February, 2010 to:

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## APPENDIX

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

COURT OF APPEALS  
DANIEL M. HERRIGAN

2009 DEC 30 AM 8:41

NEW DESTINY TREATMENT  
CENTER, INC., ET AL.

Plaintiffs-Appellants

-vs-

E. MARIE WHEELER, ET AL.

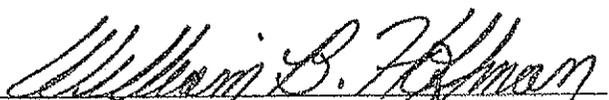
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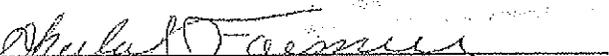
SUMMIT COUNTY  
CLERK OF COURTS

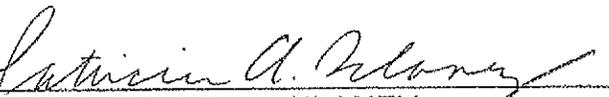
JUDGMENT ENTRY

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. HERRIGAN

DEC 30 AM 8:41

NEW DESTINY TREATMENT  
CENTER, INC., ET AL.

Plaintiffs-Appellants

-vs-

E. MARIE WHEELER, ET AL.

Defendant-Appellees

JUDGES, SUMMIT COUNTY  
Hon. Sheila K. Farmer  
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:

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JAN 04 2010

*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.

{¶18} 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.

{¶19} 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 *Marinero 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.

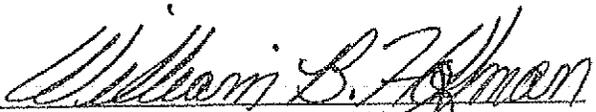
{¶34} Appellant's second and third assignments of error are overruled.

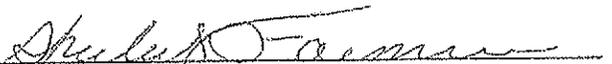
{¶35} The Judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part and remanded.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

  
HON. WILLIAM B. HOFFMAN

  
HON. SHEILA G. FARMER

  
HON. PATRICIA A. DELANEY