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IN THE SUPREME COURT OF OHIO

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

Plaintiff- Appellee

vs.

E. MARIE WHEELER, et al

Defendants-Appellants

) **Supreme Court Case No. 2010- 0298**
)
) **On Appeal from a Decision of the**
) **Ninth District Court of Appeals**
)
) **Court of Appeals Case No. 24404**
)
) **Plaintiff-Appellees'**
) **Memorandum in Opposition to Briefs**
) **in Support of Jurisdiction**

MEMORANDUM IN OPPOSITION TO BRIEFS IN SUPPORT OF JURISDICTION

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**Explanation of Why this Case Does not Involve
Issues of Public and Great General Interest**

Put simply, this case is about whether a law firm may be held responsible for acts and decisions undertaken while representing a corporate entity. Roderick Linton, LLP (“Roderick Linton”) committed malpractice which caused considerable expense to the entity it represented, and now seeks to deny that entity the chance to hold it accountable for its actions.

Roderick Linton and Marie Wheeler (“Wheeler”) attempt to characterize their client during the battle for control of New Destiny Treatment Center, Inc. fka Barberton Rescue Mission (“New Destiny”) as the group of individuals asserting themselves as the rightful board of directors of the entity. All of Roderick Linton’s and Wheeler’s arguments in support of jurisdiction flow from this characterization. However, as set forth in the appellate court decision, Roderick Linton and Wheeler represented New Destiny, not the individuals vying for its control.

The appellate court stated

“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 this Mission. Appellee Wheeler filed a voluntary notice of dismissal of the common pleas lawsuit representing herself to be counsel for the Mission.”

App. Op. ¶ 26, Apx. p. 11.

The lower court found that the facts before it indicated that Roderick Linton and Marie Wheeler had represented the entity Barberton Rescue Mission, not the group of individuals

attempting to control said entity. Viewed in this light, it is clear that this case presents no issue of public or great general interest.

Had Roderick Linton desired to solely represent the group of individuals attempting to assert control over New Destiny, rather than that group and New Destiny, it could have easily done so. It did not have to send billing statements to New Destiny or accept payment from that entity. It did not have to make an appearance in court on behalf of the entity or file pleadings on the entity's behalf. It did not have to send communications to the state and other indicating that it represented the entity. In short, Roderick Linton's actions, not an unresolved issue of law, led to its current predicament.

Roderick Linton could very easily have represented only the group of individuals vying for control of New Destiny, thereby protecting itself from malpractice claims. It did not choose to do this-- whether for financial reasons or simple failure to recognize the inherent conflict of interest in representing the individuals seeking control of New Destiny and New Destiny itself. This failure of judgment by Roderick Linton does not present issues of great or public interest for this Court to review.

Statement of the Facts and of the Case

New Destiny is a non-profit organization organized under the laws of the state of Ohio. Bruce Hawthorn was president of New Destiny at the time that the Ohio Attorney General, IRS and authorities of Summit County Ohio starting investigating Hawthorn and his family's use of New Destiny's resources for their personal benefit. App. Op. ¶ 3, Apx. p. 3. As a result of these investigations, Howard Russell and Richard Lupton took control of New Destiny's board of trustees. App. Op. ¶ 3, Apx. p. 3. Hawthorn was placed on a leave of absence.

Hawthorn subsequently hired Roderick Linton to represent New Destiny. App. Op. ¶ 4, Apx. p. 4. New Destiny paid a \$25,000 retainer to Roderick Linton. App. Op. ¶ 4, Apx. p. 4. Roderick Linton, through its employee Marie Wheeler, prepared a special board meeting agenda for December 11, 2000. At this meeting, Russell was removed from the New Destiny board of directors, several individuals were added to the board, Roderick Linton's retention was approved, and Hawthorn was given authority to terminate New Destiny's relationship with Vory's Sater Seymour & Pease. App. Op. ¶ 4, Apx. p. 4.

Roderick Linton assumed the role of counsel for New Destiny following the special board of directors meeting of December 11, 2000. Its employee, Marie Wheeler, sent correspondence to the Ohio Attorney General on December 12, 2000 stating that the Attorney General was not to have any contact with New Destiny's employees and sent a letter to Vorys Sater stating that she was general counsel for New Destiny. App. Op. ¶ 5, Apx. p. 4, 5. Roderick Linton also filed a notice of dismissal on behalf of New Destiny in a lawsuit commenced by the Ohio Attorney General and New Destiny against Hawthorn and his purported board of directors. App. Op. ¶ 5, Apx. p. 5. The board controlled by Russell and Lupton filed a motion to strike the dismissal; however, the trial court never ruled on the dismissal notice. App. Op. ¶ 5, Apx. p. 5. Control of New Destiny was finally given to the Russell board of directors by a ruling of the Ninth District Court of appeals in a quo warranto action filed by the Ohio Attorney General on October 3, 2001. State of Ohio ex rel. Montgomery v. Hawthorn, 2001 Ohio 1404. A non-operating receiver was appointed for New Destiny on March 22, 2001. The receiver terminated Marie Wheeler's employment by New Destiny in April of 2001. App. Op. ¶ 7, Apx. p. 5.

New Destiny filed a complaint against Roderick Linton and Marie Wheeler on April 24, 2002 claiming, inter alia, that Roderick Linton and Marie Wheeler committed legal malpractice.

The trial court granted summary judgment in favor of Roderick Linton and Marie Wheeler on all counts. The basis of the trial court's ruling was that the Russell/Lupton board and New Destiny could be characterized as the same entity, thus, the fact that the Russell/Lupton board never considered Roderick Linton to be its attorney was dispositive of the issue of whether an attorney client relationship existed between New Destiny and Roderick Linton.

The court of appeals correctly reversed the decision of the trial court stating "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." App. Op. ¶ 22, Apx. p. 9.

Response to Appellants' Proposition of Law No. I

Roderick Linton: No attorney-client relationship, necessary to support a legal malpractice action, 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.

Marie Wheeler: 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.

This "proposition of law" is a thinly veiled attempt to have this Court rewrite the factual findings of the Ninth District Court of Appeals. Its arguments presume that Roderick Linton and its employee, Marie Wheeler, only represented the individuals asserting control over New Destiny. As the facts of this case clearly establish, the parties seeking jurisdiction represented the organization, not the individuals on the Hawthorn board.

The determination of whether an attorney client relationship exists rests largely upon the reasonable belief of the prospective client. Cuyahoga County Bar Ass'n v. Hardiman (2003), 100 Ohio St. 3d 260. An attorney-client relationship can be formed based upon the conduct of the

attorney and the expectations of the client. Cuyahoga County Bar Ass'n v. Hardiman (2003), 100 Ohio St. 3d 260.

Using the standard set forth by this Court, the appellate court correctly determined that Roderick Linton and Marie Wheeler had formed an attorney-client relationship with New Destiny. New Destiny received bills for services from Roderick Linton and paid those bills, and New Destiny had legal documents filed on its behalf by Roderick Linton in court proceedings. These facts clearly establish that New Destiny believed that Roderick Linton was its attorney and believed that its legal interests would be protected by its legal representatives.

Furthermore, as found by the appellate court, Roderick Linton was hired by the president of New Destiny, Bruce Hawthorn, to represent the entity. Mr. Hawthorn had the actual and apparent authority to retain counsel on behalf of New Destiny and his actions established an attorney-client relationship between Roderick Linton and the entity.

This legal proposition does not involve issues of public or great general interest. It involves the straightforward application of the facts to this case to established and well-understood legal standards.

Response to Appellants' Proposition of Law No. II

Roderick Linton: 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.

Marie Wheeler: 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 contended in prior litigation that it had no attorney-client relationship with the attorney.

Roderick Linton and Marie Wheeler contend that the appellate court's ruling on the issue of judicial estoppel was erroneous. The appellate court found that because Roderick Linton and Wheeler held themselves out as New Destiny's counsel to the public, the Ohio attorney general and in prior court proceedings that they are equitably estopped from denying the existence of an attorney-client relationship.

Judicial estoppel and equitable estoppel are equitable remedies. Equitable remedies depend of the facts of a particular case. There is no great public or general interest in this case as the issue of whether judicial or equitable estoppel are appropriate squarely depends on these particular facts. A situation where a law firm represents an entity, such representation is contested, the law firm commits malpractice during the contested representation, is sued, and then asserts the plaintiffs are judicially estopped from alleging malpractice is simply a scenario which is unlikely to occur with any regularity.

Roderick Linton and Marie Wheeler were estopped from denying the existence of a prior attorney-client relationship with New Destiny on equitable grounds. This ruling was based on the particular facts of this case as determined by the appellate court. The sweeping issues asserted by Roderick Linton and Marie Wheeler in this proposition of law no. II simply do not exist.

Response to Proposition of Law No. III

Roderick Linton: 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 brief before remanding the case to the trial court.

Marie Wheeler: 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.

In their third proposition of law, Roderick Linton and Wheeler assert that the court of appeals should have addressed its statute of limitations arguments. The court of appeals did not address this argument in its decision and has not yet ruled on the motions to reconsider filed by Roderick Linton and Marie Wheeler.

First, there is nothing to suggest that the court of appeals did not consider and reject the statute of limitations argument. It could be a matter of simple oversight that caused this issue not to be addressed in the court of appeals decision. An oversight by the court of appeals does not present an issue of great public or general interest.

Second, the statute of limitations argument does not have merit. The applicable statute of limitations for a legal malpractice claim can be found in Ohio Revised Code Section 2305.11.

The Ohio Supreme Court stated:

"Under R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later."

Jackson v. Greger (2006), 110 Ohio St. 3d 488, 492, citing Zimmie v. Calfee, Halter & Griswold (1989), 43 Ohio St.3d 54. In this case, the malpractice action was filed within one year of both the termination of the attorney-client relationship and the cognizable event.

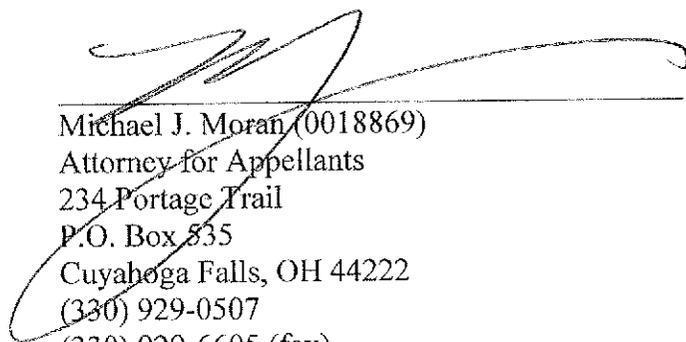
Additionally, the cognizable event in this case was the issuance of the quo warranto decision issued on October 3, 2001. It was this event which determined that the Hawthorn board was not the rightful board of trustees of New Destiny and that Roderick Linton had committed malpractice. Although some individuals thought that Roderick Linton's actions were improper prior to October 3, 2001, there was no basis for a malpractice action until the quo warranto decision was issued. See Smith v. Conley (2005), 109 Ohio St. 3d 141 (finding that the conviction in a criminal case, not the action of the attorney at trial, was the cognizable event); N. Shore Auto Sales v. Weston, 8th Dist. No. 86332, 2006 Ohio 456 (stating that the cognizable event occurred when the appellate court denied the delayed motion to certify a conflict and motion for reconsideration, as opposed to when client suspected his attorney made a mistake in refusing to certify a conflict).

Whether the court of appeals considered the statute of limitations issue or not, the result would have been the same: this case would be remanded in order for it to proceed to trial. Thus, no issue of great public or general interest is present for this Court to decide.

Conclusion

For the foregoing reasons, the issues presented in this case do not involve great public or general interest. As such, this Court should decline to exercise jurisdiction over this matter.

GIBSON & LOWRY

A handwritten signature in black ink, appearing to read 'Michael J. Moran', is written over a horizontal line. The signature is stylized with a large, sweeping flourish that extends to the right.

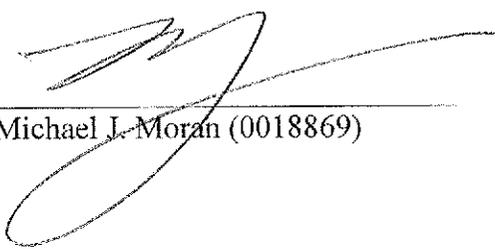
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