

ORIGINAL

No. 2010-0298

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

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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. 12

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. 27

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. 33

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I.
STATEMENT OF FACTS

A. Overview

This case arises from a complicated legal battle to control Barberton Rescue Mission (“BRM”), a not-for-profit, church-based charitable corporation. A board of directors was in place at BRM. A dissident faction attempted to take control of the board by legal means. The dissidents convened a meeting of the Board and purported to elect a new group of directors at the meeting. The established board repudiated the meeting and the election. Each faction asserted the right to control BRM. Each retained counsel to represent itself and BRM.

The dispute was eventually resolved by the Ninth District Court of Appeals in a *quo warranto* proceeding. The established board prevailed, and among the arguments it successfully advanced in prevailing were that the meeting convened by the dissidents was not a lawful meeting, that the election held at that meeting was invalid, and that actions taken pursuant to the election – including the dissidents’ efforts to retain counsel for BRM – were void. See *State ex rel. Montgomery v. Hawthorn*, 9th Dist. No. 20391, 2001-Ohio-1404, pp. 6-7.

Thereafter, BRM sued E. Marie Wheeler (“Ms. Wheeler”) and Roderick Linton, LLP,¹ who had represented the dissidents during the dispute. The complaint alleged legal malpractice, at least in a manner of speaking. The complaint was voluntarily dismissed while motions for summary

¹This action is a refile of an action first filed by the receiver for the Barberton Rescue Mission on April 24, 2002 and captioned *R. Scott Haley, et al. v. E. Marie Wheeler, et al.*, Summit County Court of Common Pleas Case No. 2002-04-2356 (“Case #1” or the “original action”). The original action was voluntarily dismissed on March 16, 2006, while separate motions for summary judgment filed by Roderick Linton and Ms. Wheeler were pending. The claims were refiled as the instant action on December 29, 2006 (“Case #2” or the “refiled action”). The trial court ordered that the deposition transcripts and all written discovery conducted in Case #1 could be used in Case #2. See “Transcript of Docket and Journal Entries” (“Docket”) for Case #2 at Entry #45, January 28, 2008 Judgment Entry.

judgment were pending and then refiled. The refiled complaint again alleged legal malpractice in a manner of speaking. The refiled complaint, which is the complaint at issue in this appeal, alleged that because the dissident faction had “purported” to retain Ms. Wheeler and Roderick Linton as counsel, a legal malpractice claim could be maintained against them by BRM even though the retention was “void and invalid.” BRM made these allegations even though it had successfully argued in the *quo warranto* litigation and in other litigation that Ms. Wheeler never represented the corporation.

Ms. Wheeler and Roderick Linton denied the existence of an attorney-client relationship with BRM and raised a number of affirmative defenses, including judicial estoppel and the statute of limitations. The trial court eventually granted motions for summary judgment filed by Ms. Wheeler and Roderick Linton, concluding that no genuine issue of fact existed and that no attorney-client relationship ever existed between BRM and Ms. Wheeler or Roderick Linton. The court of appeals reversed, holding *inter alia* that there was evidence of an attorney-client relationship and that Ms. Wheeler and Roderick Linton had unclean hands and were equitably estopped from asserting the defense of judicial estoppel. This Court accepted the matter for discretionary review.

B. The Barberton Rescue Mission

BRM is a religious and charitable organization located in Barberton, Ohio.² The core

²We will refer to the plaintiff as “BRM” throughout this brief. We do so as a matter of convenience. At the time of the events pertinent to the case, Barberton Rescue Mission was a single entity operating as two divisions. One division was the Barberton Rescue Mission, a non-profit rehabilitation facility; the other division was the Christian Brotherhood Newsletter, a not-for-profit entity assisting members with medical bills. (Docket #37 Appendix to Defendant Roderick Linton, LLP’s Motion for Summary Judgment (“Appx. to MSJ”), Exhibit B (“April 24, 2002 Complaint”), ¶8, Supplement p. 3). The Barberton Rescue Mission has now been reorganized into two separate entities: New Destiny Treatment Center, Inc. and Christian Brotherhood Newsletter. The Christian Brotherhood Newsletter asserted no separate claim against Ms. Wheeler or Roderick Linton. New Destiny Treatment Center is the named plaintiff in the current complaint, but because “BRM” was the name used during all discovery, we will continue to use it here.

purpose of the organization is to provide assistance to individuals with substance abuse problems. Over the years, BRM also began a program through which subscribers to a Christian newsletter provided mutual assistance for the payment of uninsured medical bills. This reciprocal medical payment program eventually became known as Christian Brotherhood Newsletter (CBN), became an enormous success, and grew to the point where millions of dollars were passing through CBN each month to pay subscribers' medical bills.

BRM, and later CBN as a division of BRM, were founded by members of the Hawthorn family. Bruce Hawthorn became the president of BRM, and he and members of his family sat on its board.³

C. Alleged Improprieties at BRM

In the mid 1990's, questions arose whether Mr. Hawthorn and members of his family were abusing their positions at BRM. Investigations were commenced, more or less simultaneously, by the Ohio Attorney General, Summit County authorities, and the Internal Revenue Service.⁴ Among the broad points of these investigations were whether Mr. Hawthorn and others in his family were using BRM for their personal benefit, including the payment of excessive compensation, the purchase of homes and vehicles, and other personal emoluments.⁵

These events and investigations caused a faction opposed to Mr. Hawthorn to seek control

³Docket # 38, Deposition of Philip Downey ("Downey Depo."), p. 89, Supplement p. 16; Docket #30, Deposition of Richard Lupton ("Lupton Depo."), pp. 28-29, Supplement pp. 23-24.

⁴Appx. to MSJ at Exhibit H, Deposition of Sherry Phillips, Assistant Ohio Attorney General ("Phillips Depo."), pp. 14-15, 21-23, Supplement pp. 56-57, 60-62; Appx. to MSJ at Exhibit I, Deposition of Frank Sommerville, Esq. ("Sommerville Depo."), pp. 12-15, Supplement pp. 84-87.

⁵Phillips Depo. pp. 18-19, Supplement pp. 58-59; Sommerville Depo. pp. 20-21, Supplement pp. 88-89; Lupton Depo. p. 35, Supplement p. 25.

of BRM and Mr. Hawthorn's ouster.⁶ That faction was led by Howard Russell and Richard Lupton, and they succeeded in taking control of BRM's board of trustees. The Russell/Lupton faction selected the law firm of Vorys Sater Seymour & Pease ("Vorys Sater") to represent its interests as it obtained control. Vorys Sater served as legal counsel for BRM thereafter. Mr. Hawthorn was placed on a leave of absence from his position as President and stripped of his authority.⁷ Mr. Russell and Mr. Lupton relied on Vorys Sater as legal counsel for themselves and for BRM. Vorys Sater participated in lawsuits on BRM's behalf against Mr. Hawthorn and others.⁸

D. The Struggle for Control of BRM

December 2000 was a pivotal and tumultuous month. Bruce Hawthorn determined that he wished to reassert himself as the individual in control of BRM and its board.⁹ He sought legal counsel, and eventually settled upon Marie Wheeler, who at the time was an independent contractor at the Akron firm of Roderick Linton, LLP.¹⁰

The Hawthorn faction issued a notice scheduling a meeting of the BRM board of trustees for

⁶Lupton Depo. pp. 24-25, Supplement pp. 21-22.

⁷Phillips Depo. p. 34, Supplement p. 69; Lupton Depo. pp. 107-110, Supplement pp.50-53.

⁸Downey Depo. pp. 18-19, 29-30, Supplement pp. 6-9; Lupton Depo. pp. 50, 60, Supplement pp. 37, 45.

⁹Phillips Depo. pp. 32-35, Supplement pp. 67-70; Lupton Depo. pp. 39-40, Supplement 26-27.

¹⁰Appx. to MSJ at Exhibit J, Deposition of E. Marie Wheeler ("Wheeler Depo."), p. 43, Supplement p. 103; Appx. to MSJ at Exhibit K, Affidavit of Stephen Pruneski ("Pruneski Affidavit"), ¶4-5, Supplement p. 114; Lupton Depo. pp. 49-50, Supplement pp. 36-37.

December 11, 2000.¹¹ The Russell/Lupton faction did not attend the meeting.¹² The meeting proceeded in their absence, and a slate of trustees supportive of Mr. Hawthorn was “elected” to the BRM board.¹³ Mr. Hawthorn was “reinstated” as president by the new “board.” He then formally engaged Ms. Wheeler to be counsel for BRM, and she proceeded to act as if she were.¹⁴

As a result of the December 11, 2000 meeting, two factions claimed control of BRM. Mr. Hawthorn and those supportive of him claimed control and the prerogative to direct the affairs of BRM. The Russell/Lupton faction made the same claim. Each faction hired its own counsel. Vorys Sater purported to represent BRM through the Russell/Lupton board.¹⁵ Ms. Wheeler purported to represent BRM through the Hawthorn board.¹⁶

E. Litigation Is Commenced

On December 11, 2000, the Ohio Attorney General filed suit against Hawthorn and others to recover damages for their alleged financial misdeeds at BRM (case captioned *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 (“common pleas litigation”)).¹⁷ BRM, Mr. Russell

¹¹Wheeler Depo. pp.102-103, Supplement pp. 104-105; Lupton Depo. pp. 51-54, Supplement pp. 38-41.

¹²Wheeler Depo. p. 112, Supplement p. 106; Lupton Depo. p. 55, Supplement p. 42.

¹³Wheeler Depo. pp. 116-117, Supplement pp. 107-108; see, also, *State ex rel. Montgomery v. Hawthorn*, 2001-Ohio-1404.

¹⁴Wheeler Depo. pp. 117-118, Supplement pp. 108-109.

¹⁵Downey Depo. pp. 29-30, Supplement pp. 8-9; Phillips Depo. p. 70, Supplement p. 73; Lupton Depo. p. 50, Supplement p. 37.

¹⁶Wheeler Depo. pp. 117-118, Supplement pp. 108-109.

¹⁷Downey Depo. pp. 87-88, Supplement pp. 14-15.

(as a Trustee and Chairman of the Board), and Mr. Lupton (as a Trustee) joined in the complaint, represented by Vorys Sater.¹⁸ The complaint was the result of years of investigation by the Attorney General of activities at BRM and was in no way critical of Ms. Wheeler or the representation she was providing to Mr. Hawthorn.¹⁹

The Attorney General's office filed a separate complaint requesting a writ of *quo warranto*. The complaint, captioned *State of Ohio, ex rel. Betty D. Montgomery, et al. v. Bruce E. Hawthorn*, was filed on December 22, 2000 in the Ninth District Court of Appeals (Case No. 20391).²⁰ The *quo warranto* action addressed directly the battle for control of BRM.²¹ The writ sought a determination that the December 11 meeting described above was invalid, that the election of directors friendly to Hawthorn was therefore invalid, and that actions taken at the meeting were void. BRM, Russell, and Lupton all joined as relators in the *quo warranto* petition, and again they were represented by Vorys Sater.²² The court of appeals later determined that neither BRM, Russell, nor Lupton had standing to sue in the *quo warranto* proceeding and that only the Attorney General was authorized to maintain the claim.²³

¹⁸Phillips Depo. pp. 25-26, 28-29, 56-57, 97, 129, 133, Supplement pp. 63-66, 71-72, 74, 79-80.

¹⁹Phillips Depo. pp. 28-29, Supplement pp. 65-66; Downey Depo. p. 88, Supplement p. 15; Appx. to MSJ at Exhibit N, Docket printout in *Barberton Rescue Mission, d/b/a Christian Brotherhood Newsletter, et al. v. Bruce Hawthorn, et al.*, Summit County Common Pleas Case No. 2000-12-5496, Supplement pp. 157-158.

²⁰Downey Depo. pp. 32-33, Supplement pp. 10-11.

²¹Downey Depo. p. 80, Supplement p. 13.

²²*Id.*; Phillips Depo. p. 114, Supplement p. 78.

²³Downey Depo. p. 34, Supplement p. 12; Phillips Depo. pp. 113-114, 133-134, Supplement 77-78, 80-81; Appx. to MSJ at Exhibit L, February 23, 2001 Journal Entry in the *quo warranto* proceeding (Book 0141, page 0733), Supplement 159-168.

F. Ms. Wheeler's Departure from Roderick Linton, and the Appointment of a Receiver Over BRM

On February 16, 2001, approximately two months after the filing of the *quo warranto* proceeding, Ms. Wheeler ended her association with Roderick Linton. After leaving Roderick Linton and opening her own law office, Ms. Wheeler continued to assert that she was counsel for BRM in the common pleas litigation, and she also continued to represent Mr. Hawthorn and others in the Hawthorn faction in the *quo warranto* proceeding. Roderick Linton filed a notice of withdrawal on February 20, 2001, confirming that none of its attorneys were involved any longer in the proceedings.²⁴

On March 22, 2001, in connection with the common pleas litigation, R. Scott Haley was appointed receiver for BRM. At first Mr. Haley was a non-operating receiver, later became an operating receiver, and later still returned to the status of a non-operating receiver. Once appointed as operating receiver in April 2001, he exercised day-to-day authority over BRM.²⁵ Mr. Haley made many decisions as operating receiver, the most significant of which for purposes of this appeal was his unequivocal decision to terminate Ms. Wheeler's claimed authority to act as counsel for BRM.²⁶

Ms. Wheeler's status as counsel for BRM was *never* acknowledged or accepted by Mr. Haley or by the Russell/Lupton faction, but Mr. Haley nonetheless gave formal notice on April 21, 2001 that he was terminating all ostensible authority claimed by Mr. Wheeler. BRM and Mr. Haley

²⁴Pruneski Affidavit, ¶¶10-12, Supplement 115.

²⁵See Appx. to MSJ at Exhibit Q, Plaintiff Barberton Rescue Mission's Answers to Defendant Roderick Linton's First Set of Interrogatories in Case #1 ("Plaintiffs' Answers to Interrogatories"), at No. 3, Supplement pp. 170, 186. These interrogatory answers were verified by R. Scott Haley (Receiver), Roger A. Kittelson (Chief Financial Officer), and Howard Russell (Chairman of the Board), Supplement pp. 181-182.

²⁶Id. at No. 4(b), Supplement pp. 170-171, 187.

concede that from that date forward Ms. Wheeler represented only Mr. Hawthorn and other individuals.²⁷

Any purported or attempted attorney-client relationship between BRM and Ms. Wheeler terminated no later than Mr. Haley's notice on April 21, 2001.²⁸ Any purported or attempted 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 Ms. 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 common pleas litigation.²⁹

G. Decision on the Quo Warranto Complaint

Discovery proceeded in the *quo warranto* matter, and the case was decided by the Ninth District Court of Appeals on cross-motions for summary judgment. On October 3, 2001, the Court ruled that the meeting called by the Hawthorn faction on December 11, 2000 was invalid for lack of a quorum. The court also determined that the election conducted at the meeting "was invalid," that "any and all actions taken at that meeting are void," and that "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 ruled: "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

²⁷Id.

²⁸Id.; Pruneski Affidavit, ¶¶ 3-4, 10-11, Supplement 114-115.

²⁹Pruneski Affidavit ¶¶ 10-12, Supplement 115; Appx. to MSJ at Exhibit M, Affidavit of Steven Mastrantonio ("Mastrantonio Affidavit"), ¶¶ 6-9, Supplement 202-203.

void.” Id. at pp. 6-7. The practical effect of the *quo warranto* decision was to confirm that the Russell/Lupton board was always the legitimate board with the right to control BRM, that the Hawthorn dissidents were never the legitimate board, that the powers of BRM’s presidency were never restored to Hawthorn, and that Ms. Wheeler was never BRM’s counsel, her efforts notwithstanding.

H. Outcome of the Common Pleas Litigation

The common pleas litigation seeking money damages against Mr. Hawthorn and the others proceeded independently of the *quo warranto* matter. Ms. Wheeler continued to represent Mr. Hawthorn and certain of his family members in that proceeding for a while, but she withdrew entirely on October 25, 2001.³⁰ The case continued with new defense counsel, went to trial in May 2004, and resulted in a multi-million dollar verdict against Hawthorn and the other defendants.³¹

I. BRM Reverses Course and Files a Complaint for Legal Malpractice

This legal malpractice lawsuit was filed after the battle for control was concluded. BRM’s original complaint, filed on April 24, 2002, asserted claims of legal malpractice based upon the “purported” attorney-client relationship.³² BRM filed its complaint even though it had argued successfully in the *quo warranto* proceeding that Ms. Wheeler and Roderick Linton never served as legal counsel to BRM. BRM’s complaint actually alleged that the purported attorney-client relationship between BRM and Ms. Wheeler and Roderick Linton was determined to be “invalid and

³⁰See *Barberton Rescue Mission, etc., et al. v. Bruce Hawthorn, et al.*, Docket, Supplement pp. 148-149; see, also, Appx. to MSJ at Exhibit O, October 25, 2001 Notice of Withdrawal, Supplement pp. 210-211.

³¹See Appx. to MSJ at Exhibit P, March 29, 2005 Final Judgment Entry (reducing verdict to judgment), Supplement pp. 212-215.

³²April 24, 2002 Complaint, Supplement pp. 2-3.

illegal” and that any efforts by the Hawthorn board to hire them as BRM’s attorneys was “void and without any force and effect.” Identical allegations are set forth in BRM’s refiled complaint, filed December 29, 2006.³³ Throughout discovery, BRM, its corporate representatives, its attorneys, and the Attorney General’s Office all testified unequivocally that Ms. Wheeler had never been counsel for BRM.³⁴

J. Finding No Attorney-client Relationship, the Trial Court Enters Summary Judgment

Ms. Wheeler and Roderick Linton moved for summary judgment. (See Docket # 31 and 36). They argued, *inter alia*, that they had no attorney-client relationship between them and BRM, that the complaint and BRM’s witnesses conceded as much, that BRM was judicially estopped from asserting the existence of an attorney-client relationship, and that BRM’s complaint was barred by the statute of limitations. The trial court granted summary judgment to Ms. Wheeler and Roderick Linton, concluding 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’ representations.” (Docket #64, Order and Opinion Granting Summary Judgment (“Summ. Judg. Op.”), p. 6, Apx. p. 25). 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. at p. 3, Apx. p. 22). The trial court concluded that

³³Docket #1, Plaintiffs refiled complaint.

³⁴Testimony that Ms. Wheeler and Roderick Linton were not BRM’s attorneys may be found in Plaintiff’s Answers to Interrogatories, No. 4(b), Supplement 170-171, 187; Lupton Depo., pp. 40-51, 58-61, Supplement pp. 27-38, 43-46; Docket # 50, Deposition of Howard Russell (Russell Depo.), pp. 71-72, 100, Supplement pp. 217-219; Downey Depo., pp. 116-117, Supplement pp. 17-18; Appx. to MSJ at Exhibit S, Deposition of John Winship Read (“Read Depo.”), pp. 4-6, Supplement pp. 223-225; Appx. to MSJ at Exhibit T, Deposition of Anthony O. Calabrese, III. (“Calabrese Depo.”), pp. 3-5, Supplement pp. 229-231; and Philips Depo. pp. 100-101, Supplement pp. 75-76.

there was never an attorney-client relationship and, in fact, “the opposite is true.” The trial court continued:

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. at p. 4, Apx. p. 23). The trial court reasoned that Ms. Wheeler, as a zealous advocate of her client, was necessarily taking positions contrary to those advanced by the Russell/Lupton board, 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. at p. 7, Apx. p. 26). The trial court did not rely expressly in its opinion on the defense of judicial estoppel, although elements of the defense are part and parcel of the court’s analysis. The trial court did not address the statute limitations in any respect.

K. The Court of Appeals Reverses

The court of appeals reversed the trial court’s decision. (Transcript of Docket and Journal Entries Ninth District Court of Appeals (App. Docket), Entries 33-34, Opinion of the Court of Appeals (“App. Op.”), Apx. pp. 6-19). The court of appeals disagreed with the trial court’s assessment that there was no attorney-client relationship between BRM and Ms. Wheeler, concluding that there was “sufficient evidence” to establish the existence of an attorney-client relationship.³⁵ The court of appeals rejected the argument that BRM was judicially estopped from

³⁵The 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. pp. 14-15). But the trial court did not rely upon Lupton’s “expert opinion” but rather on the “extensive evidence” that BRM never recognized Ms. Wheeler/Roderick Linton as their lawyers and never relied upon advice or representations of Ms. Wheeler/Roderick Linton. (Summ. Judg. Op., p.6, Apx. p. 26).

changing its position and from asserting the existence of an attorney-client relationship. Indeed, the court of appeals concluded that Ms. Wheeler and Roderick Linton were estopped from raising the defense. Because Ms. Wheeler had asserted during the fight for control that she did represent BRM, the court of appeals concluded that Ms. Wheeler and Roderick Linton did not “come to this court with clean hands” and “are foreclosed from asserting the defense of judicial estoppel.” (App. Op., ¶29, Apx. p. 17). The court of appeals declined to consider the defense of the statute of limitations as an alternate ground for affirming the trial court’s decision. A motion for reconsideration asking the court to address the statute of limitations was denied. (App. Docket #39, Apx. p. 4).

II.

LAW AND ARGUMENT

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.

Mark Twain once said, “The difference between the right word and the almost right word is the difference between lightning and a lightning bug.” With admiration for and apologies to Mr. Clemens, we suggest that the same can be said about the difference between having an attorney-client relationship and *almost* having an attorney-client relationship. Where there is an attorney-client relationship, there is lightning. Important duties arise, time-honored privileges attach, and a myriad of ethical obligations are triggered. But where an attorney-client relationship *almost* develops but never does, there is only a lightning bug.

The complaint at issue in this case is a lightning bug. It should never have been of any moment. But the opinion of the court of appeals now under review has made the complaint very important indeed. The court of appeals opinion exposes attorneys who had no attorney-client

relationship with a corporation to suits by the corporation alleging legal malpractice. The court of appeals has concluded that an attorney who represented a dissident group in a fight for control of a corporation, who opposed the corporation, and who lost the fight can later be sued by the corporation itself for legal malpractice. Such a suit may proceed even though the complaint that initiates the proceedings concedes the absence of a true attorney-client relationship, even though every witness affiliated with the corporation agrees that there never was an attorney-client relationship, even though the corporation never accepted or relied upon one piece of advice offered by the attorney, and even though the corporation argued successfully in earlier proceedings – when it served the corporation’s interests to do so – that there was no attorney-client relationship. The court of appeals has expressly authorized a corporation to advance different arguments in different proceedings and has deprived the attorneys being sued of the important defense of judicial estoppel.

A prerequisite for maintaining a claim for legal malpractice has always been the existence of an attorney-client relationship between the plaintiff and the defendant. *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, syllabus. Absent an actual attorney-client relationship, no legal malpractice claim may be pursued. See *Vahila v. Hall*, 77 Ohio St.3d 421, 1997-Ohio-259. This Court and others in Ohio have concluded that it is the existence of an attorney-client relationship that triggers an attorney’s various duties, and courts have devoted substantial effort to the analysis of when and whether attorney-client relationships have been created. An attorney-client relationship may exist where the putative client reasonably believes that the relationship has been formed, even if a relationship has not been formally or expressly established. Conversely, where the putative client denies ever believing that a relationship was established, no relationship can exist. *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. An “attorney-client relationship is consensual in nature

and dependent upon a mutual confidence and understanding between the attorney and client.” *A.G. Financial, Inc. v. LaSalla*, 8th Dist. No. 84880, 2005-Ohio-1504, ¶29, citing *Brown v. Johnstone* (1982), 5 Ohio App.3d 165. Where the putative client suing for malpractice is a corporation that never entertained a belief, reasonable or otherwise, that the attorney it is suing ever was its counsel, a malpractice claim should not be permitted.

At all times before and during the underlying litigation, BRM was represented by attorneys at Vorys Sater and by the Ohio Attorney General. The pleadings and arguments made in the underlying common pleas litigation and *quo warranto* proceedings, all discussed above, demonstrate that at no time during those proceedings did BRM consider Ms. Wheeler or Roderick Linton to be its counsel. The corporation repudiated both Bruce Hawthorn’s efforts to retain Ms. Wheeler and Ms. Wheeler’s attempts to appear as BRM’s counsel. All agents and representatives authorized to speak for the corporation, including those trustees who were determined to be members of the legitimate board, have testified that there was no attorney-client relationship between Ms. Wheeler and BRM.

Without exception, deposition testimony establishes that no person authorized to speak for the corporation ever considered or believed that Ms. Wheeler was BRM’s attorney.

Richard Lupton, a member of the legitimate board, testified:

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.

Q. *Did Barberton Rescue Mission have legal counsel on December 8, 2000?*

A. *My understanding is that the two entities were still joined at that time, right.*

Q. *Mine is too.*

A. *So that whoever was legal counsel for one was legal counsel for the other, and she was never legal counsel for either.*

Q. *Okay. Who was, though? Who was legal counsel for CBN and BRM in December 2000? Was it the Vorys Sater firm?*

A. *A firm out of Columbus.*

Q. *Vorys Sater?*

A. *I believe so.³⁶*

Howard Russell, another member of the legitimate board, testified:

Q. *Well, isn't it fair to say, Reverend Russell, that you recognized that Marie Wheeler's involvement in this matter was threat to the legitimate board?*

A. *I think that's fair to say. It was a, it was an obstacle.*

* * *

Q. *But you never accepted her positions or advice she was giving you?*

A. *Not as my counsel.*

Q. *And not as the organization's counsel either? From the organization -*

A. *From my perspective, absolutely not, no . . .³⁷*

Sherry Phillips, the Assistant Ohio Attorney General who represented BRM in the *quo*

³⁶Lupton Depo. pp. 49-50, Supplement pp. 36-37.

³⁷Russell Depo. pp. 71-72, 100, Supplement pp. 217-219.

warranto action and the common pleas litigation, testified:

A. *No, I never thought [Marie Wheeler] represented the Barberton Rescue Mission in an appropriate capacity as attorney for the corporation.*

Q. *And you never acknowledged Miss Wheeler as the attorney representing the Barberton Rescue Mission?*

A. *Correct.*³⁸

Phillip Downy of Vorys Sater, the firm that represented BRM before, during and after the filing of the *quo warranto* action and common pleas litigation, testified:

Q. *Who was counsel for BRM as of December 12, 2000?*

A. *In the litigation it was my firm.*

Q. *And in what other manner? Was there any other counsel for BRM at that point in time?*

A. *Frank Sommerville was counsel for the organization, primarily tax related matters. Barry Brown, *** I'm not sure if there is anybody else at that point in time.*

Q. *It would be your opinion as counsel for BRM at that point in time that Marie Wheeler was in fact not counsel for BRM at that time?*

A. *That is correct.*

Q. *And was she ever counsel for BRM in your opinion?*

A. *In my opinion, no.*³⁹

Plaintiff's Answers to Interrogatories verified by those authorized to speak for BRM, Operating Receiver, R. Scott Haley, Roger Kittelson, BRM's Chief Financial Officer, and Howard Russell, are to the same effect:

³⁸Phillips Depo. pp. 100-101, Supplement pp. 75-76.

³⁹Downy Depo. pp. 116-117, Supplement pp. 17-18.

E. Marie Wheeler began performing legal services on behalf of Barberton Rescue Mission in early December of 2000 at the request of purported members of a board of trustees that was subsequently found to be illegal, or at the request of Bruce Hawthorne [sic].⁴⁰

No attorney-client relationship was established, as the purported board was found to be illegal, but if a relationship did come about, it was terminated on April 21, 2001.⁴¹

Even the complaints that were filed in the legal malpractice case fail to allege an attorney-client relationship between the corporation and Ms. Wheeler and Roderick Linton.

The first Complaint, filed on April 24, 2002, alleged:

3. Defendant E. Marie Wheeler provided advice to certain members of the board of the Barberton Rescue Mission that purported to result in her retention as counsel for the Barberton Rescue Mission and the Christian Brotherhood Newsletter and the receipts of payments by her and Roderick, Myers & Linton, Inc. (nka Roderick Linton, LLP) in the amount of \$85,607.23.⁴²
4. That the board of trustees that purported to employ Defendants has been determined to have been invalid and illegal and all actions taken by said board void and without any force and effect.⁴³
5. That the employment of the Defendants was therefore void and invalid as was their right to any payment of fees.⁴⁴

The second and refiled complaint, filed December 29, 2006, and upon which the trial court granted summary judgment, contains virtually identical allegations in Paragraphs 4 through 6. (See Docket #1).

Throughout discovery, all evidence developed by either side has supported the conclusion that Marie Wheeler and Roderick Linton were never counsel for BRM. BRM has never presented

⁴⁰Plaintiff's Answer to Interrogatory No. 4(a), Supplement pp. 170-172, 187.

⁴¹Id. at 4(b), Supplement pp. 170-172, 187.

⁴²April 24, 2002 Complaint at ¶3, Supplement p. 2.

⁴³Id. at ¶4, Supplement p. 2.

⁴⁴Id. at ¶5, Supplement p. 3.

testimony from any representative who believed that there was an attorney-client relationship between BRM and Ms. Wheeler or Roderick Linton. All authorized representatives have agreed that Ms. Wheeler and Roderick Linton were not BRM's counsel. There is no one left to testify otherwise. There was never a reasonable corporate belief that an attorney-client relationship existed. There was no relationship. There can be no malpractice claim.

Nor can BRM seriously contend that it was in privity with Mr. Hawthorn or any other client of Ms. Wheeler's. One in privity with an attorney's client may in certain circumstances maintain a legal malpractice claim against the attorney, but there is no privity argument available in this case. BRM had no community of interest with Mr. Hawthorn or the Hawthorn faction. BRM was not relying on Mr. Hawthorn for leadership or upon Ms. Wheeler for counsel. Ms. Wheeler's clients were adverse to BRM, adverse to BRM's legitimate board, and not in privity with either.

Attorneys are to be advocates for their clients. Decisions of this Court have recognized that fervent and loyal representation of clients is promoted and facilitated by a rule of law that permits only clients (or those in privity with clients) to pursue malpractice claims. Because an attorney's efforts could be compromised or diminished if strangers to the attorney-client relationship could sue for malpractice, it has long been the law in Ohio that "an attorney may not be held liable by third parties as a result of having performed services on behalf of a client, in good faith, unless the third party is in privity with the client for whom the legal services were performed, or unless the attorney acts with malice." *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 76. "Privity" exists only where the representation of the client was the equivalent of representing the party in privity with the client. *Macken v. KDR Holdings*, 9th Dist. No. 06CA009003, 2007-Ohio-4106, ¶16, citing *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, 103-104. "For legal malpractice purposes, privity between a third person and the client exists where the client and the third person share a mutual or successive right of property or other interest." *Sayyah v. Cutrell* (2001), 143 Ohio App.3d 102, 111-112.

In *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012, this Court only two years ago reaffirmed the “strict privity rule” as a prerequisite to a legal malpractice claim in Ohio. See, also, *Scholler v. Scholler*, supra. In refusing to “relax our strict privity rule,” this Court in *Shoemaker* expressed its concern over “divided loyalties” as follows:

The principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict-of-interest provisions of these rules [of professional conduct]. 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 analysis employed by this Court in *Shoemaker*, *Scholler* and *Simon*, as well as the policy considerations that those decisions reflect and further, demonstrates both the shortcomings of the court of appeals’ opinion in this case and the dangers the opinion presents. The plaintiffs in *Shoemaker*, *Scholler*, and *Simon* were all children of the clients who had sought legal representation. The plaintiff in each case enjoyed a healthy and apparently normal relationship with the client, and in each case it was alleged that the representation provided to the client had not been what the *client* had desired, causing damage to the family member. In each case this Court concluded that because the relative was neither a client nor in privity with a client, no claim for malpractice could be pursued. If the plaintiffs in *Shoemaker*, *Scholler*, and *Simon* could not maintain claims, it follows *a fortiori* that BRM cannot maintain a claim against Ms. Wheeler and Roderick Linton. The plaintiffs in *Shoemaker*, *Scholler*, and *Simon* were passive in the transactions at issue and could argue that they had been damaged by the attorney’s failure to perform as requested. But BRM was not at all passive where Ms. Wheeler and Roderick Linton were concerned. BRM repudiated Ms. Wheeler’s efforts to represent the corporation. BRM contested her authority and would not permit her to perform as she had been requested. BRM never accepted or relied upon her advice.

An actual attorney-client relationship has always been essential to an action for legal malpractice. The complaint in the case at hand does not loudly proclaim an intent to overturn this

bedrock principal of law, but in an insidious way the complaint seeks to erode it. The complaint does seek to equate almost having an attorney-client relationship with actually having one. The complaint seeks to hold Ms. Wheeler and Roderick Linton responsible to BRM for “legal malpractice” under circumstances where their retention as counsel was only “purported,” not actual, where that purported retention was admittedly “void and invalid,” where Ms. Wheeler’s work was disputed and challenged from beginning to end, and where a good deal of time and effort was devoted to proving that no attorney-client relationship existed. (Docket #1, ¶¶4, 6, and 7) BRM’s complaint would declare lightning bugs to be lightning.

What makes the court of appeals decision perplexing is its lack of rigorous analysis. The opinion does not acknowledge the peculiar allegations of the complaint concerning a “purported” attorney-client relationship or “void employment.” The decision brushes aside the testimony of members of the legitimate board. The court of appeals did not address the testimony of attorneys who did represent BRM, who unanimously agreed that there was never an attorney-client relationship between Ms. Wheeler and BRM. The court of appeals does not explain how an attorney-client relationship could exist when BRM never relied on or accepted Ms. Wheeler’s legal advice. The court of appeals opinion does not discuss the impact of the *quo warranto* order and its specific conclusions that the December meeting was not lawful and that actions taken at it or pursuant to it, including Ms. Wheeler’s purported retention, were void.

The response of the court of appeals to the abundant evidence that Ms. Wheeler was *not* counsel for BRM is the assertion that the board is not the corporation and that testimony of a board member should not be considered as testimony of the corporation itself. (App. Op., ¶22, Apx. pp. 14-15). While it may be true that none of the individuals whose testimony we cite is BRM personified, it is all the more true that all speak for the corporation. None *is* the corporation, but when all corporate representatives who are truly in positions of authority testify and act consistently,

their collective testimony and actions do embody and express the corporate understanding. When all in authority agree there was no attorney-client relationship, the “corporation” cannot maintain a contrary position.

A corporation “speaks” only through individuals duly authorized. Ohio law provides that, unless otherwise specified, a corporation acts through its directors and its official records. R.C. 1701.59(A).⁴⁵ “A corporation speaks through its board of directors and its records, and the best evidence of a corporation's actions or authority conferred upon its officers or agents is the corporation's records.” *Doberrer v. A.M. Harris Ind., Inc.* (1971), 28 Ohio App.2d 71, 73, citing 12 Ohio Jurisprudence 2d 533, Corporations section 426.

Like all Ohio corporations, therefore, BRM acts through its board. The members of the Board do speak for the corporation. They are not “the corporation,” but they act and speak for it. Agents appointed by the Board to act on behalf of the corporation may also act and speak for the corporation consistent with their authority. *Tokles & Son, Inc. v. Midwestern Indem. Co.* (1992), 65 Ohio St.3d 621, 627 (“As an artificial person, a corporation does not speak on its own, but, rather, only through the authorized acts of its agents or alter egos, the officers charged with its management.”). Members of BRM’s board, various counsel employed by BRM, the court appointed operating receiver for BRM, BRM’s corporate representatives, corporate officers, and the Assistant Ohio Attorney General who represented BRM’s position in the *quo warranto* proceeding and common pleas litigation, all testified uniformly that Ms. Wheeler was never BRM’s counsel. No evidence was ever presented by BRM that anyone considered Ms. Wheeler or Roderick Linton to be its counsel.

Lacking evidence, BRM resorted to argument. It argued that Mr. Hawthorn, who in

⁴⁵A copy of R.C. 1705.59 may be found at Apx. p. 28.

December 2000 had the *title* of president, must have had authority to engage counsel. The court of appeals agreed. (See App. Op. ¶26, Apx. p. 16). We concede that in many circumstances the president of a corporation will have authority to act on behalf of the corporation and to retain counsel. Ohio law recognizes that a president may have implied authority to enter binding contracts on behalf of the corporation, but only if the contracts fall within the “scope of ordinary business transactions.” *Ameritrust Co. Natl. Assn v. Hicks Dev. Corp.* (1993), 91 Ohio App.3d 377, 381 (mortgaging a corporation’s assets is not an ordinary business transaction). Hiring counsel to oust the corporation’s board of directors is surely not an “ordinary business transaction,” but even if it were, a president’s power is never unlimited. A president’s actions, even if authorized *ab initio*, can be countermanded by the board. When unauthorized, a president’s actions will bind the corporation only if they are ratified by the board. See *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St.3d 54, 55; see also, *Integrated Payment Sys., Inc. v. A&M 87th, Inc.*, 8th Dist Nos. 91454 and 91473, 2009-Ohio-2715, ¶¶48-50. If an act of a president is expressly repudiated by the board, as was obviously the case with BRM and Mr. Hawthorn’s efforts to hire Ms. Wheeler, the president’s act is invalid and not an act of the corporation. See, *Flarey v. Youngstown Osteopathic Hosp.*, 151 Ohio App.3d 92, 2002-Ohio-6899, ¶11.

The court of appeals reasoned that since Mr. Hawthorn had the title of president, he therefore had authority to retain counsel to represent BRM . (App. Op. ¶26, Apx. p. 16). Since he had authority as president and sought to hire Ms. Wheeler, the argument goes, an attorney-client relationship between BRM and Ms. Wheeler could have been created. *Id.* There is a superficial logic to this simple progression, but only because it ignores the many important details made clear in the underlying record. December 2000 was not an ordinary time at BRM. Mr. Hawthorn had been divested of his presidential powers by the board. He was placed on leave of absence long before the December events. Mr. Hawthorn had been deprived of authority generally, and BRM does

not allege that the authority to hire counsel had been restored to him. If Mr. Hawthorn truly had authority, why did the legitimate board object when he retained Ms. Wheeler? If the board trusted him so, why did it not embrace the counsel he chose?

Mr. Hawthorn's lack of authority is not merely implied by the circumstances; it was confirmed by clear deposition testimony. The duly appointed operating receiver of BRM, Mr. Haley, unequivocally testified that Bruce Hawthorn had no presidential authority in 2000:

Q. Okay. Under the bylaws or code of regulation of the organization going back to late 2000, if you will, did the president, which would be Mr. Hawthorn, have authority to enter contracts and hire counsel?

A. Bruce Hawthorn wasn't the president in the year 2000, so no, he would not.⁴⁶

Richard Lupton testified similarly:

Q. Yes. But you didn't accept that he [Bruce Hawthorn] had the right to retain counsel for Barberton Rescue Mission?

A. I agree.⁴⁷

Mr. Lupton explained that Mr. Hawthorn was on a leave of absence from the office of president at the time in question. Mr. Hawthorn thus had no presidential power. He had no right to retain counsel for the corporation.⁴⁸ The complaint does not allege that Mr. Hawthorn had authority. To the contrary, the complaint alleges that Ms. Wheeler was only "purportedly" retained, and by individuals who *lacked* authority.

Since Mr. Hawthorn lacked authority to retain counsel, Ms. Wheeler could have become counsel for BRM only if she were retained by someone who did have authority to hire her, or if the

⁴⁶Appx. to MSJ at Exhibit R, Deposition of R. Scott Haley, p. 215, Supplement p. 234.

⁴⁷Lupton Depo., p. 61, Supplement p. 46.

⁴⁸Id. at pp. 100-102, Supplement pp. 47-49.

board were to ratify Mr. Hawthorn's actions. No evidence was presented to support either scenario. The evidence was overwhelming that the Board did not ratify her appointment as counsel. The board took every opportunity to repudiate and reject any suggestion that Ms. Wheeler was BRM's counsel.

The record is replete with assertions by BRM that Ms. Wheeler was not its counsel and that she was not authorized to represent it. The most striking occurred when Ms. Wheeler, purporting to act as counsel for BRM, filed a notice of voluntary dismissal per Civ. R. 41(A) in the common pleas litigation. Howls of protest were raised in response. BRM immediately moved to strike her filing. In its February 1, 2001 "Motion to Strike 'Notice of Voluntary Dismissal,'" BRM argued:

A 'Notice' filed by the Defendants' attorneys [Ms. Wheeler and Roderick Linton] purporting to dismiss the Plaintiffs' claims is a legal nullity in any case, as it is in this case. The attorneys who filed this Notice are attorneys for Defendants in this case; they are not attorneys for Plaintiff Barberton Rescue Mission, Inc., nor is there any way they conceivably could be.

The firm of Vorys, Sater, Seymour and Pease LLP is counsel for the Plaintiff Barberton Rescue Mission and has been through this action.⁴⁹

The trial court accepted BRM's assertions, ignored the notice of voluntary dismissal, and eventually conducted a trial. BRM without question rejected Ms. Wheeler as its counsel.

Other assertions that Ms. Wheeler represented only Mr. Hawthorn and not BRM itself include an Affidavit from Sherry Phillips, the Assistant Attorney General principally responsible for the *quo warranto* matter. Ms. Phillips swore:

The law firm of Vorys Sater Seymour and Pease has represented the Mission for more than a year, and, further, has entered an appearance in this action as counsel for the Mission.⁵⁰

Similarly, in a June 28, 2001 Motion to Disqualify E. Marie Wheeler As Counsel, BRM moved:

⁴⁹Appx. to MSJ at Exhibit V, Plaintiffs' Motion to Strike "Notice of Voluntary Dismissal," Supplement pp. 236-237.

⁵⁰Appx. to MSJ at Exhibit U, Plaintiffs' Memorandum Contra to Defendants' Motion for Sanctions, at Exhibit B, Affidavit of Sherry M. Phillips at ¶13, Supplement p. 253.

for an order disqualifying Attorney Marie Wheeler as counsel for any Defendant in this case, and also from purporting to act as counsel for Plaintiff, Barberton Rescue Mission.⁵¹

In a May 16, 2003, Memorandum In Opposition To Motion To Vacate Receivership Order, the Operating Receiver, Mr. Haley stated:

The Defendants had their own attorney [Marie Wheeler] who, in open court, approved the appointment of an Operating Receiver and who signed the order of appointment. The process was contentious at times and vigorously negotiated by their counsel who in many instances successfully advanced the interests of her clients, the movants [Defendants Hawthorn, etc.] herein. No error was committed by their then counsel [Ms. Wheeler].⁵²

It is well settled that 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.*, 8th Dist. Nos. 92132 and 92161, 2009-Ohio-2728, ¶150; *Nilavar v. Mercy Health System* (S.D. Ohio 2001), 143 F. Supp.2d 909, 913. See, also, Prof.Cond. Rule 1.13(a).⁵³ The converse must also be true. An attorney-client relationship with constituents of an organization, i.e., dissident shareholders, directors, trustees, or officers, is not an attorney-client 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 the retention is procured by those with authority to do so. *Osborn v. Bank of the United States* (1824), 22 U.S. 738, 829.

The question of the power of the president of a corporation to employ an attorney for the corporation is dependent upon several elements, such as the express authority granted to him as president, the extent to which he conducts the actual management

⁵¹Appx. to MSJ at Exhibit X, Plaintiffs' Motion to Disqualify Attorney E. Marie Wheeler as Counsel, p. 1, Supplement p. 258.

⁵²Appx. to MSJ at Exhibit Z, Receiver's Memorandum In Opposition To Motion To Vacate Receivership Order, p. 5, Supplement p. 280.

⁵³A copy of Prof. Cond. Rule 1.13 may be found at Apx. p. 31.

of the corporation, the nature of the litigation for which the attorney is employed These varying factors make it unsafe to state categorically that a corporate president has in all cases the power to employ counsel on behalf of the corporation However, the tendency seems to be . . . that the president has the power to employ counsel in the absence of some restriction, express or implied, in that regard. *Ross v. Roston Elevator Co.* (March 13, 1975), Cuyahoga App. No. 33572, 1975 Ohio App. LEXIS 6142 (quoting 130 A.L.R. 898).

First Nat'l Bank of Southwestern Ohio v. Individual Bus. Servs., 2nd Dist No. 22435, 2008-Ohio-3857, ¶33. It therefore follows that when the board of directors precludes a president from exercising presidential authority, no authority to employ counsel for the corporation exists.

In the final analysis, those who sought to retain Ms. Wheeler to represent BRM lacked the authority to do so. Despite the cornucopia of evidence that the legitimate board of BRM never considered Ms. Wheeler to be the corporation's counsel, BRM has succeeded in persuading the court of appeals that the allegations of a "purported" and "void" retention are sufficient to support a malpractice claim and that answers to interrogatories, deposition testimony, and prior conduct repudiating an attorney-client relationship are of no moment. After successfully denying any relationship, now BRM claims that whatever existed is sufficient to support a malpractice claim. After denying that the people who sought to hire Ms. Wheeler were authorized to do so, now BRM claims they must have been. Her retention was once null and void, but now it is something after all.

The law in Ohio should continue to require an actual attorney-client relationship as a necessary element of a claim alleging legal malpractice. An attorney who represents a dissident faction in an unsuccessful attempt to obtain control of the corporation does not represent the corporation itself, and the corporation should not be permitted to sue the attorney for malpractice after the battle for control has been concluded. Lightning bugs should not be mistaken for lightning.

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.

BRM has without question switched positions. BRM argued throughout all underlying proceedings – and quite successfully – that Ms. Wheeler was never its attorney. Now BRM argues that she was its counsel, at least in a manner of speaking. BRM’s change in attitude should be barred by 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, quoting *Griffith v. Wal-Mart Stores, Inc.* (C.A.6, 1998), 135 F.3d 376, 380, quoting *Teledyne Industries, Inc. v. Natl. Labor Relations Bd.* (C.A. 6, 1990), 911 F.2d 1214, 1217, quoting *Reynolds v. Commr. of Internal Revenue* (C.A.6, 1988), 861 F.2d 469, 472-473; see, also, *Smith v. Dillard Dept. Stores, Inc.* (2000), 139 Ohio App.3d 525, 533. Judicial estoppel preserves the integrity of the courts. Judicial estoppel prevents a party from abusing the judicial process by first achieving success on one position, then arguing the opposite to meet an exigency of a different moment. *Greer*, supra, citing *Griffith*, supra, quoting *Teledyne*, supra at 1218.

There is no reason why judicial estoppel should not apply in the context of legal malpractice claims. Whether it applies in a particular case should turn on the same general considerations that pertain in any other situation. Two Ohio appellate courts and courts outside Ohio have applied judicial estoppel in the context of a legal malpractice action. In *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter LPA*, 148 Ohio App. 3d 440, 2002-Ohio-3328, the Tenth Appellate District concluded that a legal malpractice claim was barred by the doctrine of judicial

estoppel. The client had successfully argued in bankruptcy court that its UCC financing statements complied with statutory requirements and were the first and best liens. The client later sought to advance a contrary position in order to maintain a legal malpractice claim, but was judicially estopped from switching positions. In *Wloszek v. Weston, Hurd, Fallon, Paisley & Howley, LLP*, 8th Dist. No. 82412, 2004-Ohio-146, the Eighth Appellate District concluded that a client's acceptance of facts during her entry of a plea in a criminal proceeding judicially estopped her from claiming in a legal malpractice action that she did not know that the business arrangement in question violated the law. Other jurisdictions have applied judicial estoppel in malpractice claims. In *McKay v. Owens* (1997), 130 Iowa 148, 937 P.2d 1222, the Supreme Court of Iowa concluded that a client could not repudiate a settlement accepted in open court in order to obtain recovery in a legal malpractice claim arising out of the same transaction. In *Brown v. Small* (1992), 251 Mont. 414, 825 P.2d 1209, a client accepted a small settlement from an insurance company. Her attorneys later discovered that the insurer had in bad faith hidden an endorsement providing additional coverage, and a second settlement with the insurer was thereafter accepted by the client. The client then filed a legal malpractice claim against the attorneys, alleging that they were negligent in not discovering the additional endorsement sooner. The Supreme Court of Montana held that the legal malpractice claim was barred by judicial estoppel. The second settlement was predicated upon the assertion that the insurer had acted in bad faith, and having accepted the settlement, the client could not switch positions and claim that his attorneys had been negligent.

The rationale underlying the doctrine of judicial estoppel is that "a party should not be allowed to convince one judicial body to adopt certain factual contentions and then subsequently unconscionably assert [to] another judicial body that these contentions were inaccurate and that a different set of facts should be found." *Taylor v. Blue Knights Motorcycle Club of Canton*, 5th Dist. No. 2004CA00140, 2005-Ohio-858, quoting *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse &*

Co. (Dec. 21, 1993), 10th Dist. No. 90AP-1124, 1993 Ohio App. LEXIS 6176. Judicial estoppel bars a claim if a defendant can establish that a plaintiff “(1) took a contrary position; (2) in a prior proceeding; and (3) the prior position was accepted by the court.” *Smith*, supra at 533 quoting *Teledyne*, supra at 1218. The doctrine will apply 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, quoting *Edwards v. Aetna Life Ins. Co.* (C.A.6, 1982), 690 F.2d 595, 599, fn. 5.

In the underlying common pleas litigation, BRM successfully argued that Ms. Wheeler was not its attorney and that Mr. Hawthorn and the dissident board lacked authority to retain her. The episode surrounding Ms. Wheeler’s filing of a Notice of Voluntary Dismissal again proves the point. Ms. Wheeler, claiming to be BRM’s counsel, filed a notice purporting to dismiss the Attorney General’s complaint pursuant to Civ. R. 41(A). After briefing, the court disregarded the notice, doing precisely what BRM, its legitimate board, Vorys Sater, and the Attorney General urged it to do. The voluntary dismissal was not given effect because BRM persuaded the Court that Vorys Sater represented BRM, and that Ms. Wheeler did not.⁵⁴

The trial court in the common pleas litigation obviously could not have allowed the case to proceed to trial following a legitimate notice of voluntary dismissal. A proper Rule 41(A) notice is effective upon filing and terminates the litigation without any action by the court. Civ.R. 41(A)(1); *Goldstein v. Goldstein* (1988) 50 Ohio App.3d 5, 7; *Clay Hyder Trucking Lines, Inc. v. Riley* (1984), 16 Ohio App.3d 224; *Frysiner v. Leech* (1983), 10 Ohio App.3d 150. A proper notice of voluntary dismissal *ipso facto* divests the trial court of jurisdiction to proceed. *Sturm v. Sturm* (1992), 63 Ohio

⁵⁴See Plaintiffs’ Motion to Strike “Notice of Voluntary Dismissal,” Supplement pp. 236-240.

St.3d 671, 676; *State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182. The common pleas litigation continued only because the court accepted the position advanced by BRM: that Ms. Wheeler was not its counsel. Having prevailed in the matter to its advantage, BRM should be judicially estopped from taking a contrary position in pursuing a legal malpractice claim against Ms. Wheeler.

The *quo warranto* action also settled the issue of Ms. Wheeler's status as counsel in precisely the manner advanced by BRM. The court determined in the *quo warranto* proceedings that the December 11, 2000 meeting failed for lack of a quorum and that elections and other actions purportedly taken at and following that meeting were therefore void *ab initio*. (See *State ex rel. Montgomery*, 2001-Ohio-1404). Among the conclusions flowing inescapably from the *quo warranto* decision are that the Russell/Lupton faction was always the legitimate board, that the legitimate board never returned the powers of the office of president to Hawthorn, that the legitimate board never authorized the retention of Ms. Wheeler, and that Ms. Wheeler never represented BRM. All of these conclusions are exactly what BRM contended and desired at the time. Now BRM sings a different tune. Judicial estoppel should apply and should preclude the change in position.

The court of appeals, however, concluded that Ms. Wheeler and Roderick Linton could not assert judicial estoppel as a defense. The court of appeals invoked and relied upon the doctrine of unclean hands and concluded that *Ms. Wheeler and Roderick Linton* were estopped from *denying* an attorney-client relationship. (App. Op. ¶¶28-29, Apx. p. 17) The court of appeals, in effect, employed a doctrine of reverse judicial estoppel. The court of appeals concluded that BRM, the prevailing party in earlier litigation, was at liberty to change its position and arguments, perhaps as a bonus for having prevailed, while those whose arguments were not accepted in the earlier proceedings could not raise defenses because of positions they had advanced earlier. Even though BRM's complaint does not allege an actual relationship, and even though BRM's witnesses all agree

that there was no relationship, and even though the natural and ordinary application of judicial estoppel would bar BRM's claim, the court of appeals concluded that BRM can change its position and continue with its malpractice claim.

The "reverse judicial estoppel" employed by the court of appeals is not a desirable rule of law. Why should a party who has prevailed in legal proceedings be permitted to change positions in a subsequent lawsuit? We are aware of no precedent in Ohio or elsewhere that supports the rule established by the court of appeals. Conventional judicial estoppel promotes consistent judicial decisions and discourages additional litigation, while reverse judicial estoppel encourages inconsistency and additional claims. Whether the doctrine of judicial estoppel applies should not depend upon the prior arguments of the party asserting the defense, as the very purpose of the doctrine is to preserve the integrity of judicial proceedings and to promote consistent judicial decisions, but upon the prior conduct and arguments of the party who prevailed in the earlier proceedings.

The analysis the court of appeals is inherently inconsistent, in large measure because it declined to apply the defense of judicial estoppel. For example, in finding evidence of an attorney-client relationship between BRM and Ms. Wheeler, the court of appeals determined that Mr. Hawthorn, as president of BRM, had actual authority to hire Ms. Wheeler and Roderick Linton. (App. Op., ¶26, Apx. p. 16). On the very next page, however, the court determined that Ms. Wheeler and Roderick Linton acted with unclean hands because they "represented themselves as attorneys for the Mission." (Id. at ¶¶28-29, Apx. p. 17). How can both be true? If Mr. Hawthorn really had authority, Ms. Wheeler would truly have been counsel for BRM, a position that BRM has always denied. If Mr. Hawthorn had authority, why would Ms. Wheeler be acting with unclean hands in holding herself out as BRM's counsel? The contradictory analysis demonstrates the flaw in the court's consideration of the case generally and the doctrine of judicial estoppel in particular. The

prevailing party in the prior proceeding is the party judicially estopped, not the vanquished. Ms. Wheeler and Roderick Linton should not be penalized or forfeit a defense simply because a position Ms. Wheeler asserted in an underlying matter was not accepted by a court. A lawyer's hands do not become unclean merely because her arguments did not prevail or because she happened to represent an unpopular client.

The rather breezy conclusion that Ms. Wheeler and Roderick Linton acted with "unclean hands" is especially troublesome given the procedural history of the case. A claim of unclean hands was never pleaded or raised in any brief filed in the trial court or the court of appeals. There was never notice or assertion of such a contention and no opportunity to present analysis of the issue. A finding of "unclean hands" requires evidence of "reprehensible conduct" *Basil v. Vincello* (1990), 50 Ohio St.3d 185, 190. In *Crick v. Starr*, 7th Dist. No. 08 MA 173, 2009-Ohio-6754, ¶38, the Seventh District Court of Appeal characterized the "clean hands doctrine" as follows:

'The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set into motion the judicial machinery to obtain some remedy. but has violated good faith by [his] prior-related conduct, the court will deny the remedy.' *Bean v. Bean* (1983), 14 Ohio App.3d 358, 363-364, 471 N.E.2d 785. A movant cannot obtain relief on a matter if he is 'guilty of reprehensible conduct with respect to the subject matter of the suit. *Marinaro v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45, 610 N.E.2d 450. However, the movant's conduct must constitute reprehensible, grossly inequitable, or unconscionable conduct, rather than mere negligence, ignorance, or inappropriateness." *Wiley v. Wiley*, 3rd Dist. No. 9-06-34, 2007-Ohio-6523. In order to bar a movant's claims, the movant must be at fault in relation to the non-movant and in relation to the matter upon which the movant's claims are based. *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077.

"Unclean hands" has been described as grossly inequitable behavior in the underlying transaction which is the subject matter of the suit. *North Coast Cookies, Inc v. Sweet Temptations, Inc.* (1984), 16 Ohio App.3d 342. See, also, *Goldberger v. Bexley Properties* (1983), 5 Ohio St.3d 82, 85. "The maxim, 'He who comes into equity must come with clean hands,' requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his

suit.” Id., quoting *Kinner v. Lake Shore & Michigan Southern Ry. Co.* (1904), 69 Ohio St. 339, paragraph one of the syllabus. See, also, *Basil v. Vincello*, supra.

An attorney-client relationship is a serious and important relationship. Whether an attorney-client relationship exists in a particular circumstance should be determined by assessing the interactions between the attorney and the putative client, not by a casual and eleventh hour reference to the doctrine of unclean hands. The defense of judicial estoppel should be available to an attorney defending a legal malpractice case to the same extent it would be available to any other defendant in any other case. Attorneys are expected to represent clients diligently, loyally, and creatively, and the fact that arguments advanced by an attorney on behalf of a client are not accepted by a tribunal should not permit the conclusion that the attorney has acted with unclean hands.

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.

“A reviewing court is not authorized to reverse a correct judgment merely because it was reached for the wrong reason.” *State v. Lozier*, 101 Ohio St. 3d 161, 2004-Ohio-732, ¶46, citing *State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn.*, 81 Ohio St.3d 283, 290, 1998-Ohio-471. This rule is “the definitely established law of this state.”⁵⁵ *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St. 275, 284. This rule applies *even if the lower court did not consider or rely upon those grounds*. See, e.g., *Baumgartner v. Duffey*, 121 Ohio St.3d 356, 2009-Ohio-1218, ¶4; *Bricker v. State Farm Ins.*, 11th Dist. No. 2009-L-087, 2010-Ohio-3047, ¶61; *Bridge v. Park Natl. Bank*, 179 Ohio App.3d 761, 2008-Ohio-6607, ¶11; *Matikas v. Univ. of Dayton*, 152 Ohio App.3d

⁵⁵ This rule dates back more than 165 years. See, *McClintock v. Inskip* (1844), 13 Ohio 21, 25.

514, 2003-Ohio-1852, ¶22. In order to effectuate this rule, an appellate court must actually consider and definitively address the alternative bases raised by an appellee to support the trial court's judgment. *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

This rule is particularly applicable when an appellate court is reviewing a trial court's summary judgment, where the standard of review is de novo. *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶103. Under a de novo review standard, the appellate court must conduct its own independent review of the record utilizing the same Civ.R. 56 standard that applies in the trial court. An appellate court (no different than a trial court) must examine the record to determine whether there is a genuine issue of material fact, and it does so without deference to the trial court's determinations. See, e.g., *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Because no deference is given to the trial court's determination or reasoning, an award of summary judgment must be affirmed on appeal if any grounds raised by the movant in the trial court are found to support it. *Smith v. Martin*, 176 Ohio App.3d 567, 2008-Ohio-2978, ¶8.

A. **When an Appellee Presents Alternative Grounds to Support Affirmance of the Trial Court's Judgment, an Appellate Court Must Pass Upon Those Grounds Before Reversing the Judgment.**

The Ohio Rules of Appellate Procedure contemplate that an appellee can present alternative grounds for affirmance of the trial court's judgment without the need to file a cross-appeal. App.R. 3(C)(2) specifically provides that "[a] person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal." In fact, the Commentary to the 1992 amendments to App.R. 3(C) makes it clear that "[u]nder the former rule, to raise an issue rejected *or not considered* by the trial court the appellee only had to include the issue in its brief. * * * The amended rule is the same[.]" (Emphasis Added). Such arguments have

been referred to “as independent grounds for the affirmance of the trial court’s entry of summary judgment.” *Gilbert v. WNIR 100 FM* (2001), 142 Ohio App.3d 725, 735.

Furthermore, R.C. 2505.22⁵⁶ specifically provides as follows:

In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments **shall be passed upon by a reviewing court** before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court. (Emphasis added).

As stated by the Supreme Court of Ohio in *Parton v. Weilnau* (1959), 165 Ohio St. 145, 171:

“*** [A]n assignment of error by an appellee, where such appellee has not filed any notice of appeal from the judgment of the lower court, may be used by the appellee as a shield to protect the judgment of the lower court ***.” Indeed, this Court, citing R.C. 2505.22, has observed that “. . . appellee preserved possible error for review by the court of appeals to prevent a reversal by separately arguing same within its brief.” *Morgan v. Cincinnati* (1986), 25 Ohio St.3d 285, 290. See also, *Glidden Co. v. Lumbermens Mutual Casualty Company*, 112 Ohio St.3d 470, 2006-Ohio-6553, at ¶¶ 30-37; *Pang v. Minch* (1990), 53 Ohio St.3d 186, 199, fn. 6.

As an appellee in the Ninth District, Roderick Linton specifically raised the statute of limitations defense as an independent ground supporting affirmance of the trial court’s summary judgment and as one of its “Cross-Assignments of Error” pursuant to R.C. 2505.22 “as a shield to protect the judgment” and to prevent reversal of summary judgment.⁵⁷ This argument was also made before the trial court during the summary judgment briefing.⁵⁸ However, the Ninth District did not address the statute of limitations issue before issuing its opinion reversing summary judgment.

⁵⁶ A copy of R.C. 2505.22 may be found at Apx. p. 35.

⁵⁷ (App. Docket #15, Brief of Defendant-Appellee Roderick Linton, LLP, at pp. 2-3, 41-50).

⁵⁸ (Docket #36, Roderick Linton MOSJ, at pp. 24-30)

When Roderick Linton sought reconsideration by the Ninth District to specifically address the statute of limitations issue, the appellate court denied the motion, stating “[b]ecause the trial court did not address this issue, we elect not to consider it for the first time on appeal.” (App. Docket #39, Apx. p. 5)(citations omitted).⁵⁹ The reason given by the court of appeals for not considering the statute of limitations argument is at odds with R.C. 2505.22 and the established principal that a reviewing court is “not authorized” to reverse a correct judgment merely because it was reached for the wrong reason. If the Ninth District’s reasoning here is permitted to stand as an exception to the general rule, the exception will swallow the rule and render R.C. 2505.22 without effect.

The statute of limitations argument is clearly the sort of “shield” envisioned in *Parton*. It should be addressed and resolved before a decision is made as to whether the trial court’s summary judgment should be reversed.

B. The Trial Court’s Summary Judgment Should Have Been Affirmed on the Alternative Grounds That Any Legal Malpractice Claim Is Barred by R.C. 2305.11(A).

A legal malpractice claim is subject to the one-year statute of limitations set forth in R.C.

⁵⁹ The court of appeals cited *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360 as support for declining to address the statute of limitations issue before the trial court had done so. But *Murphy* is distinguishable from this case. In *Murphy*, the trial court failed to read any of the thousands of pages of briefs and depositions submitted by the parties in connection with a summary judgment motion. The trial court announced this fact in open court just prior to reaching its decision, stating, “Let me be up front with all of you. I haven’t read your motion. I haven’t read your briefs. So, educate me.” *Id.* at 357. After hearing the attorneys’ oral arguments, the court announced from the bench that summary judgment was granted. In reversing summary judgment, the Supreme Court held that it was error for the trial court to grant summary judgment before fulfilling its obligation to review the briefs and Civ.R. 56(C) evidentiary submissions in the summary judgment exercise. *Id.* at 359-360. But here there is no suggestion that the trial court failed to fulfill its obligation to examine the evidence and read the briefs before granting summary judgment. The trial court simply did not address specifically one of the legal arguments made in support of summary judgment. *Murphy* should not stand for the proposition that an appellate court is no longer permitted to consider alternative grounds to affirm a trial court’s summary judgment.

2305.11(A), which provides that “an action for malpractice *** shall be commenced within one year after the cause of action accrued[.]”⁶⁰ The determination of when a cause of action for legal malpractice accrues is often a question of law. *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420, citing *Green v. Barrett* (1995), 102 Ohio App.3d 525. Because the statute of limitations is an independent ground to affirm the trial court’s summary judgment decision, the court of appeals should have determined whether, as a matter of law, the legal malpractice claim against Roderick Linton was filed within the one year limitation period of R.C. 2305.11(A). That issue needs to be resolved before the trial court’s summary judgment can be reversed.

In *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54, the Supreme Court of Ohio held in its syllabus:

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. (*Omni-Food & Fashion, Inc. v. Smith* [1988], 38 Ohio St.3d 385, 528 N.E.2d 941, applied.)

Therefore, the statute of limitations for a legal malpractice claim begins to run at the later of (1) the cognizable event, i.e., when a plaintiff is put on notice of an injury related to his attorney’s possible legal malpractice or (2) the termination of the attorney-client relationship. If both events occurred more than one year before the date of filing of the complaint, the claim is barred.

1. The cognizable event.

The cognizable event occurred when BRM knew or should have known that Ms. Wheeler was engaged as counsel and claiming to act or advance legal positions on BRM’s behalf and on behalf of the Hawthorn faction. The evidence leaves no doubt that BRM became aware of the

⁶⁰A copy of R.C. 2305.11 may be found at Apx. p. 36.

conduct of which it now complains in December 2000, as soon as Ms. Wheeler became involved, and also in the days and weeks that followed. For example, BRM's counsel at Vorys Sater was advised in writing by Frank Sommerville, its tax attorney, on January 29, 2001, that Ms. Wheeler had an irreconcilable conflict of interest because she purported to represent both BRM and Hawthorn.⁶¹

More telling is the Notice of Dismissal filed by Ms. Wheeler. The Notice of Voluntary Dismissal of BRM's claims per Civ.R. 41 was filed in the case for damages on January 30, 2001.⁶² On February 1, 2001, the Attorney General, BRM, Mr. Russell, and Mr. Lupton jointly filed "Plaintiffs' Motion to Strike 'Notice of Voluntary Dismissal.'" Plaintiffs argued in this motion:

A "Notice" filed by the Defendants' attorneys purporting to dismiss the Plaintiffs' claims is a legal nullity in any case, as it is in this case. The attorneys who filed this Notice are attorneys for Defendants in this case; they are not attorneys for Plaintiff Barberton Rescue Mission, Inc., nor is there any way they conceivably could be.

The firm of Vorys, Sater, Seymour and Pease LLP is counsel for the Plaintiff Barberton Rescue Mission and has been through this action. The 'Notice' filed by defenses counsel is a nullity and should be stricken promptly from the record.⁶³

The standard for establishing the "cognizable event" is an objective one. Constructive knowledge is sufficient, and the knowledge need not be so complete that all ramifications of the possible malpractice are fully understood. A cause of action for legal malpractice accrues when a client "discovers or should have discovered that his injury was related to his attorney's act or non-act

⁶¹Sommerville Depo. p. 84, Supplement p. 90; Appx to MSJ at Exhibit I-1, Exhibit B-7 to Sommerville Depo., January 29, 2001 correspondence to Ms. Wheeler and John Read, Esq., Supplement pp. 97-100.

⁶²Docket in *Barberton Rescue Mission, etc., et al. v. Bruce E. Hawthorn*, Summit County Common Pleas Case No. CV-2000-12-5496, Supplement p. 152.

⁶³Plaintiffs' Motion to Strike "Notice of Voluntary Dismissal" at pp. 1-2, Supplement pp. 236-237.

and a client is put on notice of a need to pursue his possible remedies against the attorney.” *Zimmie*, supra at the syllabus.

The Supreme Court specifically held in *Zimmie* that:

[a]lthough *Zimmie*'s damages were not completely ascertainable after the trial court invalidated the antenuptial agreement, *Zimmie* was appreciably and actually damaged by the trial court decision ***.

In *Allenius*, we stated that we did not believe that an injured person must be aware of the full extent of the injury before there is a cognizable event. Instead, it is enough that some noteworthy event, the cognizable event, has occurred which does or should alert a reasonable person that an improper medical procedure, treatment or diagnosis has taken place. *Id.* at 402.

Cases applying *Zimmie* have defined cognizable event as “an event that is sufficient to alert a reasonable person that his attorney has committed an improper act in the course of legal representation.” *Spencer v. McGill* (1993), 87 Ohio App. 3d 267, 278; *Hickle v. Malone* (1996), 110 Ohio App. 3d 703, 707. See also, *F.D.I.C. v. Alexander* (C.A.6, 1996), 78 F.3d 1103, 1109 (Ohio law does not require actual notice that a legal wrong was done, only “constructive knowledge of facts, rather than actual knowledge of their legal significance *** to start the statute of limitations running”). In *Case v. Landskroner & Phillips Co., LPA* (May 3, 2001), 8th Dist. No. 78047, 2001 Ohio App LEXIS 1987, a letter was sent to the client, not by the attorney who allegedly committed malpractice, but the attorney plaintiff retained thereafter. The letter stated, “The more I investigate the matter, the clearer it seems that your former counsel failed to join a necessary party.” The remainder of the letter detailed the malpractice that had allegedly occurred and explained why the matter could no longer be corrected. The court found that the letter to the client was the cognizable event that caused the cause of action for malpractice to accrue. Here, a comparable letter from Mr. Sommerville, BRM’s tax counsel, put BRM on notice as of January 29, 2001 of allegedly improper

conduct on the part of Ms. Wheeler.⁶⁴ See also, *Easterwood v. English*, 8th Dist. No. 82538, 2003-Ohio-6859, appeal denied 102 Ohio St.3d 1446 (counsel's letter advising client of alleged legal malpractice complaint and recommending an expeditious settlement is cognizable event triggering the statute of limitations); *Tolliver v. McDonnell*, 155 Ohio App. 3d 10, 2003-Ohio-5390 (statute of limitations on legal malpractice claim was not tolled while awaiting decision in a criminal appeal claiming ineffective assistance of counsel); *Chinese Merchants Assoc. v. Chin*, 159 Ohio App. 3d 292, 295-97, 2004-Ohio-6424, ¶8-14 (statute of limitations for a legal malpractice claim is not tolled while those with adverse interests controlled a corporation); *Francis v. Hildebrand, Williams & Farrell*, 8th Dist. No. 76823, 2000 Ohio App. LEXIS 911 (awareness of possible conflict of interest in the representation of several clients should have put client on notice).

A client need not know the full extent of his or her injury in order for the statutory period to commence. *Whitaker v. Kear*, supra, 123 Ohio App. 3d at 420 (cognizable event for legal malpractice was the knowledge that an action was filed against plaintiff as a result of his reliance on the advice of counsel, not the ensuing judgment); *Sutton v Snyder*, 11th Dist. No. 2004-T-0064, 2005-Ohio-5603 (cognizable event occurred, at the latest, when grievance was filed against attorney, not when adverse action was taken by the pharmaceutical board against plaintiffs' licenses); *Trombley v. Calamunci, Joelson, Manore, Farah & Silvers, LLP*, 6th Dist. No. L-04-1138, 2005-Ohio-2105 (cognizable event occurred when client refused to take counsel's advice and took matters into his own hands to negotiate his own settlement).

Those controlling BRM became aware of Wheeler's alleged malpractice and the specific instances of conduct about which they now complain as early as December 2000. They were reminded of her conduct on many other occasions before April 24, 2001. The cognizable event

⁶⁴Frank Sommerville's January 29, 2001 correspondence to Ms. Wheeler and John Read, Esq., Supplement pp. 97-100.

occurred more than one-year before a complaint was filed against Roderick Linton on April 24, 2002.

2. Termination of attorney-client relationship

The actionable malpractice for which BRM seeks to recover occurred between December 2000 and April 21, 2001. BRM must concede that even the “purported” attorney-client relationship between BRM and Marie Wheeler terminated on April 21, 2001, more than one year before the filing of their original complaint. Where the cognizable event occurs during the representation, as is the case alleged here, the statute of limitations begins to run when the attorney-client relationship terminates. See, *Flynt v. Brownfield, Bowen & Bally* (C.A.6, 1989), 882 F.2d 1048 (attorney-client relationship terminated and statute of limitations on client’s legal malpractice claims began to run when attorneys unambiguously advised client that they would no longer represent it). See also, *Harrell v. Crystal* (1992), 81 Ohio App.3d 515; *Personal Serv. Ins. Co. v. Quandt* (1994), 98 Ohio App.3d 121.

The original complaint was filed on April 24, 2002 and voluntarily dismissed on March 16, 2006. The current complaint was then filed on December 29, 2006. BRM initially admitted under oath that the purported attorney-client relationship between Ms. Wheeler and BRM terminated on April 21, 2001. (See Plaintiff’s Answers to Interrogatories, No. 4(b), Supplement pp. 170-171, 187) But after summary judgment motions were filed, BRM attempted to change its answers to interrogatories and claimed that the termination of the relationship with Ms. Wheeler occurred on April 25, 2001.⁶⁵ Regardless of whether the revised answers to interrogatories save the malpractice claims against Ms. Wheeler, all claims against Roderick Linton are time barred either way. Any purported attorney-client relationship between BRM and Roderick Linton must have terminated

⁶⁵See Docket #47, Affidavit of R. Scott Haley.

when Ms. Wheeler left the firm in February 2001 and Roderick Linton gave notice that none of its attorneys were counsel in the proceedings.⁶⁶ (Pruneski Affidavit, ¶¶10-12, Supplement p. 115; Mastrantonion Affidavit ¶¶6-9, Supplement pp. 202-203). The April 24, 2002 complaint was filed more than two months late as respects to Roderick Linton, and Roderick Linton is entitled to judgment as a matter of law on statute of limitations grounds.

The statute of limitations issue is ripe for review by this Court. The parties briefed the issue in the trial court and briefed it again in the court of appeals. The record is fully developed at this time. Rather than remanding the case to the court of appeals for consideration of the statute of limitations issue, this Court can resolve it in this appeal. Compare, *Fulmer v. Insura Prop. & Cas. Co.*, 94 Ohio St.3d 85, 93, 2002-Ohio-64, fn. 3. Alternatively, the case should be remanded to the court of appeals for resolution of Roderick Linton's alternative grounds/cross-assignment of error relating to the statute of limitations. *Zanesville v. Rouse*, Slip Opinion No. 2010-Ohio-3754, ¶3. The alternative ground for affirmance of the trial court's judgment is to be reviewed before that judgment can be reversed.⁶⁷

III. **CONCLUSION**

An attorney-client relationship should continue to be an essential element of a legal

⁶⁶ The Ohio Supreme Court in *National Union Fire Ins. Co. of Pittsburgh, Pa v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601 recently held that a law firm's liability for legal malpractice is limited to vicarious liability for the malpractice of the partners and associate attorneys practicing at the firm. Obviously, Roderick Linton cannot have any vicarious liability for Wheeler's conduct after she terminated her association with the firm in February 2001; and Roderick Linton cannot have any vicarious liability for her conduct before February 16, 2001 because of the statute of limitations.

⁶⁷ Of course, if the Court reverses the opinion of the court of appeals for the reasons argued in support of the first and second propositions of law, the merits of the statute of limitations argument need not be considered. The procedural issue involved in this third proposition of law should, however, be addressed by this Court irrespective of the disposition of propositions one and two.

malpractice claim. No such relationship ever existed between Appellee Barberton Rescue Mission and Appellant E. Marie Wheeler or any other attorney at Appellant Roderick Linton, LLP. The legitimate board of trustees for Appellee Barberton Rescue Mission never engaged Ms. Wheeler to act as counsel for the corporation, never recognized her as its counsel, and it never sought or relied upon her legal counsel or advice.

Nor may the doctrine of unclean hands serve as a surrogate for the essential trust and confidence that must be present in order to establish an attorney-client relationship. Because Appellee Barberton Rescue Mission advanced and maintained successfully in prior litigation the position that Ms. Wheeler was not its counsel, the doctrine of judicial estoppel prevents Appellee Barberton Rescue Mission from taking a contrary position in this litigation.

Even if there was an attorney-client relationship (or a question of fact in this regard), any claim for legal malpractice is barred nonetheless by the one-year statute of limitations in R.C. 2305.11(A).

WHEREFORE, Appellant Roderick Linton, LLP respectfully requests reversal of the Ninth District Court of Appeals and reinstatement of the trial court's summary judgment in its favor. The trial court correctly determined that the lack of an attorney-client relationship required the entry of judgment in favor of the defense. The trial court's summary judgment can and should be reinstated for the additional and independent reason that any claim for legal malpractice is barred by the statute of limitations in R.C. 2305.11(A). Alternatively, should this Court decide not to address the statute of limitations issue, the case should be remanded to the Ninth District Court of Appeals with instructions that it must pass upon that issue before deciding whether the trial court's summary judgment should be reversed.

Respectfully submitted,

A handwritten signature in black ink that reads "T. Richthammer". The signature is written in a cursive style and is positioned above a horizontal line.

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PROOF OF SERVICE

A copy of the foregoing *Merit Brief of Defendant-Appellant Roderick Linton, LLP* was sent by regular U.S. Mail, postage pre-paid, this 23rd day of August, 2010 to the following:

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APPENDIX

In the Supreme Court of Ohio

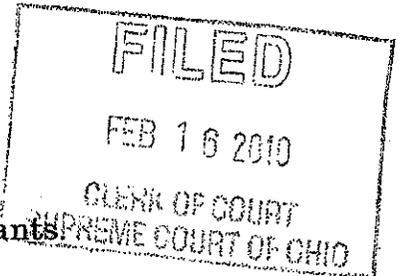
NEW DESTINY TREATMENT CENTER, INC., et al.,

Plaintiff-Appellee,

v.

E. MARIE WHEELER, et al.,

Defendants-Appellants



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

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
RODERICK LINTON, LLP**

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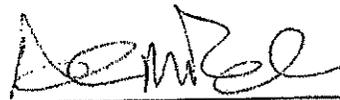
(Counsel continued on inside cover)

Notice of Appeal of Appellant Roderick Linton, LLP

Appellant Roderick Linton, LLP hereby gives notice of its appeal to the Supreme Court of Ohio from the Judgment of the Summit County Court of Appeals, Ninth Appellate District, in *New Destiny Treatment Center, Inc. et al. v. E. Marie Wheeler, et al.*, Summit App. No. 24404 journalized on December 30, 2009.

This case is one of public or great general interest.

Respectfully submitted,



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PROOF OF SERVICE

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COURT OF APPEALS
DANIEL J. JOHNSON
IN THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NINTH APPELLATE DISTRICT
2100 MAR 18 PM 2:33

SUMMIT COUNTY
CLERK OF COURTS

NEW DESTINY TREATMENT
CENTER, INC., ET AL.

Plaintiffs-Appellants

-vs-

E. MARIE WHEELER, ET AL.

Defendants-Appellees

JUDGMENT ENTRY

Case No. 24404

This matter came before the Court on the motion of defendant-appellee E. Marie Wheeler and application of defendant-appellee Roderick Linton, LLP for reconsideration of our decision of December 31, 2009, entitled *New Destiny Treatment Center, Inc. v. E. Marie Wheeler, et al.*, Summit App. No. 24404, 2009-Ohio-6956.

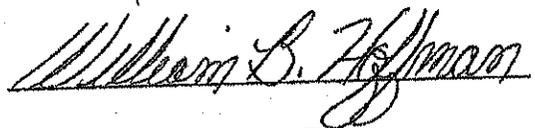
Applications for reconsideration are governed by App.R. 26. The test generally applied to an application for reconsideration is whether the application calls attention to an obvious error in the decision or raises an issue that the court did not properly consider in the first instance. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, paragraph two of the syllabus; *Fleisher v. Ford Motor Co.*, 10th Dist. No. 09AP-139, 2009-Ohio-4847, ¶ 2. App.R. 26(A) was not designed for use in instances where a party simply disagrees with the conclusions and logic of the appellate court. *In re Estate of Phelps*, 7th Dist. No. 05 JE 19, 2006-Ohio-1471, ¶ 3.

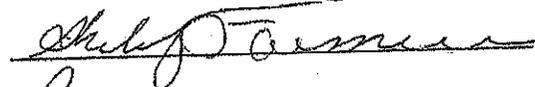
Appellees base their requests for reconsideration upon the allegation this Court did not consider the independent grounds for the affirmance of the trial court's decision, to wit: Appellants' legal malpractice claim was barred by the one year statute of limitations set forth in R.C. 2305.11(A). Both Appellees argued this defense in their respective briefs to this Court. In fact, Appellee Roderick Linton raised such in a cross-assignment of error.

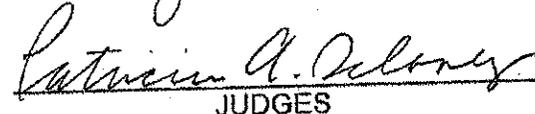
In granting summary judgment in favor of Appellees, the trial court found an attorney/client relationship never existed between the parties. The trial court did not address Appellees' statute of limitations argument. Because the trial court did not address this issue, we elect not consider it for the first time on appeal. See *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 360, 604 N.E.2d 138; *Cooper v. Jones*, Jackson App. No. 05CA7, 2006-Ohio-1770; *Bentley v. Pendleton*, Pike App. No. 03CA722, 2005-Ohio-3495 (declining to consider issues raised in cross-assignments of error when trial court had not addressed them); *Bohl v. Travelers Ins. Group*, *Washington App. No. 03CA68*, 2005-Ohio-963 (declining to consider issues raised in cross-assignments of error when trial court had not addressed them); *Farley v. Chamberlain*, Washington App. No. 03CA48, 2004-Ohio-2771 (remanding matter to the trial court so that it, not appellate court, would first consider the issue).

Based upon the foregoing, we find Appellees have not satisfied the test set forth in *Matthews v. Matthews*, supra. Accordingly, we overrule Appellee E. Marie Wheeler's Motion for Reconsideration, and Appellee Roderick Linton's Application for Reconsideration.

It is so ordered.






JUDGES

WBH;ag;2/25/10

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

COURT OF APPEALS
DANIEL J. CORRIGAN

2009 DEC 30 AM 8:41

NEW DESTINY TREATMENT
CENTER, INC., ET AL.

Plaintiffs-Appellants

-vs-

E. MARIE WHEELER, ET AL.

Defendant-Appellees

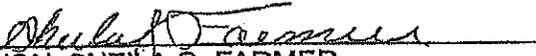
SUMMIT COUNTY
CLERK OF COURTS

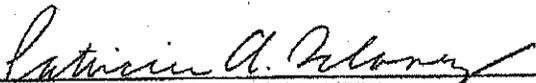
JUDGMENT ENTRY

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

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 Asslgnment)

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.

{¶14} 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.

{¶15} 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.

{16} 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.

{17} 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.

{¶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.

{121} 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.

{122} 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; *Fraleley v. Fraleley*, 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.

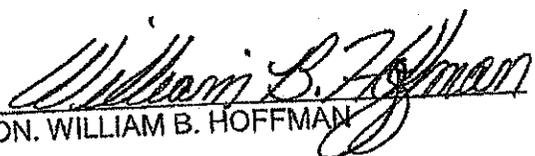
{¶33} Appellant's claim for fraudulent and negligent misrepresentation as well as the claim for unjust enrichment are founded upon the manner in which Appellees conducted themselves while representing the Mission. Because we found, supra, an attorney-client relationship existed between Appellees and 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.

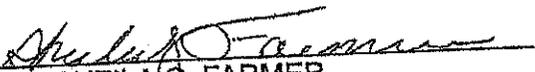
{¶34} Appellant's second and third assignments of error are overruled.

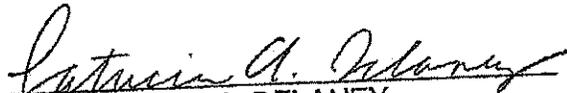
Summit County, Case No. 24404

{¶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

DANIEL M. HUNTER IN THE COURT OF COMMON PLEAS

2008 AUG -7 PM 3:41 SUMMIT COUNTY, OHIO

SUMMIT COUNTY)
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

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. Hawthorn*, 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.

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.

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

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.

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

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.

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



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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL
ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

TITLE 17. CORPORATIONS -- PARTNERSHIPS
CORPORATIONS
CHAPTER 1701. GENERAL CORPORATION LAW
DIRECTORS

Go to the Ohio Code Archive Directory

ORC Ann. 1701.59 (2010)

§ 1701.59. Authority of directors; bylaws; standard of care

(A) Except where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors. For their own government, the directors may adopt bylaws that are not inconsistent with the articles or the regulations. The selection of a time frame for the achievement of corporate goals shall be the responsibility of the directors.

(B) A director shall perform the director's duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances. In performing a director's duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, that are prepared or presented by any of the following:

- (1) One or more directors, officers, or employees of the corporation who the director reasonably believes are reliable and competent in the matters prepared or presented;
- (2) Counsel, public accountants, or other persons as to matters that the director reasonably believes are within the person's professional or expert competence;

(3) A committee of the directors upon which the director does not serve, duly established in accordance with a provision of the articles or the regulations, as to matters within its designated authority, which committee the director reasonably believes to merit confidence.

(C) For purposes of division (B) of this section, the following apply:

(1) A director shall not be found to have violated the director's duties under division (B) of this section unless it is proved by clear and convincing evidence that the director has not acted in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances, in any action brought against a director, including actions involving or affecting any of the following:

(a) A change or potential change in control of the corporation, including a determination to resist a change or potential change in control made pursuant to division (F)(7) of *section 1701.13 of the Revised Code*;

(b) A termination or potential termination of the director's service to the corporation as a director;

(c) The director's service in any other position or relationship with the corporation.

(2) A director shall not be considered to be acting in good faith if the director has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by the persons described in divisions (B)(1) to (3) of this section to be unwarranted.

(3) Nothing contained in this division limits relief available under *section 1701.60 of the Revised Code*.

(D) A director shall be liable in damages for any action that the director takes or fails to take as a director only if it is proved by clear and convincing evidence in a court of competent jurisdiction that the director's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the corporation or undertaken with reckless disregard for the best interests of the corporation. Nothing contained in this division affects the liability of directors under *section 1701.95 of the Revised Code* or limits relief available under *section 1701.60 of the Revised Code*. This division does not apply if, and only to the extent that, at the time of a director's act or omission that is the subject of complaint, the articles or the regulations of the corporation state by specific reference to this division that the provisions of this division do not apply to the corporation.

(E) For purposes of this section, a director, in determining what the director reasonably believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in the director's discretion, may consider any of the following:

(1) The interests of the corporation's employees, suppliers, creditors, and customers;

(2) The economy of the state and nation;

(3) Community and societal considerations;

(4) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(F) Nothing contained in division (C) or (D) of this section affects the duties of either of the following:

(1) A director who acts in any capacity other than the director's capacity as a director;

(2) A director of a corporation that does not have issued and outstanding shares that are listed on a national securities exchange or are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association, who votes for or assents to any action taken by the directors of the corporation that, in connection with a change in control of the corporation, directly results in the holder or holders of a majority of the outstanding shares of the corporation receiving a greater consideration for their shares than other shareholders.

HISTORY:

126 v 432(467) (Eff 10-11-55); 130 v S 264 (Eff 10-14-63); 132 v S 75 (Eff 10-31-67); 138 v S 174 (Eff 8-7-80); 139 v H 455 (Eff 11-17-81); 140 v H 262 (Eff 10-10-84); 140 v H 607 (Eff 4-1-85); 141 v H 902 (Eff 11-22-86); 141 v H 428 (Eff 12-23-86); 142 v H 708 (Eff 4-19-88); 143 v S 321 (Eff 4-11-90); 148 v H 78. Eff 3-17-2000.



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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

Ohio Rules of Professional Conduct
I CLIENT-LAWYER RELATIONSHIP

Ohio Prof. Cond. Rule 1.13 (2010)

Rule 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

(b) If a lawyer for an organization *knows or reasonably should know* that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that *reasonably* might be imputed to the organization and that is likely to result in *substantial* injury to the organization, then the lawyer shall proceed as is necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c).

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer *knows or reasonably should know* that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's *written* consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, other than the individual who is to be represented, or by the shareholders.

NOTES:**Comment****The Entity as the Client**

(1) An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. "Other constituents" as used in this rule and comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. The duties defined in this rule apply equally to unincorporated associations.

(2) When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the lawyer must keep the communication confidential as to persons other than the organizational client as required by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may disclose to the organizational client a communication related to the representation that a constituent made to the lawyer, but the lawyer may not disclose such information to others except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

(3) Division (b) explains when a lawyer may have an obligation to report "up the ladder" within an organization as part of discharging the lawyer's duty to communicate with the organizational client. When constituents of the organization make decisions for it, their decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Division (b) makes clear, however, that when the lawyer knows or reasonably should know that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

(4) In determining whether "up-the-ladder" reporting is required under division (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. In some circumstances, referral to a higher authority may be unnecessary; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice. In contrast, if a constituent persists in conduct contrary to the lawyer's advice, or if the matter is of sufficient seriousness and importance or urgency to the organization, whether or not the lawyer has not communicated with the constituent, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

(5) Division (b) also makes clear that, if warranted by the circumstances, a lawyer must refer a matter to the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

(6) Division (c) makes clear that a lawyer for an organization has the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6(b) and (c) (which incorporates Rules 3.3 and 4.1 by reference). As stated in Comment [14] to Rule 1.6, where practicable, before revealing information, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. Even where such consultation is not practicable, the lawyer should consider whether giving notice to a higher authority within the organization of the lawyer's intent to disclose confidential information pursuant to Rule 1.6(b) or Rule 1.6(c) would advance or interfere with the purpose of the disclosure.

(7) [RESERVED]

(8) [RESERVED]

Government Agency

(9) The duty to "report up the ladder" defined in this rule also applies to lawyers for governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. In addition, the duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Under this rule, if the lawyer's client is one branch of government, the public, or the government as a whole, the lawyer must consider what is in the best interests of that client when the lawyer becomes aware of an agent's wrongful action or inaction, as defined by the rule, and must disclose the information to an appropriate official. See Scope.

Clarifying the Lawyer's Role

(10) There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

(11) Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

(12) Division (e) recognizes that a lawyer for an organization may also represent one or more constituents of an organization, if the conditions of Rule 1.7 are satisfied.

Derivative Actions

Ohio Prof. Cond. Rule 1.13

(13) Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

(14) The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Comparison to former Ohio Code of Professional Responsibility

Ohio has no Disciplinary Rule directly addressing the responsibility of a lawyer for an organization. However, Rule 1.13 draws substantially upon EC 5-19.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.13 more closely resembles the substance of Model Rule 1.13 as it existed prior to its last revision by the ABA in August 2003. Specifically, Rule 1.13 identifies to whom a lawyer for an organization owes loyalty and requires that a lawyer for an organization effectively communicate to the organization concerning matters of material risk to the organization of which the lawyer becomes aware. Rule 1.13 does not include a provision of Model Rule 1.13 that imposes a "whistle-blowing" requirement upon lawyers for organizations.

Rule 1.13 alters Model Rule 1.13 in the following respects: -

Rule 1.13(a) is augmented to define the term "constituent" and to add the principle of EC 5-19 to the black letter rule.

- The rule and comment have been edited for greater simplicity and clarity. Among the changes are reconciliation of the apparent contradiction in Model Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.

- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of "reporting up" or "reporting out" make sure that the governing board knows of the lawyer's withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.



LEXSTAT OHIO REV CODE ANN 2505.22

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL
ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

TITLE 25. COURTS -- APPELLATE
CHAPTER 2505. PROCEDURE ON APPEAL

Go to the Ohio Code Archive Directory

ORC Ann. 2505.22 (2010)

§ 2505.22. Assignments of error filed on behalf of appellee

In connection with an appeal of a final order, judgment, or decree of a court, assignments of error may be filed by an appellee who does not appeal, which assignments shall be passed upon by a reviewing court before the final order, judgment, or decree is reversed in whole or in part. The time within which assignments of error by an appellee may be filed shall be fixed by rule of court.

HISTORY:

GC § 12223-21a; 121 v 189; Bureau of Code Revision, 10-1-53; 141 v H 412. Eff 3-17-87.



LEXSTAT ORC ANN. 2305.11

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TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
TORTS

Go to the Ohio Code Archive Directory

ORC Ann. 2305.11 (2010)

§ 2305.11. Time limitations for bringing certain actions

(A) An action for libel, slander, malicious prosecution, or false imprisonment, an action for malpractice other than an action upon a medical, dental, optometric, or chiropractic claim, or an action upon a statute for a penalty or forfeiture shall be commenced within one year after the cause of action accrued, provided that an action by an employee for the payment of unpaid minimum wages, unpaid overtime compensation, or liquidated damages by reason of the nonpayment of minimum wages or overtime compensation shall be commenced within two years after the cause of action accrued.

(B) A civil action for unlawful abortion pursuant to *section 2919.12 of the Revised Code*, a civil action authorized by division (H) of *section 2317.56 of the Revised Code*, a civil action pursuant to division (B)(1) or (2) of *section 2307.51 of the Revised Code* for performing a dilation and extraction procedure or attempting to perform a dilation and extraction procedure in violation of *section 2919.15 of the Revised Code*, and a civil action pursuant to division (B)(1) or (2) of *section 2307.52 of the Revised Code* for terminating or attempting to terminate a human pregnancy after viability in violation of division (A) or (B) of *section 2919.17 of the Revised Code* shall be commenced within one year after the performance or inducement of the abortion, within one year after the attempt to perform or induce the abortion in violation of division (A) or (B) of *section 2919.17 of the Revised Code*, within one year after the performance of the dilation and extraction

procedure, or, in the case of a civil action pursuant to division (B)(2) of *section 2307.51 of the Revised Code*, within one year after the attempt to perform the dilation and extraction procedure.

(C) As used in this section, "medical claim," "dental claim," "optometric claim," and "chiropractic claim" have the same meanings as in *section 2305.113 [2305.11.3] of the Revised Code*.

HISTORY:

RS § 4983; S&C 949; 51 v 57, § 16; 91 v 299; GC § 11225; 120 v 646; 122 v 374; Bureau of Code Revision, 10-1-53; 135 v H 989 (Eff 9-16-74); 136 v H 1426 (Eff 7-1-76); 139 v H 243 (Eff 3-15-82); 140 v S 183 (Eff 9-26-84); 141 v H 319 (Eff 3-24-86); 142 v H 327 (Eff 10-20-87); 143 v S 80 (Eff 6-28-90); 143 v S 125 (Eff 1-13-91); 144 v H 108 (Eff 5-28-92); 144 v S 124 (Eff 4-16-93); 146 v H 135 (Eff 11-15-95); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v H 412 (Eff 11-7-2002); 149 v S 281. Eff 4-11-2003.