

ORIGINAL

IN THE SUPREME COURT OF OHIO

NEW DESTINY TREATMENT CENTER, INC. et al.)	Supreme Court Case No. 2010- 0298
)	
Plaintiff- Appellee)	On Discretionary Appeal from a
)	Decision of the Ninth District Court of
vs.)	Appeals
)	
E. MARIE WHEELER, et al)	Court of Appeals Case No. 24404
)	
Defendants-Appellants)	Merit Brief of Appellee New Destiny Treatment Center

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STATEMENT OF THE FACTS

A. Overview

In the State of Ohio, the manner in which attorneys conduct themselves and the advice they give is subject to rules and standards. It is these rules and standards that allow a client to seek recourse against his or her attorney for failing to give advice in accordance with these rules and standards. This accountability affords greater confidence to the citizens of Ohio that their attorneys will act in their best interests and give legal advice that is competent. Roderick Linton, LLP and Marie Wheeler ask this Court to create a loophole under Ohio law by which an attorney could avoid all accountability for his or her actions, thereby eroding public confidence that attorneys in Ohio will be held to the standards and rules that govern their actions.

This case demonstrates the extremes to which a law firm will go to avoid taking responsibility for its actions. Roderick Linton, LLP and Marie Wheeler¹ gave legal counsel to Barberton Rescue Mission (nka New Destiny Treatment Center and referred to as “BRM” in this brief) and were paid for this advice. Roderick Linton held itself out to the public as BRM’s counsel and filed court documents on its behalf. Roderick Linton seeks to rewrite history and have this Court determine that it never represented BRM and thus may not be held responsible for the malpractice it committed during its representation of BRM.

¹ Although Roderick Linton and Marie Wheeler have filed separate merit briefs in this matter, they present the same arguments. Therefore, BRM is responding to Appellants’ Propositions of Law concurrently in this brief. Further, because Marie Wheeler was an attorney employed by and an agent of Roderick Linton until February 1, 2001 when she left the firm, Appellee will refer to both parties as “Roderick Linton” throughout this brief.

Despite its representations to the attorney general, the public, and a court of common pleas that it was legal counsel for BRM, Roderick Linton now states that no attorney-client relationship was ever formed. Amazingly, Roderick Linton also refuses to return monies paid to it by BRM for representation that Roderick Linton claims to have never undertaken. Further highlighting the incongruence of its position, Roderick Linton further argues that BRM may not assert that it was represented by Roderick Linton, although Roderick Linton remains free to assert that no representation was ever undertaken.

B. Facts Leading Up to Roderick Linton's Retention by Bruce Hawthorn and BRM

BRM is a not-for-profit corporation organized and existing under the laws of the State of Ohio. It formerly operated under the name Christian Brotherhood Newsletter. BRM was granted a tax exemption by the United States of America, Internal Revenue Service pursuant to § 501(c)(3) of the Internal Revenue Code.

It came to the attention of several members of BRM's board of trustees and the Ohio attorney general in the mid-1990s that Bruce Hawthorn ("Hawthorn") was abusing his position of power at BRM and appropriating funds of BRM for himself and his friends and family. (App. Op., ¶ 3, Apx. to Roderick Linton's Merit Brief pp. 8- 9)². Hawthorn's actions threatened BRM's tax exempt status under § 501(c)(3) of the Internal Revenue Code and the very existence of BRM, to the detriment of the beneficiaries of BRM's charitable works. Sommerville depo. pp. 17- 29, Supp. pp. 66-78.³

² For a more detailed account of Bruce Hawthorn's actions, see the complaint filed in case no. 2000-12-5496, Supp. pp.118-153.

³ The deposition of Frank Sommerville was filed in case no. CV-2002-04-2356 and made a part of the record in this case by order of the trial court dated January 28,

As a result of his actions, Hawthorn was placed on a six month leave of absence from his position as President of BRM on May 15, 2000. (App. Op., ¶ 3, Apx. to Roderick Linton's Merit Brief pp. 8-9). When Hawthorn revealed his intent to resume his position and resume his actions which had threatened the organization's existence, Reverend Howard Russell and other members of the board of BRM prepared to take action to remove Hawthorn and his supporters from their positions of power within BRM in order to protect the entity and its beneficiaries.

C. BRM and Hawthorn Retain Roderick Linton

Hawthorn and his supporters would not leave their lucrative positions at BRM without a fight. To protect his position, Hawthorn sought to retain legal counsel on behalf of himself and BRM. On December 4, 2000, Roderick Linton responded to a request by Bruce Hawthorn and other individuals to represent BRM. (App. Op., ¶ 4, Apx. to Roderick Linton's Merit Brief pp. 8-9). Roderick Linton agreed to undertake this representation. On this same day Roderick Linton prepared a special meeting agenda which included the removal of Reverend Howard Russell and the retention of Roderick Linton as counsel for BRM. See Response to MSJ at Exhibit 7, Supp. pp. 46-47⁴. On December 11, 2000, Roderick Linton prepared another special meeting agenda whose items included: (1) reporting the hiring of Roderick Linton by BRM under the terms of a retention contract; (2) removal of Howard Russell from the board; (3) expanding the board of trustees to include Richard Smith, Ferris Brown, Abraham Wright, and May Dobbins; and (4) granting authorization to president Hawthorn to terminate the employment of Brown, Yano and

2008 which incorporated all discovery from case no. CV-2002-04-2356 into this case.

⁴ This meeting was never held.

Calabrese, the attorneys representing BRM. See Response to MSJ at Exhibits 2, 13, Supp. pp. 41, 61-63. This special meeting was held, Roderick Linton was retained by Hawthorn on behalf of BRM, and the other items on the special meeting agenda prepared by Wheeler were approved. Response to MSJ at Exhibit 11, Supp. pp. 53-58.

Following the December 11, 2000 special meeting, Hawthorn, with the active assistance and participation of Roderick Linton, seized physical control of BRM. Thereafter Roderick Linton gave legal counsel regarding the day-to-day operations of BRM. Reverend Howard Russell testified to this in his deposition as follows:

“A. [Marie Wheeler] was explaining to me that I was to get out of this building, I was not to set foot on the premises, that she was counsel for this organization now. She was Bruce Hawthorn’s counsel, they were now in charge and she was – I had – if I came back and – if I didn’t leave or came back the police would be called. It was pretty clear where, what her position was.

And at that point there was, the physical intimidation was such that I had to leave.

Q. You left?

A. And he had changed the locks, all the locks had been changed for the exterior doors.”

Russell depo. pp 84- 85, Supp. pp. 17-18. Howard Russell further described the extent of the control Roderick Linton possessed over BRM:

“She – the employees who worked here came to react to [Marie Wheeler] as legal counsel. They followed her advice. They perceived her as such. And great damage was done to this organization because of what she purported and convincingly persuaded key players in this organization to believe that they had to adhere to.

Q. Who are you referring to? Who are the key players?

A. People who ran finance. Theo Beers. Ron Beers, of course, who was being

the brother-in-law. I think he was considered the vice president. The people who ran the departments. For instance, the supervisor of the computer department, Martin Shryor. Richard Smith, who was the kingpin here. I'm actually trying to think through from the rank and file from the people who, who do what we do, from their perception they wished she wasn't. Many of them, but as far as they were concerned, she was. Because she was, she was effecting all of the changes that she would want to effect as legal counsel.

Q. And let's see, you were here on December 6th?

A. Correct.

Q. And you testified that you left when the intimidation became too --

A. It was pretty obvious I was in harm's way.

Q. So you did leave the premises?

A. Yes.

Q. When did you return to this building?

A. I don't remember the exact date, but I can tell you it would have been after Mr. Haley was appointed as receiver and it would be significantly after that, because when he was appointed receiver, he had to sort out what was what. He had to sort out what was happening and I presume even sort out who was legal counsel.

...

Q. So your understanding is that Hawthorn would come here every day, or whenever he wanted to, and he was running the show from December 6th until Mr. Haley was appointed by the Court as receiver and took control?

A. Yes.

Russell depo. pp. 85- 88, Supp. pp. 17-20.

As compensation for its services rendered in connection with the legal advice given to BRM, Roderick Linton asked for and received from BRM a retainer of \$25,000 and received payment on periodic billing invoices. Resp. to MSJ at Exhibit 6, Supp. p. 45. In all, Roderick

Linton received over \$80,000.00 from BRM. See Response to MSJ at Exhibits 1, 6, Supp. p. 22-40, 45. In exchange for these funds, Roderick Linton advised Hawthorn and others on how to manage BRM; it prepared and filed legal documents for BRM; it held itself out as BRM's counsel; and it purported to terminate BRM's other counsel. See Response to MSJ at Exhibits 4, 5, Supp. pp. 42-44, Appellant's Supp. pp. 152, 154, 157. Under Roderick Linton's professional guidance and advice, Hawthorn and others managed and operated the businesses of BRM between mid December 2000 until April 25, 2001 – the date that Judge Cosgrove appointed attorney Scott Haley to be the Operating Receiver of BRM. It submitted bills to BRM for its legal services, and received payment from BRM on its legal bills. See Response to MSJ at Exhibit 1 Supp. pp. 22-40.

D. Acts Undertaken by Roderick Linton During its Representation of BRM

In the litigation before Judge Cosgrove in which Mr. Haley was appointed, Case No. 2000-12-5496, Roderick Linton purported to represent parties on both sides. BRM was a plaintiff in that litigation and the defendants included Bruce Hawthorn, Ron Beers, and others who, under Roderick Linton's guidance, were in actual control of BRM at that time. The claims asserted against Bruce Hawthorn, et al., were based on their years of misuse and misappropriation of this charity's assets for their own personal benefit. Roderick Linton made an appearance and filed documents on behalf of both the plaintiff, BRM, and defendant Hawthorn. Roderick Linton even filed a motion to dismiss the case on behalf of BRM. Appellant's Supp. pp. 152, 154, 157.

Roderick Linton sent numerous pieces of correspondence on behalf of BRM and communicated with the IRS and the Ohio attorney general in its capacity as counsel for BRM.

Response to MSJ at Exhibits 4, 5, Supp. pp. 42-44. Roderick Linton, on behalf of BRM, even declined to pay a portion of a bill due and owing by BRM to attorney Frank Sommerville. Sommerville depo. Exhibit B-6, Supp. pp. 81-91.

Despite these acts, Roderick Linton asserts that there was no “real” attorney-client relationship between itself and BRM – hence it cannot be sued for legal malpractice, or be held accountable in any manner. Roderick Linton continues to point to the Russell board as the true embodiment of BRM. In doing so, Roderick Linton asks this Court to ignore the fact that Hawthorn, with the active participation and advice of Roderick Linton, remained in actual control of the day-to-day activities and operations of BRM. Roderick Linton – holding itself out as BRM’s counsel – continued to facilitate the ongoing wrongdoing and to contribute to the ongoing damage inflicted by Hawthorn and his supporters. It took Judge Cosgrove’s appointment of Scott Haley as Operating Receiver – by Order dated April 25, 2001 – to wrest control of BRM from Roderick Linton and Hawthorn. At this point, the damage had been done.

E. The Legal Malpractice Committed by Roderick Linton

The malpractice for which BRM seeks to hold Roderick Linton accountable is twofold. First, Roderick Linton undertook the representation of BRM despite a direct conflict of interest due to its representation of Hawthorn in his individual capacity. In representing Hawthorn’s interests, Roderick Linton could not objectively advise BRM. This lack of objectivity led Roderick Linton to give the following negligent legal advice. Hawthorn took a leave of absence on May 15, 2000 and Dan Beers resigned as a member of the Board of Trustees. Response to MSJ at Exhibit 10 Supp. pp. 48-52. Daniel Beers, at the September 18-20, 2000 meeting, confirmed with the Board of Trustees that his resignation had been accepted and, therefore, he

had no vote on the board. Response to MSJ at Exhibit 11 Supp. p. 53-58.

Roderick Linton advised BRM that a quorum was present at the December 11, 2000 meeting. In so doing, it included Daniel Beers as a board member because without Dan Beers' participation, no quorum was present. A Court of Appeals, in the quo warranto decision, has already determined that reasonable minds could only conclude that Dan Beers was not a member, a trustee, or a board member of BRM on December 11, 2000. Consequently, a quorum was not present and the meeting was invalid. Appellant's Supp. pp. 159- 68.

The result of this negligent advice was to place Hawthorn in control of BRM and allow him to remain in control of BRM, at a time when Hawthorn was being investigated by the Ohio Attorney General due to his improper use of BRM's funds. This highlights the conflict of interest present in undertaking the representation of Hawthorn and BRM and underscores the need for Roderick Linton to be held accountable.

F. Damages Resulting from Roderick Linton's Malpractice

As a consequence of Roderick Linton's actions, an action in quo warranto was filed. The result of this action was a Ninth District Court of Appeals decision holding that there was no quorum at the December 11, 2000 meeting and, therefore, the Hawthorn board was not in lawful control of BRM. The opinion of Roderick Linton that the board created by Hawthorn was the proper representative of BRM also resulted in the appointment of Scott Haley as the operating receiver for BRM so that a clear, authorized representative of the charity would exist. The quo warranto litigation and appointment of an operating receiver caused BRM to incur significant expense, in addition to fees it paid to Roderick Linton, which it would not have incurred but for Roderick Linton's malpractice.

G. Procedural History of This Case

BRM, through this litigation, seeks to hold Roderick Linton for the malpractice it committed. The trial court granted summary judgment in favor of Roderick Linton and Wheeler, basing its decision upon the erroneous legal proposition, rejected by the Ninth District Appellate Court, that the individuals constituting the board of trustees of an entity and the entity upon whose board they serve are identical as a matter of law. The Ninth District Court of Appeals reversed the decision of the trial court, finding that an attorney-client relationship existed between it and BRM due to the fact that Roderick Linton was retained to represent BRM by its president Bruce Hawthorn. The Appellate Court further rejected Roderick Linton's judicial estoppel argument because Roderick Linton was equitably estopped from arguing this position.⁵ Roderick Linton appealed this decision and this Court accepted this appeal.

⁵ The Court of Appeals declined to overrule the trial court's grant of summary judgment on BRM's claim of negligent misrepresentation reasoning that because the legal malpractice claim was permitted, the negligent misrepresentation claim was merged into the malpractice claim. Although not argued in its Merit Brief, Roderick Linton argued to the trial and appellate courts that the negligent misrepresentation claim was merged into the malpractice claim, while simultaneously arguing that the legal malpractice claim was inappropriate due to the lack of an attorney-client relationship. This is another example of Roderick Linton attempting to have it both ways.

LAW AND ARGUMENT

Roderick Linton's 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 had been engaged by a dissident group of individuals to provide legal advice and representation in connection with the dissident group's legal challenge to the composition of the nonprofit corporation's board of trustees and to contest the legitimacy and authority of that board to act on behalf of the nonprofit corporation.

Marie Wheeler's Proposition of Law No. I: A prevailing party in a corporate governance dispute cannot maintain a legal malpractice action against the attorney engaged to represent the unsuccessful dissident group because no attorney/client relationship was established where the prevailing party did not seek, obtain or rely upon any advice from the attorney.

After holding itself out as counsel for BRM to BRM's employees, state officials, and the judicial system and billing for and accepting fees for its services from BRM, Roderick Linton offers numerous arguments in an attempt to rewrite history and erase the fact that it had entered into an attorney-client relationship with BRM. In fact, Proposition of Law No. I begins Roderick Linton's alteration of the facts by attempting to limit its representation to members of a dissident group challenging the composition of BRM's board of trustees. The record in this case reveals that Roderick Linton gave legal advice to Hawthorn and to BRM, which went far beyond simple advice over the validity of actions of the Hawthorn board. Time and time again, Roderick Linton refers to its representation of a "dissident group," ignoring the fact that this group, empowered by its attorneys, exerted complete control over BRM for nearly six months and filed pleadings on BRM's behalf.

In this case, the law is aligned with the facts – an attorney-client relationship existed between Roderick Linton and BRM. Several legal avenues will allow this Court to reach this conclusion. These are addressed as follows.

A. BRM Believed that Roderick Linton Was Its Attorney

The attorney-client relationship does not require a formal contract or the payment of a retainer for its formation. Rather, an attorney-client relationship can be formed by implication based on the conduct of the attorney and the expectations of the client. *Cuyahoga County Bar Ass'n v. Hardiman*, (2003) 100 Ohio St. 3d 260, 262. The creation of the attorney-client relationship depends largely on the reasonable belief of the prospective client. *Id.* In this case, the client is a charitable trust organized under the laws of the state of Ohio, which, as the Court of Appeals correctly determined, is an entity that is legally distinct from its officers and directors.

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; see also, *Cuyahoga County Bar Ass'n v. Hardiman* (2003), 100 Ohio St. 3d 260. In *Hardiman*, this Court stated:

“Contrary to respondent's view, neither a formal contract nor the payment of a retainer is necessary to trigger the creation of the attorney-client relationship. While it is true that 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. The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the prospective client.”

Hardiman (2003), 100 Ohio St. 3d 260, 262 (internal quotations and citations omitted). An attorney-client relationship exists when the attorney advises someone of their legal rights, which forum to use, the methods to be used in exercising their legal rights, and the practice to be followed to enforce their rights. *Landis v. Hunt*, (1992) 80 Ohio App. 3d 662, 669.

In the case before this Court, all of the above-described indicators of an attorney-client

relationship existed: a contract, payment of a retainer, conduct of the attorney, and expectations of the client. Roderick Linton advised BRM of its rights, and BRM followed the advice. Roderick Linton gave legal advice to BRM and that BRM paid for these services pursuant to a contract entered into by BRM.

Even though the actions of the Hawthorn board were invalidated by the quo warranto decision, the client, in this case the charitable entity, had an expectation that the person acting as its counsel would give competent representation to the charitable entity consistent with its charitable purposes. An attorney who undertakes such representation cannot later claim that no duty was owed due to technical flaws present in the formation of the attorney-client relationship, thereby absolving any mistakes that were made and negating its duty to refund any money paid for the services it rendered.

Scott Haley's opinion, prior to April 25, 2001, is immaterial as to whether an attorney-client relationship existed between Roderick Linton and BRM. Prior to his appointment as operating receiver, Haley was not the client and had no authority to control the operations of BRM. Therefore, his position that Roderick Linton did not represent the corporation was of no consequence until he was appointed operating receiver. It is at this point that he had the power to act for BRM.

Similarly, the belief of members of the Russell board, which was eventually determined to be the proper board of BRM by the Ninth District Court of Appeals, that Roderick Linton did not represent the Mission is not dispositive. Although it is usually the case that a corporation speaks through its authorized representatives, in this case the true board of directors was silenced by the actions of Hawthorn and Roderick Linton. The Russell board could not access BRM's

premises, did not control BRM's finances, and could do nothing to influence the actions taken by BRM. The Russell board did not speak for BRM because it had no ability to do so. In such a case, it is appropriate to look to the actions taken by the entity, rather than assertions by individuals, to determine whether it believed it was represented by a particular attorney or law firm.

The actions taken by BRM dictate that it believed it was represented by Roderick Linton. The strongest indicators were that it was billed for services rendered on its behalf by Roderick Linton, which it paid, and that it filed court documents which were prepared by Roderick Linton. Clearly BRM believed that Roderick Linton was its counsel. Thus, an attorney-client relationship existed between Roderick Linton and BRM.

B. Hawthorn's Retention of Roderick Linton to Represent BRM Created an Attorney-Client Relationship

The Court of Appeals correctly determined that Hawthorn, as president, had the actual authority to enter into transactions on behalf of BRM. It is not disputed that at the time Hawthorn retained Roderick Linton to represent BRM, he was president of the entity. Roderick Linton was aware of Hawthorne's status as president when she was hired. Wheeler Depo. 43- 44, Supp. p. 156. Further, BRM's Articles of Incorporation give its president the power to execute contracts on behalf of the corporation. Lupton depo. Exhibit 4, Supp. pp. 100-117. Nothing in the Articles of Incorporation states that an officer who is on a leave of absence lacks authority to carry out his duties.

Even if Hawthorn did not possess actual authority to hire Roderick Linton to represent BRM, he clearly possessed the apparent authority to do so. "Apparent authority occurs when a

person dealing with an agent acting outside the scope of his authority reasonably believes the agent's conduct to be within the scope of the authority due to the conduct of the principal.” *Funk v. Hancock* (1985), 26 Ohio App. 3d. 107, 110. In order for an agent to have apparent authority to contract with a third party, two facts must be present:

“(1) that the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority.”

Ammerman v. Avis Rent A Car System (1982), 7 Ohio App.3d 338 at paragraph two of the syllabus.

Hawthorn held the title of President of BRM at the time he hired Roderick Linton to represent the Mission. Roderick Linton was aware of Hawthorn’s status as President of BRM at the time she was retained. As such, it reasonably believed that he possessed the authority to retain it as counsel for BRM. Therefore, Hawthorn had the apparent authority to retain Roderick Linton as counsel for BRM. It is clear from these facts that an attorney-client relationship existed between BRM and Roderick Linton.

C. Roderick Linton Was in Privity with BRM Such That It Can Be Held Liable for Malpractice by BRM

The rule that an attorney-client relationship must exist between the party alleging malpractice and the attorney who represented them has an exception. When the third party is in privity with the client for whom services were rendered, the third party may sue the attorney for malpractice. *Shoemaker v. Gindlesberger* (2008), 118 Ohio St. 3d 226, 228; *Simon v. Zipperstein* (1987), 32 Ohio St. 3d 74. Even if this Court were to find that Roderick Linton was retained

solely by the Hawthorn board and not BRM, the Hawthorn board was in privity with BRM such that BRM may seek to hold Roderick Linton liable for malpractice.

Black's Law Dictionary defines privity as "[t]he connection or relation between two parties, each having a legally recognized interest in the same subject matter." Black's Law Dictionary (7th Ed.Rev.1999) 1217. When conducting an analysis of claims of privity, the status of those seeking to bring a cause of action for legal malpractice must be examined at the time the claimed mistakes occurred. *Lewis v. Star Bank, NA* (1993), 90 Ohio App. 3d 709, 712.

Roderick Linton argues that BRM's interests could not possibly be aligned with Hawthorn such that Roderick Linton would be in privity with BRM. This position overlooks the fact that Hawthorn was in complete control of BRM during the litigation to determine who had authority to direct the entity's actions. Roderick Linton and Hawthorn were running the show. The people who were eventually determined to be entitled to run BRM were excluded from the premises and had no say in how the organization was being run. Not only were the interests of BRM and Bruce Hawthorn aligned during this period, they were identical. The entity did whatever Hawthorn and his attorney desired because Hawthorn was in control.

This is not a case where, as in *Shoemaker*, the third party lacked a vested or present interest in the legal advice given. In that case, the beneficiary of the will had only a contingent, non-vested interest in the assets which were to be distributed pursuant to the will. The line between the attorney's advice and the impact on the third party was not direct. The connection between Roderick Linton, Hawthorn, and BRM in this case is clear and direct. BRM acted upon and conducted its business according to will of Hawthorn, who was following the advice given by Roderick Linton.

This is not a case where an attorney might neglect the need of his client due to a concern as to how his advice might impact a third party. Roderick Linton believed itself to be the representative of BRM, the party in privity with the Hawthorn Board. It billed BRM for its services and received payment from BRM. It is only now that BRM seeks to hold Roderick Linton accountable for its negligent advice that Roderick Linton claims that it did not represent BRM at any time.

Roderick Linton should not be allowed to escape the consequences of giving negligent advice to BRM and representing both BRM and Hawthorn in light of the conflict of interest present between Hawthorn and BRM. Roderick Linton, the individuals in control of BRM, and BRM itself, all believed that Roderick Linton was the attorney for BRM. Roderick Linton makes every attempt to avoid responsibility for the malpractice it committed. Ultimately, such attempt must fail. The decision of the Court of Appeals should be affirmed and this case should be remanded for a trial on the merits.

Roderick Linton's 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.

Marie Wheeler's Proposition of Law No. II: A party is judicially estopped from claiming the existence of an attorney/client relationship for purposes of pursuing a legal malpractice claim where the party successfully contended in prior litigation that it had no attorney/client relationship with the attorney.

Roderick Linton accuses BRM of changing its position as to whether Roderick Linton

was ever BRM's attorney. This is a perfect example of the pot calling the kettle black. Roderick Linton billed BRM as its attorney, held itself out as BRM's attorney to various agencies and entities, and filed court documents on BRM's behalf, but now it argues that it never represented BRM. Roderick Linton also asks the Court to prevent BRM from asserting that Roderick Linton was its attorney. The doctrine of equitable estoppel squarely prevents Roderick Linton from taking this position and from arguing that it never represented BRM. Roderick Linton's judicial estoppel argument is merely another attempt to dodge responsibility for its actions – an attempt which should be rejected by this Court.

A. Roderick Linton Is Equitably Estopped from Denying the Existence of an Attorney-Client Relationship Between Itself and BRM

Roderick Linton claimed to be counsel for BRM throughout the struggle for its control. BRM's reliance on these statements is evidenced by its payment of attorney fees and filing of court documents. Due to Roderick Linton's statements and BRM's reliance upon them, equitable estoppel prevents Roderick Linton from denying that an attorney-client relationship ever existed

Equitable estoppel is a concept that does not lend itself to one easy definition. In each case where equitable estoppel is invoked, the court must consider the facts and circumstances of that particular case to see whether it applies. *In re Election of November 6, 1990 for Office of Atty. Gen. of Ohio* (1991), 58 Ohio St. 3d 103, 113. Although difficult to define, equitable estoppel can generally be said to be the legal premise that a party cannot deny that which its conduct has induced another to believe to the other's prejudice. *Civilian Defense, Inc. v. Ross* (1958), 152 N.E.2d 160. "Equitable estoppel precludes a party from asserting certain facts where

the party, by his conduct, has induced another to change his position in good faith reliance upon that conduct." *State ex rel Cities Serv. v. Orteca* (1980), 63 Ohio St. 2d 295, 299. Equitable estoppel prevents actual or constructive fraud and promotes the ends of justice. *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St. 3d 143, 145. "A prima facie case of equitable estoppel requires a showing that (1) one party made factual misrepresentations, (2) that were misleading, (3) that induced actual reliance which is reasonable and in good faith, and (4) which caused detriment to the second party." See *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App. 3d 369, 379.

In this case, Roderick Linton made representations to BRM that led BRM to believe that Roderick Linton was its counsel. It represented that the Hawthorn board had authority to act for BRM and to retain Roderick Linton as its counsel. Roderick Linton then proceeded to act as counsel for BRM in court proceedings and aided BRM in excluding certain people from its premises. That BRM relied on these misrepresentations is apparent from the fact that it paid Roderick Linton for its services. Such reliance is further demonstrated by the fact that Roderick Linton consented on behalf of BRM to the appointment of Haley as receiver for BRM. Resp. to MSJ, Exhibit 1, Supp. pp. 22-40. Finally, in case CV-2000-12-5496, *Barberton Rescue Mission v. Hawthorn*, Roderick Linton entered appearances on behalf of BRM and filed pleadings on its behalf. Resp. to MSJ, Exhibit 1, Supp. pp. 22-40.

Roderick Linton must not be allowed to assert that it never represented BRM. BRM relied on the representation that Roderick Linton was its counsel, allowed Roderick Linton to take legal action on its behalf and paid Roderick Linton for its services. BRM incurred substantial costs due to these misrepresentations, including massive litigation expenses to reconstitute

control of BRM to the lawful representatives of the entity. To allow Roderick Linton to deny that an attorney-client relationship ever existed between it and BRM would not serve the ends of justice and should be estopped.

B. Even if Roderick Linton Is Permitted to Argue Judicial Estoppel, That Doctrine Is Inapplicable in This Case

In order to demonstrate that judicial estoppel should be applied to the facts of this case, Roderick Linton must show that BRM: "(1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Greer-Burger v. Temesi* (2007), 116 Ohio St. 3d 324, 330, citing *Griffith v. Wal-Mart Stores, Inc.* (C.A.6, 1998), 135 F.3d 376, 380. These elements are further explained as follows:

"Courts have observed that '[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.' (Internal citations omitted). Nevertheless, several factors typically inform the decision whether to apply the doctrine in a particular case: First, a party's later position must be 'clearly inconsistent' with its earlier position. (Internal citations omitted). Second, courts must regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or second court was misled[.]' (Internal citations omitted). * * * A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

State v. Burgess, 2nd Dist. No. 21315, 2006 Ohio 5309 at ¶ 8.

Roderick Linton has not cited to a ruling of any court which stated that Roderick Linton was never in an attorney-client relationship with BRM. Roderick Linton points to the fact that Judge Cosgrove allowed BRM's complaint against Hawthorn and others to proceed to trial despite Roderick Linton's filing of a Notice of Voluntary Dismissal on behalf of BRM. This says nothing about whether Judge Cosgrove believed that Roderick Linton ever represented

BRM. Nor is this fact conclusive as to whether Judge Cosgrove believed that Roderick Linton represented BRM at the time the dismissal was filed. BRM objected to the notice of dismissal asserting that it did not want the case dismissed and that Roderick Linton was not its attorney. Judge Cosgrove might very well have decided to allow the case to proceed due to BRM's assertion that it did not want the case dismissed. There is simply no evidence that Judge Cosgrove was persuaded that Roderick Linton had not represented BRM.

Roderick Linton claims that the Ninth District Court of Appeals accepted that Roderick Linton did not represent BRM when it issued its decision in the quo warranto action. Roderick Linton states that this assertion is an inescapable conclusion to be drawn from the quo warranto decision. However, the quo warranto decision does not contain a ruling as to whether Roderick Linton represented BRM. It cannot be said that the court was persuaded that BRM was not in an attorney-client relationship with Roderick Linton when this issue wasn't even germane to the matter before it.

The doctrine of judicial estoppel does not prevent BRM from asserting that an attorney-client relationship existed between it and Roderick Linton. No court has made a prior determination that such a relationship either did or did not exist. As such, judicial estoppel is simply not applicable to this case.

Roderick Linton and Marie Wheeler's 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 on the record and properly raised in the briefs before remanding the case to the trial court.

An appellate court is not a trial court. Although this statement appears to be so obviously true that it need not be stated, Roderick Linton ignores this simple fact in its third proposition of law and would have this Court rule that an appellate court is a trial court. Further, even if the statute of limitations argument is considered, it must fail as a matter of law.

A. An Appellate Court Is Not Required to Assume the Duties of a Trial Court

The trial court, in granting summary judgment in favor of Roderick Linton, did not even mention Roderick Linton's statute of limitations defense. Importantly, no factual finding was made by the trial court regarding the date upon which the cognizable event occurred or when the attorney-client relationship between Roderick Linton and BRM was terminated. In such a case, an appellate court is not required to do the work of a trial court and decide a case from scratch.

In the case of *Murphy v. City of Reynoldsburg* (1992), 65 Ohio St. 3d 356, this Court set forth the principle that an appellate court should not take it upon itself to fill the role of the trial court. This Court reasoned the Ohio Rule of Civil Procedure 56(C) mandates that a trial court make an initial determination as to whether to award summary judgment. This function cannot be performed by the appellate court should the trial court neglect its obligations. *Id.* at 360. In this case, the trial court gave no indication that it considered any evidence or argument relating to Roderick Linton's statute of limitations defense.

The occurrence of a cognizable event is a questions of fact. *Spencer v. McGill* (1993), 87

Ohio App.3d 267. Similarly, whether a termination of the attorney-client relationship occurred involves the factual question of whether there was an "affirmative act by either the attorney or the client that signals the end of the relationship." *Chapman v. Basinger* (1991), 71 Ohio App.3d 5. The trial court made no finding-of-fact as to when the attorney-client relationship terminated between Roderick Linton and BRM or when the cognizable event occurred. In the absence of any articulated findings of fact or legal conclusions by the trial court, the appellate court appropriately declined to address this issue.

B. The Complaint Was Filed Within the Statute of Limitations

In its final attempt to avoid responsibility for giving negligent legal advice to BRM, Roderick Linton argues that the statute of limitations prevents BRM from bringing a malpractice action against it. For the reasons that follow, the argument is incorrect as a matter of law.

The applicable statute of limitations for a legal malpractice claim can be found in Ohio Revised Code Section 2305.11. As this Court stated:

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

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

1. The Malpractice Action Was Filed Within One Year of the Termination of the Attorney-Client Relationship.

Haley was appointed operating receiver for BRM on April 25, 2001. Resp. to MSJ,

Exhibit 1, Supp. pp. 22-40. Prior to this appointment, Haley did not have the authority to fire professionals retained by BRM. Therefore, April 25, 2001 is the earliest possible date that the attorney-client relationship was terminated. The first malpractice action against Roderick Linton was filed on April 24, 2002, within one year of the termination of the attorney-client relationship and inside the statute of limitations.

2. The Malpractice Action Was Filed within One Year of the Cognizable Event.

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

Until the quo warranto decision was issued, BRM could not have brought the malpractice action. The individuals who believed that Roderick Linton never represented BRM were not in control of the entity. They were not on the premises and lacked control of BRM's bank accounts.

The first time the Russell board was in a position to take action against Roderick Linton for its malpractice was the day the quo warranto decision was issued.

Even if the Russell Board had used its own funds to bring a malpractice action on behalf of BRM prior to the issuance of the quo warranto decision⁶, there was a chance that the quo warranto decision would have been rendered in favor of the Hawthorn board. Russell and BRM would have been exposed to liability for bringing the malpractice action as they had no authority to do so. Another possibility is that such an action would have been dismissed as not being ripe because it was not yet known whether the Hawthorn board would succeed in its attempt to control BRM.

Furthermore, until the quo warranto decision was issued, the group of individuals who had authority to direct BRM to bring an action was uncertain. It wasn't until the quo warranto decision was issued and the rightful board of trustees was established that BRM became "aware", through its board, that it had been injured. The Russell board, although determined to be the rightful board of BRM, had no say in how the entity conducted its affairs until the quo warranto decision was issued. Even if it believed that malpractice had been committed at an earlier date, its belief cannot be imputed to BRM because Hawthorn and Roderick Linton prevented the Russell board from speaking or acting on BRM's behalf.

The malpractice action was filed within one year of the cognizable event in this case. It is not barred by the statute of limitations and should be permitted to proceed to trial.

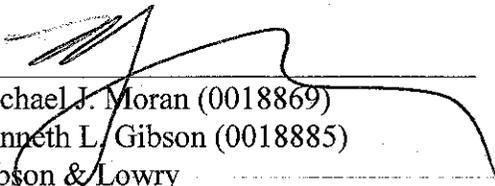
⁶ Roderick Linton declined to pay legal bills on behalf of BRM for attorney fees incurred by the Russell board in state court litigation. Supp. p. 154

CONCLUSION

By ignoring an obvious conflict of interest and giving negligent legal advice, Roderick Linton clothed Hawthorn with legal authority and allowed him to continue to exert control over BRM. Without this cloak of authority, Hawthorn's changing of the locks at BRM's premises and accessing its funds could have been dealt with far more swiftly than if Roderick Linton had not undertaken BRM's representation. Roderick Linton, in its capacity as counsel for Hawthorn and BRM, was instrumental in allowing Hawthorn to continue his actions, which threatened the existence of the entity.

Through their representation of BRM, Roderick Linton caused BRM to expend large sums of money on litigation which would not have been necessary absent Roderick Linton's malpractice. Despite receiving payment from BRM for its representation, Roderick Linton attempts to convince this Court that it should not be held responsible in any manner for its acts.

Roderick Linton, throughout its brief, argues that public confidence in attorneys would be eroded if this Court decides in BRM's favor. To the contrary, a decision that Roderick Linton can be held responsible for malpractice in this case will reassure the public that its legal representatives are held to a higher standard at all time, not only when it suits them. BRM respectfully asks this Court to affirm the decision of the Court of Appeals and remand this case to the court of common pleas for a trial on its merits.



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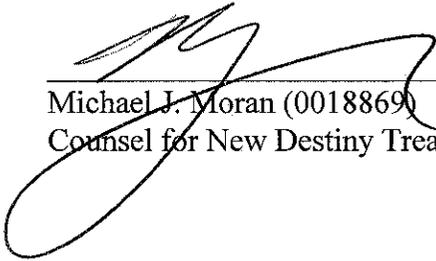
New Destiny Treatment Center

Proof of Service

A copy of the foregoing Appellee's Merit Brief was sent by regular U.S. Mail, postage pre-paid, this 11th day of October, 2010 to the following:

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