

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

CASE NO. 2010-0298

On Appeal from the Ninth Appellate District  
Summit County, Ohio

Court of Appeals Case No. 24404

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

vs.

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

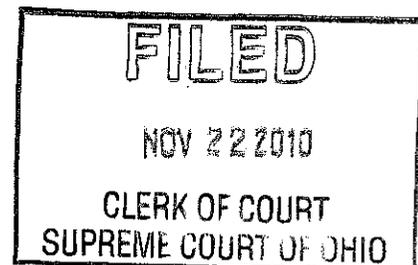
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**REPLY BRIEF OF  
APPELLANT E. MARIE WHEELER**

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## I. INTRODUCTION

A prerequisite to a legal malpractice action is the existence of an attorney/client relationship between the lawyer and her client. The benchmark of such a relationship is the attorney's rendering of legal advice and services and the client's reliance upon the advice and services of the attorney. *Sayyah v. Curtell* (2001), 143 Ohio App. 3d 102, 111. Ohio Courts have consistently held that it is the reasonable belief of the client that will govern whether an attorney/client relationship has been established. *Carnegie Cos., Inc. v. Summit Properties, Inc.*, 183 Ohio App. 3d 781, 2009-Ohio-4655; *Henry Filters, Inc. v. Peabody Barns, Inc.* (1992), Ohio App. 3d 255, 261. Plaintiffs have sought to redefine these fundamental factors. Instead of basing the existence of the attorney/client relationship on concepts rooted in mutual trust and reliance, plaintiffs would have the Court hold that an attorney/client relationship exists: (1) if an attorney's bills are paid and; (2) if the attorney attempts to take actions on behalf of a purported client, even where those actions are subsequently deemed invalid.

## II. LEGAL ANALYSIS

### PROPOSITION OF LAW NO. 1

**A PREVAILING PARTY IN A CORPORATE GOVERNANCE DISPUTE CANNOT MAINTAIN A LEGAL MALPRACTICE ACTION AGAINST THE ATTORNEY ENGAGED TO REPRESENT THE UNSUCCESSFUL DISSIDENT GROUP BECAUSE NO ATTORNEY/CLIENT RELATIONSHIP WAS ESTABLISHED WHERE THE PREVAILING PARTY DID NOT SEEK, OBTAIN OR RELY UPON ANY ADVICE FROM THE ATTORNEY.**

Plaintiffs argue that an attorney/client relationship existed between Barberton Rescue Mission ("Mission") and Ms. Wheeler because she made representations to employees, state officials, and the judicial system, to the effect that she was counsel for Barberton Rescue

Mission. Plaintiffs also assert that an attorney/client relationship existed because Ms. Wheeler billed Barberton Rescue Mission for her attorney fees and those fees were paid.

Ms. Wheeler's alleged subjective belief is simply not determinative of the existence of an attorney/client relationship. To the contrary, it is well settled that, in determining whether an attorney/client relationship exists, the Court must determine "whether the punitive client reasonably believed that he had entered into a confidential relationship with the attorney." *Lillback v. Metropolitan Life Ins. Co.* (1994), 94 Ohio App. 3d 100, 108, citing *Landis v. Hunt* (1992), 80 Ohio App. 3d 662, 669. The undisputed testimony established that all individuals with the authority to rightfully speak on behalf of Barberton Rescue Mission never considered Ms. Wheeler the attorney for the organization.

Reverend Lupton testified that he never considered Ms. Wheeler to be the attorney of the true board. R. 49, deposition of Reverend Lupton, p. 49-50. Reverend Lupton also testified that he never relied upon any advice or representations made by Ms. Wheeler and that he consistently rejected her assertions that she was counsel for the Mission. *Id.* at 59-60. Similarly, Reverend Russell testified that he never considered Ms. Wheeler to be the legitimate counsel of the board of trustees or of the charitable organization. R. 50, deposition of Reverend Russell, p. 72. The attorneys who represented Barberton Rescue Mission also testified that before, during and after the filing of the quo warranto action and the state court action for money damages, Ms. Wheeler did not represent the Mission nor was she counsel for the Mission at any point in time. See deposition of Sherry Phillips, p. 100-101; deposition of Phillip Downy, p. 116-117.

What is beyond dispute is the fact that Ms. Wheeler represented Reverend Hawthorne and members of the "insurgent board" or "dissident group" in their efforts to take control of Barberton Rescue Mission. The "insurgent board" or "dissident group" were unsuccessful and

the Ninth District Court of Appeals concluded that their efforts were invalid and void. Ms. Wheeler's legal representation of the "insurgent board" or "dissident group" and her legal work performed on their behalf did not create an attorney/client relationship with Barberton Rescue Mission sufficient to support a legal malpractice claim against her by the Mission.

Plaintiffs further argue that the Ninth District's determination that the "insurgent board" or "dissident group's" actions in attempting to obtain control of Barberton Rescue Mission is not determinative of the issue of whether an attorney/client relationship existed between Ms. Wheeler and the Mission. While acknowledging that a corporation generally speaks through its authorized representatives, plaintiffs argued that its true board of directors was silenced by the actions of Reverend Hawthorne and Ms. Wheeler. As a result, plaintiffs have asserted, the rightful board members did not have the ability to speak on behalf of the Mission. Plaintiffs' argument, however, ignores the fact that the legitimate board members were represented by counsel and participated in both the state court action for money damages and the quo warranto proceeding. Towards that end, the legitimate board members consistently and vigorously denied that Ms. Wheeler represented them or Barberton Rescue Mission. These board members did not believe that an attorney/client relationship existed between Ms. Wheeler and Barberton Rescue Mission during the critical time period. They cannot now change their position to pursue a malpractice action against a lawyer who they consistently denied represented them.

Moreover, plaintiffs assert that Reverend Hawthorne had the actual and/or apparent authority to retain Ms. Wheeler to represent Barberton Rescue Mission. This argument ignores the undisputed evidence. Specifically, the Barberton Rescue Mission's board of trustees placed Reverend Hawthorne on a leave of absence from all of his duties, including his responsibilities as president, chairman and member of the board of trustees. Reverend Lupton and Reverend

Russell both testified that, during Reverend Hawthorne's leave of absence, he was relieved of any authority to act on behalf of Barberton Rescue Mission. This authority could only be reinstated by further "action of the board," which action never occurred. As such, Reverend Hawthorne lacked the actual and apparent authority to retain Ms. Wheeler on behalf of Barberton Rescue Mission.

Plaintiffs urge this Court to find that an attorney/client relationship exists so that Ms. Wheeler will not be allowed to "escape the consequences of giving negligent advice to" the Mission. Plaintiffs failed to appreciate, however, that this Court has consistently held that attorneys in Ohio are not liable to a third party for their good faith representation of a client. *Shoemaker v. Gindlesberger*, 118 Ohio St.3d 226, 2008-Ohio-2012. Indeed, if the Court concluded that an attorney/client relationship existed between Ms. Wheeler and Barberton Rescue Mission, an irreconcilable ethical dilemma would arise. As this Court has rightly recognized "an attorney's preoccupation or concern with potential negligence claims by third parties might diminish the quality of legal services provided to the client if the attorney were to weigh the client's interests against the possibility of third party lawsuits." *Id.*, 2008-Ohio-2012 ¶ 14, citing *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, 76. Recognizing the existence of an attorney/client relationship in this context would have an undeniably chilling effect on the legal representation that is provided to all participants to disputes over corporate governance. The undisputed evidence demonstrates that no attorney/client relationship existed between Ms. Wheeler and Barberton Rescue Mission. As such, plaintiffs' claim for legal malpractice must fail as a matter of law.

## 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.**

Plaintiffs dispute that they should be equitably estopped from asserting the existence of an attorney/client relationship, but rather argue that Ms. Wheeler should be precluded from denying the existence of the attorney/client relationship because she held herself out as an attorney for Barberton Rescue Mission, because she billed the Mission for her legal fees, and because her fees were paid. Plaintiffs' assertion, however, ignores the fact that plaintiffs successfully asserted in both the state court action for money damages and the quo warranto proceeding, the opposite position, i.e. that Ms. Wheeler did not represent Barberton Rescue Mission.

The doctrine of judicial estoppel "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.* (6<sup>th</sup> Cir. 1998), 135 F. 3d 376, 380. 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 Knight Motorcycle Club of Canton*, 5<sup>th</sup> Dist. No. 2004CA00140, 2005-Ohio-858, quoting *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse & Co.* (Dec. 21, 1993), 10<sup>th</sup> Dist. No. 90AP-1124, unreported.

The concept of judicial estoppel is important in preserving the integrity of the judicial system. It precludes a party from successfully advancing a position in one proceeding and then disallowing or advancing a different position in a separate proceeding. This is exactly what plaintiffs are attempting to do in the context of its legal malpractice claim.

It is beyond dispute that plaintiffs consistently disavowed the existence of the attorney/client relationship between it and Ms. Wheeler in the state court action from money damages and in the quo warranto proceeding. Plaintiffs successfully advanced a different position. They obtained a monetary judgment against Reverend Hawthorne after Ms. Wheeler had attempted to voluntarily dismiss their claim. They successfully demonstrated that, at all relevant times, the board of trustees controlled by Reverend Russell and Reverend Lupton was the legitimate board for the Barberton Rescue Mission, and further that the attempted contrary actions of Reverend Hawthorne were invalid and void, including his attempts to authorize Ms. Wheeler to represent the Mission. Equity dictates that Barberton Rescue Mission be precluded from asserting that it had an attorney/client relationship with Ms. Wheeler as the doctrine of judicial estoppel precludes plaintiffs from doing so.

### **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**

Plaintiffs do not argue that Ms. Wheeler failed to present to the court of appeals independent grounds for the affirmance of the trial court's order granting summary judgment. Rather, plaintiffs argue that the appellate court need not consider the argument that plaintiffs'

claim was barred by the expiration of the statute of limitations because the trial court failed to rule on that portion of Ms. Wheeler's motion for summary judgment. Plaintiffs failed to address the fact that Revised Code § 2505.22 requires an appellate court to review independent grounds for affirmance properly raised prior to reversing a trial court's judgment.

The requirements of Revised Code § 2505.22 are mandatory and require an appellate court to review the independent grounds for affirmance raised by an appellee prior to modifying and reversing the judgment of a trial court. In this case, Ms. Wheeler moved the trial court for summary judgment on a number of ground including the fact that plaintiffs' claims were not timely filed within one year from the discovery of the cause of action as required by Revised Code § 2305.11. The trial court failed to address this argument; instead it found simply that no attorney/client relationship existed to support plaintiffs' legal malpractice claim. Ms. Wheeler properly raised during the appellate proceedings this independent grounds for affirmance, which the appellate court refused to consider. Inasmuch as 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 that are preserved in the record and properly raised in the briefs before remanding the case to the trial court.

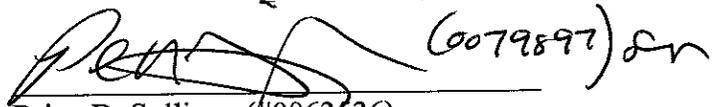
In this case, plaintiffs' claims were barred by the expiration of the statute of limitations. The cognizable event that would have triggered the running of the statute of limitations is when plaintiffs would have had reason to believe that Ms. Wheeler gave erroneous advice to the insurgent board. This would have occurred during December, 2000, when protracted litigation between Reverend Hawthorne and the Barberton Rescue Mission began. Moreover, the termination of the purported attorney/client relationship would have occurred, at the latest, on

April 21, 2001 when the operating receiver advised Ms. Wheeler that "I have not and will not be retaining your services to represent" the Mission. Plaintiffs' original action for malpractice was not filed until April 24, 2002, several days after the expiration of the one year statute of limitation. Consequently, plaintiffs' claim for legal malpractice was time barred and the court of appeals improperly refused to consider this additional argument prior to reversing the judgment of the trial court.

### III. CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the Ninth District Court of Appeals should be reversed and the judgment of the trial court granting Ms. Wheeler's motion for summary judgment should be reinstated.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

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