

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.

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

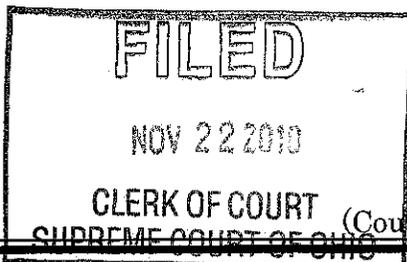
**REPLY BRIEF OF DEFENDANT-APPELLANT
RODERICK LINTON, LLP**

MICHAEL J. MORAN (#0018869)
KENNETH L. GIBSON (#0018885)
GIBSON & LOWRY
234 Portage Trail
P.O. Box 535
Cuyahoga Falls, OH 44221
Tel: (330) 929-0507
Fax: (330) 929-6605
E-mail: moranecf@yahoo.com

*Counsel for Plaintiffs-Appellees,
New Destiny Treatment Center,
Inc., et al.*

ALAN M. PETROV* (#0020283)
* *Counsel of Record*
TIMOTHY J. FITZGERALD (#0042734)
JAY CLINTON RICE (#0000349)
THERESA A. RICHTHAMMER (#0068778)
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: apetrov@gallaghersharp.com
tfitzgerald@gallaghersharp.com
jrice@gallaghersharp.com
trichthammer@gallaghersharp.com

*Counsel for Defendant-Appellant,
Roderick Linton, LLP*



(Counsel continued on inside cover)

BRIAN D. SULLIVAN (#0063536)
JOHN P. O'NEIL (#0067893)
REMINER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115-1093
Tel: (216) 687-1311
Fax: (216) 687-1841
E-mail: bsullivan@reminger.com
joneil@reminger.com

*Counsel for Defendant-Appellant,
E. Marie Wheeler (Seiber)*

TABLE OF CONTENTS

	<u>Page:</u>
TABLE OF AUTHORITIES	iii
FACTUAL REBUTTAL	1
LAW AND ARGUMENT	3
 <u>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.</u>	
A. <u>BRM Presents Argument That Wheeler and Roderick Linton Were Its Lawyers, But the Argument is Not Supported by the Evidence and is Inconsistent with BRM’s Complaint. Mere Argument Will Never Suffice to Resist a Proper Motion for Summary Judgment.</u>	3
B. <u>Hawthorn Lacked the Authority to Create An Attorney-Client Relationship Between BRM and Ms. Wheeler.</u>	5
C. <u>There Was No Privity Between Hawthorn and BRM Such That BRM May Maintain a Legal Malpractice Action Against Wheeler/Roderick Linton.</u>	7
 <u>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.</u>	
A. <u>BRM is Judicially Estopped From Claiming An Attorney-Client Relationship With Wheeler.</u>	8
B. <u>Wheeler and Roderick Linton are Not Equitably Estopped From Raising the Defense of Judicial Estoppel.</u>	10
 <u>As to 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</u>	

TABLE OF CONTENTS (cont'd.)

Page:

briefs before remanding the case to the trial court 13

A. Murphy v. Reynoldsburg Does Not Foreclose An Appellate Court From Considering Alternative Grounds to Affirm Summary Judgment Even Though the Trial Court Did Not Rely Upon Those Grounds. 13

B. A Trial Court Does Not Formulate Findings of Fact on Summary Judgment. 16

CONCLUSION 17

PROOF OF SERVICE 19

TABLE OF AUTHORITIES

Cases:	<u>Page(s):</u>
<i>Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter,</i> 148 Ohio App.3d 440, 2002-Ohio-3328	9
<i>Am. Express Travel Rel Ser Co v. Mandilakis</i> (1996), 111 Ohio App.3d 160	8
<i>Ammerman v. Avis Rent a Car System, Inc.</i> (1982), 7 Ohio App. 3d 338	6
<i>Bohan v. Dennis C. Jackson Co., L.P.A.,</i> 188 Ohio App.3d 446, 2010-Ohio-3422	16
<i>Bridge v. Park Natl. Bank,</i> 179 Ohio App.3d 761, 2008-Ohio-6607	16
<i>Cadle Co. II, Inc. v. HRP Auto Ctrs., Inc.,</i> 8 th Dist. No. 84296, 2004-Ohio-6292, discr. appeal denied, 105 Ohio St.3d 1516, 2005-Ohio-1880	17
<i>Campbell v. Hospitality Motor Inns, Inc.</i> (1986), 24 Ohio St.3d 54	6
<i>Clay Hyder Trucking Lines, Inc. v. Riley</i> (1984), 16 Ohio App.3d 224	10
<i>Couchot v. State Lottery Comm.,</i> 74 Ohio St.3d 417, 1996-Ohio-262	14
<i>Coventry Twp. v. Ecker</i> (1995), 101 Ohio App.3d 38	16
<i>Doe v. Blue Cross/Blue Shield of Ohio</i> (1992), 79 Ohio App.3d 369	11
<i>Flarey v. Youngstown Osteopathic Hosp.,</i> 151 Ohio App.3d 92, 2002-Ohio-6899	7
<i>Frysinger v. Leech</i> (1983), 10 Ohio App.3d 150	10

TABLE OF AUTHORITIES (cont'd.)

Cases (cont'd):	<u>Page(s):</u>
<i>Goldstein v. Goldstein</i> (1988) 50 Ohio App.3d 5	10
<i>Green v. Barrett</i> (1995), 102 Ohio App.3d 525	17
<i>Greer-Burger v. Temesi,</i> 116 Ohio St.3d 324, 2007-Ohio-6442	9
<i>Griffith v. Wal-Mart Stores, Inc.</i> (C.A.6, 1998), 135 F.3d 376	9
<i>Grusse v. Lang</i> (1931), 37 Ohio App. 553&8Ñ	12
<i>Integrated Payment Sys., Inc. v. A&M 87th, Inc.,</i> 8 th Dist Nos. 91454 and 91473, 2009-Ohio-2715	6
<i>Levine v. Levine,</i> 10 th Dist. No. 02AP-300, 2002-Ohio-7198	12
<i>Matikas v. Univ. of Dayton,</i> 152 Ohio App.3d 514, 2003-Ohio-1852	16
<i>McGuire v. Draper, Hollenaugh & Brisco Co., L.P.A.,</i> 4 th Dist. No. 01CA21, 2002-Ohio-6170	8
<i>McNamara v. Rittman</i> (1998), 125 Ohio App.3d 33	16
<i>Murphy v. Reynoldsburg,</i> 65 Ohio St.3d 356, 1992-Ohio-95	13-16
<i>Petrey v. Simon</i> (1984), 19 Ohio App. 3d 285	7
<i>Pournaras v. Hopkins</i> (1983), 11 Ohio App. 3d 51	7
<i>Ramco Specialties, Inc. v. Pansegrau</i> (1998), 134 Ohio App.3d 513	16

TABLE OF AUTHORITIES (cont'd.)

Cases (cont'd):	<u>Page(s):</u>
<i>Reynolds v. Commr. of Internal Revenue</i> (C.A.6, 1988), 861 F.2d 469	9
<i>Scholler v. Scholler</i> (1984), 10 Ohio St. 3d 98	7
<i>Simon v. Zipperstein</i> (1987), 32 Ohio St. 3d 74	7
<i>Smith v. Conley,</i> 109 Ohio St.3d 141, 2006-Ohio-2035	17
<i>State ex rel. Deiter v. McGuire,</i> 119 Ohio St.3d 384, 2008-Ohio-4536	14, 16
<i>State ex rel. Hunt v. Thompson</i> (1992), 63 Ohio St.3d 182	10
<i>State ex rel. McGrath v. Ohio Adult Parole Auth.,</i> 100 Ohio St.3d 72, 2003-Ohio-5062	14
<i>State ex rel. Montgomery v. Hawthorn,</i> 9 th Dist. No. 20391, 2001-Ohio-1404	1, 2
<i>State ex rel. Sharif v. Cuyahoga Cty. Court of Common Pleas,</i> 85 Ohio St.3d 375, 1999-Ohio-392	17
<i>State v. Burgess,</i> 2 nd Dist. No. 21315, 2006-Ohio-5309	9
<i>State, ex rel. Cities Service Oil Company v. Orteca, Bldg. Commr.</i> (1980), 63 Ohio St.2d 295	11
<i>Straunch v. Gross</i> (1983), 10 Ohio App. 3d 303	7
<i>Sturm v. Sturm</i> (1992), 63 Ohio St.3d 671	10
<i>Swiss Reinsurance Am. Corp., Inc. v. Roetzel & Andress,</i> 163 Ohio App. 3d 336, 2005-Ohio-4799	7

TABLE OF AUTHORITIES (cont'd.)

Cases (cont'd):

Page(s):

Teledyne Industries, Inc. v. Natl. Labor Relations Bd.
(C.A. 6, 1990), 911 F.2d 1214 9

Whitaker v. Kear
(1997), 123 Ohio App.3d 413 17

White v. Sears, Roebuck & Co.,
163 Ohio App.3d 416, 2005-Ohio-5086 16

Wooton v. Vogeles,
147 Ohio App.3d 216, 2001-Ohio-7096 16

Zimmie v. Calfee, Halter & Griswold
(1989), 43 Ohio St.3d 54 17

Statutes:

R.C. §2305.11(A) 16, 17

Rules:

Civ.R. 12(B)(6) 16

Civ.R. 41(A)(1) 10

Civ.R. 50 16

Civ.R. 52 17

Civ.R. 56(C) 15

Miscellaneous Authorities:

5 OHIO JURISPRUDENCE 3d (2009), Appellate Review, §436 15

RESTATEMENT OF LAW 3d, Agency, §2.03 6

I.
FACTUAL REBUTTAL

“What is history but a fable agreed upon?”

~Napoleon Bonaparte (1769-1821)

Left unsupervised, the parties to this appeal might throw bits of evidence back and forth forever. We could repeat the many occasions on which Barberton Rescue Mission (nka New Destiny Treatment Center (“BRM”)) – through its officers, lawyers, receiver, guardians at the attorney general’s office, and discovery responses – denied that Defendant-Appellant E. Marie Wheeler (“Wheeler”) was ever its counsel. BRM can cite in response the acts that Wheeler purported to take as BRM’s counsel and argue, as it has in its merit brief, that Roderick Linton, LLP (“Roderick Linton”) “seeks to rewrite history” by claiming that it never represented BRM. We respectfully submit that the issues presented by this appeal are not factual. There is no doubt that the actors in this drama spoke certain lines in years past. The issue is not history – who claimed what and when they claimed it is not in dispute. The issue is the legal consequence that flows from these actions – what is the significance of the disposition of those past competing claims concerning the control of BRM?

What, for example, is the legal consequence of BRM having prevailed in the quo warranto proceeding? What is the consequence of BRM successfully arguing that E. Marie Wheeler (Wheeler) and Roderick Linton were not its counsel and not authorized to serve as its counsel? The quo warranto decision determined that the election at the December 11, 2000 board meeting was “invalid,” that “any and all actions taken at that meeting are void,” and that the Hawthorn supporters’ “positions as members, trustees, and board members of the Mission are void as a matter of law.” *State ex rel. Montgomery v. Hawthorn*, 9th Dist. No. 20391, 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 void.” Id. at pp. 6-7. What are the legal ramifications of the quo warranto decision and the events that led to it?

One indisputable conclusion that flows from the quo warranto decision is that the Russell/Lupton board was *always* the legitimate board of BRM, the board that always had the right to control. Equally obvious corollaries of the decision include that the dissident Hawthorn faction was 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 because those who sought to retain her never had the authority to do so.

The quo warranto decision, its legal significance, and its consequences were all accepted by BRM when it filed its two complaints against Wheeler and Roderick Linton. The original complaint filed in 2002 conceded that the purported attorney-client “relationship” between BRM and Wheeler and Roderick Linton was judicially determined to be “invalid and illegal” and that the Hawthorn board’s efforts to hire counsel was “void and without any force and effect.”¹ Identical allegations are set forth in BRM’s refiled complaint in the case at hand.² Our arguments and defenses have from the inception of this case accepted BRM’s allegations that no actual attorney-client relationship existed. Our legal arguments have attempted to explain the legal consequences of BRM’s allegations.

The evidence has always been consistent with the allegations of the complaint. Throughout discovery, BRM’s duly authorized representatives, attorneys, and counsel at Attorney General’s office all testified emphatically that Wheeler had never been counsel for BRM. Answers to

¹April 24, 2002 Complaint at ¶4, Supplement pp. 2-3.

²Docket #1, Plaintiffs refiled complaint.

interrogatories verified by corporate officials authorized to speak for BRM (the operating receiver, R. Scott Haley; Roger Kittelson, BRM's chief financial officer; and Howard Russell, board member) specifically stated that, "[n]o attorney-client relationship was established, as the purported board was found to be illegal . . ." BRM presented not a shred of testimony from any representative, employee, or agent who believed that an attorney-client relationship existed. Only when BRM was forced to confront the consequences of the positions taken in earlier litigation, the allegations of its complaint, and the sworn testimony of its authorized representatives did BRM begin to argue that an "actual" attorney relationship had existed. The change in position proves too little, and it has arrived much too late.

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.

A. BRM Presents Argument That Wheeler and Roderick Linton Were Its Lawyers, But the Argument is Not Supported by the Evidence and is Inconsistent with BRM's Complaint. Mere Argument Will Never Suffice to Resist a Proper Motion for Summary Judgment.

BRM opposes the evidence and argument presented by Roderick Linton as to the utter absence of an attorney-client relationship between BRM and Wheeler by claiming (1) that "BRM believed" that Wheeler was its attorney, (2) that Hawthorn's efforts to retain Wheeler created an attorney-client relationship with BRM, and (3) that there was "privity" between Hawthorn and BRM such that BRM may maintain a legal malpractice claim. Missing from each of BRM's arguments is an evidentiary foundation. Who at BRM was actually in a position to deal with counsel

believed that Wheeler was BRM's counsel? Not one believer is named or described in BRM's brief. If no member of the true board of trustees, nor agent, nor attorney, nor receiver ever accepted that Wheeler was BRM's counsel, and if all took steps to refute every suggestion that Wheeler was BRM's counsel, and if BRM never followed Wheeler's legal advice, who harbored BRM's claimed belief that Wheeler was its counsel?

BRM's argument not only lacks evidentiary support, it is also disloyal to the very allegations of BRM's complaint. BRM does not allege that an authorized representative retained Wheeler or that she was its counsel. The complaint does not allege that BRM believed that Ms. Wheeler was its counsel. The complaint does not allege privity. The complaint refers to Ms. Wheeler (and Roderick Linton) as having "provided advice to certain members of the board of the Barberton Rescue Mission that *purported to result in her retention as counsel*," that the "board of trustees that *purported to employ defendants has been determined to have been invalid and illegal*," and "while in the course of this *purported employment*, Defendants provided advice."³ (Emphasis added.) The arguments advanced in BRM's merit brief stray a long distance from the allegations of the complaint. The brief, apparently recognizing the inadequacy of the complaint, jettisons the complaint and argues instead that an actual attorney-client relationship existed because Wheeler in the past claimed to be BRM's attorney.

BRM's response to the uniform testimony of the parade of its officers, directors and attorneys, all of whom agreed that Wheeler and Roderick Linton were never its counsel, is to argue BRM is an entity legally distinct from its officers and directors. The argument is accurate as far as it goes, but it doesn't go very far. BRM is indeed a separate legal entity, but like any other corporation can act only through officers, directors, and other authorized agents. An artificial entity

³Docket #1, Plaintiff's refiled complaint at ¶¶ 5-7.

cannot act of its “own” accord and cannot “believe” something that none of its authorized representatives believes. Where all in authority believed that Wheeler was not BRM’s counsel, BRM as an entity could not have believed she was.

B. Hawthorn Lacked the Authority to Create An Attorney-Client Relationship Between BRM and Ms. Wheeler.

Bruce Hawthorn was without question on a leave of absence from his duties and responsibilities as President of BRM in December 2000. The May 2000 board meeting minutes establish the beginning of the leave. The minutes confirm the board’s agreement “to accept Bruce’s [Hawthorn’s] request for a six month leave of absence for rest and recuperation.” (Supplement to the Merit Brief of Appellee (“BRM Supp.”) p. 50.) Thereafter, the minutes of a November 2000 telephone meeting confirm that Hawthorn’s leave of absence was extended: “In light of the limitations that a telephone conference call imposes, and because the personal nature of the matters before us require a great need for prayer and face to face communion, I hereby move that Bruce’s [Hawthorn’s] ‘leave of absence’ be extended, until further consideration by the Board.” (BRM Supp. 60.) The motion passed by a three to one vote. (Id.) The matter was never reconsidered thereafter. The powers of the presidency were never restored to Hawthorn.

BRM cannot repudiate the actions of its board. Hawthorn was on a leave of absence in December 2000, when he purported to retain Ms. Wheeler to represent the corporation. He had been relieved of his responsibilities and his authority. While there can be no doubt that Hawthorn’s leave stripped him of authority to retain counsel, even acts undertaken by corporate officers who have authority can be countermanded by the corporation’s board of directors. Even if one were to assume that Hawthorn had some sort of authority in December, the BRM board always had the higher authority to review his decisions and reject his choice of counsel. The BRM board did so here,

rejecting Hawthorn's choice of counsel and proclaiming that Wheeler was not BRM's attorney.

BRM's apparent authority argument is entirely misplaced. The argument advances an interesting corruption of Ohio agency law. The doctrine of apparent authority permits a third person to impute to a principal the contractual undertaking or promise of an agent whom the principal has cloaked with "apparent authority." A third party can argue that he has "reason to believe and did believe that the agent possessed the necessary authority" when a principal has, through his actions, created a situation in which an agent appears to have authority. *Ammerman v. Avis Rent a Car System, Inc.* (1982), 7 Ohio App. 3d 338, 341. The principal will be bound by the conduct of the agent in such a circumstance, even if the agent lacked actual authority. *Id.* The doctrine of apparent authority protects the third person, not the principal. The Restatement of the Law, Third, Agency, defines apparent authority as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." RESTATEMENT OF LAW 3d, Agency, §2.03.

BRM seeks to stand the doctrine on its head. It seeks to place itself in the position of the third person dealing with an apparent agent of BRM who lacks actual authority. BRM itself can never "rely" on Hawthorn's apparent authority as its own agent. BRM's board cannot seriously claim that it believed and "relied" upon an appearance of authority; the board knew that Hawthorn had no authority at all, as it was the board itself that had placed him on leave. The board's utter rejection and repudiation of Hawthorn's activities, including his retention of Wheeler, demonstrates Hawthorn's action was never ratified by BRM. The board never considered Wheeler's retention to be an authorized act of the corporation. See *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St.3d 54, 55; *Integrated Payment Sys., Inc. v. A&M 87th, Inc.*, 8th Dist Nos. 91454 and 91473,

2009-Ohio-2715, ¶¶48-50; *Flarey v. Youngstown Osteopathic Hosp.*, 151 Ohio App.3d 92, 2002-Ohio-6899, ¶11.

C. There Was No Privity Between Hawthorn and BRM Such That BRM May Maintain a Legal Malpractice Action Against Wheeler/Roderick Linton.

BRM seeks to argue that it was in privity with Hawthorn such that his retention of Wheeler/Roderick Linton permits it to pursue a legal malpractice claim even if there is no direct attorney-client relationship between BRM and Ms. Wheeler. This Court has addressed the privity exception applicable to legal malpractice claims numerous times over the years and the case law applicable to this issue is addressed in Roderick Linton's merit brief.

For BRM to claim that it was in privity with parties against whom it maintained an adverse position in litigation is contrary to Ohio law and to the clear application of the privity doctrine in legal malpractice cases. It is "well-established 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, citing *Scholler v. Scholler* (1984), 10 Ohio St. 3d 98, paragraph one of the syllabus. See also, *Petrey v. Simon* (1984), 19 Ohio App.3d 285; *Pournaras v. Hopkins* (1983), 11 Ohio App.3d 51; *Straunch v. Gross* (1983), 10 Ohio App.3d 303. BRM was not in privity with Hawthorn. It was adverse to Hawthorn. Hawthorn's retention of counsel adverse to BRM does not operate to allow BRM to pursue a legal malpractice claim under the privity exception.

Ohio courts have consistently rejected claims of privity under *Scholler* and *Zipperstein* where the interests of the plaintiff and the client do not align. See, e.g., *Swiss Reinsurance Am. Corp., Inc. v. Roetzel & Andress*, 163 Ohio App.3d 336, 2005-Ohio-4799, ¶ 27 ("In determining privity in the

context of standing to bring a malpractice claim, we must determine whether the parties' interests are the same, such that representing the client is equivalent to representing the party alleging privity with the client."); *McGuire v. Draper, Hollenbaugh & Brisco Co., L.P.A.*, 4th Dist. No. 01CA21, 2002-Ohio-6170, ¶ 63 ([B]ecause the interest between appellant and the Hollenbaugh defendants was not the same, no privity exists***[and] appellant may not maintain a legal malpractice action against appellees***."); *Am. Express Travel Rel Ser Co v. Mandilakis* (1996), 111 Ohio App.3d 160, 165 (no privity between plaintiff corporation and embezzler, thus no standing to sue embezzler's attorney for failure to disclose the embezzlement."). In order for there to be privity, one would have to conclude that Wheeler's representation of the Hawthorn faction is equivalent to representing BRM, the party alleging privity with Hawthorn. But BRM argued for ten months in the quo warranto proceeding that BRM's interests were adverse to those who were represented by Wheeler. There was no privity between the interests being represented by Wheeler in the quo warranto matter and the interests being represented by Vorys Sater and the Ohio Attorney General. BRM cannot sue Wheeler and Roderick Linton for malpractice.

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.

A. BRM is Judicially Estopped From Claiming An Attorney-Client Relationship With Wheeler.

BRM successfully advanced in prior litigation positions that were accepted by the court, but which are contrary to those being advanced in this case. BRM's change of position is precisely what the doctrine of judicial estoppel is designed to prevent. Having successfully argued the negative in

an earlier case, BRM cannot advance the affirmative now. See, *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 (discussing the elements of judicial estoppel).

BRM cites *State v. Burgess*, 2nd Dist. No. 21315, 2006-Ohio-5309, in its discussion of judicial estoppel. We have no quarrel with the analysis set forth in the *Burgess* decision; we cited *Burgess* in our own merit brief. The court in *Burgess* cited with approval *Advanced Analytics Laboratories, Inc. v. Kegler, Brown, Hill & Ritter*, 148 Ohio App.3d 440, 2002-Ohio-3328 where it was held that a client was judicially estopped from arguing in a legal malpractice action that attorneys breached their duty to ensure that financial documents comported with the requirements of the UCC, where the client had testified in earlier proceedings that the documents did comply with statutory requirements and did perfect a security interest.

BRM is grasping at straws in its analysis of the legal consequences of the Notice of Voluntary Dismissal filed by Ms. Wheeler in *Barberton Rescue Mission, d/b/a Christian Brotherhood Newsletter v. Bruce Hawthorn*. Ms. Wheeler, claiming to be counsel for BRM, filed a Civil Rule 41(A) notice purporting to dismiss the case that the attorney general and others had filed on BRM's behalf. BRM argued at the time that the notice was void because Wheeler was not counsel for BRM and moved to strike it. (Supplement, p. 236-240). The facts surrounding the motion to strike are fairly straightforward, but BRM now argues that Judge Cosgrove might have ignored the notice of dismissal for reasons other than the argument BRM advanced to her. The argument set forth in BRM's motion to strike without question constitutes a position advanced in prior litigation that was accepted by the court. Had the notice of dismissal been legitimate, it would have immediately

divested the court of jurisdiction to proceed with the matter. 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; *Fry singer v. Leech* (1983), 10 Ohio App.3d 150; *Sturm v. Sturm* (1992), 63 Ohio St.3d 671, 676; *State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182. Even an inadvertent notice of dismissal is effective upon filing. Only a void notice of dismissal can be denied legal effect. It is preposterous for BRM to suggest Judge Cosgrove declined to honor the sole argument advanced by BRM: the argument that Wheeler was not BRM's counsel.

The quo warranto decision also compels the conclusion that BRM is judicially estopped. BRM, through the Ohio Attorney General, advanced in that proceeding the position that the election and actions of the Hawthorn faction on December 11, 2000, were void and invalid. Among the actions considered to be void was the purported retention of Wheeler as counsel. After having successfully taken legal action to repudiate the efforts of Hawthorn to retain counsel, BRM now seeks to embrace them. Judicial estoppel will not permit the switch. BRM always maintained that the actions taken on December 11, 2000 were void and invalid, that Hawthorn had no power to act as president of the corporation, and that Wheeler and Roderick Linton were not its counsel. It cannot now change its mind.

B. Wheeler and Roderick Linton are Not Equitably Estopped From Raising the Defense of Judicial Estoppel.

BRM cannot avoid the consequences of positions it advanced *successfully* in prior litigation by arguing that the opposing parties were *unsuccessful* in the prior proceedings. BRM does not deny its success in the prior proceedings; rather, it claims that Wheeler and Roderick Linton are equitably estopped from denying an attorney-client relationship, first because they claimed they represented BRM, and second because BRM funds were used to pay legal fees. BRM argues that the appellants

are equitably estopped from raising the judicial estoppel defense.

Generally speaking, the elements of equitable estoppel are (1) a party must make a factual misrepresentation, (2) the misrepresentation must be misleading, (3) the misrepresentations must induce reasonable, good faith reliance, and (4) cause detriment to the relying party. See *Doe v. Blue Cross/Blue Shield of Ohio* (1992), 79 Ohio App.3d 369. Here, BRM never accepted any representation made by Ms. Wheeler or Roderick Linton and never changed its position in reliance on any advice or representation made by either. By the time Hawthorn even began the fight to regain control, BRM had already embarked on a contrary course. BRM had extended his leave and was preparing to file, through Vorys Sater and the Attorney-General, the lawsuit seeking damages. Hawthorn's December campaign for control caused the prompt filing of the quo warranto action. The filing of these lawsuits in December 2000, days after Hawthorn drew his sword, confirms that BRM never relied on Wheeler as its counsel, never altered any planned course of action, and never changed its position. The lawsuits demonstrate BRM's utter rejection of Hawthorn and the notion that he had any authority at all.

The cases cited by BRM agree that detrimental reliance is an essential element of any claim of equitable estoppel. In *Doe v. Blue Cross/Blue Shield of Ohio*, supra, the court found that a hospital made factual misrepresentations regarding the insurer's coverage for inpatient mental health care which led a patient to believe that more than 31 days of care were covered under the patient's policy. The patient's good faith reliance on the hospital's statements caused detrimental reliance, as the patient incurred costs after the 31-day period. Thus, the court concluded that the hospital could be equitably estopped from recovering medical expenses not covered by the patient's policy. We have no quarrel with the decision. But more apropos to the analysis at hand is *State, ex rel. Cities Service Oil Company v. Orteca, Bldg. Commr.* (1980), 63 Ohio St.2d 295, 299, in which this Court held that

the court of appeals "incorrectly applied the doctrine of equitable estoppel" where there was "no evidence that the conduct of the city in granting appellee a building permit in 1964 induced appellee to change its position with respect to the currently proposed modification of the property." With no evidence that the legitimate board of BRM ever relied on Wheeler or Roderick Linton, with no evidence that BRM ever changed its position because of Wheeler's statements or conduct, there can be no argument for equitable estoppel. The complaint filed in *Barberton Rescue Mission, d/b/a Christian Brotherhood Newsletter v. Bruce Hawthorn*, was filed on December 11, 2000 -- the *same day* as the meeting which was later held to be void. (Supplement at p. 158.) The quo warranto complaint in the court of appeals was filed just eleven days later. BRM, through its legitimate board and the Attorney General, vigorously and without hesitation pursued its claims. Hawthorn's purported retention of Wheeler as counsel did not dissuade them even one iota.

BRM's argument that its funds were used by the Hawthorn faction to pay Wheeler's attorney fees does not alter the analysis. Hawthorn apparently used BRM's funds to pay other personal expenses. His use of BRM's resources for his personal benefit was the subject of the trial in the case of *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, before Judge Cosgrove. The unauthorized use of corporate funds to pay for personal services or other unauthorized expenditures creates no obligation on the part of the recipient of the funds to return them. Rather, when corporate funds are used to pay for personal expenses, which would include personal legal fees, the payments are treated as "loans repayable to the corporation." See, e.g., *Levine v. Levine*, 10th Dist. No. 02AP-300, 2002-Ohio-7198, ¶¶ 36-39. See also, *Grusse v. Lang* (1931), 37 Ohio App. 553, 558 (directors may be required to return to the corporate treasury funds expended by the corporation to defend suits brought against certain directors individually which did not affect the

corporation's rights).

If Hawthorn used BRM's funds to pay the fees of his attorneys in his efforts to regain control of the corporation, that is a matter between Hawthorn and the corporation. The payment is not material, let alone determinative, of whether an attorney-client relationship existed between BRM and Roderick Linton/Wheeler. The receipt of payments authorized by Hawthorn does not equitably estop Wheeler and Roderick Linton from asserting the judicial estoppel defense.

As to 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. *Murphy v. Reynoldsburg* Does Not Foreclose An Appellate Court From Considering Alternative Grounds to Affirm Summary Judgment Even Though the Trial Court Did Not Rely Upon Those Grounds.

In opposing Proposition of Law No. III, BRM misconstrues the legal issue presented. BRM's argument also demonstrates a profound misunderstanding of summary judgment procedure. Relying exclusively upon one opinion – *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95 – BRM argues mistakenly that Roderick Linton “would have this Court rule that an appellate court is a trial court.” (Appellee's merit brief, at p. 21). But Roderick Linton espouses no such fatuity. Moreover, even BRM recognizes, perhaps unwittingly, the critical distinction between the issue presented in Proposition of Law No. III in this case and what happened in *Murphy*. BRM's own brief at page 21 concedes, as it must, that *Murphy* dealt with the peculiar circumstance where “the trial court neglect[ed] its obligation” to read the parties' briefs, examine the record and “make an initial determination as to whether to award summary judgment.” There is no suggestion here that the trial court failed or neglected its fundamental obligation to determine “whether to award summary

judgment.” What is clear from the record is that the trial court fulfilled its obligation. BRM points to nothing in the record to the contrary.

The trial court here did “make an initial determination as to whether to award summary judgment.” What the trial court did not do was address expressly the statute of limitations argument in its opinion granting summary judgment. But the trial court’s silence on the issue does not relieve an appellate court of the obligation to independently examine the correctness of that summary judgment determination, even if on grounds different from those relied upon by the trial court. This is so because “[a]ppeals are from judgments, not the opinions explaining them.” *Couchot v. State Lottery Comm.*, 74 Ohio St.3d 417, 423, 1996-Ohio-262. And that is why “[r]eviewing courts are not authorized to reverse a correct judgment on the basis that some or all of the lower court’s reasons are erroneous.” *State ex rel. Deiter v. McGuire*, 119 Ohio St.3d 384, 2008-Ohio-4536, ¶21, quoting *State ex rel. McGrath v. Ohio Adult Parole Auth.*, 100 Ohio St.3d 72, 2003-Ohio-5062, ¶ 8. A trial court’s judgment must be affirmed if any valid grounds are found on review to support it. *Murphy* does not trump this well-established principle.

As pointed out in Roderick Linton’s merit brief at page 36, *Murphy* is factually and procedurally distinguishable from this case. The *Murphy* decision emphasized that “[t]he wording of Civ.R. 56(C) makes it clear that a trial court must conscientiously examine all the evidence before it when ruling on a summary judgment motion” *Id.* at 359. In *Murphy*, the trial court failed to “conscientiously examine” any of the thousands of pages of briefs and depositions submitted by the parties in connection with a summary judgment motion. The trial court acknowledged its complete failure to do so. Just prior to reaching its decision, the trial court stated, “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 trial court announced from the bench that summary

judgment was granted. *Id.*

In reversing summary judgment, the Supreme Court held that it was reversible error for the trial court to grant summary judgment before fulfilling its obligation to review the briefs and Civ.R. 56(C) evidentiary materials submitted by the parties. The *Murphy* decision noted that the court of appeals' independent review of the record could not cure the trial court error. *Id.* at 359-360. The court stated that “[i]f the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court.” *Id.* at 360. But that is not what happened here.

In this case, there is no suggestion that the trial court failed to fulfill its “mandatory duty” to “conscientiously” and “thoroughly” examine all appropriate materials in the record before granting summary judgment. In deciding that summary judgment was appropriate, the trial court simply did not address the statute of limitations in its opinion, which was only one of the legal arguments made by Roderick Linton in support of summary judgment. Unlike what happened in *Murphy*, there was no error, procedural or otherwise, committed by the trial court. Nothing in this record suggests that this case resembles *Murphy* in any respect.

Contrary to BRM's arguments, *Murphy* does not stand for the proposition that an appellate court is prohibited from considering alternative grounds to affirm a trial court's otherwise correct summary judgment, even when those grounds were not the trial court's reason for its judgment. The trial court's procedural failings in *Murphy* should not result in an abandonment of the well-established rule that a trial court's judgment must be affirmed if any valid grounds are found on review to support it. 5 OHIO JURISPRUDENCE 3d (2009), Appellate Review, §436 at 192-192. *Murphy* did not disapprove of the overriding and long-standing principle of appellate practice that, even where a trial court has stated an erroneous basis for its judgment, a reviewing court must affirm

the judgment if the judgment is legally correct for another reason.

If *Murphy* stands for the proposition asserted by BRM, no appellate court would ever have the authority to affirm a lower court's judgment on grounds different from those relied on by the lower court. But that is not the case. Appellate courts, including this Court, are not so restrained. See *State ex rel. Deiter v. McGuire*, supra, ¶21. In the eighteen years since *Murphy* was decided, the courts of appeals of this state have regularly affirmed summary judgment on grounds that were not addressed by the trial court.⁴ See, e.g., *Bridge v. Park Natl. Bank*, 179 Ohio App.3d 761, 2008-Ohio-6607, ¶11; *Matikas v. Univ. of Dayton*, 152 Ohio App.3d 514, 2003-Ohio-1852, ¶22; *Wooton v. Vogele*, 147 Ohio App.3d 216, 2001-Ohio-7096, ¶15; *McNamara v. Rittman* (1998), 125 Ohio App.3d 33, 46; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

While *Murphy* cautions trial courts that they cannot shirk their responsibility to fulfill obligations imposed by the Civil Rules, *Murphy* certainly was not intended by this Court to allow appellate courts to avoid their duty to conduct an independent examination of the record and determine whether the trial court's judgment was correct for any reason, even if that reason differs from the trial court's expressed reasoning or was not considered by the trial court at all.

B. A Trial Court Does Not Formulate Findings of Fact on Summary Judgment.

BRM asserts erroneously that a court's cognizable event/termination inquiry and analysis under R.C. §2305.11(A) are both factual questions. Not always. The occurrence of a cognizable event and termination of the attorney-client relationship can be – and often are – determined as legal

⁴ The same has happened in regard to trial court judgments entered pursuant to Civ.R. 12(B)(6) and Civ.R. 50 which, like summary judgments, are also reviewed on appeal under a de novo standard. See, e.g., *Bohan v. Dennis C. Jackson Co., L.P.A.*, 188 Ohio App.3d 446, 2010-Ohio-3422, ¶9; *White v. Sears, Roebuck & Co.*, 163 Ohio App.3d 416, 2005-Ohio-5086, ¶23; *Ramco Specialties, Inc. v. Pansegrau* (1998), 134 Ohio App.3d 513, 520-521.

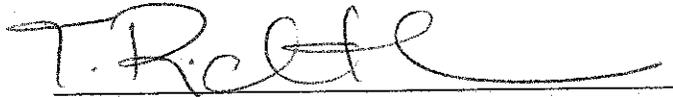
issues. See, *Whitaker v. Kear* (1997), 123 Ohio App.3d 413, 420, citing *Green v. Barrett* (1995), 102 Ohio App.3d 525. Otherwise, summary judgment could never be granted based upon the statute of limitations. But this Court has found that the cognizable event and termination of the attorney-client relationship can be resolved on summary judgment. See *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, *Zimmie v. Calfee, Halter & Griswold* (1989), 43 Ohio St.3d 54.

Advancing the misconception that the cognizable event and attorney-client termination date are factual questions, BRM argues that the court of appeals could not address the statute of limitations as an alternative basis and independent ground for affirming summary judgment because “[t]he 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.” (Appellee’s Brief at p. 22) But findings of fact are not made when a trial court rules on a motion for summary judgment. *State ex rel. Sharif v. Cuyahoga Cty. Court of Common Pleas*, 85 Ohio St.3d 375, 377, 1999-Ohio-392; Civ.R. 52. Summary judgment can be granted only when no genuine issue of material fact exists. Findings of fact are incompatible with summary judgment procedure. *Cadle Co. II, Inc. v. HRP Auto Ctrs., Inc.*, 8th Dist. No. 84296, 2004-Ohio-6292, ¶24, discr. appeal denied, 105 Ohio St.3d 1516, 2005-Ohio-1880.

III. **CONCLUSION**

WHEREFORE, this Court should reverse the Ninth District Court of Appeals and reinstate the trial court’s summary judgment in favor Appellant Roderick Linton, LLP. This Court can do so based upon the lack of an attorney-client relationship or for the independent reason that any claim for legal malpractice is barred by the statute of limitations in R.C. §2305.11(A).

Respectfully submitted,



Alan M. Petrov, Esq. (0020283)

Timothy J. Fitzgerald, Esq. (0042734)

Jay Clinton Rice, Esq. (0000349)

Theresa A. Richthammer, Esq. (0068778)

GALLAGHER SHARP

Sixth Floor, Bulkley Building

1501 Euclid Avenue

Cleveland, Ohio 44115

Telephone: (216) 241-5310

Facsimile: (216) 241-1608

Email: apetrov@gallaghersharp.com

tfitzgerald@gallaghersharp.com

jrice@gallaghersharp.com

trichthammer@gallaghersharp.com

Attorneys for Defendant-Appellant

Roderick Linton, LLP

PROOF OF SERVICE

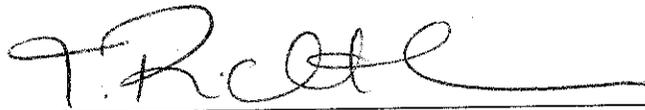
A copy of the foregoing *Reply Brief of Defendant-Appellant Roderick Linton, LLP* was sent by regular U.S. Mail, postage pre-paid, this 22nd day of November, 2010 to the following:

Michael J. Moran, Esq.
Kenneth L. Gibson, Esq.
Weick, Gibson & Lowry
234 Portage Trail
P.O. Box 535
Cuyahoga Falls, OH 44221

*Counsel for Plaintiffs-Appellees,
New Destiny Treatment Center,
Inc., et al.*

Brian D. Sullivan, Esq.
John P. O'Neil, Esq.
Reminger Co., L.P.A.
1400 Midland Building
101 Prospect Avenue West
Cleveland, OH 44115-1093

*Counsel for Defendant-Appellant,
E. Marie Wheeler*



Alan M. Petrov, Esq. (0020283)
Timothy J. Fitzgerald, Esq. (0042734)
Jay Clinton Rice, Esq. (0000349)
Theresa A. Richthammer, Esq. (0068778)