

ORIGINAL

IN THE SUPREME COURT OF OHIO

LORNA B. RATONEL, et al. :
 Plaintiffs-Appellees, : On Appeal from the
 v. : Montgomery County Court of Appeals,
 ROETZEL & ANDRESS, LPA, et al. : Second Appellate District
 : Court of Appeals
 Defendants-Appellants. : Case No. 26259

15 - 0724

MEMORANDUM IN SUPPORT OF JURISDICTION
 OF APPELLANTS ROETZEL & ANDRESS, LPA and MARK A. ROPCHOCK

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**EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST**

As the trial judge and the dissenting appellate judge in this case recognized, a lawyer should not be subjected to involuntary servitude. The ruling of the other two judges who have thus far considered this case would require a lawyer, at risk of a malpractice lawsuit, to undertake representation of a client with respect to a claim specifically excluded from an attorney-client engagement letter and the client acknowledges the fact that the lawyer has declined to undertake such representation. Moreover, the ruling would place a lawyer in peril of a malpractice suit whenever that lawyer provides a client with an explanation as to why he or she refused to undertake representation of a particular claim. Such an expansion of the potential sphere of legal malpractice litigation is, and should be, of great concern to the bench and bar of Ohio and to the citizens of this state.

That concern is especially significant where, as here, it impacts the widespread practice of handling cases on a contingent-fee basis. That practice serves the desirable social goal of permitting citizens to seek redress without the cost burden imposed by hourly rate charges. It also, however, places lawyers at the risk of huge expenditures of time and money with the prospect of no return for such effort and expense. There are innumerable reasons – both subjective and objective – which may cause any attorney to decline to undertake such representation. Neither the practitioners of our profession nor the citizens of this state will be served by the expansion of potential liability condoned by the appellate decision which this Court is urged to review.

This case also affords an opportunity for this Court to address the ongoing viability of Rule 56 of the Ohio Rules of Civil Procedure and to confirm that Rule 56 serves an important gatekeeping function. The rule should not be construed as somehow reviving the long-

abandoned scintilla rule in Ohio jurisprudence. That rule required a trial court to send a case to a jury “[w]here there is *any* evidence, however slight, *tending* to support a material issue...” *Hamden Lodge, I.O.O.F. v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 475, 189 N.E.2d 246 (1934). This Court abolished the scintilla rule in *Hamden Lodge*. In that opinion, this Court noted that the “. . . scintilla rule . . . is better calculated to confuse than enlighten the mind.” *Id.* at 477. It further criticized the scintilla rule:

. . . to say that the court must send the case to the jury whenever there is any evidence, no matter how slight, which tends to prove a party’s claim, is, in extreme cases, to permit the jury to play with shadowy and elusive inferences which the logical mind rejects. Before the judge is required to send the case to the jury, there should be in evidence something substantial from which a reasonable mind can draw a logical conclusion.

Id. at 482.

This Court then pronounced the then new Rule 56 standard. The new standard required that a case be submitted to a jury only when the reasonable minds could reach different conclusions based on the factual evidence before them. *Ibid.* The Appellate decision, in effect, would revive the long-abandoned scintilla rule and have cases sent to a jury when reasonable minds could find no genuine issue of material fact presented with respect to an asserted claim or defense. Rule 56 serves a significant function in Ohio’s civil justice system. It should be honored, not in the breach, but in the observance.

STATEMENT OF THE CASE AND FACTS

The Plaintiffs-Appellees in this case are Lorna B. Ratonel and her companies Carmalor Ohio, LLC and Carmalor, Inc. (collectively “Ms. Ratonel”). In order to avoid a huge monetary tax burden following the sale of commercial property in California, Ms. Ratonel had to make a like-kind exchange of real estate within a narrow time period. She engaged the Cincinnati law

firm of Keating, Muething & Klekamp, PLL (“KMK”) to assist her in that endeavor. With the advice and guidance of that firm she made timely acquisitions of two HUD multi-family rental properties, the Holden House in Ohio and the French Village in Nebraska. Those acquisitions led to buyer’s remorse and concerns on the part of Ms. Ratonel as to the quality of KMK’s representation.

The Defendants-Appellants Roetzel & Andress, LPA and Mark A. Ropchock (collectively “R&A”) undertook representation of Ms. Ratonel in a legal malpractice lawsuit against KMK pursuant to a contingent fee agreement that limited their representation to claims concerning the Holden House, a property badly in need of repairs at the time of its acquisition. While there was a passing reference to French Village as providing only yearly instead of monthly income distributions in paragraph 33(g) of the forty-one paragraph complaint filed by R&A, it was apparent from the complaint, the parties’ written engagement agreement, and the Plaintiff’s acknowledged understanding that the only claim R&A was willing to undertake was the Holden House claim.

The engagement agreement was signed on March 9, 2009. The complaint was filed on May 13, 2009. The case did not go to trial until October of 2010. Ms. Ratonel thus had at least a year and a half to bring French Village issues before the Court either *pro se* or with new counsel. To underscore the fact that no claim had been asserted with respect to French Village, the passing reference to yearly as opposed to monthly payments on that project was deleted from the complaint by amendment.

After her lawsuit involving Holden House proved unsuccessful, Ms. Ratonel filed this lawsuit claiming that R&A committed legal malpractice both in the case it agreed to pursue and in the case it declined to pursue. The claims against R&A with respect to its handling of the case

against KMK involving the Holden House purchase remain pending in the Common Pleas Court. Claims against R&A with respect to French Village can only be described as the assertion of legal malpractice for failing to undertake a case which R&A had unequivocally, and with full understanding of Ms. Ratonel, declined to undertake. Judge Mary Wiseman of the Common Pleas Court granted summary judgment in favor of R&A on the French Village claims. A copy of the relevant portion of her decision rendered on May 16, 2014 is attached in the Appendix to this memorandum. The Court of Appeals for the Second Appellate District, in a two-to-one decision, reversed the Common Pleas decision and remanded the French Village claim for trial. A copy of the Appellate opinion is also attached in the Appendix.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: An action for legal malpractice cannot be sustained against a lawyer who, with full understanding of a client, declines to undertake a claim on behalf of the client at a time when there is no statutory bar preventing the client from pursuing the claim *pro se* or by engaging other counsel.

The unequivocal limitation of representation set forth in the parties' written agreement was confirmed when R&A filed the complaint against KMK.

Mr. Greer: When you saw the complaint that Mr. Ropchock had filed on your behalf it was apparent that all of the claims in that complaint related to the Holden House, was it not?

Ms. Ratonel: Yes.

Ratonel Depo. at pp. 58-59.

Mr. Greer: Well, you did receive a copy of the complaint that Mark filed on your behalf, did you not, when it was filed?

Ms. Ratonel: Yes, I did. I discussed it with Ropchock, with Mark, since I feel about putting in French Village.

He refused to do it. He just absolutely refused to do it. He said he didn't want to muddy the water.

Id. at p. 50, ll 1-8.

Mr. Greer: When Mr. Ropchock filed the complaint against the Keating firm on your behalf and against others as well you did read that complaint, did you not?

Ms. Ratonel: He told what's in it, and I told him why don't you put in French Village.

Mr. Greer: And he told you he didn't think you had a claim on this side?

Ms. Ratonel: Several times, yeah. He refused to.

Mr. Greer: When he told you that he didn't think you had a claim on that side, did you consult with another attorney to see if you could get somebody else to file that claim?

Ms. Ratonel: I wanted to

.....

Mr. Caras: He asked you did you do that.

Witness: No. I am sorry. Not at that time.

Id. at p. 51, ll 12-24; p. 52, ll 4-5.

At this point, Ms. Ratonel still had approximately a year and a half to pursue a claim regarding French Village with other counsel or as a *pro se* litigant.

The limitation of R&A's representation to the Holden House claim which Ms. Ratonel acknowledged as a matter of fact, had been established as a matter of law by the written engagement agreement she entered with R&A. That agreement which is dated March 9, 2009, two months before the complaint against KMK was filed, clearly defines R&A's undertaking as the "performance of services . . . in connection with the purchase of Holden House Apartments

in Dayton, Ohio in January, 2008” Exhibit D to R&A’s Motion for Summary Judgment, p.

1. A lawyer’s duty is fixed by the scope of his representation, and a client must establish the existence of an accepted duty as an essential element of a malpractice case. *Vahila v. Hall*, 77 Ohio St. 3d 421, 427, 674 NE2d 1164 (1997), appeal dismissed, 86 Ohio St. 3d 1492, 716 N.E.2d 723 (1999). An attorney cannot be held accountable for not performing a task he expressly declined to undertake. *Svaldi v. Holmes*, 2012-Ohio-6161, 986 N.E.2d 443 ¶¶17-18 (10th Dist.).

The e-mails from R&A to Ms. Ratoneil on which the Court of Appeals majority opinion relies and from which it quotes at paragraphs 9 through 13 as creating a genuine issue of material fact simply review issues which Ms. Ratoneil could raise with other counsel if she chose to pursue French Village claims. Lawyers have a role as advisors as well as a role as advocates. None of those e-mails were shared with counsel for KMK and, as noted in paragraph 14 of the opinion, neither the settlement demand sent to those attorneys nor the amended complaint contained any reference whatsoever to French Village. As noted in the e-mail quoted at paragraph 13 of the majority opinion, R&A had informed Ms. Ratoneil that no liability expert could be found on the potential French Village claim, that she could not afford to pay for a damages expert, and that “at this time, there is no viable claim against KMK on FV.” In fact, the losses which occurred at French Village did not happen until years after the October 2010 trial against KMK and were no more than matters of speculation at the time of that trial.

The Judge of the Common Pleas Court got it right.

Whether or not meritorious claims could have been advanced against KMK relative to the French Village acquisition, the fact that these defendants declined to represent plaintiffs as to any such claims renders plaintiffs unable to pursue a cause of action for professional negligence against the R&A defendants with respect to those claims. If Ms. Ratoneil was dissatisfied with the R&A

defendants' stated unwillingness to advance legal malpractice claims against KMK based on the French Village transaction, she remained free at that time to retain other counsel for the purpose of pursuing such claims.

Decision, Order and Entry of May 16, 2014 at pp. 13-14. The dissenting Judge in the Court of Appeals also got it right.

In addition to the omission of representation regarding the French Village transaction from the engagement letter, in my view, the April 30, 2010 e-mail, coupled with Ms. Ratone's acknowledgement that Roetzel & Andress 'refused' to handle the claim related to French Village unequivocally results in the conclusion that there is no genuine issue of material fact about the scope of representation. I would affirm.

Opinion dated March 27, 2015 at pp. 13-14.

The reason for intervention by this Court, however, is not simply triggered because the majority opinion in the Court of Appeals got it wrong. The issues are much larger than that. Are Ohio attorneys exposed to the expense and risk of malpractice lawsuits when they decline to represent a client on a given matter? Is that exposure exacerbated when the attorney explains his or her rationale for refusing to undertake representation of a claim and in doing so expresses opinions on the pros and cons of the declined claim? Is the long-buried scintilla rule to be resurrected to replace the "reasonable minds could only conclude" test in determining the existence of factual issues that are both genuine and material?

To protect the lawyers of Ohio and to clarify the rights of the Ohio citizens who engage the services of those lawyers, this Court – we respectfully submit – needs to make a clear pronouncement that (1) a lawyer's duties to his client are defined by and limited to the undertakings set forth by the terms of the written agreements entered into by those parties; (2) any change in those terms must be in a writing signed by both parties; (3) only where no written engagement agreement exists can a genuine issue of material fact be presented as to the terms or

scope of an attorney-client relationship; and (4) courts have gatekeeping responsibilities under Rule 56 of the Ohio Rules of Civil Procedure to prevent the expense and risks of jury trials in cases where reasonable minds could only conclude that no genuine issues of material fact are presented.

Proposition of Law No. II: An action for legal malpractice cannot be sustained against a lawyer who, with full understanding of a client, withdraws from representation of the client at a time when there is no statutory bar preventing the client from pursuing the claim *pro se* or by engaging other counsel.

The second proposition of law is simply a corollary to the first. An attorney-client relationship is consensual in nature and therefore may be terminated by the actions of either party to the relationship. *Ruf v. Belfance*, 9th Dist. Summit No. 26297, 2013-Ohio-160, ¶17 (2013). It follows that any change in the relationship, effectively communicated and understood, is binding upon the parties. If the scope is defined by a written agreement, a change in the scope should be defined in the same manner. Even where no written engagement agreement exists, genuine issues of material fact are avoided where there is an acknowledged mutual understanding by both parties of the scope and any change in that scope. In this case, the client was informed by the written engagement agreement and by a subsequent e-mail that R&A would not undertake representation for the French Village claims.

Even if an ambiguity on that subject could be imposed upon the clear acknowledgement by Ms. Ratoneil that R&A did not represent her on anything other than her claims relating to Holden House, any arguable issue was no longer genuine or material when Ms. Ratoneil received the e-mail of April 30, 2010 referenced in paragraph 14 of the majority opinion of the Court of Appeals. The only potential topics for discussion following receipt of the clear message conveyed by that letter were: (1) further elaboration of the R&A conclusion that the claim was not viable; and (2) whether Ms. Ratoneil nonetheless wanted to pursue the claim *pro se* or with

other counsel in the six months that still remained before the trial date. Courts have held that, “[w]here the actions terminating a relationship are clear and unambiguous, such that reasonable minds can come to but one conclusion from the evidence, the termination may be decided as a matter of law.” *See, e.g., Ruf*, at ¶12.

There was no ambiguity in the message to justify a jury finding that R&A, either before or after the March 9, 2009 written engagement agreement, undertook any representation of Ms. Ratonel with respect to KMK’s handling of her acquisition of French Village. No representation means no duty. Without a duty there can be no breach of duty. To turn these subjects into subjects for jury speculation distorts Rule 56, returns Ohio jurisprudence to the long-abandoned scintilla standard, and violates the interests of the public and the legal profession that this Court exists to protect.

CONCLUSION

The score is two-to-two among the Judges who have thus far given *de novo* consideration to the subject matter of this case. The standard of review in this Court remains a *de novo* standard. An opportunity exists for this Court to clarify the rights of lawyers and their clients in Ohio, to confine legal malpractice litigation within limits that reflect existing principles and the public interest, and to assure that Rule 56 of the Ohio Rules of Civil Procedure is applied to satisfy the purposes for which that rule was adopted.

The question whether, under accepted standards of practice, an Ohio lawyer has an obligation to represent a client on a contingent fee basis – under circumstances where such representation is in conflict with the attorney’s judgment, with his willingness to act, with his written engagement agreement with his client, and with his client’s express understanding of the limited scope of his undertaking – does not present a genuine issue of material fact. Such

circumstances are the material facts of this case. No genuine issue is presented concerning them. Unless this Court intervenes, the appellate opinion from which this appeal is taken will remain a precedent for an unwarranted expansion of an attorney's professional responsibility and for an unwarranted contraction of the intended gatekeeping function of Rule 56.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary United States mail to counsel for Appellees, Sam G. Caras, David M. Deutsch, and Mitchell J. Anderson, One First National Plaza, Suite 310, 130 West Second Street, Dayton, OH 45402, on the 4th day of May, 2015.



David C. Greer
Counsel for Appellants, Roetzel & Andress, LPA
and Mark A. Ropchock

APPENDICES

- Opinion of the Montgomery County Court of Appeals
(March 27, 2015)
- Judgment Entry of the Montgomery County Court of Appeals
(March 27, 2015)
- Relevant Portion of Decision, Order and Entry of the Common
Pleas Court of Montgomery County, Ohio
(May 16, 2014)

{¶ 1} Plaintiffs-appellants Lorna Ratonel, Carmalor, Inc. and Carmalor Ohio, LLC [hereinafter collectively referred to as Ratonel] appeal from a summary judgment rendered in favor of defendants-appellees Mark Ropchock and the law firm of Roetzel & Andress, L.P.A. [hereinafter collectively referred to as Ropchock] on Ratonel's legal malpractice action. Ratonel contends that the trial court erred by finding that Ropchock did not represent her with regard to a property known as French Village. She also contends that the trial court erred by concluding that the representation was terminated.

{¶ 2} We conclude that there are genuine issues of material fact regarding whether Ropchock undertook representation of Ratonel regarding French Village, and also regarding whether that representation was terminated. Since we conclude that a reasonable jury could find from the evidence in this record that Ropchock's alleged malpractice was within the scope of his representation of Ratonel, we conclude that the trial court erred by rendering summary judgment.

{¶ 3} Accordingly the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings.

I. The Alleged Legal Malpractice

{¶ 4} This is an unfortunate case in which attorneys pursuing a legal malpractice claim are alleged, themselves, to have committed malpractice in pursuing that claim.

{¶ 5} In 2007, Ratonel engaged the services of attorney Gail Pryse and the law firm of Keating, Muething & Klekamp [KMK] to help Ratonel acquire a multi-family apartment complex in Dayton, Ohio, known as Holden House, as well as another apartment complex in Nebraska, known as French Village. Ratonel claimed that KMK

breached its professional duties with regard to the acquisition of these properties, thereby causing Ratonel to incur monetary losses.

{¶ 6} Ratonel engaged Ropchock to pursue a legal malpractice action against KMK. In March 2009, Ratonel and Ropchock entered into a written contract for the provision of legal services with regard to the Holden House transaction. The contract noted that the parties could agree to include additional services “not specified in this letter.”

{¶ 7} On May 13, 2009, Ropchock, on behalf of Ratonel, filed a complaint against KMK. The complaint consisted of forty-one paragraphs, which related solely to Holden House, except for Paragraph 33(g), which stated:

Defendants Pryse and KMK knew, or should have known, that another property for which they provided legal services, the French Village Apartments in Nebraska, was a “Limited Dividend Property.” This means that Plaintiff can only receive a yearly, not monthly, income distribution from these apartments. Defendants Pryse and KMK failed to advise Plaintiff of this obvious, significant, material fact.

{¶ 8} The complaint made a general claim for damages in excess of \$25,000, as well as for fees, costs and punitive damages.

{¶ 9} On September 21, 2009, Ratonel e-mailed Ropchock. Attached were copies of e-mails in which Ratonel had been informed of the impending loss of a large portion of the equity in French Village, due to financing issues.

{¶ 10} On October 19, 2009, Ropchock sent an e-mail to Ratonel, in which he stated:

I'm prepping for Carmichael but I found something interesting on another note. You sent me an e-mail on Sept 29th. It was from 8/13/07. It dealt with the financing of H.H.. Interestingly, [Pryse] recognizes that the HUD contract often doesn't last as long as the financing on the building, so the HUD contract "SHOULDN'T" (her words, all capitalized in her e-mail to you) pay at above market rates, b/c, naturally, the bank wouldn't loan based on something that might not be in existence in the future. EXACTLY. So why the hell would she let you buy a building, F.V., and not point out you were receiving above market rents, which she knew, or should have known, would expire in 18 months? Her statement with respect to H.H. I think is very damning to her when we get to the FV issue. . .

{¶ 11} On January 26, 2010, Ropchock sent Ratonel an e-mail to which he attached a copy of a settlement demand letter he had drafted. Most of the letter related to Holden House. However, the letter included the following statement about French Village:

KMK's Liability for French Village

The professional negligence claim against KMK concerning French Village is a different claim which flows from a separate act of negligence. KMK's negligence with respect to French Village was not revealed until well after this litigation had commenced, perhaps a month or two ago. My client was attempting to refinance French Village, in order to pull some of what she believed to be her million dollar equity in that facility. During that review process, it was discovered that the HAP contract with the federal

government, which, among other things, sets forth the rent payment amounts for French Village, stated that the rents for French Village would be reduced significantly, from above market rent levels to market rent levels. It is impossible for my client to renegotiate a higher above market rent with the government. She is simply going to be stuck with market rate rents. This has effectively reduced the value of French Village by half, from approximately \$2,100,000 to \$1,100,000. Gail Pryse was responsible for and in fact billed for reviewing the HAP contract. In her deposition, she admitted that she was not even aware that the rents were set to decrease. Accordingly, she did not, nor could she have advised my client of the rent decrease. In a document she was retained to interpret for my client, she failed to advise my client of basic, material, provisions of that document. She likely failed to do so either due to neglect, or due to her admitted unfamiliarity with HUD transactions.

Marked as an exhibit to Attorney Pryse's deposition is the attached e-mail from Alan Fershtman, which concedes "that it would be important for all of the HUD documents to be reviewed." Although that is another admission, frankly, it could go without saying. Pryse also admitted to reviewing the HAP contracts, and billed for their review. Attorney Buck may have also reviewed the same documents. Of course, we now know that KMK was not competent to handle a HUD real estate transaction as they have admitted as much. Pryse even told my client to obtain a separate HUD counsel. However, note that she did not tell my client from

the onset of the transaction, back in August, to obtain HUD counsel, but instead did not advise my client as to KMK's lack of competence until September 25, about the same time she had or was about to blow the inspection date for Holden House. In any event, it was not the responsibility of the HUD counsel, Hessel & Alouise, to advise my client as to the rental aspect of this transaction. As Pryse testified, Hessel & Alouise was brought on merely to make sure that all of the HUD documents were properly filed with HUD, including the management agreement and so on. Pryse admitted that she was responsible for any other due diligence concerning these transactions.

Regardless, it was important to review these documents, KMK billed for reviewing the documents, and KMK never advised my client as to the fundamental provisions of these documents, in this case, the imminent significant drop off in rents. Obviously, it would have been my client's decision whether or not to continue with the deal at the given price, but without any input from KMK as to the content of the HAP contracts, a review for which they billed, my client was denied the opportunity to even consider that decision, or to further negotiate the purchase price. KMK's negligence is once again undeniable. How an attorney can be responsible for reviewing a contract, bill for reviewing the contract, and not inform the client as to the significant provisions of that contract, specifically that the rent provisions in the contract would be significantly reduced, is almost incomprehensible.

{¶ 12} The draft demand letter went on to state that Ratonel was making a demand of \$1,200,000 for settlement of the French Village malpractice claim.

{¶ 13} Thereafter, on April 30, 2010, Ropchock sent an e-mail to Ratonel, in which he noted that Ratonel asserted two claims with regard to French Village. First, there was a claim that KMK failed to advise that the complex was a Limited Dividend Property. Ropchock opined that despite damage to Ratonel's cash flow [i.e., she could only take payment out once per year rather than every month], the damages would not be quantifiable. Second, Ropchock noted that Ratonel asserted a claim for a reduction of rent that would occur with regard to French Village. However, Ropchock went on to note that "it was almost impossible to find anyone willing to testify against KMK * * * so we have no liability expert." He informed Ratonel that without an expert it would not be possible to establish liability. He further informed Ratonel that they lacked an expert regarding damages because she could not afford to pay for an expert. Finally, Ropchock stated, "[i]n my opinion, at this time, there is no viable claim against KMK on FV. Please call me to discuss."

{¶ 14} On May 11, 2010, Ropchock sent a settlement demand letter to counsel for KMK, in which he omitted any mention of French Village. On August 8, 2010, an amended complaint was filed, which omitted mention of French Village.

{¶ 15} The case was tried to a jury in October 2010. Following the close of Ratonel's case, the trial court directed a verdict in favor KMK upon a finding that Ratonel failed to present competent evidence regarding proximate cause and damages. Thereafter, the parties agreed to enter into a settlement agreement whereby, in exchange

for Ratonel's agreement to forego an appeal, KMK would dismiss its counterclaim for attorney fees.

{¶ 16} Thereafter, Ratonel and Ropchock exchanged e-mails in which Ratonel stated that she did not understand what had happened to cause the trial to end, and that she did not agree to the settlement, which she felt Ropchock had pressured her into accepting. Ratonel then hired another law firm to initiate a lawsuit against Ropchock for legal malpractice.

II. The Course of Proceedings

{¶ 17} Following discovery, both parties filed motions for summary judgment. The trial court denied Ratonel's motion. The trial court denied Ropchock's motion with regard to the claims concerning Holden House, but rendered partial summary judgment in favor of Ropchock with regard to the claims concerning French Village. The trial court concluded that the alleged malpractice was outside the scope of Ropchock's representation of Ratonel, relying upon the omission of any language concerning French Village in the engagement letter, as well as the April 30, 2010 e-mail from Ropchock to Ratonel in concluding that Ropchock refused to represent Ratonel with respect to any claims regarding French Village. The trial court went on to note that even if the fact that Ropchock "did throw in a line" in the original complaint regarding French Village, gave rise to a reasonable belief that he intended to represent Ratonel on that claim, that belief "would have been extinguished by Defendant Ropchock's later communications delineating the reasons he was unwilling to pursue claims based on the French Village acquisition." Dkt. 72; p. 13.

{¶ 18} At the request of the parties, the trial court certified, under Civ.R. 54(B), that there was no just cause for delay.

{¶ 19} Ratonel appeals.

**III. There Are Genuine Issues of Material Fact Concerning
whether the French Village Malpractice Claim Was
within the Scope of Ropchock's Representation of Ratonel**

{¶ 20} Ratonel raises the following two assignments of error:

THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO GRANT RATONEL'S MOTION FOR SUMMARY JUDGMENT BASED ON R & A'S NEGLIGENT ADVICE TO RATONEL THAT THEIR CLAIMS AGAINST KMK DERIVED FROM KMK'S PREPARATION OF THE PURCHASE AGREEMENT FOR FRENCH VILLAGE, WHICH OMITTED THE OPTION OF CONVENTIONAL FINANCING, WERE NOT VIABLE AND SPECULATIVE.

THE TRIAL COURT ERRED BY COMPLETELY IGNORING UNCONTROVERTED FACTS WHEN IT FOUND THAT R & A "TERMINATED" THEIR REPRESENTATION REFERABLE TO FRENCH VILLAGE ON APRIL 30, 2010, SO GRANTING R & A'S MOTION FOR SUMMARY JUDGMENT.

{¶ 21} Ratonel contends that the trial court erred in determining that Ropchock declined to represent Ratonel with regard to French Village.

{¶ 22} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to

judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, 936 N.E.2d 481, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, 876 N.E.2d 1217, ¶ 29. When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn.*, 122 Ohio App.3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 119-20, 413 N.E.2d 1187 (1980). Therefore, the trial court's decision is not granted deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.*, 87 Ohio App.3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 23} Absent an attorney-client relationship, a plaintiff may not maintain an action for legal malpractice. *New Destiny Treatment Ctr., Inc. v. Wheeler*, 129 Ohio St.3d 39, 2011-Ohio-2266, 950 N.E.2d 157, ¶ 32. With regard to the determination of whether the relationship exists, "the law looks to the manifest intentions of the attorney and the prospective client. A relationship of attorney and client arises when a person manifests an intention to obtain legal services from an attorney and the attorney either consents or fails to negate consent when the person has reasonably assumed that the relationship has been established. Thus, the existence of an attorney-client relationship does not depend on an express contract but may be implied based on the conduct of the parties

and the reasonable expectations of the putative client.” *Id.*, ¶ 26. In this case, there is no dispute that an attorney-client relationship existed.

{¶ 24} However, that does not end our inquiry because “an attorney only owes a duty to a client if the alleged deficiencies in his performance relate to matters within the scope of the representation.” *Svaldi v. Holmes*, 2012-Ohio-6161, 986 N.E.2d 443, ¶ 18 (10th Dist.). Thus, even when an attorney-client relationship is established, we must determine the scope of the representation provided. *Id.*

{¶ 25} As a general rule, the intent of the parties regarding the scope of representation is set forth in the engagement contract, which the parties are presumed to have read. *Pierson v. Rion*, 2d Dist. Montgomery No. 23498, 2010-Ohio-1793, ¶ 19 – 20. As noted above, the engagement letter executed by the parties was limited to Holden House, but stated other services could be agreed upon. No written agreement was executed with regard to French Village. However, a contract for services can be written, oral, express or implied. *Collett v. Steigerwald*, 2d Dist. Montgomery No. 22028, 2007-Ohio-6261, ¶ 33. Thus, we can look to the conduct of the parties to determine whether representation regarding French Village was agreed to by implication. *Id.*

{¶ 26} While the reference in the complaint to French Village was admittedly short, when combined with the e-mails regarding the French Village complex and the draft settlement sent to Ratone1 for review, we disagree with the trial court’s determination, as a matter of law, that Ropchock did not undertake representation in that regard. A reasonable jury could find, on this evidence, that Ropchock rendered legal advice on the matter and began to pursue the claim.

{¶ 27} The next issue is whether the e-mail of April 30, 2010 was sufficient to extinguish any reasonable belief that Ratonel held with regard to that representation. We also disagree with the trial court's conclusion on that issue. The e-mail in question did not, as claimed by Ropchock, unequivocally communicate an intent not to represent Ratonel on the matter. It framed the problems Ropchock perceived with regard to pursuing a claim for French Village, and set forth an opinion that the claim was not viable. It ended with a statement that Ratonel should call to discuss the matter.

{¶ 28} The trial court also relies upon the fact that during the deposition of Lorna Ratonel, she made several statements that Ropchock "refused" to include a claim regarding French Village. According to the trial court and Ropchock, this testimony made it clear that Ratonel was aware from the outset that Ropchock was not going to make a claim on that issue. From our review of the deposition, Ratonel's testimony can be taken to mean that up to, and even after, the filing of the amended complaint omitting French Village, she and Ropchock continued to have discussions about the need to include a claim for French Village. While Ropchock contends that Ratonel was free to obtain other counsel to pursue the matter, we note that there is no indication that he informed her that she should do so.¹ Furthermore, the evidence can be interpreted to indicate that Ratonel was not certain, until the amended complaint was filed just two months before trial, that Ropchock would not prosecute the claim. And even then, her testimony indicates that they continued to discuss the matter.

¹ We question Ropchock's claim that Ratonel could have found new counsel to pursue the claim so close to the trial date.

{¶ 29} The issue may be close, but we conclude that summary judgment was not appropriate on the French Village malpractice claim. A jury could conclude that Ratonel had a reasonable belief that Ropchock was providing representation regarding French Village. A jury could also find that Ropchock rendered a legal opinion concerning the validity of maintaining a malpractice claim, upon which Ratonel reasonably relied to her detriment in choosing not to pursue the French Village claim with other counsel. Accordingly, the First and Second Assignments of Error are sustained.

IV. Conclusion

{¶ 30} Ratonel's assignments of error having been sustained, the partial summary judgment rendered against Ratonel on the French Village malpractice claim is Reversed, and this cause is Remanded for further proceedings.

.....

FROELICH, P.J., concurs.

HALL, J., dissenting,

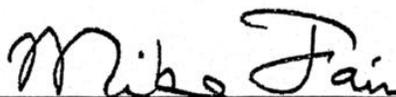
{¶ 31} I agree with the trial court that there is no genuine issue of material fact that, Ratonel hired Roetzel & Andress, LPA, to pursue a claim against the law firm, and lawyers, of Keating, Muething and Klekamp (KMK) for alleged malpractice related to purchase of a building in Dayton, Ohio. KMK had previously represented Ratonel with regard to purchase of "a multi-family apartment complex in Dayton, Ohio ['Holden House'] and another in Grand Island, Nebraska ['French Village']." (Decision, Order and Entry filed May 16, 2014, at 2) In addition to the omission of representation regarding the French Village transaction from the engagement letter, in my view, the April 30, 2010 email,

coupled with Ms. Ratonel's acknowledgement that Roetzel & Andress "refused" to handle the claim related to French Village unequivocally results in the conclusion that there is no genuine issue of material fact about the scope of representation. I would affirm.

.....

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MIKE FAIN, Judge

MICHAEL T. HALL, Judge

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GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LORNA B. RATONEL, *et al.*,

CASE NO.: 2011 CV 07832

Plaintiffs,

JUDGE MARY WISEMAN

-vs-

ROETZEL & ANDRESS, LPA, *et al.*,

**DECISION, ORDER AND ENTRY
GRANTING IN PART AND DENYING
IN PART DEFENDANTS ROETZEL &
ANDRESS, LPA'S AND MARK A.
ROPCHOCK'S MOTION FOR
SUMMARY JUDGMENTS, AND
DENYING PLAINTIFFS' FIRST
MOTION FOR PARTIAL SUMMARY
JUDGMENTS**

Defendants.

FINAL APPEALABLE ORDER

This matter is before the Court on the respective parties' cross-motions for summary judgment. On August 16, 2013, Plaintiffs filed their *First Motion for Partial Summary Judgments* ["*Plaintiffs' MSJ*"], together with the separate supporting *Affidavit of Phillip Feldman, Esq.* ["*Feldman Affid.*"]; and Defendants Roetzel & Andress, LPA and Mark A. Ropchock ["the R&A Defendants"] simultaneously filed their joint *Motion for Summary Judgments* ["*Defendants' MSJ*"].

On August 30, 2013, the R&A Defendants filed their *Memorandum in Opposition to Plaintiffs' First Motion for Partial Summary Judgments* ["*Defendants' Memo Opp.*"], and Plaintiffs filed their *Memorandum Contra Defendants' Motions for Summary Judgment* ["*Plaintiffs' Memo Opp.*"]. Finally, on September 9, 2013, Plaintiffs filed their *Reply in Support of Their First Motion for Partial Summary Judgments* ["*Plaintiffs' Reply*"]; and the R&A Defendants filed their *Reply in Support of Motion for Summary Judgments* ["*Defendants' Reply*"].

he would have been successful in the underlying matter,” and “the burden of proof for establishing a case within a case is the same burden the plaintiff would have had to satisfy if the underlying case had gone to trial.” *Goodman Weiss Miller*, 2008-Ohio-3833, ¶19 (emphasis added) (citation omitted).

“Malpractice by any other name still constitutes malpractice.” *Pierson v. Rion*, 2nd Dist. No. CA23498, 2010-Ohio-1793, ¶14 (quoting *Muir v. Hadler Real Estate Mgmt. Co.*, 4 Ohio App. 3d 89, 90, 446 N.E.2d 820 (10th Dist. 1982)), appeal not allowed, 126 Ohio St. 3d 1538, 2010-Ohio-4542, 934 N.E.2d 355. As such, any claim that arises “from the manner in which the attorney represented the client[,] . . . whether predicated upon contract or tort[,]” amounts to a claim for legal malpractice. *Id.* (quoting same). Accordingly, the Second District Court of Appeals held in *Rion* that the trial court had “properly dismissed” that plaintiff’s separate claim for negligent misrepresentation as “subsumed within [the plaintiff’s] legal malpractice claim.” *Id.*; see also *Wayside Body Shop, Inc. v. Slaton*, 2nd Dist. No. 25219, 2013-Ohio-511, ¶¶6, 26 (treating plaintiff’s breach of fiduciary duty and negligence claims against its attorney and law firm as legal malpractice claims); *Sacksteder v. Senney*, 2nd Dist. No. 24993, 2012-Ohio-4452, ¶52 (combining plaintiff’s legal malpractice, breach of fiduciary duty and vicarious liability claims against law firm defendants into single malpractice discussion).

Plaintiffs’ Legal Malpractice Action against R&A Defendants

1. The French Village Transaction

As identified in *Vahila*, 77 Ohio St. 3d at 427, the first element that Plaintiffs must prove in order to state a viable legal malpractice claim against the R&A Defendants is the existence of an attorney-client relationship which gave rise to a duty or obligation to Plaintiffs. The R&A Defendants apparently concede that they owed a duty or obligation to Plaintiffs in all relevant respects except one: they maintain that their “limited representation” of Plaintiffs “did not include an undertaking with respect to” claims arising from Plaintiffs’ investment in the French Village

property. (*Defendants' MSJ*, p. 26). Because any matter excluded from the scope of R&A's representation of Plaintiffs against KMK would not be subject to the legal malpractice analysis applicable to R&A's performance regarding those matters as to which it did agree to represent Plaintiffs, the Court chooses to address the "beyond-the-scope-of-representation" argument first, despite the fact that it appears last in the R&A Defendants' memorandum. (See *id.*, pp. 26-28).

In support of their request for summary judgment as to any claim against them based on their handling of issues related to KMK's role in the French Village acquisition, the R&A Defendants proffer a copy of their engagement letter to Ms. Ratone1, outlining the terms of their agreed representation. (*Id.*, Affidavit of David C. Greer ["Greer Affid."], ¶¶4, 9 & Exh. E). That engagement letter, dated March 9, 2009, specifically identifies the scope of Defendants' representation as involving

our [R&A's] performance of services on your behalf in connection with the purchase of Holden House Apartments in Dayton, Ohio in January 2008 for litigation against Mr. Carmichael, the law firm of Keating Muething and Klekamp, real estate agent Gene Leventhal and Barcus Company.

(*Id.*, Greer Affid., Exh. E, p. 1) (emphasis added). Ms. Ratone1 apparently signed and thus "[a]ccepted" the terms of that letter on March 11, 2009. (*Id.*, Exh. E, p. 4). Nowhere within that agreement does any reference to the French Village transaction appear. (See *id.*, Exh. 4, pp. 1-4).

Although they acknowledge that the original complaint they later filed on Plaintiffs' behalf against KMK did include a "passing reference to the French Village acquisition,"⁴ the R&A Defendants nonetheless insist that they thereafter "unequivocally communicated" to Plaintiffs that R&A "would not represent them with respect to French Village." (*Defendants' MSJ*, p. 27). In sum, Defendants urge that they cannot be liable to Plaintiffs as to representation that they declined to undertake. (*Id.*, pp. 26-28).

⁴ See *Ratone1 v. Keating Muething & Klekamp, PLL*, Case No. 2009 CV 3916, *Complaint* filed on 5/13/09, ¶33(g).

In opposing the R&A Defendants' motion in that regard, Plaintiffs in essence argue that despite the omission of any French Village reference from the engagement letter, the R&A Defendants thereafter acted in a manner consistent with pursuing such representation, going so far as to include a theory of liability relative to the French Village acquisition in the original complaint against KMK. (*Plaintiffs' Memo Opp.*, pp. 10-11); see *Ratonel*, Case No. 2009 CV 3916 (*Complaint* filed on 5/13/09, ¶33(g)). Plaintiffs further assert that "R&A's advice to permanently abandon the [French Village] claims was also negligent." (*Id.*, p. 10). Indeed, Plaintiffs seem to suggest that later dropping all claims related to French Village from the amended complaint filed against KMK, see *Ratonel*, Case No. 2009 CV 3916 (*Plaintiffs' First Amended Complaint* filed on 8/4/10), reinforces why the R&A Defendants should be deemed amenable to liability for failing to pursue claims on that basis. (See *Plaintiffs' MSJ*, p. 24) (stating that R&A "never informed Plaintiffs" that any claims against KMK re the French Village purchase became "extinguished/time-barred" by omission from amended complaint); (see also *Plaintiffs' Memo Opp.*, p. 16).

"An attorney's duty to his or her client exists in relation to the scope of representation sought by the client and undertaken by the attorney." *Advanced Analytics Labs. v. Kegler, Brown, Hill & Ritter, L.P.A.*, 148 Ohio App. 3d 440, 2002-Ohio-3328, ¶34, 773 N.E.2d 1081 (10th Dist.). Accordingly, even where an attorney-client relationship exists, a lawyer is not liable for failing to act beyond the agreed scope of representation. *Svaldi v. Holmes*, 2012-Ohio-6161, ¶¶17-18, 986 N.E.2d 443 (10th Dist.). The scope of an attorney's duty to his client is a question of law for the court to determine. *Id.*, ¶16.

Engagement agreements generally are presumed to define the contractual scope of representation and duty. See, e.g., *Rion*, 2010-Ohio-1793, ¶¶19-20. Parties to such contracts are presumed to have read and understood the agreement. *Id.*, ¶21.

"While it is true that an attorney-client relationship may be formed by the express terms of a contract," however, such a relationship "can also be formed by implication based on conduct of the

lawyer and expectations of the client.” *Collett v. Steigerwald*, 2nd Dist. No. 22028, 2007-Ohio-6261, ¶33 (quoting *Cuyahoga County Bar Ass’n v. Hardiman*, 100 Ohio St. 3d 260, 2003-Ohio-5596, ¶10, 798 N.E.2d 369). “The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the prospective client.” *Id.* (quoting same).

Yet even where an attorney-client relationship is found to have existed, that relationship may be terminated by “an affirmative act by either the attorney or the client that signals the end of the relationship.” *Toliver v. Duwel*, 2nd Dist. No. 24768, 2012-Ohio-846, ¶57 (quoting *Mobberly v. Hendricks*, 98 Ohio App. 3d 839, 843, 649 N.E.2d 1247 (9th Dist. 1994)), discretionary appeal denied, 132 Ohio St. 3d 1411, 2012-Ohio-2454, 968 N.E.2d 492, cert. denied, ___ U.S. ___, 133 S. Ct. 864 (2013). No jury question is implicated if the act terminating the relationship is “clear and unambiguous.” *Id.* (quoting same).

Having considered the parties’ contentions in light of the evidence of record, the Court concludes that no genuine issue of material fact exists regarding these Defendants’ refusal to represent Plaintiffs with respect to any claims against KMK arising from the French Village acquisition. Beyond the conspicuous omission of that matter from the parties’ signed agreement as to the scope of representation (see *Defendants’ MSJ*, Greer Affid., Exh. E), particularly persuasive is Defendant Ropchock’s April 30, 2010 email to Ms. Ratonel, discussing Plaintiffs’ perceived potential claims “against KMK for malpractice in the French Village transaction” and concluding that, “in my opinion, at this time, there is no viable claim against KMK on [French Village].” (See *Defendants’ MSJ*, Greer Affid., Exh. G). That communication reached Ms. Ratonel more than three months before the R&A Defendants filed the amended complaint omitting any allegations related to the French Village transaction. See *Ratonel*, Case No. 2009 CV 3916 (*Plaintiffs’ First Amended Complaint* filed on 8/4/10). Moreover, during her deposition, Ms. Ratonel acknowledged that Ropchock “[s]everal times . . . refused” to pursue a claim against KMK based on French Village. (See *Deposition of Lorna Bautista Ratonel* [*L. Ratonel Depos.*] filed on 4/17/13, p. 51). She also

conceded that by the time the original complaint was filed in May of 2009, she was aware that Ropchock was focused on pursuing claims related to Holden House only. (See *id.*, pp. 58-59).

Although Plaintiffs now heavily promote the fact that R&A's original complaint against KMK did "throw in a line" related to French Village (see *Plaintiffs' Memo Opp.*, p. 11) (quoting Defendant Ropchock), even a cursory review of that original complaint confirms Ms. Ratonel's impression, as related in her deposition, that R&A's intended strategy from the outset hinged on KMK's actions with respect to Plaintiffs' purchase of Holden House. (See *Ratonel*, Case No. 2009 CV 3916, *Complaint*) (wherein only 1 subparagraph among seven counts, 41 paragraphs, and 30+ subparagraphs mentions French Village). Even to the extent that R&A's conduct in including a reference to French Village in the original complaint against KMK could be argued to have altered Ms. Ratonel's expectations and given rise to a "reasonable belief" that R&A was representing her with respect to the French Village transaction, see *Collett*, 2007-Ohio-6261, ¶33, the reasonableness of any such belief would have been extinguished by Defendant Ropchock's later communications delineating the reasons he was unwilling to pursue claims based on the French Village acquisition. (See *Defendants' MSJ*, Greer Affid., Exh. G). Because Defendant Ropchock thus affirmatively, clearly and unambiguously advised Ms. Ratonel that the scope of R&A's representation would not include the pursuit of claims related to the purchase of the French Village property, the R&A Defendants cannot be held liable for failing to represent Plaintiffs as to such claims. See *Toliver*, 2012-Ohio-846, ¶57.

Whether or not meritorious claims could have been advanced against KMK relative to the French Village acquisition, the fact that these Defendants declined to represent Plaintiffs as to any such claims renders Plaintiffs unable to pursue a cause of action for professional negligence against the R&A Defendants with respect to those claims. If Ms. Ratonel was dissatisfied with the R&A Defendants' stated unwillingness to advance legal malpractice claims against KMK based on the French Village transaction, she remained free at that time to retain other counsel for the purpose of

pursuing such claims. Defendants' motion for summary judgment therefore is well taken as to Plaintiffs' legal malpractice claims relative to the French Village property.⁵

Accordingly, the remaining issues raised in the parties' respective summary judgment motions will be examined with respect to the R&A Defendants' representation as to Plaintiffs' Holden House acquisition only.

2. The Effect of Settlement

Immediately after Judge Tucker directed a verdict in favor of KMK during the jury trial of Plaintiffs' malpractice lawsuit against that firm, Plaintiffs accepted a settlement offer whereby Plaintiffs agreed to waive their right to appeal from the directed verdict in exchange for KMK dropping its counterclaim against Plaintiffs for approximately \$93,500 in unpaid legal fees. (*Defendants' MSJ*, p. 5, ¶¶26-29); see *Ratonel*, Case No. 2009 CV 3916 (*Dismissal Entry with Prejudice*). The R&A Defendants now argue that Plaintiffs' acceptance of that settlement serves as a complete bar to Plaintiffs' current legal malpractice action against R&A. (*Id.*, pp. 6-12).

According to the appellate court for this district,

where a settlement is entered into as a result of an attorney's reasonable judgment in handling a case, the settlement bars a malpractice claim against the attorney.

DePugh v. Sladoje, 111 Ohio App. 3d 675, 687, 676 N.E.2d 1231 (2nd Dist. 1996). The Court in *DePugh* observed that the "reasonable judgment" rule thus articulated has been applied by other Ohio appellate courts, including in *Sawchyn v. Westerhaus*, 72 Ohio App. 3d 25, 593 N.E.2d 420 (8th Dist. 1990) (holding that plaintiff's settlement of action before appeal completed "extinguished his right to hold [attorney] liable and shields [attorney] from a subsequent malpractice action") and *Estate of Callahan v. Allen*, 97 Ohio App. 3d 749, 647 N.E.2d 543 (4th Dist. 1994) (holding that plaintiff "waived any claim of malpractice" by settling tax claim instead of pursuing appeal).

⁵ This conclusion moots Plaintiffs' arguments for summary judgment in their favor based on the R&A Defendants failure to pursue legally viable claims against KMK arising from KMK's preparation of the French Village purchase agreement. (See *Plaintiffs' MSJ*, pp. 22-27).