Supreme Court of Ohio Clerk of Court - Filed November 20, 2015 - Case No. 2015-0724

THE SUPREME COURT OF OHIO

LORNA B. RATONEL, et al.	:	CASE NO. 2015-0724
Appellees,	:	
v.	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
ROETZEL & ANDRESS, LPA, et al.	:	
Appellants.	:	

MERIT BRIEF OF APPELLANTS, ROETZEL & ANDRESS, LPA and MARK A. ROPCHOCK

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STATEMENT OF FACTS

This case arises from a Decision, Order and Entry rendered on May 16, 2014 by the Common Pleas Court of Montgomery County, Ohio granting summary judgment in favor of the Defendants-Appellants, Roetzel & Andress, LPA, and Mark A. Ropchock (collectively "R&A") on the claims of the Plaintiffs-Appellees, Lorna B. Ratonel, Carmalor Ohio, LLC and Carmalor, Inc. (collectively "Ratonel") relating to a property known as French Village Apartments (Appendix D). On March 27, 2015 that decision was reversed by a two-to-one judgment and opinion of the Court of Appeals for Montgomery County, Second Appellate District (Appendices B & C). On May 6, 2015, R&A filed the Notice of Appeal, citing two important issues to be clarified for the bar and public (Appendix A).

The Parties Signed a Contract for Limited Representation On One Claim Only

The central and determinative fact in the parties' dispute is the unambiguous language of the engagement agreement which was dated March 9, 2009 and accepted and agreed to by Ratonel on March 11, 2009.

> The purpose of this letter is to communicate to you the terms relative to our performance 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 & Klekamp, real estate agent Gene Leventhal and Barcus Company.

(R&A Exhibit E). Although she had purchased two properties, Ms. Ratonel in her deposition taken in this litigation on April 17, 2013 ("Ratonel Dep.") acknowledged her understanding that the scope of the representation undertaken by R&A was limited to the Holden House Apartments in Dayton, Ohio and that R&A would not represent her concerning the French Village Apartments in Nebraska.

Confirmation by Complaint

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.

.....

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.

.....

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.

(Ratonel Dep., pp. 58, l. 23 to 59, l. 2; 50, ll. 1-8; 51, ll. 13-20).

Ratonel Faced Reinvestment Deadlines in Order to Avoid a Huge Tax Liability

The events leading up to the limited representation confirmed and understood by Ratonel in the written engagement agreement and in the complaint filed on her behalf began with Ratonel's sale of California commercial real estate in June of 2007. To avoid a huge capital gain

tax on that sale, Ratonel had to reinvest the sale proceeds in commercial property within six months of the sale date.

> Q. . . . You understood that the drop-dead date on a 1031 exchange was six months?
>
> A. I learned that, right.
>
> Q. And if the six months go by and the replacement purchase isn't made you suddenly find yourself with a million dollar capital gain tax?
>
> A. Correct.

(*Id.* at p. 31, ll. 13-19). The Holden House in Dayton, Ohio and the French Village Apartments in Nebraska were both HUD low income housing projects. Ratonel picked those projects as reinvestment purchases because she liked the idea of Government guaranteed rentals under HUD low income housing regulations. (Ratonel Dep., p. 46, l. 19 to 47, l. 14).

<u>Ratonel Retained KMK to Provide Legal Advice</u>
<u>On Her Two Purchases</u>

On July 24, 2007, Ratonel engaged the law firm of Keating, Muething & Klekamp, PLL ("KMK") to represent her in the investigation and acquisition of the replacement properties. (Exhibit H to the Complaint subsequently filed against KMK). At the time of the KMK engagement Ratonel had selected the Holden House in Dayton and a HUD project in Pittsburgh for which she later substituted French Village in Nebraska. The closing of the Holden House purchase occurred on January 18, 2008, just within the six months timeframe. (R&A Exhibit D). The closing of the Nebraska purchase likewise took place just before the critical deadline.

> Q. . . . You would agree with me, would you not, that you managed to get both those purchases accomplished just before the 1031 exchange deadline arrived?
>
> A. Yes.

(*Id.* at p. 81, l. 25 to 82, l. 3). Whether either of those purchases was a good or a bad idea, Ratonel had no pragmatic alternative other than going forward with them with them in order to avoid the huge tax issue. (*Id.* at p. 31, ll 13-19).

Each of Ratonel's Two Purchases Involved Totally Different Issues of Fact and Law

The only aspect which the Holden House and French Village transactions had in common, aside from the representation provided by KMK, was the short deadline which they shared. The potential legal issue arising from the Holden House purchase related to overpayment for a property that needed an impressive laundry list of significant repairs. The purchase of the French Village Apartments in Nebraska involved an issue that was apparent from a reading of the HUD Housing Assistance Payment Contract which was transferred from Seller to Purchaser as part of the acquisition. (R&A Exhibit O, Article 5 at p. 7). The French Village rents, which were paid to Ratonel only on an annual basis rather than on a monthly basis, were subject to adjustments by HUD depending on market conditions. The potential of changes in market rates, like the timing of payments, was a matter of contract language which a contracting party should have read and understood. To the extent any issue regarding HUD regulations existed on French Village, KMK had insulated itself from responsibility by advising Ratonel to retain new counsel to guide her through "the HUD document maze." (Ropchock Dep., p. 102, ll 11-14).

R&A Restricted Its Representation to Holden House Because That Presented Ratonel's Only Viable Claim

As Ratonel recognized and acknowledged in her deposition, R&A limited its representation of her to the assertion of legal malpractice claims against KMK with respect to its handling of the Holden House acquisition. The Complaint filed on May 13, 2009 noted in

paragraph 3 that "the subject matter of this action is a 96 unit apartment building known as the 'Holden House Apartments' ('Holden House'), which is located in Dayton, Ohio." (Court filing incorporated by reference at page 4 of R&A Appellate Brief filed 10/07/14). It joined as co-defendants to KMK the LLC which owned Holden House, the managing member of that LLC, the individual who managed the day-to-day operations of Holden House, the selling agent for Holden House and the selling broker/agency for Holden House. Claims were asserted against the individuals and entities engaged in the sale of Holden House for breach of warranties, fraud, and negligent misrepresentation. Claims were asserted against KMK and its attorney for professional negligence and breach of fiduciary duty "in the purchase, due diligence and financing of Holden House" and for breach of contract for legal services. A claim for civil conspiracy was added against all of the defendants. The claimed damages were listed as purchasing Holden House and/or paying an inflated price for the Holden House Apartments and/or undergoing significant damage and repairing/replacing the defects in Holden House and/or incurring excessive legal fees.

There Was No French Village Claim Asserted or Pled in Any Way

There was one reference to French Village in the complaint as originally filed. Subparagraph 33(g) of the forty-one paragraph complaint contained the following, language which served only to provide context:

> 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.

Paragraph 33 and its subparagraphs are parts of Count V of the complaint which charges KMK and its attorney with professional negligence and breach of fiduciary duty "in the purchase, due diligence and financing of Holden House." There were no claims asserted in the complaint asserting malpractice or damages in connection with the French Village purchase. Subparagraph 33(g) was deleted by an amended complaint which otherwise replicates the text of the original complaint. (Exhibit 18 to Ropchock Dep.).

The word "obvious" in the subsequently deleted subparagraph reflects the fact that the limitation was apparent on the face of a document which Ratonel would be deemed to have read and understood before signing. While the limitation may have been obvious, it was also meaningless in terms of damages. Whether Ratonel received revenue in one annual payment or in twelve monthly installments, she was still entitled to receive the full amount of the stipulated revenue from the project. The reference in the subparagraph can only be construed as a reflection of the allegation that KMK was not assiduous in representing its client. Ratonel certainly did not construe it otherwise. She has acknowledged that, after reading the complaint, she was well aware that R&A in keeping with the express language of their engagement agreement did not intend the complaint to be stating any claim for relief in connection with the French Village purchase. (Ratonel Dep., p. 58, l. 23 to 59, l. 2; 51, ll 13-20).

Discussions and Communications Never Resulted in Any Agreement of R&A to Represent Ratonel With Respect to French Village

Before filing the complaint and from time to time thereafter there were communications between R&A and Ratonel regarding potential claims against KMK with respect to the French Village transaction. In some of those communications Ratonel expressed her continuing desire to assert legal claims against KMK with respect to French Village. Those communications never led to any undertaking by R&A to represent Ratonel on any such claims. The limited

representation, which was made clear to Ratonel when she signed the engagement agreement and again when she read the complaint, was reconfirmed on repeated occasions. She was expressly told that she would have to obtain another attorney if she wanted to pursue such claims. (Ropchock Dep., p. 110, ll 19-24; p. 128, ll 9-12).

A Draft Letter Which Never Was Presented to KMK Only Discussed French Village as a Potential Tool for Settlement Leverage

In addition to communications regarding French Village claims and the mutual understanding that R&A, in Ratonel's own words "absolutely refused" to undertake Ratonel's representation on those claims, there were occasions when R&A considered using French Village issues to leverage a settlement with KMK. Those issues were raised in depositions of KMK attorneys. On January 16, 2010, R&A sent Ratonel a draft settlement demand letter which alleged KMK negligence in handling the French Village claims. (Exhibit 8 to Ropchock Dep.) While Ratonel was clearly informed that R&A would not undertake representation in pursuit of such claims and that it was unwilling to undertake any litigation against the Washington firm that had been engaged by KMK to represent Ratonel on HUD issues, the concept of using the potential of French Village claims as a negotiating tool was considered. (Ropchock Dep., p. 128, l. 23 to 129, 1. 2). On further consideration, however, the draft settlement letter was never sent.

When a settlement demand letter was sent to KMK's counsel, it contained no reference to French Village. (Exhibit 17 to Ropchock Dep.). The concept of using French Village as leverage to settle the Holden House claim was rejected because there was no viability to the French Village claim. R&A continued to communicate to Ratonel its "absolute refusal" to undertake a representation on the French Village issues, and she continued in her election not to pursue those issues *pro se* or with another attorney.

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.

(Ratonel Dep., p. 51, l. 21 to p. 52, l. 5).

R&A Clearly Explained to Ratonel Why The French Village Claim Could Not Be Pursued

In a written communication to Ratonel on December 21, 2009, R&A explained its continuing refusal to undertake the French Village claim and the need to "focus" and to avoid "throwing in everything including the kitchen sink" if the case against KMK was to be made "understandable for the jury." (R&A Exhibit F). It was clear in that communication that the focus needed to be on documenting and proving the items at Holden House which were defective on the date of its acquisition. *Ibid.* The Holden House issues were totally unrelated to the French Village concerns.

In another written communication made to Ratonel on April 30, 2010, R&A reiterated the reasons it declined to undertake any claims with respect to French Village. (R&A Exhibit G). While French Village may have run into problems in the spring of 2013, there was no way of predicting in 2007, 2009 or 2010 whether French Village would turn out to be a financial success or a financial failure. During R&A's representation of Ratonel, R&A had no information to suggest that Ratonel had lost any money in the French Village transaction. Any prediction on that subject could be no more than speculation which could not satisfy a burden of proof at trial.

(Ropchock Dep., pp. 113, 121). Ratonel accepted without reservation the limited scope of R&A's representation and the written explanations for that limited scope:

> I think a jury could buy KMK blew the inspection deadline on HH. Additionally blaming them for the FV issue reeks of making a bad deal, and then trying to blame someone else for it, especially when they recommended you have a financial person look at the deal .... [T]here is just way too much speculation as to damages and by pursuing this claim you weaken your chances on Holden House. Finally, since those rents haven't gone down yet, I don't think this claim would survive a motion for summary judgment.

(R&A Exhibit G).

As Ratonel had been repeatedly told from the outset of her representation by R&A with respect to Holden House, that representation would not be expanded into an undertaking as to French Village. No expert on HUD issues could rewrite the contracts to which Ratonel was bound. KMK took the position that it had referred HUD issues to a Washington firm and had declined to undertake such issues. No expert could resolve swearing matches between Ratonel and KMK on that subject.

The opinion and limited representation explained to Ratonel when her complaint was filed on May 13, 2009 remained unchanged on April 30, 2010. Ratonel remained free at all relevant times to seek other representation with respect to any claims she might have regarding French Village. As she had heard repeatedly, "there is no viable claim against KMK on FV." (R&A Exhibit G). The lawsuit filed by R&A went through discovery and trial exclusively on the claims involving Holden House as defined by the engagement agreement and by the complaint.

ARGUMENT

Proposition of Law No. I:
An action for legal malpractice cannot be sustained against a lawyer who, with full understanding of the 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.

This case presents the appropriate fact pattern to support a judicial endorsement from this Court of a lawyer's right to limit his representation of a client. Such an endorsement is needed from the perspective of the Ohio Bar and the perspective of Ohio citizens. In her legal malpractice case against R&A, Ratonel undertakes to establish (1) the case-within-the-case issues involving R&A's handling of the legal malpractice case against KMK on the Holden House claims; (2) the case-within-the-case-within-the-case involving KMK's handling of the Holden House claims; and (3) the case-outside-the-case involving French Village claims. Genuine issues of material fact are presented as to the issues presented by (1) and (2), and those issues await trial in the Common Pleas Court. There are no genuine issues of material fact as to the claim presented by (3), and the summary judgment on that claim which was granted by the Common Pleas Court and approved by the dissenting judge on the Court of Appeals should be reinstated.

A. The Scope of Representation Between a Lawyer and a Client Needs Clarification by This Court.

The majority opinion of the Court of Appeals leaves the lawyers of Ohio at risk for malpractice litigation involving matters which they expressly refused to undertake. There are a myriad of reasons – both objective and subjective – which cause a trial lawyer in the exercise of his judgment and discretion to limit his representation to specific claims or issues. That is precisely and unequivocally what happened here. The limitation was set forth in an engagement agreement. It was clearly understood by a client who was free to take her French Village claim elsewhere. This case provides a perfect vehicle for a much needed pronouncement from this Court that Ohio lawyers have the right to limit the scope of their representations and that it is

reasonable as a matter of law for them to do so as long as the limitation is confirmed in a writing signed by the client.

A Clear Definition of the Limits of Professional Responsibility Is Needed to Promote the Fair Representation of Clients

Without clarification from this Court of a lawyer's right to place limits on his or her exposure, the public can expect a natural progression from unaccepted exposure to unwillingness to accept such risks, from such unwillingness to the inability of Ohio citizens to obtain legal representation. The Court of Appeals in this case has placed an unfair burden on the profession. That burden creates the prospect of liability involving claims that an attorney has explicitly, and with the client's knowledge and written consent, declined to undertake. A legal malpractice claim has no justifiable basis concerning a case-outside-the-case. The burden created by the appellate decision, if uncorrected, will also cripple the profession's ability to achieve the policy goal of access to justice for potential clients.

There is, and should be, a bright line between attorney-client discussion of potential claims and an agreement between attorney and client regarding representation on some or all of such claims. In this case R&A explicitly undertook by the terms of a written engagement agreement representation limited to Ratonel's issues regarding the purchase of Holden House. It explicitly confirmed that limited undertaking by the claims articulated in a complaint filed in compliance with those terms. The undertaking explicitly did not include representation on Ratonel's issues regarding her purchase of French Village. Ratonel has admitted under oath that she fully understood that R&A "absolutely refused" to undertake representation of her on those issues. A discussion of an issue with a client on any subject cannot rationally be elevated into an agreement to represent the client on that issue where there is clear and written evidence to the

contrary. Standards of practice should not be judicially distorted to encompass any issue that a client seeking a lawyer may have or think he or she has.

The Client Is Protected By the Safeguards Proposed

R&A's First Proposition of Law adds to this Court's anticipated endorsement of limited representation the safeguard to clients that the limitations should be imposed at a time when there is no statutory bar preventing the client from pursuing the excluded claim *pro se* or by engaging other counsel. At all relevant times in this case, Ratonel had the absolute right under the applicable rules of professional conduct and the explicit language of her engagement agreement with R&A to terminate R&A's representation and bring in other counsel or undertake on a *pro se* basis both the French Village and the Holden House claims. She was explicitly told that she should obtain another attorney if she wanted to pursue the French Village claims. She also had at all times the absolute right to continue R&A's representation of her on the Holden House claims and either obtain other counsel on French Village claims or pursue French Village claims *pro se*. Since the French Village claims arose from her representation by KMK, they could have been joined by amendment to the pending complaint. Under 15(C) of the Ohio Rules of Civil Procedure, such an amendment would relate back to the date of the original pleading and thereby avoid any statute of limitations issue.

When Ratonel signed the engagement agreement she had thirty-three months to pursue any claim she might have regarding French Village. She still had over thirty months to do so when R&A reiterated its refusal to add a French Village claim to the lawsuit it filed on her behalf. The Court can use this case to establish those safeguards and parameters necessary in limited representation.

The Court of Appeals Decision Limits Access to Justice and Establishes Barriers Which Would Discourage Such Representation in a Contingency Fee Arrangement

There is no justification in law, logic or common sense for turning "no" into "yes" or for exposing an attorney to liability for declining to represent a client on a specific claim. When a lawyer agrees to represent a client, he or she undertakes a significant burden of time, risk and expense. This is especially true in cases involving contingent fees, like the one now before this Court, where the risk can be countless hours of stressful and exhausting effort and a significant advance of money in a quest that leads to nothing. Any percentage of zero is zero. Courts have recognized the importance of contingent fee agreements in the ongoing effort to achieve the social goal of access to justice.

> By choosing a contingent fee arrangement, as opposed to an hourly fee arrangement, a client reduces the risk to himself that is involved in litigation.

Vermeeren v. Donnamiller, 207-Ohio-6519 ¶45 (6th App. Dist.).

> Contingency fee agreements serve an important function in American life. Such agreements permit persons of ordinary means to access a legal system which can sometimes demand extraordinary expense. The mechanism by which this is accomplished is a contract between client and attorney whereby some or all of the risk involved in the litigation is shifted to the attorney. The *quid pro quo* for relieving the client of this risk is that the agreement normally calls for the attorney to receive a percentage of any possible recovery.

Id. at ¶46.

> Contingent fee agreements serve an important function in our society in that they increase the public's access to legal services. Contingent fee arrangements between lawyers and clients therefore should not be taken lightly or disregarded.

Central Trust Co. N.A. v. Warburg, 104 Ohio App. 3d 186, 189-90 (1st App. Dist. 1995).

To require a contingent fee lawyer to be at risk for a claim of malpractice based on a failure to pursue claims the lawyer explicitly declined to pursue, is not simply the imposition of an unfair burden of professional responsibility. In a society where many, if not most, potential litigants cannot afford to pay hourly rates for an unpredictable number of hours, to say nothing of the other staggering expenses involved in modern litigation, an undefined scope of legal representation will make lawyers less likely to take on the representation that only a contingent fee or a flat fee could make affordable. Everybody loses when limited representation is not enforced. Lawyers won't undertake cases. Clients won't obtain representation. Society will find its goal of access to justice frustrated. For public policy reasons, clearly defined limits on the scope of legal representation must be enforceable, and clients should not be able to circumvent them by hindsight reference to extraneous legal matters.

In March of this year, this Court issued the Report & Recommendations of the Task Force on Access to Justice (the "Report"). It noted that "nothing outside the Rules of Professional Conduct currently addresses limited scope representation . . . by Ohio attorneys." The Report, p. 6. This case presents an opportunity to address this critical subject and to act on the Task Force recommendation to promote limited scope representation and to address through interpretation the lack of clarity noted in Rule 1.2(c) of the Ohio Rules of Professional Conduct. *Id.* at pp. 29-31. The preliminary survey referred to in the report reached the following conclusion:

> Attorneys reported they were more likely to provide unbundled services if the limited scope representation was in writing and if there were safeguards regarding malpractice and ethics complaints.

Id. at p. 30.

Clarifying Standards of Practice Will Aid Access to Justice

Closing the courthouse door to claims beyond the scope of an expressly limited engagement will serve the policy goal of access to justice. It will support and confirm standards of practice that are consistent with established principles of contract law. Absent an attorney-client relationship, a plaintiff may not maintain an action for legal malpractice. *New Destiny Treatment Center, Inc. v. Wheeler*, 129 Ohio St. 3d 39, 2011 Ohio-2266, 950 N.E.2d 157 ¶32. 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 N.E.2d 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.).

B. Proper Discharge of a Trial Court's Gatekeeping Function Serves the Public Interest.

Promoting limited representation serves the goal of access to justice. The same goal is served by the gatekeeper function created by the standard set forth in Rule 56(C) of the Ohio Rules of Civil Procedure.

The Gatekeeping Function of Trial Courts Reduces the Risk and Expense of Unnecessary Trials

Submitting a dispute to jury determination imposes significant risk and expense on the parties and lawyers involved in the dispute as well as significant cost to the judicial system. Access to justice is improved rather than impaired when cases which present no jury question are resolved by summary judgment. Everyone wins. Years ago, this Court ruled that it is just as pernicious to send a case to a jury where no jury question is involved as it is not to send a case to a jury when a jury question is presented. "Pernicious" is a strong word that no longer fits our

professional vocabulary, but the gatekeeping function of trial courts has become increasingly significant as the expense of modern litigation has increased well beyond the hopes, fears and expectations of those who serve our system of justice. That function is enshrined in the rule that requires summary judgment where "there is no genuine issue as to any material fact."

None of the factual contentions by which Ratonel seeks to carry her claims to a jury satisfies the critical barriers of "genuine" and "material." The innocuous paragraph in the complaint was admittedly understood by Ratonel as not creating any representation of her with respect to French Village. The discarded draft of a settlement letter was not perceived nor could rationally be perceived as such an undertaking. The exploration of the possibility of claims against French Village began and ended with an unqualified refusal to undertake any such claim. Yet, the Court of Appeals found that any communication equated to an agreement fully to represent the client on the issue discussed.

The Function of Rule 56 Should Be Re-Endorsed By This Court

In 1934, the scintilla rule requiring submission of a case to a jury "[w]here there is any evidence, however slight, tending to support a material issue" was laid to rest by this Court as a rule "better calculated to confuse than to enlighten the mind." *Hampton Lodge I.O.O.F. v. Ohio Fuel Gas Co.*, 127 Ohio St. 469, 475 & 477, 189 N.E. 2d 246 (1934). Rule 56 was adopted to improve access to justice since justice is served when summary judgments are entered in cases where reasonable minds could find no genuine issue of material fact to justify the continued expense to parties and society involved in jury consideration. This is one of those cases, and the scintilla rule should rest in the comfort of its grave.

Proposition of Law No. II:
An action for legal malpractice cannot be sustained against a lawyer who, with full understanding of the 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.

R&A's Second Proposition of Law rests on the same considerations as its First Proposition of Law and provides the Court an additional opportunity to clarify limited representation.

A Clear Discontinuance of Representation Should
Also Be The Accepted Standard

On the facts of this case, the critical date coincides with the date of the written engagement agreement by which R&A undertook its limited representation of Ratonel on claims involving Holden House. That document was never amended. The events and discussions post-dating that agreement never created an undertaking by R&A to represent Ratonel on French Village issues. But assuming such a representation had been undertaken (which the evidence does not suggest) such a representation was effectively terminated by the subsequent correspondence and communications to Ratonel between March 11, 2009 and the reiteration of R&A's "no viable claim opinion" in the e-mail of April 30, 2010. The legal and public policy issues applicable to a discontinuance of representation should be no different from the issues applicable to a refusal to undertake representation.

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. 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.

(Appendix D, 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. 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.

(Appendix B, pp. 13-14).

This Court Should Address the Public Policy Issues of Limited Representation

The issue before this Court, however, is far broader than which lower court judges got it right. It is a significant public policy issue of addressing the needs of the lawyers of Ohio for safeguards regarding malpractice and ethics complaints. It is a significant public policy issue regarding the erosion of goals of access to justice if such safeguards are withheld or left in a state of ambiguity.

The public policies, the standards of practice and the legal authorities supporting R&A's Second Proposition of Law are the same as those which support its first proposition of law. If the engagement agreement between the parties in this lawsuit had expressly included an undertaking for R&A to represent Ratonel on French Village claims, either R&A or Ratonel could have withdrawn at any time from such a relationship. Even if the unsent settlement demand dated January 26, 2010, or anything else that occurred between March 11, 2009 and April 30, 2010 could be considered a valid oral amendment to the written engagement agreement, any relationship between the parties on the subject of French Village came to an end with the "no viable claim" e-mail dated April 3, 2010. Any arguable facts arising after that date

would not present a genuine issue of material fact since no arguable representation of Ratonel with respect to French Village existed after that date.

The two purchase transactions in which Ratonel was represented by KMK presented completely different factual and legal issues. The issue arising from the purchase of the Holden House Apartments in Dayton, Ohio related to overpayment for a property that needed an impressive laundry list of significant repairs.

The only aspect which the Holden House and French Village transactions had in common, aside from the representation provided by KMK, was the short deadline which they shared. Ratonel picked her own purchases because she liked the idea of Government guaranteed rentals under HUD low income housing regulations. (Ratonel Dep. p. 46, l. 19 to 47, l.4). She also put herself into a short deadline situation for reinvesting the proceeds of her sale of her California business property. Once that deadline approached, she ran out of alternatives and risked over a million dollars in taxes if she failed to complete her reinvestment purchases within the limited period available to her. Whether the Holden House and French Village purchases were good or bad ideas, Ratonel had no pragmatic alternative to going forward with them. (*Id.* at p. 72, l. 25 to 73, l. 8).

Under those circumstances, any attorney who undertook representation on the French Village claims would be assuming a high risk of a negative outcome and a significant sacrifice of time and money, let alone possible running afoul of Rule 11 if the attorney believed the claim had no merit. R&A remained understandably unwilling to sacrifice more than its commitment to pursue the less challenging – but nonetheless far from unchallenging – odds of pursuing the cost of repair claims with respect to Holden House. R&A never agreed to undertake representation with respect to French Village. Even if it were deemed to have done so, its withdrawal from that

representation was reasonable, timely and a conclusive bar to any malpractice claim with respect to French Village.

CONCLUSION

This case presents the Court with the opportunity to clarify the public policy that supports limited representation. The public and the lawyers of Ohio should be informed clearly that it is reasonable and appropriate for Ohio lawyers to limit the scope of their representation as long as the limitation is clearly expressed in a written engagement agreement signed by the client at a time when the client can pursue whatever viable unrepresented claims exist either *pro se* or with other counsel.

The summary judgment entered by the Common Pleas Court should be reinstated.

Respectfully submitted,

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Counsel for Appellants,
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CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Merit Brief was sent by electronic transmission and First Class mail to counsel of record for Appellees, Sam G. Caras, David M. Deutsch, and Mitchell J. Anderson, 130 West Second Street, Suite 310, Dayton, OH 45402, on the 20th day of November, 2015.

/s/ David C. Greer
David C. Greer, Trial Attorney

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APPENDIX A

IN THE SUPREME COURT OF OHIO

LORNA B. RATONEL, et al.	:	
Plaintiffs-Appellees,	:	On Appeal from the Montgomery County Court of Appeals, Second Appellate District
v.	:	
ROETZEL & ANDRESS, LPA, et al.	:	Court of Appeals Case No. 26259
Defendants-Appellants.	:	15-0724

NOTICE OF APPEAL
OF APPELLANTS ROETZEL & ANDRESS, LPA and MARK A. ROPCHOCK

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FILED
MAY 06 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellants, Roetzel & Andress, LPA and Mark A. Ropchock

Appellants Roetzel & Andress, LPA and Mark A. Ropchock hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 26259 on March 27, 2015.

This case involves questions of public or great general interest pursuant to Article IV, §2(B)(2)(e) of the Ohio Constitution.

Respectfully submitted,

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COUNSEL FOR APPELLANTS,
ROETZEL & ANDRESS, LPA and
MARK A. ROPCHOCK

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary United States mail to counsel for Appellees Lorna B. Ratonel, Carmalor Ohio, LLC and Carmalor, Inc., Sam G. Caras, David M. Deutsch and Mitchell J. Anderson, One First National Plaza, Suite 310, 130 West Second Street, Dayton, OH 45402, this 4th day of May, 2015.

David C. Greer, Counsel for Appellants

2896.211293.\478842.1

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LORNA B. RATONEL, et al.	:	
Plaintiffs-Appellants	:	Appellate Case No. 26259
v.	:	Trial Court Case No. 2011-CV-7832
ROETZEL & ANDRESS, LPA, et al.	:	(Civil Appeal from Common Pleas Court)
Defendants-Appellees	:	

. . . . . .

OPINION

Rendered on the 27th day of March, 2015.

. . . . . .

SAM G. CARAS, Atty. Reg. No. 0016376, DAVID M. DEUTSCH, Atty. Reg. No. 0014397, and MITCHELL J. ANDERSON, Atty. Reg. No. 0086950, One First National Plaza, Suite 310, 130 West Second Street, Dayton, Ohio 45402

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Attorneys for Defendants-Appellees, Roetzel & Andress, LPA and Mark Ropchock

. . . . . .

FAIN, J.

{¶ 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:

<u>KMK's Liability for French Village</u>

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 Ratonel 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.

. . . . . .

Copies mailed to:

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Mitchell J. Anderson
David C. Greer
James H. Greer
Curtis G. Moore
Hon. Mary L. Wiseman

APPENDIX C

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

LORNA B. RATONEL, et al.	:	
	:	Appellate Case No. 26259
Plaintiffs-Appellants	:	
	:	Trial Court Case No. 2011-CV-7832
v.	:	
	:	(Civil Appeal from
ROETZEL & ANDRESS, LPA, et al.	:	Common Pleas Court)
	:	
Defendants-Appellees	:	**FINAL ENTRY**
	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 27th day of March, 2015, the partial summary judgment of the trial court rendered in favor of defendants-appellees on the malpractice claim relating to French Village is **Reversed**, and this cause is **Remanded** for further proceedings consistent with the opinion.

Costs to be paid by defendants-appellees.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

MICHAEL T. HALL, Judge

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Hon. Mary L. Wiseman
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APPENDIX D

ELECTRONICALLY FILED
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Friday, May 16, 2014 1:41:26 PM
CASE NUMBER: 2011 CV 07832 Docket ID: 19105618
GREGORY A BRUSH
CLERK OF COURTS MONTGOMERY COUNTY OHIO

Montgomery County Common Pleas Court
General Division

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-	**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**
ROETZEL & ANDRESS, LPA, *et al.*,	
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*"].

For the reasons that follow, Plaintiffs' *First Motion for Partial Summary Judgments* is DENIED, and the R&A Defendants' *Motion for Summary Judgments* is GRANTED in part and DENIED in part.

FACTUAL & PROCEDURAL BACKGROUND/THE PARTIES' CLAIMS

On October 28, 2011, Plaintiffs Lorna B. Ratonel, Carmalor, Inc. and Carmalor Ohio, LLC filed their complaint in this case against Defendants Roetzel & Andress, LPA and Mark A. Ropchock, Esq., setting forth claims for legal malpractice and breach of fiduciary duties arising from said Defendants' allegedly deficient representation of Plaintiffs in Montgomery County Court of Common Pleas Case No. 2009 CV 3916, a lawsuit against Keating, Muething & Klekamp, PLL ["KMK"], KMK attorney Gayle G. Pryse [together with her firm, "the KMK defendants"], and other parties.[1] (See *Complaint for Money Damages*).

As explained by Plaintiffs, the KMK defendants represented Plaintiffs throughout the process of acquiring a multi-family apartment complex in Dayton, Ohio ["Holden House"] and another in Grand Island, Nebraska ["French Village"]. (*Plaintiff's MSJ*, p. 2). Plaintiffs' stated intent in purchasing those properties was to defer the assessment of capital gains taxes relative to Plaintiffs' recent sale of other commercial properties by taking advantage of Section 1031 of the Internal Revenue Code, as well as to secure a long-term income stream generated by above-market rate rental subsidies paid through the federal government's Section 8 housing program as to units within Holden House and French Village. (*Id.*). Instead, according to Plaintiffs, KMK's breach of professional duties caused Plaintiffs to suffer unexpected monetary losses as a result of those property purchases. (*Id.*).

[1] Those other Defendants included James Carmichael, the seller of the Holden House property; Holden House, LLC and The Barcus Company, Inc., which managed the Holden House property; and Eugene Levental and Ed Rothenberg Realty, the realtor and brokerage agency involved in the Holden House property sale. See *Ratonel v. Keating Muething & Klekamp, PLL*, Case No. 2009 CV 3916 (*Complaint* filed on 5/13/09, ¶¶6-10).

Plaintiffs retained R&A to pursue legal malpractice claims against KMK and Pryse. (*Id.*). During the trial of that action, however, Judge Michael Tucker directed a verdict in the KMK defendants' favor. (*Id.*, p. 3); see *Ratonel v. Keating Muething & Klekamp, LLP*, Case No. 2009 CV 3916 (*Dismissal Entry with Prejudice* dated 10/14/10). The parties thereafter arrived at a settlement in that case, see *Ratonel, supra*, but Plaintiffs then initiated this action against the R&A Defendants due to the settlement's failure to recoup their claimed damages caused by the KMK defendants.

Among the acts of negligence or recklessness attributed to the R&A Defendants in Plaintiffs' current malpractice claim are said Defendants' alleged failure to retain experts appropriate to support Plaintiffs' claims in the KMK litigation; to properly investigate, research and plead the possible claims against KMK; to apprise Plaintiffs of Defendants' own deficiencies in handling that case and of options to remedy those deficiencies; to develop evidence adequate to support Plaintiffs' damages claims against KMK; and to advise Plaintiffs of their right "to forgo entering into a settlement agreement in lieu of pursuit of appeal." (*Complaint*, ¶4). With respect to their current claim for breach of fiduciary duties, Plaintiffs rely on the R&A Defendants' alleged failure to inform Plaintiffs that the R&A Defendants themselves had "deviated from standards of professional legal representation" in representing Plaintiffs. (*Id.*, ¶¶7-8). Plaintiffs seek compensatory damages, attorneys' fees and costs, pre- and post-judgment interest, and other relief as appropriate. (*Id.*, p. 4).

Following extensive discovery, the parties filed their cross-motions for summary judgment now before the Court.

In their *First Motion for Partial Summary Judgments*, Plaintiffs contend that although the R&A Defendants knew that KMK had failed to have the Holden House property inspected prior to closing and had wrongly advised Plaintiffs that viable breach of warranty claims would survive that closing, the R&A Defendants nonetheless failed to set forth negligent misrepresentation and breach

of fiduciary duty claims against KMK based on such omissions/representations, or to produce expert testimony to support such claims. (*Id.*, pp. 1, 14-16). Plaintiffs assert that the R&A Defendants deviated from applicable professional standards by retaining as the only legal expert to testify against KMK on Plaintiffs' behalf a residential real estate attorney "who had never before completed a 1031 Exchange." (*Id.*, pp. 14-15). Further urging that Judge Tucker's grant of summary judgment in favor of Holden House's prior owner[2] "created a law of the case" establishing that Plaintiffs possessed no valid warranty claims against that property's seller, Plaintiffs fault the R&A Defendants for not "exploit[ing]" that decision as evidence that KMK committed malpractice by falsely representing to Plaintiffs that the prospect of breach of warranty claims would protect Plaintiffs in purchasing Holden House despite the absence of an inspection. (*Id.*, p. 15). Citing various depositions and other evidence, Plaintiffs urge that the damages stemming from KMK's errors re the Holden House property were demonstrable. (*Id.*, pp. 16-21). Plaintiffs then offer similar arguments regarding the R&A Defendants' failure to pursue similar claims against KMK due to KMK's purported shortcomings in preparing the French Village purchase agreement. (*Id.*, pp. 1, 22-27). Plaintiffs' motion is supported by a separate filing in which an attorney opines that the R&A Defendants "breached applicable standards of professional care" (see *Affidavit of Phillip Feldman, Esq.* ["*Feldman Affid.*"] filed on 8/16/13, ¶4),[3] as well as by unauthenticated copies of what appear to be various written communications among the parties. (See attachments to *Plaintiffs' MSJ*).

In their own motion for summary judgment, the R&A Defendants first assert that Plaintiffs' settlement of the case against the KMK defendants bars Plaintiffs from now pursuing a legal malpractice claim based on the R&A Defendants' representation in that case. (*Defendants' MSJ*, pp. 1, 6-12). Additionally, the R&A Defendants maintain that they cannot be held liable for

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[2] See *Ratonel*, Case No. 2009 CV 3916 (*Decision, Order & Entry Sustaining Defendant James Carmichael's Motion for Summary Judgment*, filed on 6/22/10).

[3] Defendants, however, question whether Mr. Feldman's unsworn statement qualifies as an "affidavit" for purposes of Ohio Civ.R. 56. (See *Defendants' Memo Opp.*, pp. 1-4).

malpractice because Plaintiffs could not have prevailed on their claims against the KMK defendants (*id.*, pp. 1-2, 12-21) – *i.e.*, Plaintiffs could not establish that any alleged omission by the KMK defendants was the proximate cause of any damages Plaintiffs claim to have suffered (*id.*, pp. 12-17); Plaintiffs' own contributory negligence and/or assumption of the risk as to the Holden House purchase barred them from recovery against the KMK defendants (*id.*, pp. 17-18); and Plaintiffs' inability to prove their claimed damages would mandate the same result. (*Id.*, pp. 18-21). Next, according to the R&A Defendants, even assuming that meritorious claims against the KMK defendants had been possible, the R&A Defendants' own performance as legal counsel did not fall below the standard of reasonable representation. (*Id.*, pp. 21-26). Finally, the R&A Defendants claim that the scope of their representation of Plaintiffs did not encompass the French Village purchase, and that Plaintiffs therefore cannot maintain claims against the R&A Defendants for any deficiencies in the KMK defendants' performance with respect to that transaction. (*Id.*, pp. 26-28).

LAW AND ANALYSIS

Law re Civ.R. 56 Motions for Summary Judgment

Summary judgment is a procedural device that terminates litigation, avoiding a formal trial in cases "where there is nothing to try." *Murphy v. City of Reynoldsburg*, 65 Ohio St. 3d 356, 358-59, 604 N.E.2d 138 (1992). This relief should be awarded "with caution," construing evidence and resolving doubts in favor of the non-moving party. *Id.* Summary judgment is proper when: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence in the light most favorable to the non-moving party, reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. *Harless v. Willis Day Warehousing Co., Inc*, 54 Ohio St. 2d 64, 66, 375 N.E.2d 46 (1978). A "material" fact is one that would affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S. Ct. 2505 (1986) (interpreting analogous Fed. R. Civ. P. 56).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists as to any essential element of the claims involved in the case. *Dresher v. Burt*, 75 Ohio St. 3d 280, 293, 662 N.E.2d 264 (1996). The movant cannot satisfy this burden simply by asserting that the non-moving party has no evidence to support its claims. *Id.* Rather, the moving party is required to "specifically delineate the basis upon which summary judgment is sought," so that the non-moving party has "a meaningful opportunity to respond." *State ex rel. Coulverson v. Ohio Adult Parole Authority*, 62 Ohio St. 3d 12, 14, 577 N.E.2d 352 (1991) (quoting *Mitseff v. Wheeler*, 38 Ohio St. 3d 112, 114 n.5, 526 N.E.2d 798 (1998)). Additionally, the moving party's evidence must be of the type listed in Civ.R. 56(C): pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *Dresher*, 75 Ohio St. 3d at 292-93, see also Civ.R. 56(C) (listing acceptable forms of evidence). A party seeking summary judgment on the basis of an affirmative defense must demonstrate that no genuine issue of material fact exists with respect to every element of the defense. *McCoy v. Maxwell*, 11th Dist. No. 2001-P-0132, 2002-Ohio-7157, ¶33.

If the moving party fails to satisfy its initial burden, summary judgment is not proper. *Dresher*, 75 Ohio St. 3d at 293. However, if the moving party satisfies its initial burden, the non-moving party cannot rest on allegations or denials in its pleadings, but has a reciprocal burden as outlined in Civ.R. 56(E) to set forth specific evidence showing that a genuine issue of material fact exists. *Id.* It is the non-moving party's task to negate the movant's showing by establishing a triable issue. *Coulverson*, 62 Ohio St. 3d at 14 (citing *Harless,* 54 Ohio St. 2d at 66). "[W]hen <u>neither</u> the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law[,] as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, 'and identifying those portions of the record which demonstrate the absence of a genuine

issue of fact on a material element of the nonmoving party's claim.'" *Welch v. Ziccarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶¶36-37, 40-42 (quoting *Dresher*, 75 Ohio St. 3d at 276).

The trial court has "an absolute duty" under Civ.R. 56(C) to read and consider all appropriate materials filed by the parties when ruling on a motion for summary judgment. *Murphy*, 65 Ohio St. 3d at 359. When considering evidentiary material presented in favor of or in opposition to a summary judgment motion, the court does not weigh credibility. *Whiteside v. Conroy*, 10th Dist. No. 05AP-123, 2005-Ohio-5098, ¶75. Summary judgment is not appropriate if, when viewing the evidence in the light most favorable to the non-moving party, reasonable minds can reach differing conclusions. *Hounshell v. American States Ins. Co.*, 67 Ohio St. 2d 427, 433, 424 N.E.2d 311 (1981).

Law re Legal Malpractice

"[T]o establish a cause of action for legal malpractice based on negligent representation, a plaintiff must show (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss." *Vahila v. Hall*, 77 Ohio St. 3d 421, 427, 1997-Ohio-259, 674 N.E.2d 1164 (1997), appeal dismissed, 86 Ohio St. 3d 1492, 716 N.E.2d 723 (1999). In *Vahila*, the Ohio Supreme Court explicitly recognized that "the requirement of causation often dictates that the merits of the malpractice action depend upon the merits of the underlying case." *Id.*, 77 Ohio St. 3d at 427-28. Accordingly, "a plaintiff in a legal malpractice action may be required, depending on the situation, to provide some evidence of the merits of the underlying claim." *Id.* at 428 (internal citations omitted). Nevertheless, the Court there found that requiring a plaintiff to "prove, in every instance, that he or she would have been successful in the underlying matter . . . would be unjust, making any recovery virtually impossible for those who truly have a meritorious legal malpractice claim." *Id.*

That Court later addressed the effect of settlement on a plaintiff's malpractice claim against the attorneys who represented the plaintiff at the time of settlement, stating as follows:

> When a plaintiff premises a legal-malpractice claim on the theory that he would have received a better outcome if his attorney had tried the underlying matter to conclusion rather than settled it, the plaintiff must establish that he would have prevailed in the underlying matter and that the outcome would have been better than the outcome provided by the settlement.

Environmental Network Corp. v. Goodman Weiss Miller, L.L.P., 119 Ohio St. 3d 209, 2008-Ohio-3833, 893 N.E.2d 173 (syllabus) (clarifying *Vahila, supra*). As reasoned by the Court in *Goodman Weiss Miller*, "in holding that not every malpractice case will require that the plaintiff establish that he would have succeeded in the underlying matter, the *Vahila* court necessarily implied that there are some cases in which the plaintiff must so establish." *Id.*, 2008-Ohio-3833, ¶17 (emphasis in original). The Court described the test applicable in such cases as the "case-within-a-case doctrine." *Id.*, ¶2.

Under the case-within-a-case doctrine, "also known as the 'trial-within-a-trial doctrine',"

> [a]ll the issues that would have been litigated in the previous action are litigated between the plaintiff and the plaintiff[']s former lawyer, with the latter taking the place and bearing the burdens that properly would have fallen on the defendant in the original action. Similarly, the plaintiff bears the burden the plaintiff would have borne in the original trial; in considering whether the plaintiff has carried that burden, however, the trier of fact may consider whether the defendant lawyer's misconduct has made it more difficult for the plaintiff to prove what would have been the result in the original trial.

Id., ¶16 (quoting Restatement of the Law 3d, Law Governing Lawyers (2000) 390, Section 53, Comment b). A malpractice claim brought despite a settlement "'places the merits of the underlying litigation directly at issue because it stands to reason that in order to prove causation and damages, [the plaintiff] must establish that [the defendant-attorney]'s actions resulted in settling the case for less than [the plaintiff] would have received had the matter gone to trial.'" *Crespo v. Harvey*, 2nd Dist. No. 25236, 2012-Ohio-5312, ¶9 (bracketed material in original) (quoting *Goodman Weiss Miller*, 2008-Ohio-3833, ¶18). The plaintiff in such an action "must establish that

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. Ratonel, 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. Ratonel 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 *Ratonel 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).

The general rule articulated in *DePugh* also has been followed in subsequent cases. As later observed by one Ohio appellate court:

> In many cases, an attorney will be faced with strategic choices, any one of which may lead to a favorable result for his client. An attorney must make an educated guess as to which course of action is most likely to succeed. The practice of law is not an exact science, however, and generally, when a client settles a claim, an attorney should not be subject to a client's malpractice claim in an effort to obtain additional monies as long as the attorney has made reasonable decisions in handling the case and represented his client competently.

Schneider, Smeltz, Ranney & LaFond, P.L.L. v. Kedia, 154 Ohio App. 3d 117, 2003-Ohio-4567, ¶11, 796 N.E.2d 553 (8th Dist.) (emphasis added). Consistent with that approach, multiple decisions in this state have affirmed summary judgment in favor of attorneys whose clients settled cases before instituting legal malpractice actions against the attorneys who represented them at the time of settlement. See *id.*; see also *Reliance Ins. Co. v. Havens*, 8th Dist. No. 84995, 2005-Ohio-1859, ¶34; and *E.B.P., Inc. v. Cozza & Steuer*, 119 Ohio App. 3d 177, 694 N.E.2d 1376 (8th Dist. 1997).[6]

Still, "[a]ccepting a settlement for a reduced amount does not necessarily waive a claim for legal malpractice against the attorney whose substandard representation made settlement for the reduced amount reasonable." *Vagianos v. Halpern*, 8th Dist. No. 76408, 2000 Ohio App. LEXIS 5856, *8 (Dec. 14, 2000) (citing *E.B.P., Inc.*, *supra*, and *DePugh, supra*), appeal dismissed, 91 Ohio St. 3d 1490, 745 N.E.2d 438 (2001). "If the evidence should show that [an attorney's] defective representation diminished [the plaintiff's] ability to reach a successful settlement or succeed at trial, we see no reason why a waiver of that malpractice claim should be implied by reason of the settlement." *Id.* (quoting *Monastra v. D'Amore*, 111 Ohio App. 3d 296, 676 N.E.2d 132 (8th Dist. 1996)). Indeed, despite affirming summary judgment in favor of the defendant attorney in the case before it, the court in *Reliance Ins. Co.* acknowledged that "a genuine issue of material fact" would

[6] Another case cited by Defendants as supporting this proposition is wholly inapposite, as the basis for affirming the grant of summary judgment in favor of the attorney there was the bar of the applicable statute of limitations, not the client's acceptance of a settlement. See *Briggs v. Wilcox*, 8th Dist. No. 98364, 2013-Ohio-1541, ¶26; (see *Defendants' MSJ*, p. 10).

exist if evidence indicated that "the client's acceptance of a reasonable settlement in a case [is] directly attributable to an attorney's substandard representation in that case." 2005-Ohio-1859, ¶34. Similarly, the court in *E.B.P., Inc.* expressly stated that "a legal malpractice claim is not barred [by settlement] when the attorney has acted unreasonably or has committed malpractice *per se*." 119 Ohio App. 3d at 182 (citing *DePugh, supra*). "When an attorney has made an obvious error which seriously compromises his client's claim, and a settlement is on the table . . ., the client should not be forced to forego the settlement offer as a condition of pursuing the attorney for malpractice." *Id.* (quoting *DePugh*, 111 Ohio App. 3d at 687).

Here, Plaintiffs insist that a genuine issue of material fact remains as to the reasonableness of R&A's conduct preceding Plaintiffs' acceptance of the KMK settlement. (*Plaintiffs' Memo Opp.*, pp. 26-30). Urging that they entered into that settlement only because "R&A negligently eviscerated Plaintiffs' meritorious claims against KMK," Plaintiffs argue that the R&A Defendants have failed to prove that Plaintiffs voluntarily waived their malpractice claims against R&A by settling with KMK. (*Id.*, p. 27).

The circumstances surrounding the settlement of underlying Case No. 2009 CV 3916 against KMK illuminate this issue. After a recess following the parties' respective arguments regarding KMK's motion for directed verdict at the close of Plaintiffs' case, Judge Tucker ruled as follows:

> When we were last on the record[,] Mr. Freund, on behalf of [KMK], did present a motion for a directed verdict under Ohio Rule [of] Civil Procedure 50. Because the last issue presented by Mr. Freund is, in the Court's opinion, dispositive of the case[,] I am not going to deal with the remaining issues that were presented in the motion. I am instead going to concentrate only upon the issues of damages and proximate cause. I have concluded, as a matter of law, that in this situation Ms. Ratonel's damages, if any, are the difference between Holden House's purchase price of $2.1 million and its actual fair market value at the time of the sale, with that being in January of 2008. And there has been no testimony regarding what the actual fair market value was in January of 2008. And given that there has been a deficiency in the plaintiff's case regarding the issue of damages and proximate cause, [ ] based upon that I would sustain the defendant's motion for a directed verdict.

(*Defendants' MSJ*, Exh. H, Transcript of Damages and Directed Verdict Conference on 1/17/12, p. 28). The record then turns to a discussion of the terms of the proposed KMK settlement and Plaintiffs' acceptance of that settlement. (*Id.*, pp. 28-31).

Judge Tucker's decision on the grounds stated tends to substantiate Plaintiffs' argument that the directed verdict in KMK's favor stemmed from the R&A Defendants' failure to present evidence at trial of the fair market value of the Holden House property at the time of Plaintiffs' January 2008 purchase. (See *Plaintiffs' MSJ*, pp. 14-16; see also *Plaintiffs' Memo Opp.*). Additionally, consistent with the portrayal offered by the R&A Defendants themselves, once Plaintiffs' claims against KMK were dismissed on that basis, Plaintiffs were faced with the prospect of having the still-waiting jury award KMK its unpaid legal fees as the prevailing party; of then having to post a costly *supersedeas* bond if Plaintiffs wished to appeal and avoid execution proceedings against the Holden House property; of likely having the directed verdict affirmed on appeal due to the dearth of cognizable evidence regarding damages; and of having to undertake the additional substantial expense of retrying the case against KMK even if the directed verdict were reversed on appeal. (See *Defendants' MSJ*, pp. 6-7). While the Court agrees that "it was certainly a reasonable exercise of judgment" for Defendants to recommend and for the Plaintiffs to accept the settlement offer under those circumstances (*id.*, p. 7), the reasonableness of the parties' actions at that time is of little consequence if the R&A Defendants' <u>un</u>reasonable decisions and/or omissions to that point left Plaintiffs constrained to accept an <u>inadequate</u> settlement offer. See *Depugh*, 111 Ohio App. 3d at 687 (where attorney error "seriously compromises" client's claim and settlement offer "(albeit an inadequate one)" is "on the table," client "should not be forced to forego the settlement offer as a condition" to retaining possible malpractice claim against that attorney).

The Court concludes that a genuine issue of material fact remains as to whether Plaintiffs' decision to settle the KMK litigation was the product of deficient or substandard representation provided by the R&A Defendants that led to a directed verdict. Contrary to the R&A Defendants'

implication, this Court's inquiry is not confined to whether R&A acted reasonably in recommending that Plaintiffs accept the settlement agreement after the verdict had been directed against them. (See *Defendants' MSJ*, p. 7; see also *Defendants' Reply*, pp. 1-3). Notwithstanding the R&A Defendants' attempts to distinguish their performance from the *per se* malpractice at issue in *DePugh, supra* (see *Defendants' MSJ*, pp. 10-11; *Defendants' Reply*, pp. 1-2), neither does Defendants' characterization of their approach to proving damages as a "strategic decision" dispose of the issue presented here. (*Defendants' MSJ*, p. 11). Rather, as this Court interprets the applicable law, Plaintiffs retain the right to pursue legal malpractice claims against the R&A Defendants if said Defendants' errors or omissions put Plaintiffs in the position of being forced to accept the offered settlement as the best outcome not foreclosed by Defendants' deficient performance. See *DePugh*, 111 Ohio App. 3d at 687; *Reliance Ins. Co.*, 2005-Ohio-1859, ¶34; *E.B.P., Inc.*, 119 Ohio App. 3d at 182; *Monastra*, 111 Ohio App. 3d 296; *Vagianos*, 2000 Ohio App. LEXIS 5856, *8. These Defendants' motion for summary judgment based solely on the fact that Plaintiffs settled their claims against the KMK defendants therefore is not well taken.

The Court nonetheless is cognizant that, in order to maintain a viable malpractice claim against the R&A Defendants, Plaintiffs still are required to prove not only that the R&A Defendants' performance as Plaintiffs' counsel in fact fell below acceptable professional standards, but also that Plaintiffs "would have prevailed in the underlying matter" against KMK, <u>and</u> that the outcome thus achieved "would have been better than the outcome provided by the settlement." See *Goodman Weiss Miller, L.L.P.*, 119 Ohio St. 3d 209 (syllabus). As the parties' remaining arguments for judgment in their favor as a matter of law implicate those very questions, the Court will proceed to examine those arguments.

3. <u>Causation</u>

The R&A Defendants next assert that Plaintiffs cannot prove that KMK's alleged omissions were the proximate cause of any damages Plaintiffs sustained as the result of purchasing Holden

House, and thus cannot establish that they would have prevailed on their malpractice claims against KMK. (*Defendants' MSJ*, pp. 12-17). Suggesting that Plaintiffs' "significant business background" made them relatively "sophisticated" buyers, the R&A Defendants argue that KMK's failure to secure a timely inspection of Holden House was not the reason that Plaintiffs found themselves owning a purportedly overpriced property in need of costly repairs. (*Id.*, pp. 1, 14-15). Instead, the R&A Defendants seek to place responsibility for Plaintiffs' purchase regrets on Plaintiffs' own failure to secure an inspection; Plaintiffs' voluntary commitment to purchase Holden House "as is" for $2.1 million; and Plaintiffs' abbreviated timeline for completing that purchase, motivated by a desire to avoid an estimated $1 million in capital gains tax liability by reinvesting the proceeds of another commercial property sale within the 180-day window provided by Internal Revenue Code Section 1031. (*Id.*, pp. 12-17). Said Defendants point to Judge Tucker's stated reservations about the capital gains tax issue (*id.*, pp. 12-13 & Exh. H. pp. 19, 30) as putative evidence that "the Court of Appeals would have [ ] affirmed the directed verdict on the alternate basis of failure to establish the essential element of proximate cause." (*Defendants' MSJ*, p. 13).

Responding in opposition, Plaintiffs argue that evidence available to the R&A Defendants would have sufficed to show that KMK's malpractice caused Plaintiffs' claimed losses. (*Plaintiffs' Memo Opp.*, pp. 16-24). Plaintiffs challenge Defendants' suggestion that Plaintiffs themselves should have hired an inspector to examine Holden House before completing that property purchase, urging that KMK agreed to "soup to nuts" representation and had communicated to Plaintiffs "that KMK would handle that task" (*i.e.*, assuring that an inspection was secured). (*Id.*, p. 18). Plaintiffs further contend that they were induced to close on Holden House despite the absence of a formal property inspection by KMK's faulty representation that Plaintiffs retained warranty claims against the property seller that would survive closing. (*Id.*, p. 17). Indeed, noting that Judge Tucker in fact denied KMK's motion for summary judgment on the issue of proximate cause in Case No. 2009 CV 3916, Plaintiffs suggest that a genuine issue of material fact must remain as to whether KMK's

conduct in representing Plaintiffs was a proximate cause of the damages Plaintiffs claim to have incurred as a result of the Holden House purchase. (*Id.*, p. 19).

The record confirms that on July 20, 2010, the KMK defendants moved for summary judgment in the earlier case against them, based in part on an assertion that these "Plaintiffs' [o]wn [c]onduct [w]as the [p]roximate [c]ause of [t]heir [a]lleged [d]amages." See *Ratonel*, Case No. 2009 CV 3916 (KMK Defendants' *Motion for Summary Judgment*, pp. 24-27). Foreshadowing the R&A Defendants' current argument, KMK there argued "that Plaintiffs' knowing and informed decision to buy Holden House for $2.1 Million in the absence of a physical inspection and in the face of documented evidence of defects and repair problems was the proximate and only cause of their damages." (*Id.*, p. 27) (emphasis in original). In denying KMK's motion on that basis, Judge Tucker deemed "the central issue" to be "whether KMK, after purportedly informing Ms. Ratonel [that] KMK would obtain an inspection, failed to do so." *Ratonel*, Case No. 2009 CV 3916 (9/9/10 *Decision, Order, and Entry Sustaining in Part and Overruling in Part Defendants' July 20, 2010 Motion for Summary Judgment*, p. 7). Judge Tucker also noted that the cognizable evidence of record before him would "not allow [a] conclusion" that "Ratonel had the duty to . . . but cho[ ]se not to inspect Holden House." (*Id.*).

The same obstacles found by Judge Tucker to preclude summary judgment on the issue of proximate cause in the case before him are determined by this Court to dictate the same result as to the R&A Defendants' instant motion. A genuine issue of material fact still remains as to whether KMK breached a duty to Plaintiffs to secure a timely inspection of the Holden House property, so as to allow Plaintiffs time to withdraw from or renegotiate their agreement to purchase that property. The R&A Defendants have cited no authority for the proposition that Plaintiffs' purported business savvy would negate their attorneys' obligation to undertake aspects of representation that KMK affirmatively agreed to perform on Plaintiffs' behalf. (See *Defendants' MSJ*, pp. 12-17; *Defendants' Reply*, pp. 3-7). Additionally, the R&A Defendants have offered nothing to counter

Plaintiffs' alternative argument targeting KMK's faulty warranty advice as the proximate cause of their damages. (See *id.*). Absent either legal authority or cognizable evidence to support their no proximate cause theory, the R&A Defendants are not entitled to judgment as a matter of law on the proposed basis of lack of proximate cause.

4. Proof of Damages

Irrespective of the causation issue, the R&A Defendants advance Judge Tucker's directed verdict as evidence that Plaintiffs' damages are not provable, suggesting that the "as-is" terms of Plaintiffs' agreement to purchase Holden House essentially left Plaintiffs unable to demonstrate a different fair market value for that property than the price Plaintiffs themselves agreed to pay. (*Defendants' MSJ*, pp. 19-20). They also offer evidence of historic maintenance expenses for Holden House as negating a "cost of repair" calculation of damages. (*Id.*, p. 21).

Plaintiffs disagree, maintaining that an appropriate measure of damages would be either the difference between the price Plaintiffs paid for the property and the actual value of the property as delivered, or the amount of loss attributable to KMK's misrepresentation regarding potential warranty claims. (*Plaintiffs' Memo Opp.*, pp. 19-23).

Again, during the trial of Plaintiffs' earlier case against KMK, Judge Tucker concluded

> that in this situation, Ms. Ratonel's damages, if any, are the difference between Holden House's purchase price of 2.1 million and its actual fair market value at the time of the sale, with that being in January of 2008.

(*Defendants' MSJ*, Exh. H, Transcript of Damages and Directed Verdict Conference on 1/17/12, p. 28). Finding that "there ha[d] been no testimony regarding what the actual fair market value was in January of 2008," Judge Tucker directed a verdict in favor of KMK. (*Id.*).

Although the transcript does not so reflect, the R&A Defendants maintain that Judge Tucker based his decision to that effect on the precedent of *Maier v. Shields*, 2nd Dist. No. 07-CA-21, 2008-Ohio-3874. (*Defendants' MSJ*, p. 22). In *Maier*, a landlord sued his tenants for the cost of repairs to the rental property in which those tenants had resided. *Id.*, 2008-Ohio-3874, ¶3. In affirming

judgment against the landlord due to his failure to offer evidence of the pre-damage and post-damage market value of the property, the Second District Court of Appeals delivered the following instructive analysis:

> We have noted on a number of occasions that where an injury is temporary and susceptible to repair, the general rule is that a "landowner may recover the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of the injury and the restoration." *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App.3d 681, 686, 605 N.E.2d 1271, citing *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238, 248, 1 Ohio Law Abs. 276, 140 N.E. 356. In *Reeser,* we analyzed developments in the law after *Ohio Collieries,* and acknowledged that in certain situations the reasonable cost of restoration might exceed the difference between the land's value before and after an injury. We stressed, however, that the differential in value still remained "the touchstone of the reasonableness determination," and that "evidence of the property's fair market value before and after the injury is required in order to assess whether the restoration costs sought are reasonable." 78 Ohio App.3d 681, 689, 605 N.E.2d 1271. Accordingly, we held in *Reeser* that:
>
> "[A]s a general rule, a landowner whose real property has suffered a temporary injury is entitled to recover reasonable restoration costs, plus the reasonable value of the loss of use of the property between the injury and the restoration. However, recovery is circumscribed by the limitation that the recoverable restoration cost cannot exceed the difference between the pre-injury and post-injury fair market value of the real property. In other words, as to restoration costs, when restoration costs exceed the diminution in fair market value, the diminution of fair market value becomes the measure of damages. Such recovery necessarily requires evidence of the pre-injury and post-injury market value of the injured real property. Moreover, the party seeking restoration costs bears the burden of establishing the diminution in the property's fair market value." *Id.*, at 691-92 (citation omitted).
>
> * * *
>
> We continued to follow the general rule in *Zartman v. Schepman* (Sept. 17, 1999), Montgomery App. No. 17634, 1999 Ohio App. LEXIS 4283, 1999 WL 33595145. In *Zartman,* we held that a landlord did not prove damages because she failed to offer any evidence on diminution in the property's fair market value resulting from injuries that occurred during the defendant's tenancy. 1999 Ohio App. LEXIS 4283, at * 1.

Id.. ¶¶18-19, 22 (emphasis added); see also *Jack Turturici Family Trust v. Carey,* 196 Ohio App. 3d 66, 2011-Ohio-4194, ¶73, 962 N.E.2d 347 (2nd Dist.) (reiterating that as to damages resulting from the purchase of commercial property in need of unanticipated repairs, "[t]he cost of repair [remains] the correct measure of damages, unless the cost of repair exceeds the difference between the market value of the property in good repair and the market value as actually delivered with defects.").

Clearly proof of damages is a critical element of a legal malpractice claim. See *Vahila*, 77 Ohio St. 3d at 428. Citing the Ohio Supreme Court's decision in *Berea City Sch. Dist. Bd. of Educ. v. Cuyahoga County Bd. of Revision*, 106 Ohio St. 3d 269, 2005-Ohio-4979, 834 N.E.2d 782, however, the R&A Defendants contend that proof of damages was impossible as to Plaintiffs' claims against KMK, given Plaintiffs' purported inability to demonstrate that the fair market value of Holden House was an amount less than what Plaintiffs paid. (*Defendants' MSJ*, p. 19).

In *Berea City Sch. Dist.*, an appeal from that county's assessment of a property's value, Ohio's high court held that "when [real] property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the property shall be 'the true value <u>for taxation purposes</u>.'" *Id.*, 2005-Ohio-4979, ¶13 (emphasis added). Indeed, the Court there relied on the language of the applicable tax assessment statute. Defendants ignore the indications that such decision apparently was not intended to be binding for purposes <u>other than</u> property tax assessments. See *id.* Moreover, even within the *Berea City Sch. Dist.* decision, the Ohio Supreme Court referred to other jurisprudence suggesting that the arm's-length sale method of valuation applies only to real property sales that involve "a willing buyer <u>under no compulsion to buy</u>." *Id.*, ¶15 (emphasis added) (quoting *N. Olmsted Bd. of Educ. v. Cuyahoga County Bd. of Revision*, 54 Ohio St.3d 98, 561 N.E.2d 915 (1990)). Ironically, because the R&A Defendants themselves argue that Plaintiffs in effect <u>were</u> under a "compulsion to buy" Holden House in order to take advantage of Internal Revenue Code Section 1031's time-limited tax savings provisions (see *Defendants' MSJ*, pp. 12-13), Defendants' own memorandum identifies another reason why the property valuation

standard set forth in *Berea City Sch. Dist.* should not be viewed as the binding measure of damages in this case.

Although the R&A Defendants clearly were required but failed to present evidence of diminution in the fair market value of Holden House in order to state a viable case of legal malpractice against KMK, a genuine issue of material fact remains as to whether such evidence could have been developed and produced at trial. What R&A terms a "strategic decision to seek damages based on estimated repair costs rather than . . . diminution of market value" (*Defendants' MSJ*, p. 11) clearly was fatal to Plaintiffs' cause of action against KMK in the earlier case. See *Ratonel*, Case No. 2009 CV 3916 (*Dismissal Entry with Prejudice* dated 10/14/10). Indeed, as argued in Plaintiffs' own summary judgment motion, the R&A Defendants' conscious decision to forego diminution evidence, despite the Second District's established line of precedent indicating that such evidence is essential to recover for damages to commercial real property,[7] might be construed as conduct falling below the standard of reasonable professional case. (See *Plaintiffs' MSJ*, pp. 14-21). The R&A Defendants' motion for judgment in their favor as a matter of law based on Plaintiffs' purported inability to prove damages therefore will be denied.

5. Contributory Negligence/Assumption of Risk

The R&A Defendants also urge that because Plaintiff Lorna Ratonel had notice of certain "defects or potential defects" in the Holden House property, Plaintiffs are barred by Ms. Ratonel's own "contributory negligence" or "assumption of risk" from any recovery against KMK arising from the Holden House purchase. (*Defendants' MSJ*, pp. 17-18). Plaintiffs counter that any "limited notice of defects" they had "was conveyed directly to KMK," whose attorneys counseled Plaintiffs that their interests would be protected by warranty claims that would survive the property closing. (*Plaintiffs' Memo Opp.*, p. 26).

[7] See *Maier*, 2008-Ohio-3874; *Reeser*, 78 Ohio App. 3d 681; *Zartman*, 1999 Ohio App. LEXIS 4283.

The concepts of contributory negligence and assumption of risk probably arise most often in the context of tort claims for personal injury. See, *e.g.*, *Hardy v. Hall*, 2nd Dist. No. 19751, 2003-Ohio-4978, ¶¶10, 11 ("Secondary or implied assumption of the risk exists when a plaintiff who fully understands the risk of harm to himself nevertheless voluntarily chooses to subject himself to it, under circumstances that manifest his willingness to accept the risk," and such defense is merged with the defense of contributory negligence for purposes of comparative negligence). Nevertheless, some Ohio courts have discussed contributory negligence or assumption of risk as possibly constituting a valid affirmative defense to other causes of action. See, *e.g.*, *Schroeder v. Treece*, 3rd Dist. No. 5-80-37, 1981 Ohio App. LEXIS 10541 (Feb. 12, 1981). The plaintiffs in *Schroeder* sued the seller of floor covering installed in the plaintiffs' home that later cracked, leading to a claim for damages. *Id.* at *1. While the appellate court there affirmed that the plaintiffs both were negligent and assumed the risk of such damage because "they knew there was danger of cracking," *id.* at *11, that court also attached significance to the trial court's explicit finding that the plaintiffs had not relied on "the seller's skill and judgment" in purchasing that particular floor covering. *Id.* at *7-8.

Concededly, the statute from which the court in *Schroeder* extracted the language regarding reliance on another's "skill and judgment" does not apply here. See R.C. § 1302.28 (re implied warranties). Nevertheless, this Court finds the issue of reliance to be significant for present purposes in a somewhat analogous fashion. Plaintiffs consistently maintain that they proceeded with the Holden House purchase in the absence of a full inspection due to their reliance on KMK's assurance that viable breach of warranty claims would survive the closing. (See *Plaintiffs' Memo Opp.*, pp. 17, 26). Indeed, evidence shows that Plaintiff Ratonel communicated to KMK her willingness to abandon the Holden House purchase if Plaintiffs would be significantly overpaying for that property. (*Id.*, p. 18). Given Plaintiffs' claimed reliance on KMK's faulty advice, this Court is unable to conclude as a matter of law that Plaintiffs "voluntarily cho[se] to subject [themselves]" to the risk that they would incur the expense of replacing Holden House's roof and

trash compactor and making other major repairs, "under circumstances that manifest [their] willingness to accept th[at] risk." See *Hardy*, 2003-Ohio-4978, ¶11. To the contrary, any finding that Plaintiffs willingly and voluntarily assumed that risk would depend upon factual questions that remain unresolved at this time. Defendants therefore are not entitled to summary judgment on that basis.

6. Standard for Reasonable Performance as Legal Counsel

In their final argument for summary judgment in their favor, the R&A Defendants urge that their representation of Plaintiffs as to the KMK litigation did not fall below the standard for reasonable performance of an attorney in that case, as a matter of law. (*Defendants' MSJ*, pp. 21-25). Conversely, said Defendants' purportedly *per se* deviation from acceptable standards of professional practice is the basis for Plaintiffs' competing motion for partial summary judgment in their favor. (See *Plaintiffs' MSJ*; see also *Plaintiffs' Memo Opp.*, pp. 23-25).

Defendants begin by referring back to their earlier arguments defending the reasonableness of their recommendation that Plaintiffs accept a settlement in the KMK litigation. (*Defendants' MSJ*, p. 22; see also *id.*, pp. 6-12). For the reasons advanced by R&A and considered by this Court in its discussion, *supra*, of the effect of that settlement, the Court agrees that the R&A Defendants did conform to a reasonable standard of practice by recommending that Plaintiffs accept the proffered settlement terms under the circumstances that confronted Plaintiffs following Judge Tucker's directed verdict. See *Vahila*, 77 Ohio St. 3d at 427. Again, however, the more meaningful question is whether said Defendants' performance prior to that directed verdict also satisfied the applicable standard.

Based on the current record before it, this Court cannot conclude as a matter of law that the R&A Defendants' representation of Plaintiffs met the requisite standard of professional conduct in all relevant respects. Defendants' assertion that their failure to present evidence of diminution of Holden House's fair market value was justified by a lack of such proof and by a "conflict" in Ohio

law (*Defendants' MSJ*, pp. 22-24) is unpersuasive. As demonstrated in the discussion, *supra*, of proof of damages, the Second District Court of Appeals has held unwaveringly since at least 1992 that a party seeking to recover for damage to commercial real property bears the burden of proving "the pre-injury and post-injury market value of the injured real property" in addition to the cost of repairs. See *Reeser*, 78 Ohio App. 3d at 691-92. The fact that the Supreme Court has found proof of diminished value unnecessary as to "non-commercial real estate" and that a decision from a different appellate district extended that holding to commercial property prior to the KMK trial (see *Defendants' MSJ*, p. 23) (citing *Martin v. Design Constr. Servs. Inc.*, 121 Ohio St. 3d 66, 2009-Ohio-1, 902 N.E.2d 10, ¶24; *Monroe v. Steen*, 9th Dist. No. 24342, 2009-Ohio-5163, ¶22) does not excuse the R&A Defendants' failure to present such evidence when representing these clients before a trial court bound to follow Second District precedent. Neither does a lawyer's laudable penchant "to push the envelope" (see *Defendants' MSJ*, p. 22) excuse a knowing failure to develop evidence that will satisfy well-established elements of necessary proof, resulting in a directed verdict against that lawyer's client.

The Court likewise is not convinced by the R&A Defendants' argument regarding Key Bank's loan appraisal consistent with Holden House's $2.1 purchase price; their assertion that the "nationwide collapse of the real estate market" would have made it "difficult to prove the cause of any diminution" in Holden House's value after purchase; or their conjecture that evidence of fair market value would have "undercut" the jury's focus on the costs of repair. (*Id.*, p. 24). Particularly telling is R&A's failure even now, in conjunction with their summary judgment motion, to present any dispositive evidence of the actual fair market value of Holden House as of January 2008, in the state of disrepair in which Plaintiffs then acquired it. (See *Defendants' MSJ*).

Similarly, while Plaintiffs effectively discount the value of the Key Bank appraisal (see *Plaintiffs' MSJ*, p. 25), they, too, present no legally cognizable evidence of the fair market of Holden House in the condition in which it was delivered in January of 2008. (See *id.*, generally).

Absent such evidence, unresolved issues of material fact preclude this Court from concluding as a matter of law whether the R&A Defendants did or did not perform to acceptable professional standards by failing to present such evidence. Accordingly, neither the R&A Defendants nor Plaintiffs are entitled to summary judgment on that basis.

Nor are Plaintiffs entitled to partial summary judgment in their favor as to other discrete aspects of the R&A Defendants' handling of Plaintiffs' claims against KMK – *i.e.*, the alleged deficiency of R&A's pursuit of potentially meritorious claims based upon KMK's alleged failure to secure a timely inspection of Holden House and KMK's alleged misrepresentations re viable warranty claims surviving the Holden House closing. (See *Plaintiffs' MSJ*, pp. 14-21). In the first instance (as noted *supra*, n. 3), Defendants raise a credible challenge to the sufficiency under Ohio law of the purported "affidavit" of Plaintiff's expert witness. (See *Defendants' Memo Opp.*, pp. 1-4); (see also *Feldman Affid.*). Expert testimony is necessary to prove professional negligence. See *C&K Indus. Servs. v. McIntyre, Kanh & Kruse Co., L.P.A.*, 8th Dist. No. 98096, 2012-Ohio-5177, ¶34 (citing *McInnis v. Hayatt Legal Clinics*, 10 Ohio St. 3d 112, 113, 461 N.E.2d 1295 (1984)). In light of extensive Ohio precedent indicating that an "unsworn declaration" such as that proffered by Mr. Feldman "cannot be considered as evidence under Civ.R. 56," this Court concludes that Plaintiffs have not produced cognizable legal evidence that R&A's performance as Plaintiffs' legal counsel deviated from applicable standards of professional care. See *Toledo Bar Ass'n v. Neller*, 102 Ohio St. 3d 1234, 2004-Ohio-2895, ¶¶23-24, 809 N.E.2d 1152; *Watley v. Ohio State Adult Parole Auth.*, 10th Dist. No. 10AP-1195, 2006-Ohio-2745, ¶11; *Countrywide Home Loans v. Meldrum*, 5th Dist. No. 2001CA00209, 2002-Ohio-364; *Pollock v. Brigano*, 130 Ohio App. 3d 505, 509, 720 N.E.2d 571 (12th Dist. 1998); *In re Disqualification of Pokorny*, 74 Ohio St. 3d 1238, 657 N.E.2d 1345 (1992)). Absent such evidence, judgment in Plaintiffs' favor is not available at this juncture.

The R&A Defendants' additional insistence that they in fact did present evidence at trial to support a claim based on KMK's alleged misrepresentations re viable warranty claims (*Defendants' MSJ*, p. 7); their accurate observation that claims for negligent misrepresentation and breach of fiduciary are "subsumed" by a legal malpractice claim (*id.*, pp. 4-6); and other arguments presented in their opposing memorandum (*id.*, pp. 8-10, 15) pose additional reasons why Plaintiffs' motion for partial summary judgment is not well taken.

CONCLUSION

For the foregoing reasons, Plaintiffs' *First Motion for Partial Summary Judgments* hereby is DENIED with prejudice as to Plaintiffs' claims based upon the R&A Defendants' conduct with respect to the French Village purchase, and DENIED without prejudice in all other respects.

Additionally, the R&A Defendants' *Motion for Summary Judgments* hereby is GRANTED in part and DENIED in part. The R&A Defendants' motion is GRANTED as to Plaintiffs' claims related to the French Village purchase, and judgment as a matter of law pursuant to Civ.R. 56 therefore is ENTERED in favor of Defendants Roetzel & Andress, LPA and Mark A. Ropchock and against Plaintiffs Lorna B. Ratonel, Carmalor, Inc. and Carmalor Ohio, LLC with respect to those claims only. The R&A Defendants' motion is DENIED without prejudice in all other respects.

SO ORDERED:

_____

JUDGE MARY WISEMAN

This document is electronically filed by using the Clerk of Courts e-Filing system. The system will post a record of the filing to the e-Filing account "Notifications" tab of the following case participants:

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Type: Decision

Case Number: 2011 CV 07832

Case Title: LORNA B RATONEL vs ROETZEL AND ANDRESS LPA

So Ordered

Mary Wiseman