

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. :

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

David C. Greer (0009090) (COUNSEL OF RECORD)
James H. Greer (0046555)
Curtis G. Moore (0091209)
BIESER, GREER & LANDIS, LLP
400 PNC Center, 6 N. Main Street
Dayton, OH 45402-1908
PHONE: (937) 223-3277
FAX: (937) 223-6339
E-MAIL: dcg@bgllaw.com
jhg@bgllaw.com
cgm@bgllaw.com

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

Sam G. Caras (0016376) (COUNSEL OF RECORD)
David M. Deutsch (0014397)
Mitchell J. Anderson (0086950)
SAM G. CARAS CO., LPA
130 W. Second Street, Suite 310
Dayton, OH 45402
PHONE: (937) 223-7170
FAX: (937) 223-8989
E-MAIL: samcaras@caraslaw.com
deutsch.lawyer@gmail.com
manderson@caraslaw.com

COUNSEL FOR APPELLEES, LORNA B. RATONEL,
CARMALOR OHIO, LLC and CARMALOR, INC.

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APPELLANTS' REPLY BRIEF

As articulated in R&A's opening brief, this case presents a threshold legal question for determination by this Court. What are the standards for limited legal representation? The answer to that question will provide much needed guidance to the Bar of Ohio. The trial court and the dissenting judge on the Court of Appeals got it right. The majority decision of the Court of Appeals erroneously expanded the boundaries of legal representation to include – despite clear written contractual limitation – any communications, discussions, courses of conduct, or expressions of client desire.

Such an expansion creates an impossible burden on the Bar. It goes against established principles of contract law, and it undercuts the ability of parties to define their legal relationships. By motivating attorneys to decline representation where an attempt to limit the scope of their undertaking will not serve as a shield against malpractice claims, the expanded scope of responsibility created by the appellate decision goes against the access to justice goals expressed and promoted by this Court. Failure to provide a clear standard for limited representation will be harmful both to the Bar and to the public.

The Factual Disputes of the Parties Were Fully Explored, Argued and Resolved at the Trial Court Level

The critical and determinative facts – as reconfirmed by the testimony of Ms. Ratonel cited at page 3 of her merit brief – are that R&A limited its representation to claims involving the Holden House purchase, that R&A refused to undertake representation on claims involving the French Village purchase, that Ratonel clearly understood the limited representation, and that Ratonel elected not to seek other counsel to pursue French Village claims or to replace R&A and pursue both claims.

Rather than addressing the propositions of law presented to this Court, Ratonel has elected to challenge this Court's previous jurisdictional ruling, to disregard the limited representation issue as "conjured," to ignore the limited representation enshrined in writing and acknowledged by Ms. Ratonel in sworn testimony, and to propose a list of "uncontroverted facts" that are not supported by the references cited and are irrelevant to the limited representation issue. This Court is not being asked to determine the merits of the French Village case or to determine whether R&A should have undertaken that case. This appeal is not about Ratonel's desire to retry her entire case or about the facts. This is not an appeal requesting a *de novo* decision on a motion for summary judgment that was granted by the trial court after a thorough vetting and debate of all factual issues. This appeal is about the legal boundaries and standards of limited representation which this Court should set for the Bar. It is about the erroneous expansion of those boundaries and standards that, unless corrected, the majority opinion of the Court of Appeals condones.

The Jurisdictional Issue Raised By Ratonel Has Already
Been Resolved, and Correctly Resolved, By This Court

The Ratonel brief opens with the erroneous statement that "this appeal derives from an interlocutory order denying a motion for summary judgment," and the first sentence of Ratonel's argument asserts that this case "does not involve a final appealable order." Brief, pp. 1 and 15-16. In fact, the appeal derives from a final appealable order of the trial court granting R&A's motion for summary judgment on the French Village issue. Ohio courts, including this Court, have ruled that the setting aside of a grant of summary judgment is a final appealable order. *McGreary v. Brocker*, 94 Ohio St. 3d 440, 763 N.E.2d 1175; *Nationwide Ins. Co. v. Davey Tree Expert Co.*, 166 Ohio App. 3d 268, 273 (2006) ("... a judgment vacating a grant of summary judgment is a final appealable order"). In an analogous case, a trial court granted summary

judgment and then later vacated its own judgment after the non-movant filed a motion for reconsideration. The appellate court held that the trial court's vacation of its own judgment was a final appealable order. *Hoecker v. Dayton*, 1995 Ohio App. LEXIS 3983 (2d Dist. Sept. 13, 1995).

The jurisdictional issue presented by Ratonel has already been presented by Ratonel on a motion to dismiss which was the subject of a memorandum contra filed on behalf of R&A on June 15, 2015. The motion to dismiss was denied by this Court by an entry filed on October 28, 2015. The same result should apply the second time around.

Ratonel Has Misconstrued Established Legal Principles
Relating To Express and Implied Contracts

At pages 17 and 18 of her brief, Ratonel cites five cases in support of the proposition that an attorney-client relationship may be created by an implied contract. She again cites four of those five cases in support of the same proposition at page 26 of her brief. The cases cited are good law, just as is the proposition that no implied contract can be considered when an express contract exists.

This case presents an express contract between the parties pursuant to which R&A agreed to pursue legal malpractice litigation against KMK on behalf of Ratonel. The express contract limited that undertaking to Holden House issues.

It is generally agreed that there cannot be an express agreement and an implied contract for the same thing existing at the same time.

Hughes v. Oberholtzer, 162 Ohio St. 330, 123 N.E.2d 393 (1954) (HN 2).

Simply put, 'a claim pursuant to quasi-contract is incompatible with claims pursuant to an express contract' . . . 'the reason for this rule is that if the parties have fixed their contractual relationship in an express contract, there is no reason or necessity for the law to supply an implied contractual relationship between them.' . . .

Therefore, a party cannot claim both an express contract and a quasi-contract exist over the same subject matter . . . ‘an express contract and an implied contract cannot exist for the same thing at the same time.’

Champion Contracting & Construction Co. v. Valley City Post No. 5563, 2004-Ohio-3406 (9th Dist. at ¶25) (emphasis in quoted decision), *see also, Freeman v. Montessori School*, 1994 Ohio App. LEXIS 3803, 1994 W.L. 476025 (6th Dist. at HN4).

None of the cases cited by Ratonel address the Propositions of Law presented on this appeal or the limited representation expressed in the parties’ written agreement.

- In the first case cited, this Court found that no attorney-client relationship existed between an attorney and a corporation where the attorney’s only client was a dissident trustee who instructed the attorney to take action on behalf of the corporation. Without an actual engagement of the attorney’s services by the corporation, no implied corporate engagement was found to exist. *New Destiny Treatment Center, Inc. v. Wheeler*, 129 Ohio St. 3d 39, 2011-Ohio-2266, 950 N.E.2d 157.
- In the second case cited, the attorney and client did not enter into a written fee agreement, but an attorney-client relationship was created when the client met with the attorney who reviewed documents and accepted a \$1,500.00 partial retainer. *Cuyahoga County Bar Ass’n v. Hardiman*, 100 Ohio St. 3d 260, 2003-Ohio-5596, 798 N.E.2d 369.
- In the third case cited, the client’s attorney sought advice from a second attorney with whom the client had no communications. Summary judgment was granted in favor of the second attorney in a legal malpractice action on the ground that the second attorney had no attorney-client relationship with the client of the first

attorney. *McGuire v. Draper Hollenbaugh & Briscoe Co. LPA*, 4th Dist. Highland No. 01CA21, 2002-Ohio-6170.

- In the fourth case cited, there was no written engagement agreement, but an attorney-client relationship was found to have been formed when the attorney was consulted by the client and gave legal advice on the facts given to him. *Landis v. Hunt*, 80 Ohio App. 3d 662, 610 N.E.2d 554 (10th Dist. 1991).
- In the fifth case cited, there again was no written agreement, but the rendering of legal advice was held to create an attorney-client relationship. *Hamrick v. Union Tp. Ohio*, 79 F.Supp.2d 871, 1999 W.L. 1282501 (S.D. Ohio 1999).

Unlike the case now before this Court, none of these cases involved a written fee agreement. Unlike the case now before this Court, none of these cases have any conceivable relevance to the question presented here of the validity of limitations on the scope of legal representation.

Ratonel Has Failed To Respond To The Propositions of Law
Set Forth In R&A's Merit Brief

Ratonel's merit brief is remarkable in that it never addresses the Propositions of Law which are the subject of R&A's merit brief. Instead, it simply replays the "factual" arguments that were presented to and rejected by the trial judge. In doing so, Ms. Ratonel ignores her own sworn testimony confirming that she knew and understood that her representation by R&A was limited to claims arising from her purchase of Holden House.

It is implicit in the Ratonel brief that an attorney's undertaking cannot be limited by anything less than the scope of the client's desires or by the claims some subsequent attorney may retrospectively opine might have been available to the client. The brief does not address the likelihood that Ohio lawyers will be unwilling to accept the expanded risks that would be imposed by the Court of Appeals' decision if it is left uncorrected. It does not address the

concerns expressed in the recommendations of this Court's Task Force on Access to Justice, as cited at page 14 of R&A's merit brief.

The Lawyers of Ohio Need Clear Standards For
Undertaking Limited Representation Of Their Clients

There is no reason in law, logic or public policy why contracts between lawyers and their clients should not be governed by legal principles applicable to all contracts. Where there is an express written contract executed by attorney and client, it should be enforced according to its terms. Where there is no express written contract, a contract may be implied from the circumstances surrounding the relationship. No implied contract, however, can arise where an express contract exists.

The only exception to such a standard fairly dictated by the professional responsibilities of the Bar should require that the limited engagement should not be undertaken at a time when it is too late for the client to pursue, either through separate counsel or *pro se*, known potential claims that fall outside the scope of the limited representation. This exception is provided in the Propositions of Law submitted by R&A. In the absence of the proposed exception, limited representation under principles of freedom of contract should be deemed reasonable and appropriate. As noted in R&A's opening brief, such a right benefits the public as well as the Bar by helping to effectuate representation in situations where most attorneys, for a variety of reasons ranging from economic considerations to risk assessments, might otherwise decline any representation whatever.

In this case, RatoneI at the time she knowingly executed a limited representation agreement with R&A had over a year to retain separate counsel to join a French Village claim by amendment to the pending suit, to discharge R&A and retain other counsel to take over the pending case and amend it to add a French Village claim, or to assert a French Village claim on a

pro se basis. Ratonel, by her own admission under oath, accepted R&A's representation as it was limited to issues involving her purchase of Holden House. The trial court's enforcement of that limited engagement agreement was justified.

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 at pp. 13-14.

The Court of Appeals' reversal leaves Ohio lawyers in uncharted territory for determining when, whether or how they can appropriately undertake limited representation of clients. "Reasonable" and "under the circumstances" are ambiguous standards that invite subjective bias and inconsistent decision-making. Guidance should not be withheld where it is needed for the benefit of attorneys, clients, the courts and the public. Here it is readily and rationally available by adoption of Propositions of Law that are themselves adoptions of basic principles of contract law. This Court's expressed concern with the lack of clarity that has been noted in Rule 1.2(c) of the Ohio Rules of Professional Conduct is readily resolved by reviewing the erroneous standard inherent in the Court of Appeals' decision and adopting a rule that attorneys and their clients should be bound by the terms of their written engagement agreements. With the exception suggested this is a workable, understandable, objective application of established contract law in defining the concept of reasonableness reflected in Rule 1.2.

Left uncorrected, the opinion of the Court of Appeals creates a devil's playground in which every conversation between attorney and client could be distorted into an argument of

expanded representation. An explanation of why an attorney refuses to undertake a claim and why the client would have to obtain another attorney if the client wishes to pursue the excluded claim can be morphed into a claim of legal malpractice. Any discussion of or reference to an excluded claim can be recast as an undertaking of representation on that claim. The door to unlimited representation opened by the Court of Appeals would jeopardize the free and frank discussion that should characterize the attorney-client relationship.

Again, consideration of basic principles of contract law should cause this Court to close the door which the Court of Appeals has opened. Where, as here, the limited undertaking is expressed in unambiguous language, it should only be modified by a writing signed by both parties.

Because . . . the plain language . . . was dispositive in resolving the issues . . . it was unlawful . . . to rely on matters outside the written agreement of the parties.

Sunoco, Inc. (R&M) v. Toledo Edison Co., 129 Ohio St.3d 397, 2011-Ohio-2720 ¶58 (2011).

It is well established that extrinsic evidence should only be considered when contract language is ambiguous ‘The subjective understanding of a party to an objectively unambiguous written contract will not change the terms of the contract.’

Carder Buick-Olds Co. v. Reynolds & Reynolds, 148 Ohio 3d 635, 2002-Ohio-2912 ¶39 (2nd Dist. 2002) (emphasis in quoted decision).

This Court should set forth a guideline on which Ohio lawyers can rely. Such a guideline would establish that a written contract for limited representation will control the rights and responsibilities of the parties unless modified in writing. Other communications between attorney and client in the course of limited representation should be recognized as an appropriate part of the attorney-client relationship and should not create an inadvertent expansion of the scope of such representation.

CONCLUSION

Unless corrected by this Court, the ruling of the Court of Appeals in this case will leave Ohio lawyers without the right and ability to define the scope of their representation of clients. The decision of the Court of Appeals should be reversed, and the proposed Propositions of Law should be adopted.

Respectfully submitted,

/s/ David C. Greer

David C. Greer (0009090), Trial Attorney

James H. Greer (0046555)

Curtis G. Moore (0091209)

BIESER, GREER & LANDIS, LLP

400 PNC Center, 6 North Main Street

Dayton, OH 45402-1908

PHONE: (937) 223-3277

FAX: (937) 223-6339

E-MAIL: dcg@bgllaw.com

jhg@bgllaw.com

cgm@bgllaw.com

Counsel for Appellants,

Roetzel & Andress, LPA and Mark A. Ropchock

CERTIFICATE OF SERVICE

I certify that a copy of Appellants' Reply 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 7th day of January, 2016.

/s/ David C. Greer

David C. Greer, Trial Attorney