**[Cite as *Fornshell v. Roetzel & Andress, L.P.A.*, 2009-Ohio-2728.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**Nos. 92132 and 92161**

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**MATTHEW L. FORNSHELL, RECEIVER**

PLAINTIFF-APPELLANT/CROSS-APPELLEE

vs.

**ROETZEL & ANDRESS, L.P.A.**

DEFENDANT-APPELLEE/CROSS-APPELLANT

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**JUDGMENT:**
**AFFIRMED**

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-583417

**BEFORE:** Dyke, P.J., Celebrezze, J., and Jones, J.

**RELEASED:** June 11, 2009

**JOURNALIZED:**

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme

Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

ANN DYKE, P.J.:

**{¶ 1}** In these consolidated appeals, plaintiff Matthew L. Fornshell, court-appointed receiver of various assets and entities controlled by Alan and Joanne Schneider (hereafter "the receiver") appeals from the order of the trial court that awarded summary judgment to defendant Roetzel & Andress, L.P.A. ("R & A" or "the law firm") in the receiver's action for legal malpractice and other claims. R & A cross-appeals from the order of the trial court that denied its counterclaim for frivolous conduct sanctions pursuant to R.C. 2323.51. For the reasons set forth below, we affirm both orders.

**{¶ 2}** This case arises in connection with Joanne Schneider's (hereafter "Schneider") and Alan Schneider's sale of unregistered securities[1] in what the Ohio Department of Commerce has described as a Ponzi[2] scheme.

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[1]Joanne Schneider pled guilty in Cuyahoga County Case No. CR-472739-B to engaging in a pattern of corrupt activity, money laundering, aggravated theft, and 10 violations of the prohibitions pertaining to the sale of unregistered securities. Alan Schneider pled guilty in Case No. CR-472739-C to two counts of aggravated theft and three violations of the prohibition against selling unregistered securities set forth in R.C. 1707.44(C).

[2]This is a type of fraud in which returns are provided to earlier investors through capital generated from new investors in the scheme, rather than through legitimate investment activity. See *SEC v. George* (C.A.6, 2005), 426 F.3d 786.

**{¶ 3}** The record reveals that in the late 1980s, the Schneiders began purchasing various commercial and residential properties. By 2000, they also owned a machine shop, an office building, several wineries, and other businesses. It is undisputed that Joanne Schneider was the primary decision-maker of these business entities. In July 2002, Ken Lapine and other R & A attorneys began representing Joanne Schneider in connection with her proposed "Cornerstone Project," a residential/retail development project in Parma Heights, which was to be financed with private funds and public funds and improvements. The development was to proceed through three separate entities: Pearl Development Co., LLC ("Pearl"); Ruby Development Co., LLC ("Ruby"); and Garnet Development Co., LLC ("Garnet").

**{¶ 4}** The record indicates that Pearl was the entity through which the development process was to begin. Schneider Management, an entity owned by Joanne and Alan, with Joanne as president, owned 90 percent of Pearl. The remaining 10 percent was owned by NexTerra, Ltd. ("NexTerra"), which was managed by Len Corsi. Under the terms of Pearl's operating agreement, Schneider Management was the managing member of Pearl, and had "all power and authority to manage, and direct the management of" this entity. Joanne Schneider was president of Pearl, and had authority to execute documents and contracts on Pearl's behalf. Corsi, as vice president, could act as directed by Joanne Schneider or in her absence or disability.

**{¶ 5}** Ruby is the entity that was to control intermediate development of Cornerstone. NexTerra owned 70 percent of Ruby, Schneider Management owned 30 percent, Corsi was designated president, and Joanne Schneider was designated vice president.

**{¶ 6}** Garnet was to handle the conclusion of the development process. It was owned by Alan and Joanne Schneider and was to be managed by Joanne Schneider.

**{¶ 7}** It is undisputed that as the development got underway, Corsi took an active role in seeking financing from the Port Authority and consulted with R & A attorneys.

**{¶ 8}** On October 9, 2003, the Ohio Department of Commerce, Division of Securities ("Securities Division") sent the Schneiders a request for information pertaining to their sale of unregistered promissory notes during the previous three years. Joanne Schneider met with Ken Lapine of R & A to prepare a response. Lapine averred that it was at this time that he and R & A attorneys first learned that the Schneiders were selling unregistered promissory notes to finance their ventures. According to Joanne Schneider's testimony before the Securities Division, Lapine instructed her at this time to immediately stop selling promissory notes.

**{¶ 9}** In December 2003, Lapine and Jeffrey Fromson, a partner in R & A's Columbus office, met with the officials from the Securities Division and provided the requested documents. At this time, Securities Division officials advised Joanne Schneider that intentional sales of unregistered securities could result in criminal

prosecution. The evidence indicates that at this meeting, Joanne Schneider gave the Securities Division a schedule of the notes she had sold, which listed $7,400,243 in sales, a vast understatement of the true total.

**{¶ 10}** The Securities Division subpoenaed Joanne Schneider to appear for hearing on March 2, 2004. She was also ordered to produce the 2003 bank records for her mortgage escrow account and her income tax returns for the last three years. At this hearing, Joanne Schneider testified that she had been selling promissory notes since the 1980s. An attorney unconnected to R & A instructed her that each promissory note had to be secured with a recorded mortgage. In 1996, she stopped tying the instruments to mortgages because, she claimed, her investors wanted to finance the transactions through their IRA accounts, but she then began issuing the notes without any collateral at all. She further testified that she had over $7 million in outstanding promissory notes and that her net worth was $33 million. She also admitted that she had sold notes after Lapine advised her to stop doing so because these were "works in progress."

**{¶ 11}** In May 2004, the Securities Division concluded that Joanne Schneider had violated the prohibitions against the sale of unregistered promissory notes set forth in R.C. 1707.44 and that she had sold over $7 million in such notes. The Securities Division and Schneider subsequently entered into an agreed cease-and-desist order but the Securities Division did not shut down the Schneiders' business operations and did not shut down the Cornerstone development. The enforcement

attorney handling the matter testified that at this point, the Securities Division "thought everything was okay."

**{¶ 12}** It is undisputed that Joanne Schneider continued to sell unregistered securities after the issuance of the cease-and-desist order. The Securities Division held an additional hearing on the matter, and Schneider explained that she did not know that she was in violation of the order because the notes were secured with mortgages.

**{¶ 13}** In December 2004, the Securities Division calculated that the Schneiders had actually sold $64 million in promissory notes, including over $8 million in promissory notes following the entry of the cease-and-desist order. It subsequently filed a complaint alleging that the Schneiders had committed multiple securities laws violations and seeking to enjoin them from future violations. See *Jennette Bradley, Lt. Governor v. Joanne C. Schneider, et al.,* Common Pleas Case No. CV-548887. The Securities Division and the Schneiders subsequently entered into an agreed preliminary injunction to preclude further securities laws violations. Fornshell was appointed as the Special Master to supervise adherence to the preliminary injunction, and to investigate the soundness of the repayment plan to noteholders.

**{¶ 14}** In February 2005, Fornshell was appointed as receiver of the Schneiders' personal assets. Thereafter, the court determined that the noteholders would receive interests in Pearl in exchange for their notes. This plan was later filed with the Securities Division. By the end of February 2005, however, Joanne

Schneider again began selling unregistered securities, and Fornshell was also appointed receiver of Pearl, Ruby, and Garnet, and the Schneiders' other businesses. The following month, R & A was granted leave to withdraw as counsel for the Schneiders. By the end of 2005, the Schneiders were indicted on a total of 163 charges after it was determined that the total of the unregistered notes far surpassed the Schneiders' net worth and that individual properties had served as collateral multiple times.

**{¶ 15}** On February 3, 2005, Fornshell filed the instant matter against R & A, alleging that R & A committed legal malpractice in connection with its representation of the Schneiders[3] by failing to advise them, subsequent to May 2004, that their sale of unregistered securities would violate the cease-and-desist order. He further asserted that R & A knew or should have known by October 2003 that the Schneiders were selling unregistered securities and actually had a negative net worth. Fornshell further alleged that R & A committed malpractice in connection with its representation of Pearl, Ruby, and Garnet by failing to "'counsel' its clients to cease their participation in Cornerstone, at least until they could arrange a legitimate source of funding." Finally, Fornshell alleged that R & A breached its fiduciary duty to Pearl, Ruby, and Garnet by placing its self-interest above the interest of these

[3] The record further reveals that in April 2005, the Schneiders filed a malpractice lawsuit against R & A, and R & A filed a counterclaim. The Schneiders later dismissed their claims, apparently in favor of Fornshell's action, and R & A was awarded $82,867 on its counterclaim in that matter. See *Schneider v. Roetzel & Andress Co., L.P.A.*, Common Pleas Case No. CV-560753.

companies and failing to advise them to withdraw from the Cornerstone development plan.

**{¶ 16}** On May 16, 2007, R & A moved for summary judgment. With respect to the claim of malpractice as to the Schneiders, by failing to advise her not to sell the unregistered notes following the issuance of the cease-and-desist order, the law firm relied upon Joanne Schneider's unrefuted testimony that Lapine advised her to stop selling unregistered securities shortly after the Securities Division issued its first subpoena to Schneider, i.e., in October 2003. With respect to the claims that it committed legal malpractice in its representation of Pearl and Ruby, the law firm presented evidence that Schneider testified under oath before the Securities Division that she had only sold approximately $7 million in notes and had assets exceeding $33 million, and the Securities Division imposed a cease-and-desist order prohibiting future sales but did not stop the Cornerstone project. The law firm also argued that the true nature of Schneider's illicit financing scheme was not established until late 2005, after then-Special Master Fornshell hired a forensic auditor to perform an audit, which included additional records that were not in the possession of the law firm.

**{¶ 17}** The law firm also argued that it did not commit malpractice as to Pearl because Schneider, as president and majority owner, controlled this business entity, and her knowledge of the true nature of her illicit financing scheme must be imputed to her company. The firm had no duty to separately advise minority owner NexTerra.

**{¶ 18}** In his brief in opposition to the motion for summary judgment, the receiver asserted that R & A had notice, prior to 2003, of the dubious nature of the Schneiders' financing scheme in light of Security Division publications, which warned that promissory notes were the "Next Big Thing in chancey investments," the high annual interest rates offered by the Schneiders, and because Christine Woodruff, an administrative assistant with R & A and purchaser of one of the Schneider's unregistered notes, asked Lapine to review a promissory note for form. At this time, Lapine informed Schneider that the note could not be called a "mortgage note." The receiver also asserted that because the Securities Division inquiry indicated that she had sold approximately $7 million in promissory notes from 2000 to 2003, and R & A knew that she had employed this form of financing for many years, R & A had reason to believe that the Schneiders had obtained significantly more money from unregistered securities. The receiver further claimed that a review of Schneiders' mortgage escrow account and other documentary evidence presented to the Securities Division were indicative of a Ponzi scheme because funds "came in at a furious rate to replace funds that were leaving even more quickly," and did not show a significant net worth.

**{¶ 19}** Building upon this alleged notice, the receiver further claimed that the law firm had the duty to inform Schneider that she was required to disclose to Corsi "'any facts' concerning her note sales 'that could have a meaningful possibility of having an adverse effect' on their business operations." If Scheider then rejected this argument, the receiver continued, then R & A "would have then become duty-

bound in that capacity to disclose the relevant facts on its own initiate to Corsi, in his role as the companies' representative." By failing to do so, Pearl spent over $8 million on Cornerstone following the commencement of the Securities Division inquiry. The receiver also presented the expert report of Steven A. Martin, who opined that R & A had the duty:

**{¶ 20}** "[T]o explore the potential ramifications of the securities issue with respect to the Cornerstone Developers. * * * If R & A determined that there was a meaningful possibility that the investigation could have had an effect that would have either been detrimental to the Cornerstone Project (such as its impending collapse) or that would have had a chilling effect on the Cornerstone Project, then R & A would have had a duty to disclose the investigation and the surrounding facts to the Cornerstone Developers. * * * If R & A (i) determined that there was a meaningful possibility of an adverse effect on the Cornerstone Developers, (ii) was unable to convince Joanne Schneider to fulfill her duty of complete candor to the Cornerstone Developers, and yet (iii) continued to represent the Cornerstone Developers, then R & A continued to have a duty to disclose to the Cornerstone Developers through their agents any facts that would have had a meaningful possibility of having an adverse effect on the Cornerstone Developers.

**{¶ 21}** "* * * R & A as counsel to Pearl and Ruby, was in privity with and owed a duty to NexTerra (as one of the owners of Ruby and Pearl) to advise NexTerra of issues and facts relevant to Ruby and Pearl, two of the Cornerstone Developers,

relating to the Cornerstone Project that could have had an adverse effect on their business."

**{¶ 22}** The trial court subsequently granted R & A's motion for summary judgment, concluding, in relevant part, as follows:

**{¶ 23}** "It should be noted that neither NexTerra, Ltd., the 10 percent owner of Pearl and the 70 percent owner of Ruby, nor NexTerra's owner Leonard Corsi have made any recorded attempts to enter this case. Fornshell brought this suit only in his capacity as Receiver for the three development companies and the Schneiders. Pearl, Ruby, and Garnet were all controlled and/or managed by the Schneiders. It was the Schneiders' own actions, including their inability to obtain legal financing, that are largely responsible for the demise of the Cornerstone Project and, hence, the three L.L.C.'s formed to carry out the project.

**{¶ 24}** "* * *

**{¶ 25}** "The Schneiders created the implosion of the Cornerstone project through their own allegedly criminal conduct. At the time these events took place, the Schneiders, apparently savvy business persons judging by their previous accomplishments, defied the Division of Securities' explicit and unmistakeable order to stop selling promissory notes. This was done despite legal advise from [R & A] to the contrary.

**{¶ 26}** "* * *

**{¶ 27}** "It was the Schneiders who hired Roetzel. It was Joanne Schneider who dominated the entire Cornerstone project. It was Joanne Schneider who owned

a 90 percent share in and dominated Pearl. The record is clear that, Schneider, the president of, and force behind Pearl, was well aware of the inadviseable financing scheme. * * *

**{¶ 28}** "Fornshell implies that [R & A] should have conducted a full investigation (apparently more extensively than that of the Division of Securities) and then reported its findings back to Corsi, a 10 percent shareholder in Pearl. This Court does not find that Roetzel had such a duty, and even if it did, that Roetzel's conduct conformed to the standard required of attorneys by the law. [R & A] instructed Schneider to stop selling notes. Further, assuming that [R & A] had conducted its own inquiry, and did report it back to the minority shareholder, Fornshell presents no evidence that any different result would have been realized. There is no indication that Corsi, a non-party to this case, could or would have attempted to stop Schneider's continued note sales. * * *

**{¶ 29}** "* * * Plaintiff's expert report fails to establish a definitive standard of care, it fails to state that [R & A] breached that standard of care and it certainly fails to establish proximate cause of damage.

**{¶ 30}** "[R & A also] satisfied its fiduciary duty and met the standard of care through its communications with Joanne Schneider * * *."

**{¶ 31}** Fornshell filed a motion for reconsideration, which asserted that the trial court impermissibly weighed the credibility of his expert in ruling on the summary judgment motion. The trial court denied this motion, and the receiver filed an additional motion for reconsideration, supported by Schneider's affidavit, refuting her

earlier testimony that R & A advised her in October 2003 to stop selling the notes and claiming that the law firm never informed her of the "ramifications of my note-selling activities and the Division's investigation upon the future of Cornerstone [and] I ABSOLUTELY WOULD NOT HAVE SOLD NOTES TO INVESTORS to finance what I recognized as an exercise in futility." The trial court likewise denied this motion and the receiver now appeals and assigns eight errors for our review.

**FORNSHELL'S APPEAL**

**{¶ 32}** For the sake of convenience, we shall address the receiver's assignments of error out of their predesignated order.

**{¶ 33}** For his sixth assignment of error, the receiver notes that he has withdrawn his allegations that the law firm advised Schneider that she could sell mortgage-backed promissory notes subsequent to the cease-and-desist order and/or failed to adequately advise her about that matter. He, therefore, asserts that R & A is not entitled to summary judgment on these withdrawn issues.

**{¶ 34}** This court recognizes that these issues have been withdrawn from the receiver's case and our analysis will focus on the remaining claims for relief.

**{¶ 35}** The receiver's third, fourth, and fifth assignments of error are interrelated in that they all challenge the trial court's award of summary judgment to the law firm on the receiver's second and third claims for relief. They state as follows:

**{¶ 36}** "R & A had a duty to advise the development companies through Corsi about the implications of the [Securities Division] investigation and Mrs. Schneider's sale of unregistered notes.

**{¶ 37}** "The development companies did not have imputed knowledge of what Joanne Schneider knew about the [Securities Division] investigation and her sale of unregistered notes.

**{¶ 38}** "Fornshell has not accused R & A of violating some duty owed directly to Corsi or NexTerra."

**{¶ 39}** We review the grant of summary judgment de novo using the same standards as the trial court. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.

**{¶ 40}** A trial court may not grant a motion for summary judgment unless the evidence before the court demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164, 1171.

**{¶ 41}** The burden of showing that no genuine issue exists as to any material fact falls upon the moving party in requesting a summary judgment. Id., citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46,

47. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Vahila v. Hall,* supra.

**{¶ 42}** In responding to a motion for summary judgment, the nonmoving party may not rest on "unsupported allegations in the pleadings." Civ.R. 56(E); *Harless v. Willis Day Warehousing Co.,* supra. Rather, Civ.R. 56 requires the nonmoving party to respond with competent evidence that demonstrates the existence of a genuine issue of material fact for trial. *Vahila v. Hall,* supra. Summary judgment, if appropriate, shall be entered against the non-moving party. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52, 567 N.E.2d 1027, 1031.

**Pearl**

**{¶ 43}** In order to establish a legal malpractice claim relating to civil matters under Ohio law, a plaintiff must prove three elements: (1) existence of an attorney-client relationship giving rise to a duty, (2) breach of that duty, and (3) damages proximately caused by the breach. *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 538 N.E.2d 1058.[4]

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[4]With regard to the duties owed to the public, in *Riedel v. Acutote of Colorado* (S.Oh.E.D. 1991), 773 F.Supp. 1055, the court held that professionals, such as attorneys, whose participation is confined to providing professional services are not included within the definition of sellers in Section 12 of the Securities Act of 1933, 15 U.S.C. §771. The court stated:

"Accordingly, no 'specific duty to the public [exists] which the securities laws impose upon attorneys.' Id. at 1133. Absent such a duty, 'lawyers are [not] required to tattle on their clients ***. To the contrary, attorneys have privileges not to disclose.' *Abell,* 858 F.2d at 1133 (quoting *Barker,* 797 F.2d at 497 [*Abell v. Potomac Insurance*

**{¶ 44}** Although expert opinion is needed to establish the element of duty in some cases, in other instances, duty or lack thereof may be determined as a matter of law. *Werts v. Penn,* 164 Ohio App.3d 505, 2005-Ohio-6532, 842 N.E.2d 1102.

**{¶ 45}** In this matter, the undisputed evidence indicated that Schneider Management, an entity owned by Joanne and Alan, with Joanne as president, owned 90 percent of Pearl. The remaining 10 percent was owned by NexTerra, which was managed by Len Corsi. Under the terms of Pearl's operating agreement, Schneider Management was the managing member of Pearl, and had "all power and authority to manage and direct the management of" this entity. Joanne Schneider was president of Pearl and had authority to execute documents and contracts on Pearl's behalf; Corsi, as vice president, could act as directed by Joanne Schneider or in her absence or disability. As the trial court correctly noted, Joanne Schneider, was both the president and controlling force behind Pearl.

**{¶ 46}** Moreover, as to whether there was a breach of duty to Pearl, the undisputed evidence indicates that R & A advised Schneider to stop selling the notes in October 2003. Despite receiving this advice, Schneider continued with the illegal sales and, as properly noted by the trial court, "was the perpetrator of the unlawful financing." Indeed, the undisputed evidence of record indicates that Schneider purposely continued with her unlawful scheme despite Lapine's advice that she stop

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*Co.*(C.A.5, 1988), 858 F.2d 1104, vacated on other grounds sub nom. *Fryar v. Abell* (1989), 492 U.S. 914, 106 L.Ed.2d 584, 109 S.Ct. 3236]. Without a duty to disclose, a law firm has 'no fiduciary duty to breach.' *Abell,* 858 F.2d at 1133."

selling notes, continued despite the Securities cease-and-desist order, and continued despite the agreed preliminary injunction.

**{¶ 47}** The evidence likewise refutes the receiver's contention that the law firm had reason to know of the Ponzi scheme from a review of the 2000-2003 records submitted to the Securities Division. It is undisputed, however, that the Securities Division, the enforcement agency charged with overseeing such transactions, did not determine that the securities exceeded the Schneiders' net worth until well after the 2003 hearing and after completing its December 2004 calculations. Moreover, the extent of the Ponzi scheme was not established until the completion of the forensic audit in late 2005. We therefore reject this contention.

**{¶ 48}** As to the receiver's claim that the firm had a duty to conduct an investigation of Schneider to determine whether the financing scheme was legitimate, we concur with the trial court's conclusion that the firm had no such duty. The privileged nature of the attorney-client relationship is intended to promote trust between the parties in order to facilitate the provision of legal services and the administration of justice. *State v. Doe,* Montgomery App. No. 19408, 2002-Ohio-4966. We cannot countenance a rule that would require attorneys to conduct an extensive audit and investigation of its clients for actual financial solvency and possible criminal conduct and to report the results of such investigation to third parties. Further, although the receiver claims that the trial court impermissibly passed upon the credibility of his expert in awarding the law firm summary judgment, we reject this contention as the issue of duty was decided as a matter of law.

**NexTerra / Corsi**

**{¶ 49}** In *Maloof v. Benesch, Friedlander, Coplan & Aronoff,* Cuyahoga App. No. 84006, 2004-Ohio-6285, this court held:

**{¶ 50}** "Ohio law has consistently held that 'an attorney's representation of a corporation does not make that attorney counsel to the corporate officers and directors as individuals.' *Nilavar v. Mercy Health System Western Ohio* (S.D. Ohio 2001), 143 F.Supp.2d 909, 913. See, also, *Hile v. Firmin, Sprague & Huffman Co., L.P.A.* (1991), 71 Ohio App.3d 838, 595 N.E.2d 1023. Therefore, Ohio law has consistently recognized that because the corporation is a separate entity from its directors and officers, causes of action belonging to the corporation may not be litigated by the officers for their own benefit. See *Maloof v. Squire, Sanders & Dempsey, L.L.P., et al.,* Cuyahoga App. No. 82406, 2003-Ohio-4351."

**{¶ 51}** Moreover, majority shareholders generally have a fiduciary duty to minority shareholders. *Crosby v. Beam* (1989), 47 Ohio St.3d 105, 548 N.E.2d 217. A limited-liability company, like a partnership, involves a fiduciary relationship, which imposes on the members a duty to exercise the utmost good faith and honesty in all dealings and transactions related to the company. *Blair v. McDonagh,* 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, citing *McConnell v. Hunt Sports Ent*. (1999), 132 Ohio App.3d 657, 687, 725 N.E.2d 1193.

**{¶ 52}** As correctly noted by the trial court, the receiver does not represent NexTerra and neither NexTerra nor Corsi are parties to this action. Further, there is absolutely no evidence that the law firm committed malpractice as to Pearl as the

undisputed evidence indicates that R & A advised Schneider to stop selling the unregistered notes in October 2003, yet she persisted and continued her scheme even following the cease-and-desist order and various contempt citations, until she ultimately pled guilty to criminal charges.

**{¶ 53}** The receiver insists, however, that the law firm violated its duties to Corsi and NexTerra as agents of Pearl. We note that in *Arpadi v. First MSP Corp.* (1994), 68 Ohio St.3d 453, 628 N.E.2d 1335, the Ohio Supreme Court held that a partnership is an aggregate of individuals that does not constitute a separate legal entity and that an attorney-client relationship established with the fiduciary extends to those in privity therewith regarding matters to which the fiduciary duty relates. The court further held that the attorney for a limited partnership stands in privity with the owners of a limited partnership and therefore owes a duty to those owners.

**{¶ 54}** This rule, however, was not applied to corporations. See *Thompson v. Karr* (C.A.6, 1999), Case No. 98-3544. Further, the *Arpadi* decision has essentially been abrogated by statutory changes in 1994 and 2006. In 1994, the state legislature included limited liability companies and limited partnerships as "entities" pursuant to R.C. 1782.01(C). In 2006, the legislature adopted House Bill 301, which enacted the following statute:

**{¶ 55}** "1705.61. Liability of persons providing goods or performing services:

**{¶ 56}** "(A) Absent an express agreement to the contrary, a person providing goods to or performing services for a limited liability company owes no duty to, incurs no liability or obligation to, and is not in privity with the members or creditors of the

limited liability company by reason of providing goods to or performing services for the limited liability company.

**{¶ 57}** "(B) Absent an express agreement to the contrary, a person providing goods to or performing services for a member or group of members of a limited liability company owes no duty to, incurs no liability or obligation to, and is not in privity with the limited liability company, any other members of the limited liability company, or the creditors of the limited liability company by reason of providing goods to or performing services for the limited liability company."

**{¶ 58}** In addition, R.C. 1782.08 now defines limited partnerships as "an entity formed at the time of filing the certificate of limited partnership."

**{¶ 59}** In accordance with the foregoing, we hold that R & A had no duty to NexTerra, the minority owner of Pearl. To the contrary, it was Schneider Management as majority shareholder that had the fiduciary duty to deal fairly and honestly with NexTerra in all transactions. Moreover, even though NexTerra is the majority owner of Ruby, there was little evidence regarding this entity. Finally, neither NexTerra nor Corsi are parties to this matter, and the receiver has no authority over NexTerra.

**Cornerstone Developers**

**{¶ 60}** The receiver's expert also asserted that the firm violated its duties to disclose the investigation and the surrounding facts to the Cornerstone Developers. Cornerstone is not a legal entity, however, but was simply the name of the residential/retail project that was to be developed via Pearl, Ruby, and Garnet.

**{¶ 61}** In accordance with all of the foregoing, the trial court properly determined that there are no genuine issues of material fact and the law firm is entitled to judgment as a matter of law on the receiver's claims for legal malpractice.

**{¶ 62}** In addition, the claim for breach of fiduciary duty arises out of the manner in which the law firm represented Schneider, Pearl, and the other Cornerstone entities, and is subsumed into the malpractice claim. *Endicott v. Johrendt* (June 22, 2000), Franklin App. No. 99AP-935, citing *Muir v. Hadler Real Estate Mgmt. Co.* (1982), 4 Ohio App.3d 89, 446 N.E.2d 820, and *Hibbett v. Cincinnati* (1982), 4 Ohio App.3d 128, 131, 446 N.E.2d 832. Therefore, because the law firm was properly awarded summary judgment on the malpractice claims, the trial court likewise properly entered summary judgment for the law firm on the claim of breach of fiduciary duties.

**{¶ 63}** The third, fourth, and fifth assignments of error are without merit.

**{¶ 64}** In the first assignment of error, the receiver asserts that the trial court erred and considered an issue that had not been briefed by the law firm when it determined that R & A was entitled to summary judgment because the receiver could not establish that the law firm's actions were the proximate cause of plaintiff's damage. In light of our determination that R & A did not violate any duties in this matter, this claim is moot. See App.R. 12(A)(1)(c).

**{¶ 65}** In his eighth assignment of error, the receiver asserts that the trial court erred in denying his motions for reconsideration. In that we have concluded that R &

A was entitled to judgment as a matter of law, this claim is also moot. App.R. 12(A)(1)(c). In any event, as to the first motion for reconsideration, the trial court properly determined that, as a matter of law, the law firm did not violate any duties and did not impermissibly weigh the credibility of the receiver's expert. Further, as to the second motion for reconsideration, it is well-settled that an affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, without sufficient explanation, create a genuine issue of material fact to defeat the motion for summary judgment. *Byrd v. Smith,* 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, paragraph three of the syllabus. In this matter, the explanation for the contradiction was lacking, and no genuine issue of fact was created. Moreover, although the Schneider affidavit claimed that Lapine knew in October 2003 of the true extent of her debt, she admits that she stopped selling new promissory notes after this date, then resumed it again while Lapine "was seeking alternative means of raising money." She also admitted that she never discussed selling promissory notes with Lapine after the cease-and-desist order went into effect. Accordingly, the affidavit was insufficient to create a genuine issue of material fact.

**{¶ 66}** In his seventh assignment of error, the receiver asserts that R & A was not entitled to summary judgment due to the Schneiders' seemingly untimely waiver of their attorney-client privilege with the firm (i.e., May 2007) because the waiver was in place before the firm filed its motion for summary judgment. Our determination that the law firm did not breach any duties herein necessarily renders moot

consideration of this alternative ground for summary judgment. See *Landers v. Lucent Techs., Inc.*, Cuyahoga App. Nos. 81506 and 81531, 2003-Ohio-3657. Accordingly, this assignment of error is without merit.

**{¶ 67}** The order of the trial court that awarded summary judgment to R & A is affirmed.

**R & A' S CROSS-APPEAL**

**{¶ 68}** In its cross-appeal, R & A asserts that the trial court erred in denying its motion for frivolous conduct sanctions against the receiver. Specifically, the law firm asserts that the receiver's filing of the first claim for relief was frivolous, since there was no evidence that R & A advised Schneider to sell notes of any kind after the cease-and-desist order and Schneider testified that she received no such advice. The law firm additionally asserts that the receiver's second claim was frivolous because the receiver failed to provide proper expert testimony as to the applicable standard of care and evidence of breach of that standard of care.

**{¶ 69}** "Frivolous conduct" includes conduct that "is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law." R.C. 2323.51. "Whether a claim is warranted under existing law is an objective consideration. * * * The test, we find, is whether no reasonable lawyer would have brought the action in light of the existing law. In other words, a claim is frivolous if it is absolutely clear under the existing law that no reasonable lawyer could argue the claim." *Hickman v. Murray* (Mar. 22, 1996), Montgomery App. No. CA 15030.

**{¶ 70}** A party adversely affected by frivolous conduct may file a motion for an award of court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the civil action or appeal. R.C. 2323.51. Such award is discretionary with the trial court and will not be reversed absent an abuse of discretion. *Taylor v. Franklin Blvd. Nursing Home, Inc.* (1996), 112 Ohio App.3d 27, 677 N.E.2d 1212; *Papadelis v. Makris,* Cuyahoga App. No. 84046, 2004-Ohio-4093.

**{¶ 71}** We find no abuse of discretion in this matter. As to the contention that the receiver's first claim for relief is frivolous, since there was no evidence that R & A advised Schneider to sell notes of any kind after the cease-and-desist order, we note that where it is ultimately determined that a claim lacks evidentiary support, a court nonetheless has discretion to deny a motion for frivolous conduct sanctions. See *Real Estate Appraisal v. Starks,* Franklin App. No. 02AP-377, 2002-Ohio-6752. That is, R.C. 2323.51, "does not define frivolous conduct so as to include the assertion of a claim or defense which is not well grounded in fact." *Richmond Glass & Aluminum Corp. v. Wynn* (Sept. 5, 1991), Columbiana App. No. 90-C-46. The court explained:

**{¶ 72}** "[T]he statute does not define frivolous conduct so as to include the assertion of a claim or defense which is not well grounded in fact. It is not for us to read such into the statute. We realize that it is difficult for the trial court to strike a delicate balance between protecting the adversary system and not allowing attorneys to exploit the system for their own purpose. However, we must not be unmindful that in some close cases applying R.C. 2323.51 would have a chilling effect on legitimate advocacy by discouraging aggressive representation by the

attorney for the client. Unless there is a clear-cut violation of the statute, a potential dilemma confronts a lawyer in satisfying his obligation of professional responsibility, which requires zealous representation on one hand and satisfying his obligation under R.C. 2323.51 on the other hand."

**{¶ 73}** In this matter, although the evidence ultimately failed to support the receiver's claim that the law firm advised Schneider to sell notes of any kind after the cease-and-desist order, the trial court was within its discretion to find that plaintiff had not engaged in frivolous conduct herein.

**{¶ 74}** In addition, as to the claimed deficiency of the expert report regarding the standard of care, we note that an attorney's failure, in a medical malpractice case, to have a medical expert examine a plaintiff's medical records prior to filing suit "does not automatically subject him or her to sanctions under either R.C. 2323.51 or Civ.R. 11." *Sigmon v. Southwest Gen. Health Ctr.,* Cuyahoga App. No. 88276, 2007-Ohio-2117, citing to *Driskill v. Babai* (Mar. 26, 1997), Summit App. No. 17914. The trial court was therefore well within its discretion in denying sanctions where the plaintiff's attorney has provided an expert report that describes a purported breach of duty but is ultimately deemed insufficient.

**{¶ 75}** The cross-appeal is without merit.

**{¶ 76}** The order of the trial court that denied R & A's motion for sanctions is affirmed.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
LARRY A. JONES, J., CONCUR