**[Cite as *New Destiny Treatment Ctr. v. Wheeler*, 2009-Ohio-6956.]**

COURT OF APPEALS
SUMMIT COUNTY, OHIO
NINTH APPELLATE DISTRICT

NEW DESTINY TREATMENT CENTER, INC., ET AL.

Plaintiffs-Appellants

-vs-

E. MARIE WHEELER, ET AL.

Defendant-Appellees

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. William B. Hoffman, J.
Hon. Patricia A. Delaney, J.
(Fifth District Judges Sitting by Assignment)

Case No. 24404

O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Summit County Court of Common Pleas, Case No. 2006-12-8593

JUDGMENT: Affirmed in part, Reversed in part and Remanded

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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*Hoffman, J.*

**{¶1}** Plaintiff-appellant New Destiny Treatment Center, Inc. appeals the August 7, 2008 Final Order-Summary Judgment entered by the Summit County Court of Common Pleas, granting summary judgment in favor of defendants-appellants E. Marie Wheeler and Roderick Linton, LLP.

STATEMENT OF THE FACTS AND CASE

**{¶2}** Appellant New Destiny Treatment Center, Inc., fka Barberton Rescue Mission, and Christian Brotherhood Newsletter are not-for-profit corporations organized under the laws of the State of Ohio. Originally, Christian Brotherhood Newsletter was a division of Barberton Rescue Mission. The Christian Brotherhood Newsletter is not a party to this Appeal.

**{¶3}** The Barberton Rescue Mission ("the Mission") was founded by members of the Hawthorn family. By the early 1990s, Reverend Bruce Hawthorn was the President of the Mission, and he and members of his family sat on the board of trustees. In the mid- 1990s, questions arose as to whether Hawthorn and his family were abusing their positions at the Mission. The Ohio Attorney General, Summit County authorities, and the IRS commenced, more or less simultaneously, investigations into Hawthorn and his family's use of the Mission for their personal benefit, including payment of excessive compensation, and the purchase of homes, vehicles, and other personal items. As a result, Reverend Howard Russell and Reverend Richard Lupton, represented by the law firm of Vorys Sater Seymour & Pease, successfully took control of the Mission's board of trustees. Hawthorn was relieved of his duties and placed on a leave of absence on

May 15, 2000. The board extended Hawthorn's leave of absence on November 17, 2000.

**{¶4}** Hawthorn subsequently decided he wished to reassert himself as the individual in control of the Mission and its board. On December 4, 2000, Hawthorn retained Appellee E. Marie Wheeler and her law firm Appellee Roderick Linton, LLP to represent the Mission. The Mission paid Appellees a retainer of $25,000. A board of trustees meeting led by the Russell/Lupton board was scheduled for December 4, 2000. Appellee Wheeler presented for the meeting, but was denied access thereto. On December 11, 2000, Appellee Wheeler prepared a special meeting agenda. Items on the agenda included the reporting of the hiring of Appellees under the terms of a retention contract; removal of Russell from the board; expansion of the board to include Richard Smith, Ferris Brown, Abraham Wright, and May Dobbins; and granting authority to Hawthorn to terminate Vorys Sater Seymour & Pease. The special meeting was held, during which Hawthorn approved retention of Appellees on behalf of the Mission. The Hawthorn board approved the remaining items on the special meeting agenda. Neither Reverend Russell or Lupton nor their followers attended this meeting.

**{¶5}** Thereafter, both the Hawthorn board and the Russell/Lupton board purported to control the Mission. On December 11, 2000, the Ohio Attorney General sued Hawthorn and his board in the Summit County Court of Common Pleas, to recover money damages resulting from their financial misdeeds with the Mission's money. The Mission and the Russell/Lupton board – all represented by Vorys Sater– joined the complaint. By written correspondence dated December 12, 2000, Appellee Wheeler notified the Attorney General not to have any contact with Mission employees without

her approval, noting such employees were employees of her client. Via a December 13, 2000 correspondence, Appellee Wheeler informed Vorys Sater she was general counsel for the Mission. Appellee Wheeler filed a voluntary notice of dismissal of the common pleas lawsuit. The Russell/Lupton board filed a motion to strike. The trial court never ruled on the motion.

**{¶6}** On December 22, 2000, the Ohio Attorney General also filed a quo warranto action in the Ninth District Court of Appeals, which directly addressed the battle for control over the Mission's board. The Mission, Russell, and Lupton – all represented by Vorys Sater – joined the action. Appellee Wheeler represented Hawthorn, et al. in the quo warranto matter. The Ninth District found the Mission, Russell and Lupton did not have standing to sue. Via Decision filed October 3, 2001, the Ninth District found the December 11, 2000 meeting called by Hawthorn and his board was invalid because it lacked a quorum. The Ninth District further found the election conducted at that meeting was void as a matter of law. The effect of the decision was to reestablish the Russell/Lupton board as the legitimate board for the Mission.

**{¶7}** On March 22, 2001, in the Summit County Court of Common Pleas action, the trial court appointed Attorney R. Scott Haley as a non-operating receiver for the Mission. In April, 2001, Attorney Haley became the operating receiver, exercising day-to-day authority over the Mission. Attorney Haley immediately informed Appellee Wheeler, both orally and in writing, she did not represent the Mission. The case proceeded to trial in May, 2004, and resulted in a multi-million dollar verdict against Hawthorn.

**{¶8}** On April 24, 2002, Attorney Haley, as the receiver, filed a Complaint in the Summit County Court of Common Pleas, naming Appellees as defendants, and asserting claims of legal malpractice. The original action was voluntarily dismissed on March 16, 2006, while Appellee Wheeler's and Appellee Roderick Linton's motions for summary judgment were pending. The case was re-filed on December 29, 2006, asserting claims of legal malpractice, fraudulent misrepresentation, and unjust enrichment. Appellees again filed motions for summary judgment. Appellees maintained no attorney/client relationship existed between them and Appellant. Appellant filed a memorandum in opposition. Via Final Order filed August 7, 2008, the trial court granted summary judgment in favor of Appellees. The trial court found an attorney/client relationship never existed between the parties. The trial court further found Appellant's claims for negligent/fraudulent misrepresentation and unjust enrichment were without merit.

**{¶9}** It is from this judgment entry, Appellant appeals, raising the following assignments of error:

**{¶10}** "I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARIE WHEELER AND RODERICK LINTON, LLP ON PLAINTIFF'S CLAIM OF LEGAL MALPRACTICE.

**{¶11}** "II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARIE WHEELER AND RODERICK LINTON, LLP ON PLAINTIFF'S CLAIM OF NEGLIGENT MISREPRESENTATION.

**{¶12}** "III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF MARIE WHEELER AND RODERICK LINTON, LLP ON PLAINTIFF'S CLAIM OF UNJUST ENRICHMENT."

STANDARD OF REVIEW

**{¶13}** Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36.

**{¶14}** Civ. R. 56(C) provides, in pertinent part:

**{¶15}** "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

**{¶16}** Pursuant to the above rule, a trial court should not enter a summary judgment if it appears a material fact is genuinely disputed, nor if, construing the allegations most favorably towards the non-moving party, reasonable minds could draw

different conclusions from the undisputed facts. *Houndshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427. The court may not resolve ambiguities in the evidence presented. *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St.3d 321. A fact is material if it affects the outcome of the case under the applicable substantive law. *Russell v. Interim Personnel, Inc.* (1999), 135 Ohio App.3d 301.

**{¶17}** The party moving for summary judgment bears the initial burden of informing the trial court of the basis of the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the non-moving party's claim. *Drescher v. Burt* (1996), 75 Ohio St.3d 280. Once the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact does exist. Id. The non-moving party may not rest upon the allegations and denials in the pleadings, but instead must submit some evidentiary material showing a genuine dispute over material facts, *Henkle v. Henkle* (1991), 75 Ohio App.3d 732.

**{¶18}** It is based upon this standard we review Appellant's assignments of error.

I

**{¶19}** In the first assignment of error, Appellant contends the trial court erred in granting summary judgment in favor of Appellees on the legal malpractice claim. Appellant submits the trial court's finding no attorney-client relationship existed was erroneous.

**{¶20}** 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.

**{¶21}** In the case sub judice, the trial court concluded the Mission could not succeed on its legal malpractice claim as it was unable to satisfy the first element: the existence an attorney-client relationship between Appellees and Appellant. The trial court reasoned, "the opposite is true: the current parties had an adversarial relationship during the time period in question. Two factions were warring over control of the Rescue Mission. The factions had separate interests, separate Boards, and separate attorneys. Both factions claimed to be the one true and legitimate Board. However, only one faction prevailed. Plaintiffs, as the prevailing faction, are asserting a malpractice action against the attorneys for the losing faction. This claim must fail because there was never an attorney-client relationship between [Appellees] and the prevailing faction." Final Judgment-Summary Judgment at 4, unpaginated. The trial court noted although plaintiff below (Appellant herein) is a corporate entity, Appellant "may also be characterized, however, as the prevailing faction in the prior litigation", or the Russell/Lupton Board. By such characterization, the trial court viewed the deposition testimony of Reverend Richard Lupton, in which he states he never considered Appellee Wheeler to be the attorney for the Mission, as determinative of the issue of the existence of an attorney-client relationship. We disagree with the trial court's reasoning.

**{¶22}** A corporation is an entity separate and apart from the individuals who compose it; it is a legal fiction for the purpose of doing business. *Ohio Bur. of Workers' Comp. v. Widenmeyer Elec. Co.* (1991), 72 Ohio App.3d 100, 105. Although a board of directors is the group of persons vested with the authority to conduct the affairs of a

non-profit corporation, the board is not the non-profit corporation. This presumption is statutorily supported by R.C. 1702.55(B), in which a board of directors may be held liable to the non-profit corporation, and R.C. 1702.12(I), which permits members of the non-profit corporation to sue in derivative actions on behalf of the non-profit corporation. To find a non-profit corporation and its board of directors to be one and the same would render these statutes meaningless. As such, we find the trial court's determination the prevailing board is, in essence, the Mission for purposes of determining the existence of an attorney-client relationship was erroneous. The trial court's reliance on Reverend Lupton's opinion of who he considered to be the attorney for the Mission is misplaced because Reverend Lupton is not an expert qualified to offer an opinion on the same.

**{¶23}** We now turn to the issue of whether an attorney-client relationship existed between Appellees and the Mission.

**{¶24}** Neither a formal contract nor the payment of a retainer is necessary to trigger the creation of the attorney-client relationship. See, e.g., *In re Disciplinary Action Against Giese* (N.D.2003), 662 N.W.2d 250. While it is true an attorney-client relationship may be formed by the express terms of a contract, it "can also be formed by implication based on conduct of the lawyer and expectations of the client." *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, at ¶ 10 (Citation omitted).

**{¶25}** In deciding whether an attorney-client relationship exists, "the ultimate issue is whether the putative client reasonably believed that the relationship existed and that the attorney would therefore advance the interests of the putative client." *Henry Filters, Inc. v. Peabody Barnes, Inc.* (1992), 82 Ohio App.3d 255, 261, 611 N.E.2d 873;

see also *Hardiman*, supra at para. 10. (The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the prospective client"); *Lillback v. Metro. Life Ins. Co.* (1994), 94 Ohio App.3d 100, 108, 640 N.E.2d 250; *David v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.* (1992), 79 Ohio App.3d 786, 798, 607 N.E.2d 1173. Existence of an attorney-client relationship will vary from case to case. *Henry Filters, Inc*., supra at 261.

**{¶26}** Upon review of the entire record, we find sufficient evidence to establish the existence of an attorney-client relationship between Appellees and the Mission. Bruce Hawthorn, in his capacity as President of the Mission, hired Appellees to represent the Mission. As President, Hawthorn had the actual authority to enter into an attorney-client relationship with Appellees on the Mission's behalf. Further, Appellees were paid a retainer by the Mission, and sent periodic billing statements to the Mission. Appellee Wheeler purported to represent the Mission. After the Ohio Attorney General filed a damages action in December, 2000, Appellee Wheeler notified the Attorney General not to have any contact with Mission employees without her approval, noting such employees were employees of her client. Appellee Wheeler also contacted Vorys Sater, and informed the law firm she was general counsel for the Mission. Appellee Wheeler filed a voluntary notice of dismissal of the common pleas lawsuit representing herself to be counsel for the Mission.

**{¶27}** Appellees contend the Mission is judicially estopped from arguing the existence of an attorney-client relationship because, in both prior proceedings, the Mission and the Russell/Lupton board advanced the position Appellee Wheeler was not the Mission's attorney.

**{¶28}** Under the doctrine of judicial estoppel, a party cannot espouse one position in a court and then subsequently take a contrary position in another court. *Hildreth Mfg., L.L.C. v. Semco, Inc.,* 151 Ohio App.3d 693, 2003-Ohio-741; *Fraley v. Fraley,* 2d Dist. No. 19178, 2002-Ohio-4967, *Smith v. Dillard Dept. Stores, Inc.* (2000), 139 Ohio App.3d 525. "Judicial estoppel is an equitable doctrine that preserves the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposing to suit an exigency of the moment." *Teledyne Indus., Inc. v. Natl. Labor Relations Bd.* (C.A.6, 1990), 911 F.2d 1214, 1218. In order to assert such a defense, a party must comport with the maxim "he who seeks equity must do equity and that he must come into court with clean hands." See, *Christman v. Christman* (1960), 171 Ohio St. 152, 154; *McPherson v. McPherson* (1950), 153 Ohio St. 82, 91. Under this maxim, equitable relief is not available to a person who has "violated conscience or good faith" or is guilty of reprehensible conduct. See, *Greer-Burger v. Temesi,* 116 Ohio St. 3d. 324, 2007-Ohio-6442, citing *Marinaro v. Major Indoor Soccer League* (1991), 81 Ohio App.3d 42, 45; *Kettering v. Berger* (1982), 4 Ohio App.3d 254, 261-2.

**{¶29}** We find Appellees have not come to this Court with clean hands. In the two prior actions, Appellees represented themselves as attorneys for the Mission, both in words and in actions. In the case sub judice, however, Appellees claim the absence of an attorney-client relationship. Accordingly, we find Appellees are foreclosed from asserting the defense of judicial estoppel.

**{¶30}** Appellant's first assignment of error is sustained.

II, III

**{¶31}** In the second assignment of error, Appellant argues the trial court erred in granting summary judgment in favor of Appellees on the claims of fraudulent and negligent misrepresentation. In the third assignment of error, Appellant asserts the trial court erred in granting summary judgment in favor of Appellees on the unjust enrichment claim. The trial court found the fraudulent and negligent misrepresentation claims could not stand as Appellant failed to establish the essential element of "reliance". The trial court determined the unjust enrichment claim also could not stand as payments made to Appellees were the result of Hawthorn's decisions, and not any misrepresentations by Appellees to Appellant.

**{¶32}** We note "an action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Management Co.* (1982), 4 Ohio App.3d 89, 90.

**{¶33}** Appellant's claim for fraudulent and negligent misrepresentation as well as the claim for unjust enrichment are founded upon the manner in which Appellees conducted themselves while representing the Mission. Because we found, supra, an attorney-client relationship existed between Appellees and the Mission, we find Appellant's remaining claims, which arise from that relationship, merge with the legal malpractice claim. Accordingly, we affirm the trial court's granting summary judgment in Appellees' favor on these claims.

**{¶34}** Appellant's second and third assignments of error are overruled.

**{¶35}** The Judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part and remanded.

By: Hoffman, J.

Farmer, P.J. and

Delaney, J. concur

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR SUMMIT COUNTY, OHIO
NINTH APPELLATE DISTRICT

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|---|---|---|
| NEW DESTINY TREATMENT CENTER, INC., ET AL. | : | |
| Plaintiffs-Appellants | : | |
| -vs- | : | JUDGMENT ENTRY |
| E. MARIE WHEELER, ET AL. | : | |
| Defendant-Appellees | : | Case No. 24404 |

For the reasons stated in our accompanying Opinion, the Judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part and remanded for further proceedings in accordance with our opinion and the law. Costs to Appellees.

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HON. WILLIAM B. HOFFMAN

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HON. SHEILA G. FARMER

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HON. PATRICIA A. DELANEY