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Gallagher Sharp Newsflash: Without Attorney-Client Relationship, Corporation Cannot Sue Attorney for Dissident Board Member

Today, May 18, 2011, the Supreme Court of Ohio held that an attorney who was retained by a dissident member of a nonprofit corporation's board of trustees, and who assisted the dissident in temporarily taking control of the corporation, may not be sued by the corporation for legal malpractice in the absence of evidence establishing the existence of an attorney-client relationship between the attorney and the corporation. *New Destiny Treatment Ctr., Inc. v. Wheeler*, Slip Opinion No. 2011-Ohio-2266.

The *New Destiny* case arose out of a protracted fight for control of New Destiny Treatment Center, Inc. and Christian Brotherhood Newsletter, two nonprofit corporations operating a substance abuse rehabilitation facility and providing a mutual aid program to assist subscribers to its Christian newsletter in paying uninsured medical expenses. The IRS, the Ohio Attorney General, and the Summit County Prosecuting Attorney began investigating the nonprofits in the late 1990s. The investigation focused on whether Reverend Bruce Hawthorn, the nonprofits' founder and president, had abused the tax-exempt status by diverting funds designated for a charitable purpose to his personal use and the use of friends and relatives. After two independent members joined the board of trustees in 1999, the board retained the law firm of Vorys, Sater, Seymour & Pease, L.L.P. to act as legal counsel in response to the investigations of the alleged misuse of charitable funds. Hawthorn was placed on a leave of absence – initially for six months then indefinitely – from his position as president controlling the daily activities of the ministry. When a meeting of the board of trustees was scheduled for December 4, 2000, to discuss permanently removing Hawthorn from the board and forcing him to retire, Hawthorn retained E. Marie Wheeler and the law firm of Roderick Linton, L.L.P. to ensure that he retained control of the board.

Competing board meetings were held by the adverse factions during December 2000 during which Hawthorn announced that Wheeler had been retained as attorney for the nonprofits. Questions arose as to the legitimacy of the actions taken at these meetings due to the uncertainty as to whether the meetings lacked a quorum of legitimate board members. Litigation was commenced against Hawthorn and others on behalf of the nonprofits by the Ohio attorney general to recover the funds allegedly misappropriated by Hawthorn and to oust the dissident board led by Hawthorn and to re-establish control in the legitimate board. During this litigation, board members opposed to Hawthorn's faction consistently maintained that Hawthorn had no authority to retain Wheeler and the Roderick Linton firm as attorneys for the nonprofits. Ultimately, it was judicially determined that the board meetings conducted by Hawthorn in December 2000 were invalid for lack of a quorum and that all actions taken at those meetings were "void."

Then, the legal malpractice action was filed against Wheeler and Roderick Linton. The nonprofits' complaint asserted that Wheeler and Roderick Linton had breached their obligations as attorneys to the nonprofits and had negligently represented that a quorum had been present during the December 2000 meeting, which allowed Hawthorn to temporarily regain and assert control over the nonprofits. The trial court granted summary judgment to Wheeler and Roderick Linton finding that no attorney-client relationship had ever been established with the nonprofits. On appeal, the court of appeals reversed the

summary judgment and held that (1) a fact question remained as to whether Hawthorn could hire Wheeler in his capacity as president of the nonprofits and (2) that Wheeler and Roderick Linton had acted with “unclean hands” by having represented themselves as attorneys for the nonprofits.

The Supreme Court reversed the court of appeals and reinstated summary judgment in favor of Wheeler and Roderick Linton. Writing for the unanimous Court, Justice Terrence O’Donnell emphasized that “no one with authority to employ counsel for the [nonprofits] retained either Wheeler or the firm of Roderick Linton, and no corporate resolution exists to that effect.” The Court held that “Wheeler and the law firm of Roderick Linton represented only the dissident trustee and took action on behalf of the corporation as instructed by the dissident. No attorney-client relationship ever existed between the corporation and the attorney or the law firm. Therefore, there is no basis for the corporation to maintain a cause of action for legal malpractice against either.”

Gallagher Sharp attorneys Alan M. Petrov, Timothy J. Fitzgerald, Jay Clinton Rice, and Theresa A. Richthammer were counsel for Roderick Linton, L.L.P.

Today's opinion can be accessed here:

<http://www.supremecourtofohio.gov/rod/docs/pdf/0/2011/2011-ohio-2266.pdf>.

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