[Cite as *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 2010-Ohio-5872.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Illinois National Insurance Company,	:	
Plaintiff-Appellant/ [Cross-Appellee],	:	
v.	:	No. 10AP-290
	:	(C.P.C. No. 06CVA05-6670)
Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.,	:	(REGULAR CALENDAR)
Defendant-Appellee/ [Cross-Appellant].	:	

D E C I S I O N

Rendered on December 2, 2010

Roetzel & Andress, LPA, *Douglas G. Leak*, *Bradley L. Snyder* and *Jeremy S. Young*; *Sutter, O'Connell & Farchione*, and *James M. Popson*, for appellant/cross-appellee.

Freund, Freeze & Arnold, *Neil F. Freund* and *Leonard J. Bazelak*, for appellee/cross-appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Plaintiff-appellant/cross-appellee, Illinois National Insurance Company ("Illinois National"), appeals the decision of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee/cross-appellant, Wiles, Boyle,

Burkholder & Bringardner Co., L.P.A. ("the Wiles firm"). For the reasons that follow, we affirm the judgment of the trial court.

{¶2} This matter results from the legal representation of Illinois National by Dale Cook and Michael Close, attorneys from the Wiles firm. The attorneys were retained to assist with the defense of an uninsured motorist claim filed by Anne Marie Harvey against Illinois National, pursuant to *Scott-Pontzer v. Liberty Mut. Ins. Co.* (1999), 85 Ohio St.3d 660. The case proceeded to a jury trial, after which a verdict was returned against Illinois National in the amount of $20,759,269. The judgment was reduced to $8,531,488.67 and was subject to prejudgment interest at a rate of 10 percent per year. The judgment entry was filed on December 30, 2002.

{¶3} On January 15, 2003, counsel for Illinois National filed a motion for judgment notwithstanding the verdict ("JNOV"), or in the alternative, for new trial, or for remittitur. In response, Ms. Harvey opposed the motion on the ground that it was untimely. The trial court denied the motion for JNOV and for remittitur on February 25, and on March 4, 2003, it similarly denied the motion for a new trial. Neither decision addressed the timeliness of Illinois National's post-trial motions.

{¶4} On March 13, 2003, counsel for Illinois National filed an appeal from the judgment entry and the decisions denying its post-trial motions. In response, Ms. Harvey argued that the appellate court lacked jurisdiction over the appeal because it was untimely. The Twelfth District Court of Appeals agreed and dismissed the portion of the appeal relating to the December 30, 2002 judgment entry. See *Harvey v. Hwang* (June 12, 2003), 12th Dist. No. CA2003-03-010. The Supreme Court of Ohio heard the matter based upon a certified conflict. See *Harvey v. Hwang*, 99 Ohio St.3d 1509, 2003-

Ohio-3957. Ultimately, the dismissal was affirmed. See *Harvey v. Hwang*, 103 Ohio St.3d 16, 2004-Ohio-4112. Thereafter, the parties settled the *Scott-Pontzer* issues for $10,000,000. At the time, however, there still existed a product liability claim, which had been bifurcated from Ms. Harvey's *Scott-Pontzer* claims. As a result, in June and July, 2005, attorney Cook discussed with Illinois National the possibility of intervening in the product liability matter.

{¶5} Illinois National and the Wiles firm entered into a tolling agreement, which became effective on July 28, 2005. This agreement tolled the statute of limitations with regard to any potential claims Illinois National might have against the Wiles firm in relation to the *Harvey* matter.

{¶6} On May 19, 2006, Illinois National filed the instant matter against the Wiles firm to recover the $10,000,000 it paid to settle the *Harvey* case. The complaint presented claims for legal malpractice, breach of contract, and breach of fiduciary duty. Importantly, Illinois National did not file suit against any individual attorney from the Wiles firm. On January 3, 2007, new counsel substituted for the attorneys from the Wiles firm and began representing Illinois National in the product liability matter.

{¶7} On August 2, 2006, the Wiles firm filed a motion for summary judgment based upon the argument that Illinois National's claims were time-barred. The trial court denied this motion after finding that genuine issues of material fact existed with regard to when the attorney-client relationship ended.

{¶8} On January 23, 2008, the Wiles firm filed a second motion for summary judgment based upon *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth* (S.D.Ohio, 2007), 540 F.Supp.2d 900. That case involved a legal malpractice claim filed in the

United States District Court for the Southern District of Ohio by National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") against the law firm of Lane, Alton & Horst, LLC ("Lane Alton") and attorney Richard Wuerth. In that case, the district court held that the statute of limitations barred National Union's malpractice claim against Wuerth. Id. at 911. As a result, the district court dismissed him from the matter. It further held that Lane Alton could not be vicariously liable because the claims against Wuerth were time-barred at the time National Union filed suit. Id. at 912. Finally, the district court held that Lane Alton could not be directly liable for malpractice because it was not an attorney. Id. at 913. As a result, the district court granted summary judgment to Lane Alton. Id. at 914. National Union appealed to the United States Court of Appeals for the Sixth Circuit, which certified the following question to the Supreme Court of Ohio:

> Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?

Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth (C.A.6, 2009), 349 Fed.Appx. 983; see also *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 119 Ohio St.3d 1442, 2008-Ohio-4487. After accepting the certified question, the Supreme Court of Ohio held:

> We answer the certified question in the negative and hold that a law firm does not engage in the practice of law and therefore cannot commit legal malpractice directly and that a law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice.

Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth, 122 Ohio St.3d 594, 2009-Ohio-3601.

{¶9} After the proceedings in *Wuerth* concluded, the parties submitted supplemental briefing regarding the implications to the instant matter. On March 3, 2010, the trial court granted the Wiles firm's second summary judgment. Illinois National has timely appealed and raises the following assignment of error:

> The Trial Court erred by entering summary judgment in favor of Defendant-Appellee and against Plaintiff-Apellant.

On April 2, 2010, the Wiles firm filed a cross-appeal that it concedes is merely conditional and becomes ripe only if we reverse some portion of the summary judgment rendered by the trial court. Nevertheless, by way of its conditional cross-appeal, the Wiles firm argues that the trial court erred when it denied its first motion for summary judgment.

{¶10} In its sole assignment of error, Illinois National challenges the summary judgment granted by the trial court. At issue, therefore, is whether the trial court erred in granting the second motion for summary judgment filed by the Wiles firm.

{¶11} Appellate review of summary judgment motions is de novo. *Helton v. Scioto Cty. Bd. Of Commrs*. (1997), 123 Ohio App.3d 158, 162. "When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court." *Mergenthal v. Star Bank Corp.* (1997), 122 Ohio App.3d 100, 103.

{¶12} Summary judgment is proper only when the party moving for summary judgment demonstrates that (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could 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 most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp.*

Relations Bd. (1997), 78 Ohio St.3d 181, 183. Additionally, a moving party cannot discharge its burden under Civ.R. 56 by simply making a conclusory allegation that the non-moving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must affirmatively demonstrate by affidavit or other evidence allowed by Civ.R. 56(C) that the nonmoving party has no evidence to support its claims. Id.

{¶13} In the instant matter, the trial court concluded that Illinois National's claims for breach of contract and breach of fiduciary duty were subsumed within its legal malpractice claim. It then concluded that the Wiles firm was neither directly nor vicariously liable for legal malpractice based upon the circumstances of this case. On appeal, Illinois National presents three arguments in support of the position that a reversal is warranted.

{¶14} First, Illinois National argues that the trial court erred in granting summary judgment on its breach of contract and breach of fiduciary duty claims. It argues that the trial court erred by extending *Wuerth* beyond its legal malpractice claim.

{¶15} Claims arising out of an attorney's representation, regardless of their phrasing or framing, constitute legal malpractice claims that are subject to the one-year statute of limitations set forth in R.C. 2305.11(A). *Hillman v. Edwards*, 10th Dist. No. 08AP-1063, 2009-Ohio-5087, ¶19, citing *Sprouse v. Eisenman*, 10th Dist. No. 04AP-416, 2005-Ohio-463, ¶8; see also *Muir v. Hadler Real Estate Mgt. Co*. (1982), 4 Ohio App.3d 89, 90; see also *White v. Stotts*, 3d Dist. No. 1-10-44, 2010-Ohio-4827, ¶25-26. When the gist of a complaint sounds in malpractice, other duplicative claims are subsumed within the legal malpractice claim. *Pierson v. Rion*, 2d Dist. No. CA23498, 2010-Ohio-

1793, ¶14; see also *Polivka v. Cox*, 10th Dist. No. 01AP-1023, 2002-Ohio-2420, ¶2, fn. 1. Indeed, "[m]alpractice by any other name still constitutes malpractice." *Muir* at 90.

{¶16} " 'The term "malpractice" refers to professional misconduct, i.e., the failure of one rendering services in the practice of a profession to exercise that degree of skill and learning normally applied by members of that profession in similar circumstances.' " (Emphasis omitted.) *Wuerth*, 122 Ohio St.3d 594, ¶15, citing *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 211, citing 2 Restatement (Second) of the Law, Torts (1965), Section 299A.

{¶17} After our review of the claims in the instant matter, it is clear that the trial court did not err in construing Illinois National's complaint as presenting only a claim for malpractice. The breach of contract claim and breach of fiduciary duty claim only regard the alleged deficiencies and omissions in the legal representation of Illinois National. No other alleged conduct occurred apart from that forming the basis of the legal malpractice claim. As a result, the trial court properly found that Illinois National's breach of contract and breach of fiduciary duty claims were subsumed within its legal malpractice claim. We reject Illinois National's argument to the contrary.

{¶18} Next, Illinois National argues that the Wiles firm should be estopped from denying the existence of an attorney-client relationship between Illinois National and the Wiles firm. It cites the answer and discovery responses, in which the Wiles firm admitted to having an attorney-client relationship with Illinois National. It then cites an affidavit in which attorney Close averred that there was no attorney-client relationship amongst the parties to this matter. Illinois National therefore argues that the trial court erred by granting summary judgment because issues of fact remain regarding the attorney-client

relationship. Illinois National fails to explain its argument any further. Nor does it explain the legal significance or relevance of the attorney-client relationship in relation to its legal malpractice claim against the Wiles firm.

{¶19} The attorney-client relationship is relevant when analyzing a direct claim for legal malpractice. See *Wuerth*, 540 F.Supp.2d 900, citing *Krahn v. Kinney* (1989), 43 Ohio St.3d 103 ("It is well-settled that the first, and indispensable, element of a direct claim for legal malpractice is the existence of an attorney-client relationship."). Indeed, in *Wuerth*, National Union argued that a direct claim for legal malpractice could be maintained against Lane Alton because an attorney-client relationship existed between the parties. *Wuerth*, 122 Ohio St.3d 594, ¶10. After considering this argument, the Supreme Court of Ohio found:

> [A] law firm is a business entity through which one of more individual attorneys practice their profession. While clients may refer to a law firm as providing their legal representation or giving legal advice, in reality, *it is in every instance the attorneys in the firm who perform those services and with whom clients have an attorney-client relationship*. Thus, in conformity with our decisions concerning the practice of medicine, we hold that a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice.

(Emphasis added.) Id. at ¶18. Furthermore, in the instant matter, Illinois National even concedes that *Wuerth* has "rendered a direct claim against a law firm for legal malpractice a nullity." (Appellant brief, at 15.)

{¶20} Based upon the foregoing, it is clear that the trial court did not err in granting summary judgment based upon the discrepancies in the record. Because direct claims for legal malpractice against a law firm are a nullity, and attorneys are the parties to attorney-client relationships, there are no genuine issues of material fact based upon

the purported attorney-client relationship amongst the parties to this matter. We reject Illinois National's second argument in support of its assignment of error.

{¶21} Lastly, Illinois National argues it was error for the trial court to have granted summary judgment because the Wiles firm could be vicariously liable for the negligence of its attorneys. It asserts that it was injured by the negligence of the attorneys practicing on behalf of the Wiles firm. It argues that *Wuerth* did nothing to disrupt the longstanding principle that an injured plaintiff may sue an agent, a principal, or both. Additionally, it attempts to distinguish *Wuerth* on the grounds that the statute of limitations had already expired at the time the complaint was filed in *Wuerth*, whereas the statute had not yet expired as to the individual attorneys at the time the complaint was filed herein. We find all of these arguments to be unpersuasive.

{¶22} In legal malpractice claims, the vicarious liability of a law firm is based upon the agency relationship between a law firm and its attorneys. *Wuerth*, 122 Ohio St.3d 594, ¶22. "[T]he liability for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. *If there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions*." (Emphasis sic.) Id. quoting *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, ¶20, citing *Losito v. Kruse* (1940), 136 Ohio St. 183, and *Herron v. Youngstown* (1940), 136 Ohio St. 190. "A law firm cannot be held vicariously liable for legal malpractice absent a finding of malpractice by individual attorneys who are principals or associates at the firm." *Pierson v. Rion*, 2d Dist. No. CA23498, 2010-Ohio-1793, ¶45, citing *Wuerth*, 122 Ohio St.3d 594, paragraph two of the syllabus. Therefore, the vicarious liability of a law firm is necessarily dependent upon the direct liability of its principals or associates.

{¶23} With regard to the vicarious liability of Lane Alton in *Wuerth*, the Supreme Court of Ohio framed the issue before it as follows: "whether a law firm may be held vicariously liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants." (Emphasis omitted.) Id. at ¶12. The court explained the principles of agency and the derivative nature of the alleged vicarious liability of Lane Alton before holding: "[a] law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." Id at paragraph two of the syllabus.

{¶24} The instant matter falls squarely within the confines of *Wuerth*. The parties acknowledge that no individual attorneys have been sued for legal malpractice. Further, the statute of limitations regarding these attorneys has run. The trial court reached this determination, which Illinois National has not challenged on appeal. All of Illinois National's arguments presuppose the idea that attorneys Cook and Close indeed committed malpractice. As it stands, however, it is only alleged that attorneys Cook and Close committed malpractice. Because Illinois National neglected to file suit against these individual attorneys within the statute of limitations, these allegations will remain just that. The direct liability of attorneys Cook and Close will never be conclusively established. Absent such direct liability on the part of attorneys Cook and Close, the Wiles firm cannot be vicariously liable. See *Pierson* citing *Wuerth*, 122 Ohio St.3d 594; see also *JS Products, Inc. v. Standley Law Group, LLP* (S.D.Ohio, 2010), 2010 U.S. Dist. LEXIS 101567, *5, 2010 WL 3702638, *2 (Judgment on the pleadings granted to a law firm when "no individual lawyer was named as a defendant in this action nor can one be named now because the statute of limitations has run."); see also *Bohan v. Dennis C.*

Jackson Co., 8th Dist. No. 93756, 2010-Ohio-3422, ¶7 ("By naming only the firm as a defendant in this action, Bohan failed to name a party against whom relief in legal malpractice could be granted."). The trial court did not err in reaching this same conclusion.

{¶25} Having considered and found unpersuasive each and every argument in support of Illinois National's sole assignment of error, we find that the trial court did not err in granting summary judgment because there are no genuine issues of material fact, and the Wiles firm is entitled to judgment as a matter of law. Accordingly, we overrule Illinois National's sole assignment of error. Our resolution of Illinois National's appeal renders moot the Wiles firm's conditional cross-appeal, which pertains to the trial court's decision to deny the first summary judgment motion filed by the Wiles firm. As a result, we affirm the judgment rendered by the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and McGRATH, JJ., concur.