

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

HILDEBRANT FAMILY PARTNERSHIP, :
et al., :

Plaintiffs, :

CASE NOS. CA2009-06-077
CA2009-06-084

- vs - :

OPINION
6/14/2010

PROVIDENT BANK nka National City :
Bank, et al., :

Appellants/Cross-Appellees, :

- vs - :

DINSMORE & SHOHL, LLP, et al., :

Appellees/Cross-Appellant. :

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 04CV63041

McFadden, Winner, Savage & Segerman, James S. Savage, Douglas J. Segerman, 175 South Third Street, Suite 350, Columbus, Ohio 43215, for appellants/cross-appellees, Provident Bank nka National City Bank and First American Title Insurance

Lindhorst & Dreidame, James F. Brockman, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202, for appellee, Mercantile Title Agency and Title Industry Assurance Co.

Arzen, Molloy & Storm P.S.C., Mark G. Arzen, Aaron A. VanderLaan, 600 Greenup Street, P.O. Box 472, Covington, KY 41012, for appellee/cross-appellant, Dinsmore & Shohl, LLP

Freund Freeze & Arnold, LPA, Thomas B. Bruns, 105 East Fourth Street, Suite 1400, Cincinnati, Ohio 45202, for appellee, Griffin-Fletcher, LLP

HENDRICKSON, J.

{¶1} This is a consolidated appeal in which appellants/cross-appellees, Provident Bank and First American Title Insurance Company (collectively "appellants"), appeal decisions issued by the Warren County Court of Common Pleas in favor of appellee/cross-appellant, Dinsmore & Shohl, LLP, and appellee, Griffin-Fletcher, LLP (collectively "appellees"). For the reasons outlined below, we affirm the decision of the trial court.

{¶2} In May 2004, Provident Bank loaned funds in excess of \$3,000,000 to Northern Kentucky Professional Baseball ("NKPB") for the construction of a baseball stadium. NKPB owner Charles Hildebrant ("Mr. Hildebrant") personally guaranteed the loans. In addition, Mr. Hildebrant mortgaged real estate as collateral for the loans. The mortgaged parcels were owned by the Hildebrant Family Partnership, Ltd. and the Sandy Cove Corporation. First American Title Insurance Company provided title insurance in the transaction.

{¶3} A short time after the monies were disbursed, NKPB ceased operations and defaulted on the loans. It was then discovered that Mr. Hildebrant had fraudulently represented his status as a partner of the Hildebrant Family Partnership and president of the Sandy Cove Corporation. Mr. Hildebrant was a relative of the people who controlled the two entities, but had no proprietary interest in either entity. He was not an authorized agent of either company, nor did he have the right to encumber the mortgaged real estate. The documents purportedly demonstrating Mr. Hildebrant's authority to act on behalf of these companies were forgeries.

{¶4} In September 2004, the Hildebrant Family Partnership and the Sandy Cove Corporation filed suit against Provident Bank, First American Title Agency, and Mr. Hildebrant. The trial court subsequently issued a decision declaring the fraudulent

mortgages void.¹

{¶15} Seeking to recover for its losses, Provident Bank filed its first amended third-party complaint in May 2005. Relevant to this appeal, the complaint alleged claims of negligence and professional malpractice against Dinsmore & Shohl, LLP (the law firm representing Provident Bank in the loan transaction).² The complaint also asserted a claim of negligent misrepresentation against Griffin-Fletcher, LLP (the law firm representing NKPB and Mr. Hildebrant in the loan transaction).

{¶16} Both Griffin-Fletcher and Dinsmore & Shohl moved for summary judgment. In a decision rendered on September 7, 2007, the trial court awarded summary judgment to Griffin-Fletcher but denied Dinsmore & Shohl's motion.

{¶17} The matter was tried to a jury in February 2009. The jury returned a verdict in favor of Dinsmore & Shohl, after which appellants moved for judgment notwithstanding the verdict ("JNOV"). On April 1, 2009, the trial court issued a decision awarding judgment in favor of Dinsmore & Shohl. Thereafter, appellants filed a motion for new trial based upon juror misconduct. In two separate decisions issued on May 14, 2009, the trial court denied appellants' motion for JNOV and their motion for new trial.

{¶18} Appellants timely appeal, raising five assignments of error. Dinsmore & Shohl cross-appeals, raising four assignments of error. We shall address appellants' assignments of error slightly out of order to facilitate our analysis.

{¶19} Assignment of Error No. 1:

{¶10} "THE VERDICT OF THE JURY AND THE JUDGMENT REGARDING DEFENDANTS AND THIRD-PARTY PLAINTIFFS/APPELLANTS,

1. The proceedings pertaining to the complaint filed by the Hildebrant Family Partnership and the Sandy Cove Corporation are not at issue in the present appeal.

PROVIDENT BANK AND FIRST AMERICAN TITLE INSURANCE COMPANY'S, PROFESSIONAL NEGLIGENCE CLAIM AGAINST THIRD-PARTY DEFENDANT/APPELLEE, DINSMORE AND SHOHL, FOR FAILING TO ADHERE TO THE STANDARD OF CARE FOR ATTORNEYS BY NOT TIMELY FILING THE CORRECT DOCUMENTATION WITH THE KENTUCKY SECRETARY OF STATE THAT WAS NECESSARY FOR PROVIDENT BANK TO OBTAIN A FIRST LIEN ON THE BUSINESS ASSETS OF NKPB WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} Assignment of Error No. 3:

{¶12} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THIRD-PARTY DEFENDANT/APPELLEE, GRIFFIN-FLETCHER, LLP ON SEPTEMBER 7, 2007."

{¶13} In their first assignment of error, appellants argue that the jury verdict in favor of Dinsmore & Shohl was against the manifest weight of the evidence. Appellants insist that the law firm breached its professional duties by failing to timely file a certain financial statement with the Kentucky Secretary of State to perfect Provident Bank's security interest in NKPB's assets.

{¶14} In their third assignment of error, appellants challenge the trial court's award of summary judgment in favor of Griffin-Fletcher. According to appellants, Griffin-Fletcher made negligent misrepresentations regarding the validity of documents produced by Mr. Hildebrant and Provident relied upon these misrepresentations in closing on the loans.

{¶15} Because the first and third assignments of error are amenable to the same

2. The trial court permitted First American Title Insurance Company to join in Provident Bank's claim

disposition, they will be addressed together. Shortly after the appeal and cross-appeal were filed in this case, the Ohio Supreme Court released its decision in *National Union Fire Insurance Company v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601. In *Wuerth*, the high court addressed a question of state law certified by the United States Court of Appeals for the Sixth Circuit. The high court was asked to determine the following: "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?" *Id.* at ¶9.

{¶16} The Ohio Supreme Court split the certified question into two separate inquiries: (1) "whether a law firm may be *directly* liable for legal malpractice – i.e., whether a law firm, as an entity, can commit legal malpractice[,]" and (2) "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." *Id.* at ¶12. (Emphasis in original.)

{¶17} The high court answered the first inquiry in the negative. The court surveyed prior decisions involving the practice of medicine and observed that only individuals can commit medical malpractice because only individuals practice medicine. Similarly, the high court reasoned, only licensed individuals, rather than firms or other entities, can practice law. Due to the fact that a law firm itself cannot practice law, the high court held that "a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice." *Id.* at ¶18.

{¶18} In answering the second inquiry, the high court reviewed the doctrine of respondeat superior. In order for a principal to be vicariously liable for an agent's

actions, the court noted, an agent must be directly liable for an injury. Where no liability can be assigned to the agent, no liability can be imposed upon the principal for the actions perpetrated by the agent. Bearing these principles of agency law in mind, the high court held that "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 ¶26.

{¶19} We have scrutinized Provident Bank's first amended third-party complaint in the present matter, particularly its claims against Dinsmore & Shohl and Griffin-Fletcher. The complaint identified only the law firms as the objects of Provident Bank's malpractice-related claims. No individual attorneys or employees from the two law firms were named as defendants in the complaint.

{¶20} Applying *Wuerth*, we observe that the law firms of Dinsmore & Shohl and Griffin-Fletcher do not engage in the practice of law and cannot directly commit legal malpractice. *Id.* at ¶18. See, also, *Pierson v. Rion*, Montgomery App. No. CA23498, 2010-Ohio-1793, ¶44. Furthermore, neither law firm can be held vicariously liable for any alleged malpractice because Provident Bank's complaint failed to aver that one or more of the principals or associates at the firms were liable for legal malpractice. *Wuerth* at ¶26.

{¶21} In view of *Wuerth*, these oversights are fatal to Provident Bank's professional malpractice claims. It is of no import that *Wuerth* was released after the parties filed their separate appeals. We are bound to follow the dictates of common law as espoused by the Ohio Supreme Court. *Sherman v. Millhon* (June 16, 1992), Franklin App. No. 92AP-89, 1992 WL 142368 at *1. That includes high court cases that are released while a civil appeal is pending. See, e.g., *Bogan v. Johnson*, Clinton App. No. CA2003-04-010, 2004-Ohio-422, ¶18-20. Accordingly, applying *Wuerth*, we uphold the

trial court's respective decisions awarding judgment in favor of Dinsmore & Shohl and Griffin-Fletcher.

{¶22} Appellants' first and third assignments of error are overruled.

{¶23} Assignment of Error No. 2:

{¶24} "THE TRIAL COURT ERRED IN DENYING PROVIDENT BANK AND FIRST AMERICAN TITLE INSURANCE COMPANY'S, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT."

{¶25} Assignment of Error No. 4:

{¶26} "THE TRIAL COURT ERRED IN DENYING DEFENDANT AND THIRD-PARTY PLAINTIFFS/APPELLANTS, THE PROVIDENT BANK AND FIRST AMERICAN TITLE INSURANCE COMPANY'S[,] MOTION FOR NEW TRIAL[.]"

{¶27} Assignment of Error No. 5:

{¶28} "[THE TRIAL COURT ERRED] IN REFUSING TO TAKE EVIDENCE WITH REGARD TO [DEFENDANT AND THIRD-PARTY PLAINTIFFS/APPELLANTS, THE PROVIDENT BANK AND FIRST AMERICAN TITLE INSURANCE COMPANY'S, MOTION FOR NEW TRIAL] AFTER THE MATTER HAD BEEN SET FOR ORAL HEARING."

{¶29} Given that we do not see fit to disturb the verdict or judgment in favor of Dinsmore & Shohl, appellants' second assignment of error challenging the denial of their motion for JNOV is without merit. Likewise, appellants' fourth and fifth assignments of error pertaining to the denial of their motion for new trial are also without merit.

{¶30} Appellants' second, fourth, and fifth assignments of error are overruled.

{¶31} In view of our disposition of appellants' assignments of error, appellees' cross-assignments of error have been rendered moot. Therefore, the cross-

assignments will not be addressed. App.R. 12(A)(1)(c).

{¶32} Judgment affirmed.

BRESSLER, P.J., and RINGLAND, J., concur.