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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION

This case directly addresses the question as to whether this Court has the authority to contradict its own Rules for the Government of the Bar when making pronouncements of law and whether those pronouncements are of no force and effect pursuant to Ohio Const. Art. IV, Section 5(B). This Court, in *National Union Fire Insurance Company of Pittsburgh, PA v. Wuerth, et al.*, 122 Ohio St.3d 594 (Ohio, 2009), held that an entity cannot be liable for professional malpractice when none of the individuals involved were named as parties to the lawsuit or were no longer parties to the case. In *Wuerth*, the Plaintiff named the law firm and one of its attorneys in Federal Court, but the individual lawyer was dismissed out of the case. Because the question of vicarious liability of the entity was unsettled under Ohio law, this Court agreed to address two narrow issues:

- 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.

In its decision, this Court answered those questions in the negative, relying on court precedent dealing with medical malpractice.

This pronouncement is directly contrary to Rule VII, Section 5a of the Rules for the Government of the Bar, which states:

“(A)(1) Upon receipt of substantial, credible evidence demonstrating that an individual or entity has engaged in the authorized practice of law and poses a substantial threat of serious harm to the public, Disciplinary Counsel, the unauthorized practice of law committee of any regularly organized bar association, or the Attorney General, which shall be referred to as the relator, shall do both of the following:

- (a) Prior to filing a motion for an interim cease and desist order, make a reasonable attempt to provide the individual or entity, who shall be referred to as respondent, with notice, which may include notice by telephone, that a motion requesting an interim order that the respondent cease and desist engaging in the unauthorized practice of law will be filed with the Supreme Court and the Board.”

This Rule specifically addresses whether entities have the capability to practice law in Ohio (albeit, without authorization), and answers that question in the affirmative. The Rule does not state “individual and entity” but, rather, is clear that the unauthorized practice of law can be committed by either an individual OR an entity. This Court, *post-Wuerth*, reiterated that entities CAN practice law in two separate cases: *Ohio State Bar Association v. Am Foreclosure Specialists, LLC*, 2010-Ohio-148, and *Ohio State Bar Association v. United Fin. Sys Corp.*, 2010-Ohio-143. In those cases, no individuals were named as Respondents, but this Court went forward to enjoin the entity from practicing law in the State of Ohio. If, as *Wuerth* states, entities cannot practice law, and thus, cannot commit professional malpractice, how can an entity be enjoined from doing that which *Wuerth* states it is incapable of doing?

The Appellant asserts that pursuant to Ohio Const. Art. IV, Section 5(B), the

holding of *Wuerth* cannot withstand scrutiny because it contradicts the Rules for the Government of the Bar. Those Rules reign supreme pursuant to the Constitution, and could not be clearer on their face. The Appellant invites this Honorable Court to address this contradiction, and determine that consistent with its own Rules AND rulings *post-Wuerth*, entities do provide professional services to the public of Ohio, and thus, can be directly liable for professional malpractice.

STATEMENT OF THE CASE AND FACTS

On March 13, 2009, the Appellant filed a small claims complaint, alleging a dental malpractice claim against Glick, Layman and Associates in the Bedford Municipal Court. A hearing was scheduled, at which the Appellee orally moved to dismiss the complaint. The motion was denied, and the case was transferred to the regular docket. In October and December, 2009, pre-trials were scheduled at which neither a representative of the Appellee, nor Appellee's counsel appeared. At a third pre-trial, Fred Glick finally appeared, and he was ordered to obtain counsel before February 12, 2010. Richard Kaplow made his appearance on that date.

Counsel for the Plaintiff filed an Amended Complaint along with a Motion for Extension of Time to Obtain an Affidavit of Merit, which was granted in the face of Appellee's Motion to Dismiss on that basis. At a pre-trial held May 4, 2011, the Appellant produced the Affidavit of Merit, and the Court ruled that the cause could go forward, and set a discovery cut-off of August 20, 2010. On July 6, 2010, the Appellee interposed a third Motion to Dismiss, based upon the holding in *Wuerth* that entities

cannot engage in professional malpractice because it is incapable of rendering professional services in the first instance. On July 28, 2010, the Trial Court granted the Appellee's Motion, and before the Court dismissed the Defendant's counterclaim, the Appellant filed a Motion for Reconsideration in light of the Supreme Court's Rules for the Government of the Bar and the *post-Wuerth* cases noted above. Thereafter, all claims were resolved by Court Order, and on September 21, 2010, the Appellant filed a Notice of Appeal.

On appeal, the Appellee did not address the constitutional argument posited by the Appellant, but rather, made the argument that the Motion for Reconsideration was a "nullity." Appellant argued that inasmuch as the Motion for Reconsideration was filed prior to the judgment resolving all claims of all the parties, it was not a nullity, but rather, recognized that a Trial Court always has the authority to re-visit its interlocutory orders prior to final judgment. On April 7, 2011, the Eighth District Court of Appeals agreed that the Motion for Reconsideration was properly interposed prior to the final judgment, and that the merits of the appeal could, thus, be reached. However, it also ruled that the pronouncement in *Wuerth* does not contradict the Rules for the Government of the Bar, and did not at all address the Appellant's argument pursuant to Ohio Const. Art. IV, Sec. 5(B), that *Wuerth* should be found to be of "no further force and effect."

LAW AND ARGUMENT

Proposition of Law No. 1: This Court's pronouncement in *National Union Fire Ins. Co. v. Wuerth, et al.*, (2009), 122 Ohio St.3d 594 is contrary to the Rules for the Government of the Bar, and this Court's decisions *post-Wuerth*, and as such, should be deemed to be in no further force and effect pursuant to Ohio Const. Art. IV, Section 5(B)

Ohio Const. Art. IV, Section 5(B) provides that all laws in conflict with this

Court's Rules "shall be of no further force and effect." Appellant asserts that the holding in *Wuerth, infra*, is plainly contrary to the Rules of the Government of the Bar, and as such, should be deemed "of no further force and effect" by this Honorable Court.

The record in this case clearly shows that ENTITIES ALONE, and NOT ONLY individuals have been sanctioned by this Court for the unauthorized practice of law. *Ohio State Bar Association v. Am Foreclosure Specialists, LLC*, 2010-Ohio-148; *Ohio State Bar Association v. United Fin. Sys. Corp.*, 2010-Ohio-143. Both these cases post-date the decision in *Wuerth*, and demonstrate that entities can provide professional services to the consuming public in Ohio. As such, these entities are entirely capable of committing professional misconduct in their own right, and not by virtue of individual actions. The Appellant asserts that only this Court can rectify this contradiction, and that it should do so by re-affirming the Rules for the Government of the Bar and its *post-Wuerth* decisions pursuant to those Rules.

CONCLUSION

This case presents a contradiction that only this Honorable Court can resolve. The Appellant implores this Court to exert its jurisdiction to do so.

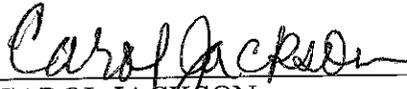
Respectfully submitted,


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CERTIFICATE OF SERVICE

A copy of the foregoing was served by ordinary U.S. mail on Michael Fitzpatrick, 55 Public Square, #930, Cleveland, OH 44113 and Richard Kaplow, 808 Rockefeller Bldg., 614 Superior Avenue, West, Cleveland, OH 44113 on this 20 day of May, 2011.



CAROL JACKSON

[Cite as *Hignite v. Glick, Layman & Assoc., Inc.*, 2011-Ohio-1698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95782

DIANNE HIGNITE

PLAINTIFF-APPELLANT

vs.

GLICK, LAYMAN & ASSOCIATES, INC.

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Bedford Municipal Court
Case No. 09 CVF 01762

BEFORE: Boyle, J., Blackmon, P.J., and Cooney, J.

RELEASED AND JOURNALIZED: April 7, 2011

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MARY J. BOYLE, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R.

11.1 and Loc.R. 11.1.

{¶ 2} Plaintiff-appellant, Dianne Hignite, appeals the dismissal of her complaint against defendant-appellee, Glick, Layman & Associates (“the dental practice”) on her claim for dental malpractice. Finding no merit to the appeal, we affirm.

Procedural History and Facts

{¶ 3} In March 2009, Hignite filed a small claims complaint in the Bedford Municipal Court against the dental practice, alleging that she “was left in pain and agony” from improper services rendered by the dental office. She sought \$3,000 in damages. Approximately one year later, Hignite filed an amended complaint, alleging that “in October through December 2008, the Defendant, its agents, servants and/or employees negligently provided dental care and treatment.” In May 2010, the dental practice subsequently answered the complaint and asserted a counterclaim, seeking payment for services provided. Two months later, the dental practice filed a motion to dismiss the complaint, arguing that the dental practice cannot be liable for dental malpractice under a theory of respondeat superior when the statute of limitations has expired against the individual dentists. The dental practice established that Hignite failed to commence any action against the individual dentists of the practice within the one-year statute of limitations period.

{¶ 4} On July 28, 2010, the trial court treated the motion to dismiss as a motion for judgment on the pleadings and entered judgment in favor of the dental practice on Hignite’s

claim. Hignite subsequently filed a motion for reconsideration, arguing that a dental practice can be held liable for dental malpractice, despite the failure to name an individual dentist. The trial court subsequently scheduled a hearing on the motion for reconsideration but the hearing was never held. Instead, upon the dental practice's filing of a notice of dismissal of its counterclaim, the trial court issued a judgment entry on August 23, 2010, dismissing the dental practice's counterclaim, thereby disposing of all of the claims in the case.

{¶ 5} Hignite subsequently filed the instant appeal on September 21, 2010, attaching the trial court's order and opinion awarding the dental practice judgment on Hignite's complaint. She raises a single assignment of error, arguing that the trial court erred in denying her motion for reconsideration because she properly stated a claim for dental malpractice against the dental practice.

Motion for Reconsideration

{¶ 6} Before addressing the substance of Hignite's argument, we first address the dental practice's contention that Hignite's appeal should be dismissed because she is purporting to appeal a decision that the trial court never made, namely, that the trial court never ruled on the motion for reconsideration. We find the dental practice's argument misplaced. It is well settled that a motion not ruled upon is implicitly deemed denied. See

Fitworks Holdings, L.L.C. v. Pitchford, 8th Dist. No. 88634, 2007-Ohio-2517. Once the trial court entered a dismissal of the dental practice's counterclaim, thereby disposing of all the claims, the trial court's judgment in favor of the dental practice became final, and the motion for reconsideration was implicitly deemed denied.

{¶ 7} We further recognize if the trial court's dismissal of Hignite's complaint had been a final order, the trial court would have had no authority to reconsider its ruling. Under such circumstances, a motion for reconsideration is considered a legal nullity because judgments and final orders are not subject to motions for reconsideration either expressly or impliedly. *Pitts v. Ohio Dept. of Transp.* (1981), 67 Ohio St.2d 378, 423 N.E.2d 1105, paragraph one of the syllabus. Indeed, "Civ.R. 60(B) dictates that a party's ability to seek relief from a final judgment is limited to the methods expressly provided in the rules, and a motion for reconsideration is only impliedly referenced in Civ.R. 54(B)." *Syphard v. Moore Peterson/Accordia*, 7th Dist. No. 09MA151, 2010-Ohio-6501, ¶13, citing *Pitts* at 379-380. But the Ohio Supreme Court has explicitly noted that "interlocutory orders are subject to motions for reconsideration" pursuant to Civ.R. 54(B). *Pitts* at 379. Here, at the time that Hignite filed her motion for reconsideration, the trial court had not yet entered a final order — the granting of the dental practice's motion for judgment on the pleadings was an interlocutory order. The trial court therefore had the authority to consider the motion, and

we cannot summarily dismiss her assignment of error. Compare *Miles Landing Homeowners Assn. v. Harris*, 8th Dist. No. 88471, 2007-Ohio-3411 (recognizing that a motion to reconsider a final order is a legal nullity and trial court does not err in denying motion).

{¶ 8} We now turn to the merits of Hignite’s assignment of error.

Judgment on the Pleadings

{¶ 9} The gravamen of Hignite’s sole assignment of error is that the trial court erred in granting judgment in favor of the dental practice on her claim for dental malpractice. We review an order granting judgment on the pleadings de novo, applying the same standard of review the trial court used. *Vinicky v. Pristas*, 163 Ohio App.3d 508, 2005-Ohio-5196, 839 N.E.2d 88, ¶13. “The determination of a motion for judgment on the pleadings is limited solely to the allegations in the pleadings and any writings attached to the pleadings. Pursuant to Civ.R. 12(C), dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief.” (Internal quotations and citations omitted.) Id.

{¶ 10} Hignite contends that the trial court erroneously relied on the Ohio Supreme Court's decision in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, in granting judgment in favor of the dental practice. In *Wuerth*, the court addressed the issue of a law firm's liability for legal malpractice. Applying the same reasoning used in the context of medical malpractice suits, the court held that (1) a law firm does not engage in the practice of law and therefore cannot commit legal malpractice; and (2) a law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice. *Id.* at paragraphs one and two of the syllabus. Relying on *Wuerth*, the trial court granted judgment in favor of the dental practice, recognizing that the dental practice "could not possibly be found vicariously liable for malpractice if [Hignite] did not sue any of the named dentists individually." The trial court further noted that Hignite could no longer name the individual dentists because the statute of limitations on any action against them had run.

{¶ 11} Although Hignite does not dispute the holding in *Wuerth*, she argues that subsequent Ohio Supreme Court cases have contradicted this holding. Specifically, she relies on two disciplinary cases wherein the Ohio Supreme Court approved consent decrees enjoining the respondents from engaging in the unauthorized practice of law. See *Ohio State Bar Assn. v. Am. Foreclosure Specialists, L.L.C.*, 124 Ohio St.3d 300, 2010-Ohio-148,

921 N.E.2d 1053, and *Ohio State Bar Assn. v. United Fin. Sys. Corp.*, 124 Ohio St.3d 301, 2010-Ohio-143, 921 N.E.2d 1054. Contrary to Hignite's argument, we find no basis to conclude that the Ohio Supreme Court's sanctioning of entities for the unauthorized practice of law overrules or conflicts with *Wuerth*.

{¶ 12} We likewise find Hignite's reliance on the Ohio Supreme Court's recent decision in *Squires Sanders & Dempsey, L.L.C. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, 937 N.E.2d 553, for this same proposition to be misplaced. Again, the court does not even mention *Wuerth*, let alone address a law firm's liability for legal malpractice. Hignite has extracted isolated sentences from the opinion for the proposition that the court implicitly recognizes that a law firm, and not just the attorneys, can practice law. She therefore contends that a dental practice can be found to engage in services provided by its dentists. The context of the language reveals, however, that the court was referring to the services rendered by the attorneys.

{¶ 13} Consistent with the holding in *Wuerth*, we find that the trial court did not err in granting judgment in favor of the dental practice. Given that Hignite is unable to demonstrate that any of the individual dentists were liable for dental malpractice, we agree that the dental practice therefore cannot be held liable.

{¶ 14} Hignite's sole assignment of error is overruled.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

PATRICIA ANN BLACKMON, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR