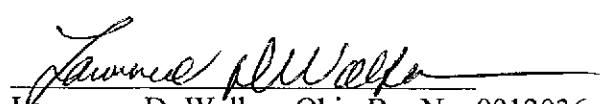
IN THE
SUPREME COURT OF OHIO

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,	:	
Petitioner,	:	Case No. 2008-1334
v.	:	
RICHARD O. WUERTH, *et al.*,	:	**MOTION TO STAY**
Respondents.	:	

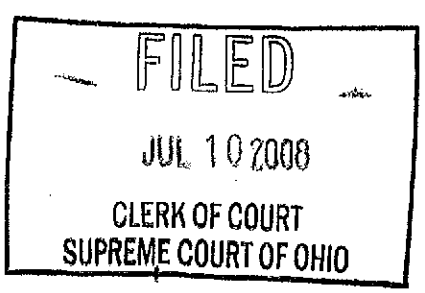
Respondents Richard O. Wuerth and Lane Alton & Horst LLC (hereinafter "Respondents") move this Court to stay this proceeding pending decision by the United States Court of Appeals for the Sixth Circuit on the Motion For Reconsideration With Respect To Its Certification Order, which motion was filed by Respondents on July 10, 2008 in the case of *National Union Fire Insurance Co. of Pittsburgh, PA v. Richard O. Wuerth, et al.*, Case No. 07-4035 on the docket of that Court.

This motion is based upon the following memorandum.

Respectfully submitted,



Lawrence D. Walker, Ohio Bar No. 0012036
Benjamin J. Parsons, Ohio Bar No. 0076813
TAFT STETTINIUS & HOLLISTER LLP
21 East State Street, Suite 1200
Columbus, Ohio 43215-4221
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
Email: walker@taftlaw.com
Email: parsons@taftlaw.com
Attorneys for Respondents



MEMORANDUM

Petitioner National Union Fire Insurance Co. of Pittsburgh, PA (hereinafter "National Union") sued Respondents for legal malpractice in the Eastern Division of the United States District Court for the Southern District of Ohio. The Honorable George C. Smith, a Judge of that Court, granted Respondents' motion for summary judgment on July 17, 2007. *See National Union Fire Insurance Co. of Pittsburgh, PA v. Wuerth,* 540 F. Supp.2d 900 (S.D. Ohio 2007).

National Union timely appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit, where the matter was docketed as Case No. 07-4035. The case has been fully briefed in the Sixth Circuit, and oral argument was conducted on June 11, 2008.

On July 8, 2008, the Sixth Circuit filed a Certification Order certifying a question of Ohio law to this Court pursuant to Rule XVIII of its Rules of Practice. That Certification Order was entered without any prior notice to National Union or Respondents and without giving them an opportunity to be heard on whether the Sixth Circuit's question was appropriate for certification to this Court under Rule XVIII of its Rules of Practice.

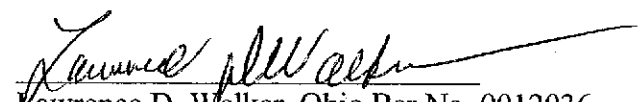
On July 10, 2008, Respondents filed a motion with the Sixth Circuit asking that it reconsider its Certification Order and on reconsideration to vacate it. A copy of that motion is attached. Therein, Respondents argued that the certified question had not been briefed or argued by the parties, had not been a contested issue in the District Court, was not being contested before the Sixth Circuit, and was not "determinative" of the appeal for the purposes of this Court's Rule XVIII. Respondents also contended that there was, in fact, ample controlling precedent from this Court with respect to the certified question.

Respondents respectfully submit that this Court should stay this proceeding until the Sixth Circuit has had an opportunity to reconsider its Certification Order. As explained above,

that Order was entered without prior notice to the parties and without the benefit of their views on whether certification is necessary or appropriate under this Court's Rule XVIII. The pending motion for reconsideration is the Sixth Circuit's first opportunity to hear from the parties on this important issue. Under the circumstances, there is, Respondents submit, a substantial likelihood that the Sixth Circuit may vacate its Certification Order on reconsideration.

For all of the foregoing reasons, Respondents Richard O. Wuerth and Lane, Alton & Horst LLC request that their motion be granted and that this proceeding be stayed pending decision by the Sixth Circuit on the motion for reconsideration now pending before it.

Respectfully submitted,

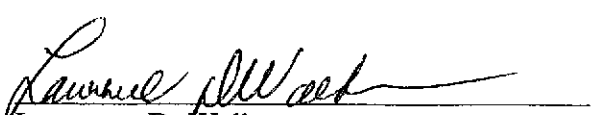


Lawrence D. Walker, Ohio Bar No. 0012036
Benjamin J. Parsons, Ohio Bar No. 0076813
TAFT STETTINIUS & HOLLISTER LLP
21 East State Street, Suite 1200
Columbus, Ohio 43215-4221
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
Email: walker@taftlaw.com
Email: parsons@taftlaw.com
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was mailed, postage prepaid, this July 10, 2008 to:

Joseph M. Callow, Jr., Esq.
Keating, Muething & Klekamp PPL
1400 Provident Tower
One East Fourth Street
Cincinnati, OH 45202
Attorney for Petitioner



Lawrence D. Walker

FILED
JUL 10 2008
LEONARD GREEN, Clerk

CASE NO. 07-4035

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA,

Plaintiff-Appellant,

v.

RICHARD O. WUERTH; LANE ALTON & HORST,

Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of Ohio

DEFENDANTS-APPELLEES' MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR PANEL REHEARING WITH RESPECT TO ITS CERTIFICATION ORDER FILED ON JULY 8, 2008

Lawrence D. Walker
Benjamin J. Parsons
TAFT STETTINIUS & HOLLISTER LLP
21 East State Street, Suite 1200
Columbus, Ohio 43215-4221
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
Email: walker@taftlaw.com
Email: parsons@taftlaw.com
Attorneys for Defendants-Appellees

Defendants-Appellees Richard O. Wuerth and Lane Alton & Horst LLC (hereinafter "Defendants") respectfully move this Court pursuant to Rule 27 of the Federal Rules of Appellate Procedure to reconsider its Certification Order filed on July 8, 2008, and, on reconsideration, to vacate that Order.

In the alternative, Defendants respectfully petition this Court pursuant to Rule 40 of the Federal Rules of Appellate Procedure for a panel rehearing with respect to the Certification Order filed on July 8, 2008, and, on rehearing, to vacate that Order.

The foregoing motion and petition are based upon the following memorandum.

Respectfully submitted,

Lawrence D. Walker
Benjamin J. Parsons
TAFT STETTINIUS & HOLLISTER LLP
21 East State Street, Suite 1200
Columbus, Ohio 43215-4221
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
Email: walker@taftlaw.com
Email: parsons@taftlaw.com
Attorneys for Defendants-Appellees

MEMORANDUM

I. INTRODUCTION

In its Certification Order filed on July 8, 2008, this Court certified the following question to the Supreme Court of Ohio pursuant to Rule XVIII of that Court's Rules of Practice:

> 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? [Certification Order filed July 8, 2008 at p. 5]

On the first page of its Certification Order, it stated:

> Resolution of this appeal requires us to determine whether, under Ohio law, a legal malpractice claim can 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.

The foregoing were neither briefed nor argued by the parties. Plaintiff and Defendants did not list them in the "Statement of the Issues " of their briefs. Plaintiff has never contended that it could sue Lane Alton for the alleged malpractice of Richard Wuerth or other lawyers in the firm even though the claim against Mr. Wuerth was time-barred and the other lawyers were never sued. Indeed, in the footnote on page 6 of its Reply Brief, it

expressly acknowledged that a law firm can be vicariously liable for legal malpractice only if one or more of its lawyers is liable:

> As Defendants themselves have recognized, "to be vicariously liable, one or more of [the firm's] lawyers must be liable."

Under Section 1 of Rule XVIII of the Ohio Supreme Court's Rules of Practice, a question should be certified only if it "may be determinative of the proceeding and for which there is no controlling precedent in the decisions of [the Ohio] Supreme Court." The question this Court has certified is not "determinative" of this appeal and, in any event, there is controlling precedent from the Ohio Supreme Court with respect to it. Accordingly, Defendants respectfully submit that this Court should vacate its Certification Order filed on July 8, 2008.

II. ARGUMENT

A. Whether A Legal Malpractice Action Can Be Maintained Against A Law Firm For The Alleged Malpractice Of Attorneys In The Firm Who Have Been Adjudged Not Liable Or Who Were Never Sued Is Not A Determinative Question On This Appeal

As stated above, the certified question was neither briefed nor argued by Plaintiff or Defendants. It was not contained in the "Statement Of The Issues" of any of the parties. *See* Pl. Brief at p. 2; Def. Brief at p. 1. Because none of the parties briefed or argued the certified question or listed

it as one of the issues presented for review, Defendants respectfully submit that it cannot be "determinative" of this appeal.

Whether a law firm can be liable for the legal malpractice of lawyers in the firm who were adjudged not liable or who were never sued was an issue in the District Court. Citing the recent Ohio Supreme Court case of *Comer v. Risko* (2005), 106 Ohio St. 3d 185, 833 N.E. 2d 712, and this Court's decision in *Flynt v. Brownfield, Bowen & Bally,* 882 F. 2d 1048 (6th Cir. 1989), Judge Smith held:

> It is a well-settled principle of Ohio law that for the principal to be liable, the agent must be liable. ....
>
> * * * * *
>
> Plaintiff has not argued against this well-settled principle ... (R. 124 Opinion and Order, pg. 20, Apx. pg. 56).

"Plaintiff has not argued against this well-settled principle" in this Court either. As set forth above, it expressly adopted it in its Reply Brief. *See* Pl. Reply Brief at p. 6, n 2.

The question this Court has certified to the Ohio Supreme Court was never an issue in the District Court and is not an issue in this Court. Accordingly, it cannot be "determinative" of this appeal.

B. There Is Controlling Ohio Supreme Court Precedent Regarding The Certified Question

Only three years ago, the Ohio Supreme Court held that a medical malpractice claim cannot be maintained against a hospital if the allegedly negligent physician agents could not be adjudged liable. In *Comer v. Risko, supra* (2005), 106 Ohio St. 3d 185, 833 N.E. 2d 712, the plaintiff sued a hospital claiming that two physicians, who allegedly were its agents, committed malpractice. The plaintiff did not sue the physicians who committed the alleged malpractice. After the statute of limitations on the plaintiff's unasserted malpractice claims against the physicians had expired, the trial court granted the hospital's motion for summary judgment. In affirming the trial court's judgment, the Ohio Supreme Court held:

> Consequently, a direct claim against a hospital premised solely upon the negligence of an agent who cannot be found liable is contrary to basic agency law.
>
> * * * * *
>
> Drs. Wall and Schlesinger, the ... physicians who read and interpreted the x-rays, were not named defendants in this case. The statute of limitations as to them has expired, thereby extinguishing their liability, if any. In the absence of the tortfeasor's primary liability, there is no liability that may flow through to the hospital on an agency theory. Consequently, there is no genuine issue of material fact, and [the defendant-hospital] is entitled to

> judgment as a matter of law. (106 Ohio St.3d at pp. 190-192; emphasis added)

Defendants respectfully submit that the foregoing holding of the Ohio Supreme Court from 2005 is a "controlling precedent" here. And, that holding is not particularly novel. In *Flynt v. Brownfield, Bowen & Bally, supra,* 882 F. 2d 1048 (6th Cir. 1989), a case decided under Ohio law, this Court affirmed a summary judgment granted to a lawyer alleged to be vicariously liable for the legal malpractice of another attorney because the allegedly negligent attorney himself was not liable.

As Defendants explained at oral argument, Plaintiff's claim of "direct liability" against Lane Alton is based upon the alleged negligence of lawyers in the firm. *See* Pl. Brief at pp. 17-18, 32-33. Those are claims of vicarious liability. In *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251, 553 N.E. 2d 1038, the Ohio Supreme Court held:

> It is a fundamental maxim of law that a person cannot be held liable, other than derivatively, for another's negligence. In an employment setting such as is before this court today, the most common form of derivative or vicarious liability is that imposed by the law of agency, through the doctrine of *respondeat superior*. (50 Ohio St. 3d at pp. 254-255, 553 N.E. 2d 1042-1043)

Similarly, in *Comer v. Risko, supra* (2005), 106 Ohio St. 3d 185, 833 N.E. 2d 712, the Supreme Court stated:

> An agent who committed the tort is primarily liable for its actions, while the principal is merely secondarily liable. [Citations omitted]. (106 Ohio St. 3d at p. 189, 833 N.E. 2d at p. 716)

According to the foregoing recent decisions of the Ohio Supreme Court, the liability of a principal for the negligence of its agent is vicarious. According to those same decisions, the principal can be vicariously liable only if the agent is liable.

On pages 2 and 3 of the Certification Order, this Court cited § 58 of *The Restatement (Third) of the Law Governing Lawyers* (2000). That section is entitled "Vicarious Liability" and Comment *a* thereto provides:

> This Section sets forth the vicarious liability of a law firm and its principals.

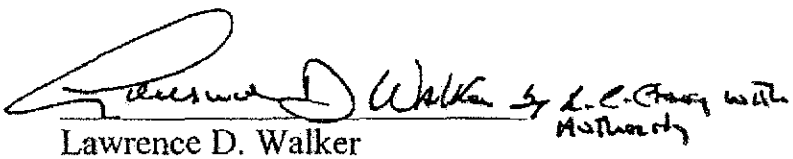
Plainly, the liability of a law firm for legal malpractice is vicarious and, according to the authorities cited above, that vicarious liability can attach only if the allegedly negligent lawyer is adjudged liable. As Judge Smith observed, the foregoing are "well-settled principles" which Plaintiff never contested in the District Court, did not contest here, and which need no further consideration by the Ohio Supreme Court.

III. CONCLUSION

Defendants respectfully submit that the question this Court has certified to the Ohio Supreme Court is not "determinative." Moreover, it has

been definitively answered by both the Supreme Court and this Court. Accordingly, this Court should reconsider or, in the alternative, rehear its July 8, 2008 Certification Order and on reconsideration or rehearing vacate it.

Respectfully submitted,



Lawrence D. Walker
Benjamin J. Parsons
TAFT STETTINIUS & HOLLISTER LLP
21 East State Street, Suite 1200
Columbus, Ohio 43215-4221
Telephone: (614) 221-2838
Facsimile: (614) 221-2007
Email: walker@taftlaw.com
Email: parsons@taftlaw.com
Attorneys for Defendants-Appellees

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Motion were personally delivered to the offices of Joseph M. Callow, Jr., Esq., Keating, Muething & Klekamp PPL, 1400 Provident Tower, One East Fourth Street, Cincinnati, Ohio 45202, Attorney for Plaintiff-Appellant, this 10th day of July, 2008.

Lawrence D. Walker