

**IN THE  
SUPREME COURT OF OHIO**

**NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH, PA,**

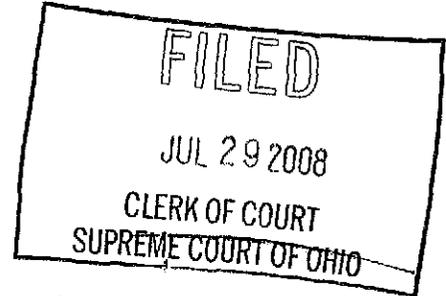
Petitioner,

v.

**RICHARD O. WUERTH, et al.,**

Respondents.

Case No. 2008-1334



**RESPONDENTS'  
PRELIMINARY MEMORANDUM PURSUANT TO RULE XVIII(6)**

**STATEMENT OF THE CASE**

Petitioner National Union Fire Insurance Company of Pittsburgh, PA (hereinafter "National Union") sued Respondent Richard O. Wuerth for legal malpractice in the United States District Court for the Southern District of Ohio. It also sued Mr. Wuerth's law firm, Respondent Lane Alton & Horst LLC (hereinafter "Lane Alton"), claiming that it was vicariously liable for Mr. Wuerth's alleged malpractice and also "directly" liable for the alleged malpractice of Mr. Wuerth and other lawyers in the firm.

In a lengthy Opinion and Order issued on July 17, 2007, the Honorable George C. Smith, a Judge of the United States District Court for the Southern District of Ohio, granted summary judgment to both Mr. Wuerth and Lane Alton. *See National Union Fire Insurance Company of Pittsburgh, PA v. Wuerth* (S.D. Ohio 2007), 540 F. Supp. 2d 900. He held that National Union's legal malpractice claim against Mr. Wuerth was barred by the statute of limitations. *Id.* at 905-912.

Citing this Court's recent decision in *Comer v. Risko*, 106 Ohio St. 3d 185, 2005-Ohio-4559, 833 N.E. 2d 712, as well as other authorities, Judge Smith also held that Lane Alton could not be vicariously liable for the alleged malpractice of Mr. Wuerth because Mr. Wuerth himself was not liable. *Id.* at 912. In granting summary judgment to Lane Alton on National Union's so-called "direct claim" for legal malpractice, the District Court again relied upon this Court's recent decision in *Comer v. Risko* and held:

... Plaintiff's purported "direct claims" against Defendant Lane Alton are not "direct." According to Plaintiff's Memorandum in Opposition, its "direct claims" are based exclusively on the alleged acts or omissions of attorneys Defendant Wuerth, Beth Lashuk, Rick Marsh, and Jeffrey Hutson. (*See* Pl.'s Memo. in Opp. at 16-17). Plaintiff is claiming that Defendant Lane Alton is liable for their malpractice. These are claims for vicarious, not direct, liability. ... Defendant Lane Alton can only be liable for the alleged malpractice of Mr. Wuerth, Mr. Marsh, Mr. Hutson, and Ms. Lashuk, only if they are liable. Mr. Wuerth is not liable, because Plaintiff's claims against Mr. Wuerth were untimely. ... Mr. Marsh, Mr. Hutson, and Ms. Lashuk cannot be liable because they have never been sued and it is too late to sue them now. (*Id.* at 913-914) <sup>1</sup>

National Union appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit. The case has been fully briefed, and oral argument was conducted on June 11, 2008.

On July 8, 2008, the Sixth Circuit entered an order certifying the following question of Ohio law to this Court: 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

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<sup>1</sup> In *dictum*, Judge Smith also stated "that due to the nature of a legal malpractice claim, a 'direct claim' for legal malpractice can only be brought against a member of the legal profession" and "that a 'direct claim' for legal malpractice cannot be asserted against a non-attorney." *Id.* at 912-913. The District Court cited substantial authority in support of its observation. *See Id.* at 912-913

from the lawsuit or were never sued in the first instance? (Certification Order at p. 5; emphasis added).

The certified question was neither briefed nor argued in the Sixth Circuit. It was an uncontested issue in the District Court. Judge Smith stated:

It is a well-settled principle of Ohio law that for the principal to be liable, the agent must be liable. [Citations omitted]

Plaintiff has not argued against this well-settled principle.  
... (*Id.* at 912)

And, it is an uncontested issue in the Sixth Circuit. National Union expressly conceded it in its Reply Brief filed with that Court:

As Defendants themselves have recognized, "to be vicariously liable, one or more of [the firm's] lawyers must be liable."  
(National Union Sixth Circuit Reply Brief at p. 6, n.2)

Not only is the certified question not an issue in the appeal pending before the Sixth Circuit, but there is recent and controlling precedent from this Court with respect to it. Only three years ago this Court definitively held in *Comer v. Risko, supra*, that, in cases of vicarious liability, the agent must be liable in order for the principal to be liable.

Respondents respectfully submit that this Court should decline to answer the certified question. It is not an issue in the pending appeal, and, as the following demonstrates, there is already controlling precedent from this Court with respect to it.

### **ARGUMENT**

#### **This Court Has Definitively Held That, In Cases Of Vicarious Liability, The Agent Must Be Liable In Order For The Principal To Be Liable**

The Sixth Circuit's Certification Order provides:

It is generally recognized that "[a] law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was

acting in the ordinary course of the firm's business or with actual or apparent authority." Restatement (Third) of the Law Governing Lawyers § 58 (2000). The unsettled issue now before this panel is 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. (Certification Order at pp. 2-3; emphasis added)

The section of the *Restatement* cited by the Sixth Circuit is entitled "Vicarious Liability," and Comment *a* thereto provides:

This Section sets forth the vicarious liability of a law firm and its principals. It presupposes that a firm principal or employee is liable on one or more claims under §§ 48-57 [which impose liability on attorneys for legal malpractice] and considers when the firm itself and each of its principals share in that liability. (Emphasis added)

It is well-settled that law firms can be vicariously liable for legal malpractice committed by attorneys in the firm. *See Restatement Third, The Law Governing Lawyers* (2000) § 58; 1 *Mallen & Smith, Legal Malpractice* (2007 Ed.), §§ 5.3, 5.4, 5.5, and 5.6; *Brown v. Morganstern* (Ohio App. 2004), 2004 WL 1238776, 2004-Ohio-2930, ¶ 40, *appeal den.*, 103 Ohio St. 3d 1480, 816 N.E. 2d 255 (2004); *Soltis v. Wegman, Hessler, Vanderburg & O'Toole* (Ohio App. 1997), 1997 WL 64049 \*3, *appeal den.*, 79 Ohio St. 3d 1457, 681 N.E. 2d 440 (1997).

The Sixth Circuit's question is whether, under Ohio law, a principal can be vicariously liable for the negligence of its agent when the agent has been adjudged not liable or otherwise cannot be found liable. This Court definitively answered that question only three years ago.

In *Comer v. Risko, supra*, the plaintiff sued a hospital claiming that it was vicariously liable for the alleged medical malpractice of two physicians who purportedly were its agents. 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, this 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. (*Id.* at ¶¶ 25 and 29; emphasis added)

This Court's recent decision in *Comer* answers the Sixth Circuit's question. A principal can be vicariously liable for the negligence of its agent only if the agent is liable. This Court's holding is entirely consistent with, and supported by, the statement in Comment *a* to § 58 of the *Restatement* that a law firm's vicarious liability for legal malpractice “presupposes that a firm principal or employee is liable.” *See, supra*, at p. 4. There is controlling and recent precedent from this Court with respect to the Sixth Circuit's question. Accordingly, it does not fall within the purview of Rule XVIII of the Rules of Practice, and this Court should decline to answer it.

**This Court Has Definitively Held That, In Cases Where The Liability Of The Principal Is Premised Solely Upon The Negligence Of An Agent, The Principal's Liability Is Vicarious**

Respondents expect that National Union will argue that the Sixth Circuit wants to know if a law firm can be directly -- -- as opposed to vicariously -- -- liable for legal malpractice committed by a lawyer in the firm if that lawyer has been adjudged not liable or otherwise cannot be found liable. The context of the Sixth Circuit's question is the vicarious liability of a law firm under § 58 of the *Restatement Third, Law Governing Lawyers (2000)*. *See* Certification

Order at pp. 2-3. That is the only liability law firms have for legal malpractice committed by their lawyers. *See, supra*, at p. 4 and authorities cited therein.

This Court has definitely and consistently held that a principal's liability for torts committed by its agent is only vicarious. In *Albain v. Flower Hospital* (1990), 50 Ohio St. 3d 251, 553 N.E. 2d 1038, it 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; emphasis added)

Similarly, in *Comer v. Risko, supra*, this Court stated:

An agent who committed the tort is primarily liable for its actions, while the principal is merely secondarily liable. [Citations omitted]. (*Id.* at ¶ 20)

The precedents of this Court are clear, consistent, and recent. The liability of a principal for the torts of its agent is strictly vicarious. But, vicarious liability attaches only if the agent is liable. As this Court held in *Comer*:

The 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. (*Id.* at ¶ 20; emphasis added)

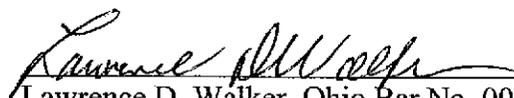
In light of the clear, consistent, and recent holdings of this Court, this matter does not come within the parameters of Rule XVIII. The Sixth Circuit entered its Certification Order without prior notice to the parties or giving them an opportunity to be heard on whether its question was appropriate for certification to this Court. The issue giving rise to the Sixth Circuit's question was not contested in the District Court or on appeal.

Obviously, the Sixth Circuit has a question. But, it should be posed to the parties in the first instance, particularly when this Court has so clearly, consistently, and recently articulated the rule of law which provides the answer. This Court's procedure for providing Federal courts with answers to questions of Ohio law should be utilized only if there is a compelling need to settle an unsettled question of Ohio law. With due respect to the Sixth Circuit, the question it has certified is not unsettled, and there is no compelling reason for this Court to answer it again. *See Dunn v. Ethicon, Inc.*, 106 Ohio St.3d 1531, 2005-Ohio-5146, 835 N.E.2d 381 (Table) (This Court declined to answer a question certified to it by the Sixth Circuit "because applicable law is settled in Ohio.").

### CONCLUSION

Respondents Richard O. Wuerth and Lane Alton & Horst LLC respectfully submit that this Court should decline to answer the certified question for the reason that it has clearly, consistently, and recently answered it.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing was mailed, postage prepaid, this 29<sup>th</sup> day of

July, 2008 to:

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