

IN THE SUPREME COURT OF OHIO

NATIONAL UNION FIRE INSURANCE :
CO. OF PITTSBURGH, PA, : Case No. 2008-1334
:
Petitioner, :
:
-v- : On Review of Certified Question from
:
RICHARD O. WUERTH, et al., : The United States Court of Appeals for
:
:
Respondents. : U.S. Court of Appeals Case No. 07-4035
:
:

PRELIMINARY MEMORANDUM OF PETITIONER IN SUPPORT OF ANSWERING
THE CERTIFIED QUESTION OF STATE LAW

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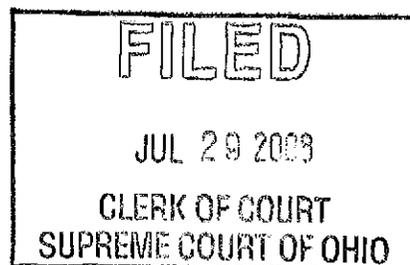


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INTRODUCTION

The United States Court of Appeals for the Sixth Circuit has certified the following question of fundamental importance of Ohio law to this Court for review:

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?

This Court should accept the Certified Question of State Law for review and answer the question in the affirmative. This Court should hold that a direct cause of action may be maintained against a law firm for the firm's independent breach of duties owed to the firm's clients consistent with the elements of a legal malpractice claim.¹

In the Certification Order, the Sixth Circuit recognized that an attorney-client relationship can exist under Ohio law directly between a client and a law firm. The Sixth Circuit further recognized that several Ohio cases have *implicitly* recognized the propriety of a direct malpractice claim against a law firm. Absent a patent holding from this Court that a malpractice claim can be asserted directly against a law firm, however, and recognizing the importance of this issue, the Sixth Circuit exercised the authority this Court granted, through Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, to certify this issue for disposition by this honorable Court.

¹ The applicable legal standard for determining legal malpractice claims in Ohio was established by the Ohio Supreme Court in *Vahila v. Hall* (Ohio 1997), 674 N.E.2d 1164:

[T]o establish a cause of action for legal malpractice based on negligent misrepresentation, a plaintiff must show: (1) that the attorney owed a duty or obligation to the plaintiff, (2) that there was a breach of that duty or obligation and that the attorney failed to conform to the standard required by law, and (3) that there is a causal connection between the conduct complained of and the resulting damage or loss.

Id. at 1169.

The Certified Question not only impacts this case, but also has a profound impact on the practice of law within the state of Ohio. Law firms contract with clients and bill clients for legal services; law firms in turn owe duties to clients, by contract, by law, and by our Rules of Professional Conduct -- yet the Federal District Court ruled that no direct claim for legal malpractice exists against a law firm under Ohio law for a breach of any of these duties because no attorney-client relationship is formed between a client and a law firm. If allowed to stand, this perverse result would alter the fundamental attorney-client relationship in this state; call into question all representation and fee agreements entered into between law firms and clients in this state; increase malpractice litigation against individual attorneys; and make Ohio an outlier among states that have addressed this issue. The Sixth Circuit has already rejected part of the Federal District Court's ruling in certifying the question to this Court; it is imperative that this Court accept the Certified Question and offer guidance to the Sixth Circuit and to all Ohio law firms and the clients that they have the privilege to represent.

Petitioner National Union Fire Insurance Company of Pittsburgh, PA ("National Union") believes that the groundwork has been fully laid for an affirmative answer and joins the Sixth Circuit's request that this Court accept the certified question for review.

STATEMENT OF THE CASE

National Union entered into a contract with Respondent law firm Lane Alton & Horst ("Lane Alton") to defend National Union's insureds in litigation. The Lane Alton law firm assigned the litigation to Respondent Richard Wuerth ("Wuerth"), who was suffering from alcohol-related problems and who has testified that, in retrospect, he should not have been lead trial counsel in the Underlying Litigation. Wuerth's admission came too late, however, because a multi-million dollar adverse judgment was entered against National Union's insureds.

National Union brought a direct claim against Lane Alton alleging negligence in their representation of National Union's insureds, seeking the resulting adverse judgment as damages. National Union asserted that Lane Alton breached duties owed to National Union and its insureds and failed to properly staff, monitor and supervise the litigation, and failed to bring information regarding Mr. Wuerth's condition to its attention in a timely fashion. Surprisingly, the Federal District Court determined, without citing any Ohio case law on point, that National Union could not bring a direct claim for legal malpractice against Lane Alton because it concluded that Ohio Law does not recognize an attorney-client relationship between a law firm and a client. Accordingly, the Federal District Court granted summary judgment to Lane Alton because it concluded no legal claim exists as a matter of Ohio law.

National Union appealed to the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit, recognizing the broad implications of the Federal District Court's holding, certified the issue to this Court for a final disposition of whether a direct claim of legal malpractice can ever be asserted against a law firm. National Union respectfully requests that the Court hold that such a claim is cognizable and answer the certified question in the affirmative.

STATEMENT OF FACTS

On February 21, 2003, National Union filed this legal malpractice action arising from Underlying Litigation in which Lane Alton represented insureds of National Union. An adverse verdict of approximately \$16.2 million was rendered against National Union's insureds on February 21, 2002. National Union contends that the adverse verdict was directly and proximately caused by the negligent conduct of Lane Alton and its attorneys throughout the

course of their representation of National Union's insureds and that Lane Alton is liable to National Union for amounts paid due to the adverse verdict.²

A. Lane Alton Mismanaged the Underlying Litigation.

National Union entered into a contract with, and retained the law firm of, Lane Alton to defend National Union's insureds in litigation. Lane Alton assigned Wuerth the responsibility for the case, even though Lane Alton had other counsel more experienced in larger litigation cases and more experienced in insurance coverage disputes. Lane Alton's compensation system thereafter incentivised Wuerth not to request assistance from other Lane Alton attorneys in order to increase his own personal compensation.

Lane Alton attorneys knew that Wuerth had serious personal problems in the months leading up to trial. Wuerth was depressed, in counseling, and abusing alcohol for months prior to (and during) trial – as confirmed by the deposition testimony of Wuerth's treating doctor who testified in his deposition that Wuerth was impaired and stated "I wouldn't want him representing me" in his condition. Lane Alton, however, chose not to provide Wuerth any meaningful assistance or support and failed to notify National Union or its insureds.

Wuerth made a series of errors in the months leading up to trial – admittedly failing to contact witnesses, preserve witness testimony for trial, follow up with potential experts, or name any expert or fact witnesses to refute plaintiff's damage theories. Wuerth failed to inform National Union and its insureds of these issues. And Lane Alton stood idly by.

One week after the trial commenced in the Underlying Litigation, Wuerth informed several Lane Alton partners that he was "physically and mentally unable to proceed" with the

² National Union paid \$8.25 million of the \$16.2 million judgment based on a high/low settlement agreement entered into prior to the adverse verdict being announced. National Union filed suit seeking \$8.25 million, plus pre-judgment interest from the date the judgment was paid.

trial. Lane Alton partners described him as “incoherent” and “not making sense” in internal communications — but unfortunately they did not help Wuerth or provide the information (or share their concerns) with National Union or its insureds. Despite these warnings, Lane Alton urged Wuerth to continue with the trial. Lane Alton partners appeared in the courtroom to “observe” — but Lane Alton still did not assign any additional attorneys to the case as the trial proceeded.

By the end of the second week of trial, Wuerth collapsed and was unable to continue with the trial. Wuerth admitted during his deposition that he should not have been responsible for this litigation in the months leading up to trial and should not have been trial counsel.

A. . . . In retrospect, I should have asked for help. **Probably in retrospect I probably should have taken a couple months off.** But you know, through most of my life, I’ve been a tough guy. I’ve been in tough situations repeatedly. I’ve been under stress, and I’ve always done well.

In February of 2002, I discovered my own mortality. Okay. It’s – you know, we all have limits, and I hit my limits, and my – I hit the wall big time. That’s as straight an answer as I can give you.

* * *

Q. Could not have taken the case; could have transferred the case to somebody else; could have transferred it sometime in the November 2001 timeframe. You didn’t have to be working on this.

A. I don’t think – I don’t know whether I could have at that point in time. But in retrospect, that’s exactly what I should have done.

Q. **You shouldn’t have been working on this case, should you?**

A. **Well, in light of all that was occurring, by the time I got to January, February, that’s what I’ve concluded.**

Critically, Lane Alton knew that Wuerth was having significant personal problems and was in family counseling. Despite its knowledge, Lane Alton failed to inform National Union of

Wuerth's condition. Lane Alton failed to request a continuance. Lane Alton failed to assign a partner to assist with trial preparations or the trial. Lane Alton failed to reassign the case to a different partner. Instead, Lane Alton concealed the information from National Union and permitted Wuerth to prepare for and try a multi-million dollar case without appropriate resources and with no meaningful help. Lane Alton's head-in-the-sand approach resulted in National Union being left without a functioning Lead Trial Counsel when Wuerth physically collapsed and was taken to the hospital.

After Wuerth's collapse, Lane Alton partners futilely attempted to assume the defense of National Union's insureds. Initially, they sought a mistrial. The court denied the motion for mistrial because: (a) Lane Alton failed to timely inform the court of Wuerth's condition; and (b) Lane Alton was only calling two witnesses in the defense of a \$16.2 million case — the named defendant and one standard of care expert. From the onset, therefore, Lane Alton was negligent in not timely informing the Court — and National Union — of Wuerth's situation and failing to obtain a mistrial or continuance.

Lane Alton placed itself, National Union and the insureds in a difficult situation by concealing Wuerth's personal problems. Lane Alton is liable for the consequences of the concealment and for breaching duties it directly owed to National Union and its insureds.³

³ In the record before the Federal District Court, National Union presented two expert reports offering opinions regarding the negligence of Lane Alton, in addition to admissions from Mr. Wuerth, deposition testimony from other Lane Alton attorneys, and other evidence to support their direct claim against Lane Alton in response to Defendants' motion for summary judgment.

National Union also provided testimony confirming how it would have acted differently had it been timely informed of Wuerth's personal issues by Lane Alton before trial.

ARGUMENT IN SUPPORT OF ACCEPTING THE CERTIFIED QUESTION

Rule XVIII of the Rules of Practice of the Supreme Court of Ohio authorizes a federal court to certify novel issues of Ohio law to this Court, so that this Court — not federal courts — definitively determines the meaning of Ohio law. Once this Court answers the certified question, the federal courts have the necessary guidance to resolve the cases before them. Rule XVIII ensures that application of Ohio law is consistent in the State and federal courts — thereby advancing judicial comity.

Certified Questions of State Law are as rare as they are important. A search of the Court's docket reveals that this is only the twelfth such case filed since 2005 — an average of just three cases per year. Certified Questions from the Sixth Circuit are exceedingly rare. This is just the third such case certified by the Sixth Circuit in the same time period. The rarity of the institution of a case under Rule XVIII, combined with the importance of the juridical comity that it serves, result in a very high acceptance rate of these cases.

The matter *sub judice* presents an important question of Ohio law that has not yet been expressly addressed by this Court. The Sixth Circuit has asked this Court to answer a question regarding the scope of the law governing lawyers — an area of law in which this Court, and its boards and commissions, take a heightened interest. Accordingly, National Union requests that the Court accept the certified question and answer it in the affirmative.

A. Certified Question of State Law: 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?

While the Court has not directly ruled upon this precise issue of Ohio law, decisions of this Court and many Ohio lower courts, as well as decisions from several other states and federal courts, have laid the groundwork for answering the Certified Question in the affirmative.

This Court has recognized that an attorney-client relationship can exist between a law firm and a client. *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 404, 715 N.E.2d 518. *See also, Id.*, at 411 (Lundberg Stratton, J., dissenting) (“The simple, undisputed fact is that an attorney-client relationship existed between the law firm and the hospital”). Other Ohio courts have acknowledged that a direct claim for legal malpractice can be maintained against a law firm. *See, e.g., Blackwell v. Gorman*, 142 Ohio Misc.2d 50, 2007-Ohio-3504 (C.P., Franklin Cty., 2007) (holding that the date the *law firm* representation ended was the day the statute of limitations began to run); *North Shore Auto Sales, Inc. v. Weston, Hurd, Fallon, Paisley & Howley, L.L.P.*, 2006-Ohio-456, 2006 WL 250733; (Ohio Ct. App., Cuyahoga Cty., 2006) (same); *Rosenberg v. Atkins* (1994), Hamilton Cty. App. No C-930259, 1994 WL 536568, at **2-3 (same); *Baker v. LeBoeuf, Lamb, Leiby and MacRae* (S.D. Ohio 1993), No. C-1-92-718, 1993 WL 662352, at *6 (“Plaintiffs have submitted sufficient evidence to support a colorable claim to the existence of an attorney-client relationship between plaintiffs and [the law firm]”).

For example, *Blackwell v. Gorman* plainly reveals that the plaintiff in that case brought legal malpractice claims against his trial lawyer and directly against the attorney’s law firm, Porter, Wright, Morris & Arthur (“Porter Wright”), for its own negligent acts and omissions. At the outset of the opinion, the court notes that plaintiff claimed:

Porter Wright misled him about *its* expertise in the defense of white-collar criminal cases, mishandled negotiations with the government, did a poor job trying his criminal trial, unduly pressured him into firing co-counsel experienced in criminal cases, required him to post substantial financial security for his legal fees on the eve of trial, and charged a clearly excessive legal fee . . .

Id. at 53. (emphasis added). The language employed by the court clearly indicates that the plaintiff's claims against Porter Wright were direct claims, not claims based on vicarious liability. The court specifically acknowledged that an attorney-client relationship existed between the plaintiff and Porter Wright and focused on when the attorney-client relationship with the *law firm* terminated for the particular transaction that formed the basis for the plaintiff's malpractice action. *Id.*

Similarly, in *Rosenberg v. Atkins*, the plaintiff brought a claim against her individual attorney as well as a direct claim of legal malpractice against the law firm of Strauss & Troy ("Strauss"). The language employed by the court clearly indicates that the direct liability of the law firm, rather than vicarious liability, was in issue. The court noted:

Appellant claimed that *the Strauss firm* (1) 'overcharged' her for litigation expenses not attributable to her private causes of action and failed to provide a satisfactory accounting of all litigation expenses, court costs and settlement proceeds; (2) wrongfully attempted to settle her libel claim; (3) incorrectly and fraudulently advised her with respect to the tax consequences of the settlement; (4) extracted an excessive contingency fee through harassment of appellant and misrepresentation of the true settlement value of her claims; and (5) created a conflict of interest because members of the Strauss firm held teaching positions at UC at various times during the pendency of appellant's litigation.

Id. at *6. (emphasis added).

The *Rosenberg* court clearly indicated that the claim against the Strauss firm was for its own negligent acts and omissions. The court focused its analysis on the termination of the

attorney-client relationship with the law firm. *Id.* at *7-8. Thus, that court too recognized that a client may bring a direct claim for legal malpractice against a law firm.

The rules this Court established to regulate the practice of law state that a “law firm” is itself “authorized to practice law”. *See* Prof. Cond. Rule 1.0(c) (“ ‘Firm’ or ‘law firm’ denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or *other association authorized to practice law*”) (effective February 1, 2007). Moreover, Rule III of the Supreme Court Rules for the Government of the Bar of Ohio is titled “Legal Professional Associations Authorized to Practice Law.” *See* Gov. Bar Rule III. This rule sets forth the guidelines under which a law firm practices law. It would be completely consistent with the treatment of a law firm as an attorney under the bar governance rules for this Court to hold that a law firm is civilly liable to its client for a breach of its professional duties to the client.

Syllabus law from this Court expressly holding that a law firm is directly liable to a client for its negligence would be in line with decisions from numerous sister States and federal courts. *See General Security Insurance Company v. Jordan, Coyne & Savits, LLP* (E.D. Va. 2005), 357 F.Supp.2d 951, 956-57 (“[N]early all jurisdictions in the United States permit some form of legal malpractice action by an insurer against the firm it retains to defend an insured”) (collecting cases). *See also, e.g., Carpenter v. Law Offices of Dresser and Associates, LLC* (Conn. Ct. App. 2004), 85 Conn. App. 655 (holding that direct claims of legal malpractice may be asserted against law firms); *Connelly v. Wolf, Block, Schorr and Solis-Cohen* (E.D. Penn. 1978), 463 F. Supp. 914, 918 (acknowledging that a direct claim for malpractice can be maintained against a law firm); *Streit v. Covington & Crowe* (Cal. Ct. App. 2000), 82 Cal. App.4th 441, 447 (held that law firm entered into an attorney-client relationship with client for purposes of legal malpractice

action); *In re SRC Holding Corp.* (D. Minn. 2007), 364 B.R. 1 (held that a direct attorney-client relationship between the law firm and the bank was created and that the law firm committed malpractice and breached its fiduciary duties of loyalty and full disclosure); *Bangor Motor Co. v. Chapman* (Maine 1982), 452 A.2d 389 (granting plaintiffs leave to file an amended complaint asserting a claim of negligence directly against a law firm); *Randolph v. Phillips, King & Smith* (5th Cir. 1993), 995 F.2d 611, 616-617 (acknowledged that an attorney-client relationship can be formed between a client and a law firm); *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.* (Fla. App. 1987), 527 So. 2d 211 (assuming that malpractice claims can be brought directly against a law firm); *Deutsch v. Hoover, Bax & Slovacek, L.L.P.* (Tex. App. 2002), 97 S.W.3d 179 (same); *Flint v. Hart* (Wash. App. 1996), 917 P.2d 590 (same); *McVaney v. Baird, Holm, McEachen, Pedersen, Hamann & Strasheim* (Neb. 1991), 466 N.W.2d 499, 506-507 (same); *Hartford Acc. & Indem. Co. v. Michigan Mut. Ins. Co.* (N.Y. App. Div. 1983), 462 N.Y.S.2d 175, *aff'd* 61 N.Y.2d 569 (1984) (same); *Weitzel v. Oil Chemical and Atomic Workers Int'l Union, Local 1-5* (9th Cir. 1982), 667 F.2d 785 (same); *Mordesovitch v. Westfield Ins. Co.* (S.D.W.V. 2002), 235 F. Supp.2d 512, 516 (same); *Peaceful Family Lmt'd. Partnership v. Van Hedge Fund Advisors, Inc.* (N.D. Ill. 1999), 1999 U.S. Dist. LEXIS 1838, at **16-17 (“the direct attorney-client relationship here was between the law firm defendants and Theta Group, a corporate entity”).

Contrary to this plethora of case law, however, the Federal District Court ruled that even though law firms contract with clients, bill clients for legal services rendered by individual attorneys, and owe duties to clients under contract, law and ethical rules, law firms are not directly liable to clients on a legal malpractice claim. The Federal District Court based its ruling

on its erroneous conclusion that no attorney-client relationship exists between a law firm and a client in Ohio, despite the foregoing authority to the contrary. In such a perverse setting, clients have no recourse against the party with whom they contract; they would have to sue individual attorneys – and many individual attorneys (managing partners, assigning partners, department heads, etc.) to preserve their claims. Clients will be surprised to learn that an engagement letter or a contingency fee agreement with a solo practitioner is enforceable but the same agreement with a law firm is not. And because no attorney-client relationship exists with a law firm, clients now have to be wary that they have differing statutes of limitations running and expiring with different attorneys at different times during the same engagement – which means that clients will need to file more cases against more individual attorneys in order to protect their rights. This Court must step in to prevent this chaos.⁴

In the matter *sub judice*, National Union has asserted direct claims against Lane Alton alleging that the law firm 1) breached its duty to properly staff a \$16 million case, 2) breached its duties to supervise and monitor the attorneys assigned to the case, 3) concealed the condition of the attorney assigned to the case from National Union and the trial court, 4) failed to timely intervene to correct errors it knew its attorneys were making in the representation of National

⁴ The Federal District Court had to determine that there was no attorney-client relationship between the law firm and National Union in order to: (1) grant summary judgment to defendant Lane Alton as a matter of law because no claim for legal malpractice can exist as a matter of law without an attorney-client relationship; and (2) grant summary judgment to defendant Wuerth on statute of limitations grounds by focusing solely on the attorney-client relationship between Wuerth-National Union and ignoring the attorney-client relationship between Lane Alton-National Union – which did not terminate until May 29, 2002, making National Union’s claims against both Wuerth and Lane Alton within the one year statute of limitations applicable to malpractice claims. *See, e.g., Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 388; *Smith v. Conley* (2006), 109 Ohio St.3d 141, 142, 846 N.E.2d 509.

If the Court accepts the Certified Question and answers in the affirmative, both rulings will be reversed.

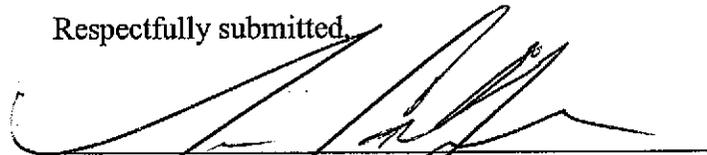
Union's insured, 5) failed to adequately handle the trial after Wuerth collapsed, and 6) breached its fiduciary duty of loyalty to National Union and its insured. These breaches proximately resulted in a \$16.2 million judgment being entered against National Union's insureds, and ultimately, in National Union paying \$8.25 million to the plaintiff in that matter under a high-low settlement agreement. Lane Alton breached duties owed to National Union and its insureds and is directly and independently liable for damages resulting from the breaching conduct.

The claims National Union asserts directly against the Lane Alton firm are cognizable claims of negligence. Accordingly, this Court should accept the certified question and answer it in the affirmative.

CONCLUSION

The Question of State Law certified by the United States Court of Appeals for the Sixth Circuit should be accepted for review and answered in the Affirmative.

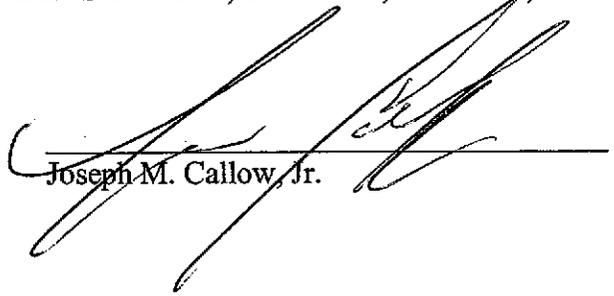
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum In Support Of Accepting the Certified Question of State Law* was sent by regular mail to Lawrence D. Walker and Benjamin J. Parsons, Taft Stettinius & Hollister, 21 East State Street, Suite 1200, Columbus, Ohio 43215 this 29th day of July, 2008.



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