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INTRODUCTION

In its certification order, the Sixth Circuit noted that “an attorney-client relationship can exist under Ohio law between a client and a firm.” This Court is asked to expressly confirm the implicit ramification of a direct attorney-client relationship with a law firm: A legal malpractice claim can be asserted directly against a law firm without naming individual attorneys as Defendants. This Court should answer the Sixth Circuit’s certification question in the affirmative and hold that a direct cause of action may be maintained against a law firm both for the firm’s independent breach of duties owed to a client and for the respondeat superior liability it has for malpractice committed by the firm’s attorneys.

Several Ohio cases have *implicitly* recognized the propriety of a direct malpractice claim against a law firm. Clients contract with law firms and employ reputable law firms based upon the combined talents that comprise the firm as an institution; law firms, in turn, owe duties to clients, by contract, by law, and by our Rules of Professional Conduct. When those duties are breached, clients should have the right to bring a direct claim against the law firm for damages resulting from the law firm’s conduct. To hold otherwise would alter the fundamental attorney-client relationship within the State of Ohio; call into question all representation and fee agreements entered into between law firms and clients in this state; increase malpractice litigation against individual attorneys; ignore basic tenants of respondeat superior liability that apply to all other corporations and partnerships; and make Ohio an outlier among states that have addressed this issue. The General Assembly has not excepted law firms from liability for their misdeeds. This restrained body should not either.

STATEMENT OF THE CASE

Petitioner National Union Fire Insurance Co. of Pittsburgh, PA (“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 only after a multi-million dollar adverse judgment was entered against National Union’s insureds.

Within one year of the termination of the attorney-client relationship between National Union and Lane Alton, National Union brought a direct claim against Lane Alton in the United States District Court for the Southern District of Ohio alleging the firm breached multiple duties owed to National Union and its insureds during Lane Alton’s representation of National Union’s insureds. National Union also alleged that, through the doctrine of respondeat superior, Lane Alton was vicariously liable for Wuerth’s malpractice (who was also individually named as a defendant). With respect to the breaches of the duties owed directly by the firm, National Union asserted that Lane Alton failed to properly staff, monitor and supervise the litigation, and failed to bring information regarding Wuerth’s condition to National Union’s attention in a timely fashion. Both the claims for the firm’s breaches and the respondeat superior liability are malpractice claims. *See, e.g., Blackwell v. Gorman* (Franklin Cty. Common Pleas 2007), 142 Ohio Misc. 2d 50, 67 (“Under Ohio law, a legal-malpractice case subsumes within it any of the issues that can arise from the attorney client relationship. . . . All claims in tort, fraud, or contract against a lawyer are, essentially, considered to be malpractice.”) (internal citations omitted); *Muir v. Hadler Real Estate Mgmt. Co.* (Ohio Ct. App. 1982), 4 Ohio App.3d 89, 446 N.E.2d 820, 822 (“Malpractice by any other name still constitutes malpractice...”); *Omlin v. Kaufman &*

Cumberland Co., L.P.A. (6th Cir. 2001), 8 Fed. Appx. 477 (holding under Ohio law that any action for damages “resulting from the manner in which the attorney represented the client constitutes an action for malpractice).

The District Court granted summary judgment to the Defendants without considering the merits of the malpractice claim. Without citing any Ohio authority on point, the District Court determined that “[s]ince Defendant Lane Alton is not an attorney, an attorney-client relationship with it could never be established” in the State of Ohio. The District Court therefore granted summary judgment to Defendants because “this Court finds that a ‘direct claim’ for legal malpractice cannot be asserted against a non-attorney.” The District Court also concluded that the claim against Wuerth was time barred. Recognizing that the statute of limitations for a legal malpractice claim runs from the later of a cognizable event or when the attorney-client relationship for that particular transaction terminates, *see Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St. 3d 385, the District Court looked solely to the termination of the attorney-client relationship between Wuerth and National Union rather than the relationship between Lane Alton and Wuerth collectively and National Union. As a result, the District Court determined, as a matter of law, that the statute of limitations against Wuerth began to run *before* the adverse underlying jury verdict was entered even though (1) Lane Alton continued with the defense of the underlying litigation for three months after the jury verdict; (2) Wuerth remained as a named attorney on pleadings filed with the Court both before and after the adverse jury verdict; and (3) Wuerth owed duties to National Union’s insureds even after he was substituted as trial counsel. The District Court’s decision was the first case that has held, under Ohio law, that the statute of limitations begins to run for an attorney within a firm before the firm’s relationship with the client on the particular transaction or undertaking ended, and as a consequence, that different

statutes of limitation effectively run on different attorneys for different cognizable events within a law firm.

National Union appealed. In its certification order rendered after briefing and argument on the various issues in the case, the United States Court of Appeals for the Sixth Circuit rejected the District Court's interpretation of Ohio law with respect to the existence of an attorney-client relationship between client and law firm and certified 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 from the lawsuit or were never sued in the first instance?

This Court accepted certification, and Petitioners request that the Court answer the 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. The adverse verdict was caused by the negligence of Lane Alton and its attorneys throughout the course of their representation of National Union's insureds. Accordingly, Lane Alton is liable to National Union for the \$8.25 million, plus interest, National Union paid under a high/low settlement agreement based on the \$16.2 million verdict.

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 this particular 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. Wuerth's treating doctor stated it best, "I wouldn't want him representing me" in his condition. Despite being aware that Wuerth was not capable of defending the case, Lane Alton chose not to reassign the case or even provide additional staff to assist in the defense of the multimillion dollar case. Lane Alton also prevented National Union from taking corrective measures because Lane Alton failed to notify National Union or its insureds of the inadequate representation that Wuerth was providing.

Through Wuerth, Lane Alton 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. Lane Alton failed to inform National Union and its insureds of these issues.

Despite its knowledge that Wuerth was having significant personal problems and was in family counseling, 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 malpractice continued during the trial. 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 trial. Lane Alton partners described him as "incoherent" and "not making sense" in internal communications. Despite his pleas, Lane Alton did not help Wuerth. Nor did it inform National Union or its insureds of Wuerth's inability to proceed. Shockingly, Lane Alton urged Wuerth to continue with the trial without additional assistance. Lane Alton partners observed Wuerth at the trial, but did nothing to intervene.

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.**

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'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.

National Union has presented two expert witnesses who opine that Lane Alton was negligent. These experts' opinions combined with the admissions from Mr. Wuerth, deposition testimony from other Lane Alton attorneys, and other evidence coalesce to establish National Union's direct claim against Lane Alton. National Union representatives testified to how they would have acted differently had they been timely informed of Wuerth's personal issues by Lane Alton before trial.

Lane Alton placed itself, National Union and the insureds in an unenviable situation by concealing Wuerth's personal problems from National Union and the trial court. Lane Alton is

liable for the consequences of the concealment and for breaching duties it directly owed to National Union and its insureds, in addition to its respondeat superior liability.

ARGUMENT

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?

Proposition of Law No. I: A Legal Malpractice Claim Can Be Asserted Directly Against a Law Firm.

Decisions of this Court and Ohio lower courts, as well as decisions from several other state and federal courts, confirm that a legal malpractice claim can be asserted directly against a law firm. The uncontested standard for determining legal malpractice claims in Ohio was established by this Court when it wrote:

[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.

Vahila v. Hall (1997), 77 Ohio St.3d 421, 1997-Ohio-259, 674 N.E.2d 1164, 1169. This standard is equally applicable to a law firm as it is to an individual attorney. Cf. *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 404, 1999-Ohio-115, 715 N.E.2d 518 (addressing law firm's duty to protect confidential information). Justice Stratton, in dissent, agreed. *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"). This case calls for the Court to do nothing more than to expressly hold what it implicitly concluded in *Biddle*.

In line with *Biddle*, lower Ohio courts have recognized that a direct claim for legal malpractice can be maintained against a law firm. See, e.g., *Blackwell* 2007-Ohio-3504 (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.* (Ohio Ct.

App., Cuyahoga Cty., 2006), 2006-Ohio-456, 2006 WL 250733 (same); *Rosenberg v. Atkins* (Ohio Ct. App., Hamilton Cty., 1994), 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.

When these courts imposed direct liability upon the law firm, they were supported by the Ohio Revised Code, the Code of Professional Conduct, and the Supreme Court Rules for the Government of the Bar. The Ohio Revised Code expressly recognizes that a corporation, partnership, limited liability company, limited liability partnership or professional association may render professional legal services. *See generally* R.C. Ch. 1785. 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).¹ 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

¹ It is of no legal significance that this malpractice lawsuit was initiated prior to the effective date of the current Rules, for the Code of Professional Responsibility similarly defined 'law firm' as an organization "under which a lawyer may engage in the practice of law pursuant to the Supreme Court Rules for the Government of the Bar of Ohio." Code of Prof. Resp., Definitions § 2.

practices law. It is in keeping with the Revised Code's and rules of this Court's treatment of a law firm as an entity "authorized to practice law" 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 also 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 (holding 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 (holding 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 (acknowledging 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”).

In the face of the Revised Code, the rules of this Court, and case law from Ohio and across the nation, Lane Alton argues that even though it and other 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. Clients will be surprised to learn that an engagement letter or a contingency fee agreement is not enforceable against a law firm. If such a perverse rule were the law, 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. The most absurd result of such a holding, as demonstrated by this case, is that each individual attorney in a firm will have a personal statute of limitations expiring at different times for the same undertaking. Fortunately, by expressly adopting the rule it applied in *Biddle*, this Court may prevent this chaos.

In the matter *sub judice*, National Union has asserted direct claims against Lane Alton because 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 Union's insureds; 5) failed to adequately handle the trial after Wuerth collapsed; and 6) breached its fiduciary duty of loyalty to National Union and its insureds. 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 legal malpractice. This Court has previously recognized that a law firm owes professional duties to its client. Now, this Court should expressly announce that Ohio, along with its sister states discussed above, holds law firms directly liable for its legal malpractice.

Proposition of Law No. II: Under the Doctrine of Respondeat Superior, Law Firm Is Directly Liable for the Actions of Its Attorneys.

In addition to asserting direct claims against Lane Alton for the firm's legal malpractice, National Union also asserted direct claims against Lane Alton for its respondeat superior liability for Wuerth's malpractice. These transgressions are distinct causes of liability. "The vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer has for his own torts. An employer whose employee commits a tort may be liable in his own right for negligence in . . . supervising the employee." *Black's Law Dict.* 934 (8th Ed. 2004) (quoting Kenneth S. Abraham, *The Forms and Functions of Tort Law* 166 (2002)).

Law firms in Ohio are often organized as partnerships, limited liability partnerships or limited liability companies. Under basic principals of agency law, these entities are directly liable for the actions of their agents. “[U]nder Ohio law, the partnership and each individual partner are responsible to third persons for the wrongful acts of any partner committed in the ordinary course of partnership business. This liability, under the agency principal of respondeat superior, attaches . . . as long as the [act] is committed in the ordinary course of the partnership business or is authorized by the other partners.” *Allen v. Neihaus* (Ohio Ct. App., 1st Dist., 2001), Nos. C-000213, C-000235, 2001-Ohio-4021, 2001 Ohio App. LEXIS 5540 (citing *Vrabel v. Acri* (1952), 156 Ohio St. 467, 103 N.E.2d 564, Paragraph 1 of the Syllabus (“Upon a showing that a partnership or joint enterprise exists, each member of such project acts both as principal and agent of the others as to those things done within the apparent scope of the business of the project and for its benefit.”))).

Ohio Revised Code § 1775.08 states that “every partner is an agent of the partnership for purposes of its business, and as a result the act of every partner . . . apparently carrying on in the usual way the business of the partnership binds the partnership.” This is the codification of the doctrine of respondeat superior, which attributes the act of each partner directly to the partnership. Respondeat superior applies equally to limited liability partnerships. *See* R.C. 1782.24(B) (“Except as otherwise provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners”). Respondeat superior also makes a limited liability company liable for the acts of its members. *See* R.C. 1705.25(A)(1) (“Every member is an agent of the company for the purpose of its business, and the act of every member, including the execution in the company name of any instrument for apparently carrying on in the usual way

the business of the company binds the company”). There simply is no disputing that a partnership, limited liability partnership, or a limited liability corporation is liable for the actions of its partners or members performed within the course of the business. Nor is there a dispute that Wuerth’s legal representation of National Union’s insured in litigation was the very form of business in which Lane Alton routinely engages.

Black letter law holds that Lane Alton is liable for Wuerth’s malpractice:

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, The Law Governing Lawyers (2000) § 58(1). The *Restatement* also explains the rationale behind the rule:

Vicarious liability of law firms . . . results from the principles of respondeat superior or enterprise liability. Vicarious liability also helps to maintain the quality of legal services, by requiring not only a firm but also its principals to stand behind the performance of other firm personnel.

Id., (Comment *b*).

Under the doctrine of respondeat superior, “‘The act of the servant, done within the scope and in the exercise of his employment, is in law the act of the master himself.’ This rule has been recognized as ‘legal unity of the principal and agent.’” *Orebaugh v. Wal-Mart Stores, Inc.* (Ohio Ct. App., 12th Dist., 2007), No. CA2006-08-185, 2007-Ohio-4969, ¶ 7 (quoting *Atl. & Great W. Ry. Co. v. Dunn* (1869), 19 Ohio St. 162, 168). As a result of the unity between principal and agent, “‘the plaintiff has a right of action against either the master or the servant, or against both’”. *Id.*, at ¶ 12 (quoting *Lusito v. Kruse* (1940), 136 Ohio St. 183, 187). Here, in addition to the direct claims National Union has against Lane Alton for its failures to properly handle the underlying case, National Union can assert a respondeat superior claim directly against Lane

Alton for Wuerth's malpractice. The respondeat superior claim against Lane Alton can be maintained regardless of whether Wuerth is a party.² Accordingly, even if the trial court was correct that the only cognizable claim against Lane Alton is a respondeat superior claim—a controversial holding currently pending before the Sixth Circuit for review—the respondeat superior claim is not invalidated by Wuerth's absence. Accordingly, a direct claim based upon respondeat superior may be maintained against a law firm where the attorney is not a party.

Lane Alton relies upon *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, in its attempt to sidestep respondeat superior liability. The very first words of *Comer* restrict its holding to “[t]he narrow issue before us”. *Id* at ¶ 1. The narrow issue in *Comer* was whether a hospital can be held liable for the actions of an *independent contractor* physician based on an agency by estoppel theory when the independent contractor cannot be sued. *Id*. Lower courts have recognized the limited nature of *Comer*'s narrow holding, and have limited it accordingly. *E.g. Doros v. Marymount Hosp., Inc.*, Cuyahoga App. No. 88106, 2007-Ohio-1140 (declining to extend *Comer* to required the naming of a leased-employee nurse in a suit against a hospital).

Agency by estoppel is an attenuated theory of liability, whereas respondeat superior is direct. *Orbaugh*, 2007-Ohio-4969, ¶ 17. The *Orbaugh* court explained:

In *Comer*, the Ohio Supreme Court was concerned that the appellate court, in allowing a claim to proceed against a hospital on the theory of agency by estoppel after the statute of limitations had run against the independent contractor physician, created independent liability where none existed before. . . . However, as

² While the District Court concluded that the statute of limitations bars National Union's claim against Wuerth, it did so based upon its erroneous holding that an attorney-client relationship under Ohio law cannot exist with a law firm such that the date the relationship with Lane Alton terminated was irrelevant to a statute of limitations analysis. Because the United States Court of Appeals for the Sixth Circuit found to the contrary, however, the District Court's ruling on this issue will likely be reversed and Wuerth will once again become a party to this lawsuit.

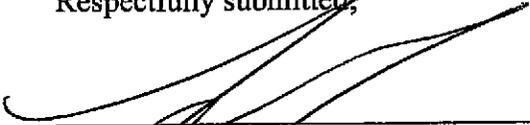
discussed above, respondeat superior developed as a direct claim against an employer and treated the employer as having committed the tort.

Id. Thus, the court concluded that *Comer* only applied when the primary tortfeasor was an independent contractor. *Accord Holland v. Bob Evans Farms, Inc.* (Ohio Ct. App., 3rd Dist., 2008), No. 17-07-12, 2008-Ohio-1487 (following *Orbaugh* and concluding that *Comer* does not apply to respondeat superior claims). Here, the primary tortfeasors were the members and associates of Lane Alton. As such, *Comer* does not shield Lane Alton from liability for the acts of its members and associates.

CONCLUSION

Lane Alton & Horst, LLC, is directly liable for the malpractice it committed as a law firm. It is also directly liable, under respondeat superior, for the malpractice of its members and associates. Accordingly, the Question of State Law certified by the United States Court of Appeals for the Sixth Circuit should be answered in the affirmative.

Respectfully submitted,



Joseph M. Callow, Jr. (0061814)

Danielle M. D'Addesa (0076513)

Charles M. Miller (0073844)

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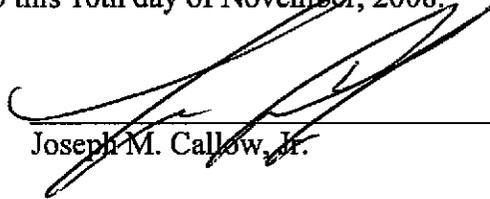
One East Fourth Street, Suite 1400

Cincinnati, Ohio 45202-3752

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Petitioner's Merit Brief* 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 10th day of November, 2008.



Joseph M. Callow, Jr.

IN THE SUPREME COURT OF OHIO

NATIONAL UNION FIRE INSURANCE
CO. OF PITTSBURGH, PA,

Petitioner,

-v-

RICHARD O. WUERTH, et al.,

Respondents.

:
: Case No. 2008-1334
:
:
: On Review of Certified Question from
: The United States Court of Appeals for
: the Sixth Circuit
:
:
: U.S. Court of Appeals Case No. 07-4035
:

APPENDIX TO PETITIONER'S MERIT BRIEF

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-4035

FILED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JUL 08 2008

LEONARD GREEN, Clerk

NATIONAL UNION FIRE INSURANCE
CO. OF PITTSBURGH, PA,

08-1334

Plaintiff-Appellant,

v.

RICHARD O. WUERTH;
LANE ALTON & HORST,

Defendants-Appellees.

FILED
JUL 09 2008
CLERK OF COURT
SUPREME COURT OF OHIO

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE
SOUTHERN DISTRICT OF
OHIO

BEFORE: MARTIN and BATCHELDER, Circuit Judges; JORDAN, District Judge.*

CERTIFICATION ORDER

LEON JORDAN, District Judge. Appellant National Union Fire Insurance Co. of Pittsburgh, PA ("National Union") appeals the district court's summary judgment dismissing its legal malpractice complaint against appellees Richard O. Wuerth and Lane Alton & Horst ("Lane Alton"). 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. Because this important question of Ohio law may be

* The Honorable R. Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

determinative of the present appeal and because there is no clear controlling precedent, we hereby certify the question to the Supreme Court of Ohio pursuant to that Court's Rule of Practice XVIII.

I

On February 21, 2003, National Union filed suit alleging malpractice and misrepresentation by Lane Alton, a law firm, and by Wuerth, a partner in the firm. The complaint sought to hold Lane Alton "vicariously liable for the wrongful acts, errors, and/or omissions of Wuerth, as well as for its own wrongful acts, errors and/or omissions."

On July 17, 2007, the district court granted appellees' summary judgment motion. The court concluded that the claims against Wuerth were barred by Ohio's one-year statute of limitations. In granting summary judgment to Lane Alton, the district court reasoned: (1) Lane Alton could not be vicariously liable for Wuerth's alleged malpractice because the statute of limitations had run as to claims against Wuerth individually; (2) Lane Alton could not be vicariously liable for the alleged malpractice of any other agent because National Union did not sue any agent other than Wuerth; and (3) Lane Alton cannot be directly liable for malpractice because it is not an attorney. The present appeal followed.

II

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.

A number of cases have recognized that an attorney-client relationship can exist under Ohio law between a client and a firm. *Baker v. LeBouef, Lamb, Leiby & MacRae*, No. C-1-92-718, 1993 WL 662352 at *6 (S.D. Ohio Oct. 7, 1993); *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 526 (Ohio 1999); *Luce v. Alcox*, 848 N.E.2d 552, 556 (Ohio Ct. App. 2006); *Henry Filters, Inc. v. Peabody Barnes, Inc.*, 611 N.E.2d 873, 876-77 (Ohio Ct. App. 1992). In its briefing to this court, National Union contends that “Ohio courts have continuously held and acknowledged that an attorney-client relationship can exist between a client and a law firm, and have specifically acknowledged that a direct claim for legal malpractice can be maintained against a law firm.” However, the citations provided by appellant all involve cases in which both the individual lawyer and the law firm were sued, *see Baker*, 1993 WL 662352 at *1; *Rosenberg v. Atkins*, No. C-930259, 1994 WL 536568 (Ohio Ct. App. Oct. 5, 1994); *Blackwell v. Gorman*, 142 Ohio Misc. 2d 50, 52 (Ohio Com. Pl. 2007), and/or in which the existence of a right of action against the law firm appears to have been assumed rather than at issue. *See id.*; *N. Shore Auto Sales, Inc., v. Weston, Hurd, Fallon, Paisley & Howley, L.L.P.*, No. 86332, 2006 WL 250733 (Ohio Ct. App. Feb 2, 2006).

Lane Alton quotes Ohio authority for the proposition, "Malpractice is 'professional misconduct [by] members of the medical profession and *attorneys*.'" See *Dingus v. Kirwan*, No. E-05-082, 2006 WL 2384070, at *2 (Ohio Ct. App. Aug. 18, 2006) (emphasis added) (quoting *Richardson v. Doe*, 199 N.E.2d 878, 880 (Ohio 1964)). However, neither *Dingus* nor *Richardson* expressly support the proposition that malpractice can only be committed by an individual lawyer as opposed to a firm.

Lane Alton similarly quotes additional Ohio authority for the proposition that malpractice concerns "damages resulting from the manner in which *the attorney* represented the client[.]" See *Muir v. Hadler Real Estate Mgmt. Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) (emphasis added). *Muir*, however, also does not expressly hold that "the attorney" must be an individual rather than a firm.

Lane Alton quotes *Vahila v. Hall*, 674 N.E.2d 1164, 1165-66 (Ohio 1997) for a definition of legal malpractice that addresses only "the attorney." Like *Dingus*, *Richardson*, and *Muir*, however, *Vahila* does not expressly hold that "the attorney" must be an individual. Further, *Vahila* extensively cites with approval *Krahn v. Kinney*, 538 N.E.2d 1058 (Ohio 1989). *Krahn* was a malpractice case filed against both an individual attorney and a law firm. See *id.* at 1059 (syllabus). Like the other cases discussed herein, *Krahn* does not hold that a malpractice suit can only be filed against an individual, nor does it address whether a claimant can sue a law firm if the agent is not also a defendant.

Having reviewed the cited authorities and having heard oral argument, we find that an unsettled question of Ohio law may be determinative of the present appeal and that there is no clear controlling precedent in the decisions of the Supreme Court of Ohio. We therefore certify the following question:

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?

III

In accordance with Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, we provide the following required information:

(A) Style of the case: *National Union Fire Insurance Co. of Pittsburgh, PA v. Wuerth*, No. 07-4035.

(B) Facts and questions of law: the circumstances out of which the question of state law arises, and the question itself, has been explained *supra*.

(C) The names of the parties: National Union Fire Insurance Co. of Pittsburgh, PA; Richard O. Wuerth; and Lane Alton & Horst.

(D) The names, addresses, and telephone numbers of counsel for each party:

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Joseph M. Callow, Jr. 61814
Danielle M. D'Addesa 76513
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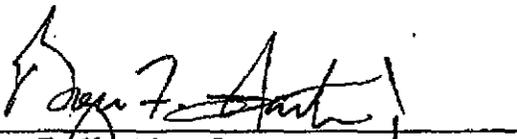
Counsel for Richard O. Wuerth and Lane Alton & Horst:
Benjamin J. Parsons 76813
Lawrence David Walker 12036
Taft Stettinius & Hollister
21 E. State Street
Suite 1200
Columbus, OH 43215
614-221-2838

(E) Designation of one of the parties as the moving party:

The moving party (Petitioner): National Union Fire Insurance Co. of
Pittsburgh, PA

The adverse parties (Respondents): Richard O. Wuerth; Lane Alton &
Horst

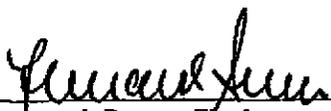
It is ORDERED that the above question be certified to the Supreme Court of
Ohio and forwarded to the clerk of that Court under Rule XVIII, Rules of Practice of the
Supreme Court of Ohio.



Boyce F. Martin, Jr.,
U.S. Court of Appeals for the Sixth Circuit

PROOF OF SERVICE

True copies of the foregoing Certification Order were sent this 8th day of July, 2008, by ordinary United States Mail, to Joseph M. Callow, Jr. and Danielle M. D'Addesa, Keating, Muething & Klekamp, One E. Fourt Street, Suite 1400, Cincinnati, Ohio 45202, counsel for plaintiff-appellant; Benjamin J. Parsons and Lawrence David Walker, Taft Stettinius & Hollister, 21 E. State Street, Suite 1200, Columbus, Ohio 43214, counsel for defendants-appellees.



Leonard Green, Clerk

(Seal)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

**National Union Fire Insurance
Company of Pittsburgh, PA,**

Plaintiff,

-v-

**Case No. C-2-03-0160
JUDGE SMITH
Magistrate Judge Kemp**

Richard O. Wuerth, et al.,

Defendants.

OPINION AND ORDER

Plaintiff National Union Fire Insurance Company of Pittsburgh, Pennsylvania (“National”) brings this action against Defendants Richard Wuerth and Lane Alton & Horst, who represented National’s insureds in a federal trial in February, 2002, which resulted in an adverse verdict.

Defendants Wuerth and Lane Alton & Horst have moved for summary judgment (Doc. 105) and Plaintiff National has also moved for summary judgment (Doc.109). For the reasons that follow, the Court **GRANTS** Defendants’ Motion for Summary Judgment and **DENIES** Plaintiff’s Motion for Summary Judgment.

I. FACTS

A. Background

Plaintiff National is an insurance company based in Pittsburgh, Pennsylvania. Defendant Lane Alton & Horst (hereinafter "Lane Alton") is a law firm in Columbus, Ohio and Defendant Richard Wuerth is an attorney and a partner of the firm.

This case is a legal malpractice action arising out of a lawsuit filed by Nationwide Mutual Insurance Company (hereinafter "Nationwide") against National Catastrophe Adjusters (hereinafter "NCA"), McLarens Toplis North America, Inc. (hereinafter "McLarens"), and McLarens' employee Lany Wood in the Court of Common Pleas of Franklin County, Ohio on August 26, 1999. The case was removed to this Court pursuant to the provisions of 28 U.S.C. § 1441, docketed as Case No. C2-99-1022 (hereinafter "the *Nationwide* case"). The matter was initially assigned to the late Judge Joseph P. Kinneary and was subsequently transferred to the docket of the Honorable Algenon L. Marbley.

Plaintiff National provided liability insurance coverage to McLarens and Lany Wood for the claims asserted against them in the *Nationwide* case. Richard O. Wuerth of the Lane Alton law firm was retained to represent them. Plaintiff did not insure NCA, and Defendant Wuerth did not represent it in the *Nationwide* litigation. Nationwide's claims against McLarens, Lany Wood, and NCA exceeded \$16 million. The trial to the jury, with Judge Marbley presiding, began on February 4, 2002.¹ Prior to the submission of the case to the jury, Plaintiff entered

¹ The parties cite to the record in the *Nationwide* case. A complete copy of the Civil Docket in that action has been filed and the entire transcript of the trial was filed as well. This Court will take judicial notice of the proceedings in the *Nationwide* case. See Rule 201 of the Federal Rules of Evidence; *Sf. Louis Baptist Temple, Inc., Federal Depositor Ins. Corp.*, 605 F.2d 1169 (6th Cir. 1979) (court should take judicial notice of prior litigation on its own docket);

into a “high-low” settlement agreement with Nationwide on behalf of McLarens and Larry Wood. That agreement provided, among other things, that Plaintiff would pay Nationwide the amount of the jury’s verdict up to the maximum of \$8.25 million. On February 21, 2002, the jury returned a verdict in favor of Nationwide and against McLarens and Larry Wood for \$16.2 million. Plaintiff paid Nationwide \$8.25 million in settlement and was reimbursed by its reinsurers in the amount of \$1,625,000. Plaintiff instituted this action on February 21, 2003 against Defendant Wuerth and his law firm claiming that Defendant Wuerth had committed malpractice in his representation of McLarens and Larry Wood in the *Nationwide* case, demanding the full \$8.25 million it paid in settlement, notwithstanding that it has already recovered over \$1.6 million from its reinsurers.

B. The Underlying *Nationwide* case

In 1997, Nationwide Mutual Insurance Company (“Nationwide”) entered into a contract with NCA to provide claims adjusting services to Nationwide and its subsidiaries. Nationwide provided property damage insurance to Professional Hospitality Resources, Inc. (“PHR”) for six hotels which it operated in Virginia Beach, Virginia. All six of those hotels were damaged by Hurricane Bonnie on August 28, 1998. Nationwide received notice of the potential claims from the insured and requested that NCA assist in adjusting the claims. NCA contacted McLarens to assist with this process and they in turn retained Larry Wood, an individual adjuster, to work on the project.

Mr. Wood was on the job eleven days before being removed. Nationwide alleged that

Rodic v. Thistledown Racing Club, Inc., 615 F. 2d 736 (6th Cir. 1980) (court should take judicial notice of state court proceedings).

Mr. Wood exceeded his authority and was negligent in adjusting the claims. Nationwide claimed that he improperly committed Nationwide to compensate PHR for over \$16 million more than it otherwise would have paid if the claims had been properly adjusted. Nationwide initiated a lawsuit against NCA, McLarens, and Mr. Wood, referred to the Nationwide lawsuit above. McLarens was an insured of National and National retained Defendant Lane Alton to defend the case.

Defendant Wuerth assumed responsibility for the case and handled it almost exclusively by himself. The trial began on February 4, 2002. Defendant Wuerth, along with an associate, Beth Lashuk, represented McLarens and Larry Wood, National Union's insureds. Early in the second week of trial, Defendant Wuerth advised several Lane Alton partners that he was not feeling well. At about the same time, he also told the Court he felt unwell. However, he continued with the trial until Thursday, February 14, when he suffered from tremors, and was taken by Emergency Squad to Mt. Carmel East Hospital. He was examined by his family physician, James B. Soldano, the following day. Dr. Soldano opined, also in an affidavit, that Defendant Wuerth was physically incapable of continuing to participate in the trial and would be so for a significant period of time.

The Defendants moved for a mistrial arguing that Defendant Wuerth had become incapacitated and could no longer proceed with the trial. The Motion was argued before Judge Marbley on February 20, 2002. Judge Marbley, however, declined to grant a mistrial and other Lane Alton attorneys stepped in and completed the trial. In addition to the fact that Defendant Wuerth became ill and was unable to complete the trial, Plaintiff also claims that Defendant Wuerth has personal problems and alcohol abuse that interfered with his ability to practice as an

attorney and properly defend National's insureds. Plaintiff highlights numerous incidents in which Defendant Wuerth made mistakes, failed to properly prepare for trial, and failed to inform National of critical issues and decisions regarding trial preparation.

In addition to asserting legal malpractice and misrepresentation claims against Defendant Wuerth, Plaintiff also alleges that Defendant Lane Alton is vicariously liable for Defendant Wuerth's legal malpractice as well as directly liable for its own wrongful acts, errors, and/or omissions. Plaintiff has moved for summary judgment. Defendants have also moved for summary judgment asserting various alternative grounds for its motion.

II. SUMMARY JUDGMENT STANDARD

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

When reviewing a summary judgment motion, the Court must draw all reasonable

inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).² The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. *Id.* Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. *Id.*

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex*, and *Matsushita* have effected “a decided change in summary judgment practice” ushering in a “new era” in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party “cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment.” *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must

² *Reeves* involved a motion for judgment as a matter of law made during the course of a trial under Fed. R. Civ. P. 50 rather than a pretrial summary judgment under Fed. R. Civ. P. 56. Nonetheless, standards applied to both kinds of motions are substantially the same. One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record, *Reeves*, 530 U.S. at 150. In contrast, in ruling on a summary judgment motion, the Court will not have heard all of the evidence, and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001). As such, *Reeves* did not announce a new standard of review for summary judgment motions.

adduce more than a scintilla of evidence to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely “show that there is some metaphysical doubt as to the material facts.” *Id.* (quoting *Matsushita*, 475 U.S. at 586).

Moreover, “[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact.” *Id.* at 1479-80. That is, the nonmoving party has an affirmative duty to direct the court’s attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *In re Morris*, 260 F.3d 654, 665 (6th Cir. 2001).

III. DISCUSSION

Plaintiff has asserted claims of legal malpractice and misrepresentation against Defendants Wuerth and Lane Alton. Plaintiff has moved for summary judgment on both claims contending that “Defendants’ liability is clearly established.” (Pl’s Mot. for Summ. J. at 1).

Defendants Wuerth and Lane Alton have also moved summary judgment. Defendants assert that there are alternative grounds for its motion, specifically: (1) Plaintiff’s claims are barred by the malpractice statute of limitations; (2) Plaintiff is unable to show a causal connection between the alleged malpractice and the resulting damage; (3) Plaintiff lacks standing to sue; and (4) Defendant Lane Alton is a non-lawyer and therefore cannot be directly sued for malpractice and is not vicariously liable because Defendant Wuerth and other Lane Alton attorneys are not liable. (*See generally*, Def’s Mot. for Summ. J. and Def’s Reply). The Court will first address the parties’ arguments as they pertain to Defendant Wuerth and then turn to review Plaintiff’s claims against Defendant Lane Alton.

A. Defendant Wuerth

Defendants contend that both of Plaintiff's claims against Defendant Wuerth -- legal malpractice and misrepresentation -- are barred by Ohio's malpractice statute of limitations. This Court agrees.

1. Legal Malpractice Claim

Under O.R.C. §2305.11(A), an action for legal malpractice "shall be brought within one year after the cause thereof accrued." The Ohio Supreme Court, in *Zimmie v. Calfee Halter & Griswold*, 43 Ohio St.3d 54 (1989), set forth the standard with respect to the statute of limitations:

Under R.C. 2305.11(A), an action for legal malpractice accrues and the statute of limitations begins to run when there is a cognizable event whereby the client discovers or should have discovered his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue its possible remedies against the attorney, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

43 Ohio St. 3d at syllabus (*citing Omini-Food & Fashion, Inc. v. Smith*, 38 Ohio St.3d 385 (1988)). *Zimmie* and *Omini-Food* require factual determinations as to (1) when a cognizable event occurred such that the client should have known he or she may have an injury caused by his or her attorney; and (2) when the attorney-client relationship terminated. *Smith v. Conley*, 109 Ohio St.3d 141, 142 (2006). The statute of limitations begins running on the latter of these two dates. *Id.*

The Complaint in this action was filed on February 21, 2003. Thus, if either a "cognizable event" or termination of representation occurred after February 21, 2002, Plaintiff's malpractice claims against Defendant Wuerth were timely filed.

a. Cognizable Event

Plaintiff maintains that the “cognizable” event sufficient to start the running of the statute of limitations did not occur until February 21, 2002, when the verdict was rendered in the *Nationwide* case. (Pl’s Memo. in Opp. at 8-11). To support its position, Plaintiff contends that no injury resulted to Plaintiff from Defendant Wuerth’s malpractice until the adverse verdict was rendered, and consequently, Plaintiff “could not have ‘discovered’ that its injury was related to any act or non-act of the Defendants until it in fact suffered an injury.” (Pl’s Memo. in Opp. at 9). Defendants, on the other hand, assert that undisputed deposition and affidavit testimony establishes that Plaintiff had actual knowledge of Defendant Wuerth’s alleged malpractice prior to February 21, 2002. (Def’s Mot. for Summ. J. at 20-28; Def’s Reply at 1). The Court agrees with Defendants.

“The Ohio Supreme Court has never held that a party must be aware or suffer the full extent of his injury before there is a cognizable event triggering the statute of limitations in a legal malpractice action.” *Griggs v. Bookwalter*, 2006 WL 2941041 *3 (Ohio App. 2 Dist.) (internal citations omitted). Instead, “case law applying *Zimmie* has defined a cognizable event as ‘an event that is sufficient to alert a reasonable person that his attorney has committed an improper act in course of legal representation.’” *Ladanyi v. Crooks & Hanson Ltd*, 2007 WL 416926, *3 (Ohio App. 8 Dist.) (quoting *Spencer v. McGill*, 87 Ohio App.3d 267, 278 (1993); and *Hickle v. Malone*, 110 Ohio App.3d 703, 707 (1996)). *Accord, Omlin v. Kaufman & Cumberland Company, L.P.A.*, 8 Fed. Appx. 477 (6th Cir. 2001) (holding that a “cognizable event” triggering the statute of limitations in legal malpractice cases occurs when the client perceives “mistakes in lawyering.”); *Griggs*, 2006 WL 2941041 at *3 (declaring “[k]nowledge

of a potential problem starts the statute to run, even when one does not know all the details.”).

One Ohio appellate court has recently remarked on the harsh result of such a standard:

Although we affirm the grant of summary judgment, we note the harsh result of this decision. This case stands for the unfortunate position that a litigant must identify the cognizable event and act on it, all before the litigant's case is resolved. Requiring a litigant to recognize and appreciate a legal concept he is not trained in and then requiring the litigant to file suit, all before his case is resolved places a heavy burden upon litigants.

Szabo v. Goetsch, 2007 WL 764544 (Ohio App. 8 Dist.).

Applying the foregoing law to the present case, it is evident that the cognizable event occurred prior to February 21, 2002. In early 1999, Mr. DeMaria, Director of Plaintiff's claims department, was assigned the claim asserted by Nationwide against McLarens and Mr. Wood and retained Defendant Wuerth when Nationwide instituted litigation. Mr. Ilardi, a Senior Vice President, was Mr. DeMaria's supervisor. The trial of the *Nationwide* case began on Monday, February 4, 2002. Mr. DeMaria did not attend the first week of trial, but after hearing reports that Defendant Wuerth "was doing a terrible job," he attended the trial commencing on Monday, February 11, 2002. The following is a summary of what Mr. DeMaria observed, believed, and concluded during the period February 11, 2002 to February 15, 2002:

- *February 11, 2002*: The McLarens representative told DeMaria that Mr. Wuerth was "just generally performing badly in Court" (DeMaria Depo. at 105-106).
- *February 11, 2002*: DeMaria became concerned that a judgment might be entered against McLarens in excess of policy limits because Mr. Wuerth "was shaking like a leaf and sweating like a pig and smoking like a chimney. He just looked like he was totally panic stricken" (DeMaria Depo. at 105-106).

- *February 11, 2002:* DeMaria concluded that Mr. Wuerth “was obviously unprepared” to try the *Nationwide* case and “thought that because of Rick’s performance, we were in trouble and a highly defensible case had been compromised” (DeMaria Depo. at 106-107).
- *February 11, 2002:* DeMaria told Ilardi “that Rick looked totally unprepared [and] looked very nervous.” Ilardi was “disturbed and upset” (DeMaria Depo. at 113).
- *February 12, 2002:* DeMaria had breakfast with Lane Alton senior partner Rick Marsh. DeMaria viewed the meeting as his “opportunity to tell a senior partner at Lane Alton that in [his] view Mr. Wuerth had been mishandling [the *Nationwide*] case” (DeMaria Depo. at 108-113).
- *February 12, 2002:* According to DeMaria, Mr. Wuerth “looked nervous, unprepared, panic stricken.” DeMaria concluded on that day “[t]hat we had the wrong attorney representing us” and was concerned about how the *Nationwide* case would go “[b]ecause of his performance, most definitely” (DeMaria Depo. at 120-121).
- *February 12, 2002:* DeMaria was of the opinion that Mr. Wuerth was approaching a breakdown “[b]ecause of his nervousness and his messing up witnesses’ names and exhibits. It looked like he had lost control” (DeMaria Depo. at 122).
- *February 13, 2002:* Mr. Wuerth advised DeMaria that he had no damage experts to rebut *Nationwide*’s damage evidence. DeMaria concluded that the absence of such witnesses will “have an adverse impact on the case” (DeMaria Depo. at 128-129, 139-140).
- *February 14, 2002:* DeMaria concluded that there will be an adverse verdict because Wuerth had not performed to expectations (DeMaria Depo. at 160-162).
- *February 15, 2002:* Columbus attorney Percy Squire advised DeMaria that, in his opinion and that of Judge Marbley, “you had a good defense but your defense counsel blew it for you.” DeMaria concludes that, because of Mr. Wuerth’s “activities,” DeMaria “couldn’t settle the case for less than eight and a half to \$9 million” (DeMaria Depo. at 166-170).

- *February 15, 2002:* Ilardi begins settlement discussions with Nationwide’s counsel and tells DeMaria that Mr. Wuerth is “responsible for why we’re overpaying on this case” (DeMaria Depo. at 171-172).

Mr. Ilardi, like Mr. DeMaria, had concluded that Defendant Wuerth had made mistakes and committed malpractice prior to February 21, 2002. Mr. Ilardi settled the *Nationwide* case the night of February 20, 2002. Prior to doing so, he conferred with his colleague, Henry Williams, another Senior Vice President. Mr. Ilardi told Mr. Williams that he believed Defendant Wuerth had committed malpractice, that he was contemplating a malpractice claim against Defendant Wuerth, and that he wanted Williams’ opinion “as to whether or not a settlement of the *Nationwide* case would have an affect on a malpractice claim” against Defendant Wuerth. (Williams Depo. at 6-9, 11, 16-19).

In addition, on February 15 and February 18, 2002, Mr. Ilardi spoke with Joseph Gerling, the head of the Lane Alton firm. In both conversations, Mr. Ilardi told Mr. Gerling “that the pretrial defense [of the *Nationwide* case] had been mismanaged” by Defendant Wuerth. (Ilardi Depo. at 51-52). Mr. Ilardi testified as follows regarding his telephone conversations with Mr. Gerling on these dates:

I remember telling Rick Marsh and/or Mr. Gerling, I’m certain I told Mr. Gerling, I don’t remember telling Mr. Marsh. But it’s possible they work together or I may have said it twice, that we were going to go ahead and settle the case to protect our insured’s interest, *but we were going to hold Lane Alton accountable.*

* * * * *

I definitely spoke with Joe Gerling before speaking with plaintiff’s counsel [about settlement]. In fact, I believe that during the course of one of those discussions, *I asked Joe Gerling point blank, how much money he was willing to put on the table to get the case settled.*”

(Ilardi Depo. at 63-64, 67) (emphasis added). Mr. Ilardi also told Gerling “that Lane Alton

should notify their malpractice insurer that we plan to file a claim against them.” (Ilardi Depo. at 67). On February 20, 2002, Mr. Gerling, in response to Mr. Ilardi’s directive, instructed Lane Alton’s insurance broker to notify Lane Alton’s malpractice insurer. (Gerling Aff., ¶¶ 10 and 11).

Thus, Mr. Ilardi had determined to sue Defendants even before settling the case.

Q. In fact, sir, you had concluded in your mind to raise a claim with I guess Mr. Wuerth and Lane Alton prior to the time you entered into the settlement agreement with Mr. Brudney [Nationwide’s counsel], correct?

A. Clearly -- --

MR. CALLOW: Objection, I’m sorry.

A. Clearly, my thinking at that time was that we had, we meaning AIG [Plaintiff], had been placed in a situation by Lane Alton’s mismanagement of the case.

Lane Alton/Mr. Wuerth’s mismanagement of the case that was now going to cause AIG [Plaintiff] to have to pay a substantially higher amount of money to settle the case, much less have a success of winning the case. *And so there was no doubt in my mind that I was going to seek recovery for some significant portion of that money from Lane Alton.*

(Ilardi Depo. at 97) (emphasis added).

In summary, prior to February 21, 2002, both Mr. DeMaria and Mr. Ilardi had determined that Defendant Wuerth’s mistakes in lawyering had caused injury to Nationwide in that Nationwide would be forced to overpay to settle the case. In addition, and also prior to February 21, 2002, Mr. Ilardi had determined to sue Defendants for malpractice. This Court therefore concludes that it is undisputable that a cognizable event involving Defendant Wuerth occurred

prior to February 21, 2002. However, the Court's inquiry as to the accrual date in this legal malpractice claim does not end here; the parties also dispute whether or not Defendant Wuerth's representation of McLarens and Larry Wood terminated prior to February 21, 2002.

b. Termination of Representation

Defendants argue that the Defendant Wuerth's representation of McLarens and Larry Wood terminated on February 14, 2002, more than one year before Plaintiff's Complaint. (Def's Mot. for Summ. J. at 29). Plaintiff counters that Defendant Wuerth's representation did not terminate until after February 21, 2002, thus making the filing of Plaintiff's February 21, 2003 Complaint timely under O.R.C. § 2305.11(A). (Pl's Memo. in Opp. at 11-12). "[T]he attorney-client relationship is consensual, subject to termination by acts of either party. *Brown v. Johnstone*, 5 Ohio App.3d 165, 166-167 (1982). "An attorney-client relationship can terminate upon the affirmative act of either party." *Savage v. KucharSKI*, 2006 WL 2796264 (Ohio App. 2006). The point at which the attorney-client relationship is terminated is a factual question to be resolved by the trier of fact. *Smith v. Conely*, 109 Ohio St.3d 141, 142 (2006) *citing Omni Food*, 38 Ohio St.3d at syllabus. For a trial court to take this issue away from a jury, the court must be able to point to a clear and unambiguous act which signals the end of the relationship. *Mobberly v. Hendricks* 98 Ohio App.3d 839, 843, (Ohio App. 9 Dist.1994) (*citing Mastran v. Marks*, Summit App. No. 14270, 1990 WL 34845). For example, Ohio Courts have found that for statute of limitations purposes, a lawyer's representation of a client terminates when the lawyer discontinues all work on behalf of the client and the client is aware that he or she has done so. *See e.g., Markham v. Brandt*, 2006 WL 783464 (S.D. Ohio 2006); *Trombley v. Calamunci, Joelson, Manore, Farah & Silvers, LLP*, 2005 WL 1009841 (Ohio App. 2005);

Koerber v. Levey & Gruhin, 2004 WL 1344834 (Ohio App. 2004).

In the present case, in the early morning of February 14, 2002, Defendant Wuerth collapsed at his home and was taken to the hospital. Defendant Wuerth's doctor, Dr. Soldano opined that Defendant Wuerth was physically incapable of continuing representation in the *Nationwide* case. (Soldano Depo. at 32-34). Consistent with his opinion, Dr. Soldano ordered Defendant Wuerth to immediately stop working and remain at home. (Sec. Wuerth Aff. ¶ 13). Defendant Wuerth followed Dr. Soldano's orders and "performed no legal services for or on behalf of McLarens or Mr. Wood in connection with the *Nationwide* case, or otherwise, after February 13, 2002"; he "provided no assistance whatsoever in connection with the defense of the *Nationwide* case after February 13, 2002"; and he has "had no contact or communication with Mr. Larry Wood or with any representative of McLarens since February 13, 2002." [Sec. Wuerth Aff., ¶ 14]. Finally, except for proceedings in this legal malpractice case, Defendant Wuerth has had no contact or communication with any representative of Plaintiff in any way related to the *Nationwide* case since February 13, 2002. (Sec. Wuerth Aff. ¶ 14).

The Court finds that the evidence demonstrates that Plaintiff knew that Defendant Wuerth's representation of McLarens and Woods in the *Nationwide* case had terminated prior to February 21, 2002. Mr. DeMaria testified that, on February 14, 2002, Rick Marsh advised him that Defendant Wuerth had been taken to the hospital and that he would not be continuing with the *Nationwide* case or be of any assistance (DeMaria Depo. at 148-150). Mr. DeMaria acknowledged that Mr. Marsh took over the representation of McLarens and Mr. Wood on February 14, 2002 (DeMaria Depo. at 163). Mr. DeMaria testified that he knew on February 14, 2002, that Defendant Wuerth would not be returning to work on the *Nationwide* case and that

neither he nor Mr. Ilardi was surprised that Defendant Wuerth would not be doing so. (DeMaria Depo. at 150-152). Mr. DeMaria also testified that he knew on February 14, 2002, that Richard Wuerth was out of the case and was replaced by Rick Marsh. (DeMaria Depo. at 163-165).

Finally, on February 14, 2002, Mr. DeMaria and Plaintiff's Cleveland lawyer, Steven Janik, ordered Rick Marsh to prepare and file a motion for mistrial due to Defendant Wuerth's inability to continue representing McLarens and Larry Wood (Marsh Aff., ¶ 8; DeMaria Depo. at 152-153, 166). DeMaria also sought the advice of Plaintiff's Columbus attorney, Percy Squire, and he likewise recommended that a motion for mistrial be filed (Squire Depo. at 49-50). All of Plaintiff's representatives -- Messrs. DeMaria, Janik, and Squire -- were attorneys, and all of them were of the belief on February 14, 2002 that, because Defendant Wuerth could no longer represent McLarens and Larry Wood in the *Nationwide* case, a mistrial was in order. Per Messrs. DeMaria, Janik, and Squire's direction, a motion for mistrial was filed on February 15, 2002 (Marsh Aff., ¶ 12). Mr. Marsh faxed copies of it to Messrs. DeMaria, Janik, and Squire on Monday morning, February 18, 2002 (Marsh Aff., ¶ 12; Exh. A). That motion informed anyone who received it that Defendant Wuerth's representation of McLarens and Larry Wood ended on February 14, 2002. (See Marsh Aff., Ex. A). Judge Marbley noted the termination of Richard Wuerth's representation of McLarens and Larry Wood the morning of February 20, 2002:

THE COURT: As a housekeeping matter, I will note for the record that Mr. Rick Marsh has been substituted as trial counsel for Mr. Richard Wuerth. Ms. Beth Lashuk remains as counsel of record as she has been a lawyer for McLarens Toplis and Mr. Wood throughout these proceedings. Mr. Jeff Hutson, who I believe is a partner in the Lane, Alton and Horst firm, is going to argue the Rule 50 motion on behalf of McLarens Toplis

and Mr. Wood.

(*Nationwide* Tr. Vol. IX at 5).

Plaintiff seeks to refute this evidence by asserting that the attorney-client relationship could not have been terminated because “Wuerth never formally withdrew as counsel for National Union’s insured as required by S.D. Ohio Civ. Rule 83.4(d); and Wuerth was listed as trial counsel for National Union’s insured on pleadings filed as late as February 22, 2005.” This Court must reject Plaintiff’s assertions as both the Ohio Supreme Court and the Sixth Circuit have specifically held that compliance with local court rules regarding withdrawal of counsel is not relevant to determining whether a lawyer’s representation of a client has terminated for statute of limitations purposes. *See Smith v. Conley*, 109 Ohio St.3d at 144; *Omlin v. Kaufman & Cumberland Co.*, 8 Fed. Appx. 477 (6th Cir. 2001).

Based on the foregoing, the Court finds that reasonable minds cannot differ as to whether Defendant Wuerth’s representation in the *Nationwide* case terminated prior to February 21, 2002. Therefore, because the Court finds that, prior to February 21, 2002, a cognizable event involving Defendant Wuerth occurred, and Defendant Wuerth’s representation of McLarens and Woods in the *Nationwide* case had terminated, Plaintiff’s claim against Defendant Wuerth is barred by Ohio’s malpractice statute of limitations. Accordingly, Defendants are entitled to summary judgment in their favor on Plaintiff’s legal malpractice claim against Defendant Wuerth.

2. Misrepresentation Claim

Defendants maintain that Plaintiff has masqueraded its malpractice claim as a

misrepresentation claim in order to circumvent Ohio's one-year statute of limitations for malpractice actions. (Def's Mot. for Summ. J. at 36-38). Consequently, Defendants argue that Plaintiff's misrepresentation claims against Defendant Wuerth are barred by Ohio's malpractice statute of limitations. (See Def's Mot. for Summ. J. at 36). This Court agrees.

Plaintiff's "claim" of misrepresentation is that Defendant Wuerth "provided faulty information and/or advice." (See Compl. ¶ 23). In Plaintiff's Second Supplemental Responses to Defendants' Interrogatories, served on November 15, 2005, Plaintiff stated that the sole and exclusive bases for its purported misrepresentation claim were the acts it claimed constituted legal malpractice. (See Pl. Second Supp. Ans. to Interrog. No. 14).

This is not the first time a Plaintiff has sought to characterize malpractice claims as something else in order to circumvent the statute of limitations. In *Omlin v. Kaufman & Cumberland Company, L.P.A.*, 8 Fed. Appx. 477 (6th Cir. 2001), the Sixth Circuit affirmed a summary judgment granted to the defendant in an Ohio legal malpractice case and held:

Although Omlin argues that this action was not a malpractice action, but a breach of contract, breach of fiduciary duty, and tort action, an "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. 2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Mgmt. Co.*, 4 Ohio App.3d 89, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982). The *Muir* court noted that: "[m]alpractice by any other name still constitutes malpractice ... [M]isconduct may consist either of negligence or a breach of the contract of employment. It makes no difference whether the professional misconduct is found in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.* Thus, Omlin's attempt to characterize her action as something other than a legal malpractice proceeding is without merit.

Id. at 479. *Accord Thut v. Canala*, 2005 WL 2000744 (Ohio App. 2005); *Triplett v. Benton*, 2003 WL 22390065 (Ohio App. 2003). An identical case is *Dingus v. Kirwan*, 2006 WL 2384070 (Ohio App. 2006), where the plaintiff sued his lawyer for fraud committed while prosecuting a lawsuit. In affirming a summary judgment based upon the malpractice statute of limitations, the Ohio appellate court held:

Clothing a malpractice action in the language of fraud, does not convert the action into one based on fraud. [Citation omitted]. Malpractice by any other name is still malpractice. [Citation omitted]. Most importantly, simply re-labeling a malpractice action as a fraud action will not extend the statute of limitations. [Citation omitted].

Id. The Court agrees with Defendants that Plaintiff cannot save an untimely filed legal malpractice claim by calling it something else. As the *Muir* Court put it, “[m]alpractice by any other name still constitutes malpractice.” *Muir*, 4 Ohio App.3d at 90. Accordingly, Plaintiff’s claim of misrepresentation is barred by the one-year period of limitations set forth in O.R.C. § 2305.11(A).

B. Defendant Lane Alton

Plaintiff seeks to hold Defendant Lane Alton vicariously liable for Defendant Wuerth’s alleged malpractice. (Pl’s Memo. in Opp. at 16). Plaintiff also seeks to assert a direct claim for legal malpractice against Defendant Lane Alton. (Pl’s Memo. in Opp. at 16). Defendants argue that Defendant Lane Alton cannot be liable for Defendant Wuerth’s malpractice because Defendant Wuerth is not liable. (Def’s Mot. for Summ. J. at 11-12). This Court Agrees. Defendants further argue that Defendant Lane Alton, a limited liability company, can only be

vicariously liable for legal malpractice. (Def's Mot. for Summ. J. at 12-15). Again, this Court agrees.

1. Claim for Vicarious Liability for Defendant Wuerth's Alleged Malpractice

It is a well-settled principle of Ohio law that for the principal to be liable, the agent must be liable. *See e.g., Soltis v. Wegman, Hessler, vanderburg & O'Toole*, 1997 WL 64049, *3 (Ohio App. 1997) (holding "[a]bsent negligence on the part of [the defendant lawyer] as an employee, the law firm and its principals as the employer cannot be held liable); *Comer v. Risko*, 106 Ohio St.3d 185, 189 (2005) (holding "[i]f 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); and *Flynt v. Brownfield, Bowen & Bally*, 882 F.2d 1048 (6th Cir. 1989) (applying Ohio law to affirm a grant of summary judgment to a general partner of a lawyer alleged to have committed legal malpractice, and explaining that because the statute of limitations had run against the lawyer who committed the purported legal malpractice, his partner could not be vicariously liable).

Plaintiff has not argued against this well-settled principle, but instead merely states that its "derivative claims against Lane Alton are not barred by the statute of limitations as the claims asserted against Defendant Wuerth were timely." (Pl's Memo. in Opp. at 16-18). For the reasons set forth *supra*, this Court has rejected Plaintiff's assertion that Plaintiff's malpractice claims against Defendant Wuerth were timely and instead has found that Defendant Wuerth has no liability to Plaintiff because the statute of limitations has run. *See supra* at III.A. Consequently, Defendant Lane Alton cannot be held liable for Defendant Wuerth's alleged malpractice.

2. Direct Claim for Legal Malpractice

Plaintiff has cited no legal authority to support its contention that it can assert a “direct claim” for legal malpractice against Defendant Lane Alton. (Pl’s Memo. in Opp. at 16-18). Defendants argue, and this Court agrees, 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. (*See* Def’s Reply at 11-15).

Malpractice is “professional conduct [by] members of the medical professions and attorneys.” *Dingus v Kirwan*, 2006 WL 2384070, *10 (Ohio App. 2006) (citation omitted). Malpractice occurs when a member of the medical profession or attorney fails to “(1) treat a case professionally; or (2) fulfill a duty implied into the employment law; or (3) exercise the degree of skill or care exercised by members of the same profession practicing in the same locality.” *Id.* It is well-settled that the first, and indispensable, element of a direct claim for legal malpractice is the existence of an attorney-client relationship. *See e.g., Krahn v. Kinney*, 43 Ohio St.3d 103 (1989); *Landis v. Hunt*, 80 Ohio App.3d 662 (1992).

Defendant Lane Alton is not an attorney. Rather, it is a limited liability company organized under Chapter 1705 of the Ohio Revised Code. (Gerling Aff. ¶ 3). Defendant Lane Alton has never taken the bar examination; it is not admitted to the bar; and it is not subject to professional discipline. Since Defendant Lane Alton is not an attorney, an attorney-client relationship with it could never be established. Instead, the attorney-client relationships are with the individual lawyers of the firm, and the firm’s liability, if any, is dependent upon the liability of those individual lawyers. This is the essence of vicarious liability.

The Court finds *Youngstown Park & Falls St. Ry. Co. v. Kessler* 84 Ohio St. 74 (1911), instructive. In *Youngstown*, the plaintiff asserted a "direct claim" for medical malpractice against a railroad. The Ohio Supreme Court held:

It is sufficient to say with reference to this contention that a railroad company cannot be guilty of malpractice. *It is not authorized to practice medicine or surgery*, and therefore any contract it might make to do so would be not only ultra vires, *but in direct conflict with the laws of this state regulating the practice of medicine and surgery*. Therefore the statute limiting the time in which actions for damages for malpractice may be brought has no application to this suit.

No such action [medical malpractice] will lie against a railroad company, and, if that is the cause of action stated in this second amended petition, then it would be vulnerable to a demurrer, not only because of the statute of limitation, *but also because it does aver facts sufficient to constitute a cause of action*.

Id. at 77 (emphasis added).

Accordingly, this Court finds that a "direct claim" for legal malpractice cannot be asserted against a non-attorney. Regardless, 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.³ (See PI'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. In *Albain v. Flower Hospital*, 50 Ohio St.3d 251 (1990), the Ohio Supreme Court held: "[i]t is a fundamental maxim of law that a person cannot be held

³Plaintiff's expert James Coogan testified that, when he mentioned the malpractice of Lane Alton in his report, he was actually referring to the negligence of the individual attorneys in the firm and particularly that of Richard Wuerth, Rick Marsh, Jeffrey Hutson, Joseph Gerling, and Beth Lashuk. (Coogan Depo. at 109-110). Plaintiff's "nationally recognized expert" Phillip Feldman testified that most of those individuals should have been sued. (Feldman Depo. at 180).

liable, other than derivatively, for another's negligence." *Id.* at 254-255. Similarly, in *Comer v. Risko*, 106 Ohio St.3d 185 (2005), the Ohio Supreme Court stated: "[a]n agent who committed the tort is primarily liable for its actions, while the principal is merely secondarily liable." *Id.* at 189. Thus, 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. *See supra* at III.A. 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.

A virtually identical situation occurred in *Comer v. Risko*, 106 Ohio St. 3d 185, (2005). In that case, the plaintiff sued a hospital claiming that two physicians, who allegedly were its agents, committed malpractice. Just as in this case, 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 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.*

Id. at 190-192 (emphasis added).

This case is no different. The purported liability of the Lane Alton lawyers who Plaintiff never sued was extinguished by the statute of limitations. Accordingly, Lane Alton cannot be liable for their alleged “negligence.”

Therefore, Defendants are entitled to summary judgment in their favor on Plaintiff’s “direct claims” of legal malpractice against Defendant Lane Alton.

IV. CONCLUSION

Based on the above, the Court **GRANTS** Defendants’ Motion for Summary Judgment (Doc. 105) and **DENIES** Plaintiff’s Motion for Summary Judgment (Doc. 109).

The Clerk shall remove Documents 105 and 109 from the Court’s pending motions list.

The Clerk shall remove this case from the Court’s pending cases list.

IT IS SO ORDERED.

/s/ George C. Smith

**GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT**

1705.25 Authority of managers.

(A) If the management of a limited liability company is reserved to its members, all of the following apply:

(1) Every member is an agent of the company for the purpose of its business, and the act of every member, including the execution in the company name of any instrument for apparently carrying on in the usual way the business of the company binds the company, unless the member so acting has in fact no authority to act for the company in the particular matter, and the person with whom he is dealing has knowledge of the fact that he does not have that authority.

(2) Unless the act is authorized by the other members, an act of a member that is not apparently for the carrying on the business of a limited liability company in the usual way does not bind the company.

(3) Unless authorized by the other members or unless the other members have abandoned the business, one or more but less than all of the members of a limited liability company have no authority to do any of the following:

(a) Assign the property of the company in trust for creditors or on the assignee's promise to pay the debts of the company;

(b) Dispose of the good will of the business of the company;

(c) Do any other act that would make it impossible to carry on the ordinary business of the company;

(d) Confess a judgment;

(e) Submit a claim or liability of the company to arbitration or reference.

(B) Except as provided in the operating agreement, if the management of a limited liability company is not reserved to its members, all of the following apply:

(1) Every manager is an agent of the company for the purpose of its business, and the act of every manager, including the execution in the company name of any instrument for apparently carrying on in the usual way the business of the company binds the company, unless the manager so acting has in fact no authority to act for the company in the particular matter, and the person with whom he is dealing has knowledge of the fact that he does not have that authority.

(2) Unless it is authorized by the members, an act of a manager that is not apparently for the carrying on the business of a limited liability company in the usual way does not bind the company.

(3) Unless authorized by the members or unless the limited liability company has dissolved, managers of the company have no authority to engage in any of the conduct listed in divisions (A)(3)(a) to (e) of this section.

(C) Except as otherwise provided in the operating agreement, a person who is both a manager and a member of a limited liability company has the rights and powers of a manager, is subject to the restrictions and liabilities of a manager, and, to the extent of his membership interest, has the rights and powers of a member and is subject to the restrictions and liabilities of a member.

Effective Date: 07-01-1994

APPX 32

1775.08 Agent of partnership - act of individual partner binds partnership.

Effective January 1, 2010, Chapter 1775 is repealed and no longer governs partnerships. 2008 HB332.

(A) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(B) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(C) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(1) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;

(2) Dispose of the good will of the business;

(3) Do any other act which would make it impossible to carry on the ordinary business of a partnership;

(4) Confess a judgment;

(5) Submit a partnership claim or liability to arbitration or reference.

(D) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

Effective Date: 10-01-1953; 2008 HB332 01-01-2010

1782.24 General partner - rights and powers.

(A) Except as otherwise provided in this chapter, the partnership agreement, or section 5815.35 of the Revised Code, a general partner of a limited partnership shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners.

(B) Except as otherwise provided in this chapter, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as otherwise provided in this chapter or the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

Effective Date: 04-01-1985; 01-01-2007

CHAPTER 1785: PROFESSIONAL ASSOCIATIONS

1785.01 Professional association definitions.

As used in this chapter:

(A) "Professional service" means any type of professional service that may be performed only pursuant to a license, certificate, or other legal authorization issued pursuant to Chapter 4701., 4703., 4705., 4715., 4723., 4725., 4729., 4730., 4731., 4732., 4733., 4734., or 4741., sections 4755.04 to 4755.13, or 4755.40 to 4755.56 of the Revised Code to certified public accountants, licensed public accountants, architects, attorneys, dentists, nurses, optometrists, pharmacists, physician assistants, doctors of medicine and surgery, doctors of osteopathic medicine and surgery, doctors of podiatric medicine and surgery, practitioners of the limited branches of medicine specified in section 4731.15 of the Revised Code, mechanotherapists, psychologists, professional engineers, chiropractors, chiropractors practicing acupuncture through the state chiropractic board, veterinarians, occupational therapists, physical therapists, and occupational therapists.

(B) "Professional association" means an association organized under this chapter for the sole purpose of rendering one of the professional services authorized under Chapter 4701., 4703., 4705., 4715., 4723., 4725., 4729., 4730., 4731., 4732., 4733., 4734., or 4741., sections 4755.04 to 4755.13, or 4755.40 to 4755.56 of the Revised Code, a combination of the professional services authorized under Chapters 4703. and 4733. of the Revised Code, or a combination of the professional services of optometrists authorized under Chapter 4725. of the Revised Code, chiropractors authorized under Chapter 4734. of the Revised Code to practice chiropractic or acupuncture, psychologists authorized under Chapter 4732. of the Revised Code, registered or licensed practical nurses authorized under Chapter 4723. of the Revised Code, pharmacists authorized under Chapter 4729. of the Revised Code, physical therapists authorized under sections 4755.40 to 4755.56 of the Revised Code, occupational therapists authorized under sections 4755.04 to 4755.13 of the Revised Code, mechanotherapists authorized under section 4731.151 of the Revised Code, and doctors of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery authorized under Chapter 4731. of the Revised Code.

Effective Date: 03-22-1999; 04-06-2007; 2007 SB33 08-22-2007

1785.02 Incorporation of professional individuals or groups.

An individual or group of individuals each of whom is licensed, certificated, or otherwise legally authorized to render within this state the same kind of professional service, a group of individuals each of whom is licensed, certificated, or otherwise legally authorized to render within this state the professional service authorized under Chapter 4703. or 4733. of the Revised Code, or a group of individuals each of whom is licensed, certificated, or otherwise legally authorized to render within this state the professional service of optometrists authorized under Chapter 4725. of the Revised Code, chiropractors authorized under Chapter 4734. of the Revised Code to practice chiropractic or acupuncture, psychologists authorized under Chapter 4732. of the Revised Code, registered or licensed practical nurses authorized under Chapter 4723. of the Revised Code, pharmacists authorized under Chapter 4729. of the Revised Code, physical therapists authorized under sections 4755.40 to 4755.56 of the Revised Code, occupational therapists authorized under sections 4755.04 to 4755.13 of the Revised Code, mechanotherapists authorized under section 4731.151 of the Revised Code, or doctors of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery authorized under Chapter 4731. of the Revised Code may organize and become a shareholder or shareholders of a professional association. Any group of individuals described in this section who may be rendering one of the professional services as an organization created otherwise than pursuant to this chapter may incorporate under and pursuant to this chapter by amending the agreement establishing the organization in a manner that the agreement as amended constitutes articles of incorporation prepared and filed in the manner prescribed in section 1785.08 of the Revised Code and by otherwise complying with the applicable requirements of this chapter.

Effective Date: 03-22-1999; 04-06-2007; 2007 SB33 08-22-2007

1785.03 Rendering professional services.

A professional association may render a particular professional service only through officers, employees, and agents who are themselves duly licensed, certificated, or otherwise legally authorized to render the professional service within this state. As used in this section, "employee" does not include clerks, bookkeepers, technicians, or other individuals who are not usually and ordinarily considered by custom and practice to be rendering a particular professional service for which a license, certificate, or other legal authorization is required and does not include any other person who performs all of that person's employment under the direct supervision and control of an officer, agent, or employee who renders a particular professional service to the public on behalf of the professional association.

No professional association formed for the purpose of providing a combination of the professional services, as defined in section 1785.01 of the Revised Code, of optometrists authorized under Chapter 4725. of the Revised Code, chiropractors authorized under Chapter 4734. of the Revised Code to practice chiropractic or acupuncture, psychologists authorized under Chapter 4732. of the Revised Code, registered or licensed practical nurses authorized under Chapter 4723. of the Revised Code, pharmacists authorized under Chapter 4729. of the Revised Code, physical therapists authorized under sections 4755.40 to 4755.56 of the Revised Code, occupational therapists authorized under sections 4755.04 to 4755.13 of the Revised Code, mechanotherapists authorized under section 4731.151 of the Revised Code, and doctors of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery authorized under Chapter 4731. of the Revised Code shall control the professional clinical judgment exercised within accepted and prevailing standards of practice of a licensed, certificated, or otherwise legally authorized optometrist, chiropractor, chiropractor practicing acupuncture through the state chiropractic board, psychologist, nurse, pharmacist, physical therapist, occupational therapist, mechanotherapist, or doctor of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery in rendering care, treatment, or professional advice to an individual patient.

This division does not prevent a hospital, as defined in section 3727.01 of the Revised Code, insurer, as defined in section 3999.36 of the Revised Code, or intermediary organization, as defined in section 1751.01 of the Revised Code, from entering into a contract with a professional association described in this division that includes a provision requiring utilization review, quality assurance, peer review, or other performance or quality standards. Those activities shall not be construed as controlling the professional clinical judgment of an individual practitioner listed in this division.

Effective Date: 03-22-1999; 04-06-2007; 2007 SB33 08-22-2007

1785.04 Effect of chapter.

This chapter does not modify any law applicable to the relationship between a person furnishing a professional service and a person receiving that service, including liability arising out of the furnishing of that service.

Effective Date: 07-01-1994

1785.05 Issuing capital stock.

A professional association may issue its capital stock only to persons who are duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service as that for which the association was organized or, in the case of a combination of professional services described in division (B) of section 1785.01 of the

Revised Code, to render within this state any of the applicable types of professional services for which the association was organized.

Effective Date: 04-10-1998

1785.06 Biennial statement to secretary of state.

A professional association, within thirty days after the thirtieth day of June in each even-numbered year, shall furnish a statement to the secretary of state showing the names and post-office addresses of all of the shareholders in the association and certifying that all of the shareholders are duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service for which the association was organized or, in the case of a combination of professional services described in division (B) of section 1785.01 of the Revised Code, to render within this state any of the applicable types of professional services for which the association was organized. This statement shall be made on a form that the secretary of state shall prescribe, shall be signed by an officer of the association, and shall be filed in the office of the secretary of state.

If any professional association fails to file the biennial statement within the time required by this section, the secretary of state shall give notice of the failure by certified mail, return receipt requested, to the last known address of the association or its agent. If the biennial statement is not filed within thirty days after the mailing of the notice, the secretary of state, upon the expiration of that period, shall cancel the association's articles of incorporation, give notice of the cancellation to the association by mail sent to the last known address of the association or its agent, and make a notation of the cancellation on the records of the secretary of state.

A professional association whose articles have been canceled pursuant to this section may be reinstated by filing an application for reinstatement and the required biennial statement or statements and by paying the reinstatement fee specified in division (Q) of section 111.16 of the Revised Code. The rights, privileges, and franchises of a professional association whose articles have been reinstated are subject to section 1701.922 of the Revised Code. The secretary of state shall inform the tax commissioner of all cancellations and reinstatements under this section.

Effective Date: 05-16-2002

1785.07 Selling or transferring shares.

A shareholder of a professional association may sell or transfer that shareholder's shares in the association only to another individual who is duly licensed, certificated, or otherwise legally authorized to render within this state the same professional service as that for which the association was organized or, in the case of a combination of professional services described in division (B) of section 1785.01 of the Revised Code, to render in this state any of the applicable types of professional services for which the association was organized.

Effective Date: 04-10-1998

1785.08 Applicability of general corporation laws.

Chapter 1701. of the Revised Code applies to professional associations, including their organization and the manner of filing articles of incorporation, except that the requirements of division (A) of section 1701.06 of the Revised Code do not apply to professional associations. If any provision of this chapter conflicts with any provision of Chapter 1701. of the Revised Code, the provisions of this chapter shall take precedence. A professional association for the practice of medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery or for the combined practice of optometry, chiropractic, acupuncture through the state chiropractic board, psychology, nursing, pharmacy,

physical therapy, mechanotherapy, medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery may provide in its articles of incorporation or bylaws that its directors may have terms of office not exceeding six years.

Effective Date: 03-22-1999; 2007 SB33 08-22-2007

1785.09 Other forms of organization.

This chapter does not preclude the rendering of a professional service within this state by a corporation formed under division (B) of section 1701.03 of the Revised Code, a limited liability company formed under Chapter 1705. of the Revised Code, or a foreign limited liability company registered with the secretary of state and transacting business in this state in accordance with sections 1705.53 to 1705.58 of the Revised Code.

Effective Date: 07-01-1994