

IN THE SUPREME COURT OF OHIO

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

PETITIONER'S REPLY BRIEF

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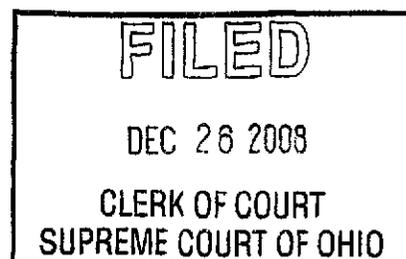
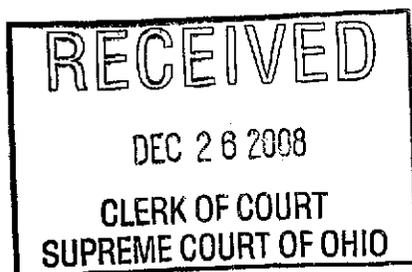


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INTRODUCTION

The issue before the Court is clear: Whether an aggrieved party can bring a direct legal malpractice claim against a law firm regardless whether individual attorneys are named as individual defendants. There are two reasons a malpractice claim can be asserted against a law firm without also naming an attorney. First, a law firm, like any other corporation or partnership, is capable of entering contracts and committing torts. A law firm is “authorized to practice law” by this Court. Thus, a law firm should be directly liable for legal malpractice. Second, the doctrines of respondeat superior and enterprise liability hold a corporation or partnership directly liable for the acts of its employees and principals.

Petitioner’s merit brief answered the certified question and analyzed the history of legal malpractice claims against law firms in Ohio; the treatment of similar claims in sister states; the interplay between those claims and the Revised Code, the Code of Professional Conduct, the Code of Professional Responsibility, and the Supreme Court Rules for the Government of the Bar; and the public policy favoring direct actions against law firms. Respondents neither answered the certified question nor addressed any of these topics.

Respondents’ brief fails to cite and discuss legal malpractice cases at all. Of the 15 cases substantively relied upon in Respondents’ brief (excluding string citations), only four cases involve legal malpractice claims. Of these four cases, not one addressed when a law firm is liable for malpractice. Respondents’ entire substantive argument against Petitioner’s well researched and persuasive brief is confined to a dismissive footnote. (Respondents’ Merit Brief, at 6). This is hardly the means by which to address an issue certified by the Sixth Circuit and accepted by this Court for decision. When two distinguished courts determine a question should be answered, the parties should not skirt the issue. Ignoring Petitioner’s arguments does not

make them go away. Respondents have failed to point the Court to any authority to support their position.

Not only did Respondents ignore the substantive legal issue before the Court, they failed to include a statement of facts.¹ As this is a certified question of state law, Section 7 of S.Ct. Prac. R. XVIII states that the matter is to be briefed under S.Ct. Prac. R. VI, which reads, in pertinent part, “A statement of facts may be omitted from the appellee’s brief *if the appellee agrees with the statement of facts given in the appellant’s merit brief.*” S.Ct. Prac. R. VI, §3(A) (emphasis added). Respondents’ failure to contest the facts leaves the Petitioner’s statement of facts uncontested, and thus, stipulated.

To complete the trifecta, Respondents failed to answer the certified question, and instead, answered a question that has not been asked. Respondents focus their brief on whether a law firm is liable *when its attorneys are not liable*. Respondents’ attempt to morph the certified question into one they think is susceptible to a favorable answer should be rebuffed.

Respondents and their attorneys are neither incompetent nor lazy. Their failure to squarely address the issue before this Court was intentional. Respondents engaged in a calculated attempt to avoid the certified question because they recognized that direct analysis of the certified question inevitably leads to an affirmative answer. Ohio case law, the Revised Code, the rules promulgated by this Court, and precedent from other states that addressed this issue all lead to the same result: A legal malpractice claim may be maintained directly against a law firm.

¹ Perplexingly, Respondents wrote that “Respondents will resist the temptation—as difficult as that is—to refute the outrageous ‘factual’ statements Petitioner has made . . . in its Brief.” (Respondents’ Merit Brief at 2).

PUBLIC POLICY FAVORS PETITIONERS

One remarkable aspect of the Respondents' brief is its utter failure to demonstrate any harm that will result from answering the certified question in the affirmative. The statute of limitations against a law firm will remain a short one year. The law firm will retain the right to assert third-party claims or separate indemnity suits against those individuals it believes are also liable. Its ability to defend itself will not be harmed. No negative consequences will befall the legal system in Ohio by holding law firms accountable the same as other corporations are held accountable for their transgressions.

The harms of holding that a law firm cannot be directly sued are many. Law firms, such as both firms representing the parties here, represent clients in complex matters that take many attorneys to handle and that continue for years. Law firms could avoid liability for an attorney's malpractice by quietly removing that attorney from the team participating in that matter long before the representation ends. Moreover, the already short statute of limitations in legal malpractice claims against a law firm does not need to be abbreviated further based upon the running of separate statutes of limitation for each attorney within the firm (assuming for the moment that the statute of limitations runs separately for each individual attorney within a firm).

Answering the certified question in the manner suggested by Respondents will result in multiple individual attorneys in a firm being named in a malpractice suit in order to preserve the cause of action, and having multiple statutes of limitations running and expiring at the same time as representation in the underlying matter continues undercuts the basic attorney-client relationship and impedes the actual resolution of claims and litigation. When a car buyer is injured by a defective automobile, they are not expected to individually name every engineer and employee involved in the design and construction of the car. Asserting a claim against the manufacturer is sufficient. When a party is aggrieved by a corporation or partnership or other

legal entity recognized under Ohio law, the party does not need to sue every person associated with the relationship and can bring the claim against the legal entity itself – regardless of whether individual defendants are named. The same rule should apply to law firms. When a law firm, or its attorneys, commits malpractice, bringing an action against the firm should be sufficient to state a claim.

RESPONDENTS ADMIT THEIR SECOND PROPOSITION OF LAW IS ERRONEOUS

Respondents’ own briefing renders their second proposition of law erroneous. The proposition is “A law firm’s liability for legal malpractice is vicarious.” The brief then contradicts that statement! “Petitioner asserts that law firms should be directly liable for breach of engagement letters, contingent fee agreements, and other contracts. *Respondents have never argued otherwise*”. (Respondents’ Merit Brief at 9) (emphasis added). This admission must result in the certified question being answered in the affirmative.

If a firm is independently liable for breaching representation agreements, then it can be sued directly for malpractice. *C.f. N. Shore Auto Sales, Inc. v. Weston, Hurd, Fallon, Paisley & Howley, LLP*, 8th Dist. App. 86332, 2006-Ohio-456, 2006 WL 250733, 2006 Ohio App. LEXIS 393 (applying the one year statute of limitations for malpractice claims under R.C. 2305.11 to claims asserted against a law firm). It makes no difference whether the malpractice claim is premised on tort or contract. *Muir v. Hadler Real Estate Management Co.* (1982), 4 Ohio App.3d 89, 90, 446 N.E.2d 820 (“An action against one’s attorney for damages resulting from the manner in which the attorney represents a 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.”); *Endicott v. Johrendt* (2000), 10th Dist. App. No. 99AP-935, 2000 Ohio App. LEXIS 2697, *13 (Holding any claims that “arise out of the manner in which [a client] was represented within the attorney/client relationship” are subsumed into a

malpractice claim.) Because a law firm can be held directly accountable for legal malpractice (under a contractual or tort theory of liability), a direct claim against a law firm is a viable claim.

In an effort to sidestep the *Muir* holding, Respondents cite to a 1911 case that held that a railroad cannot be liable for medical malpractice because a railroad is not authorized to practice medicine. *Youngstown Park & Falls St. Ry. Co. v. Kessler* (1911), 84 Ohio St. 74, 95 N.E. 509. As discussed at length in Petitioner's Merit Brief, a law firm can practice law. (Petitioner's Merit Brief, 10-14). *Kessler* is inapposite. Based upon Respondents' acknowledgment that a law firm is directly liable for contractual breaches with a client, the Court should reject Respondents' second proposition of law, and adopt Petitioner's First Proposition of Law that a legal malpractice claim can be asserted directly against a law firm.

Once it is settled that a law firm can be sued directly for its malpractice, it follows that the statute of limitations against the law firm runs from the date the law firm's representation ended. The law firm, as a legal entity, is subject to its own statute of limitations accrual date. The certified question is answered in the affirmative because the claims based upon the law firm's independent breaches do not require the presence of an attorney in the case.

RESPONDENTS ANSWER A QUESTION THAT WAS NOT ASKED

Respondents' first proposition of law is "For a law firm to be liable for legal malpractice one or more of its attorneys must be liable." There are two errors with this proposition of law. First, it contradicts the acknowledgment discussed above that a law firm is directly liable for its own breach of duties owed to a client. Second, the proposition erroneously focuses on whether an attorney is "liable."

The question this Court asked the parties to brief, is:

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?*

The certified question is not focused on whether an individual attorney is liable. The question presupposes that an attorney is (or at least could be) liable. The certified question turns on whether an individual attorney must be a party to the suit in order for claims against the law firm – even direct claims – to be viable. The distinction is key. Thus, the first proposition of law that Respondents brief is irrelevant.

There are numerous reasons why an attorney might not have been named in a complaint against a law firm, or is dismissed from a suit, including lack of knowledge of the identity of all attorneys who participated in the tort, partial settlement with one of the attorneys, the bankruptcy of an attorney, personal jurisdiction issues, legal strategy, and others. The mere fact that a particular tortfeasor is not a defendant does not lead inexorably to the conclusion that the person is not liable.

If one *is* going to discuss liability, then it is important to define the term. The definition is important in this case because the mere fact that the statute of limitations might have run for one tortfeasor on the plaintiff's claim does not free that tortfeasor from liability. The other defendants have the option to assert cross-claims under Civil Rule 13(G), bring third party claims under Civil Rule 14, or file a separate suit for contribution or indemnity. See, e.g., *Johns v. Univ. of Cincinnati Med. Assocs.*, 101 Ohio St. 3d 234 n.3, 2004 Ohio 824, 804 N.E.2d 19 (“even though a private employer may be liable for injuries caused by its employee's actions pursuant to the doctrine of respondeat superior, the private employer has a right of indemnity against its employee for any amount that the employer pays the injured party.”).

An indemnity claim against an employee or partner can be brought up to six years after the law firm pays a settlement or judgment. *Ohio Cas. Ins. Co. v. Ford Motor Co.* (6th Cir.

1974), 502 F.2d 138; *Firemen's Ins. Co. v. Antol* (1984), 14 Ohio App. 3d 428, 471 N.E.2d 831. This Court has held that in contribution claims, “ ‘liable in tort’ means no more than that the contribution defendant acted tortiously and thereby caused damages. . . . That [the contribution defendant] was not ‘susceptible to suffer an adverse judgment in a maintainable action by the underlying claimant’ at the time the contribution action was filed is not dispositive.” *MetroHealth Medical Ctr. v. Hoffmann-LaRoche, Inc.* (1997), 80 Ohio St. 3d 212, 215, 1997 Ohio 345, 685 N.E.529. Thus, this Court has held that a tortfeasor is “liable” for an injury where a co-tortfeasor or indemnitee may bring a contribution or indemnity claim against the tortfeasor.

Because a tortfeasor remains liable for indemnity and contribution claims after the statute of limitations has run on a plaintiff’s direct claim, Respondents’ first proposition of law is a truism – when a lawyer is liable, the law firm is liable. While this statement is generally true, it is of little value in resolving the certified question, as can be seen by examining the three cases Respondents claim control this matter.

The first, *Comer v. Risko*, was thoroughly addressed in Petitioner’s Merit Brief. 106 Ohio S.3d 185, 2005 Ohio 4559, 833 N.E.2d 712. Suffice it to say that the *Comer* decision confined itself to “[t]he narrow issue” of *independent contractor* liability. (See Petitioner’s Merit Brief, 17-18).

The second case Respondents claim to be a pillar of their truistic proposition of law, stands for the underwhelming conclusion that a plaintiff cannot assert a common law claim that has been abolished by statute. *Strock v. Pressnell* (1988), 38 Ohio St. 3d 207, 217, 527 N.E.2d 1235 (“Because R.C. 2305.29 abolished the torts of alienation of affections and criminal conversation, any legal right that a spouse may have had under these common-law actions has been abrogated and, thus, there can be no violation of a nonexistent right.”). The Court held that

Pressnell could not be liable for alienation of affections and criminal conversation because the General Assembly abolished those torts. The fact that Pressnell's employer also was not liable for the non-tort is not earth-shattering. In the words of *MetroHealth*, Pressnell was not "liable in tort," and so neither was his employer. *Strock* offers no guidance here.

Respondents' third pillar consists merely of a citation to *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 548. That case addressed "whether a church may be held liable under the doctrine of respondeat superior for nonconsensual sexual conduct between a pastor and a parishioner." *Id.* at 58. In answering that question, the Court quoted *Strock*, which is the only reason Respondents cite *Byrd*. *Byrd*, like *Strock*, offers nothing to assist with the task of answering the certified question. All three of the pillars upon which Respondents build their first proposition of law have been reduced to ash. Respondents have no legal foundation for their arguments.

In an effort to save themselves from the inevitable, Respondents cite to several lower court cases that stand for the holdings that when an employee is immune for liability or not at fault, the employer is not liable. (Respondents' Merit Brief at 5-6). While those cases have sound legal holdings, they are not applicable here.

The Respondents' first proposition of law is axiomatic – vicarious liability must be based upon actual liability. The flaw in Respondents' argument is that they did nothing to show that the statute of limitations in a claim against a principal is limited by the statute of limitations against the agent. In *MetroHealth*, this Court made very clear that it is not. The principal, in this case Lane Alton, has its own statute of limitations within which it can be sued. Lane Alton is not harmed by the expiration of the statute of limitations against Wuerth on National Union's claim because Lane Alton can bring indemnification claims if it so desires.

PETITIONER'S MERITS BRIEF IS PERSUASIVE

Respondents failed to rebut the arguments asserted by Petitioner in its merit brief. It is important to take a moment to briefly recant the un rebutted arguments.

This Court has recognized that a law firm owes professional duties to its clients. *Biddle v. Warren Gen. Hosp.* (1999), 86 Ohio St.3d 395, 404, 1999-Ohio-115, 715 N.E.2d 518. *See also Id.*, at 411 (Lundberg Stratton, J., dissenting) (“The simple, undisputed fact is that an attorney-client relationship existed between the law firm and the hospital”).

Ohio Courts of Appeals have treated malpractice claims against law firms as viable. *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]”).

As have courts in every other state that Petitioners found to have addressed the issue. *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”).

Respondeat superior and enterprise liability claims can be asserted directly against a corporation or partnership without also naming the employee or principal in the suit. “The act

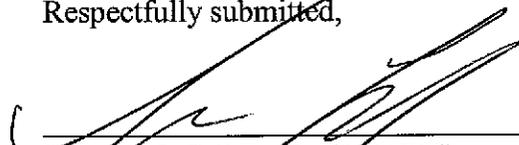
of the servant, done within the scope and in the exercise of his employment, is in law the act of the master himself.’ This rule has been recognized as ‘legal unity of the principal and agent.’” *Orebaugh v. Wal-Mart Stores, Inc.* (Ohio Ct. App., 12th Dist., 2007), No. CA2006-08-185, 2007-Ohio-4969, ¶ 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).

Respondents do not challenge any of these points. Respondents’ entire argument is premised upon ignoring the great weight of precedent, court rules and statutes that all point to an affirmative answer of the certified question. Respondents’ want the court to except law firms from traditional liabilities that arise under any business, and instead treat each attorney at a firm as an independent contractor. Law firms are not entitled to special treatment under the law. The certified question should be answered in the affirmative.

CONCLUSION

A malpractice suit can be asserted directly against a law firm even where individual attorneys are not defendants therein. Petitioner respectfully submits that the certified question should be answered in the affirmative.

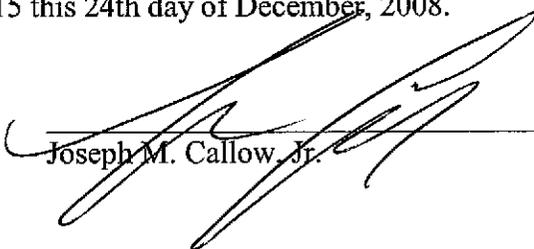
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Petitioner's Reply 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 24th day of December, 2008.



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