

ORIGINAL

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

MOTION FOR RECONSIDERATION

Joseph M. Callow, Jr. (0061814)
Counsel of Record
Danielle M. D'Addesa (0076513)
Charles M. Miller (0073844)
KEATING, MUETHING & KLEKAMP PPL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202-3752
Tel: (513) 579-6400
Fax: (513) 579-6457

Lawrence D. Walker (0012036)
Counsel of Record
Benjamin J. Parsons (0076813)
TAFT STETTINIUS & HOLLISTER
21 East State Street, Suite 1200
Columbus, Ohio 43215
Tel: (614) 221-2838
Fax: (614) 221-2007

**Counsel for Petitioner, National Union Fire
Insurance Co. of Pittsburgh, PA**

**Counsel for Respondents, Richard O.
Wuerth and Lane Alton & Horst, LLC**

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SUPREME COURT OF OHIO

MOTION

Petitioner National Union Fire Insurance Co. of Pittsburgh, PA (“National Union”) respectfully moves this Court, pursuant to Supreme Court Rule XI, Section 2, to reconsider the Question of State Law Certified by the United States Court of Appeals for the Sixth Circuit. The decision issued by this Court did not address an important aspect of the certified question directly implicated in this case. The portion of the decision that touches upon the important issue points to an answer to the certified question different than that given. Accordingly, National Union requests that the Court clarify its opinion. National Union believes this clarification will result in the certified question being answered in the affirmative.

ARGUMENT

The Certified Question asked whether a law firm could be sued for malpractice when either the individual attorneys involved were dismissed or “*were never sued in the first instance*”. *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, Slip Opinion No. 2009-Ohio-3601, ¶ 1. This Court answered that a “law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.” *Id.* at Paragraph 2 of the Syllabus. Liability is a distinct concept from having been named as a defendant. These concepts should not be conflated.

In its decision, this Court recognized, “For the wrong of a servant acting within the scope of his authority, *the plaintiff has a right of action against either the master or the servant*, or against both”. *Id.* at ¶21 (internal quotation and citation omitted). The Court cited a string of cases dating back to 1883 for this foundational principal of agency law. Thus, the Court should have held that a law firm may be vicariously liable for legal malpractice when no principal or associate has been sued [so long as at least one principal or associate is liable for legal malpractice]. The issue of liability was not before the Court. National Union never argued that it

did not have to establish liability of one of Lane Alton's agents in order to prevail on vicarious liability claims. National Union merely argued that when a plaintiff sues the master, it need not also sue the agent.

The issue pending before the Sixth Circuit is not whether any of Lane Alton's agents are liable. Rather it is whether National Union may maintain a case filed against Lane Alton before the statute of limitations expired against Lane Alton and (at least some of) its partners and associates when the individual attorneys were not named in the suit. For this reason, the discussion in paragraphs 22-26 of the lead opinion, although legally correct, offer no guidance to the Sixth Circuit in this matter, and do not address the certified question which focuses on the viability of an action against a principal where the agents "were never sued in the first instance."

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 the plaintiff's lack of knowledge of the identity of all attorneys who participated in the tort, partial settlement with one of the attorneys, the bankruptcy of the 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. As a corollary, a plaintiff can maintain a design defect claim against an auto manufacturer without also asserting a claim against the engineer employees who designed the vehicle. It does not mean the employee was not liable. Similarly, a complaint should not need to name the attorneys in a law firm for a respondeat superior claim to be viable.

If one *is* going to discuss liability, then it is important to define the term. 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. *MetroHealth* recognizes the very point National Union makes now. An aggrieved party can sue just one tortfeasor (the principal) and place the duty to collect from other tortfeasors (the agents) upon the defendant. All that is necessary is that the agent be liable in tort. The plaintiff need not be able to obtain a judgment against the agent.

The second paragraph of the syllabus, as it currently reads, is axiomatic – vicarious liability must be based upon actual liability. To fully address the certified question, that paragraph should be expanded to read, “A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice, *but no principal or associate must be named as a defendant in order for the claim against the law firm to be viable.*”

As this Court noted, the question of whether the statute of limitations has been tolled in this case is pending before the Sixth Circuit.¹ *Id. at n.3* (Moyer, C.J, concurring). In order for the Sixth Circuit to resolve that issue, it is important that the certified question be completely answered. If this limited aspect of the opinion is not reconsidered, the Sixth Circuit will be left with a negative answer to the Certified Question. From that answer, the Sixth Circuit might conclude that the Court actually held that normal principals of agency law and respondeat superior liability do not apply to law firms. The body of this Court’s opinion does not support such a revolutionary change in the law. The answer to the certified question should not either.

National Union appreciates the Court’s desire to answer only the narrow question presented. *Id. at ¶35* (Moyer, C.J., concurring). Unfortunately, the present answer is narrower

¹ This case presents the unique situation where the lead opinion and the concurring opinion garnered the same number of votes, rendering them equally controlling.

than the question. This results in an unintentionally misleading answer to the certified question. Accordingly, National Union seeks a very narrow modification of the second paragraph of the syllabus based upon the body of the Court's opinion and long standing precedent of this Court.

CONCLUSION

Petitioner respectfully requests that the second paragraph of the syllabus be modified to read:

2. A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice, but no principal or associate must be named as a defendant in order for the claim against the law firm to be viable.

This modification would result in an affirmative answer to the Certified Question. Accordingly, Petitioner respectfully requests that the Court reconsider the decision in this case and modify it accordingly.

Respectfully submitted,



Joseph M. Callow, Jr. (0061814)
Danielle M. D'Addesa (0076513)
Charles M. Miller (0073844)
KEATING, MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202-3752

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Reconsideration* 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 August, 2009.



Charles M. Miller