

ORIGINAL

IN THE  
SUPREME COURT OF OHIO

NATIONAL UNION FIRE  
INSURANCE CO. OF PITTSBURGH, PA,

Petitioner,

v.

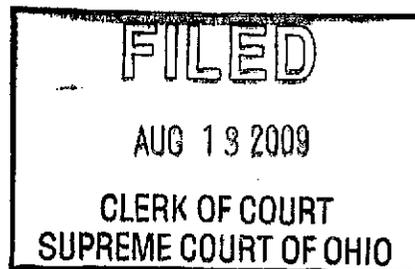
RICHARD O. WUERTH, *et al.*,

Respondents.

CASE NO. 2008-1334

On the Certified Question from The United  
States Court of Appeals for the Sixth Circuit

U.S. Court of Appeals Case No. 07-4035



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RESPONDENTS' MEMORANDUM OPPOSING  
PETITIONER'S MOTION FOR RECONSIDERATION

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## PRELIMINARY

This Court unanimously and clearly answered the Sixth Circuit's question in the negative. Petitioner has now moved that it reconsider.

Its motion should be denied for two fundamental reasons: First, this Court's Rules of Practice do not allow for the reconsideration of questions certified to it by the federal courts. Second, Petitioner has merely reargued points it raised in its Reply Brief and has not established, or even contended, that this Court overlooked or misapprehended any important fact or decisive issue or made a mistake.

## ARGUMENT

### Questions Certified By The Federal Courts Are Not Subject To Reconsideration

This matter was before the Court on a question of state law certified to it by the United States Court of Appeals for the Sixth Circuit. The procedure for addressing the Sixth Circuit's question is exclusively governed by Rule XVIII of this Court's Rules of Practice, entitled: "Certification of Questions of State Law from Federal Courts." Practice Rule XVIII nowhere provides for reconsideration of a question certified to this Court by a federal court. Instead, Section 8 of Practice Rule XVIII states:

If the Supreme Court decides to answer a question or questions certified to it, it will issue a written opinion stating the law governing the question or questions certified. The Clerk shall send a copy of the opinion to the certifying court and to the parties or their counsel.

The Clerk complied with the directive of Section 8 on July 29, 2009. The Sixth Circuit then filed and docketed this Court's Judgment Entry and Opinions on August 4, 2009. Pursuant to Practice Rule XVIII, this matter is now concluded.<sup>1</sup>

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<sup>1</sup> Under Section 4 of Practice Rule XI, a mandate will not issue until after the deadline for filing a motion for reconsideration or, if such a motion has been filed, after it is decided. There is no analogous provision in Practice Rule XVIII for delaying the transmission of the answer to a certified question to the certifying court. Clearly, if motions for reconsideration in certified question cases were appropriate, Practice Rule XVIII would require that transmission of the answer to a certified question be delayed until after reconsideration proceedings have concluded.

Petitioner relies upon Section 2 of Practice Rule XI to support its motion. That is the general provision regarding motions for reconsideration. But, Practice Rule XVIII is specific to questions certified by the federal courts, and it does not provide for reconsideration of certified questions. It is well-settled that special or specific statutes govern over the general. *See Acme Engineering Co. v. Jones* (1949), 150 Ohio St. 423, 431, 83 N.E. 2d 202; *State ex rel. Elliott Co. v. Connor* (1931), 123 Ohio St. 310, 175 N.E. 200 (Syllabus).

By its express terms, Section 2 of Practice Rule XI does not apply to federal court certified question proceedings. In pertinent part, it provides:

(B) A motion for reconsideration ... may be filed only with respect to the following:

- (1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;
- (2) The *sua sponte* dismissal of a case;
- (3) The granting of a motion to dismiss;
- (4) A decision on the merits of a case (emphasis added).

An opinion of this Court answering a federal court's question plainly is not within the scope of sub-paragraphs 1, 2, or 3. Nor is it encompassed by sub-paragraph 4. This Court has neither affirmed nor reversed the summary judgment issued by the United States District Court. It has made no "decision on the merits of" the *National Union* case or any other. It has simply answered a question of state law pursuant to the provisions of Practice Rule XVIII. The Sixth Circuit will issue the "decision on the merits of [this] case."

This Court made the important distinction between deciding a case on the merits and answering a federal court's certified question in *Scott v. Bank One Trust Company, N.A.* (1991), 62 Ohio St. 3d 39, 577 N.E. 2d 1077, a case regarding the predecessor to Practice Rule XVIII:

However, jurisdictional analysis is irrelevant to Rule XVI's constitutionality for a court does not exercise jurisdiction by answering a certified question. "Jurisdiction means '[t]he power to hear and determine a cause ... ' " [citation omitted]. By answering a state-law question certified by a federal court, we may affect the outcome of the federal litigation, but the federal court still hears and decides the cause. Therefore, answering a certified question is not an exercise of jurisdiction. (62 Ohio St. 3d at p. 42; emphasis added)

By its explicit terms, Section 2 of Practice Rule XI limits motions for reconsideration to cases falling within this Court's appellate and original jurisdiction. As stated in *Scott*, this proceeding is neither. This Court has repeatedly and *sua sponte* stricken motions for reconsideration which were not expressly authorized by Practice Rule XI. *See, e.g., State v. Bryan* (2004), 103 Ohio St. 3d 1529, 817 N.E. 2d 891; *State v. Williams* (2004), 103 Ohio St. 3d 1482, 816 N.E. 2d 257; *Wynn v. Stone* (2003), 100 Ohio St. 3d 1436, 797 N.E. 2d 515; *Nyamusevya v. Dr. T.C. Hobbs & Assoc., Inc.* (2002), 97 Ohio St. 3d 1432, 778 N.E. 2d 45. It should do so here.

This matter is governed by Practice Rule XVIII, and that Rule does not allow for reconsideration of questions certified by the federal courts. This proceeding is over. It is time for the Sixth Circuit to decide the case. Petitioner's motion should be denied.

**Petitioner's Reargument Of Points Made  
In Its Reply Brief Is No Basis For Reconsideration**

Even if reconsideration were procedurally proper, Petitioner has failed to establish that it is substantively warranted. In its decision rendered on July 29, 2009, this Court clearly and decisively answered the Sixth Circuit's question in the negative. There can be no confusion about what this Court decided or the rationale of its decision.

Petitioner does not claim that there is. Nor does it assert that this Court overlooked or misapprehended a critical fact or decisive issue. Instead, it has merely reargued points set forth in its Reply Brief. By the explicit terms of Section 2 of Practice Rule XI, that is not the purpose of a motion for reconsideration.

This Court has already considered and rejected the three arguments upon which Petitioner's motion is based. First, Petitioner says the attorney who committed the alleged malpractice might not be joined in a case against his or her law firm because of a settlement with, the bankruptcy discharge of, or lack of personal jurisdiction over him or her [Mot. at p. 2; Reply Brief at p. 6]. What Petitioner is recounting -- -- for the second time -- -- are scenarios where the individual lawyer could not be joined because he or she could not be found liable. It has missed the entire point of the Sixth's Circuit's question and this Court's holding: If the lawyer is not liable, the law firm cannot be liable.<sup>2</sup>

Petitioner also reargued the point made in its Reply Brief that an automobile manufacturer's employees need not be joined in an action against the manufacturer for injuries resulting from a defective vehicle [Mot. at p. 2; Reply Brief at pp. 3-4]. While it is well-settled that manufacturers are directly liable for injuries caused by their defective products, *see* R.C. §§ 2307.71 *et seq.*, *Temple v. Wean United, Inc.* (1977), 50 Ohio St. 2d 317, 364 N.E. 2d 267, *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St. 2d 227, 218 N.E. 2d 185, this Court has explicitly held in this case that law firms are not directly liable for legal malpractice.

Finally, as it did on page 7 of its Reply Brief, Petitioner argues again for the application of *Metrohealth Medical Center v. Hoffmann-LaRoche, Inc.*, 80 Ohio St. 3d 212, 1997-Ohio-345, 685 N.E. 2d 529. *See* Mot. at pp. 2-3. In that case, this Court held that, under the Uniform Contribution Among Joint Tortfeasors Act, R.C. §§ 2307.25 *et seq.*, one joint tortfeasor can obtain contribution from another joint tortfeasor even if the latter is not liable to the plaintiff.

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<sup>2</sup> As it did on page 6 of its Reply Brief, Petitioner also mentioned the mythical case of the unknown lawyer who committed the undiscovered malpractice. *See* Mot. at p. 2. Considering the nature and elements of legal malpractice as set forth in *Environmental Network Corp. v. Goodman Weiss Miller, LLP*, 119 Ohio St. 3d 209, 2008-Ohio-3833, 893 N.E. 2d 1173, and *Vahila v. Hall* (1997), 77 Ohio St. 3d 421, 674 N.E. 2d 1164, Petitioner's hypothetical is unimaginable. It is noteworthy that, in neither its Reply Brief nor its motion, was Petitioner able to cite a single real-life example of the mystery lawyer who committed the secret malpractice.

In both its principal and concurring opinions rendered in this proceeding, this Court squarely held that law firms are not directly liable for legal malpractice and that their liability is strictly vicarious. There can be no contribution, and the Contribution Act does not apply, where there is vicarious liability. See *Wells v. Spirit Fabricating, Ltd.* (1996), 113 Ohio App. 3d 282, 294, 680 N.E. 2d 1046, appeal denied, 77 Ohio St. 3d 1514, 674 N.E. 2d 369 (1997). And, this Court and the courts of appeal have repeatedly held that, in cases of vicarious liability, for the principal to be liable, the agent must be liable. See Slip Opinion at ¶¶ 22-25 and cases cited therein; Respondents' Merit Brief at pp. 3-7 and cases cited therein. There is nothing in *Metrohealth* which supports Petitioner's reargued position.

The practice of law by an attorney in a law firm is not an example of a servant slavishly obeying the directives of his master. A law firm does not, and lawfully cannot, direct or control the prosecution or defense of a case, the drafting of a contract, or the writing of a will. That is the practice of law, and only lawyers may permissibly do those things.

As a consequence, the vicarious liability of a law firm for the legal malpractice committed by one of its lawyers is not rooted in the principal of *respondeat superior* applicable to employment settings. Rather, it is one of those "other types of vicarious liability" mentioned by this Court in paragraph 23 of its decision. As both this Court and the Sixth Circuit held, a law firm's vicarious liability for the legal malpractice committed by one of its lawyers is based upon the criteria set forth in Section 58 of the Restatement of the Law 3d, The Law Governing Lawyers (2000). Those criteria do not and cannot include a law firm's "direction and control" over the practice of law. But, they do presuppose "that a firm principal or employee is liable on one or more [malpractice claims] ... and [consider] when the firm itself ... share[s] in that liability." Comment *a* to Restatement of the Law 3d, The Law Governing Lawyers (2000), Section 58; Slip Opinion at ¶ 25.

In its decision, this Court observed that "our precedent concerning medical malpractice is instructive" in cases of legal malpractice. See Slip Opinion at ¶ 14. In *Comer v. Risko*, 106 Ohio St. 3d 185, 2005-Ohio-4559, 833 N.E. 2d 712, the plaintiff sued a hospital claiming that it was vicariously liable for the alleged medical malpractice of two physicians. The plaintiff did not sue the physicians who committed the alleged malpractice. This Court affirmed the summary judgment granted to the hospital and held:

Consequently, a direct claim against a hospital premised solely upon the negligence of an agent who cannot be found liable is contrary to basic agency law.

\* \* \* \* \*

Drs. Wall and Schlesinger, the ... physicians who read and interpreted the x-rays, were not named defendants in this case. The statute of limitations as to them has expired, thereby extinguishing their liability, if any. In the absence of the tortfeasor's primary liability, there is no liability that may flow through to the hospital on an agency theory. Consequently, there is no genuine issue of material fact, and [the defendant-hospital] is entitled to judgment as a matter of law. (*Id.* at ¶¶ 25 and 29)

Petitioner's motion is refuted by its own actions. As the District Court stated in its Opinion filed on July 17, 2007, the Sixth Circuit observed in its Certification Order dated July 8, 2008, and this Court recounted in its Decision filed on July 29, 2009, Richard Wuerth was the only lawyer alleged in the Complaint to have committed malpractice, and Petitioner prominently listed him therein as the first-named Defendant. The fatal flaw in Petitioner's case is not that it failed to name the lawyer who committed the alleged malpractice. It undisputedly did so. It is that it sued him too late.

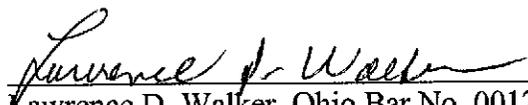
Petitioner's motion is a back-handed attempt to shift the responsibility for handling a client's legal matter from licensed attorneys bound by the Rules of Professional Conduct to unlicensed

artificial legal entities not subject to the regulation and discipline of this Court. In its decision issued on July 29, 2009, this Court resoundingly rejected that notion. It should do so again.

**Conclusion**

This Court's answer to the Sixth Circuit's question is correct, clear, and decisive. There is no procedural or substantive basis for reconsideration. Petitioner's motion should be denied.

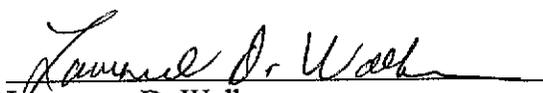
Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing *Memorandum* was mailed, postage prepaid, this 13<sup>th</sup> day of August, 2009 to:

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