No. 06-179

IN THE

Supreme Court of the United States

CHARLES R. RIEGEL and DONNA S. RIEGEL,

Petitioners,

v.

MEDTRONIC, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONSE TO MOTION FOR SUBSTITUTION

Pursuant to this Court's Rules 21.4 and 35.1, respondent Medtronic, Inc., respectfully submits this response to the Motion for Substitution of petitioners Charles R. Riegel and Donna S. Riegel.* The Court should deny that motion as untimely and deem Mr. Riegel's claims to have abated. It should further dismiss the writ of certiorari as improvidently granted because, under New York law, it is an open question whether Mrs. Riegel's derivative loss-of-consortium claim survives the abatement of Mr. Riegel's claims

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* Pursuant to this Court's Rule 29.6, undersigned counsel state that Medtronic, Inc., has no parent company and no publicly held company owns 10% or more of its stock.

and the better reading of existing New York law is that Mrs. Riegel's claim has been extinguished.

1. This Court's Rule 35.1 provides, "If a party dies after the filing of a petition for a writ of certiorari to this Court, . . . the authorized representative of the deceased party may appear and, on motion, be substituted as a party. . . . If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate." That rule does not authorize the substitution of Mrs. Riegel, as administrator of her husband's estate, at this stage of the proceedings.

As an initial matter, Rule 35.1 provides for substitution only where a "party dies after the filing of a petition for a writ of certiorari." Mr. Riegel passed away in December 2004, more than a year and a half *before* the August 2006 filing of the Riegels' petition for a writ of certiorari. Mrs. Riegel therefore cannot be substituted as her husband's representative under Rule 35.1 because Mr. Riegel's death occurred prior to the initiation of proceedings in this Court.

Moreover, petitioners' motion for substitution was filed more than two years out of time. Although petitioners are correct that this Court generally has the discretion to waive its own procedural requirements (*see Schacht v. United States*, 398 U.S. 58, 64 (1970)), Rule 35.1 provides in mandatory terms that a case "*shall* abate" whenever a motion for substitution is not filed within six months of a party's death. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("the mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion"). The use of such

mandatory language indicates that the six-month time limit for filing a motion for substitution cannot be extended.

Furthermore, even if this Court does possess the discretion to extend the filing deadline established by Rule 35.1, petitioners have offered no basis for this Court to exercise that discretion in this case. Petitioners' counsel—who also represented the Riegels before the Second Circuit—provides no plausible explanation for failing to learn of Mr. Riegel's death in a more timely fashion. An attorney's failure for more than two and a half years ever to speak with a client or otherwise ascertain that client's wishes (as opposed to simply inferring them from silence), even though the attorney was filing appellate briefs and a petition for a writ of certiorari on the client's behalf during that period, cannot conceivably be deemed excusable neglect. *Cf.* ABA Model Rules of Prof'l Conduct 1.4(a)(2) ("A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished").

Because Mr. Riegel passed away long before the petition for a writ of certiorari was filed and well more than six months ago, this Court should deny the motion for substitution and deem Mr. Riegel's claims to have abated.

2. The writ of certiorari should be dismissed as improvidently granted because it is an open question under New York law—which provides the substantive tort law in this diversity action—whether the abatement of Mr. Riegel's claims extinguishes Mrs. Riegel's derivative loss-of-consortium claim and because the better reading of existing New York law is that Mrs. Riegel's claim cannot survive independently of Mr. Riegel's abated claims.

Although the New York Court of Appeals has never addressed whether a spouse's loss-of-consortium claim can survive the abatement of the injured party's cause of action, it has given strong indications that a loss-of-consortium claim cannot continue under such circumstances. In *Millington v. Southeastern Elevator Co.*, 239 N.E.2d 897 (N.Y. 1968), the New York Court of Appeals for the first time recognized a wife's right to bring a loss-of-consortium claim to recover for "loss of support or services," as well as loss of "love, companionship," and other intangibles, based upon injury to her husband. *Id.* at 899. The New York Court of Appeals cautioned, however, that "[w]here . . . the husband's cause of action has been terminated either by judgment, settlement or otherwise, that should operate to bar the wife's cause of action for consortium." *Id.* at 903; *see also Liff v. Schildkrout*, 404 N.E.2d 1288, 1291 (N.Y. 1980) ("Nor can it be said that a spouse's cause of action for loss of consortium exists in the common law independent of the injured spouse's right to maintain an action for injuries sustained."). *Millington* strongly suggests that, if given the opportunity to address the issue, the New York Court of Appeals would hold that a loss-of-consortium claim cannot survive the abatement of the injured spouse's cause of action and that Mrs. Riegel's loss-of-consortium claim therefore has been extinguished.

The New York Court of Appeals' most recent loss-of-consortium decision supports that conclusion. In *Buckley v. National Freight, Inc.*, 681 N.E.2d 1287 (N.Y. 1997), the court of appeals held that settlement barred a husband from filing a loss-of-consortium claim where the husband had declined to join that claim to his wife's settled suit. *Id.* at 1290. In so holding, the court expressly reserved the question "whether a release would bar a loss of consortium claim that a defendant knew to be pending when it obtained the release

from the impaired spouse" (*id.* at 1291)—a question analogous to whether abatement of an injured party's cause of action would bar a spouse's pending loss-of-consortium claim.[1]

Due to the abatement of Mr. Riegel's claim, this Court cannot address the federal preemption issue on which it granted certiorari without first resolving the status of Mrs. Riegel's loss-of-consortium claim under New York law. This Court has made clear, however, that where, "to reach the merits of [a] case, [it] would have to address a question that was neither presented in the petition for certiorari nor fairly included in the one question that was presented," the appropriate course is to dismiss the writ of certiorari as improvidently granted. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Philips Corp.*, 510 U.S. 27, 28 (1993) (per curiam).

Because the Court cannot reach the merits of the question presented without first addressing a question of New York law not raised in the petition for a writ of certiorari or

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[1] State courts outside of New York are divided on the question whether a loss-of-consortium claim can ever survive the extinguishment of the injured spouse's claim, whether by settlement, abatement, or otherwise. *Compare Hopson v. St. Mary's Hosp.*, 408 A.2d 260, 264 (Conn. 1979) ("because a consortium action is derivative of the injured spouse's cause of action, the consortium claim would be barred when the suit brought by the injured spouse has been terminated by settlement"), *with Parent v. E. Me. Med. Ctr.*, 884 A.2d 93, 96 (Me. 2005) (holding that a wife's settlement of her medical malpractice action did not bar her husband from bringing a loss-of-consortium claim).

fairly included in the federal preemption issue that was raised, the Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I am a member in good standing of the bar of this Court and that on this 10th day of August, 2007, I caused a copy of the foregoing Response To Motion For Substitution to be served by the means indicated below on the counsel identified below, pursuant to Rule 29.5 of the Rules of this Court. All parties required to be served have been served.

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