The Supreme Court of Ohio

CASE ANNOUNCEMENTS

November 20, 2013

[Cite as *11/20/2013 Case Announcements #2,* 2013-Ohio-5095.]

APPEALS NOT ACCEPTED FOR REVIEW

2013-1193. Wagner v. Ohio State Univ. Med. Ctr.
Franklin App. No. 12AP-399, 2013-Ohio-2451.
Pfeifer, J., dissents.
O'Neill, J., dissents with opinion.

O'NEILL, J., dissenting.

{¶ 1} I respectfully dissent from the court's decision denying jurisdiction in this case. The court should hear this case and clarify the boundaries around employer liability for the misdeeds of employees. In *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 58, this court stated that "an employer is not liable under a theory of respondeat superior unless its employee is acting within the scope of her employment when committing a tort—merely being aided by her employment status is not enough." This language is not only overbroad, it is an inaccurate statement of the law.

{¶ 2} This case presents this court with a perfect opportunity to clarify the rule of respondeat superior in the employment setting. According to the parties' filings in this court and the court of appeals opinion, John Wagner, a patient at Ohio State University Medical Center's pain clinic, was seriously injured and

suffered debilitating pain as the result of the actions of Dr. G. Todd Schulte. Dr. Schulte, Wagner's OSU Medical Center physician, siphoned morphine from Wagner's pain pump to feed his own chronic drug addiction, of which OSU was aware.

{¶ 3} The Court of Claims and the court of appeals held that Schulte's actions were not foreseeable and that he was not acting as an agent of the OSU Medical Center at the time that he literally assaulted patients who were being treated by his employer.

{¶ 4} Relying on the aforementioned language from *Groob*, the lower courts have held that because Schulte had been terminated for his drug use the previous month, the university's liability ended with his employment. That is not the law in Ohio. At a minimum, once the university was aware that the drug-impaired doctor was stealing pain medicine from the pain pumps of patients, the university had a duty to warn its patients that a monster wearing OSU Medical Center scrubs was on the loose, and that he may be carrying an OSU ID badge and utilizing the OSU patient database to obtain the home addresses of his former patients.

{¶ 5} At the time of the Wagner assault, OSU Medical Center was aware that Dr. Schulte had siphoned morphine from his own father's pain pump; the university had in fact reported that incident to authorities as elder abuse. Moreover, at the time Schulte siphoned Wagner's pump, he was wearing his OSU scrubs and represented to the patient that he was acting with OSU's approval. Wagner had no reason to believe otherwise, since OSU had not warned any of Schulte's patients of his drug problems or nefarious activities.

{¶ 6} These facts by themselves demonstrate that the *Groob* language is overbroad and unjustly shields employers from agency liability that they would otherwise bear. But the rule in *Groob* goes even further than that.

{¶ 7} Let us assume that a mall security guard has a racist propensity for violence. He does not believe that black children should be allowed in the mall, so he uses his night stick to roust them in a firm manner, making sure they understand that he does not like them and is capable of doing more, with their race as the basis. A disturbed parent calls the mall executive office and tells the management that its employee is making racist remarks, treating the kids roughly, and threatening to escalate his behavior. The mall takes what they consider to be "appropriate" measures by bringing him in for a talk. Two weeks later, he smacks a kid and takes out a tooth. The parent is unhappy and files suit. Once again, the employer brings the employee in for a firm reprimand. The next day, however, the guard hits a kid over the head with the baton, and tragically, the child dies. Under *Groob*, the tort is not condoned by the employer and therefore clearly outside the employment relationship. This makes no sense.

{¶ 8} Because Schulte's actions towards Wagner were both foreseeable and a direct result of his agency relationship with OSU Medical Center, I would accept jurisdiction in this case and confirm that under Ohio law, an employer is subject to liability for the torts of an employee acting outside the scope of his employment if the employee purported to act or to speak on behalf of the employer and there was reliance upon that apparent authority. *See* Restatement of the Law 2d, Agency, Section 219(2)(d) (1958).
