**IN THE SUPREME COURT OF OHIO**

**CASE NO. 2016-0636**

**ANTHONY AND TAMMY RUSH**
**Plaintiff-Appellants**

**-vs-**

**U.C. PHYSICIANS INC.; THOMAS KUNKEL, M.D.**
**Defendant-Appellees.**

**ON APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF APPEALS**
**CASE NO. C 150309**

# MERIT BRIEF OF PLAINTIFF-APPELLANTS, ANTHONY AND TAMMY RUSH

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## INTRODUCTION

There is no dispute in this case that an anesthesiologist employed by Defendant-Appellee, U.C. Physicians, Inc. ("U.C. Physicians"), violated the duty of care that was owed to Plaintiff-Appellant, Anthony Rush. The professional group had been responsible for all aspects of his anesthesia care during his admission to the West Chester Medical Center ("West Chester"). A hospital nurse had reported symptoms that required prompt attention by one of the employee-physicians, which was never provided. Plaintiff's experts contend that he is now a paraplegic as a result of the mismanaged anesthesia care.

Despite the acknowledgement of negligence, a jury returned a defense verdict on liability that was upheld on appeal. The counterintuitive outcome was reached solely as a result of a pleading technicality concerning the necessary parties. Relying upon the medical chart while preparing their Complaint, Plaintiffs had identified Defendant-Appellee, Thomas Kunkel, M.D. ("Dr. Kunkel"), as the anesthesiologist who had failed to properly respond to the patient's alarming condition. But once he could be deposed, Dr. Kunkel claimed that he had been misidentified by the nurse who had charted the conversation and he had never authorized the order at issue bearing his name. Over-and-over, Dr. Kunkel refused to "speculate" as to who else in his professional group had mishandled the nurse's report of the worsening complications. While logic dictates that Defendant U.C. Physicians should have remained liable under the doctrine of *respondeat superior* for the other employee-physician's purported violation of the duty of care that was owed, the jury was instructed that a defense verdict had to be returned unless Plaintiffs could establish by a preponderance of the evidence that Dr. Kunkel alone had received and failed to respond appropriately to the nurse's call.

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The First Judicial District upheld this nonsensical ruling by extending this Court's decision in *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St. 3d 594, 2009-Ohio-3601, 913 N.E. 2d 939, to the medical context. That decision had held that a law firm could no longer be sued once the statute of limitations expired upon the individual claim against the partner who had allegedly committed the legal malpractice. *Id.,* 122 Ohio St. 3d at 596-600, ¶13-26. At least in Hamilton County, physicians who are employed by medical institutions and professional organizations must now be separately joined and exposed to personal liability in every lawsuit that has been brought against their employer. Liability can always be avoided simply by pointing fingers at unidentifiable co-employees. No legitimate objectives are accomplished by this pleading requirement, which serves only to extinguish otherwise viable claims of legal and medical malpractice.

At least one other Ohio appellate court has refused to apply *Wuerth* in a manner that would require physicians to be unnecessarily sued in their personal capacities. In *Taylor v. Belmont Community Hosp.*, 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986, ¶16-30, the Seventh District reversed a trial court's entry of summary judgment in favor of a hospital that had been sued alone, without the physicians and nurses who had allegedly mishandled the patient's care. As will be developed in the remainder of this Merit Brief, *Taylor* reflects the legally correct and most pragmatic application of the doctrine of *respondeat superior* and should be adopted by this Court. Substantial confusion and gamesmanship will be avoided if *Wuerth* is limited to its unique facts.

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## STATEMENT OF THE CASE

This medical malpractice action was commenced in the Hamilton County Court of Common Pleas on April 9, 2012. *T.d. 2*. The Complaint alleges that Plaintiff Anthony Rush was rendered a paraplegic as a result of the mismanagement of a thoracic epidural that had been administered to relieve pain from several fractured ribs. *Id*. Claims of negligence were raised against Defendants, U.C. Physicians, Dr. Kunkel, West Chester, The Health Alliance of Greater Cincinnati ("Health Alliance"), U.C. Health, U.C. Healthcare System, Paul Wojciechowski, M.D. ("Dr. Wojciechowski"), Douglas C. Hingsbergen, M.D. ("Dr. Hingsbergen"), and General & Vascular Surgeons of Butler County, Inc. ("General & Vascular Surgeons"). *Id*. Plaintiff-Appellant, Tammy Rush, raised a claim for loss of consortium. *Id*. Each of the Defendants submitted Answers, denying liability and interposing various affirmative defenses. *T.d. 17, 20, 22, 23*. Eventually, all claims were voluntarily dismissed against Defendants, Health Alliance, Dr. Hingsbergen, General & Vascular Surgeons, West Chester, and Dr. Wojciechowski. *T.d. 24, 30, 36*.

One of the critical facets of Plaintiff's theory of malpractice was a notation that Amy Mueller, R.N. ("Nurse Mueller") had recorded in the chart, indicating that Dr. Kunkel had been called at 6:40 p.m. on November 27, 2010 and advised that his patient was exhibiting symptoms that required prompt attention. An order bearing Dr. Kunkel's electronic signature was entered at the same time, which merely decreased the rate of the epidural.

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When he was deposed on April 15, 2013, Dr. Kunkel claimed that it was "unlikely" he had actually received that report since he "wouldn't have been on first call that day." *Deposition of Thomas Kunkel, M.D., dated April 15, 2013 ("Dr. Kunkel Depo."), p. 81*. He asserted that "the nurse could very easily have written down the wrong physician's

name." *Id., p. 81.* When he was shown the electronically signed order that was issued immediately thereafter bearing his name, the anesthesiologist lapsed into a confusing explanation of how someone else could have actually been responsible for authorizing the directive. *Id., pp. 81-85.* The following exchange typifies his largely incoherent defensiveness:

> Q. Who else's order could it have been?
>
> A. It could have been from you. What I'm saying is I don't know who it's from, I don't recall independently, and I'm telling you I wasn't on call that day, so why I would have given an order on a day when I wasn't on call I can't tell you. I can speculate she wrote the wrong doctor's name down, Khalil, Kunkel, she may have said who did I just talk to on the phone, I can't recall, she looks at the call schedule, accidentally sees my name underneath his and says, oh, yeah, probably Kunkel, good enough. I'm speculating. I don't recall - -
>
> Q. But as you sit here - -
>
> A. - - giving any order of that sort.

*Id., pp. 83-84.* When pressed to identify the U.C. Physicians' anesthesiologist who approved the order bearing his electronic signature, Dr. Kunkel persisted with his refusal to "speculate." *Id., p. 86.*

On November 10, 2014, Plaintiffs' claims proceeded to trial against Dr. Kunkel and U.C. Physicians. Both Dr. Kunkel and his expert acknowledged that the anesthesiologist who had received Nurse Mueller's call and responded merely by decreasing the epidural rate, had violated the standard of care that was owed. *Trial Tr. pp. 795-796 & 965.* Dr. Kunkel continued to insist that he had been misidentified in the chart. *Id., p. 964.*

Later, outside of the presence of the jury, defense counsel cited *Wuerth* and objected to the imposition of vicarious liability upon U.C. Physicians through any

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anesthesiologist who had not been specifically named in the Complaint. *Id., pp. 970-971*. After the parties rested, Visiting Judge Timothy S. Hogan directed a verdict for the professional group except any malpractice attributable to Dr. Kunkel. *Id., pp. 1220-1221*. Derivative liability based upon the negligence of any of the other employee-physicians was thus precluded. *Id.* The jury was likewise instructed that the Plaintiffs had to prove that Dr. Kunkel was negligent by a preponderance of the evidence in order to establish their case. *Id., p. 1341*. Not surprisingly, the centerpiece of the defense closing argument was that Nurse Mueller must have called some other anesthesiologist who proceeded to drop the ball, as Dr. Kunkel would have immediately initiated an appropriate response. *Id., pp. 1301-1305*.

The jury returned a defense verdict on November 14, 2014, finding that Dr. Kunkel had complied with the standard of care. *Trial Tr., p. 1386*. Judge Hogan journalized the ruling on December 3, 2014. *T.d. 90; Apx. 0002*.

Plaintiffs commenced their appeal to the First Judicial District on April 30, 2015. *T.d. 101*. Following briefing and oral argument, a decision was released affirming the trial court's decision on March 11, 2016. *Apx. 0004*. Specifically, the majority concluded that the directed verdict had been properly granted based upon the precedent established in *Wuerth*, 122 Ohio St. 3d 594. *Id., 00012-13, ¶25-25*. Judge Peter J. Stautberg concurred separately by noting that he was compelled to adhere to prior precedent extending *Wuerth* to the medical malpractice context. *Id., 00015-16, ¶31-35*.

As permitted by Section 3(B)(4), Article IV, of the Ohio Constitution and App. R. 25, Plaintiffs requested a certification of a conflict with *Taylor*, 2010 -Ohio- 3986, on March 17, 2016. Over Defendants' opposition, the Motion was granted by the First District on April 19, 2016. *Apx. 00017*.

Plaintiffs then sought further review in the Supreme Court of Ohio. *Apx. 0001*.

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Jurisdiction was accepted over the Proposition of Law questioning the application of *Wuerth* on July 27, 2016. *Rush v. Univ. of Cincinnati Physicians, Inc.*, 146 Ohio St. 3d 1469, 2016-Ohio-5108, 54 N.E. 3d 1268 (table). The separate certification appeal was dismissed at the same time on the grounds that no conflict existed. *Sup. Ct. Case No. 2016-0621*.

Plaintiffs now submit their Merit Brief in support of the Proposition of Law that this Court has agreed to consider.

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## STATEMENT OF THE FACTS

The following facts were established during the jury trial. Plaintiff Anthony Rush is a 52-year-old resident of West Chester, Ohio. *Trial Tr., pp. 68 & 642*. He and his wife, Plaintiff Tammy Rush, had one daughter. *Id., 644-645*. Plaintiff started his own painting business and employed as many as ten workers. *Id., pp. 645-646*.

On November 23, 2010, Plaintiff fell off a 30-foot ladder during a painting job. *Trial Tr., pp. 647-648*. He knew he had broken some ribs, and one of his employees drove him to West Chester Hospital. *Id., pp. 647-648*. Plaintiff's wife was called and she met him in the emergency room. *Id., pp. 489-490*. Plaintiff was complaining of pain and was moving between the bed and chair in an attempt to get comfortable. *Id., p. 490*.

A chest x-ray was taken, which was read by neuroradiologist Thomas Brown, M.D. ("Dr. Brown"). *Trial Tr., pp. 985-986*. He was able to identify several fractures in the front (anterior) and side (lateral) of the rib cage. *Id., p. 986*. Specifically, Dr. Brown's x-ray report identified "[n]ondisplaced fractures of the right second, FLAIR, fourth and fifth ribs with displaced fractures of the right 6th 7th and 8th ribs[.]" *T.d. 91, Plaintiffs' Motion for New Trial, Exhibit 1*. No fractures to the rear (posterior) ribs were reported. *Id*. The x-ray did reveal "a fracture through the mid right clavicular shaft." *Id*.

Plaintiff was admitted to the hospital and an epidural was administered to relieve his pain. *Trial Tr., p. 649*. His legs went immediately numb. *Id., pp. 649-650*. He was still able to walk around his room and visit with his family. *Id., p. 650*.

Significantly, for purposes of the instant appeal, Defendant U.C. Physicians was responsible for Plaintiff's anesthesia care. *Trial Tr., pp. 929-932 & 1341-42*. This medical group employs approximately 30-40 anesthesiologists, of which roughly ten

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work at West Chester Hospital. *Id., p. 750*. One of these employee-physicians was Defendant Dr. Kunkel. *Id., pp. 1179 & 1341*. He and his fellow anesthesiologists rotated through a 24-hour call schedule at West Chester Hospital. *Id., pp. 874-875*.

Dr. Kunkel has acknowledged that anesthesiologists must remain "on high alert for any signs or symptoms of spinal cord compression" when a patient has received an epidural. *Trial Tr., p. 253*. The potentially dangerous condition "is time sensitive" and must be ruled out as soon as suspected. *Id., p. 254, 311, & 916-917*. Either a computer tomographic (CT) scan or a magnetic resonance imaging (MRI) study can identify the condition, although he preferred the latter. *Id., p. 254*. If an emergent spinal cord compression is identified in the imaging study, immediate decompression surgery is necessary. *Id., pp. 254-255*.

A spinal epidural hematoma can cause a cord compression, during which blood fills the spine. *Trial Tr., pp. 254-255 & 315-316*. Such bleeding can be caused by the catheter. *Id., p. 255*. The blood flow to the cord can be disrupted by the hematoma, resulting in permanent neurological injuries. *Id., p. 257*.

Dr. Kunkel further agreed that a difficult catheter placement should increase the suspicion of a spinal epidural hematoma. *Trial Tr., p. 255*. Pain in the middle of the back (axial) is another "classic" cause for concern. *Id., p. 258*. Additional warning signs include numbness and weakness, as well as urinary incontinence. *Id., p. 258*. The anesthesiologist admitted that if one of his patients develops the classic signs of a spinal epidural hematoma and was ultimately paralyzed as a result of the lack of surgical intervention that "would not reflect highly upon the quality of [his] care[.]" *Id., p. 261*.

On Thanksgiving Day, November 25, at 10:00 p.m., dry blood was observed near Plaintiff's epidural site, which was slightly swollen. *Trial Tr., p. 267*. This was two days after the catheter had been placed. *Id*. A report was made to the anesthesiologist in

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charge. *Id.* The next morning, on November 26th, there was "a new report of back pain." *Id., p. 268.* Plaintiff's rating of nine on a scale of ten was very significant. *Id., p. 268.* Between 7:00 a.m. and noon, the nurse's charting indicated that Plaintiff's pain level was seven to eight, and he was observed grimacing. *Id., p. 270.* Bloody drainage was also detected at the catheter site. *Id., p. 271.*

By 12:45 p.m. on November 26th, Dr. Kunkel was on duty at West Chester Hospital. *Trial Tr., p. 271.* The anesthesiologist was aware that Plaintiff had been admitted as a result of his conversations with the other physicians. *Trial Tr., p. 876.* He reviewed the notes, which were concerning in that the patient was remaining in the hospital due to continued pain. *Id., p. 880.*

Dr. Kunkel claimed that he conducted an examination and confirmed that Plaintiff was suffering pain over his "posterior ribs[.]" *Id., p. 282 & 285.* The encounter was never charted, however, which Dr. Kunkel acknowledged was a "failure" on his part. *Id., p. 295.*

Kiplie Culp, R.N. ("Nurse Culp") had been working for West Chester Hospital for approximately 20 years. *Trial Tr., pp. 401-402.* Plaintiff was one of her patients on the medical-surgical floor. *Id., p. 402.* She acknowledged that an urgent situation can develop when a patient with a thoracic epidural begins to experience weakness and numbness in the lower extremities. *Id., p. 413.* It was therefore important to make an immediate report to a physician so that the proper decisions could be made. *Id., pp. 413-414.*

When her shift started at 7:00 p.m. on November 27th, Nurse Culp received a report that Plaintiff had been having trouble lifting his left leg and was experiencing numbness and weakness. *Trial Tr., pp. 414-417.* The numbness was extending into his abdomen. *Id., pp. 416-417.* The nurse who had been caring for Plaintiff during the

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preceding shift, Nurse Mueller, noted that the numbness had been worsening. *Id., pp. 417-418*. Her charting indicated that Dr. Kunkel had been called at 6:40 p.m. and advised of the patient's condition. *Id., pp. 419-420*. He ordered a decrease in the epidural rate, which the nurse verified. *Id., pp. 420-421*. According to Nurse Culp, Nurse Mueller was very competent and provided accurate reports. *Id., p. 422*.

Despite the notation that Nurse Mueller had called him, Dr. Kunkel claimed that: "I don't believe I ever received that phone call." *Trial Tr., p. 305*. His reasons for his belief that Nurse Mueller had made a mistake were "vast[,]" which he was anxious to explain to Plaintiff's counsel "when you are ready." *Id., p. 305*. He denied not only that Nurse Mueller had alerted him to Plaintiff's worsening condition, but additionally claimed that he would have initiated a "totally different" response, which would have included an immediate assessment by a physician. *Id.* He theorized that perhaps Nurse Mueller had meant Dr. "Khalil" instead of "Kunkel." *Id., p. 306*.

Later while being questioned by his own attorney, Dr. Kunkel explained that he and his partners were electronically signing each other's orders as a "courtesy" without actually reading them. *Id., pp. 902-904*. He was adamant that: "I am telling you that I have been misidentified." *Id., p. 964*. He further insisted upon cross-examination that:

> * * * My testimony is, she did not call me. The note does not say she called me. Says she called some anesthesiologist. And my contention is, it wasn't me because if it was me, I would have acted totally different in light of two data points instead of one.

*Id., p. 962*. In truth, Nurse Mueller's 6:40 p.m. notation did indeed reference "Dr. Kunkel" and the written order that followed bore his electronic signature. *Id., pp. 419, 743-745, & 901-902*.

Both Dr. Kunkel and his standard of care expert, Joseph Neal, M.D. ("Dr. Neal"), agreed that the U.C. Physician employee who took Nurse Mueller's call violated the

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standard of care by failing to properly address the potential emergency condition. *Trial Tr. pp. 795-796 & 965.* Dr. Kunkel acknowledged that "based on the chart, somebody should have followed up within two hours, either with a phone call, a visit or whatnot." *Id., p. 965.* He would have turned the epidural off immediately and made arrangements for one of his partners to see the patient right away or driven to the hospital himself. *Id., pp. 910-911.* His primary concern would have been a hematoma or abscess. *Id., pp. 911-912.*

When Nurse Culp conducted an assessment at 9:30 p.m., Plaintiff's left leg was still numb, and he was having trouble moving his toes and lifting his foot. *Trial Tr., p. 423.* She called one of the admitting surgeons a few minutes before midnight and received further instructions. *Id., pp. 424-425.* The increase in the patient's temperature was significant and could have indicated a problem with the epidural catheter. *Id., pp. 426-427.*

At 3:10 a.m. on November 28th, Nurse Culp charted that Plaintiff was incontinent and feeling numb in his bilateral lower extremities. *Trial Tr., p. 428.* Forty minutes later she called Dr. Kunkel to alert him to the changing condition. *Id., pp. 428-429.* Her understanding was that he was on call that evening. *Id., pp. 429-430.* The incontinence was a significant development for a patient with an epidural catheter. *Id., p. 429.* Dr. Kunkel responded by issuing an order to discontinue the epidural. *Id., p. 429.* He did not indicate that he was going to proceed to the hospital, nor did he ask for another physician to examine the patient. *Id., p. 432.* There had been an in-house physician available. *Id., p. 432.* At the end of the notes, Nurse Culp charted that she was to call back in two hours with a report. *Id., pp. 432-433.* This was significant to her. *Id., pp. 433-434.*

Dr. Kunkel has admitted that he had likely received Nurse Culp's call at 3:00 a.m.

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*Trial Tr., pp. 308-309.* He confirmed that he told her to turn down the epidural and call him back in two hours. *Id., p. 309.*

In accordance with his instructions, Nurse Culp contacted Dr. Kunkel at some point between 6:30 and 7:00 a.m. *Trial Tr., p. 434.* Although the conversation was never noted in the record, the veteran nurse was confident that she had reached Dr. Kunkel. *Id., pp. 435-436.* She informed the anesthesiologist that, while the patient was improving, he was still numb on the left side. *Id., p. 434.* No physician had seen him, however, for his incontinence. *Id., p. 435.* While decreasing the epidural rate appeared to help, it was "[m]ost definitely" important to alert the physician to his condition before her shift ended. *Id., p. 436.* His left leg was still numb, and there was some weakness. *Id., p. 436.* She felt that she had reported all of the changes she had noted during the call. *Id., p. 437.* Dr. Kunkel's response was that he would see the patient in the morning. *Id., p. 435.*

Dr. Kunkel testified that he received a phone call at 9:00 a.m., assuring him that his patient's incontinence was improving and he could move his legs. *Trial Tr., p. 915.* Because the caller had been reassuring, he decided to go to church. *Id., p. 310.* When he finally arrived at the hospital shortly after noon, Plaintiff was complaining of weakness in both legs and could barely twitch his left foot. *Id., p. 310 & 915-916.* The anesthesiologist insisted that he was thinking, "this is not the picture I was told about at all." *Id., p. 916.* For the first time, he began to suspect that this "could be an epidural hematoma." *Id., p. 916.*

Plaintiffs' standard of care expert was Andre Boezaart, M.D. ("Dr. Boezaart"). *Trial Tr., p. 107.* The eminently qualified anesthesiologist is a full professor at the University of Florida and practices in a Level 1 trauma center at the campus hospital. *Id., pp. 108-109.*

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While reviewing the Plaintiff's medical chart with the jury, Dr. Boezaart observed that the initial thoracic epidural placement had been difficult. *Id., pp. 175-176.* He was not, however, critical of the ultimately successful effort. *Id.* By the third day, there was a report of bleeding and swelling around the epidural site. *Id., p. 178.* This was a new development. *Id.* Plaintiff then began to experience severe neck pain at 1:00 a.m. that he rated as nine out of a scale of ten. *Id., p. 179.* The pain grew worse and extended into his back. *Id., pp. 179-180.* The only reason that Dr. Kunkel would have been called at 3 o'clock in the morning is if the nurse felt the patient was in trouble. *Id., p. 179.*

But the reports were ignored, and then numbness and paralysis developed. *Trial Tr., pp. 180-181.* At that point, the electrical activity in the spinal cord had been disrupted, which explained the abatement of the pain. *Id., pp. 180-181.* The "red lights" should have been "screaming" since the numbness indicated that the spinal cord was not receiving enough oxygen. *Id., p. 181.* But this report was also ignored, and Dr. Kunkel did not see the patient until noon that day. *Id., p. 181.* By that time, Plaintiff's spinal cord was dead and nothing could be done. *Id., pp. 182-183.*

Charles Hecht-Leavitt, M.D. ("Dr. Hecht-Leavitt"), also testified on behalf of Plaintiffs. *Trial Tr., p. 326.* He is a neuroradiologist practicing in Virginia. *Id., pp. 328-329.* After reviewing all of the available imaging studies and other relevant materials, he determined that Plaintiff had suffered a hemorrhage (*i.e.*, bleeding) into the neural space in his spine that compressed the cord. *Id., pp. 336-337.* This mass effect displaced and damaged the spinal cord. *Id., pp. 336-338.*

Plaintiffs also called Douglas Cohen, M.D. ("Dr. Cohen"), a neurosurgeon practicing in New York, at trial. *Trial Tr., pp. 509-510.* He also confirmed from his review of Plaintiff's chart and imaging studies that following his hospital admission on November 23rd, a mass of blood, air, and fluid from the epidural catheter developed in

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the spinal column. *Id., pp. 516-517.* Just as Dr. Hecht-Leavitt had testified, the displacement of the spinal cord was visible on the imaging studies. *Id., pp. 517-518.* The hematoma was the direct and proximate cause of the Plaintiff's paralysis. *Id., p. 518.* Decompression surgery should have been ordered in response to the reports of incontinence, numbness, weakness, and other signs of a spinal cord disorder (*i.e.*, myelopathy). *Id., p. 550.* Had the procedure been initiated by the evening of November 27th, this permanent disability likely would have been avoided. *Id., pp. 551-552 & 571.*

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## ARGUMENT

A single Proposition of Law is being presented for this Court's consideration. For the reasons that follow, the lower court should be reversed and this action remanded for a new trial, during which the proper *respondeat superior* standards can be applied.

> **PROPOSITION OF LAW: IN ANY TORT ACTION, THE EMPLOYEE DOES NOT NEED TO BE JOINED IN ORDER TO ESTABLISH *RESPONDEAT SUPERIOR* LIABILITY SO LONG AS THE EMPLOYER HAS BEEN PROPERLY NAMED AND SERVED. [*National Union Fire Ins. Co. v. Wuerth*, 122 Ohio St. 3d 594, 2009-Ohio-3601, 913 N.E. 2d 939, limited; *Taylor v. Belmont Community Hosp.*, 7TH Dist., Belmont No. 09 BE 30, 2010-Ohio-3986, approved].**

### A. THE MISIDENTIFIED ANESTHESIOLOGIST DEFENSE

As a result of a misunderstanding of the limited holding of *Wuerth*, 122 Ohio St.3d 594, the trial court prohibited the jury from finding U.C. Physicians liable for the negligence of any anesthesiologist, other than Dr. Kunkel. *Trial Tr. Vol. VII, pp. 1180-81 & 1220-21.* By blaming one of his unidentified co-employees for mishandling Nurse Mueller's call and issuing the fateful order that bore his name, Dr. Kunkel was successfully able to prevent any recovery against himself and his employer. This outcome could have been avoided only if Plaintiffs had possessed the foresight to predict that Dr. Kunkel would be claiming he was "misidentified" and sued every member of his organization before the statute of limitations expired. That is unrealistic when the corporate entity is comprised of dozens of physicians, like U.C. Physicians, and impossible for medical institutions that employ hundreds of them, like the Cleveland Clinic Foundation. *Trial Tr. p. 250.*

There was no dispute at trial that some anesthesiologist employed by U.C. Physicians had received the call from Nurse Mueller on November 27th and issued the

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order that required a response within a short period of time. *Trial Tr., pp. 964-965.* Even the defense standard of care expert, Dr. Neal, agreed that the anesthesiologist who spoke with Nurse Mueller proceeded to violate the duty of care that was owed:

> Q. * * * So whatever member of his group was contacted, although it says Dr. Kunkel, * * * whoever was contacted as you read the chart at 6:30, just by looking at the chart, you are saying there is a standard of care violation by the anesthesiologist that was contacted, correct?
>
> A. I agree with that, yes.

*Id., pp. 795-796.* This was Dr. Kunkel's opinion as well. *Id., p. 965.* Despite these concessions, the jury was allowed to find that no negligence had been committed, solely because any standard of care violation had been perpetrated by an unnamed, unidentifiable anesthesiologist.

During the argumentation over the motion for directed verdict, Judge Hogan was unconcerned with Plaintiff's observation that the anesthesiologist who had supposedly received Nurse Mueller's call and issued the order under Dr. Kunkel's name was never identified. *Trial Tr., pp. 1181-82.* While he acknowledged that the call had to be placed to one of the members of the group, his unwavering position was that:

> *** So those others members of the group should be defendants in this case if they had any contact. The fact that they are not is not the fault of the defense.

*Id., p. 1184.*

The trial court's short-sighted solution requires malpractice plaintiffs to sue every individual physician or attorney who has had any "contact" with the patient/client, with full knowledge that all but one of them did nothing wrong. *Id.* In actions involving lengthy hospital confinements and complex legal proceedings, numerous professionals will have to be joined and cannot be dismissed until no further opportunity remains for finger-pointing prior to trial. Because the interests of the individual defendants will be

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potentially adverse to each other, they will all require separate counsel and an opportunity to submit their own filings, cross-examine the plaintiff's witnesses, and present their own witnesses and argumentation. And once it is apparent that no potentially viable claims of malpractice had actually existed against the majority of the individual defendants, sanctions can be pursued through Civ. R. 11 and R.C. 2323.51. *Harris v. Southwest Gen. Hosp.,* 84 Ohio App. 3d 77, 616 N.E. 2d 507 (8th Dist. 1992); *Barbato v. Mercy Med. Cntr.,* 5th Dist. No. 2005CA00044, 2005-Ohio-5219.

Although Defendants and their *amici* will undoubtedly insist otherwise, plaintiffs should be commended for confining their malpractice actions to the individuals who are actually identified in the available records as having committed the malpractice. That was certainly the case in this instance. The medical chart plainly and unmistakably identified Dr. Kunkel as the sole recipient of Nurse Mueller's 6:40 p.m. report and his electronic signature was set forth on the corresponding order. *Trial Tr., pp. 419-421 & 743-745.* No one could have possibly foreseen that Dr. Kunkel was going to claim that he had been mistaken for an unidentifiable anesthesiologist until he was deposed. Prior to that point in time, Nurse Mueller's purported blunder had never been disclosed through any source. Even then, Dr. Kunkel offered only that he could "speculate she wrote the wrong doctor's name down, Khalil, Kunkel, ***." *Dr. Kunkel Depo., p. 84.* He took care to emphasize again that he was "speculating." *Id.* Later he repeated he was "speculating" when he suggested that Dr. Khalil may have been responsible. *Id., p. 96.* He also refused "to speculate" about who else had issued the order of November 27th bearing his name. *Id., pp. 86-87.* The anesthesiologist who had purportedly approved this written directive without conducting a proper assessment of the patient was <u>never</u> identified prior to trial.

In the appeal to the First District, Defendants conceded *sub silentio* that Dr.

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Kunkel never alerted anyone that there were errors in the chart, and he had been sued unjustifiably, until he could be deposed. *Defendants' Court of Appeals Brief, pp. 16-18.* They nevertheless maintained that Plaintiffs' "standard of care expert, Dr. Boezaart, even testified that Dr. Khalil deviated from the standard of care when he saw Mr. Rush in the hospital on November 27, 2010. *T.p. 191.*" *Defendants' Court of Appeals Brief, p. 17.* In truth, the expert had merely acknowledged that Dr. Khalil would have been liable if he had indeed taken Nurse Mueller's call. *Trial Tr., p. 191.* The question was posed only after it was evident once the trial was underway that Dr. Kunkel intended to blame Dr. Khalil for his patient's mismanaged care.

Much ado was also made over the "call schedule" and "payment records" indicating that Dr. Khalil had been on first call on November 27, 2010. *Defendants' Court of Appeals Brief, p. 17.* Neither of these administrative records were included in the patient's chart or otherwise available to Plaintiffs' counsel when the Complaint was filed. Nor are these defense exhibits significant, as Dr. Kunkel acknowledged that he was on second call that day. *Trial Tr. pp. 306 & 874.* But Dr. Kunkel's electronic signature was conspicuously set forth on the 6:40 p.m. telephone order, which is the linchpin of the malpractice claim. *Joint Exhibit A, p. 91; Plaintiff's Exhibit 2, p. 4.* Plaintiffs' counsel was entitled to assume that Dr. Kunkel had been responsible for that fateful directive, and had no way of knowing (if it was indeed true) that the U.C. Physicians employee-physicians were indiscriminately issuing orders in each other's names.

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The First District offered a response to the "potential unfairness asserted by the" Plaintiffs that differed from those that had been fashioned by Defendants and the trial court. *Apx. 00013, ¶25.* The majority theorized that "the plaintiff has a duty to investigate and identify all potential tortfeasors" and perhaps "an extension or tolling of

the limitations period" was the best solution. *Id., ¶25*. But no attempt was made to explain how Plaintiffs could have ascertained the true tortfeasor from the medical chart and information that was available prior to trial. *Id*. This silence speaks volumes. This Court should refuse to endorse the "blame the unidentifiable co-employee" maneuver that allows any doctor or lawyer to easily avoid accountability for a malpractice claim once it is too late to join new parties to the lawsuit.

### B. THE NARROW *WUERTH* HOLDING

Both the trial court and the First District erred by stretching and contorting the decision in *Wuerth*, 122 Ohio St.3d 594, beyond recognition. In that instance, this Court held merely that a law firm can be held vicariously liable for legal malpractice only when one or more of its principals or associates have been negligent. *Id*. at paragraph two of the syllabus. Far from restricting the doctrine of *respondeat superior*, the majority specifically observed that:

> Although a party injured by an agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable. [emphasis added].

*Id*. at ¶ 22.

The legal malpractice claim in *Wuerth* was based upon substandard representation that was allegedly furnished by easily identified attorneys who were members of the same law firm. *Id.,* 122 Ohio St. 3d at 595, ¶3-12. No one was claiming there were any mistakes in any of the records. It had been the plaintiff's decision to name just the lead trial attorney as the only individual defendant, but after the statute of limitations had expired. *Id*. This Court's answer to the certified question should be limited to those particular facts, as there is no suggestion in the opinion that professional corporations should be allowed to avoid liability for torts committed by unidentified members. In a concurring opinion that was joined by four other members

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of the Court, Chief Justice Moyer cautioned "that today we answer only the very narrow certified question before us." *Id.,* at 601, ¶27. Later in the same opinion he took the opportunity to again "stress the narrowness of our holding today." *Id., ¶35.*

## C. THE UNWARRANTED PLEADING STANDARD

Defendants maintained below that U.C. Physician's vicarious liability had to be limited to the only anesthesiologist named in the Complaint because "only individuals practice medicine and only individuals can commit medical malpractice." *Defendants' Court of Appeals Brief, p. 17 (citations omitted).* This same language appears in *Wuerth*, but has been routinely misconstrued from virtually the moment the opinion was released. Since it is indeed true that only professionals commit malpractice, the plaintiff is always required to demonstrate by a preponderance of the evidence that such an individual breached the standard of care that was owed and proximately caused compensable damages. *See generally, Berdyck v. Shinde*, 66 Ohio St. 2d 573, 578, 1993-Ohio-183, 613 N.E. 2d 1014, 1020; *Schelling v. Humphrey*, 123 Ohio St. 3d 387, 391, 2009-Ohio-4175, 916 N.E. 2d 1029, ¶19. Plaintiffs have never denied that they can only recover against U.C. Physicians by successfully establishing that one of the employee-physicians committed malpractice in the course and scope of employment.

But this rudimentary principle of substantive tort law should not be confused with the entirely separate question of whether the professional has to be individually sued, which is purely a matter of procedure. None of the Civil Rules require the plaintiff to join both the employer and the employee to the action before *respondeat superior* can be invoked, and for good reason. So long as the employer has been properly and timely included in the action, nothing is gained by adding the employee. Damages can only be recovered from the employer in such instances, and a full and fair opportunity will still be afforded to defend the claim. If the plaintiff has no interest in securing a

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judgment against the employee in a personal capacity, there is no need to name him/her in the complaint.

In the medical context, in particular, forcing the patient to individually sue a physician who is employed by a healthcare organization is undesirable on a number of levels. The proceedings are unnecessarily complicated by the inclusion of an additional party, who will likely be represented by separate counsel. And perhaps more significantly, the physician must endure the stress and stigma of being named in a lawsuit that may result in a judgment being entered against him/her personally. If the hospital or professional organization is the only defendant, the non-party physician can still be expected to participate as a witness and defend the care that he/she provided as an employee. If for some reason an antagonistic interest develops between the employer and employee, a third-party complaint may be filed in accordance with Civ. R. 14(A). In the vast majority of instances, however, the malpractice claim can be resolved both fairly and expeditiously against the medical employer alone.

Requiring the physician to be personally joined in the lawsuit effectively bars any malpractice claim against a medical organization whenever the actual tortfeasor cannot be identified. Such "institutional" malpractice actions arise frequently. Hypothetically, a patient might seek care in a hospital emergency room and require immediate attention. If a nurse pages for a doctor, but no one responds before the patient passes away, an expanded *Wuerth* rule would effectively immunize the hospital from liability since malpractice could not be established against an identifiable physician.

In the legal context, an established corporate client might send a letter to a law firm requesting that an attorney be sent to a legal proceeding to protect its interests. But if no one appears and damages are sustained as a result, a malpractice claim would be permissible against the law firm only if an attorney could be identified who had

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actually mishandled the client's request. If no one will admit to the dereliction, or disclose who had received the letter, a complaint could never be filed. Medical and legal institutions should not be able to evade liability simply because the circumstances preclude the inclusion of the actual employee-tortfeasor as a co-defendant.

This Court should reject the view that *Wuerth* established a new, unwritten pleading rule that requires doctors and lawyers (and presumably other professionals) to be individually sued in civil actions that have been brought against their employers. As the instant action forcibly demonstrates, this unwarranted expansion of *Wuerth* not only creates hyper-technical pitfalls, but also enables liability to be avoided simply by blaming an unidentifiable co-employee. Thus far in these proceedings, neither Defendants nor the lower courts have identified any legitimate interests that are served by this pointless pleading practice.

Defendants' attempt to justify an enlargement of *Wuerth* through *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, is certainly misplaced. *Defendants' Court of Appeals Brief, pp. 17-18*. The patient was alleging in that instance that two physicians had failed to identify a cancerous mass in her chest x-ray. *Id.,* 106 Ohio St. 3d at 185-186, ¶4. Because they were, "independent contractors," her only claim against the hospital was through a theory of agency by estoppel. *Id.* at ¶ 9. The Court was careful to note that this doctrine stands apart from the traditional principle of *respondeat superior*. *Id.* at ¶ 9 & 12-13. The patient attempted to join the two doctors to her lawsuit, but the statute of limitations had already expired. *Id.* at ¶ 5. Since the apparent agents could not be held liable for any malpractice, the claim of agency by estoppel failed as well. *Id.* at ¶ 28-30. The *Comer* decision is strictly limited to independent contractor physicians, and has no application to actions that are based upon *respondeat superior*. *Tisdale v. Toledo Hosp.*, 197 Ohio App.3d 316, 2012-Ohio-

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1110, 967 N.E.2d 280 (6th Dist.).

### D. THE PROPER APPLICATION OF *RESPONDEAT SUPERIOR*

The standards governing the doctrine of *respondeat superior* have been well-established in Ohio and elsewhere for decades, and an expansion of *Wuerth* is thus unnecessary. When an employee/employer relationship exists with an individual healthcare provider that allegedly violated the standard of care, the employer can be sued under the familiar doctrine of *respondeat superior*. *Klema v. St. Elizabeth's Hosp. of Youngstown*, 170 Ohio St. 519, 11 O.O.2d 326, 166 N.E.2d 765 (1960); *Harris v. Mt. Sinai Med. Ctr.,* 116 Ohio St. 3d 139, 146, 2007-Ohio-5587, 876 N.E. 2d 1201, 1208, ¶45; *Meehan v. AMN Healthcare, Inc.*, 1st Dist. No. C-1100442, 2012-Ohio-557, ¶11; *Cornell v. Ohio State Univ. Hosps*., 36 Ohio Misc.2d 25, 28, 521 N.E.2d 857 (Ct. Cl.1987). In *Morris v. Children's Hosp. Med. Ctr*., 73 Ohio App.3d 437, 597 N.E.2d 1110 (1st Dist. 1991), for example, the First District specifically held that a hospital could be held liable under a theory of *respondeat superior* for the negligence of a nurse. *See also Cancilla v. Fairview Gen. Hosp*., 8th Dist. No. 65424, 1994 W.L. 173491, *2 (May 5, 1994) ("It is uncontested that a hospital may be held vicariously liable, under the doctrine of *respondeat superior,* for the negligence of its employees.") In order to spare nurses, medical technicians, and other staff members from being individually sued, some post - *Wuerth* courts have been drawing an artificial distinction between these healthcare providers and physicians, osteopaths, and even dentists. *Tisdale,* 197 Ohio App. 3d at 322, ¶15; *Stanley v. Community Hosp*., 2011-Ohio-1290, ¶23 (2nd Dist.); *Cope v. Miami Valley Hosp.,* 195 Ohio App.3d 513, 518-520, 2011-Ohio-4869, 960 N.E.2d 1034, ¶20-27 (2nd Dist.); *Henik v. Robinson Mem. Hosp.,* 9th Dist. 25701, 2012-Ohio-1169, ¶16-19.

While it is equally true that business corporations and associations can only commit torts through their agents and employees, the longstanding rule in Ohio has

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been that only one of them has to be named in the complaint:

> Where a liability arises against both a master and his servant in favor of a party injured by the sole negligence of the latter while acting for the master, such injured party may sue either the servant, primarily liable, or the master, secondarily liable, or both, in separate actions, as a judgment in his favor against one, until satisfied, is no bar to an action against the other, the injured party being entitled to full satisfaction from either the master or servant or from both. (Emphasis added.)

*Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705, 126 A.L.R. 1194, 16 O.O. 185 (1940), paragraph two of the syllabus; *see also State ex rel. Flagg v. City of Bedford*, 7 Ohio St.2d 45, 47-48, 36 O.O.2d 41, 218 N.E.2d 601 (1966); *Holland v. Bob Evans Farms, Inc.*, 3rd Dist. Shelby No. 17-07-12, 2008-Ohio-1487; *Orebaugh v. Wal-Mart Stores, Inc.*, 12th Dist. Butler No. CA2006-08-185, 2007-Ohio-4969. No plausible justification exists for elevating the pleading requirements when doctors and lawyers are sued, simply because of their advanced education and training. Many professors, scientists, and engineers possess even more impressive credentials, but do not need to be individually named when they commit torts in the course of employment. *Losito*, 136 Ohio St. 183.

## E. THE *TAYLOR* DECISION

The limited impact of *Wuerth* was properly recognized by the Seventh District, which has permitted a malpractice claim to proceed strictly against a hospital even though the complaint did not specifically name the physicians and nurses who had purportedly violated the standard of care. *Taylor*, 2010-Ohio-3986, ¶25-36. The patient maintained that she had been suffering from a knee injury but was "released prematurely by a physician" and "two nurses then dropped" her as she was being transferred from a wheelchair. *Id.* at ¶ 3. After the statute of limitations expired, a motion for summary judgment was filed arguing that *Wuerth* barred the claim against

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the hospital, since the individual employees had not been sued. *Id.* at ¶ 6. The trial court agreed and terminated the proceedings. *Id.* at ¶ 8.

In reversing this decision, the Seventh District recognized that the doctrine of *respondeat superior* has long allowed an employer to be held liable for the negligence of an employee, even in the medical setting. *Taylor*, 2010-Ohio-3986, ¶9-13. The *Wuerth* opinion was then analyzed at length. *Id.* at ¶ 14-19. The court specifically noted Chief Justice Moyer's concurring opinion which "twice emphasized the narrowness of the holding." *Id.* at ¶ 19 (citation omitted). Lawsuits have been permitted in the past that have been brought against the principal without specifically including the individual tortfeasor. *Id.* at ¶ 26. Even the *Wuerth* opinion had "acknowledged the basic premise that the plaintiff can choose to sue the master, the servant, or both." *Id.* at ¶ 30 (citation omitted). *Wuerth* was further distinguished on the grounds that the attorney who had allegedly committed the malpractice was not a traditional employee, but was a partner of the firm and a part owner. *Id.* at ¶ 34. After again consulting Chief Justice Moyer's concurrence, the appellate court concluded that:

> *** Consequently, we refuse to extend a Supreme Court case regarding law firm liability for the acts of partners and associates to the arena of hospital liability for the acts of its employees.

*Id.* at ¶ 35.

It is certainly noteworthy that Judge Mary DeGenaro both concurred in *Taylor* and had been part of the majority in *Wuerth*, as a result of her substitution for Justice Evelyn Lundberg Stratton. She had also joined Chief Justice Moyer's concurring opinion along with Justices Pfeifer, O'Connor, and Lanzinger. *Taylor* was issued only thirteen months later, and Judge DeGenaro took the opportunity to highlight that "the doctor and nurses were employees of the hospital." *Id.,* 2010-Ohio-3986, ¶ 39.

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Accordingly, the plaintiffs had "properly filed their complaint against the hospital alone." *Id.* at ¶ 39. After detailing the *Wuerth* proceedings, she concluded that "because the hospital is the employer of the alleged tortfeasors, [the plaintiffs] can directly pursue the hospital for their damages under the theory of respondeat superior, without joining the employees as party defendants." *Id.* at ¶ 47. The same sound logic should have been applied in the case *sub judice*.

## F. THE *DINGES/SAWICKI* REASONING

The *Wuerth* rule was narrowly applied under similar circumstances in *Dinges v. St. Luke's Hosp.*, 2012-Ohio-2422, 971 N.E. 2d 1045 (6th Dist.) The trial court had dismissed the malpractice claims that had been brought against two physicians on the grounds that they had not been properly and timely served with an amended complaint. *Id.* at ¶ 14. Summary judgment was then granted in favor of their professional group on the basis of *Wuerth's* remark that such entities do not practice medicine and cannot commit malpractice. *Id.* at ¶ 20. In an effort to reconcile *Wuerth* with decisions applying *respondeat superior* in the traditional manner, the Sixth District identified three potential categories of professionals. *Id.* at ¶ 36, citing *Tisdale*, 197 Ohio App. 3d 316. The relationship between the professional and the professional organization can be either a straight employment, agency by estoppel, or ownership as in *Wuerth*. *Id.* A remand was therefore ordered to determine the relationship that existed between the two physicians and their professional group. *Id.* at ¶ 38-39.

*Dinges* is thus at odds with the First District's decision below. The later *Rush* opinion specifically recognizes that all of the anesthesiologist were "employees" of U.C. Physicians. *Apx. 0006*, ¶ 3. There is no evidence in the record of any ownership interests and no one has ever suggested that agency by estoppel applies. If *Dinges* had been followed, *Wuerth* would have no application and the employer could be held liable

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regardless of whether the physician-employee was individually sued. *Dinges*, 2012-Ohio-2422, ¶ 36.

Notably for purposes of the instant appeal, Judge Stephen A. Yarbrough concurred "separately to emphasize certain points that should not be left to implication." *Dinges*, 2012-Ohio-2422, ¶ 41. He observed that further support for the *Dinges* holding could be found in *State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas*, 126 Ohio St. 3d 198, 2010-Ohio-3299, 931 N.E. 2d 1082. In that instance, the physician who had allegedly committed malpractice had arguably maintained an employment relationship with both a private medical corporation and a state medical college. *Id.,* 126 Ohio St. 3d at 202, ¶ 20. The trial court dismissed the claims against the physician because of his status as a state employee and stayed the *respondeat superior* claim against the corporation until the Court of Claims resolved whether the physician was entitled to immunity. *Id.* at ¶ 4. The plaintiffs took no action in the Court of Claims and sought a writ of *procedendo* to overturn the stay. *Id.* at ¶ 6-7.

In affirming the Tenth District's issuance of the writ, this Court held that the physician's immunity did not preclude a lawsuit against the private corporate employer. *Sawicki,* 126 Ohio St. 3d at 203, ¶ 28-29. Justice Judith Lanzinger's majority opinion explained that:

> *** An employee's immunity from liability is no shield to the employer's liability for acts under the doctrine of respondeat superior. *Adams,* 18 Ohio St.3d at 142–143, 18 OBR 200, 480 N.E.2d 428. A private employer may still be liable even if the employee is personally immune, for the doctrine of respondeat superior operates by imputing to the employer the acts of the tortfeasor, not the tortfeasor's liability. See, e.g., *Davis v. Lambert–St. Louis Internatl. Airport* (Mo.2006), 193 S.W.3d 760, 765–766 (a public employee's immunity "does not deny the existence of th[e] tort; rather it provides that [the employee] will not be liable for damages caused by his negligence"); *Hooper v. Clements Food Co.* (Okla.1985), 694 P.2d 943, 945 ("Under respondeat

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> superior, the *negligence* or *wrongful act,* as opposed to the civil liability of the servant, is imputed to the master" [emphasis sic]).

*Id.* at ¶ 28. This decision, which was issued roughly a year after *Wuerth*, thus rejects the notion that an individual must always be sued and held liable before derivative liability applies because professional corporations cannot commit malpractice. As Judge Yarbrough observed in his concurrence, "*Wuerth* neither defines the present contours of respondeat superior nor is it controlling precedent for negligence suits arising in the medical *employer-employee* context." *Dinges*, 2012-Ohio-2422, ¶ 51 (emphasis original).

## G. THE NATIONAL CONSENSUS OF AUTHORITY

Plaintiffs' counsel has been unable to locate any appellate decisions that have been issued by any court anywhere within the last few decades holding, as the First District did, that a professional corporation can only be held derivatively liable for the malpractice of a physician who has been individually sued in the action. Most (if not all) jurisdictions recognize that the *respondeat superior* claim only has to be brought in a proper and timely manner against the employer, so long as the employee's tortious wrong doing is ultimately established. Compelling examples include the following:

- *Yamane v. Pohlson*, 111 Hawai'i 74, 75, 137 P.3d 980 (2006) (plaintiff not required to name the doctor in the medical malpractice lawsuit in order to state a claim against the medical center).

- *Walker v. Choudhary*, 425 N.J. Super. 135, 150-154, 40 A. 3d 63, 71-74 (2012) (holding that professional corporation could still be liable under *respondeat superior* even if the claims against the employee-physician were time barred.)

- *Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164 (1996) ("when a plaintiff initiates an action under the theory of respondeat superior against an employer before

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the statute of limitations has run as to the employee, the plaintiff need not sue both the employer and employee to prevent his action from being time barred.")

- *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 111 (Tenn.2010) (where the plaintiff has initially filed a vicarious liability claim against the principal, and the plaintiff's claims against the principal's agents are later extinguished by operation of law, the plaintiff's claims are not barred based on agency principles allowing the plaintiff to sue the master or servant).

- *Lomando v. United States*, 667 F.3d 363, 383-384 (3d Cir.2011) (a plaintiff in New Jersey is not required to include the allegedly negligent employee as a defendant in an action seeking to impose respondeat superior liability on an employer).

- *Wiedenfeld v. Chi. & N. W. Transp. Co.*, 252 N.W.2d 691, 695 (Iowa 1977) (the servant is not a necessary party to an action against the master), citing *Losito*, 136 Ohio St. at 187.

- *Helms v. Rudicel*, 986 N.E.2d 302, 312 (Ind.App.2013) ("While Indiana has not addressed this specific issue, we observe that some of our sister states have concluded that *the running of a statute of limitations with respect to a physician does not preclude a complaint against a hospital on a theory of vicarious liability and apparent authority*.")

- *Wright v. Village of Calumet Park*, E.D. Ill. No. 09-CV-3455, 2009 WL 4545191, *4 (Dec. 2, 2009) ("When an employer is sued under a theory of *respondeat superior*, 'the servant is not a necessary party in an action against the master.'"), quoting *McCottrell v. City of Chicago*, 135 Ill.App.3d 517, 90 Ill.Dec. 258, 481 N.E.2d 1058, 1059 (Ill. App. 1985).

- *Prate v. Village of Downers Grove*, E.D. Ill. No. 11-cv-3656, 2011 WL 5374100, *5 (Nov. 7, 2011) ("when a statute of limitations bars a plaintiff's claims against an identified employee and the plaintiff names the employer as a defendant within the statute of limitations, the bar of the plaintiff's claim against the employee cannot be grounds for dismissing the claim against the employer."), [string citation omitted].

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- *Strozyk v. Norfolk Southern Corp.*, E.D. Penn. No. 01-CV-1898, 2001 WL 818496, *1 (July 18, 2001) (plaintiffs are not required to name an employee separately from his employer), citing *Hall v. Natl. Serv. Industries, Inc.*, 172 F.R.D. 157, 159 (E.D.Pa.1997).

The time has now arrived for Ohio to return to this consensus of authority. This Court should reaffirm that *Wuerth* is limited to its facts and hold that there is no need to individually sue the employee, including doctors and attorneys, in order to establish *respondeat superior* liability against an employer that has been properly and timely named in a lawsuit.

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## CONCLUSION

In accordance with both the consensus of authority and basic common sense, this Court should reverse the First Judicial District Court of Appeals and remand this action with instructions that Defendant U.C. Physicians is derivatively liable under the doctrine of *respondeat superior* for the negligence committed by any of the employee-physicians who cared for Plaintiff, whether individually named in the Complaint or not. The *Wuerth* decision should be limited to the particular facts of that case.

Respectfully Submitted,

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ORIGINAL

**IN THE SUPREME COURT OF OHIO**

**CASE NO.** 16-0636

**ANTHONY AND TAMMY RUSH**
**Plaintiff-Appellants,**

**-vs-**

**U.C. PHYSICIANS INC.; THOMAS KUNKEL, M.D.; UNIVERSITY ANESTHESIA ASSOCIATES, INC.**
**Defendant-Appellees.**

**ON APPEAL FROM THE HAMILTON COUNTY COURT OF APPEALS CASE NO. C-150309**

# NOTICE OF APPEAL OF PLAINTIFF-APPELLANTS, ANTHONY AND TAMMY RUSH


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## NOTICE

Plaintiff-Appellants, Anthony and Tammy Rush, serve notice that they are seeking further review in the Supreme Court of Ohio of the issues of public and great general interest that were raised in the final judgment and opinion that were rendered by the First Judicial Court of Appeals on March 11, 2016.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Notice** has been sent by e-mail on this 25th day of April, 2016 to:

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# IN THE COURT OF APPEALS
# FIRST APPELLATE DISTRICT OF OHIO
# HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| ANTHONY RUSH, | : | APPEAL NO. C-150309<br>TRIAL NO. A-1202669 |
| and | : | |
| TAMMY RUSH, | : | *JUDGMENT ENTRY.* |
| Plaintiffs-Appellants, | : | |
| vs. | : | |
| UNIVERSITY OF CINCINNATI PHYSICIANS, INC., | : | |
| and | : | |
| THOMAS JOHN KUNKEL, M.D., | : | |
| Defendants-Appellees, | : | |
| and | : | |
| WEST CHESTER MEDICAL CENTER, et al., | : | |
| Defendants. | : | |


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ENTERED
MAR 11 2016

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

**To The Clerk:**

**Enter upon the Journal of the Court on March 11, 2016 per Order of the Court.**

By: Peter Sundmann
**Presiding Judge**

# IN THE COURT OF APPEALS
# FIRST APPELLATE DISTRICT OF OHIO
# HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| ANTHONY RUSH, | : | APPEAL NO. C-150309<br>TRIAL NO. A-1202669 |
| and | : | |
| TAMMY RUSH, | : | *OPINION.* |
| Plaintiffs-Appellants, | : | |
| vs. | : | |
| UNIVERSITY OF CINCINNATI PHYSICIANS, INC., | : | |
| and | : | |
| THOMAS JOHN KUNKEL, M.D., | : | |
| Defendants-Appellees, | : | |
| and | : | |
| WEST CHESTER MEDICAL CENTER, et al., | : | |
| Defendants. | : | |





Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 11, 2016

*Paul W. Flowers Co., Paul W. Flowers, The Becker Law Firm, Michael F. Becker* and *David W. Skall,* for Plaintiffs-Appellants,

*Freund, Freeze & Arnold* and *Mark A. MacDonald,* for Defendants-Appellees.

Please note: this case has been removed from the accelerated calendar.

**DEWINE, Presiding Judge.**

{¶1} This is an appeal in a medical-malpractice case. Anthony Rush sustained injuries when he fell off a ladder at work. A few days later—while still hospitalized for his injuries—he became paralyzed. Mr. Rush filed suit, and claims proceeded to trial against Dr. Thomas Kunkel, an anesthesiologist who had treated him, and Dr. Kunkel's employer, University of Cincinnati Physicians, Inc., ("UC Physicians"). The jury returned a defense verdict. Mr. Rush now appeals. He argues that the court (1) improperly allowed the defense to offer expert opinions that were not disclosed prior to trial, (2) erred in granting a directed verdict limiting the liability of UC Physicians to the conduct of the named anesthesiologist, and (3) improperly gave a "different methods" jury instruction that was not warranted under the facts of the case. We find no error and affirm the judgment.

## I. Background

{¶2} On November 23, 2010, Mr. Rush fell off a 30-foot ladder while painting a house. He was taken to West Chester Hospital where he was told he had broken his clavicle and eight ribs on the right side. At issue in this appeal is the anesthesiology care that Rush received while at the hospital.

{¶3} Upon Rush's admission to the hospital, an epidural catheter was inserted into his spinal canal for the purpose of administering anesthetic medications. Over the course of his stay at the hospital, Mr. Rush was treated by several anesthesiologists, all of whom were employees of UC Physicians.

{¶4} During his first few days in the hospital, Mr. Rush continued to suffer pain that was treated primarily with medications administered via the epidural catheter. Dr. Kunkel saw Rush for the first time on November 26. Based upon Rush's complaint

of right-sided chest pain, Dr. Kunkel delivered an additional dose of medication. Mr. Rush reported improvement. Because the additional medication had provided relief, Dr. Kunkel increased the epidural infusion rate. Rush's pain diminished, and the next morning, he reported to Dr. Ahmed Khalil that his pain was tolerable.

{¶5} On the evening of November 27, Mr. Rush complained to a nurse of increasing numbness and weakness in his legs and abdomen. The nurse telephoned an anesthesiologist about Rush's worsening condition. The hospital notes do not identify the anesthesiologist with whom she spoke, but the records contain a telephone order from Dr. Kunkel instructing her to decrease the epidural rate. Despite his name on the order, Dr. Kunkel insists that he did not receive this phone call. He testified that he would have followed a different course of action if he had, and that it was common practice for anesthesiologists to routinely sign electronic orders for each other. By his account, it was likely Dr. Khalil who received the call and ordered the decrease, as Dr. Khalil was the anesthesiologist who was "on call" at the time.

{¶6} By early the next morning, Mr. Rush was incontinent of urine and felt numb in both legs. A nurse phoned Dr. Kunkel at 3:50 a.m., and he instructed that the epidural be turned off completely and that the nurse call him back in two hours. At 6:30 a.m., the nurse called back and reported Rush's condition was improving. Another nurse called Dr. Kunkel at 9 a.m. and stated that Rush had increasing sensation in his arms and right leg, but that the numbness persisted in his left leg.

{¶7} But when Dr. Kunkel arrived at hospital at 12:30 p.m., things had taken a turn for the worse. He found Rush could not move his left leg and was very weak in his right leg. Dr. Kunkel ordered an MRI and transferred Rush to University Hospital for evaluation and possible treatment by a neurosurgeon. Mr. Rush did not recover. He is now paralyzed and requires the use of a wheel chair.

{¶8} Mr. Rush and his wife filed suit against a number of defendants who had been involved in his medical treatment. Eventually all of the defendants were dismissed except Dr. Kunkel and UC Physicians. The matter proceeded to a jury trial. The plaintiffs argued that Rush had become paralyzed as a result of a spinal epidural hematoma. Under this theory, bleeding from the placement of the epidural had caused compression on the spinal cord that ultimately cut off blood flow to the spinal cord and caused Rush's neurological injuries. Dr. Kunkel, they argued, was negligent because he had failed to timely identify the hematoma and take corrective action.

{¶9} The defendants presented a different theory of causation. Their experts asserted that Rush did not have an epidural hematoma and that there was no compression of the spinal cord. In their view, the original fall caused injuries to the arteries that run along the ribs, and over time, these damaged arteries resulted in reduced blood flow to the spine. This reduced blood flow caused ischemic injury to the spinal cord, and nothing could reasonably have been done to prevent Rush's paralysis. Further, they opined that Dr. Kunkel's conduct did not fall below the standard of care.

{¶10} After the plaintiffs presented their case, the defendants moved for a partial directed verdict, asserting that UC Physicians could not be liable for the conduct of physicians who were not named in the lawsuit. The court granted the directed verdict, holding that UC Physicians could be held vicariously liable only for the conduct of Dr. Kunkel. After the close of evidence, the jury returned a verdict in favor of the defendants.

## II. "New" Expert Opinions

{¶11} In their first assignment of error, the Rushes argue that the trial court abused its discretion when it permitted defendants to introduce new expert opinions that were not disclosed prior to trial. Specifically, they contend that the court erred in

permitting two defense experts to testify about posterior rib fractures that the experts had not identified prior to trial.

{¶12} At trial, Dr. Thomas Brown testified that on his initial review of Rush's chest x-rays, he had identified a number of rib fractures on Rush's front and side. On subsequent review of his CT scans and MRIs, Dr. Brown also identified a number of posterior rib fractures that he had not observed on his read of the chest x-ray. Dr. Bradford Mullin similarly testified that he identified three fractures on the posterior ribs in his review of Rush's MRI. The posterior ribs, he noted, were in proximity to the artery of Adamkiewicz, a major source of blood to the spinal cord.

{¶13} The plaintiffs objected to this testimony arguing that Drs. Brown and Mullin had not disclosed these rib fractures in their initial reports or at their pretrial depositions. They argued that the posterior rib fractures constituted a new expert opinion that the defense was required to disclose prior to trial. The trial court overruled the objection.

{¶14} Civ.R. 26(B)(5) allows a party to obtain discovery of "facts known or opinions held" by an opposing party's expert that are relevant to the subject matter upon which the expert is to testify. Civ.R. 26(E)(1) requires that a party supplement discovery responses in regard to questions "directly addressed * * * to the subject matter on which [the expert] is expected to testify."

{¶15} We review the court's decision to admit expert testimony under an abuse-of-discretion standard. *Sindel v. Toledo Edison Co.*, 87 Ohio App.3d 525, 529, 622 N.E.2d 706 (3d Dist.1993). The Ohio Supreme Court has found it was an abuse of discretion for a trial court to permit a medical expert to testify about a previously undisclosed causal connection between an injury and a medical problem. *Schumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367, 371, 504 N.E.2d 44 (1986). Civ.R.

26(E), however, does not require parties to provide detailed information with regard to the basis for an expert's opinion. *Metro. Life Ins. Co. v. Tomchik*, 134 Ohio App.3d 765, 783, 732 N.E.2d 430 (7th Dist.2000). Instead, the opposing party must be adequately informed as to the subject matter about which the expert intends to testify. *Id.*

**{¶16}** In this case, Dr. Brown stated in his pretrial report that the damage to the spinal cord was likely caused by "vascular injury to the segmental arteries in the upper thoracic region." He then noted that the right-sided rib fractures displayed on Rush's x-ray demonstrated the severity of the initial traumatic injury. Finally, he concluded that "[d]ecreased blood flow to the cord as a result of the initial trauma ultimately produced [a] spinal cord infarct (a.k.a. "spinal stroke")." The Rushes' attorney asked Dr. Brown several questions in his deposition about literature related to arterial infarct and whether such an injury to Rush's arteries would be visible on the available imaging. The Rushes' counsel did not ask Dr. Brown where Rush's rib fractures were located during the deposition.

**{¶17}** Dr. Mullin noted in his report that the rib fractures were "correctly positioned to affect the artery of Adamkiewicz." He further explained that the "most definitive MRI reading states that the findings were most consistent with ischemic change and infarct within the distribution of the artery of Adamkiewicz." At his deposition, Dr. Mullin explained that the trauma from the fall caused damage to the vasculature that supplied blood to Rush's spinal cord, resulting in the spinal infarct. The Rushes' counsel did not ask Dr. Mullin where the rib fractures were located during the deposition.

**{¶18}** Based upon our review of the trial transcript and the discovery proceedings, we conclude that the testimony about posterior rib fractures did not constitute a new "subject matter" of expert testimony that required the defendants to

supplement their discovery responses. *See* Civ.R. 26(E). The theory of the defense experts throughout the case had been that the cause of paralysis was an ischemic injury caused by fractured ribs. Indeed, Dr. Mullin specifically noted in his report that the fractures were positioned to affect blood flow through the artery of Adamkiewicz. It is true that the experts never pinpointed the fractures prior to trial as posterior; but it is also true that the plaintiffs never asked them to pinpoint the fractures.

{¶19} This is not a case like *Schumaker,* 28 Ohio St.3d 367, 504 N.E.2d 44, where the expert presented a completely new and previously undisclosed theory of causation. Nor is it like *Walker v. Holland,* 117 Ohio App.3d 775, 691 N.E.2d 719 (2d Dist.1997), where the expert offered testimony at trial that contradicted what he had said in his deposition.

{¶20} Closer to our case is *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 569 N.E.2d 875 (1991). There, the Ohio Supreme Court held that a trial court did not abuse its discretion in allowing an expert to offer testimony that differed from his previous expert report in the precise cause of death, though not in his opinion that the defendant's product was not responsible. *Id.* at 153. If anything, the discrepancies between what was said at trial and what was disclosed pretrial were much greater in the *Tracy* case than here. *See Faulk v. IBM*, 1st Dist. Hamilton Nos. C-000765 and C-000778, 2001 Ohio App. LEXIS 3980 (Sept. 7, 2001).

{¶21} While the testimony provided at trial was more detailed than that presented in the expert report, we do not find that it constituted a new subject matter of expert testimony. It was not a new theory of causation, and what was presented was consistent with the matters disclosed in discovery. In these circumstances, we cannot conclude that the trial court abused its discretion. The first assignment of error is overruled.

## III. Respondeat Superior

{¶22} In their second assignment of error, the Rushes contend the trial court erred as a matter of law when it granted a directed verdict on all claims against UC Physicians, except for those arising from any negligence committed by Dr. Kunkel. We review a trial court's decision to grant a directed verdict de novo. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033, ¶ 22.

{¶23} The court was on solid legal ground in granting a directed verdict. In *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, paragraph one of the syllabus, the Ohio Supreme Court held that because a law firm does not practice law, it cannot be liable for legal malpractice. Thus, a law firm can only be legally liable for malpractice when one of its principals or associates is liable for malpractice. *Id.* at paragraph two of the syllabus. In reaching its decision, the court found "instructive" its precedent on medical malpractice, explaining that "because only individuals practice medicine, only individuals can commit medical malpractice." *Id.* at ¶ 14, citing *Browning v. Burt*, 66 Ohio St.3d 544, 556, 613 N.E.2d 993 (1993). We have applied *Wuerth* to medical-malpractice claims. *See Henry v. Mandell-Brown*, 1st Dist. Hamilton No. C-090752, 2010-Ohio-3832; *but see Taylor v. Belmont Community Hosp.*, 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986. In *Henry*, we concluded that where the claims against a doctor were not filed within the statute-of-limitations period, the plaintiff could not pursue vicarious-liability claims against the doctor's employer. *Henry* at ¶ 14. Thus, under *Wuerth* and our precedent, it is clear that UC Physicians may not be vicariously liable for the conduct of an unnamed physician.

{¶24} Despite this clear authority, the Rushes ask that we carve out an exception for this case. They argue that it is unfair to allow the defendants to point the finger at Dr. Khalil as responsible for the order to which Dr. Kunkel's name was

attached, yet allow UC Physicians to avoid liability for any negligence by Dr. Khalil. They contend further that by the time that they discovered that the defendants intended to assert that Dr. Khalil had signed the note, it was too late for them to name Dr. Khalil in their lawsuit.

{¶25} We are not unmindful of the potential unfairness asserted by the Rushes. *Wuerth*, however, leaves no room for vicarious liability for medical malpractice where a doctor cannot be found to be liable for malpractice. The Rushes' real complaint is not the theory of vicarious liability adopted by the Supreme Court in *Wuerth*. Rather, it is the potential unfairness that may be caused where inaccurate hospital records prevent a plaintiff from discovering the identity of a potentially liable defendant until after the limitations period has passed. But the law in Ohio is clear that once a cognizable event occurs that places a plaintiff on notice that an injury may have resulted from medical treatment, the statute begins to run and the plaintiff has a duty to investigate and identify all potential tortfeasors. *See Akers v. Alonzo*, 65 Ohio St.3d 422, 425-426, 605 N.E.2d 1 (1992); *Pratt v. Wilson Mem. Hosp.*, 2d Dist. Montgomery No. 18030, 2000 Ohio App. LEXIS 2955 (June 30, 2000). The Rushes' argument would be better addressed to an extension or tolling of the limitations period than to an expansion of vicarious liability.

{¶26} The trial court properly granted a directed verdict in favor of UC Physicians other than for the negligence of Dr. Kunkel. We overrule the assignment of error.

## IV. Different Methods Instruction

{¶27} In their third assignment of error, the Rushes argue that the trial court improperly provided the following instruction to the jury:

> Although some other physician may have used a different method of treatment—used a method of treatment different from that used by the defendant this circumstance will not by itself prove the defendant was negligent. You shall decide whether the diagnosis and treatment used by the defendant was reasonably prudent in accordance with the standard of care required of an anesthesiologist in his field of practice.

{¶28} The Rushes argue that this "different methods" instruction was inappropriate because the crux of this case pertains to Dr. Kunkel's failure to timely order spinal imaging and diagnose Rush, not whether Dr. Kunkel chose the best treatment option available.

{¶29} The "different methods" instruction is properly given where there is evidence that more than one method of diagnosis or treatment is acceptable for a medical condition. *Pesek v. Univ. Neurologists Assn.*, 87 Ohio St.3d 495, 498, 721 N.E.2d 1011 (2000). The expert witnesses testified that Dr. Kunkel had alternative methods to choose from once Rush reported numbness in his feet and legs. The Rushes' expert testified that when a patient complains of numbness, a CT scan must be conducted immediately. Dr. Kunkel's expert stated the numbness must be addressed, but it is not necessary to rush the patient to a CT or MRI. Instead, he opined, a doctor can cut back on the epidural—or stop it all together—and check the patient's progress after an hour or two. Because evidence was presented that indicated Dr. Kunkel could have utilized different methods and still have acted within the standard of care, the instruction was proper. The third assignment of error is overruled.

## IV. Conclusion

{¶30} The judgment of the trial court is affirmed.

Judgment affirmed.

**MOCK, J.**, concurs.
**STAUTBERG, J.**, concurs separately.

**STAUTBERG, J.**, concurring separately.

{¶31} I concur with the majority opinion, but write separately to discuss the analysis and disposition of appellant's second assignment of error. In it, appellants argue that the trial court should not have granted a directed verdict on all claims against UC Physicians except for those derivative of the claim against Dr. Kunkel. Appellants argue the trial court should have allowed their claims against UC Physicians to proceed notwithstanding the absence of the other possibly culpable physicians as parties. I agree, but am constrained by our previous holding in *Henry v. Mandell-Brown*, 1st Dist. Hamilton No. C-090752, 2010-Ohio-3832, and the doctrine of *stare decisis*, and therefore concur in our outcome.

{¶32} We join the trial court in relying upon *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, for the proposition that an employer of a physician may not be held liable for the malpractice of its employee-physician on the theory of respondeat superior unless that physician is a named defendant in the lawsuit. I do not agree *Wuerth* should be read so broadly.

{¶33} It is well settled that

> [w]here a liability arises against both a master and his servant in favor of a party injured by the sole negligence of the latter while acting for the master, such injured party may sue either the servant, primarily liable, or the master, secondarily liable, or both, in separate actions, as a judgment in his favor against one, until satisfied, is no bar to an action against the other, the injured party being entitled to full satisfaction from either the master or servant or from both.

*Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940), paragraph two of the syllabus. Not only is *Losito* still good law, it was favorably cited for the same proposition in *Wuerth*. Indeed, other courts have come to the conclusion that *Wuerth* is and should be limited in its application to the particular facts of that case. *See Tisdale v. Toledo Hosp.*, 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 280 (6th Dist.) and *Taylor v. Belmont Community Hosp.*, 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986. These cases conflict with our analysis and outcome.

{¶34} Here, UC Physicians was sued as the employer of providers of medical care to Mr. Rush before the expiration of the statute of limitations. In my view, *Wuerth* should not apply to preclude any claim for vicarious liability flowing from the alleged malpractice of physicians not named as parties in the lawsuit. Indeed, in *State ex rel. Sawicki v. Lucas Cty. Court of Common Pleas*, 126 Ohio St.3d 198, 2010-Ohio-3299, 931 N.E.2d 1082, the Supreme Court passed on an opportunity to expand or even mention *Wuerth*. Rather, the court there reiterated the employer can still be held vicariously liable for the negligence of a statutorily-immune, and dismissed, physician.

{¶35} Nevertheless, in *Henry v. Mandell-Brown*, 1st Dist. Hamilton No. C-090752, 2010-Ohio-3832, we applied *Wuerth* to medical malpractice claims and prohibited a claim against the employer where the physician was not named in a lawsuit until after the statute of limitations had run. We are bound by the doctrine of *stare decisis* to follow that application unless and until the Supreme Court resolves the differing interpretation of *Wuerth* in this area of the law.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

**IN THE COURT OF APPEALS**
**FIRST APPELLATE DISTRICT OF OHIO**
**HAMILTON COUNTY, OHIO**

D114202258

ANTHONY RUSH, et al.,

APPEAL NO. C-150309
TRIAL NO. A-1202669

Appellants,

vs.

ENTRY GRANTING MOTION TO CERTIFY CONFLICT

U.C. PHYSICIANS, et al.,

Appellees.

This cause came on to be considered upon the motion of the appellants to certify this appeal to the Supreme Court of Ohio as being in conflict with *Taylor v. Belmont Community Hosp.*, 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986.

The motion is well taken and is granted.

Wherefore, this appeal is hereby certified to the Ohio Supreme Court as being in conflict with the above case regarding the following issue:

> Does the holding in *National Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, limiting the malpractice liability of a law firm to those principals and employees named as defendants within the limitations period, extend also to medical practices and hospitals?

**To The Clerk:**

**Enter upon the Journal of the Court on** APR 19 2016 **per order of the Court.**

**By:** _____
**Presiding Judge**

**(Copies sent to all counsel)**

ENTERED
APR 19 2016