IN THE SUPREME COURT OF OHIO

MALIEKA EVANS,	:	Supreme Court Case Nos.
	:	2019-0284 and 2019-0453
Plaintiff-Appellee,	:	
	:	On Appeal from the Ninth Appellate
v.	:	District, Summit County, Ohio
	:	Appellate Court Case No. CA-28340
AKRON GENERAL MEDICAL CENTER, ET AL.	:	
	:	
Defendant-Appellant.	:	

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS, IN SUPPORT OF THE POSITION ADVANCED BY DEFENDANT-APPELLANT, AKRON GENERAL MEDICAL CENTER

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I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is comprised of attorneys who are united by their desire to improve the administration of justice within the State of Ohio. OACTA's membership includes those who independently represent employers, those who serve in house for employers, and those who are themselves employers. Many of those employers, in addition to having their own employees, utilize the services of independent contractors, including, but not limited to physicians, lawyers, and a variety of other professional and non-professional specialists.

For more than 50 years, OACTA has endeavored to provide a forum for dedicated professionals to collaborate in the service of this important purpose. Whether through professional education, public service, or advocacy, OACTA has taken an active role in improving the administration of justice throughout Ohio. To that end, it supports laws and policies that promote fairness, predictability, stability, and consistency within our State's civil justice system.

It is OACTA's commitment to fairness and the administration of actual justice that compels it to weigh in on the primary issue presented by this certified conflict – namely, whether an employer can be susceptible to civil liability for the negligent hiring, supervision, or retention of an employee or independent contractor, when there is no viable cause of action or existing adjudication of liability against the employee/independent contractor[1] for alleged wrongdoing? For those reasons set forth

[1] OACTA is cognizant that the Ninth District Court of Appeals did not make a finding as to whether Dr. Shahideh was an employee or independent contractor, and instead left that question to be answered by the trial court; however, the trial court described as "fact" that "Dr. Shahideh was not an employee of Akron General Medical Center." *Order* (May 12, 2016) (ruling on the parties' motion for summary judgment). In addition, Plaintiff's

below, OACTA respectfully submits that the foregoing question should be answered in the negative.

There are currently more than 5.8 million individuals employed in the State of Ohio.[2] Employers of all types are forced to deal with myriad uncertainties, including, but not limited to, those stemming from business cycle fluctuations, accessibility to investment capital, variability in the cost of raw materials, employee productivity, liability contingencies, and the impact of geopolitical events on trade and the economy at large. Needless to say, uncertainty is never absent for any employer. Nor is risk. Yet, in order to remain viable, employers must be able to reasonably anticipate and bear a certain degree of both. For this, employers depend heavily upon our State to enact and enforce laws that fairly and equitably allocate both risk and liability.

The decision rendered by the Ninth District Court of Appeals below constitutes an unjust and illogical expansion of potential liability for employers who conduct business in the State of Ohio. The Appellate Court's decision improperly blurs the legal distinction between employees and independent contractors by imposing upon business owners many of the liabilities of an employment relationship without imparting any of the potential benefits. The Ninth District's determination also departs from the principled precedent

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Amended Complaint alleges that Dr. Shahideh was "a physician employed by G.E.M.S. and assigned duties in the emergency room of AKRON GENERAL." *Plaintiff's Amended Complaint*, ¶ 7. Accordingly, OACTA submits that, based upon the existing state of the pleadings and the trial court's rulings below, there is every reason to believe that Dr. Shahideh was an independent contractor and not an employee of the hospital. Nevertheless, in the interest of caution and because it does not materially alter OACTA's overriding concerns regarding the potential ramifications of the decision rendered by the Ninth District Court of Appeals in this matter, for purposes of clarity and convenience, OACTA shall hereinafter use the term "employees" with the understanding that the arguments advanced herein apply to, encompass, and shall contemplate both.

[2] See Bureau of Labor Statistics; Ohio Civilian Labor Force Data (June 2019).

that has heretofore defined the extent of an employer's potential liability for negligent hiring, supervision, and/or retention – most notably this Court's seminal decision in the matter of *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988) – and alters the logical manner in which liability can and should be established under such circumstances.

The potential policy implications of the Ninth District's ruling are indeed significant. So too are its practical effects. That, of course, is what has garnered the interest and attention of this amicus curiae and potentially others as well. If allowed to stand, the determination rendered by the Ninth District Court of Appeals will unfairly shackle employers with responsibilities that exceed what is just. It will also impose upon employers the undue burden and prejudice of defending the actions and decisions of non-parties for whom employers would not otherwise likely bear any legal responsibility. In a broader sense, the decision below threatens to incentivize carelessness and irresponsibility on the part of employees by making employers their de facto insurers. Conversely, it disincentivizes victims of allegedly harmful conduct from pursuing available civil and criminal remedies against actual wrongdoers by making proxies of their deep pocket employers.

If an adjudication of the alleged tortfeasor's liability is no longer to be a necessary precursor to an employer's potential derivative liability, there is sure to be a marked increase in the number of claims instituted against employers, who may well be strategically targeted and exploited by a process that is fraught with prejudice and partiality. This, of course, raises a host of additional complications for those who seek to insure employers. Those complications and uncertainties will undoubtedly translate into greater cost for employers seeking to insure against these types of risk.

The practical implications of the Appellate Court's decision below are indeed troubling. It is OACTA's position that employers should not be made to bear such disproportionate risk. Nor should they be subjected to potential liability for the unsanctioned actions of those whom they employ or with whom they contract to provide services. More to the point, no employer should be forced incur the cost or potential liability for the alleged wrongdoing of another whose intentionally wrongful conduct exceeded the scope of the employment relationship. That is particularly so when, as here, the alleged wrongdoer is not individually subject to liability her/himself.

Because it finds these potential realities unjust and incongruent with established principles of law, on behalf of its members and the many that they serve, OACTA respectfully urges this honorable Court to reverse the decision rendered by the Ninth District Court of Appeals, thereby clarifying that, pursuant to its ruling in *Strock v. Pressnell*, in the absence of a viable cause of action or existing judgment against an employee, there can be no liability for negligent hiring, supervision, or retention on the part of the employer who employed or retained the services of the employee.

II. STATEMENT OF THE CASE

In the interests of brevity and economy, OACTA hereby adopts by reference the Statement of the Case set forth in the merit brief submitted by Appellant, Akron General Medical Center ("AGMC"). From a procedural standpoint, it should be noted that, on February 11, 2019, the Ninth District Court of Appeals certified that its holding in this matter is in apparent conflict with the prior holding of the Third District Court of Appeals in the matter of *Bishop v. Miller*, 3rd Dist. Defiance Nos. 4-97-30 and 4-97-31, 1998 Ohio

App. LEXIS 1526 (1998). Pursuant to S.Ct.Prac.R. 8.01, formal notice of said conflict was timely provided to this Court for consideration. See *Notice of Certified Conflict* (Feb. 25, 2019). The Court additionally accepted for discretionary review a single proposition of law, referenced herein as "Proposition of Law No. 1." Consistent with its stated interests in this matter, OACTA offers the following for consideration in the resolution of the issues raised in this appeal.

III. LAW AND ARGUMENT

Based upon the nature of negligent hiring, supervision, and retention claims, as reflected in the holding of *Strock v. Pressnell*, this amicus curiae respectfully submits that Proposition of Law No. 1 is a correct statement of law and should be affirmed. Because Proposition of Law No. 1 closely parallels the substance of Certified Question No. 2, in the interest of economy, both issues have been jointly addressed hereinbelow. There also appears to be some logical overlap between Certified Question Nos. 1 and 2. To the extent that the following analysis addresses Certified Question No. 1, it is respectfully submitted for due consideration; however, this amicus curiae does not otherwise intend to specifically or separately address Certified Question No. 1.

> ***Proposition of Law No. 1:*** *If no viable cause of action exists against an employee, such that an employee can no longer be found liable for an alleged wrong, a plaintiff cannot maintain a cause of action against an employer for negligent hiring, supervision, or retention.*
>
> ***Certified Question No. 2:*** *Does the language of Strock v. Pressnell, 38 Ohio St.3d 207, 217, 527 N.E.2d 1235 (1988) require that a plaintiff show the liability of an employee in order to maintain a negligent hiring, supervision, or retention action against an employer?*

A. The Derivative Nature of Negligent Hiring, Supervision, and Retention Claims

Negligent hiring, retention, and supervision claims are among several recognized causes of action that are at once independent, yet derivative. They are independent in the sense that they allow an aggrieved individual to bring a claim directly against an employer for its alleged failure to reasonably hire, retain, or supervise an individual who has inflicted some harm upon the claimant. These claims are, however, simultaneously derivative in that they depend upon an adjudication of the employee's underlying wrongdoing, without which there can be no fault on the part of employer. For, if the employee has acted in a manner not deemed negligent or inappropriate under the law, there can be no derivative liability on the part of the employer for negligently hiring, retaining, or supervising the employee.

The simple fact of the matter is that any alleged failure on the part of an employer "to 'prevent harm' necessarily assumes an underlying wrong; i.e. the commission of a tort by an employee. Thus, a negligent supervision claim requires that an employee commit an underlying tort." *Total Auctions & Real Estate, LLC v. S.D. Dept. of Revenue and Regulation*, 2016 S.D. 95, 888 N.W.2d 577 (S.D. Dec. 14, 2016) (citing *Schoff v. Combined Ins. Co. of Am*., 604 N.W.2d 43, 53 (Iowa 1999) (observing that "an employer cannot be held liable for negligent supervision . . . where the conduct that proper supervision and training would have avoided is not actionable against the employee"). Because the underlying wrong by the employee is the actual instrument of injury and an essential component of the employer's liability, the two are inextricably intertwined, the latter being derivative of the former.

Thus, while they are indeed "direct" claims against the employer, those alleging

negligent hiring, retention, and supervision are not "wholly independent cause[s] of the plaintiff's injuries." *Ferrer v. Okbamicael*, 2017 CO 14M, 390 P.3d 836, 844 (Colo. Mar. 27, 2017). For they are premised upon both the employer's alleged negligence in hiring, retaining, and/or supervising, as well as the actionable conduct of the employee-tortfeasor. Courts have accordingly concluded that claims for negligent hiring, supervision, and/or retention represent a form of "derivative or dependent liability" that is "tethered to the employee's tortious acts." *Id*. "Derivative or dependent liability means that one element of imposing liability on the employer is a finding of some level of culpability by the employee in causing injury to a third party." *Id*. "A derivative claim is one 'that derives from, grows out of, or results from an earlier or fundamental state or condition.' Accordingly, a claim against an employer for negligent supervision of an employee is derivative of an employee's wrongful act that causes injury to another, which wrongful act is alleged to have been caused by the employer's negligence." *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, 303 Wis.2d 34, 55, 734 N.W.2d 827, 836 (internal citations omitted).

The dual nature of negligent hiring, supervision, and retention claims is by no means a novel concept. Causes of action such as those for negligent entrustment and loss of consortium share this same duality. While direct, they too are undeniably derivative. The Ohio Ninth District Court of Appeals has, in fact, acknowledged in its prior decisions that, by definition, a "derivative action is dependent upon the existence of a primary cause of action and **can be maintained only so long as the primary action continues**." *Messmore v. Monarch Machine Tool Co*., 11 Ohio App.3d 67, 68-69, 463 N.E.2d 108 (9th Dist.1983) (emphasis added). That is precisely why it, like so many other

courts, has recognized that "but for the primary cause of action by the plaintiff," a derivative claim "would not exist." *Bradley v. Sprenger Enters*., 9th Dist. No. 07CA009238, 2008-Ohio-1998. Consequently, when there is no actionable claim against the primary tortfeasor, there can be no derivative liability. *See id*.

B. The Ninth District Court of Appeals Decision in *Evans v. AGMC*

In the trial court proceedings below, the derivative nature of Plaintiff's negligent retention/supervision claim was an obvious impediment to her ability to seek relief from the Defendants – a fact that was plainly recognized by the trial court when it granted the Defendants' motions for summary judgment in accordance with the aforementioned principles. To combat this important shortcoming in her claim, Plaintiff crafted a false dichotomy between direct and derivative liability, which she used quite effectively in the presentation of her claims to the Ninth District Court of Appeals and again reiterated in her subsequent efforts to contest this Court's jurisdiction.[3] The central premise of

[3] Plaintiff's argument in the proceedings below relied heavily on language drawn from *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940), a decision rendered by this Court. Importantly, the *Losito* decision addressed the manner in which a plaintiff could achieve satisfaction of a judgment where the claim was premised entirely upon allegations of *respondeat superior* liability. In the course of articulating its holding, it was noted by this Court that, in situations involving *respondeat superior* liability, a plaintiff may sue either the employee, the employer, or both, for the simple reason that a judgment against one does not preclude an action against the other, until the plaintiff's claim is satisfied in full. That principle, however, only applies when the liability is purely vicarious in nature, a fact that the Plaintiff herself has made a point of establishing throughout these proceedings. Importantly, this concept has no place in the analysis of Plaintiff's present claim against AGMC, which, although derivative, involves a direct claim of negligence, the liability for which would not be vicarious. When the actual substance of *Losito* is brought into full relief, it is easy to see how Plaintiff misconstrued her application in the matter *sub judice*. Contrary to her suggestion, this case is not at all like the *Losito* matter. Specifically, Plaintiff did not enjoy the luxury of being able to select exactly who she may and may not sue in this instance – at least not without ramifications on her ability to proceed against AGMC. Because her direct claim against AGMC as employer is derivative of Dr. Shahideh's individual liability, *Losito* has no bearing on the resolution of

Plaintiff's argument is that a claim may be "direct" or "derivative," but it may not be both.[4] See *Appellant's Brief*, pp. 12-15.

Although inherently flawed, the Ninth District Court of Appeals appears to have embraced this artificial distinction, allowing it to misinform the Court's determination of the appellate proceedings below. *Evans v. Akron Gen. Med. Ctr.*, 2018-Ohio-3031, ¶¶ 32-33 (9th Dist.). The Appellate Court incorrectly concluded that, because an employer's liability for negligent hiring, supervision, and retention is not "vicarious for torts committed by employees," but is, instead, based upon the employer's own negligence, claims of this type must be solely "direct" in nature. However, as noted above, derivative claims are not simply those that are vicarious in nature. They can and often do include claims that, while direct, are preliminarily dependent upon the underlying liability of a third party (i.e., consortium, negligent entrustment, and negligent hiring/supervision/retention claims). That is precisely why the "all or nothing" approach that the Ninth District employed in determining that negligent hiring, supervision, and retention claims are purely direct and in no way derivative was misinformed.

By definition, a truly "direct" claim is one that does not involve, result from, or depend upon a third party in any way. It exists solely between plaintiff and defendant, accuser and accused. Plaintiff has, of course, gone to great lengths in this litigation to

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Plaintiff's action. Moreover, the fact that Dr. Shahideh is no longer amenable to judgment renders Plaintiff's failure to proceed against him in any meaningful way detrimental to her derivative claims against AGMC.

[4] Plaintiffs cannot credibly contend on one hand that there is no need for a predicate adjudication of the primary tortfeasor's liability, and simultaneously maintain that decisions like *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, have absolutely no application to the matter at hand. While there are indeed differences, the overarching principle of *Comer* has application, particularly in this instance, where the alleged tortfeasor is an independent physician contractor.

characterize negligent hiring, supervision, and retention claims as those that are "direct" against an employer, requiring no predicate adjudication of the alleged employee-tortfeasor's liability. However, the validity of this characterization is internally inconsistent with the Appellate Court's finding that "a plaintiff must allege and prove a wrong recognized as a tort or crime in the State of Ohio within the statute of limitations for negligent hiring, supervision, and retention as determined by the legislature." *Evans*, 2018-Ohio-3031 at ¶ 34. For, if these types of claims were truly "direct" as to the employer and had no derivative component to them, there would be no need for such a finding against the employee.

In its surprise reversal of the trial court's determination, the Ninth District Court of Appeals eschewed the logical and well-established concepts outlined above and, in effect, contradicted its own prior holdings, as well as those of this Court. Claims such as those for negligent hiring, supervision, and retention are direct in the sense that they constitute a cause of action against an employer for its own negligence. However, they are also derivative, as they depend upon an underlying finding of the employee-tortfeasor's liability for the alleged injuries of the plaintiff. In short, they possess characteristics of both direct and derivative liability that are not mutually exclusive to one another. That is precisely why the decision of the Ninth District Court of Appeals below stands at odds with this Court's decision in *Strock v. Pressnell* and the well-reasoned decision of the Third District Court of Appeals in *Bishop v. Miller,* 3rd Dist. Defiance No. 4-97-30 and 4-97-31, 1998 Ohio App. LEXIS 1526 (Mar. 26, 1998), not to mention the Ninth District's own existing derivative claim jurisprudence.

C. The Language of Precedent – *Strock v. Pressnell* Means What It Says.

In 1988, this Court issued its seminal decision in the matter of *Strock v. Pressnell*, wherein it held that "an underlying requirement in actions for negligent supervision and negligent training is that the employee is **individually liable for a tort** or **guilty of a claimed wrong** against a third person, **who then seeks recovery against the employer**. Because no action can be maintained against Pressnell in the instant case, it is obvious that any imputed actions against the church are also untenable." *Strock, supra.* (emphasis added). The language utilized by this Court in rendering its determination in that matter is of particular significance to the resolution of this issue. Not only does it accurately reflect the derivative nature of negligent hiring, supervision, and retention claims, it also affirms the inherent logic of a predicate determination requirement. These principles are reflected in the abundant precedent from this and other jurisdictions that have found similarly in their determination of derivative claims.

As with most decisions of precedential value, the specific language utilized by this Court in *Strock* is indeed significant. Phrases such as "individually liable" and "guilty" are, of course, terms of art. In legal vernacular, they imply a determination that has satisfied the minimum standards for judgment. These terms logically presuppose a bona fide adjudication under the law – one that has met the accepted burden of proof and appropriately respected the rights of the accused. In this regard, the language of *Strock* clearly calls for a predicate finding of liability, whether civil or criminal, before claims of negligent hiring, supervision, and/or retention against an employer may ensue. In addition to the implicit importance of the terminology utilized, the language of *Strock* also explicitly prescribes the necessary sequence for there to be a viable claim for negligent

hiring, supervision, or retention. This Court employed a simple ("if-then") syllogistic construct to expressly confirm that an adjudication of the employee's liability[5] stands as a necessary precursor to any derivative liability on the part of an employer for negligent hiring, supervision, and/or retention.

It is somewhat telling that, rather than simply apply the express language of *Strock* to the facts at hand, the Ninth District Court of Appeals chose instead to focus on language that this Court did not use in its holding. See *Evans*, 2018-Ohio-3031 at ¶ 33. That appears to have been the only way for the Appellate Court to justify its expansive interpretation of existing law.[6] Notably, the Ninth District provided absolutely **no authority** to support its conclusion that Plaintiff could proceed with her claims against AGMC, despite the fact that no actionable claim exists against the employee/independent contractor, who is alleged to have assaulted her. *Id*. at ¶ 34.

D. Ohio Law Does Not Support the Ninth District's Holding in *Evans v. AGMC.*

For more than 30 years, Ohio courts, both state and federal alike, have universally

[5] Applying this same logical principle, other courts have determined that, where there has not been a prior adjudication of the employee's liability, then, at a minimum, the employee must be amenable to suit, lest the derivative claim against the employer fail. See, e.g., *Myers v. Goodwill Indus. of Akron, Inc.*, 130 Ohio App.3d 722, 721 N.E.2d 130, 134 (9th Dist. 1998) (actionable claim against the employee is required); *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999) (same); *Dahlberg v. MCT Transp., LLC*, 571 F.App'x 641, 655 (10th Cir.2014) (actionable misconduct on the part of the employee required); *Dushane v. Acosta*, No. 68359, 2015 WL 9480185, at *2 (Nev. App. Dec. 16, 2015) ("a claim for negligent supervision cannot exist without an underlying, actionable tort"); *Total Auctions & Real Estate, LLC v. S.D. Dep't of Revenue & Regulation*, 2016 S.D. 95, ¶¶ 15-16, 888 N.W.2d 577, 582-83 (actionable tort claim against employee required).

[6] The liberties that the Ninth District Court of Appeals took in attempting to interpret the holding of *Strock* reduced that important decision to nothing more than a "blank paper." *The Letters of Thomas Jefferson*, Letter to Wilson C. Nicholas (Sept. 7, 1803) (a term used to convey the ill effects that result from a loose construction of established laws).

understood the holding of *Strock* to mean precisely what it says – namely that, in actions for negligent hiring/retention/supervision **"[where] no action can be maintained against [the employee] ***, it is obvious that any imputed actions against the [employer] are also untenable**." *Strock,* 38 Ohio St.3d at 217 (emphasis added). This approach is consistent in its application of concepts that are not only widely accepted, but irrefutably logical. That is precisely why the holding of *Strock* has remained undisputed for more than three decades.

The trial court's interpretation of *Strock* and its application to the facts at hand in the proceedings below was indeed correct. The principles espoused in *Strock*, which require a predicate judgment against the primary tortfeasor, are supported by subsequent authority that similarly recognizes the derivative nature of negligent hiring, supervision, and retention claims. In the matter of *Bishop v. Miller*, 3rd Dist. Defiance Nos. 4-97-30 and 4-97-31, 1998 Ohio App. LEXIS 1526 (1998), the Third District Court of Appeals examined, interpreted, and applied the holding of *Strock* to facts remarkably similar to those at issue in this matter. In so doing, it determined that there can be no liability on the part of an employer where no action can be maintained against the employee for the alleged harm. See *id*. at 9.

The federal courts within Ohio who have had occasion to address negligent hiring, supervision, and retention claims have taken much the same approach in applying the holding of *Strock*. The United States District Court for the Northern District of Ohio determined that, where a "plaintiff's claims for sexual harassment fail, there is no underlying tort to which a claim of negligent supervision may be attached." *Blough v. Hawkins Mkt., Inc*., 51 F.Supp.2d 858, 865 (N.D.Ohio 1999). Similarly, in *Greenberg v.*

Life Insurance Co. of Virginia, 177 F.3d 507, 517-18 (6th Cir.1999), the United States Court of Appeals for the Sixth Circuit, applying Ohio law, similarly concluded that it must be alleged and proven that an employee is individually liable to the plaintiff for a tort before a claim for negligent hiring, supervision, or retention may proceed. Notably, the Sixth Circuit Court of Appeals subsequently had occasion to reexamine its ruling in *Greenberg*, along with this Court's holding in *Strock* and others from various Ohio courts of appeal. In so doing, the Sixth Circuit again reaffirmed the fact that "**a plaintiff must be able to establish a tort claim against the individual employee in order to maintain an action for negligent supervision or retention against the employer**." *Minnich v. Cooper Farms, Inc*., 39 F.App'x. 289, 296 (6th Cir.2002) (emphasis added).

Clearly, the decision rendered by the Ninth District Court of Appeals in this matter is an anomaly. It not only ignores the plain language of *Strock*, but actually stands at odds with its own jurisprudence on such matters. For the Ninth District previously held that, "**Where there is an actionable legal claim against an employee** based on a pattern of behavior that poses a risk of harm to fellow employees, a claim against the employer for negligent retention may lie, if the employer knew of the behavior but failed to act, and the failure to act resulted in injury to an employee." *Myers v. Goodwill Indus. of Akron, Inc*., 130 Ohio App.3d 722, 721 N.E.2d 130, 134 (9th Dist.1998) (emphasis added). The Ninth District's decision in this matter represents a clear deviation from established precedent and constitutes an improper effort to expand the logical parameters of the torts of negligent hiring, retention, and supervision.

E. Law of Other Jurisdictions Also Contradicts the Ninth District's Holding.

The foregoing decisions are reflective of the logical approach that the courts of

Ohio have consistently taken in determining claims for negligent hiring, supervision, and retention. Even where not expressly stated, there is an implicit acknowledgement in each of the aforementioned decisions that negligent hiring, supervision, and retention claims are, in fact, derivative, despite their direct nature. This same logical application finds abundant support in the jurisprudence of other jurisdictions as well, which overwhelmingly endorse the concept that negligent hiring, supervision, and retention claims are "direct" and "derivative," due to the fact that they depend upon a determination of an employee's allegedly wrongful conduct. See, e.g., *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, 303 Wis.2d 34, 55, n.11, 734 N.W.2d 827, 836 (holding that negligent supervision claims are effectively "derivative claims"); *Anderson v. Dunbar Armored, Inc.*, 678 F.Supp.2d 1280, 1329 (N.D.Ga.2009) (negligent retention and hiring claims "are derivative and cannot survive without an underlying tort"); *MARTA v. Mosley*, 280 Ga.App. 486, 490, 634 S.E.2d 466, 469 (2006) ("A claim for negligent retention is necessarily derivative and can only survive summary judgment to the extent that the underlying substantive claims survive the same."); *Grego v. Meijer, Inc.*, 187 F.Supp.2d 689, 694 (W.D.Ky.2001) ("the tort of negligent supervision is a second tort that derives from a tort committed by the person negligently supervised"); *DeBinder v. Albertson's, Inc.*, No. CV 06-1804-PCT-PGR, 2009 WL 57096, at *9 (D.Ariz. Jan. 8, 2009) ("The remaining claims, negligent supervision, vicarious liability, and loss of consortium are all derivative claims. In order for derivative claims to exist, all elements of the underlying cause of action must be proven."); *Fakes v. Terry*, No. 2:15-CV-01574, 2018 WL 1382513, at *4 (W.D.Pa. Mar. 19, 2018) (describing negligent training and negligent supervision claims as "derivative claims"); *Pineda v. Chromiak*, No. CV 17-5833, 2019 WL 175135, at *2 (E.D.Pa. Jan. 10,

2019) (“The rationale is that the employer’s liability is a derivative claim fixed by a determination of the employee’s negligence.”). This authority from other jurisdictions is both reassuring and persuasive.

When due recognition is given to the fact that negligent hiring, supervision, and retention claims are of a derivative nature and not wholly independent, the proper outcome of this appeal is brought into stark relief. This Court should, therefore, confirm that it stands in accord with the courts of numerous other jurisdictions, which have similarly concluded that an adjudication or underlying actionable tort against an employee is a “necessary predicate” or “condition precedent” to any derivative claim for negligent hiring, supervision, or retention. *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999) (“Thus, the torts of negligent hiring, supervision, or training ‘must include as an element an underlying tort or wrongful act committed by the employee.’ We conclude, therefore, that an employer cannot be held liable for negligent supervision or training where the conduct that proper supervision and training would have avoided is not actionable against the employee.”); *Dahlberg v. MCT Transp., LLC*, 571 F.App’x 641, 655 (10th Cir.2014) (“Ms. Dahlberg has not identified—nor are we aware of—a single case in which a plaintiff was able to sustain a negligent-training or negligent-supervision claim against an employer without some actionable misconduct on the part of the employee who caused the injury. In fact, our survey of New Mexico caselaw suggests that negligent-training and negligent-supervision claims depend on underlying employee wrongdoing.”); *Dushane v. Acosta*, No. 68359, 2015 WL 9480185, at *2 (Nev.App. Dec. 16, 2015) (“a claim for negligent supervision cannot exist without an underlying, actionable tort”); *Total Auctions & Real Estate, Ltd. Liab. Co. v. S.D. Dep’t of Revenue & Regulation*, 2016 S.D.

95, ¶¶ 15-16, 888 N.W.2d 577, 582-83 ("a negligent supervision claim requires that an employee commit an underlying tort. Because Total Auctions' complaint fails to state an actionable tort claim against Rysavy, it also fails to state a claim against Director Laurenz for negligent supervision."); *Retherford v. AT&T Communications of the Mountain States, Inc.*, 844 P.2d 949, 977, 142 L.R.R.M. (BNA) 2668 (Utah 1992) ("Before an employer can be found liable for negligent employment, one of its employees must have committed a tort…..the tort of negligent employment requires the employee's tort as a condition precedent…."); *Ferrer v. Okbamicael*, 2017 CO 14M, ¶¶ 29-30, 390 P.3d 836, 844-45 (Colo. Mar. 27, 2017) ("Importantly, to prevail on direct negligence claims against the employer, a plaintiff still must prove that the employee engaged in tortious conduct. That is, tortious conduct by an employee is a predicate in direct negligence claims against the employer. Direct negligence claims effectively impute the employee's liability for his negligent conduct to the employer, similar to vicarious liability."); *Daka, Inc. v. McCrae*, 839 A.2d 682, 693 (D.C.Cir.2003) ("Daka cites considerable authority for the principle that negligent supervision, while an independent tort directed to the conduct of the employer, requires logically antecedent proof of a tort committed by the supervised employee. Daka is most probably right in this argument…."); *Rogala v. District of Columbia*, 161 F.3d 44, 56 n.9 (D.C.Cir.1998) ("In order to prevail on a negligent retention claim, plaintiffs must first prove that [the employee] was negligent and must then prove the additional element of negligent retention."); *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 723-724, 508 N.W.2d 907, 913 (Neb. 1993) (citing *Strock v. Pressnell*, and holding that the plaintiff could not have a negligent supervision claim against the Archdiocese if it had no cause of action against the employee-priest).

F. Policy Implications of the Ninth District's Determination of This Matter

At its most fundamental level, the purpose of the law is to encourage individual responsibility and accountability on the part of those who live under it. The decision rendered in this case by the Ninth District Court of Appeals undermines that purpose and raises a number of significant policy concerns, none of which exist under a proper application of this Court's precedent. In that sense and others, the Ninth District's decision in this matter stands at odds with the existing law of this State, as well as the logical principles that have guided other states to require something more than merely finding of "a recognized wrong" by a non-party. The Appellate Court's ruling also dilutes both the circumstances and the requirements for establishing either civil or criminal liability on the part of an employee-tortfeasor. Under its interpretation of *Strock*, there would no longer be a need for a predicate judgment or a cognizable legal claim against the employee.

This approach to negligent hiring, supervision, and retention marks an unprecedented expansion of potential employer liability under Ohio law. Practically speaking, the decision rendered by the Ninth District Court of Appeals constitutes a de facto extension of the statute of limitations for wrongful conduct, such as that alleged by the Plaintiff herein. Furthermore, for reasons discussed, the Appellate Court's decision serves to disincentivize aggrieved parties from taking action against those who have done them harm. By reducing the evidentiary burden and expanding the potential liability of "deep pocket" employers, those who have suffered loss at the hands of another shall no longer be motivated to directly prosecute the instrumentality of their injuries. In instances such as this, aggrieved individuals may well be better served to prosecute employers

alone. This movement toward a form of quasi strict liability for employers contravenes traditional liability standards and is at odds with the fundamental tenets upon which our justice system is based.

Given the fact that employer liability is, in part, dependent upon an underlying demonstration of the employee's wrongdoing, under the Ninth District's interpretation of *Strock*, employers will now be burdened with the sole responsibility and expense of conducting discovery and defending the actions of non-parties, who, in instances such as this, allegedly exceeded the scope of their employment and/or acted with criminality. By eliminating the predicate requirement for a judgment against the employee and allowing a finding of the employee's culpability to take place informally in the context of the negligent hiring claim, the Appellate Court has created a near untenable circumstance fraught with undue prejudice for employers. Not only will employers henceforth be burdened with the duty to defend the unsanctioned actions of their employees before the jury, but their efforts to do so will inevitably be tainted by extrinsic evidence of prior unrelated incidents, bad acts, or other wrongdoing that do not involve the aggrieved party in any way. See *Lehrner v. Safeco Ins*., 171 Ohio App.3d 570, 583, 2007-Ohio-795 (2nd Dist.) (identifying the elements of negligent hiring, supervision, and retention claims, including the employer's knowledge of the employee's alleged incompetence).

The Ninth District Court of Appeals' decision below also has implications for the employee who has been accused of wrongdoing. Under its proposed framework, a determination as to the employee's culpability could easily be rendered without the knowledge or involvement of the employee. A finding of the employee's wrongdoing, which serves as the basis for bringing a related action against the employer, could thus

be rendered based upon mere speculation, innuendo, or other circumstantial evidence that does not rise to the level of a preponderance or establish culpability beyond a reasonable doubt. In fact, it is quite possible that this determination could be made without the employee ever having the opportunity to confront his/her accuser. This is particularly troubling for a professional, like Dr. Shahideh, because such a finding could adversely impact his professional licensure, privileges, and insurability.

The facts of this case provide clear evidence as to why a predicate finding of liability on the part of the employee-tortfeasor is so important to the ultimate administration of justice. Here, we have an allegation of sexual battery that is purported to have occurred in the course of a medical examination of the Plaintiff that was performed by Dr. Shahideh, the putative employee of AGMC. The battery was apparently reported to and investigated by both law enforcement and prosecutorial authorities. As a result of their respective investigations into the matter, those authorities decided not to criminally prosecute Dr. Shahideh for any type of wrongdoing. In the meantime, although she had ample opportunity to do so, Plaintiff chose not to bring a separate civil action of her own against Dr. Shahideh for her alleged injuries. To this day, she has never initiated any type of claim against Dr. Shahideh. Yet Plaintiff has sued Dr. Shahideh's putative employer, AGMC, for the injuries that she claims resulted from the sexual battery.

By permitting the Plaintiff to pursue a derivative action against AGMC, without ever seeking or obtaining an adjudication as to Dr. Shahideh's underlying liability, the Ninth District Court of Appeals has, in essence, improperly shifted the burden of proof from plaintiff to defendant. Under this new paradigm of employer liability, AGMC will be forced to disprove inflammatory allegations of wrongdoing that were purportedly carried out by

an absent non-party over whom AGMC has no direct control and over whom the Court may well have no jurisdiction. The imbalance of equities presented by this situation is so patent that it calls for both clarification and reparation – remedies that only this honorable Court is equipped to provide. Should the Ninth District Court of Appeals' decision be permitted to stand as it is, those inequities will unfairly inure to the detriment of AGMC in this action and hereafter unfairly expose employers throughout the State to similar situations. As such, the Appellate Court's determination of this matter should be overruled and Proposition of Law No. 1 should be affirmed in accordance with this Court's prior holding in the matter of *Strock v. Pressnell*.

IV. CONCLUSION

At the heart of this dispute rests the question, do claims for negligent hiring, supervision, and retention have a derivative component? Based upon a logical examination of the law and the numerous authorities cited herein, it seems clear that they do. In fact, it would be difficult to credibly suggest otherwise. Much like consortium claims and negligent entrustment claims, those for negligent hiring, supervision, and retention, although direct, are also unmistakably derivative in nature. Thus, in such instances, the liability of the employer depends, in part, upon a predicate adjudication of the employee-tortfeasor's underlying liability for the acts alleged. By extension, if there has been no judgment of the employee-tortfeasor's underlying liability and that employee-tortfeasor is not amenable to suit, then, by definition, there is no legally cognizable claim against that tortfeasor's employer for negligent hiring, supervision, and/or retention.

OACTA, by and through the undersigned counsel, hereby respectfully submits that

the decision rendered by Ninth District Court of Appeals in this matter fails to give due recognition to the derivative nature of negligent hiring, supervision, and retention claims. Furthermore, the Appellate Court's decision constitutes a departure from well-settled legal principles and represents an expansion of employer liability that could have significant consequences for those doing business within Ohio. The potential policy implications of its decision are no less troubling, particularly for those who value fairness of process and view our judicial system as a bulwark against inequity.

For these reasons and those more fully set forth hereinabove, OACTA, in its capacity as amicus curiae, respectfully requests that this honorable Court affirm Proposition of Law No. 1 and reverse the decision of the Ninth District Court of Appeals as it relates to the claims asserted against Defendant, AGMC.

Respectfully submitted,

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I hereby certify that on the 19th day of August, 2019, the foregoing was electronically filed and a true and correct copy was served via electronic mail upon the following:

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