Nos. 2019-0284 and 2019-0453

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. 28340

MALIEKA EVANS,
Appellee,

v.

AKRON GENERAL MEDICAL CENTER, et al.,
Appellants.

BRIEF OF AMICUS CURIAE ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANT AKRON GENERAL MEDICAL CENTER

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I. Statement of Interest of Amicus Curiae

The Academy of Medicine of Cleveland & Northern Ohio (AMCNO) is a nonprofit § 501(c)(6) professional medical association serving the northern Ohio medical community. It has been in existence since 1824 and became known as The Academy of Medicine in 1902. Now known as AMCNO, it has a membership of over 5,000 physicians, making it one of the largest regional medical associations in the United States.

AMCNO provides legislative advocacy for its physician members before the Ohio General Assembly, and also advocates on behalf of its members before the state medical board, other state and federal regulatory boards, and Ohio courts. AMCNO sponsors numerous community initiatives and works collaboratively with hospitals, chiefs of staff, and other related organizations on a myriad of different projects of interest and concern to its members. Put simply, AMCNO is the voice of physicians in northern Ohio—and has been so for over 190 years.

As this Court is aware, physicians, including those in the northern Ohio community, are often litigants in a wide variety of civil litigation both individually and as employers. Thus, it is appropriate that AMCNO weigh in on important matters that implicate the interests of its physician members. While each of the issues raised in the appeal of Appellant Akron General Medical Center is of interest to AMCNO, it particularly supports the rule of law that a plaintiff must prove an employee is individually liable in tort or guilty of a crime to successfully maintain a cause of action for negligent hiring, supervision, or retention under Ohio law. Amicus requests this Court to answer the certified questions before it affirmatively, consistent with the Third District's decision in *Bishop v. Miller*, 3d Dist. Defiance Nos. 4-97-30, 4-97-31, 1998 WL 135802 (Mar. 26, 1998).

II. Statement of the Case and Facts

Amicus defers to the Statement of the Case and the Statement of Facts as set forth in Akron General's Merit Brief.

III. Argument

Proposition of Law:

> 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.[1]

Certified Question No. 2:[2]

> Does the language of *Strock v. Presnell*, 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 the employer?

This court should answer the certified question in the affirmative.

A. To maintain a negligent hiring, supervision, or retention claim against an employer requires proof of an employee's underlying, *actionable* liability.

To prove a claim for negligent hiring and retention, a plaintiff must show (1) the existence of an employment relationship; (2) the employee's incompetence; (3) the employer's actual or constructive knowledge of the incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring,

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[1] For ease of discussion, Certified Question No. 2 and Proposition of Law No. 1 are addressed together.

[2] The Court also recognized another certified question of law. That question states: Is a claim asserted against an employer for negligent hiring, supervision, or retention limited by the statute of limitations governing the employee's alleged misconduct? As it relates to this question, AMCNO defers to and supports the arguments as set forth in Akron General Medical Center's Merit Brief.

retaining, or supervising the employee as the proximate cause of plaintiff's injuries. *Simpkins v. Grace Brethren Church of Delaware*, 2014-Ohio-3465, 16 N.E.3d 687, ¶ 40 (5th Dist.) *aff'd sub nom. Simpkins v. Grace Brethren Church of Delaware, Ohio*, 149 Ohio St.3d 307, 2016-Ohio-8118, 75 N.E.3d 122. For a plaintiff to prevail on this claim then, the plaintiff must prove that the employee's actions legally caused the plaintiff's injuries. *Id*. This is an essential element of a negligent-hiring claim.

This Court has long recognized this rule of law in *Strock v. Presnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988). There the Court made clear that there is "an underlying requirement" in a negligent-hiring claim "that the employee is individually liable for a tort or guilty of a claimed wrong against a third person" before liability can be found against an employer. *Id*. at 217. To be liable in tort or guilty of a wrong necessarily means that the underlying tort or wrong is *actionable* against the employee before the employer could be held liable on a negligent-hiring claim. If it is not, then the plaintiff cannot satisfy an essential element of the plaintiff's negligent-hiring claim and the claim fails as a matter of law.

The Ninth District failed to heed this Court's clear pronouncement and instead expanded employer liability so that a plaintiff need not show that the underlying liability on the part of the employee is actionable to prevail on a negligent-hiring claim, but merely allege it. *Evans v. Akron Gen. Med. Ctr.*, 9th Dist. Summit No. 2843, 2018-Ohio-3031, ¶ 33-34. In failing to follow *Strock*, the Ninth District eliminated an essential element of a negligent-hiring claim, which effectively allows for direct liability when there is no proof of individual liability on the part of the employee. This conclusion is not only inconsistent with *Strock*, but well-established principles of Ohio tort law and the prevailing rule of law nationwide.

1. The holding in *Strock* is unambiguous.

The plaintiff in *Strock* alleged claims for clergy malpractice, intentional infliction of emotional distress, fraud, misrepresentation, nondisclosure, and breach of fiduciary duty against a minister who allegedly had a sexual relationship with the plaintiff's wife during the course of marriage counseling. 38 Ohio St.3d at 208, 210. The plaintiff also brought claims of negligent supervision and negligent training against the church that employed the minister. *Id.* at 208. In finding that the plaintiff did not have a viable cause of action for any underlying tort against the minister, the Court ultimately concluded that the claim for negligent training and supervision against the church likewise failed because the claim was predicated on the individual liability or criminal guilt of an employee. *Id.* This Court succinctly articulated this principle in a single paragraph stating:

> It is axiomatic that for the doctrine of respondeat superior to apply, an employee must be liable for a tort committed in the scope of his employment. Likewise, 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 [the employee] in the instant case, it is obvious that any imputed actions against the [employer] are also untenable.

(Emphasis added.) *Id*.

Strock explicitly holds that an employer is only liable for a negligent hiring, supervision, or retention claim when there is a legal finding of individual liability or criminal guilt on the part of the employee. And, since "[a]ll * * * intermediate courts of appeal are charged with accepting and enforcing the law as promulgated by the Supreme Court and are

bound by and must follow the Supreme Court's decisions,"[3] the Ninth District should have followed *Strock* instead of contorting the meaning of "underlying requirement."

Yet that is precisely what the Ninth District did. By parsing out this Court's use of alternative types of underlying liability where an employee must either be "individually liable for a tort" or "guilty of a claimed wrong against a third person," the Ninth District inappropriately gives a no-actionable-liability exemption in place of the underlying-liability requirement. In doing so, it creates a false distinction between never having a viable cause of action to not pursuing one—all resting on the rule of law that a negligent-hiring claim is a direct claim and not a vicarious one. *Evans*, 2018-Ohio-3031, ¶ 33.

This leap in logic is seriously flawed. Individual liability is still an underlying requirement whether one is liable in tort or otherwise guilty of a wrong. Liability subsumes a finding of legal responsibility—or causation—for the underlying conduct. That this Court used "guilty" instead of "found" or "crime" (*see id*.) is inconsequential because the term "guilty" assesses actionable blame just as does "liable" in the tort context. One cannot be either unless there is some actionable legal consequence.

Nor does this baseless distinction bear any relationship to a negligent-hiring claim being a direct claim instead of a vicarious one. Even as a direct claim, it still has essential elements that have to be proven and one of those essential elements is a finding of underlying liability on the part of the employee—precisely as *Strock* held. The Ninth District, in essence, excised that essential element by finding that a claim for direct liability need not be predicated on the actionable, underlying wrongful act of a third party. But this is not what

[3] *Jackson v. Glidden Co*., 8th Dist. Cuyahoga No. 87779, 2007-Ohio-277, ¶ 14 (internal quotation omitted).

makes a claim direct. Rather, a claim is direct because it holds a party liable for its own conduct.

Under Ohio law, an employer may be liable for an employee's tort under at least two theories: (1) respondeat superior and (2) negligent hiring, supervision, or retention. *Clark v. Stewart*, 126 Ohio St. 263, 185 N.E. 71 (1933), paragraph one of the syllabus. These two theories are analytically distinct and require proof of different elements. *Rojas v. Concrete Designs, Inc.*, 2017-Ohio-379, 83 N.E.3d 339, ¶ 10 (8th Dist.); *see also Simpkins*, 2014-Ohio-3465, 16 N.E.3d 687, ¶ 49 ("In Ohio, negligent hiring, supervising, and retention are separate and distinct from torts from other theories of recovery such as negligent entrustment and respondeat superior and an employer can be held independently liable for negligently hiring, supervising, or retaining an employee.").

Respondeat superior is a claim for vicarious liability. Vicarious liability imputes liability of the employee on the employer irrespective of the employer's fault. *See* Black's Law Dictionary 1566 (6th Ed.1990) (defining vicarious liability as the indirect or imputed legal responsibility for acts of another). Vicarious liability attaches when the employee commits tortious conduct in the course and scope of his or her employment. *Byrd v. Faber*, 57 Ohio St.3d 56, 58, 565 N.E.2d 584, 587 (1991). A negligent-hiring claim, on the other hand, is a claim for direct liability. *Simpkins*, 2014-Ohio-3465, 16 N.E.3d 687, ¶ 49, quoting Kenneth S. Abraham, *The Forms and Functions of Tort Law,* 2d Ed. 166 (2002) ("An employer whose employee *commits a tort* may be liable in his own right for negligence in hiring or supervising the employee * * * [b]ut that is not vicarious liability."). In a claim for negligent hiring, an employer is directly liable for the wrongful conduct committed by its employees, regardless

of whether the employee was acting in the "course and scope," when the employer's *conduct*—i.e. negligent hiring, supervision or retention—causes a plaintiff harm.

By resting its decision on the direct nature of a negligent-hiring claim, the Ninth District effectively broadens claims for negligent hiring by eliminating an essential element of the claim that this Court and other appellate courts have recognized. This expansion in liability is unjustified and subjects all employers to liability for negligent-hiring claims regardless of whether the employee can be held legally responsible for any act that caused the plaintiff's injuries. This is not the law under *Strock*, nor does *Strock* or Ohio's negligent-hiring jurisprudence support the Ninth District's flawed reasoning.

2. The majority of Ohio courts follow *Strock* and its underlying-liability requirement.

This Court's decision in *Strock* does not stand alone. Ohio courts have consistently interpreted *Strock* to mean that a party is required to show individual liability or criminal guilt to sustain a claim for negligent hiring, supervision, or retention. *See, e.g.*, *DiPietro v. Lighthouse Ministries*, 159 Ohio App.3d 766, 2005-Ohio-639, 825 N.E.2d 630, ¶ 24-27 (10th Dist.) (applying *Strock* and holding that the defendant was not liable for negligent hiring because the plaintiff "individually ha[d] no tort liability."); *Campbell v. Colley*, 113 Ohio App.3d 14, 22, 680 N.E.2d 201 (1st Dist. 1996) (applying *Strock* and holding "there must first be liability on the part of the employee before the employer may be liable for the employee's acts."); *Ford v. Brooks*, 10th Dist. Franklin No. 11AP-664, 2012-Ohio-943, ¶ 22 ("An underlying requirement in actions for negligent hiring, supervision, and training is that the employee is individually liable for a tort or guilty of a wrong against a third party, who seeks recovery against the employer."); *Nye v. Ellis*, 5th Dist. Licking No. 09-CA-0080, 2010-Ohio-1462, ¶ 50-54 (applying *Strock* and holding that the defendant was not liable for negligent

hiring because the plaintiff had no liability in tort); *Warren v. Trotwood-Madison City School Dist. Bd. of Edn.*, 2d Dist. Montgomery No. 17457, 1999 WL 148233, at *9 (Mar. 19, 1999) (applying *Strock* and finding an elementary school teacher could not maintain a cause of action for negligent hiring against the board of education because the underlying alleged conduct was not a viable tort action); *Bishop v. Miller*, 3d Dist. Defiance Nos. 4-97-30, 4-97-31, 1998 WL 135802 (Mar. 26, 1998) (holding that since a pastor could not be held liable for sexual battery due to the statute of limitations, the plaintiff could not maintain a cause of action against the church for negligent supervision); *Silvey v. Washington Square Chiropractic Clinic*, 11th Dist. Geauga No. 2012-G-3052, 2013-Ohio-438, ¶ 24 (holding that because there was no underlying sexual harassment, there is no claim for negligent hiring or retention). Each of these courts found that, under Ohio law, a negligent-hiring claim fails against an employer without proof of actionable, individual liability or criminal guilt by the employee.

Federal courts applying Ohio law have come to the same conclusion. These courts found "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 Fed. Appx. 289, 296 (6th Cir. 2002); *see also Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 517 (6th Cir.1999); *Hout v. Mansfield*, 550 F.Supp.2d 701, 745 (N.D. Ohio 2008) ("In [*Greenberg*], the Sixth Circuit interpreted the Ohio Supreme Court's decision in [*Strock*] to require that a plaintiff allege and prove that the employee is individually liable to the plaintiff for a tort."); *Stanley v. United States Enrichment Corp.*, S.D. Ohio No. 2:07-CV-656, 2009 WL 88623, at *6 (Jan. 12, 2009) ("[A] plaintiff must allege and prove a tort against an employee as a prerequisite to a negligent retention or supervision claim against the employer.").

At bottom, courts that have interpreted and applied the holding in *Strock* have found that individual liability or criminal guilt on the part of an employee is a prerequisite to proving employer liability for negligent hiring, supervision, or retention. The Ninth District's decision is an aberration that alters the essential elements that a plaintiff must prove to prevail on a negligent-hiring claim under Ohio law by effectively eliminating the actionable liability underlying requirement.

B. The majority of jurisdictions hold that a negligent-hiring claim, even if direct, is dependent on an employee's underlying, actionable tortious or criminal conduct.

Most jurisdictions across the United States recognize that the doctrine of respondeat superior and direct negligence for negligent hiring, supervision, and retention "are simply alternative theories by which to impute an employee's negligence to an employer. Under either theory, the liability of the [employer] is dependent on the negligence of the [employee]." *Gant v. L.U. Transp., Inc.*, 331 Ill.App.3d 924, 770 N.E.2d 1155, 1160 (2002). In fact, courts routinely hold that negligent-hiring claims rest on the predicate of the employee's proven actionable wrongful conduct. For example:

- *Gant v. L.U. Transp., Inc.*, 331 Ill.App. 3d 924, 928, 770 N.E.2d 1155, 1159 (2002): Finding that an employer's liability under negligent entrustment "is predicated initially on, and therefore is entirely derivative of, the negligence of the employee, * * * ."
- *McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo.1995): "Like respondeat superior or negligent entrustment, this is a form of imputed liability because the employer's duty is dependent on and derivative of the employee's misconduct."
- *Haverly v. Kaytec, Inc.*, 169 Vt. 350, 357, 738 A.2d 86, 91 (1999): "[T]he tort of negligent supervision must include as an element an underlying tort or wrongful act committed by the employee."

- *Schoff v. Combined Ins. Co. of America*, 604 N.W.2d 43, 53 (Iowa 1999), quoting *Haverly v. Kaytec, Inc.*, 738 A.2d 86, 91 (Vt.1999): "[T]he torts of negligent hiring, supervision, or training must include as an element an underlying tort or wrongful act committed by the employee."

- *Little v. Omega Meats I, Inc.*, 171 N.C.App. 583, 586-87 (2005), *aff'd Little v. Omega Meats I, Inc.*, 360 N.C. 164, 622 S.E.2d 494 (2005): Finding that an employer's liability in negligent hiring is direct, not derivative and an essential element for the cause of action is that the independent contractor acted negligently.

- *Schieffer v. Catholic Archdiocese of Omaha*, 244 Neb. 715, 722-23, 508 N.W.2d 907 (1993): "[I]f there is no tort liability to the plaintiff against [the employee] individually, it follows that the [employer] cannot be held liable for his conduct."

- *Jones Exp., Inc. v. Jackson*, 86 So.3d 298, 304 (Ala.2010): "[I]n order for an employer to be liable for the negligent hiring, training, retention, and supervision of its employee, the plaintiff must also prove 'wrongful conduct' on the part of the employee." (citing additional Alabama authority holding the same).

- *State v. Jones*, 197 Md.App. 638, 666-67, 669-70 (2011), *rev'd on other grounds*, *Jones v. State*, 425 Md. 1, 38 A.3d 333 (2012): A necessary element for negligent hiring and retention is for the plaintiff to establish "the employee's act or omission causing the plaintiff's injuries."

- *Beavis v. Campbell Cty. Mem. Hosp.*, 20 P.3d 508, at 515-16 (Wy.2001): "[N]egligent hiring theory against [the employer] rests upon the predicate of [the employee's] alleged negligence."

The rationale for this rule—i.e., to maintain a claim for direct liability based on negligent hiring, supervision, or retention a plaintiff must prove actionable liability of an employee—is in line with the purpose and rationale of modern tort law. Modern tort law is based on two traditional concepts. First, liability is based on fault. And second, risk should be spread to encompass both the elements of fault and blameworthiness. *See* Michael F. Wais, *Negligent Hiring-Holding Employers Liable When Their Employees' Intentional Torts Occur Outside of the Scope of Employment*, 37 Wayne L.Rev. 237, 248 (1990), citing Note, *Employer*

Liability for the Criminal Acts of Employees Under Negligent Hiring Theory, 68 Minn. L.Rev. 1303, 1306 (1984).

Before recognizing negligent hiring as an independent claim, plaintiffs were often left without a remedy to pursue a cause of action against an employer when the employee's conduct was outside the course and scope of his or her employment. To fill in this gap, courts began recognizing direct liability claims for negligent hiring. *See* Michael Silver, *Negligent Hiring Claims Take Off*, ABA J., 72 (May 1987) (discussing the emergence of negligent hiring claims across the country). This development was an expansion of tort liability for employers. It provided a potential means of recovery in situations where vicarious liability was otherwise unavailable. *See, e.g.*, *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 910–11 (Minn. 1983) ("The concept of direct employer liability arising as a result of negligent hiring was later expanded to include a duty to 'exercise reasonable care for the safety of members of the general public' so today it is recognized as the rule in the majority of the jurisdictions and recognized as the law by Restatement of the Law (Second) Agency, § 213 (1958) * * * ."); *see also Wagner v. Ohio State Univ. Med. Ctr.*, 188 Ohio App.3d 65, 2010-Ohio-2561, 934 N.E.2d 394, ¶ 26 (10th Dist.) ("Ohio courts recognize the tort of negligent retention. When defining the conduct these torts make actionable, this court has relied upon the Restatement of the Law 2d, Agency (1958) Section 213.").

This expansion, however, was never meant to expose employers to unlimited liability simply based on a plaintiff's allegations of employee misconduct during the time allowed by law to bring a negligent-hiring claim. On the contrary, courts throughout the country have been unwilling to find an employer liable for negligent hiring, supervision, or retention when the employee cannot be held legally liable or responsible for a tort or crime.

IV. Conclusion

The Supreme Court of Ohio in *Strock*, like the majority of jurisdictions nationwide, recognizes direct employer liability for the tortious and criminal conduct of its employees through a negligent hiring, supervision, or retention claim. This liability, however, is not unlimited. Instead, it is dependent on proof of actionable, individual liability or criminal guilt on the part of the employee. This limitation follows modern tort law by allowing for additional remedies for third parties harmed by the conduct of employees, without exposing employers across the state to limitless liability that is not premised on any proven, actionable wrong. The Third District's interpretation of *Strock* does just that, while the Ninth District's construction introduces chaos and uncertainty by rewriting the elements of a negligent-hiring claim.

AMCNO as amicus here urges this Court to reaffirm the rule of law pronounced in *Strock* and make clear that a claim for negligent hiring, supervision, or retention is dependent on a finding of underlying, *actionable* liability—whether under tort or criminal law. They urge the Court to answer Certified Question No. 2 in the affirmative.

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