CASE NOS. 2019-0284 and 2019-0453

On Appeal from the Ninth Appellate District
Summit County, Ohio

Court of Appeals Case No. 28340

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MALIEKA EVANS
*Plaintiff-Appellee*

v.

AKRON GENERAL MEDICAL CENTER, et al.
*Defendant-Appellant*

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# AMICUS CURIAE BRIEF OF THE OHIO MANAGEMENT LAWYERS ASSOCIATION

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## STATEMENT OF INTEREST

The Ohio Management Lawyers Association ("OMLA") is an Ohio nonprofit corporation. Its stated purpose is "[t]o provide an organization and forum for the exchange of information, discussion of common issues and problems, and promotion of the administration of justice with respect to employment, labor, and other areas of law affecting employers." The OMLA submits this brief because the issue of whether an employer can be found liable for negligent hiring, retention or supervision, even when the employee could not be held individually liable to the plaintiff or convicted of a crime, is of critical importance to Ohio employers.

## INTRODUCTION

For at least 30 years, this Court has recognized that an employer's liability in negligent hiring, retention and supervision cases is necessarily intertwined with the unlawful conduct of its employee: the employee engages in legally cognizable misconduct, and the employer's negligence facilitates the commission of the conduct. It makes perfect sense, then, as this Court has also recognized for 30 years, that there can be no liability to the employer without a finding of liability against the employee.

The decision of the Ninth District Court of Appeals ignores this established, common-sense principle, instead suggesting that plaintiffs can prove employer-negligence claims without proving legally viable employee misconduct. This decision contravenes the express teachings of this Court and over 30 years of precedent from numerous decisions applying Ohio law, including the United States Court of Appeals for the Sixth Circuit. The Ninth District's decision also imposes unfair and unworkable burdens on employers and the judicial system. Therefore, the OMLA respectfully joins Appellant and the other Amicus Curiae parties in urging this Court to grant this appeal.

## STATEMENT OF FACTS

The OMLA adopts the Statement of the Case and Facts in Appellant's merit brief to this Court. For purposes of this brief, the OMLA offers the following summary of these facts.

Plaintiff-Appellee Malieka Evans alleged that she was "sexually abused, assaulted and battered by Dr. Amir H. Shahideh, a physician working in the emergency department of Akron General Medical Center ("AGMC") on the day Mr. Evans sought treatment. (Transcript of Docket and Journal Entries ("T.d."), Trial court 10, Amended Complaint at ¶¶ 28-29.) Ms. Evans also alleged that AGMC failed to supervise and negligently retained Dr. Shahideh and, as "a direct and proximate result of such negligence, Plaintiff Evans was sexually abused, assaulted, and battered by [Dr.] Shahideh." *Id*. at ¶¶ 34, 35.

Though she immediately filed a criminal complaint against Dr. Shahideh with the Akron Police Department, the investigation was closed and no charges were filed against him. \Similarly, Ms. Evans stipulated that she did not have an "expectation that the criminal case will be reopened." Trial court T.d. 71, July 21, 2016 Final Order. Further, despite Ms. Evans' allegations that Dr. Shahideh sexually assaulted her, she never brought a civil cause of action for assault or battery against Dr. Shahideh, nor did she attempt to name Dr. Shahideh as a defendant in the underlying action. Trial Court T.d. 50, AGMC's Motion for Summary Judgment, Ex. A, Plaintiff's Responses to GEMS' First Request for Admissions Nos. 1-4; Trial Court T.d. 10, Amended Complaint, generally.

After the parties stipulated to the fact that Ms. Evans failed to pursue any civil suit against Dr. Shahideh and no criminal case was pending, AGMC moved for summary judgment, in part, on the basis that Ms. Evans never established the liability of Dr. Shahideh and she was statutorily-barred from doing so as any claim for civil assault and battery was now time-barred. Trial Court

T.d. 50, AGMC's Motion for Summary Judgment, pg. 6. The trial court ultimately agreed. Trial Court, T.d. 60, May 12, 2016 Order, pg. 3. Consequently, Ms. Evans could not maintain a negligent hiring, supervision, or retention claim against AGMC.

On appeal, the Ninth District reversed. It concluded that despite the fact that Plaintiff had no viable civil or criminal claims against Dr. Shabideh, her negligent hiring, retention, and supervision claims against AGMC could still proceed. In doing so, the Ninth District concluded that a negligent hiring, retention, or supervision claim does not require a finding of actual individual liability by the employee, but merely a finding that the employee's conduct could constitute a tort or a crime in a hypothetical sense – in other words, if statute of limitations defenses and other, unspecified legal defenses did not apply. *See Evans v. Akron Gen. Med. Ctr*., 9th Dist. No. 28340, 2018-Ohio-3031, ¶ 22 (asserting that to meet the individual-wrong a requirement, a plaintiff must merely "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.")

## ARGUMENT

CERTIFIED CONFLICT QUESTION NO. 1. 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?

CERTIFIED CONFLICT QUESTION NO. 2. Does the language of *Strock v. Presnell,* 38 Ohio St.3d 207, 217 (1988) require that a plaintiff show the liability of an employee through a civil or criminal action asserted against the employee in order to maintain a negligent hiring, supervision, or retention action against an employer?

**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.**

The OMLA agrees with Appellant that a proper analysis of this issue begins with the Court's holding in *Strock v. Pressnell*: 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." 38 Ohio St. 3d 207 (1988).

In *Strock*, the plaintiff asserted claims of negligent supervision and negligent training against a church that employed a minister who was accused of having sexual relations with plaintiff's wife during the course of marriage counseling. Id. at 208. Because plaintiff's tort claims failed against the minister, this Court explicitly determined that the negligent retention and supervision claims against the employer, the church, also failed. *Id*.

To meet the requirements of *Strock*, therefore, "a plaintiff [in a negligent hiring or supervision case] must allege and prove that the incompetent employee is *individually liable* to the plaintiff." *Minnich v. Cooper Farms, Inc*., 39 Fed. App'x 289, 295-96 (6th Cir. 2002)(emphasis added) (citing *Strock,* 38 Ohio St. 3d 207). This burden in turn requires that an action actually "may be maintained against" the plaintiff. *Nat'l Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 122 Ohio St. 3d 594 (2009) (citing *Strock,* 38 Ohio St. 3d at 217).

To be sure, this is not the only requirement for a negligent hiring, supervision, or retention claim: the plaintiff must *also* prove an independent negligent act or omission by the employer. *See, e.g., Jackson v. Hogeback*, 12th Dist. No. CA2013-10-187, 2014-Ohio-2578, ¶ 34. Without proof of the employee's liability, however, there can be no claim against the employer. *See Strock,* 38 Ohio St. 3d at ("Because no action can be maintained against the individual in the instant case, it is obvious that any imputed actions against the church are also untenable."). *Wuerth*, 122 Ohio St. 3d 594 ("If there is no liability assigned to the agent, it logically follows that there can be no

liability imposed upon the principal for the agent's actions); 30 C.J.S. Employer—Employee § 204 ("Like negligent hiring, negligent retention is based on the employer's act or omission, and not on respondeat superior, *but the employee's underlying tort is also an essential element*." (emphasis added)). *Strock* and its progeny therefore make clear that if the underlying tort claim is barred—by the statute of limitations or otherwise — then so, too, is the negligence claim against the employer. *See Minnich*, 39 Fed. App'x at 295-96.

As explained in Appellant's brief and as elaborated below, this interpretation is supported by the overwhelming majority of cases interpreting *Strock*, including a decision from this Court; several federal decisions from the United States Court of Appeals for the Sixth Circuit; a majority of lower Ohio court decisions; and authority from outside of Ohio. Furthermore, the Ninth District's decision is contrary to the text of *Strock*, unsupported by law and logic, and imposes unfair and unworkable burdens on employers and the judicial system.

### A. Appellant's Interpretation Is Consistent with Federal Decisions from and within the Sixth Circuit Applying *Strock*.

Although this Court has only had occasion to interpret the applicable *Strock* language once (see below), the Sixth Circuit has applied *Strock* several times. The Sixth Circuit has consistently concluded that *Strock* requires the plaintiff to allege and prove the individual liability of the employee. *Greenberg v. Life Insurance Co. of Virginia*, 177 F.3d 507, 517-18 (6th Cir. 1999); *Hout v. City of 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."); C*olston v. Cleveland Pub. Librar*y, 522 F.App'x 332, 338 (6th Cir.2013)("Colston has failed to establish that any employee of the Library is, in fact, liable for a tort against her; *she offers only a claim that Abrams*

*is liable*. In order to prevail on a negligent hiring claim, Colston must p*rove tort liability.*") (emphasis added); *Minnich v. Cooper Farms, Inc*., 39 Fed. Appx. 289 (6th Cir. 2002).

*Minnich* is especially compelling. In that case, as here, the Sixth Circuit considered an Ohio negligent retention and supervision claim that rested on alleged sexual harassment by an employee. In light of *Strock* and its progeny, the *Minnich* Court surmised that, under Ohio law, a plaintiff must demonstrate a viable claim against an employee to sustain a negligent retention claim against an employer. There, however, the plaintiff could not hold her co-worker personally liable: the statute of limitations for assault and battery had lapsed, and there were no criminal charges pending. Therefore, the Sixth Circuit properly affirmed summary judgment to the employer. *Minnich*, 39 F.3d at 296.

**B. <u>Appellant's Interpretation is Consistent with Lower Court Decisions.</u>**

Appellant's interpretation is also supported by lower Ohio courts, which take the view that negligent hiring, retention, and supervision claims against employers require plaintiffs to establish a legally viable tort claim against the individual employee. *See Myers v. Goodwill Indus. of Akron, Inc.,* 130 Ohio App. 3d 722 (9th Dist. 1998) (negligent retention claim against employer failed where plaintiff could not show that the employee's conduct rose to the level of intentional infliction of emotional distress); *Campbell v. Colley,* 113 Ohio App. 3d 14 (4th Dist. 1996) (because dispatcher could not be liable for negligence due to statutory immunity, the employer could not be liable for his negligence); *Chapa v. Genpak, LLC*, C.P. No. 10 CV 16496, 2012 Ohio Misc. LEXIS 16151, at *26-27 (May 2, 2012) ("Genpak cannot be found to have negligently supervised or retained any unidentified employees in his Complaint. An underlying requirement for negligent retention and supervision claims is that "the employee is individually liable for a tort or guilty of a claimed wrong."); *Fair v. S. Ohio Corr. Facilit*y, Ct. of Cl. No. 2006-06400, 2008-Ohio-7045,

¶ 10 ("The court finds that plaintiff has failed to prove individual liability on the part of any of defendant's employees, and his claim for negligent training and supervision must therefore fail."); *Bishop v. Miller*, 3d Dist. Defiance No. 4-97-30, 4-97-31, 1998 Ohio App. LEXIS 1526, at *7 (3rd Dist. Mar. 26, 1998).

Most notably, in *Bishop,* the Third District addressed a squarely analogous case in which the plaintiffs brought claims against a pastor for sexual abuse and against his employer — the church — for negligent retention and supervision. As in this case, the sexual abuse claims against the pastor had expired, and therefore, the Third District also dismissed plaintiffs' negligent supervision claim against the church. *Id*. at *9 (quoting *Strock*, 38 Ohio St.3d at 217).

### C. Appellant's Interpretation is Consistent with This Court's Pronouncement in *National Fire Insurance*

Since *Strock,* this Court has discussed the individual liability requirement in negligent hiring and retention claims just once, in *Nat'l Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 122 Ohio St. 3d 594 (2009)4 ("National Fire Insurance"). While the facts of that case concerned respondeat superior liability — not negligent hiring, retention or supervision — this Court explicitly reiterated the individual-liability prerequisite in *both* contexts:

> 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… As we held in *Losito*, for example, "[a] settlement with and release of the servant will exonerate the master. Otherwise, the master would be deprived of his right of reimbursement from the servant, if the claim after settlement with the servant could be enforced against the master." [if] *there is no liability assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions.*
>
> Moreover, this rule applies not only to claims of respondeat superior, but also to other types of vicarious liability. As we emphasized in *Strock*, "[i]t 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 agent] in the instant case, it is obvious that any imputed actions against the [principal] are also untenable."

*Id.* at 599.

As the Court's most recent application of *Strock, National Fire Insurance* also strongly supports Appellant's interpretation that an employee must be individually liable to the plaintiff

**D. <u>Appellant's Interpretation is Consistent with Authority Outside of Ohio.</u>**

Finally, Appellant's interpretation is also supported by persuasive authority from outside of Ohio – from Nebraska, Alabama, and Texas. In several cases, courts from these states have properly concluded that state-law negligence claims against an employer require a finding of tort liability against the individual, and that if the claim against the individual fails — even for non-substantive reasons, such as statute of limitations grounds — the negligence claims against the employer also fail.

In *Schieffer v. Catholic Archdiocese*, for instance, the Nebraska Supreme Court reviewed *Strock* and expressly concluded that under *Strock,* a negligence claim against an individual requires a viable tort claim against the individual. *Schieffer v. Catholic Archdiocese*, 244 Neb. 715, 723 (Nebraska 1993) ("If there is no tort liability to the plaintiff against Lange individually, it follows that the Archdiocese cannot be held liable for his conduct." ); *see also Medrano Cambara v. Schlote*, No. 8:14-CV-260, 2015 U.S. Dist. LEXIS 133916, at *24-See ( D.Neb. Sep. 30, 2015) ("In other words, an employer can only be liable for the negligence of its employee if the employee *is herself liable* as well.")(emphasis added).

Similarly, in *Poole v. American International Group, Inc.*, an Alabama federal district court applied Alabama state law to an analysis of tort claims against individual defendants and claims for "negligent and wanton hiring, training, and supervision" against a corporation. 414 F.Supp.2d

1111 (M.D.Ala.2006). The court concluded that if the claims against the individual defendants were barred by a statute of limitations defense, then the negligence claims against the corporate defendant, which required the finding of underlying tortious conduct by an employee before the employer can be held liable, was also barred. *Poole,* 414 F.Supp.2d at 1116 (discussed approvingly in *Loop v. Allianz Life Ins. Co. of N. Am*., No. 09-0007-M, 2009 U.S. Dist. LEXIS 31322, at *17 ( S.D.Ala. Apr. 13, 2009); *see also Loop,* 2009 U.S. Dist. LEXIS 31322, at *17 ("If the claims for fraud and suppression are barred because of the statute of limitations, the only claim left is the negligence/wantonness claim which would also disappear as one necessary element for proving it is the showing of underlying tortious conduct by an employee")).

Finally, *in Janvey v. Adams & Reese, LLP,* a Texas federal district court reached the same conclusion under Texas law. *See Janvey v. Proskauer Rose LLP*, No. 3:13-CV-0477-N, 2015 U.S. Dist. LEXIS 187809, at *23 ( N.D.Tex June 23, 2015) (discussing *Janvey v. Adams & Reese, LLP*, No. 3:12-CV-0495-N, 2013 U.S. Dist. LEXIS 202981 ( N.D.Tex. Sep. 11, 2013) (because the negligent supervision claims in *Adams & Reese* were based on time-barred tortious conduct, the negligent supervision claims failed, too).

These cases lend significant additional support for the fundamental proposition that if an action against the employee is barred, then so too is an action against the employer for negligence.

### E. The Ninth District's Interpretation is Flawed and Imposes Unfair and Unworkable Burdens on Employers and the Judicial System

Contrary to the foregoing authority, the Ninth District has now crafted its own unique interpretation of *Strock* that does *not* require individual liability as an element of negligent supervision, hiring or retention claims. This interpretation is completely without legal or textual foundation.

To be sure, the Ninth District did get a couple of things right. First, quoting *Strock,* the court correctly acknowledged 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." The court also correctly acknowledged that in this case, Appellee had no viable legal claim (civil or criminal) against Dr. Shahideh. Indeed, in light of the authority above, these acknowledgments *should* have led the court to dismiss the negligent hiring, retention, and supervision claims.

Instead, however, the court misinterpreted *Strock'*s "guilty of a claimed wrong" language as being satisfied either by proof either of actual tort liability *or* by some other, amorphous form of *non-legal* liability. The court concluded that "guilty of a claimed wrong" does not necessarily mean "found guilty," or otherwise criminally or civilly liable; rather, it simply means the commission of conduct that *could* constitute a tort or a crime in a hypothetical world where statute of limitations and other defenses do not apply.

This interpretation contradicts the text of *Strock.* While *Strock* did not define the phrase "guilty of a claimed wrong," the word "guilty" plainly requires actual legal guilt or civil liability of some sort. *See* Appellant's Brief at 15 (citing Black's Law Dictionary, 7th Ed. 1999, p. 927. "guilty" is defined as "[h]aving committed a crime; responsible for a crime; [r]esponsible for a civil wrong, such as a tort or breach of contract")); *Edwards v. Atlantic C. L. R. Co*., 148 S.C. 266, 312 (South Carolina 1928) (using the "word" guilty to connote civil legal liability for commission of negligence and violation of statutory law); *Pike v. Camden Trust Co*., 128 N.J.Eq. 414, 424, 16 A.2d 634 (1940)(same, as to statutory liability); *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 128 (2d Cir. 2004) (same, as to contractual breach, i.e., "guilty of breach of contract"). Thus, *Strock* clearly indicated that negligent supervision, hiring, and retention claims require proof of a

*legally cognizable* claim against the individual—i.e., that some sort of action can be "maintained against the individual"—whether it be tort liability specifically, or some other form of civil or criminal liability, such as breach of a contract or violation of a statute that imposes civil liability. *Id.* at 217 ("Because no action can be maintained against the individual in the instant case, it is obvious that any imputed actions against the church are also untenable.") (emphasis added).

The court also based its conclusion on an irrelevant distinction between respondeat superior liability and negligence, namely, that the former holds the employer liable solely for the employee's conduct, while the latter requires direct action or omission by the employer. This is perhaps true, but this distinction does not undermine the requirement for individual liability in *both* situations. With respondeat superior claims, the employee's liability (while acting in the scope of his employment) is both necessary and sufficient to impose liability on the employer. With negligence claims, on the other hand, the employee's liability is still necessary, but it is *not* sufficient; rather, the plaintiff must *also* prove the employer's negligent conduct (among other things). *See* In any event, both claims require individual liability by the employee. Thus, the Ninth District's reliance on this distinction to support its contrary conclusion was not proper.

In addition, the court's conclusion is directly contradicted by the overwhelming authority cited above, and the Ninth District did not cite any authority that supported its own holding. That is because no such authority exists. In fact, to the OMLA's knowledge, not a single federal or state case applying Ohio law has ever agreed with the Ninth District's holding that a negligent hiring, supervision, or retention claim could proceed in the absence of a legally viable claim against the employee. The OMLA submits that there is no good reason to change that now.

Furthermore, the court's holding imposes an unfair and unworkable burden on employers and the judicial system, potentially requiring employers to litigate conduct that an employee

committed decades ago and requiring a civil court to render a criminal adjudication. Consider the situation here: an alleged criminal sexual assault for which the statute of limitations is 25 years and for which the parties stipulated that the prosecution declined to press charges. Under the Ninth District's holding, which permits a plaintiff to meet the *Strock* requirement by proving that the individual violated a criminal statute — even in the absence of a criminal conviction by the state — the employer potentially could be forced to defend and litigate criminal statutes and procedures that are properly the province of the state or its political subdivisions, not private parties,[1] and to do so many years after the conduct occurred. Similarly, the Ninth District's holding also potentially requires the parties to litigate in a civil trial court the issue of whether an employee engaged in criminal conduct, thus interjecting criminal burdens of proof in civil cases. This contradicts the fundamental separation of civil and criminal proceedings in the judicial system.

Finally, the OMLA also agrees with Appellant that the Ninth District's holding improperly infringes on the employer's right to seek contribution from the employee tortfeasor. (Appellant's Brief at 18-19.)

## CONCLUSION

For each and all of the foregoing reasons, the OMLA respectfully asks the Court to grant this appeal and adopt Appellant's proposed proposition of law.

Respectfully Submitted,

/s/ *Michael J. Frantz*

[1] *See, e.g., Perotti v. Wilson*, No. 1:18-cv-482, 2018 U.S. Dist. LEXIS 220306, *13 (S.D. Ohio 2018)("Courts in Ohio have held that a plaintiff cannot assert a claim predicated upon an alleged violation of a criminal statute because criminal violations are brought not in the name of an individual but rather by, and on behalf of, the state of Ohio or its political subdivisions.")(internal quotations omitted)(collecting cases).

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 19, 2019, a copy of foregoing document was filed electronically. Notice of this filing will be sent to all parties via electronic mail:

*/s/ Michael J. Frantz*