In the Supreme Court of Ohio

Jasman L. Johnson, Plaintiff-Appellee vs. Mercy Health- St. Vincent Medical Center Defendant-Appellant	Case No. 2025-0668 Appeal from the Lucas County Court of Appeals, Sixth Appellate District, Case No. L-24-1107

BRIEF OF AMICUS CURIAE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLEE

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I. STATEMENT OF INTEREST

The Ohio Association for Justice ("OAJ") is a statewide association of over 1,500 lawyers whose mission is to protect and promote Ohioans' right to a fair and impartial civil justice system, including their constitutional right to trial by jury, through advocacy, education and training. Additionally, as a proponent of 2024 Am.H.B. 179, which was unanimously passed by both chambers of the Ohio General Assembly and signed into law by Governor DeWine on July 24, 2024, OAJ has a particular interest in this case and adhering to principles of *respondeat superior* and vicarious liability that have existed for centuries at common law.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

Neither Ohio law nor English common law has ever required the over-naming or shotgunning of every single potentially negligent employee solely to hold the employer vicariously liable for their actions. Instead, as held by this Court numerous times, plaintiffs have the option to sue the master, the servant, or both. Importantly, as virtually every trial and appellate court in this state has previously held, the scope of this Court's decisions in *Nat'l Union Fire Ins. Co. v. Wuerth*, 2009-Ohio-3601 and *Clawson v. Heights Chiropractic*, 2022-Ohio-4154 only extend to instances of **malpractice committed by lawyers and doctors**. In keeping with centuries of precedent and legal jurisprudence, the Ohio Revised Code, and the rationale of the healthcare *amici* in *Clawson*, traditional principles of *respondeat superior* should not be abandoned here. Appellant's position would radically change well-settled, firmly rooted legal principles by universally expanding *Wuerth* and *Clawson* to require plaintiffs to sue all employees to hold the employer accountable for the employees' actions. This would eliminate traditional agency principles, judicially erase R.C. §§ 2307.24 and 2307.241, and produce absurd, real-life implications for all litigants and trial courts.

III. STATEMENT OF FACTS AND THE CASE

OAJ adopts the facts presented by Ms. Johnson and simply reiterates that the undisputed facts for purposes of this case are that at all times relevant herein, Appellant's nurses and non-physician employees were acting in the course and scope of their employment with Appellant.

IV. LAW AND ARGUMENT

OAJ's Proposition of Law:

> *An employer can be held liable under the doctrine of respondeat superior for the allegedly negligent actions of its employee if the action is timely commenced against the employer.*

A. For over a Millennium, *Respondeat Superior* has Never Required Plaintiffs to Sue both the Master and the Servant to Hold the Master Responsible for the Servant's Actions.

The doctrine of *respondeat superior* was rooted in the ancient maxim "*Qui facit per alium facit per se*," meaning "he who acts through another, acts himself." At the time of the founding of our country and our state, there was no mystery about *respondeat superior*. It was part of the common law the Framers inherited and took for granted. English courts applied the rule without ceremony. In *Hern v. Nichols*, 91 Eng. Rep. 256 (1709), the merchant was held liable for his factor's fraud, servant or no servant in the dock. The point is obvious: the servant was merely the instrument; the law fixed responsibility on the one who wielded the instrument.

It was Sir William Blackstone, the English jurist, who recognized this principle as follows:

> If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect...[I]n these cases, the damage must be done while he is actually employed in the master's service otherwise the servant shall answer for his own misbehaviour...We may observe, that in all the cases here put, **the master may frequently be a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehaviour, but can never shelter himself from punishment by laying the blame on his agent. The reason all of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself;**

> **and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.**

Blackstone, 1 *Commentaries* Ch. 14, 419-420 (emphasis added).

Former U.S. Supreme Court Justice Oliver Wendell Holmes, in his lecture "Early Forms of Liability" in *The Common Law* traced the history of *respondeat superior* back to Roman times, noting:

> A baker's man, while driving his master's cart to deliver hot rolls of a morning, runs another man down. The master has to pay for it. And when he has asked why he should have to pay for the wrongful act of an independent and responsible being, he has been answered from the time of Ulpian to that of Austin, that it is because he was to blame for employing an improper person. If he answers, that he used the greatest possible care in choosing his driver, he is told that that is no excuse; and then perhaps the reason is shifted, and it is said that there ought to be a remedy against some one who can pay the damages, or that such wrongful acts as by ordinary human laws are likely to happen in the course of the service are imputable to the service.

Holmes, *The Common Law* (1881) at 6. Justice Holmes concluded his remarks on this topic by stating:

> To return to the English, the later laws, from about a hundred years after Alfred down to the collection known as the laws of Henry I, compiled long after the Conquest, increase the lord's liability for his household, and make him surety for his men's good conduct. If they incur a fine to the king and run away, the lord has to pay it unless he can clear himself of complicity. But I cannot say that I find until a later period the unlimited liability of master for servant which was worked out on the Continent, both by the German tribes and at Rome. **Whether the principle when established was an indigenous growth, or whether the last step was taken under the influence of the Roman law, of which Bracton made great use, I cannot say. It is enough that the soil was ready for it, and that it took root at an early day. This is all that need be said here with regard to the liability of a master for the misdeeds of his servants.**

Id. at 19-20.

B. This Court has Adopted and Enforced Common Law *Respondeat Superior* Principles Dating Back Over 150 Years.

As early as *Cleveland, C&C. R. Co. v. Keary*, 3 Ohio St. 201 (1854), this Court adopted the common law of England as follows:

> We profess to administer the common law of England, in so far as its principles are not inconsistent with the genius and spirit of our own institutions, or opposed to the settled habits, customs, and policy of the people of this State, thereby rendering it inapplicable to our situation and circumstances.
>
> It has not been adopted by express legislative enactment, but brought to the old States by our fathers, and constantly claimed as their birthright. Its introduction here by their descendants was almost a matter of course, and its terms and foundation principles have been so interwoven with our constitution and laws, so blended with the remedies we afford, and so constantly enforced by our courts, that its implied recognition by the government and the people, may be fairly assumed; and if it cannot be said to be in force as the common law of England, it may not inaptly be termed the common law of Ohio.

Id. at 205. In *Keary*, this Court then applied this rationale to enforce and adopt common law *respondeat superior*. *Id.* at 201.

Similarly to Blackstone's *Commentaries*, this Court in *Keary* stated:

> It is a settled maxim of the common law, founded upon the highest obligations of social duty, that everyone shall so use his own, and so prosecute his lawful business, as not by his negligence or want of care to injure others. Hence, the law exacts of him who puts a dangerous force in motion, that he shall control it with reasonable care and skill.
>
> He cannot divest himself of this obligation by committing its control to another; but he still remains liable upon the maxim, *respondeat superior*, for such injuries as arise from the negligence or carelessness of his agent while engaged in the prosecution of a business.

Id. at 201. This Court likewise concluded that when the master substitutes a servant to do the job, "it requires the same care and skill as though he had retained it...and by his direction, he cannot, in this manner, release himself from any part of the obligation he owes to others." Id. at 206. This Court likewise stated, "he cannot escape responsibility to those who are injured by the failure of his substitute to discharge his duty with skill and care." *Id.* at 207.

Despite the roots of respondeat superior liability's roots tracing back to the earliest parts of English, American, and Ohio common law, Appellant now wants this Court to ignore *stare decisis* and overrule on *Losito v. Kruse*, 136 Ohio St. 183 (1940). This would not only abandon this firmly established legal principle, but would also, for the first time, require injured Ohioans to look to the agent, not the principal by suing every possibly negligent employee in a lawsuit. As this Court noted in *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849:

> *Stare decisis* is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system. It is only with great solemnity and with the assurance that the newly chosen course for the law is a significant improvement over the current course that we should depart from precedent.

Id. at ¶ 1. Furthermore, Appellant has never, at any point throughout this litigation, explained why any of the *Galatis* factors would be met by overruling *Losito*. This is especially true for the third *Galatis* factor, "abandoning the precedent would not create an undue hardship for those who have relied upon it." *Id.* at syllabus. Abandoning *respondeat superior* and requiring the master and the servant to both be sued would represent a breathtaking departure from these principles which have been around for centuries and result in an extreme hardship to all litigants, trial courts, and clerks alike. Since there is no good reason to do so, *stare decisis* should require this Court to again reaffirm *Losito* and the Sixth District Court's decision.

C. *Wuerth* and *Clawson* only Apply to Claims of Malpractice, which this Court has Always Limited to Claims Against Doctors and Lawyers and Distinguished from a Negligence Claim.

The certified question answered in *Wuerth* was, "Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?" *Id.* at 594. In *Wuerth*, this Court correctly noted that under the Ohio Constitution and this Court's Rules of Practice, only individuals can practice law. *Id.* at 598. This Court also pointed out, "While clients may refer to a law firm as providing their legal representation or giving legal advice, in reality, it is in every instance the attorneys in the firm who perform those services and with whom clients have an attorney-client relationship." *Id.* Therefore, as *Wuerth* reasoned, because it is the lawyer, not the law firm practicing law, a law firm could not be held liable for malpractice. *Id.*

Likewise, as longstanding precedent from this Court has noted, only doctors practice medicine. Most importantly, under the Ohio Revised Code, nurses are prohibited from practicing medicine. Revised Code § 4723.151 states, "medical diagnosis, prescription of medical measures, and the practice of medicine or surgery or any of its branches by a nurse **are prohibited**." (emphasis added). No court in Ohio has found nurses capable of practicing medicine. Instead, as this Court noted in *Lombard v. Good Samaritan Med. Ctr.*, 69 Ohio St. 3d 471 (1982), "**A nurse, although obviously skilled and well trained, is not in the same category as a physician who is required to exercise his independent judgment on matters which may mean the difference between life and death**." *Id.* at 473 (emphasis added). Likewise, in *Avellone v. St. John's Hosp.*, 165 Ohio St. 467, 473 (1956), this Court, in holding that a non-profit hospital could be held liable for injuries caused by the negligence of its staff, stated, "we see the right of the individual injured by the negligence of a servant to look for the recompense to the master of such servant, under the

doctrine of respondeat superior." *Id.* Additionally, as stated by this Court in *Richardson v. Doe*, 176 Ohio St. 370, 372 (1964), a nurse's primary function is:

> [T]o observe and record the symptoms and reactions of patients. A nurse is not permitted to exercise judgment in diagnosing or treating any symptoms which the patient develops. Her duty is to report them to the physician. Any treatment or medication must be prescribed by a licensed physician.

Id. at 373. *Richardson* concluded by stating, "[the] lack of due care by a nurse in caring for a hospital patient constitutes ordinary negligence and is not malpractice within the meaning of Section 2305.11 of the Revised Code." *Id.* Additionally, as the Sixth District noted in *Tisdale v. Toledo Hosp.*, 2012-Ohio-1110 (6th Dist.):

> The Supreme Court has long held that the negligence of nurses employed by a hospital is not within the definition of "malpractice," as used in R.C. 2305.11(A) [the statute of limitations]. *Lombard v. Good Samaritan Med. Ctr.*, 69 Ohio St.2d 471, 473-474, 433 N.E.2d 162 (1982). Rather, a claim asserting that a nurse-employee acted negligently is a type of "medical claim" within the meaning of R.C. 2305.113(A). [*Cope v. Miami Valley Hosp.*, 2011-Ohio-4869 (2nd Dist.)] at ¶ 22 ("[A]ll other medical employees are not subject to malpractice.") Compare *Holman v. Grandview Hosp. & Med. Ctr.*, 37 Ohio App.3d 151, 153-154, 524 N.E.2d 903 (1987) (suit against hospital based on respondeat superior for the nurse-employee's alleged negligence was an "action in negligence," not a "medical malpractice claim," and thus could proceed even though the nurse was not named as a defendant.)

Id. at ¶ 36. The Sixth District in *Tisdale* also correctly pointed out that R.C. § 2305.11(A) offered an explicit reason to exclude nurse-employees from what has traditionally been called "malpractice." *Id.* at ¶ 37. R.C. § 2305.11(A) notes, in pertinent part, "... an action for malpractice other than an action upon a medical...claim." R.C. § 2305.11(A). Additionally, "medical claims" under R.C. 2305.113(E)(3)(b)(i) include "any claim asserted in any civil action against...any employee or agent of a...hospital." *Id.* In light of the different treatment between "malpractice"

claims and "medical claims," the *Tisdale* Court noted:

> Together these sections indicate that medical employees, such as nurses, technicians or other assistants, are not subject to malpractice claims but are amenable to "medical claims," including those which assert they negligently acted or omitted "in providing medical care."

Id. at ¶¶ 37-40.

Therefore, nurses and hospitals are clearly not included under the definition of "malpractice" because only doctors practice medicine. The issue decided by this Court in *Clawson* was "whether a plaintiff may prevail on a claim of **chiropractic malpractice** against a chiropractor's employer under the doctrine of *respondeat superior*." *Clawson*, 2022-Ohio-4154 at ¶ 1. *Losito* was again reaffirmed in *Clawson* (*Id.* at ¶ 20), and neither the holding nor the proposition of law stated differently because it was in the context of an action in malpractice.

D. Appellate Courts Unanimously Refused to Expand *Wuerth* Beyond Malpractice Claims Because of the Control Hospitals and Corporations Maintained over their Non-Physician Employees.

Chief Justice Moyer, in his concurrence in *Wuerth*, specifically emphasized, "I stress the narrowness of our holding today." *Wuerth* at ¶ 35. This concurrence was joined by four other members of the Court. Despite this, hospitals immediately attempted to argue that *Wuerth* applied to every claim of *respondeat superior*. Motions to dismiss for failure to sue nurses were filed all over the state, but every appellate court rejected this expansion of *Wuerth*. *See e.g. Meehan v. Amn Healthcare, Inc.*, 2012-Ohio-557 (1st Dist.); *Stanley v. Cmmty. Hosp.* 2011-Ohio-1290 (2nd Dist.); *Cope v. Miami Valley Hosp.*, 2011-Ohio-4869 (2nd Dist.), *Tisdale v. Toledo Hosp.*, 2012-Ohio-1110 (6th Dist.); *Dinges v. St. Luke's Hosp.*, 2012-Ohio-2422 (6th Dist.); *Taylor v. Belmont Cmmty. Hosp.*, 2010-Ohio-3986 (7th Dist.); *Van Doros v. Marymount Hosp.*, 2007-Ohio-1140 (8th Dist.); *Henik v. Robinson*, 2012-Ohio-1169 (9th Dist.); and *Staples v. OhioHealth Corp.*, 2020-Ohio-4578 (10th Dist.). Likewise, outside of the context of medical claims, the Third District in

Holland v. Bob Evans Farms, 2008-Ohio-1487 (3rd Dist.) and the Twelfth District in *Orebaugh v. Wal-Mart Stores*, 2007-Ohio-4969 (12th Dist.) likewise refused to require the naming of non-physician employees in cases of *respondeat superior*.

Appellate courts recognized that under basic agency law, the employer's direction and control over the details of the employee's work and conduct is what makes their relationship one of actual agency. *Costell v. Toledo Hosp.*, 98 Ohio App.3d 586, 592-94, 649 N.E.2d 35 (6th Dist. 1994). Unlike doctors and lawyers who are required to exercise their independent medical and legal judgment in the practice of their profession, nursing employees are under the direction and control of their employer.

Similarly, in *Stanley*, the Second District held that caselaw did not preclude a suit against the hospital for the negligence of its employee nurse where the nurse or nurses were not sued individually. *Id.* at ¶¶ 20-22. Since there was no dispute the plaintiff's suit was timely filed against the *hospital* for the alleged negligence of its employee nurses, *respondeat superior* applied and the trial court erred in granting summary judgment to the hospital defendant. *Id.*

The Second District in *Cope* noted the absurdity in the position that an employee nurse must be individually named, contrary to basic agency principles:

> The hospital is in exclusive control of hiring criteria, training, and routine performance evaluation and review. A hospital should be responsible for the negligence of its employees who perform medical services and act in the scope of their employment. **To allow a hospital to be shielded from the rule of "respondeat superior" liability due to a court's liberal application of the distinction carved out by *Wuerth* would effectively allow the distinction to swallow the rule.**

Cope, 2011-Ohio-4869 at ¶25. (emphasis added).

This rationale from *Cope* was adopted by the First District in *Meehan*, which noted:

> Medical claims alleging the negligence of a hospital employee, such as a nurse, are governed by the doctrine of *respondeat superior*. *Cope v. Miami Valley Hosp.*, 2nd Dist. No. 24458, 2011-Ohio-4869, ¶ 18. **Under that doctrine, a plaintiff may elect to sue only the employer or both the employer and the employee.** *Id.; see also Losito v. Kruse,* 136 Ohio St. 183, 24 N.E.2d 705 (1940). Therefore, even without [the nurse] as a defendant, the Meehans may nevertheless maintain a lawsuit against Bethesda for the alleged negligence of Bethesda's nursing staff.

Id. at ¶ 11. (emphasis added). Likewise, the Tenth District Court of Appeals in *Staples* unanimously held that it was not necessary to sue the negligent traveling nurse to hold the hospital liable. *Staples*, 2020-Ohio-4578 at ¶ 23. The unanimous decision in *Staples* also included Judge Frederick Nelson, who had been appointed to the Tenth District by Governor DeWine. The Tenth District noted:

> Regardless of whether Stoneburner [the nurse] was employed directly by the hospital or through a staffing agency, she was in a distinctly different position than the independent-contractor physician in *Comer*. **Stoneburner, like all hospital nurses, was subject to the control and supervision of the hospital and was required to follow hospital guidelines and protocols in carrying out her normal daily duties.** Stoneburner's daily work was not controlled or supervised by American Traveler, the staffing agency under contract with Ohio Health, and American Traveler did not dictate the tasks and manner of completing those tasks on a daily basis. **In the hospital setting, there is no distinction between the work performed by the hospital-employee nurse and agency nurse, both are under the control of the hospital.**

Id. at ¶25 (emphasis added). Moreover, the Tenth District noted "under the doctrine of *respondeat superior*, because the employer is liable for the actions of the employee, it can be sued **independently of the employee** by the inured party." *Id.* at ¶17, citing *Losito*, syllabus. (emphasis added). In reaching its decision, the Tenth District followed an identical case with identical rationale from the Eight District in *Van Doros v. Marymount Hosp.*, 2008-Ohio-1140 (8th Dist.)

Importantly, neither *Cope*, *Stanley*, *Tisdale* nor any of the other post-*Wuerth* decisions describing its narrow applicability only to malpractice cases have been reversed.

E. Appellant's Position is Directly Contrary to the Briefs Filed by Healthcare *Amici* in *Clawson*.

This Court can and should take judicial notice of the lack of any amicus support for Appellant. The reason for this is clear- Appellant's proposed expansion of *Wuerth* and *Clawson* to include non-physician employees is not just contrary to all the case law cited above, it is also directly contrary to the amicus brief filed by the Ohio State Medical Association, the Ohio Hospital Association, the Ohio Osteopathic Association, the Ohio State Chiropractic Association, the Ohio Radiology Society, the Ohio Alliance for Civil Justice, the Ohio Insurance Institute, and the Academy of Medicine of Cleveland and Northern Ohio in *Clawson*. (Attached as Appendix 1[1]). There, these entities presciently noted, "including nurses and technicians would result in nearly all hospital employees potentially being named individually in medical malpractice lawsuits." *Id.* (emphasis added). These entities further argued:

> [i]n the healthcare context, this Court should continue to apply *Wuerth* **to only physicians** (medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors) because 'no other medical employees are subject to malpractice.'

Id.; citing *Cope* 2011-Ohio-4869 at ¶22; *Tisdale,* 2012-Ohio-1110, at ¶40 (6th Dist.). (emphasis added).

These entities advocated for this interpretation because they "**Recognize[d] the need to strike a proper balance between the right of injured persons to recover against medical employers and ensuring that medical employers and the delivery of healthcare as a whole are not jeopardized due to expanded liability.**" *Id.* (emphasis added). OAJ agrees. Furthermore,

[1] https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2020/1574

had these entities filed an amicus brief in support of Appellant in this case, it would have represented a "John Kerry" level flip flop of positions[2].

F. Appellate and Trial Courts Throughout the State, Including Justice Shanahan in *LeNeo v. Wyant Leasing Co., LLC*, have also Refused to Expand *Clawson* Beyond Malpractice

Justice Shanahan encountered this issue when she was on the Hamilton County Court of Common Pleas in *LeNeo v. Wyant Leasing Co., LLC.* In rejecting the attempt to expand Clawson beyond cases of malpractice, Justice Shanahan wrote:

> The issue is whether Plaintiff needed to identify each and every non-physician employee who may have been involved in the allegedly negligent care provided to Plaintiff Leneo. **Plaintiffs assert Ohio law does not require naming individually every allegedly negligent employee. This Court Agrees**.
>
> This Court finds that **pursuant to the law of vicarious liability, Plaintiffs' suit against Defendants for the alleged negligence of its non-physician employees is not precluded despite the fact that these employees were not named as Defendants in Plaintiffs' Complaint.**

LeNeo v. Wyant Leasing Co. LLC, Hamilton C.P. No. A2300366, at pp. 3-4 (Jun. 28, 2023) (emphasis added). (Appendix II).

Justice Shanahan was not alone in her reasoning. Trial courts throughout Ohio have also rejected Appellant's position as well. *See e.g. Mickhail v. Garden II Leasing Co.,* Lucas C.P. No. CI-21-2737 (March 14, 2023); *Drenser v. Lake Health System. Inc*, Cuyahoga C.P. No. CV-20-932429 (April 4, 2023); *Estate of Stephen Tate v. LP Warren LLC*, Trumbull C.P. 2023 CV 00098 (May 5, 2023); *Bugeda v. Maplewood at Chardon LLC*, Geauga C.P. No. 21P000743 (May 23, 2024); *Childers v. The Toledo Clinic, Inc.*, Lucas C.P. No G-4801-CI-2022-4076-000 (July 27, 2023); *Harris v. HCRMC Promedica, LLC, et al.*, Lucas C.P. No. CI-0202003021 (Aug. 15, 2023); *McCoy v. Avon Place Skilled Nursing & Rehab. Center*, Cuyahoga C.P. No . CV-21-950678 (Oct.

[2] https://www.cbsnews.com/news/kerrys-top-ten-flip-flops/

11, 2023) ("The employer of the nurse ... may be vicariously liable when the employees have not been named and the applicable statute of limitations has expired."); *Ramsey v. Manorcare Health Services, LLC*, Franklin C.P. No. 21CV006903 (October 12, 2023); *Martinez v. Promedica Toledo Hospital*, Lucas C.P. No G-4801-CI-2023-1629-000 (Nov. 20, 2023); *Bachman v. Sybert*, Franklin County C.P. No. 21CV3509 (July 29, 2024) (Appendix II). These trial judges, just like Justice Shanahan, recognized the difference between medical malpractice, which necessitated naming the responsible physician, and a medical claim, which could be pursued without shotgunning every negligent non-physician.

The Eight District in *Orac v. Montefiore Found.*, 2024-Ohio-4904 (8th Dist.), and the First District in *Marshall v. Mercy Health- Anderson Hosp.*, 2025-Ohio-1268 (1st Dist.) each affirmed this concept as well, holding, "A plaintiff filing a medical claim against a nurse or their employer hospital can choose to file against either or both." *Marshall*, 2025-Ohio-1268 at ¶ 13; *Orac*, 2024-Ohio-4904 at ¶ 40.

G. Appellant's Position would Require this Court to Judicially Override R.C. §§ 2307.24 and 2307.241

Wuerth committed his legal malpractice in 2002, but this Court did not decide his case until 2009. In between the two, the Ohio General Assembly, as part of tort reform, did away with joint and several liability in favor of comparative fault and apportionment. Moreover, the General Assembly wisely contemplated the situation where an employer would try to apportion fault to its own employees under R.C. §§ 2307.22 and 2307.23 in contravention of common law and common sense. In enacting R.C. § 2307.24(B), the General Assembly reaffirmed common law respondeat superior principles dating back to Blackstone and made it clear that employers would not be permitted to engage in such conduct. R.C. 2307.24(B) states, "For purposes of Section 2307.22 of the Revised Code, **a principal and agent, a master and servant, or other persons having a**

vicarious liability relationship shall constitute a single party when determining percentages of tortious conduct in a tort action in which vicarious liability is asserted." (emphasis added). This is exactly what this Court held dating back to *Keary*, and moving forward through *Losito* to the present.

Under Appellant's reading of *Clawson* and *Wuerth*, if Ms. Johnson had instead sued several, but not all staff members involved in her care, then Appellant would be able to apportion fault or avoid liability by blaming any of its own non-party, non-physician employees. This is contrary to Ohio and common law. R.C. § 2307.24 has never been struck down by this Court or repealed by other legislation. When someone is under the control of the master and must follow policies and procedures, this statute applies and permits recovery against the master directly; thus, *Wuerth* and its progeny do not apply. This Court should not ratify the judicial activism sought by Appellant. This statute was not even mentioned in *Clawson* because as this Court has recognized time and time again, it would not apply to physicians and lawyers.

Following this Court's decision in Clawson, the General Assembly again spoke to reiterate and codify common law and clarify any confusion among litigants and trial courts in 2024 Am.H.B. No. 179. This bill was **unanimously passed** by both chambers of the Ohio General Assembly, and did two things- it expressly overruled this Court's decision in *Elliot v. Durrani*, 2022-Ohio-4190, and codified *respondeat superior* by harmonizing this Court's decisions in *Losito*, *Wuerth*, and *Clawson*. In enacting R.C. § 2307.241, the General Assembly reiterated that the only individuals that are necessary parties to lawsuits alleging respondeat superior are doctors and lawyers. R.C. § 2307.241(B)(2). It likewise made clear that plaintiffs still have to prove scope of agency and negligence of the agent, servant, or employee. R.C. § 2307.241(C). The most telling part of R.C. § 2307.241 is that it does not change (and would not have changed) the outcome

of a single case on agency decided by this Court regarding doctors, hospitals, and nurses in the last 100 years. It codified and harmonized Ohio law as it has always been, and now as it always will be.

This Court has held on several occasions, "We first recognize that statutes are presumed to be constitutional and that courts have a duty to liberally construe statutes in order to save them from constitutional infirmities. *Eppley v. Tri-Valley Loc. Sch. Dist. Bd. of Educ.*, 122 Ohio St. 3d 56, 59 (2009) (quoting *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538 (1999)). In this vein, this Court has also noted, "It is a cardinal rule of statutory construction that a statute should not be interpreted so as to make the statute ineffective. A court must construe the statute so as to render it compatible with other enactments and construe it so as to avoid unreasonable consequences." *Gulf Oil Corp. v. Kosydar*, 44 Ohio St. 2d 208 (1975). Affirming the Sixth District's decision would give R.C. §§ 2307.24 and 2307.241 their full force and effect, as opposed to judicially overriding the will of a unanimous Ohio General Assembly. Appellant's request to have this Court engage in extreme judicial activism should therefore be rejected.

H. Appellant's Misplaced Reliance on Distinguishable Cases

Appellant relies on numerous cases that involve *respondeat superior* claims and physicians or lawyers. For all the reasons outlined in this amicus brief, these have no bearing on the case here, which involves nurse employees who are incapable of practicing medicine. Appellant then turns to *Green v. Luxe Laser*, 2025-Ohio-682 (6th Dist.) and *Badra-Muniz v. Vinyl Carpet Serv., Inc.*, 2024-Ohio-5507 (2nd Dist.). *Green* involved a situation where a nurse and physician were not named in the initial complaint, then Green attempted to add them without raising or referencing R.C. § 2323.451 at any point prior to the court of appeals. *Id.* at ¶¶ 32-35. Because Green's counsel

was unaware of the appropriate statute to amend the complaint, and never raised it, the Sixth District affirmed the dismissal of the complaint for the expiration of the statute of limitations. *Id.*

Badra-Muniz is likewise distinguishable from the present case because there, the plaintiff exercised his choice to sue both the employer as well as the employee by suing John Does 1-99. *Badra Muniz*, 2024-Ohio-5507 at ¶ 3. When this is done, a plaintiff cannot take affirmative steps to destroy vicarious liability. See e.g. *Weiler v. Knox Cmmty. Hosp.*, 2021-Ohio-2098, ¶ 26 (5th Dist.)("It logically follows that release of the employee from liability would thwart the employer's ability to seek reimbursement for payments made to the plaintiff by destroying the employer's subrogation rights). Because the plaintiff did not timely serve and amend his complaint to bring in the correct John Doe employee, dismissal was correctly warranted.

In this case, Ms. Johnson took no affirmative step to destroy vicarious liability. She exercised her right to sue the master for the negligence of the servant. Appellant attempts to argue that this was improper and that she had to serve "180-day" letters on the individual nurses she intended to sue due to the requirement of giving the "person" written notice pursuant to R.C. § 2305.113(B)(1). A hospital meets the definition of "person" pursuant to R.C. § 1.59 as a "corporation" and R.C. § 2305.113 does not define a "person" differently. Therefore, by the plain language of the Ohio Revised Code and the well-established case law outlined above, it was proper to send the "180-day" letter to Appellant without sending it to every potentially negligent nurse employee. This is further evidenced by the fact that Evid. R. 601(B)(5) contemplates qualified expert testimony against a "hospital," not "every potentially negligent medical provider." Evid. R. 601(B)(5).

I. Appellant's Position, if Adopted, would Lead to Absurd Real-Life Implications for Trial Courts and Litigants.

Appellant's interpretation of *Clawson* would wreak havoc on trial courts and the Ohio legal system as a whole by turning each and every case involving *respondeat superior* claims into its own class action lawsuit. For example, a restaurant serves a patron who gets food poisoning after being served spoiled food, violating health codes, industry standards, and potentially company policies in doing so. According to Appellant, the patron would be unable to sue the restaurant alone. Instead, they would be required to track down and sue the line cooks, prep cooks, manager, servers, dish washers, and anyone else who was responsible in *any way* for the restaurant's negligence in serving spoiled food. The same would be true of a customer shopping at Walmart who slips on a patch of water leaking form in ill-maintained cooler that was known to cause the dangerous condition. According to Appellant, the injured customer could not just sue Walmart. Instead, the injured person would be required to track down and sue the associates, managers, teenage stock clerks, greeters, or anyone else whose negligence may have played a role in the fall. Additionally, there is no guidance on how far up the corporate chain one needs to go to hold the employer accountable. Does every hospital CEO need to be named in every medical claim? How many different district, regional, and/or risk managers would need to be named if any large scale grocery store was sued?

This result makes no logical sense, and the public policy fallout would be immense. It is not supported by *Wuerth, Clawson*, or common law predating the founding of our country. Appellant's interpretation would require every plaintiff alleging a *respondeat superior* claim to sue potentially hundreds of employees to their respective cases, create issues with service of process, representation of current and former employees, and swelling each case docket with a myriad of lawyers. The practical implications alone of such a rule are staggering. How does one try a jury

case with dozens of defendants and defense lawyers, and hundreds of peremptory challenges for a simple slip and fall or other negligence case? Even the most modern courtrooms in Ohio do not allow dozens of defendants and their attorneys to be able to fit, let alone in disproportionately affected smaller counties large swaths of the community would be needed to be called to jury service. Alternative locations would become necessary in virtually every case in which a corporation was sued. Such a ruling would paralyze court dockets, which undo the positive work the Chief Justice has done to get dockets moving that were still backed up from the COVID-19 pandemic. All of these ramifications can be avoided by adhering to common law principles of *respondeat superior*. Affirming the well-reasoned decision of the Sixth District Court of Appeals would do just that.

V. CONCLUSION

For all these aforementioned reasons, this Court should affirm the decision of the Sixth District Court of Appeals.

Respectfully submitted,

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This is to certify that a true and accurate copy of the foregoing was sent via electronic mail only, this 6th day of October, 2025, to the following:

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APPENDIX I- Brief of Healthcare *Amici* in *Clawson*

IN THE SUPREME COURT OF OHIO

Cynthia Clawson,	:	
	:	**Case No. 2020-1574**
Plaintiff-Appellee,	:	
	:	
v.	:	**On Appeal from the Second**
	:	**Appellate District, Montgomery**
Heights Chiropractic Physicians, LLC, et al.,	:	**County**
	:	
	:	**Court of Appeals**
Defendants-Appellants.	:	**Case No. CA 028632**

MERIT BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION, OHIO STATE CHIROPRACTIC ASSOCIATION, OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO RADIOLOGICAL SOCIETY, OHIO INSURANCE INSTITUTE, AND ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANT

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Together, the OHA, OSMA, OOA, OSCA, ORS, and AMCNO represent the vast majority of hospitals and physicians in Ohio, spanning the medical, osteopathic, chiropractic, and radiology fields. They have a strong interest in legal and legislative developments impacting their thousands of members, including developments that impact medical malpractice claims based on vicarious liability. All Amici recognize the need to strike a proper balance between the right of injured persons to recover against medical employers and ensuring that medical employers and the delivery of healthcare as a whole are not jeopardized due to expanded liability.

Amici urge this Court to reverse the Second District's decision in *Clawson v. Heights Chiropractic Physicians, LLC*, 2nd Dist. Montgomery No. 28632, 2020-Ohio-5351 because it misinterprets this Court's decision in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939. More specifically, the Second District determined that *Wuerth* is not applicable to this case because it applies to only part-owners, as opposed to employees. *Clawson*'s reliance on the fact that attorney Richard Wuerth was a part-owner of Lane, Alton & Horst, L.L.C. is misplaced. As *Wuerth* makes clear, this Court was tasked with resolving a certified question of state law concerning both attorney-principals (*i.e.*, part-owners) and attorney-employees *(i.e.*, associates).

The certified question in *Wuerth* was: "Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant ***principals and employees*** have either been dismissed from the lawsuit or were never sued in the first instance?" (Emphasis added.) *Wuerth*, 122 Ohio St.3d at paragraph one of the syllabus. This Court answered that question in the negative, holding that "a law firm is not vicariously liable for legal malpractice unless one of its ***principals or associates*** is liable for legal malpractice." (Emphasis added.) *Id.* at paragraph two

of the syllabus and ¶ 26. Nowhere in the majority's opinion in *Wuerth* did this Court state that its decision applies to only part-owners.

Amici urge the Court to hold that *Wuerth* applies here and the proper application of *Wuerth* is that when a physician-employee's primary liability is extinguished, so too is the secondary liability of the physician's corporate employer under the doctrine of respondeat superior. Interpreting *Wuerth* in this manner is both logical and consistent with this Court's holding in *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 20 (holding that under an agency by estoppel theory of vicarious liability, "if there is no liability assigned to the [independent contractor] agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions").

Importantly, Amici's use of the term "physician" throughout this brief is intended to include not only physicians such as medical doctors (M.D.s) and doctors of osteopathic medicine (D.O.s), but also dentists, optometrists, and chiropractors. Each of these specialties require the achievement of a doctoral degree, and these practitioners have unique and independent roles in their respective fields in making diagnoses and dictating treatment plans and should thus be treated similarly. Further, the Ohio Revised Code contemplates that these types of medical professionals are capable of committing professional malpractice (*see e.g.*, R.C. 2305.11 and R.C. 2305.113). Amici's use of the term "physician" does not, however, include nurses or technicians or other types of medical professionals who are not capable of committing professional malpractice under Ohio law.

Reading *Wuerth*'s holding to apply to physicians who are part-owners ***and*** physicians who are employees strikes a proper balance between public policy and existing Ohio case law. This result allows injured persons to sue hospitals and other medical employers for the negligence of

does not apply to hospital employees (nurses and laboratory technicians) whose conduct does not fall within the common-law definition of 'malpractice.'" *Lombard, supra*, at syllabus. Rather, R.C. 2305.11(A) and R.C. 2305.113 define malpractice as encompassing "medical, dental, optometric, or chiropractic claim[s]."

"Nowhere in *Wuerth* does the Court conclude that a medical claim brought against a hospital for the alleged negligence of one of its [non-physician] employees constitutes a malpractice claim." *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034 (2d Dist.), ¶¶ 25, 37 (rejecting application of *Wuerth* to employee radiological technicians).

Thus, in the healthcare context, this Court should continue to apply *Wuerth* to only physicians (medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors) because "no other medical employees are subject to malpractice." *Cope* at ¶ 22; *see also Tisdale* at ¶ 40 ("medical *employees*, such as nurses, technicians or other assistants, are not subject to malpractice claims but are amenable to '*medical* claims,' including those that assert that they negligently acted or omitted 'in providing medical care'") (Emphasis sic.); *Stanley v. Community Hosp.*, 2nd Dist. Clark No. 2010 CA 53, 2011-Ohio-1290, ¶ 22 (same); *Henik v. Robinson Mem. Hosp.*, 9th Dist. Summit No. 25701, 2012-Ohio-1169, ¶ 19 (same).

As explained by the Second District in a decision preceding *Clawson*, wherein it held that *Wuerth* did not preclude a respondeat superior claim against the hospital for the negligence of its employee radiological technicians who were not timely named in the Complaint:

> Ultimately, this court's decision to give *Wuerth* a narrow application is supported by the public-policy considerations found at the heart of the "respondeat superior" doctrine, which supports vicarious liability. A hospital employs a wide range of people who provide a variety of medical service to patients. The hospital is in exclusive control of hiring criteria, training, and routine performance evaluation and review. A hospital should be responsible for the negligence of its [non-

physician] employees who perform medical services and act in the scope of their employment.

Cope at ¶ 25; *see also Moore v. Mt. Carmel Health Sys.*, 2020-Ohio-6695, 164 N.E.3d 1041 (10th Dist.), ¶ 36. Thus, "[t]here is no reason to treat a medical technician differently from a nurse—neither is considered a physician." *Cope* at ¶ 26. In other words, the Second District agreed in *Cope* that *Wuerth* should be read to not require plaintiffs to sue every single potential non-physician employee who might be primarily liable in order to maintain their respondeat superior claims against their medical employers.

Physicians are different from other medical employees due to the notable differences in their duties and roles vis-à-vis their patients. For example, "[a] nurse, although obviously skilled and well trained, is not in the same category as a physician who is required to exercise his independent judgment on matters which may mean the difference between life and death * * *." *Lombard*, 69 Ohio St.2d at 473, quoting *Richardson,* 176 Ohio St. 370, 372–73. "A nurse is not permitted to exercise judgment in diagnosing or treating any symptoms[.] * * * Any treatment or medication must be prescribed by a licensed physician. * * * It is in the areas of diagnosis and prescription that there is the greatest danger of unwarranted claims." *Richardson* at 373.

Amici urge this Court to affirm longstanding Ohio common and statutory law and to maintain the important public policy considerations described above by concluding that "physician" encompasses medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors but not other medical professionals such as nurses or technicians. Including nurses and technicians would result in nearly all hospital employees who interact with a patient potentially being named individually in medical malpractice lawsuits, contrary to the well-reasoned rationale of the Second District in *Cope*.

IN THE SUPREME COURT OF OHIO

Cynthia Clawson,	:	
	:	
Appellee,	:	**Case No. 2020-1574**
	:	
v.	:	**On Appeal from the Second Appellate District, Montgomery County, Case No. Ca 028632**
	:	
Heights Chiropractic Physicians, LLC,	:	
	:	
Appellant.	:	

REPLY BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION, OHIO STATE CHIROPRACTIC ASSOCIATION, OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO RADIOLOGICAL SOCIETY, OHIO INSURANCE INSTITUTE, AND ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO

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INTRODUCTION

Amici file this Reply Brief to clarify two points. First, this case is not about who needs to be named as a defendant in order to establish secondary liability under the theory of *respondeat superior,* as Amicus Curiae Ohio Association for Justice ("OAJ") would have this Court believe. It is about whether a corporate employer of a physician can be held secondarily liable for a physician-employee's malpractice, under the theory of *respondeat superior*, when the physician-employee has been exonerated from primary liability. Amici assert that, if the physician-employee's liability has been extinguished, the physician-employee's corporate employer cannot be held liable under *respondeat superior*. This principle is not new or novel and is consistent with this Court's decisions, including in *Losito v. Kruse*, 136 Ohio St. 183, 24 N.E.2d 705 (1940) and *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939.

Second, Appellant Heights Chiropractic Physicians LLC and Amici are not seeking to "elevat[e] the pleading requirements when doctors and lawyers are sued, ***simply*** because of their advanced education and training." (Emphasis added.) (OAJ Amicus Brief, at 4.) This case is not about pleading requirements and no one is arguing that physicians need to be treated differently simply because of their advanced education and training. Rather, Ohio law historically has recognized that physicians' advanced education and training bestow upon them a unique and independent role vis-à-vis' their patients, regardless of whether the physicians are independent contractors or employed by a corporate entity. Because only physicians – not other licensed professionals such as nurses or corporate entities such as hospitals – have the unique and independent role of diagnosing disease, illness, and other medical conditions, and prescribing treatment plans for their patients, they are (and should be) treated differently than other employees when it comes to imposing vicarious liability because their corporate employers do not and cannot

When applied here, this fundamental general principle, results in reversing the court of appeals decision as the trial court held, and the court of appeals affirmed, that the physician-employee cannot be held liable.

B. Ohio law has historically recognized a distinction between employees who can commit malpractice and those who cannot and there is no reason to upend decades of jurisprudence

1. Corporate employers of physicians cannot commit malpractice and should not be held secondarily responsible for malpractice that has not been established directly against the physician-employee

OAJ argues that "[n]o plausible justification exists for elevating the pleading requirements when doctors and lawyers are sued, simply because of their advanced education and training." (OAJ Amicus Brief, at 4). However, no one is arguing for elevating pleading requirements and there is plausible justification for treating physician-employees differently than employees at ice cream shops or gas stations for purposes of imposing *respondeat superior* liability.

This "plausible justification" has been set forth in decades of jurisprudence in Ohio. Ohio courts, including this Court, historically have recognized a distinction between those who can commit malpractice (physicians and lawyers) and those who cannot (corporate entities, such as hospitals, and law firms). (*See* Amici Merit Brief, at 10-13.) "It is well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys." *Wuerth*, at ¶15, quoting *Thompson v. Community MentalHealth Ctr. of Warren* (1994), 71 Ohio St.3d 194, 195 642 N.E.2d 1102; *see also Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964). Those who can commit malpractice are a small subset of all potential defendants.

Contrary to Appellee's and OAJ's assertions, this small subset, which includes physicians, are different from other employees (including other licensed medical employees) due to the notable differences in their education and training, and their duties and roles vis-à-vis their patients. As this Court explained decades ago when recognizing this distinction:

> A nurse, although obviously skilled and well-trained, is not in the same category as a physician who is required to exercise his ***independent judgment*** on matters which may mean the difference between life and death * * *. A nurse is not permitted to exercise judgment in diagnosing or treating any symptoms[.] * * * Any treatment or medication must be prescribed by a licensed physician * * *.

(Emphasis added.) *Richardson*, 176 Ohio St. 370, 372-73. At bottom, physicians are required to exercise their independent professional judgment in caring for their patients and their professional independent judgment – including in making potential life and death decisions — cannot be dictated or controlled by their corporate employer. Appellee and the OAJ completely ignore this fundamental difference between physician employees and other employees. There is no reason, and particularly not on the record before this Court, to upend well-established Ohio common law on this point.

2. This Court need not address issues that were not raised or briefed below

Even though there is no issue in this case as to proper identification of the physician-employee, the OAJ attempts to convince the Court that the issues of failure to identify a physician employee and "institutional malpractice" need to be addressed herein. (*See* OAJ Amicus Brief, at 6.) These issues, which were not raised below nor briefed by the parties, do not need to be considered by the Court. Nonetheless, if they are considered, the two hypothetical scenarios raised by OAJ do not necessarily result in no liability, as OAJ suggests.

In OAJ's first hypothetical, a patient seeks care in an emergency room and a nurse's paging for a physician is ignored while the patient passes away. (OAJ Amicus Brief, at 6.) OAJ contends that the hospital would be immunized from liability because malpractice could not be established against an identifiable "medical professional." (*Id.*) OAJ ignores that there are pre-litigation procedures for identifying potential defendants. *See* Civ.R. 34(D) and R.C. 2317.48. By utilizing these procedures, a potential plaintiff can find out which physicians were on duty or call when the

APPENDIX II- Trial Court Decisions

LeNeo v. Wyant Leasing Co. LLC, Hamilton C.P. No. A2300366 (Jun. 28, 2023)

Mickhail v. Garden II Leasing Co., Lucas C.P. No. CI-21-2737 (March 14, 2023)

Drenser v. Lake Health System. Inc, Cuyahoga C.P. No. CV-20-932429 (April 4, 2023)

Estate of Stephen Tate v. LP Warren LLC, Trumbull C.P. 2023 CV 00098 (May 5, 2023)

Bugeda v. Maplewood at Chardon LLC, Geauga C.P. No. 21P000743 (May 23, 2024)

Childers v. The Toledo Clinic, Inc., Lucas C.P. No G-4801-CI-2022-4076-000 (July 27, 2023)

Harris v. HCRMC Promedica, LLC, et al., Lucas C.P. No. CI-0202003021 (Aug. 15, 2023)

McCoy v. Avon Place Skilled Nursing & Rehab. Center, Cuyahoga C.P. No . CV-21-950678 (Oct. 11, 2023)

Ramsey v. Manorcare Health Services, LLC, Franklin C.P. No. 21CV006903 (October 12, 2023)

Martinez v. Promedica Toledo Hospital, Lucas C.P. No G-4801-CI-2023-1629-000 (Nov. 20, 2023)

Bachman v. Sybert, Franklin County C.P. No. 21CV3509 (July 29, 2024)

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MARVIN LENEO, et al.,	:	**Case No. A2300366**
Plaintiffs,	:	**Judge Shanahan**
vs.	:	**ENTRY ON JOINT MOTION FOR JUDGMENT ON THE PLEADINGS**
WYANT LEASING CO., LLC dba WYANT CARE CENTER, et al.,	:	
Defendants.	:	

This case is before the Court on joint motion of Defendants, Wyant Leasing Co., LLC, dba Wyant Woods Care Center. Heritage Ohio Leasing Co., LLC, dba Copley Health Center. Health Care Facility Management LLC. dba CommuniCare Family of Companies. CommuniCare Health Services. Inc., CommuniCare. Inc., WWood Asset Ownership. LLC. Copley Asset Ownership. LLC. and FIRELANDS MSTR LSCO, LLC ("Defendants"), for judgment on the pleadings under Civ.R. 12(C). For the reasons that follow, the motion is denied.

I. Facts

This is a refiled case against several nursing homes alleging negligence and recklessness involving the care provided to Plaintiff, Marvin LeNeo. Plaintiffs allege Defendants employ the care providers responsible for ensuring LeNeo's care and safety. Defendants manage, control and/or employ the nursing staff at Wyant Wood Healthcare Center and Copley Health Center.. Plaintiffs allege Defendants are vicariously liable for the negligent action of their employees and agents and independent contractors. None of the individual nurses or other employees are

named. Defendants contend plaintiff cannot prevail against them without a finding of liability against an individual, which is impossible, as no individual tortfeasor appears in the complaint. Accordingly, Defendants argue that Plaintiffs have failed to state a claim for relief against Defendants for vicarious liability. Additionally, Defendants argue Plaintiffs failed to submit an affidavit of merit as to each Defendant named in the complaint sufficient to establish the sufficiency of their medical claims, which include their claims for vicarious liability, understaffing and civil conspiracy.

II. Law

Civil Rule 12(C) provides that "after the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "A motion for judgment on the pleadings will be granted where the material allegations in the complaint, including all reasonable inferences therefrom, are construed in the plaintiff's favor, and it appears beyond doubt the plaintiff can prove no set of facts entitling the plaintiff to the relief sought." *Walker v. Metro. Envtl. Servs.*, 2018-Ohio-530, ¶ 17 (6th Dist.). Defendants submit that "accepting all Plaintiffs' allegations as true, and drawing all reasonable inferences in Plaintiffs' favor, and applying the basic principles of agency law, Plaintiffs have failed to state a claim for relief against Defendants for vicarious liability." Defendants submit that a principal is vicariously liable only when an agent could be held directly liable. As none of the individual nurses allegedly responsible for the harm are named (and now cannot be because the statute of limitations has expired), then the case against Defendants must be dismissed.

Clawson v. Hts. Chiropractic Physicians, LLC, 2022-Ohio-4154, and *Nat'l Union Fire Ins. Co., PA v. Wuerth*, 2009-Ohio-3601, as well as cases subsequent to both cases, are significant to the analysis. In *Clawson*, the Ohio Supreme Court considered "whether a plaintiff

may prevail on a claim of chiropractic malpractice against a chiropractor's employer under the doctrine of respondeat superior when the expiration of the applicable statute of limitations has extinguished the chiropractor's direct liability for the alleged malpractice. Based on our holding in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, and basic principles of agency law, we answer that question in the negative." *Clawson v. Hts. Chiropractic Physicians, LLC*, 2022-Ohio-4154, ¶ 1. In *Clawson*, the plaintiff filed an action against a chiropractor and his employer. The plaintiff failed to get service on the chiropractor within a year and the statute of limitations as to him expired. The Court held that if the plaintiff could not proceed as to the chiropractor, it could not proceed against the employer under a respondeat superior theory. Thus, the holding in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, essentially was extended from legal malpractice to medical malpractice. Defendants would have this Court extend it to nursing home non-physician employees.

The Court in *Clawson* approvingly quotes *Losito v. Kruse*, 136 Ohio St. 183, 186, 24 N.E.2d 705 (1940), for the proposition that, in vicarious liability cases, "the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied." *Clawson* at ¶ 13.

III. Analysis

The issue is whether Plaintiff needed to identify each and every non-physician employee who may have been involved in the allegedly negligent care provided to Plaintiff LeNeo. Plaintiffs assert Ohio law does not require naming individually every allegedly negligent employee. This Court agrees.

This Court finds that pursuant to the law of vicarious liability, Plaintiffs' suit against Defendants for the alleged negligence of it non-physician employees is not precluded despite the fact that these employees were not named as Defendants in Plainitffs' complaint.

Judge Megan E. Shanahan 6/28/23

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ENTERED
JUN 28 2023

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

DANIELLE MICKHAIL, PERSONAL REPRESENTATIVE /ADMINISTRATOR OF THE ESTATE OF CARLA NASH

Plaintiff,

vs.

GARDEN II LEASING CO, LLC, et al.,

Defendants.

Case No. CI-21-2737

Judge Joseph V. McNamara

OPINION AND JUDGMENT ENTRY

This matter is before the Court upon the Motion for Judgment on the Pleadings filed on December 16, 2022 by Defendant Garden II Leasing Co., LLC aka and dba Advanced Specialty Hospital of Toledo ("Advanced Hospital"), and Defendant Parkway Operating Co., LLC aka and dba Advanced Healthcare Center ("Advanced Center," collectively, "Defendants"). Upon review of the pleadings and memoranda of the parties, and the applicable law, the Court finds Defendants' motion not well-taken.

A. BACKGROUND

This is a personal injury case. Plaintiff Danielle Mickhail alleges that Defendants negligently inflicted injuries upon Plaintiff's decedent, Carla Nash, while Mrs. Nash was a patient at their nursing care facility.[1] Specifically, Plaintiff contends that Defendants failed to prevent Mrs. Nash from developing pressure ulcers, and further failed to maintain proper nutrition and hydration for Mrs. Nash.[2] Defendants separately answered Plaintiff's complaint, denying the negligence claims.[3]

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[1]

[2] *Id.* at ¶¶ 7-9.

[3] *Id.*

Defendants also filed a third-party complaint against Hospice of Northwest Ohio. The Court recently granted Hospice's motion for summary judgment, dismissing Defendants' third-party complaint. See Opinion & Judgment Entry, January 18, 2023.

Defendants filed a motion for judgment on the pleadings, arguing that Plaintiff cannot prevail on a theory of vicarious liability, as Plaintiff's complaint does not name individual tortfeasors, only entities. Defendants emphasize that the applicable statute of limitations has lapsed, precluding Plaintiff from amending her complaint to add individual defendants. In opposition, Plaintiff argues that the authority cited by Defendants is only applicable in professional negligence cases. Defendants counter that, for purposes of vicarious liability, the professional status of the employee and the type of claim are irrelevant, and Plaintiff must establish the liability of individual employees in order to prevail on a theory of respondeat superior.

Defendants' motion has been fully briefed, and the Court heard oral arguments on March 2, 2023. As such, Defendants' motion is now decisional.

B. STANDARD FOR JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings may be made "after the pleadings are closed but within such time as not to delay the trial." Civ.R. 12(C). "Civ.R. 12(C) motions are specifically for resolving matters of law." *Walker v. Metro. Envtl. Servs.*, 6th Dist. Lucas No. L-17-1131, 2018-Ohio-530, ¶17. "A motion for judgment on the pleadings will be granted where the material allegations in the complaint, including all reasonable inferences therefrom, are construed in the plaintiff's favor, and it appears beyond doubt the plaintiff can prove no set of facts entitling the plaintiff to the relief sought." *Id.* "In considering a Civ.R. 12(C) motion, the trial court may review only "the complaint and the answer as well as any material incorporated by reference or attached as exhibits to those pleadings." *Shannak v. Yark Auto. Grp., Inc.*, 6th Dist. Lucas No. L-21-1027, 2021-Ohio-2372, ¶12, quoting *Walker v. City of Toledo*, 6th Dist. Lucas, No. L-15-1240, 2017-Ohio-416, ¶19. "Employing the same standard as a Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, the trial court must construe as true the material allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Id.*

C. VICARIOUS LIABILITY

Both defendants named in Plaintiff's Complaint are entities, specifically, limited liability companies. As such, Plaintiff's causes of action are based on the doctrine of respondeat superior, pursuant to which, "an employer will have derivative liability for another's negligence when that tortfeasor was acting as an agent or 'servant' of the employer/'master.'" *Longlott v. Carpet Barn & Tile House*, 6th Dist. Lucas No. L-05-1057, 2005-Ohio-4883, ¶5, citing *Albain v. Flower Hospital*, 50 Ohio St.3d 251, 255, 553 N.E.2d 1038 (1990), reversed on other grounds. Defendants contend that, "[b]ecause Plaintiff has sued institutional parties upon a theory of vicarious liability, she cannot prevail against defendants without a finding of liability against an individual, which is impossible, as no individual tortfeasor appears in the Complaint."[4]

[4] Defendants' Motion for Judgment on the Pleadings, p. 1.

Defendants rely on the Ohio Supreme Court's recent decision in *Clawson v. Hts. Chiropractic Physicians*, L.L.C., 2022-Ohio-4154. In *Clawson*, the Ohio Supreme Court addressed the question of whether a plaintiff may pursue a vicarious liability claim under the doctrine of respondeat superior for medical malpractice against a physician's employer after the physician's direct liability has been extinguished. Previously, in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, the Ohio Supreme Court held that "a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice[,]" and thus, "a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice[.]" 2009-Ohio-3601 at ¶¶22 & 26. In *Clawson*, the Ohio Supreme Court held that, "[i]n light of this court's reliance in *Wuerth* on basic principles of agency law and the widely acknowledged similarities between legal malpractice and medical malpractice, we agree...that *Wuerth* precludes a vicarious-liability claim for medical malpractice against a physician's employer when a direct claim against the physician is time-barred." 2022-Ohio-4154, ¶29.

Defendants contend that, applying *Clawson*, Plaintiff cannot prevail on her vicarious liability claims against Defendants, as no individual tortfeasors are named in the complaint. Defendants further assert, and Plaintiff does not deny, that the applicable one-year statute of limitations for medical claims has passed, thereby precluding Plaintiff from amending her complaint to name individual defendants. In opposition, Plaintiff argues that *Clawson* "is only applicable to professional negligence cases brought against lawyers or physicians, i.e., legal malpractice and medical malpractice claims."[5] And, as Plaintiff's claim "is a medical claim separate and distinct from a medical malpractice claim, *Clawson* is inapplicable to this case[.]"[6]

In support, Plaintiff cites *Tisdale v. Toledo Hospital*, 6th Dist. Lucas No. L-11-1005, 2012-Ohio-1110. In *Tisdale*, the plaintiff sued a hospital for medical malpractice and medical negligence, alleging that nursing staff employed by the hospital failed to put pressure cuffs on his legs to preven blood clots, as ordered by the plaintiff's doctor. *Id.* at ¶2. The nursing staff were not named as defendants. On a motion to dismiss, the hospital argued that, in order to hold the hospital vicariously liable, *Wuerth* required the nurses be joined as defendants. *Id.* at ¶24. The trial court granted the hospital's motion to dismiss. On appeal, the 6th District reversed the trial court's judgment, finding that *Wuerth* "is sui generis" "for use as vicarious-liability precedent," and "the reach of its holding is thus circumscribed to legal-malpractice actions—or perhaps even more narrowly[.]" *Id.* at ¶29. The 6th District concluded:

> *Wuerth* hardly offers broad insulation from secondary liability for either law firms or hospitals. It merely recognizes that in framing the complaint the joinder/naming requirement depends on *the tortfeasor's relationship* to the principal. In turn, the issue of whether, or if, the statute of limitations

[5] Plaintiff's Response in Opposition, p. 1.
[6] *Id.* at 2.

> applies—*and to whom*—is determined by that relationship. A reading any more expansive threatens to obfuscate what should be considered settled law in Ohio [emphasis in original].

Id. at ¶33.

Defendants contend that *Clawson* overruled *Tisdale*. To an extent, that is undoubtably so. As the *Clawson* court observed, "Ohio's appellate courts have offered differing interpretations of [*Wuerth*'s] scope and meaning." Referencing *Tisdale* in particular, *Clawson* clarified that "*Wuerth* made no distinction with respect to a law firm's exposure to vicarious liability as to an attorney who is an employee of the firm and an attorney who is a partner in the firm." 2022-Ohio-4154 at ¶26. *Clawson* also expressly rejected the notion that *Wuerth's* holding is applicable solely to legal malpractice claims. *Id.* at ¶26 ("In light of this court's reliance in *Wuerth* on basic principles of agency law and the widely acknowledged similarities between legal malpractice and medical malpractice, we agree...that *Wuerth* precludes a vicarious-liability claim for medical malpractice against a physician's employer when a direct claim against the physician is time-barred."). On these points, *Clawson* clearly overruled *Tisdale*.

Nevertheless, the Court cannot agree that *Clawson* is as broad as Defendants suggest. Defendants emphasize that, in applying *Wuerth*, the Ohio Supreme Court stated: "There is no basis for differentiating between a law firm and *any other principal* to whom Ohio law would apply [emphasis added]." *Clawson*, 2022-Ohio-4154 at ¶32, quoting *Wuerth*, 2009-Ohio-3601 at ¶24. Based on this passage, Defendants urge the Court to find that the *Wuerth* rule applies to all "causes of action against an employer for vicarious liability[.]"[7] However, *Clawson* is not a wholesale rejection of the doctrine of respondeat superior. To the contrary, *Clawson* approvingly quotes *Losito v. Kruse*, 136 Ohio St. 183, 186, 24 N.E.2d 705 (1940) for the proposition that, in vicarious liability cases, "the plaintiff has a right of action against *either* the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied [emphasis added]." 2022-Ohio-4154 at ¶13. Rather than reject this longstanding principle, the *Clawson* Court held as follows:

> In *Wuerth*, we applied basic principles of agency law and held, 'A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.' Not only did we emphasize the similarities between the legal and medical professions with respect to liability for malpractice, but we also stated, 'There is no basis for differentiating between a law firm and any other principal to whom Ohio law would apply.' Today, we hold that the rule stated in *Wuerth* applies equally *to claims of vicarious liability for medical malpractice* [emphasis added].

Id. at ¶32.

[7] Defendants' Reply, p. 5.

Clawson clearly expands the *Wuerth* rule to medical malpractice cases. However, Plaintiff argues, there is a distinction between medical malpractice and "medical claims," and "[b]ecause claims against nurse-employees are not medical malpractice claims, they are not subject to the same requirements."[8] Here, the Court is inclined to agree with Plaintiff. As the Ohio Supreme Court has recognized, "the common meaning and legal definition of the term 'malpractice' [i]s limited to the professional misconduct of members of the medical profession and attorneys." *Hocking Conservancy Dist. v. Dodson-Lindblom Assoc.*, 62 Ohio St.2d 195, 197, 404 N.E.2d 164 (1980) (interpreting the scope of R.C. 2305.11). The Ohio Revised Code also makes a distinction between 'malpractice' and 'medical claims' as set forth in R.C. 2305.11(A) and 2305.113(A), respectively. Pursuant to R.C. 2305.11(A), 'an action for malpractice *other than an action upon a medical...claim*...shall be commenced within one year after the cause of action accrued." R.C. 2305.113(A) states that "an action upon a medical...claim shall be commenced within one year after a cause of action accrued."

Based on the distinction between "medical malpractice" and "medical claims," several appellate districts have found *Wuerth* inapplicable as to claims against hospitals and their non-physician employees. *Stanley v. Cmty. Hosp.*, 2nd Dist. Clark No. 2010CA53, 2011-Ohio-1290 ¶¶ 22-23 ("Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under R.C. 2305.11."); *Henik v. Robinson Mem. Hosp.*, 9th Dist. Summit No. 25701, 2012-Ohio-1169, ¶18 ("[t]he Ohio Supreme Court has held that the negligence of nurses employed by a hospital does not fall under the definition of 'malpractice' as discussed in R.C. 2305.11(A). Rather, the alleged negligence of a nurse employee falls under the definition of a 'medical claim' in R.C. 2305.113(A). Thus, a suit against a hospital under a theory of respondeat superior may proceed where an alleged negligent employee was not named as a defendant."); *Cobbin v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 107852, 2019-Ohio-3659, ¶30 ("...it is true that hospitals can be vicariously liable for the negligence of its nurses even if the nurses are not named in a plaintiff's complaint[.]").

The holding of *Clawson* does not undermine the reasoning of *Stanley*, *Henik* and *Cobbin*. *Clawson* clarified that the *Wuerth* rule "applies equally to claims of vicarious liability for medical malpractice." 2022-Ohio-4154 at ¶32. Had the Ohio Supreme Court also intended for *Wuerth* to apply vicarious liability claims based on medical claims, it could have said so. However, *Clawson*'s holding specifically extends *Wuerth* to include "claims of vicarious liability for medical malpractice," specifically. In absence of authority indicating that *Wuerth* also applies to medical claims, this Court declines to do so.

Moreover, reading *Clawson* as broadly as Defendants suggest would fundamentally alter the doctrine of respondeat superior, depriving plaintiffs of the "right of action against *either* the master or the servant, or against both" in all instances. The implications of such a reading would

[8] Plaintiff's Response in Opposition, p. 5.

be profound, particularly in a medical claim such as the instant case. Here, Plaintiff's cause of action arises not from a readily identifiable act or omission by a particular licensed medical practitioner, but rather, is based upon allegations of collective negligence by numerous employees, taking place over several months. Defendants' proposed reading of *Clawson* would require Plaintiff to name as defendants every employee in Defendants' facilities, rather than simply naming Defendants, as permitted by the long-standing doctrine of respondeat superior. Again, if the *Clawson* court intended the scope of its holding to include medical claims as well as medical malpractice, it would have said so.

For these reasons, this Court finds that *Wuerth* and *Clawson* do not preclude Plaintiff's suit against Defendants for the negligence of its non-physician employees, despite the fact that these employees were not named as defendants in Plaintiff's complaint. There being no dispute that Plaintiff's complaint was timely filed against Defendant for the alleged negligence of its employees, the doctrine of respondeat superior is applicable.

Based upon the foregoing, the Court finds Defendants' Motion for Judgment on the Pleadings not well-taken and is therefore **DENIED**.

JUDGMENT ENTRY

It is **ORDERED, ADJUDGED, AND DECREED** that Defendants' Motion for Judgment on the Pleadings is hereby **DENIED.**

March 14th, 2023

Joseph V. McNamara, Judge

c: LOUIS SCHNEIDER, ESQ.
ARTHUR KOSTENDT, ESQ.
JEFFREY VAN WAGNER, ESQ.
ALEXANDRIA ESPOSITO, ESQ.
MICHAEL MURPHY, ESQ.

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ESTATE OF SANDRA JEAN DRENSER
Plaintiff

LAKE HEALTH SYSTEM. INC. DBA LAKE HEALTH ET AL.
Defendant

Case No: CV-20-932429

Judge. MICHAEL J RUSSO

JOURNAL ENTRY

04/03/2023: D5 COMMUNITY HOSPITALISTS. LLC'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS. FILED 03/01/2023 BY CHRISTINE SANTONI 0062110. IS DENIED. THE CLAWSON COURT HELD "THAT THE RULE STATED IN WUERTH APPLIES EQUALLY TO CLAIMS OF VICARIOUS LIABILITY FOR MEDICAL MALPRACTICE." CLAWSON V. HTS.CHIROPRACTIC PHYSICIANS. L.L.C.. 2022-OHIO-4154 AT PARA. 32. WHILE THE CLAWSON COURT SUGGESTS THAT THE SCOPE OF ITS OPINION IN WUERTH AND CLAWSON COULD BE EXTENDED TO ALL PRINCIPALS. THE COURT SPECIFICALLY CHOSE NOT TO ABROGATE THE DOCTRINE OF RESPONDEAT SUPERIOR. RATHER. IT LIMITED ITS HOLDING TO THE MALPRACTICE OF PHYSICIANS, AND NOT TO THE NEGLIGENCE OF NURSES OR OTHER HOSPITAL EMPLOYEES. THE COURT FINDS THAT CLAWSON DOES NOT PRECLUDE PLAINTIFF'S ARGUMENT THAT COMMUNITY HOSPITALISTS CAN BE HELD VICARIOUSLY LIABLE FOR ANY FOR ANY NEGLIGENCE OF MAUREEN WEISHNER, C.N.P. THAT CONTRIBUTED TO THE INJURIES OF PLAINTIFF'S DECEDENT. THIS ENTRY TAKEN BY JUDGE JANET R BURNSIDE.

Judge Signature 04/04/2023

04/03/2023

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KAREN INFANTE ALLEN
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2023 CV 00098 CWR
FILED: 05 05/2023 10:24 AM

IN THE COURT OF COMMON PLEAS
- GENERAL DIVISION -
TRUMBULL COUNTY, OHIO

ESTATE OF STEPHEN TATE,	)	**CASE NO. 2023 CV 00098**
	)	
Plaintiff,	)	
	)	
V.	)	**JUDGE CYNTHIA RICE**
	)	
LP WARREN LLC,	)	
	)	
Defendant.	)	**JUDGMENT ENTRY**

This matter is before the Court on the Defendants' Motion for Directed Verdict. The Court has reviewed the Motion, the response, and the applicable law. For the reasons that follow, the Court finds the Defendants' Motion not well-taken.

In this case, Plaintiff, the Administrator of the Estate of Stephen Tate, filed a complaint asserting claims for medical negligence, wrongful death, violations of R.C. 3721.13, the Nursing Home Residents Rights, and Civil Conspiracy against the Defendants, Ohio for-profit corporations owned and controlled by LP Warren, LLC, that were responsible for providing care and services to residents of Signature Healthcare of Warren.

This case has proceeded to jury trial in this matter. Defendants have filed this Motion for Directed Verdict as to all Plaintiff's claims against them that are based on vicarious liability, citing to the Ohio Supreme Court's decision in *Clawson v. Hts. Chiropractic Physicians*, L.L.C., 2022-Ohio-4154 for the proposition that Plaintiff's failure to assert claims against individual agents, the nurses, precludes a finding of liability

against the principal entities. In *Clawson*, the plaintiff sued a chiropractic practice, but did not sue the individual chiropractor that caused the injury. The statute of limitations extinguished the claim against the individual chiropractor before service could be perfected, and the only remaining claims were against the employer for vicarious liability. The Supreme Court, in extending the holding in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 913 N.E.2d 939, 2009 -Ohio- 3601 from lawyers to physicians, held that a vicarious-liability claim for medical malpractice against a physician's employer is precluded when a direct claim against the physician is time-barred.

Accordingly, Defendants claim that under Clawson, Plaintiff cannot prevail on the vicarious liability claims against Defendants as no individual tortfeasors are named in the complaint, and the statute of limitations has passed.

Plaintiffs argue that in a nursing home, employees are under the direction and control of the employer, "including when to work, how exactly to work (through policies and direct supervision) and lack independent judgment" while the opposite is true for independent professionals such as lawyers and doctors "who are legally and ethically required to exercise their independent judgment." Plaintiff contends that her claims are not malpractice but instead are "medical claims" citing to *Tisdale v. Toledo Hosp.*, 197 Ohio Spp. 3d 316, 2012-Ohio-1110, 967 N.E.2d 280, ¶36 (6th Dist.). In that case, the court explained:

> The Supreme Court has long held that the negligence of nurses employed by a hospital is not within the definition of "malpractice" as used by R.C. 2305.11(A) [the statute of limitations]. *Lombard v. Good Samaritan Med. Ctr.*, 69 Ohio St. 2d 471, 473-474, 433 N.E.

> 2d 162 (1982). Rather, a claim asserting that a nurse-employee acted negligently is a type of "medical claim" within the meaning of R.C. 2305.113(A) *Cope [v. Miami Valley Hosp.* 2011-Ohio-4869, (2nd Dist.)] at ¶22 ("[A]ll other medical employees are not subject to malpractice.").

Indeed, the *Weurth* court acknowledged that"[a]s we explained in *Thompson v. Community Mental Health Ctrs. of Warren* (1994), 71 Ohio St.3d 194, 195, 642 N.E.2d 1102, "[i]t is well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys." *Weurth* at ¶15.

This identical issue was addressed post-Clawson in *Mickhail, Personal Representative/Administrator of the Estate of Carla Nash, v. Garden II Leasing Co., LLC, et al,* CI-21-2737, Lucas Cty. Court of Common Pleas, (March 16, 2023). In *Mickhail,* the plaintiff estate of a nursing home resident brought a negligence claim alleging that the defendants failed to prevent the decedent from developing pressure ulcers (aka bedsores) and further failed to maintain proper nutrition and hydration for the decedent. Plaintiff did not name the individual nurses and other non-physician employees whose alleged negligence caused the decedent's injuries. In that case, Defendants filed a motion for judgment on the pleadings asserting that plaintiff could not prevail on her vicarious liability claims against defendants because no individual tortfeasors were named in the complaint.

The Mikhail Court found, and this Court agrees, that *Wuerth* and *Clawson* do not overrule basic agency principles of tort law.

> [T]he Court cannot agree that *Clawson* is as broad as Defendants suggest. Defendants emphasize that, in applying Wuerth, the Ohio Supreme Court stated: "There is no basis for differentiating

> between a law firm and any other principal to whom Ohio law would apply [emphasis added]." *Clawson*, 2022-Ohio-4154 at ¶ 32, quoting *Wuerth*, 2009-Ohio-3601 at ¶ 24. Based on this passage, Defendants urge the Court to find that the *Wuerth* rule applies to all "causes of action against an employer for vicarious liability[.]" However, *Clawson* is not a wholesale rejection of the doctrine of respondeat superior. To the contrary, *Clawson* approvingly quotes *Losito v. Kruse*, 136 Ohio St. 183, 186, 24 N.E.2d 705 (1940) for the proposition that, in vicarious liability cases, "the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied [emphasis added]." 2022-Ohio-4154 at ¶ 13. Rather than reject this longstanding principle, the *Clawson* Court held as follows:
>
> In *Wuerth*, we applied basic principles of agency law and held, 'A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.' Not only did we emphasize the similarities between the legal and medical professions with respect to liability for malpractice, but we also stated, 'There is no basis for differentiating between a law firm and any other principal to whom Ohio law would apply.' Today, we hold that the rule stated in *Wuerth* applies equally to claims of vicarious liability for medical malpractice. *Mickhail* at 4 (quoting *Clawson*, 2022-Ohio-4154, ¶ 32) (emphasis included in *Mickhail* opinion).

The *Mickhail* Court also recognized that Defendants interpretation of *Clawson* would be problematic, from a practical standpoint:

> Moreover, reading Clawson as broadly as Defendants suggest would fundamentally alter the doctrine of respondeat superior, depriving plaintiffs of the "right of action against either the master or the servant, or against both" in all instances. The implications of such a reading would be profound, particularly in a medical claim such as the instant case. Here, Plaintiffs cause of action arises not from a readily identifiable act or omission by a particular licensed medical practitioner, but rather, is based upon allegations of collective negligence by numerous employees, taking place over several months. Defendants' proposed reading of Clawson would require Plaintiff to name as defendants every employee in Defendants' facilities, rather than simply naming Defendants, as

> permitted by the long-standing doctrine of respondeat superior. Again, if the Clawson Court intended the scope of its holding to include medical claims as well as medical malpractice, it would have said so. Id. at 5-6 (emphasis added).

This Court approves and adopts the reasoning of the *Mickhail* court, and finds that *Wuerth* and *Clawson* do not preclude Plaintiff's suit against Defendants for the negligence of its non-physician employees who were not named in the complaint as defendants.

Moreover, even if the Plaintiff's claims were somehow barred for failure to individually name the non-physician staff, Ohio law expressly allows claims against the nursing home directly for violations of their statutory duties to patients pursuant to R.C. 3721.13(A). "Any resident whose rights under sections 3721.10 to 3721.17 of the Revised Code are violated has a cause of action against any person *or* ***home*** committing the violation." R.C. 3721.17. (emphasis added.)

In a recent case, decided after *Clawson,* the Eleventh District held the Nursing Home Resident's Bill of Rights ("NHRBR") provides "a new and additional remedy for survivorship and wrongful death, which includes punitive damages." *Cunning v. Windsor House, Inc.*, 2023-Ohio-352, P60. The *Cunning* court upheld a verdict because the jury was properly instructed on the theory of general nursing negligence and a violation of the NHRBR, and held that a verdict was permissible under either theory.

> "While one could envision a scenario in which there are multiple injuries at issue in the same case—one resulting from ordinary negligence and another from a negligent violation of the NHRBR or a violation of a right afforded by the NHRBR that does not result in bodily injury—in this case, the estate's claim for medical negligence and violations of the NHRBR both

> concern the same injury. Thus, it would seem the cumulative remedy rule of statutory construction applies. 'Where a statute which creates a new right prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute for a right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option.' Id. at ¶ 61 (quoting *Zanesville v. Fannon*, 53 Ohio St. 605 (1895), paragraph two of the syllabus.

Based on the foregoing, the court holds that the Motion for Directed Verdict is not well-taken and is DENIED.

JUDGE CYNTHIA WESTCOTT RICE

GEAUGA COUNTY CLERK OF COURTS Case: 21P000743, eFile ID: 197301,
FILED: ONDREY, DAVID M 05/10/2023 03:21 PM

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

ANN BUGEDA	:	CASE NO. 21P000743
Plaintiff(s)	:	JUDGE DAVID M. ONDREY
-vs-	:	**ORDER**
MAPLEWOOD AT CHARDON LLC	:	
Defendant(s)	:	

Pending before the Court is the Defendants'[1] joint Motion for Partial Summary Judgment ("MSJ"), filed March 2, 2023.[2] The Court also reviewed and considered the Plaintiffs'[3] Brief in Opposition ("BIO"), filed March 30, 2023; supplemental authorities, filed April 4, 2023 and May 8, 2023; and Defendants' Reply Brief ("Reply"), filed April 5, 2023.

A trial court may grant summary judgment when "'(1) [n]o genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.'" *Esber Beverage* at ¶ 9, quoting *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12, quoting *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977), citing Civ.R. 56(C).

Under Civ.R. 56, the moving party bears the initial burden to inform the trial court of the basis for the motion and to identify those portions of the record that demonstrate the absence of a material fact. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St.3d 461, 2008-Ohio-87, 880 N.E.2d

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[1] "Defendants" collectively refers to Maplewood at Chardon, LLC; Maplewood at Heather Hill, LLC; Maplewood Senior Living, LLC; Kevin Cook; Krystal Martin; Kim Keller; Donna Carter; Lisa Hoffman; Gina Saunders; and Eileen Duggan.
[2] The MSJ is partial, as it only seeks judgment on the survivorship claims.
[3] "Plaintiffs" collectively refers to Ann Bugeda and Christine Golias, Joint Executors of the Estate of Leona Sovey.

88, ¶ 12, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). Once the moving party satisfies its burden, the nonmoving party bears a corresponding duty to set forth specific facts to show that a genuine issue exists. Civ.R. 56(E); *Dresher, supra.* "Whether a genuine issue exists is answered by the following inquiry: Does the evidence present 'a sufficient disagreement to require submission to a jury' or is it 'so one-sided that one party must prevail as a matter of law[?]'" *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123, 1126 (1993), quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 251–252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The MSJ is based on a recent Ohio Supreme Court decision in *Clawson v. Heights Chiropractic Physicians, L.L.C.*, 2022-Ohio-4154. Defendants argue that *Clawson*, coupled with the Court's Order prohibiting amendment to the pleadings, renders the survivorship claims unviable against the LLC Maplewood at Chardon. MSJ at pg. 2, ¶ 1. As Defendants note, the Court's Order prohibiting amendment was based on a procedural technicality, i.e., the failure to identify incorrectly named defendants within one year as prescribed by Civ.R. 3(A). Id.

Defendants argue that *Clawson* applies to both direct and ancillary claims and further intimate that Plaintiffs' survivorship claims can only be derivative. While Defendants accurately state that a corporation acts through its agents, it is also true that a corporation can be independently liable.[4] In fact, some Ohio courts have held nursing homes can be "directly liable" aside from vicarious liability for acts of their employees.[5]

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[4] *Butler v. Jordan*, 2001-Ohio-204, 92 Ohio St. 3d 354, 367, 750 N.E.2d 554, 565. "A municipal corporation, *unless immune by statute,* is liable for its negligence in the performance or nonperformance of its acts." Citations omitted. *Delco Prod. Div. Gen. Motors Corp. v. Dayton Forging & Heat Treating Co.*, No. 6017, 1979 WL 155686, at *2 (Ohio Ct. App. Feb. 2, 1979). Examined the issue of "whether a corporation may relieve itself from responsibility for its own negligence". Cleveland Ry. Co. v. Wiesenberger, 15 Ohio App. 437, 444 (1922). Distinguishing between corporate liability "for its own negligence" versus vicarious liability for acts of its employees. See also, *Shaw v. Bd. of Ed. of City Sch. Dist. of Columbus*, 17 Ohio Law Abs. 588, 590 (1934).

[5] *Slagle v. Parkview Manor, Inc.*, No. CA-6155, 1983 WL 7079, at *4. "Chapter 3721 places a direct obligation on nursing home operators such as the two corporations of this case and makes them directly liable for violation of a resident's rights both in compensatory damages and punitive damages." *Jackson v. Hogeback*, 2014-Ohio-2578, ¶ 34. "In the context of negligent hiring, supervision, or retention, liability on behalf of the employer results by way of its own negligence in selecting a person to employ or allowing a person to continue to work, where the employer, knows or should have known of the hired individual's violent or dangerous propensities." *Altercare of Mayfield Vill., Inc. v. Berner*, 2017-Ohio-958, ¶ 3, 86 N.E.3d 649, 653. Nursing home sued for its "own negligence" and for breaching its duty of care, etc.

Clawson generally applies to preclude a derivative survivorship claim but does not apply to a direct claim against the employers for their own negligence.[6] Plaintiffs here have arguably asserted direct liability claims against the entities for their own negligence.

Plaintiffs allege that "Defendants and their agents and/or employees failed in their duty", etc. Complaint at ¶ 25. Plaintiffs allege that the entities failed to comply with their duties under R.C. § 3721.01. Id. at Third Claim. Plaintiffs further allege a failure of supervision, among other direct claims. Id. at ¶ 25.

Defendants did not address Plaintiffs' claims regarding the assertion of direct liability other than to generally dispute existence of such causes of action. This leaves a material issue of fact as to whether direct liability claims against the entities have been asserted, thereby preventing summary judgment at this time.

Even absent direct liability claims, or ultimate liability for same, summary judgment would not be appropriate given that the vicarious liability claims were extinguished "otherwise than on the merits." In its reasoning, the *Clawson* Court explained the distinction between its earlier decisions in *Comer*[7] and *Wuerth*[8].

The *Clawson* Court noted that there could be no agency liability where claims against the agent were barred by the statute of limitations. *Clawson* at ¶ 15. In explaining the different results between the cases, the *Clawson* Court reasoned:

> we distinguished *Comer* in part because "[t]he claim against the hospital [in *Comer*] was extinguished by the statute of limitations, not by application of immunity," *id.* A determination of immunity, we stated, is not a determination of liability, *id.*, whereas a dismissal based on the statute of limitations is a dismissal on the merits". . . Because Clawson had failed to timely serve Dr. Bisesi with her refiled complaint, and because the statute of limitations on her claim against Dr. Bisesi had expired, Clawson's right of action against Dr. Bisesi was extinguished by operation of law. [Id. at ¶¶ 31 and 34, respectively.]

Consequently, *Clawson* applies to preclude vicarious liability claims where the agents' liability extinguished on the merits. Here, the claims against the employees/agents extinguished

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[6] The "employers" collectively refers to Maplewood at Chardon, LLC; Maplewood at Heather Hill, LLC; Maplewood Senior Living, LLC.

[7] *Comer v. Risko*, 2005-Ohio-4559, 106 Ohio St. 3d 185, 833 N.E.2d 712.

[8] *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 2009-Ohio-3601, 122 Ohio St. 3d 594, 913 N.E.2d 939.

upon a failure of Plaintiffs to identify them within the time prescribed by Civ.R. 3(A). Such decision was otherwise than on the merits.[9]

Accordingly, *Clawson* does not prohibit a direct action against the entities, the existence of which is disputed but remains an issue of fact. Further, *Clawson* does not apply to preclude an agency-based claim for vicarious liability where liability of the agents extinguished otherwise than on the merits, as here.

Finally, in addition to the conclusions reached above, the Court is persuaded that *Wuerth* and *Clawson* do not overrule basic agency principles of tort law, as likewise determined in the three Common Pleas decisions cited by the Plaintiffs herein, namely *Mickhail v Garden Leasing Co., LLC,* Lucas County Common Pleas Case No. CI-21-2737, *Estate of Sandra Jean Drenser v Lake Health System Inc.* Case No. 20-932429, and *Estate of Stephen Tate v LP Warren LLC,* Case No. 2023 CV 00098 (5/5/2023). In such decisions, the courts concluded the Supreme Court conclusions should be limited to malpractice claims. Plaintiffs do not make malpractice claims in the instant action.

For all the foregoing reasons, the Defendants Motion for Partial Summary Judgment must be Denied.

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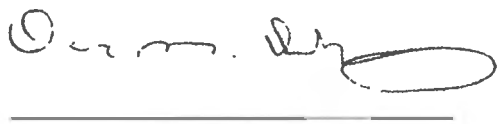
[9] *Brown v. Marsaw*, No. 66360, 1994 WL 197211, at *3 (Ohio Ct. App. May 19, 1994). "Decisions on the merits should not be avoided on the basis of mere technicalities; pleading is not 'a game of skill in which one misstep by counsel may be decisive to the outcome [;] * * * [rather,] the purpose of pleading is to facilitate a proper decision on the merits.'" Citations omitted. The *Brown* Court thereby implies that the trial court's decision, apparently based on Civ.R. 3(A) to allow amendment within 1 year of filing the original complaint, but after the statute of limitations had run, was a technicality, which it equates to a decision otherwise than on the merits. Several cases equate rulings on "pleading deficiencies" as otherwise than on the merits. See, e.g., *State ex rel. Rust v. Lucas Cty. Bd. of Elections*, 2003-Ohio-5643, ¶ 6, 100 Ohio St. 3d 214, 215, 797 N.E.2d 1254, 1255. "Given the precedent favoring liberal amendment of pleadings and the resolution of cases on their merits rather than upon pleading deficiencies"; *Jordan v. Cuyahoga Metro. Hous. Auth.*, 2005-Ohio-2443, ¶ 19, 161 Ohio App. 3d 216, 222, 829 N.E.2d 1237, 1241. "The collective purpose of Civ.R. 12(B)(6) and Civ.R. 15(A) is to encourage such amendments so that a plaintiff can correct pleading deficiencies and thereby proceed to have the case decided on its merits." *Bethel v. Chillicothe*, 2005-Ohio-5390, ¶ 6. "More recently, the Supreme Court of Ohio addressed the issue presented in the case sub judice in *Blankenship et al. v. Blackwell, Secy. of State et al.*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382. The *Blankenship* Court reasoned that 'when a failure to comply with R.C. 2731.04 is raised and relators file a motion for leave to amend the caption of the complaint to specify that the mandamus action is brought in the name of the state on their relation, [the court has] granted leave to amend so as to resolve cases on the merits rather than on a pleading deficiency.'"



JUDGE DAVID M. ONDREY

Cc: Donna Carter, Pro Se Defendant
Lisa Hoffman, Pro Se Defendant
Gina Saunders, Pro Se Defendant
Eileen Duggan, Pro Se Defendant

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

LISA CHILDERS,

Plaintiff

vs.

THE TOLEDO CLINIC, INC., et al.,

Defendants.

* Case No. G-4801-CE-2022-4076-000
*
*
* **OPINION AND JUDGMENT ENTRY ON DEFENDANT MCLAREN ST. LUKE'S HOSPITAL'S MOTION FOR JUDGMENT ON THE PLEADINGS**
*
*
*
* JUDGE GARY G. COOK

This matter is before the Court on Defendant McLaren St. Luke's Hospital's (hereinafter "Defendant") Motion for Judgment on the Pleadings, filed March 24, 2023. Plaintiff Lisa Childers (hereinafter "Plaintiff") filed her Memorandum in Opposition to Defendant McLaren St. Luke's Hospital's Motion for Judgment on the Pleadings on April 14, 2023. Defendant thereafter filed its Reply in Support of Motion for Judgment on the Pleadings on April 21, 2023. This motion is now decisional.

This instant case involves medical negligence claims stemming from a surgery Plaintiff underwent at Defendant's hospital on July 8, 2020. Specifically, Plaintiff alleges a surgical clip was not removed from her left ureter prior to the end of her surgery, ultimately necessitating the removal of her left kidney on December 23, 2021. The leftover clip was not discovered until Plaintiff underwent a cystoscopy due to hydronephrosis on October 29, 2021. Plaintiff alleges Defendant is vicariously liable for medical negligence stemming from the actions of its agents and or employees at the time of Plaintiff's July 2020 surgery. By contrast, Defendant argues it cannot be held vicariously liable, because Plaintiff failed to name any of its specific agents or employees in her suit prior to expiration of the one-year statute of limitations for medical malpractice claims.

I. Legal Standard

"A Civ.R. 12(C) motion for judgment on the pleadings has been characterized as a belated Civ.R. 12(B)(6) motion for failure to state a claim upon which relief may be granted, and the same standard of review is applied to both motions." *McMullian v. Borean*, 6th Dist. Nos. OT-05-040, OT-05-037, 2006-Ohio-3867, 167 Ohio App. 3d 777, 857 N.E.2d 180, ¶ 7. "In order for a trial court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to the relief sought." *Ohio Bureau of Workers' Comp. v. McKinley*, 130 Ohio St. 3d 156, 2011-Ohio-4432, 956 N.E.2d 814, ¶ 12, citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975); *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254, ¶ 14.

"The allegations of the complaint must be taken as true, and those allegations and any reasonable inferences drawn from them must be construed in the nonmoving party's favor." *Id.* at 12. The Court considers the complaint, as well as materials attached to the complaint, in ruling on a Civ.R. 12(B)(6) motion. See e.g. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281 (1997), fn. 1 (citations omitted) ("Material incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss.").

II. Analysis

Defendant argues that pursuant to the Supreme Court of Ohio's decisions in *Natl. Union Fire Ins. Co. v. Wuerth* and *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, it cannot be held vicariously liable for any negligent conduct by its agents and/or employees because no such claims have been filed within the applicable statute of limitations. "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." *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 22. The Supreme Court of Ohio recently clarified: "*Wuerth* precludes a vicarious-liability claim for medical malpractice against a physician's employer when a direct claim against the physician is time-barred." *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2022-Ohio-4154, ¶ 29. Because Plaintiff has not named specific employees/agents of Defendant within the one-year statute of limitations, Defendant now argues the vicariously liability claim against it must be dismissed.

However, the Second District Court of Appeals has addressed the timeliness of vicarious liability claims where a plaintiff does not individually name hospital employees in the complaint. In *Stanley v. Cmty. Hosp.*, the Second District stated the following:

> Relying on *Wuerth*, Community argues that it is not directly liable for Stanley's injuries because it cannot practice medicine, and therefore cannot commit medical malpractice. Moreover, Community argues that its nurse-employees cannot be found liable because Stanley's claims against them are time-barred by the statute of limitations since he failed to individually name them as defendants in the complaint. **Thus, the issue before us is whether *Wuerth* should be extended to the instant case in order to preclude a suit against Community where the employee nurses were not named as defendants and where the statute of limitations ran against them after suit had been filed against the hospital.**
>
> **After a thorough review of the record and the pertinent legal authority, we conclude that Community's interpretation of the Ohio Supreme Court's holding in *Wuerth* is too expansive.**

2d Dist. Clark No. 2010 CA 53, 2011-Ohio-1290, ¶¶ 19-20 (emphasis added). Put succinctly, the Second District Court of Appeals directly rejected the argument advanced by Defendant in the instant case, and the Supreme Court of Ohio declined to take up the matter on appeal. *Stanley v. Cmty. Hosp.*, 129 Ohio St.3d 1450, 2011-Ohio-4217, 951 N.E.2d 1047.[1] "*Wuerth* does not preclude a suit against [a defendant hospital] for the negligence of its employee nurses despite the fact that the nurse or nurses were not named as defendants in Stanley's complaint." *Id.* at ¶ 23. This logic can be applied to Plaintiff's vicarious liability claims in the instant case against Defendant as a result of the alleged negligence of its "nurses or other hospital personnel."[2] As such, Defendant's motion for judgment on the pleadings is denied.

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[1] In *Clawson*, the Supreme Court of Ohio addressed various interpretations of the *Wuerth* case by Ohio's appellate courts. *Clawson* at ¶¶ 25-28. Importantly, the Supreme Court of Ohio did not distinguish, overrule, or even address *Stanley* in its *Clawson* opinion.

[2] Plaintiff's Memorandum in Opposition to Defendant McLaren St. Luke's Hospital's Motion for Judgment on the Pleadings, filed April 14, 2023, at 1.

JUDGMENT ENTRY

After careful consideration, the Court finds Defendant McLaren St. Luke's Hospital's Motion for Judgment on the Pleadings, filed March 24, 2023, not well-taken. Defendants' motion is therefore DENIED. **IT IS SO ORDERED**.

7.26.23
Date

JUDGE GARY G. COOK

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Calvin Harris,	*	Case No. CI-0202003021
	*	
Plaintiff,	*	Judge Lindsay D. Navarre
	*	
	*	ORDER AND JUDGMENT ENTRY
v.	*	
	*	
HCRMC Promedica, LLC, et al.	*	
	*	
Defendants,	*	

This matter is before the Court on Defendant HCRMC-Promedica, LLC's Motion for Judgment on the Pleadings pursuant to Ohio Civil Rule 12(C) filed on January 9, 2023. Plaintiff filed his Brief in Opposition on January 20, 2023. On January 27, 2023, Defendant filed its reply in support of its original Motion. With leave of Court, Plaintiff filed a sur-reply on February 17, 2023. Also with leave of Court, Defendant filed a sur-sur-reply on March 23, 2023. This matter is now decisional.

Upon consideration of the pleadings, memoranda of counsel, and applicable law, the Court finds Defendant HCRMC-Promedica, LLC's Motion for Judgment on the Pleadings is not well-taken and denied.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Calvin Harris filed the present action against Defendant HCRMC-Promedica, LLC alleging negligent medical care and treatment he received from Defendant's employees while under their care through the dates of November 20, 2018 and December 18, 2018. Plaintiff also named Tatiana Masyk, MD, in his original Complaint, alleging medical negligence. Dr. Masyk allegedly supervised and directed "his care and treatment." Plaintiff's Complaint ¶12.

Plaintiff filed his Complaint on September 11, 2020, bringing an action for medical negligence against Dr. Masyk and respondeat superior/agency by estoppel claims against Defendant based on the actions of Dr. Masyk and "nurses, nurse practitioners, and other persons who treated and cared for Calvin Harris." Plaintiff's Complaint ¶28. Dr. Masyk was voluntarily dismissed from the action on September 16, 2022 via joint stipulation.

II. JUDGMENT ON THE PLEADINGS STANDARD

Parties may move for judgment on the pleadings any time "[a]fter the pleadings are closed but within such time as to not delay trial . . . ." Ohio Civ. R. 12(C). A motion for judgment on the pleadings shall be granted when the "court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn therefrom, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *State ex rel. Midwest Pride IV v. Pontious*, 75 Ohio St. 3d 565, 570 (1996). Dismissal pursuant to Civ. R. 12(C) is permissible when no issues of material fact exist. *Peterson v. Teodosio*, 34 Ohio St. 2d 161, 166 (1973). Judgment on the pleadings permits review of the complaint and answer. *Pontious*, 75 Ohio St. 3d at 569.

III. ANALYSIS

A. Defendant's Motion for Judgment on the Pleadings was Timely Filed as to Not Delay Trial.

A motion for judgment on the pleadings can be made "[a]fter the pleadings are closed but within such time as to not delay trial . . . ." Ohio Civ. R. 12(C). Defendant's Motion was filed on January 9, 2023, at which time trial was originally scheduled for February 27, 2023. Plaintiff argues Defendant was untimely in filing its Motion because the briefing schedule would delay trial. Plaintiff also argued there was no reason Defendant had to delay filing of its Motion for 28 months, noting this Court's original Dispositive Motion Deadline of October 3, 2022. Case Management Order (April 11, 2022).

Defendant in turn argued there would be no delay to trial because its Motion would become decisional only 30 days prior to trial. Further, Defendant noted the limited scope of review in deciding its Motion as only the pleadings themselves would be considered. As to cause for Defendant's delay in filing its Motion, Defendant argued there was no basis on which to file its Motion until the Ohio Supreme Court issued its decision in *Clawson v. Heights Chiropractic Physicians, LLC*, which did not occur until the end of November 2022.

"The determination of whether the motion constitutes a delay of trial is within the sound discretion of the court. However, if it seems clear that the motion may effectively dispose of the case, the court should permit it regardless of any possible delay its consideration may cause." *Fischer v. Morales*, 38 Ohio App. 3d 110 (10th Dist. Ct. App. 1987), paragraph 2 of the syllabus. Given Defendant's Motion was based on an Ohio Supreme Court decision that was not issued until the end of November 2022, the Court is inclined to find Defendant's Motion timely. Further, Plaintiff will suffer no undue burden, delay, or prejudice from the Court considering

Defendant's Motion because the original trial date of February 27, 2023 has since been vacated with trial now scheduled to commence on October 2, 2023. Order Vacating Trial Date (January 31, 2023); Revised Case Management Order (March 23, 2023).

B. Defendant's Motion for Judgment on the Pleadings Must be Denied Because the *Clawson* Decision is Inapplicable as to Nursing Home Medical Claims.

Defendant argues Plaintiff's Complaint should be dismissed based on the Ohio Supreme Court's ruling in *Clawson*. In *Clawson*, the Ohio Supreme Court reexamined the history of Ohio's agency law and vicarious liability. Slip Opinion No. 2022-Ohio-4154 (Nov. 23, 2022). First, the Court reviewed its decision in *National Union Fire Insurance Company v. Wuerth* where the Court was asked to determine whether a law firm could be found liable for legal malpractice despite all relevant principals and employees having been dismissed from the lawsuit. 122 Ohio St. 3d 594 (2009).

In *Wuerth*, the Court cited the following principles of agency law: "(1) a person can be held liable for another's negligence only derivatively, . . . ; (2) generally, an employer is vicariously liable for its employees' torts under the doctrine of respondeat superior, . . . ; and (3) '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.'" *Clawson*, Slip Opinion No. 2022-Ohio-4154, ¶20 (citing *Wuerth*, 122 Ohio St. 3d at 599) (internal citations omitted)). The Court ultimately determined "a law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." *Wuerth*, 122 Ohio St. 3d at 600.

After its extensive review of *Wuerth*, the Ohio Supreme Court ultimately held the same principles applied to a medical malpractice claim against a chiropractor's employer when the

claim against the physician himself was time-barred. *Clawson*, Slip Opinion No. 2022-Ohio-4154, ¶29. This was a simple conclusion as the Court drew from principles of medical malpractice when determining the outcome of *Wuerth*. *See id.* at ¶19 ("With respect to the first issue in *Wuerth*—whether a law firm may be directly liable for legal malpractice—we looked to our medical-malpractice precedent . . . .").

Defendant argues it cannot be found liable as a principal because none of its agents or employees remain named in Plaintiff's Complaint for liability to be imposed vicariously. Given that the applicable statute of limitations has passed for Plaintiff's claim, Defendant argues there is no mechanism through which Defendant can be found vicariously liable. *See* O.R.C. § 2305.113(A) ("[A]n action upon a medical . . . claim shall be commenced within one year after the cause of action accrued."). Specifically, Defendant latches onto one sentence in the *Clawson* decision in drawing this conclusion: "Not only did we emphasize the similarities between the legal and medical professions with respect to liability for malpractice, but we also stated, 'There is no basis for differentiating between a law firm and any other principal to whom Ohio law would apply.' *Id.* at ¶ 24. Today, we hold that the rule stated in *Wuerth* applies equally to claims of vicarious liability for medical malpractice." *Clawson*, Slip Opinion No. 2022-Ohio-4154, ¶32.

Plaintiff argues *Clawson* is inapplicable to the present case because both *Clawson* and *Wuerth* dealt with medical and legal malpractice respectively. Instead, Plaintiff insists a medical claim against a nursing home based on the negligence of Defendant's nurse employees can survive without naming the individual nurses responsible for the alleged negligence. "A hospital should be responsible for the negligence of its employees who perform medical services and act in the scope of their employment." *Cope v. Miami Valley Hosp.*, 195 Ohio App. 3d 513, 520 (2nd Dist. Ct. App. 2011). Plaintiff argues the same general principle applies to nursing homes.

The Court is ultimately inclined to agree with Plaintiff. "[A] medical claim can be asserted against . . . a 'home' and against 'any employee or agent of a . . . home.' . . . [Defendant], could have respondeat superior liability for medical claims asserted against any employees it hires to provide medical care to the home's residents." *O'Dell v. Vrable III*, 2022-Ohio-4156, ¶29 (4th Dist. Ct. App. 2022). Plaintiff exercised his option to sue Defending nursing home as principal in the present matter, a choice that has long been a staple of Ohio's agency law. *See Losito v. Kruse*, 136 Ohio St. 183, 187 (1940) ("For the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied.").

The Ohio Supreme Court has explicitly distinguished "medical malpractice claims" from mere "medical claims" when determining the applicable law. *See Lombard v. Good Samaratin Medical Ctr.*, 69 Ohio St. 2d 471, 474 (1982) ("Appellees argue, however, that (1) these cases present 'medical claims'; (2) the General Assembly intended that the terms 'malpractice' and 'medical claims' be used interchangeably; and, therefore, (3) R.C. 2305.11(A) bars all medical claims filed more than one year after the cause of action arose. We disagree."). "Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under R.C. 2305.11." *Stanley v. Cmty. Hosp.*, 2011-Ohio-1290, ¶22 (2nd Dist. Ct. App. 2011). The same must hold true for the employees of nursing homes.

The *Clawson* decision has no bearing on whether medical claims brought against a nursing home or hospital on the basis of a nurse employees' negligence constitute malpractice. Simply put, not all medical claims are malpractice claims, contrary to what Defendant may

argue. *Clawson* merely applied the *Wuerth* decision to a medical malpractice analysis in determining whether the principal could be held liable when the chiropractor-employee that committed the malpractice could also no longer be found liable for malpractice. *Clawson*, Slip Opinion No. 2022-Ohio-4154, ¶¶32-33. The Ohio Supreme Court's reference to various appellate court decisions merely clarified that the status of an individual within a firm or practice has no bearing on whether said principal can be held vicariously liable. *See id.* at ¶26 ("Contrary to those decisions, *Wuerth* made no distinction with respect to a law firm's exposure to vicarious liability as to an attorney who is an employee of the firm and an attorney who is a partner in the firm. . . . We therefore reject any suggestion that *Wuerth* is limited to claims arising out of the negligence of a partner/part owner, as opposed to a traditional employee.").

Notably, *Clawson* makes no mention of the above-referenced *Cope* or *Stanley* decisions arising out of the Second District explicitly distinguishing medical malpractice claims and medical claims involving hospital employees. Both decisions explicitly indicated *Wuerth* was inapplicable to the latter regarding vicarious liability. If the Ohio Supreme Court believed the Second District was incorrect and that *Wuerth* did indeed apply to vicarious liability claims involving hospitals, it would have clarified such.

C. Plaintiff's Complaint Does Not Sufficiently Plead a Claim for Violation of the Nursing Home Patients' Bill of Rights.

In opposition to Defendant's Motion for Judgment on the Pleadings, Plaintiff also argued he sufficiently pled a claim for violation of the Ohio Nursing Home Patients' Bill of Rights. The Court finds this argument to be irrelevant as the Complaint only raised claims for medical negligence against Dr. Masyk (a claim which has since been dismissed), two claims against Defendant for respondeat superior, and one claim against Defendant for agency by estoppel.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED, and DECREED that Defendant HCRMC Promedica, LLC's Motion for Judgment on the Pleadings is not well-taken and DENIED.

August 15, 2023

Judge Lindsay D. Navarre

cc: J. Randall Engwert
Taylor Knight
Blake Dickson

ENTERED
SEP 14 2023

THE STATE OF OHIO, HAMILTON COUNTY

COURT OF COMMON PLEAS

DESARI ROBERTS, AS ADMINISTRATOR,	:	Case Number A2200585
Plaintiff	:	
-vs-	:	Judge Lisa C. Allen
ALLEN VIEW HELATHCARE CENTER, ET AL,	:	ENTRY DENYING MOTION FOR JUDGMENT ON THE PLEADINGS
Defendants	:	

Defendant filed a Motion for Judgment on the Pleadings on June 6, 2023 and Plaintiff filed a response to the motion. The court took the matter under submission on August 9, 2023. After reviewing the pleadings and the applicable law, the court finds Defendant's Motion for Judgment on the Pleadings is DENIED.

IT IS SO ORDERED.

ENTERED
SEP 14 2023

Judge Lisa C. Allen

HON. LISA C. ALLEN

D139272430

CV21950678 161340831

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

KAREN P. MC COY, ADMINISTRATOR, etc., et. al. PLAINTIFFS	CASE NO. CV-21-950678 JUDGE JEFFERY P SAFFOLD
v.	
AVON PLACE SKILLED NURSING & REHABILITATION CENTER, et al. DEFENDANTS	**MEMORANDUM WITH ORDER DENYING SUMMARY JUDGMENT TO DEFENDANTS (PARTIAL)**

INTRODUCTION

Karen McCoy, the daughter of Marianne Andrews and administrator of her estate, brought this wrongful death and survival action against Avon Place Skilled Nursing & Rehabilitation Center[1], a skilled nursing facility based on the negligence of its employees.

The motion of defendants for summary judgment asks the court to dismiss the complaint because the individual nurse and respiratory therapist employees who caused the injuries are not named. Under their theory, Avon Place Skilled Nursing & Rehabilitation Center, the employer cannot be vicariously liable for the tort of its employees committed within the scope of employment because the individual employees are not named in the suit and the action against them is barred by the statute of limitations.

Plaintiff believes she can establish the vicarious liability of the employer by showing its employees were negligent despite not naming the nurse and respiratory therapist in the complaint.

SUMMARY JUDGMENT STANDARD

Civ. R. 56(C) provides that summary judgment is proper if: (1) No genuine issue of material fact remains to be litigated; (2) The moving party is entitled to judgment as a matter of law; and (3) It appears from the evidence that reasonable

[1] Several business entities are named.

minds could come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

ISSUE PRESENTED

The defendants' motion for summary judgment asserts:

> "Plaintiff was required to individually name each of the care providers she seeks to assert medical claims against, in other words, simply naming the employer, the Defendants, is not sufficient. Thus, because no employee of the Defendants has been named and that the applicable statute of limitations has now expired, the Defendants cannot be held vicariously liable for the conduct of their employees concerning the care they provided the Plaintiffs decedent." Reply in Support of Defendants' Motion for Summary Judgment, *4.

The court is asked to decide whether the nurse's and respiratory therapist's employer, the skilled nursing facility, could be vicariously liable for a medical claim when the nonphysician employees have not been named and the applicable statute of limitations has expired.

VICARIOUS LIABILITY

Generally, a person cannot be held liable for another's negligence (derivative or vicarious liability) except when liability is "imposed by the law of agency, through the doctrine of respondeat superior." The basis underlying this form of vicarious liability "depends on the existence of control by a principal (or master) over an agent (or servant), ..." *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 20.

The agent who committed the tort while acting within the scope of their authority is primarily liable for their negligence. Because of the agency relationship, the principal is secondarily liable. A plaintiff has a right of action against the employee and against the employer or against both. *Caruso v. Leneghan*, 8th Dist. Cuyahoga No. 99582, 2014-Ohio-1824, ¶ 11.

In *Comer v. Risko*, 106 Ohio St.3d 185, 2005 – Ohio - 4559, 833 N.E.2d 712, the court observed "[t]he liability [of the principal] for the tortious conduct flows through the agent by virtue of the agency relationship to the principal. 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." Id., at ¶ 20. Said another way, "the master's sole liability depends upon a finding of liability on the part of the servant, so he cannot be held accountable where there is no such finding." *Munson v. United States* 380 F.2d 976, 979 (6th Cir. 1967). 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. *Wuerth,* ¶ 22.

DEFENDANTS' POSITION

In this case, defendants argue the medical claim cannot be maintained directly against the nursing facility because the relevant employees were never sued. Consequently, because they are not joined in the suit, the nurse and respiratory therapist cannot be found directly liable. Since the agents cannot be found primarily liable their principal cannot be found secondarily liable.

The defendants rely on *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 170 Ohio St.3d 451, 2022-Ohio-4154 for the position that the employer cannot be held secondarily liable if the employees cannot be held primarily liable. The *Clawson* court held the rule stated in a legal malpractice case [*Wuerth*] applies "equally to claims of vicarious liability for medical malpractice." *Clawson,* ¶ 32.

In *Wuerth,* the defendant law firm asked the Ohio Supreme Court "to hold a law firm is not liable for malpractice unless one or more of its attorneys is liable for malpractice." *Wuerth,* ¶ 11. In *Wuerth*, the court held: "A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice." Id., Syllabus, 2., ¶ 1.

DISCUSSION

"Malpractice" refers to professional misconduct, that is, the negligence of attorneys and physicians. *Strock v. Pressnell*, 38 Ohio St.3d 207, 211, 527 N.E.2d 1235 (1988). The term "malpractice" does not refer to the negligence of any professional group. The common law legal definition of "malpractice" is limited to the negligence of doctors and attorneys. *Thompson v. Community Mental Health Ctrs. of Warren Cty.*, 71 Ohio St.3d 194, 195, 642 N.E.2d 1102 (1994).

Courts continue to recognize there is a distinction between malpractice and other medical claims. *Lombard v. Good Samaritan Med. Ctr.*, 69 Ohio St.2d 471, 433 N.E.2d 162 (1982). The negligence of other medical employees does not constitute malpractice. *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034 (2d Dist. Montgomery) ¶¶ 21-22;

It is clear, the limited issue presented to the *Wuerth* court was "whether a law firm may be vicariously liable for legal malpractice when no individual attorneys are liable or have been named." *Wuerth,* ¶¶ 12, 19. A law firm cannot be liable for legal malpractice if the relevant employee, an attorney who is a partner to the law firm or an attorney who is an employee / associate in the law firm, have either been dismissed from the lawsuit or were never sued in the first instance. Id., ¶ 1.

The *Clawson* court observed lower courts misinterpreted the scope and meaning of *Wuerth* if its analysis turned on whether the primarily negligent employee was an attorney who is a partner to the law firm or an attorney who is an employee / associate in the law firm. The secondary vicarious liability of the law firm for legal malpractice does not depend on the status of the negligent attorney being a partner as opposed to an associate. *Clawson,* at ¶ 26.

In *Wuerth* the court held the law of agency does not impose vicarious liability on a law firm when no individual attorneys are liable or have been named. The holding is based on (1) a law firm does not engage in the practice of law and therefore cannot commit legal malpractice; and (2) a law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice. The "relevant employee" in professional malpractice cases is the agent (servant, employee) whose actions are under the control of the principal (master, employer). The principal – agent relationship exists only when one party possesses the right to control the actions of another.

"[A]n employer may be liable for a wrong committed by its employee when the employer delegates a course of action to the employee and the employee then commits a tortious act while acting within the scope of his employment as to the delegated course of action." *Clawson,* ¶ 12. Because a law firm does not practice law it does not delegate a course of action to the legal practitioner. It cannot be held liable for the wrong committed by its attorney-employee on the basis it delegated a course of action to the attorney. A law firm or a medical practice does not possess the right to control the actions of the professional-employee.

Courts that have been asked to apply *Wuerth* have interpreted it narrowly and found it controlling in limited circumstances. *Hignite v. Glick, Layman & Assocs.*, 8th Dist. Cuyahoga No. 95782, 2011-Ohio-1698, ¶ 10. Those cases address the employer's vicarious liability for malpractice, allegedly negligent

services provided by a physician, dentist (*Hignite*), and chiropractor (*Clawson*) who is employed by the facility. See *Estate of Sandra Jean Drenser v. Lake Health System etc., et al.,* Cuyahoga County CP Court, CV-20-932429; *Mickhail v. Garden II Leasing Co, LLC, et al.,* Lucas County CP Court, CI-21-2737.

"... [W]e hold that the rule stated in *Wuerth* applies equally to claims of vicarious liability for medical malpractice. *Clawson*, ¶ 32. "... *Wuerth* precludes a vicarious-liability claim for medical malpractice against a physician's employer when a direct claim against the physician is time-barred." *Id.*, ¶ 29.

CONCLUSION

Wuerth does not control all agency relationships in the legal and medical fields. Only those involving malpractice. The agency relationship in this medical claim case against a skilled nursing facility does not involve liability for an employee's medical malpractice. Plaintiff's claims against [defendant Avon] allege it is vicariously liable for its employees' negligence. The agency relationship involves the liability of non-physicians: a nurse and respiratory therapist for negligence.

"While the *Clawson* court suggests that the scope of its opinion in *Wuerth* and *Clawson* could be extended to all principals, the court specifically chose not to abrogate the doctrine of respondeat superior. Rather, it limited its holding to the malpractice of physicians, and not to the negligence of nurses or other hospital employees." *Estate of Sandra Jean Drenser,* 04/04/2023.

Plaintiff sued only the skilled nursing facility. The facility allegedly delegated a course of action to the employees who then committed a tortious act while acting within the scope of employment as to the delegated course of action This case is unlike *Wuerth* and *Clawson,* where the principal could not be held liable for the negligence of professional employees (malpractice). A skilled nursing facility can be held liable for the negligence of nonphysician employees.

Neither *Wuerth* nor *Clawson* preclude plaintiffs' medical claims. The employer of the nurse and respiratory therapist, the skilled nursing facility, may be vicariously liable when the employees have not been named and the applicable statute of limitations has expired.

Having considered the Motions, Briefs, and Civ. R. 56 evidence, the Motions for Summary Judgment of Defendants, Avon Place Skilled Nursing &

Rehabilitation Center, Foundations Health Solutions LLC, FHS Old, Inc., Cardinal Avon, Inc., and Cardinal Care Management, Inc. are DENIED.

IT IS SO ORDERED.

DATED: 10/6/23

JEFFREY P. SAFFOLD, JUDGE

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

ESTATE OF TOMMIE LEE RAMSEY, BY GARY B. RAMSEY, ADMINISTRATOR	:	
Plaintiff,	:	**Case No. 21CV006903**
-v-	:	**JUDGE CARL A. AVENI**
MANORCARE HEALTH SERVICES, LLC DBA HERTHLAND OF DUBLIN, ET AL.,	:	
Defendants.	:	

DECISION AND ENTRY GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT FILED FEBRUARY 22, 2023
AND
DECISION AND ENTRY DENYING DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS'S MOTION FOR SUMMARY JUDGMENT FILED MARCH 17, 2023
AND
DECISION AND ENTRY GRANTING DEFENDANTS' ALTERNATIVE MOTION FOR EXTENSION OF TIME FILED MARCH 17, 2023
AND
DECISION AND ENTRY DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND FILED MARCH 15, 2023

I. Introduction

This matter is before the Court on Defendants ManorCare Health Services, LLC dba Heartland of Dublin, HCR Healthcare, LLC, HCR ManorCare, Inc., HCR Manor Care Services, LLC, and Heartland Employment Services, LLC's (collectively "Defendants") Motion for Summary Judgment filed February 22, 2023.

On March 15, 2023, Plaintiff Estate of Tommie Lee Ramsey filed a Brief in Opposition and Alternative Motion for Extension of Time.[1] Defendants filed their Reply in Support of Motion

[1] Plaintiff did not seek this Court's leave to exceed the page limit. In return, on March 17, 2023, Defendants filed a Motion to Strike Plaintiff's Memo Contra and Alternative Motion for Extension of Time. Defendants filed their Reply in Support of Motion for Summary Judgment on April 19, 2023. Defendants' Reply itself exceeds the page limit. The Court finds that Defendants

for Summary Judgment on April 19, 2023. Defendants' Motion for Summary Judgment is ripe for decision. On May 8, May 11, and June 28, 2023, the Plaintiff submitted Notices of Supplemental Authority, highlighting additional relevant decisions issued after the initial briefings in this case.

II. Standard of Review

The standard governing the disposition of Defendants' motion for summary judgment is set forth in Civil Rule 56. Under Civil Rule 56, summary judgment is proper only when the moving party demonstrates "(1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor." *Pohmer v. JPMorgan Chase Bank, N.A.*, 2015-Ohio-1229, ¶ 16-17 (10th Dist.), citing *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St. 3d 181, 183, 1997-Ohio-221, 677 N.E.2d 343 (1997).

Additionally, the moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a material fact. *Id.* citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264 (1996). The moving party cannot discharge its initial burden under this rule with a conclusory assertion that the nonmoving party has no evidence to prove its case; the moving party must specifically point to evidence of the type listed in Civil Rule 56(C) affirmatively demonstrating that the nonmoving party has no evidence to support the nonmoving party's claims. *Id.* Once the moving party discharges its initial burden, summary judgment is appropriate if the nonmoving party does not respond, by affidavit or as otherwise provided in Civil Rule 56, with specific facts

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have not been prejudiced and therefore denies Defendants' Motion to Strike Plaintiff's Brief in Opposition.

showing that a genuine issue exists for trial. *Dresher* at 293; *Id.*; Civ. R. 56(E). In light of this standard, the Court has reviewed all of the evidence presented by the parties which comports with Civil Rule 56(C).

III. Statement of Facts

This refiled case arises out of alleged deficient care Plaintiff's Decedent, Tommie Ramsey received at Heartland of Dublin. The original action, Case No. 19CV006911, was filed on August 23, 2019. The Complaint in that case was substantially similar to the Complaint in this case. Defendants filed a Motion for Summary Judgment in the original case, but, on July 9, 2021, Plaintiff dismissed that action without prejudice before the Court's ruling on Motion for Summary Judgment. (Pl.'s Notice of Rule 41(A)(1) Dismissal Without Prejudice). On October 29, 2021 Plaintiff refiled this case inside the time limits of Ohio's Savings Statute.

Plaintiff Gary Ramsey filed this action as Administrator of the Estate of his late wife, Tommie Lee Ramsey, against Defendants ManorCare Health Services, LLC dba Heartland of Dublin (Manor Care) and four affiliated companies on October 29, 2021. None of the individual nurses or other employees are named neither in the original Complaint nor in the refiled action.

Ms. Ramsey was admitted to Heartland of Dublin on May 4, 2018, for rehabilitation services. (Compl. ¶ 39). Plaintiff alleges that Ms. Ramsey had Ocular Oculopharyngeal Muscular Dystrophy disorder which put her increased risk of throat and breathing complications. (*Id.* at ¶41). Plaintiff claims that Decedent suffered pneumonia, a collapsed lung, and mucus plug while under the care of Defendant, but Defendant failed to report them timely to a primary care practitioner or her family; the symptoms were not properly assessed, reported, or responded to by facility nursing staff. (*Id.* ¶46). Plaintiff further alleges that while a resident of Heartland of Dublin, Ms. Ramesy suffered from sepsis, that ultimately caused her death on September 7, 2018. (*Id.* ¶47).

Plaintiff's Complaint asserts the following five claims for relief: Count I: survivorship, Count II: wrongful death, Count III: nursing home resident rights in violation of R.C. 3721.13, Count IV: fraud, and Count V: civil conspiracy. In the first two counts, Plaintiff claims that Defendants failed to provide proper care and treatment by, among other things, (1) choosing to put inadequate prevention and response interventions in place to prevent infection and injuries, including death; (2) choosing to provide inadequate resident observation, supervision, and monitoring; (3) choosing to provide improper training to staff members regarding infection prevention and response; (4) choosing to provide too few, and' or underqualified nursing staff members for the resident needs at the facility to protect and provide adequate care to residents like Decedent; (5) choosing to not provide accurate, adequate, or timely information to Decedent's family; (6) choosing not to timely report to a primary care practitioner significant changes in Decedent's condition; (7) choosing not to carry out the instructions of Decedent's physician ; (8) choosing not to adequately, timely and consistently prevent, assess, and treat Decedent's risk for mucus buildup, pneumonia, infections, and other conditions; (9) choosing not to timely transfer Decedent to a facility that could provide adequate care. (*Id.* ¶54). Plaintiff alleges that the foregoing failures proximately caused Decedent's injury and ultimately her death. (*Id.* ¶53). Plaintiff asserts that these failures are willful, wanton, and/or reckless and Defendants are directly liable for them. (*Id.* ¶¶56-58). At the same time, Plaintiff alleges that Defendants are also vicariously liable for their employees' and agents' willful, wanton, and or reckless misconduct. (*Id.* ¶59).

In her third cause of action, Plaintiff claims that Defendants violated, among other things, Decedent's right to adequate and appropriate medical treatment and nursing care under R.C. 3721.13 which gives rise to a statutory cause of action. (*Id.* ¶70-71).

In sum, the gravamen of Plaintiff's Complaint seeks to hold Defendants vicariously liable for the acts of its agents and employees, the nursing staff, as well as directly liable for its own negligent operation of the facility.

On February 22, 2023, Defendants' filed Motion for Summary Judgment. In their Motion, Defendants assert that Plaintiff's vicarious liability claims fail under the Supreme Court of Ohio's recent decision in *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2022-Ohio-4154, because of expiration of statute of limitation against individual nurses who were not named as defendants in this lawsuit (Defendant's Motion for Summary Judgment p.1). According to Defendants, because any primary liability attributable to individual nursing staff has been extinguished, under Supreme Court's *Clawson* decision, the vicarious liability claims against the corporate Defendants must likewise fail. *Id.*

In addition, Defendants argue that direct liability claims against Defendants must also fail because Defendants argue claims for corporate negligence are not recognized under Ohio law and Plaintiff failed to produce any evidence to support these claims. (*Id.* at 2-3). Finally, Plaintiff claims that civil conspiracy claims should also fail because of the intra-corporate conspiracy doctrine bars such claims. Plaintiff asserts the aforementioned arguments lack merit.

IV. Discussion

A. Defendants Are Not Entitled to Summary Judgment on Plaintiff's Vicarious Liability Claims.

Defendants assert that Plaintiff's vicarious liability claims fail under the Supreme Court of Ohio's decision in *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2022-Ohio-4154, because of the expiration of statute of limitation against individual nurses who were not named as defendants in this lawsuit (Defendants' Motion for Summary Judgment p.1). In *Clawson*, the plaintiff filed

claims against a chiropractic clinic without naming the specific chiropractor responsible for the injury. Before a legal action could be formally initiated against the individual chiropractor, the statute of limitations expired, leaving only claims against the employer based on vicarious liability. The Supreme Court, by broadening the decision from *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 913 N.E.2d 939, 2009-Ohio-3601, held that if a direct claim against a physician is barred by the statute of limitations, then a secondary claim for medical malpractice against the physician's employer cannot be made, thus extending the principle from lawyers to doctors.

Defendants argue that *Clawson* has broad application and apply to *any* vicarious liability claims, including the vicarious liability claims in this case. Specifically, Defendants assert that failure to assert claims against individual agents, the nurses, precludes a finding of liability against the principal entities. However, Plaintiffs appropriately contend that in nursing homes, employees operate under the employer's guidance, including their working hours and specific work methods, which is dictated by institutional policies and direct oversight, emphasizing their lack of autonomy. (Memo. Op. p. 11). By contrast, independent professionals such as doctors and lawyers have a legal and ethical obligation to make decisions based on their own independent judgment. Thus, Plaintiff asserts that his claims are not malpractice but instead constitute "medical claims" citing to *Tisdale v. Toledo Hosp.*, 197 Ohio Spp. 3d 316, 2012-Ohio-1110, 967 N.E.2d 280, 136 (6th Dist.). In that case, the court opined:

> The Supreme Court has long held that the negligence of nurses employed by a hospital is not within the definition of "malpractice," as used in R.C. 2305.11(A). *Lombard v. Good Samaritan Med. Ctr.*, 69 Ohio St.2d 471, 473-474, 433 N.E.2d 162 (1982). Rather, a claim asserting that a nurse-employee acted negligently is a type of "medical claim" within the meaning of R.C. 2305.113(A). *Cope* at ¶ 22 ("[A]ll other medical employees are not subject to malpractice.") *Compare Holman v. Grandview Hosp. & Med. Ctr.*,

> 37 Ohio App.3d 151, 153-154, 524 N.E.2d 903 (1987) (suit against hospital based on respondeat superior for the nurse-employee's alleged negligence was an "action in negligence," not a "medical malpractice claim," and thus could proceed even though the nurse was not named as a defendant.)

Tisdale v. Toledo Hosp., 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 280, ¶ 36 (6th Dist.)

Accordingly, the Court finds that *Clawson* does not apply to nurses in the manner Defendants seek to apply it. This Court's finding is in accordance with other courts in the state of Ohio. See *Estate of Stephen Tate v. LP Warren, LLC*, Trumbull County CP Case No. 20233 CV 00098, (Rice, J.); *Ann Bugeda v. Mapplewood at Chardon, LLC*, Geauga County Common Pleas Case No. 21P000742 (Ondrey, J.); and *Marvin LeNeo v. Wyant Leasing Co., LLC dba Wyant Care Center, et al.*, Hamilton County Common Pleas, Case No. A2300366 (Shanahan, J.) provided by Plaintiff in her notice of supplemental authority. Accordingly, the Court finds Defendant is not entitled to summary judgment on Plaintiff's vicarious liability claims.

B. Defendants Are Entitled to Summary Judgment on Plaintiff's Direct Liability Claims.

In addition, Defendants seek summary judgment on Count III of Plaintiff's Complaint, which aims to hold the Defendants directly liable for their alleged violations of R.C. 3721.13. Defendant argues that summary judgment is proper as a matter of law on Count III of Plaintiff's Complaint on the grounds that Ohio law does not recognize "corporate negligence". Defendants rely on *Albain v. Flower Hosp.*, 50 Ohio St.3d 251, 553 N.E.2d 1038 in support of their position. However, the Court finds *Albain* is not applicable to the facts of this case. In *Albain*, the Court was addressing a situation where the plaintiffs were attempting to impose a direct duty of care on the hospital, separate from the acts of its employees. In contrast, Count III alleges the corporate entity's duty to statutory obligations under R.C. 3721.13, which permits a direct claim against a nursing home if they violate any of the 33 specified statutory resident rights enumerated in the statute. As

such, the Court finds Defendants' generalized argument that it is entitled to summary judgment on the grounds that Count III seeks to hold the corporate defendants directly liable lacks merit.

However, in addition to asserting that Plaintiff's direct liability claims are subject to summary judgment as a matter of law, Defendants assert that Plaintiff has failed to provide evidentiary support for his claim on the grounds that Plaintiff's nursing expert failed to offer any criticism of any of the defendants named in Plaintiff's complaint (Deposition of Lisa Contreras, 29:3-18, 32:4-15).[2]

Instead, Ms. Contreras testified that "any corporation or entity or management company that... had responsibility for Heartland of Dublin and administration of their nursing services and other services." (Contreras Depo., 31:18-24). This is not sufficient to create a fact issue for trial. In *O'Dell v. Vrable Iii*, 2022-Ohio-4156, 200 N.E.3d 1208 (4th Dist.), the Fourth District Court of Appeals examined a similar situation. In that case, the plaintiff's expert tried to assign liability on the corporate owner of a nursing home using what he termed the "whole ball of wax" theory. *Id.* When probed to share his views on the criticisms directed at the defendants, the expert remarked, "it's the whole ball of wax... whoever owns, runs it, operates it, and is involved in it, they're all responsible...I don't pick out who's responsible for what." *Id.* at It 90. The Fourth District Court of Appeals determined that the opinions of the plaintiff's expert were not sufficient enough to fend off summary judgment. *Id.* at ¶ 91. The expert's lack of clarity about the defendant's identity or actions meant that his criticism couldn't be used to link the corporation's actions to the care given to the resident. *Id.* In the current case, Plaintiff's nursing expert testified that she is unaware of the identities or roles of the Defendants concerning the operations of Heartland of Dublin. (Contreras

[2] When asked about whether she had any opinions about the specific corporate defendants, Ms. Contreras answered serially "No, I do not."

Depo., 29:3-18, 32:4-15). Ms. Contreras' testimony mirrors that of the expert in *O'Dell*, implying blanket responsibility for all entities without providing any degree of specificity.

In an effort to create a fact issue for trial, Plaintiff cites the deposition testimony of Heartland of Dublin staff, which suggests that the Defendants exerted extensive control over both administrative and clinical aspects of the facility. (Memo. Op. pp 33-41.) In response, Defendants note that Ms. Schutte and Mr. Lewis testified that they were not in their respective roles at Heartland of Dublin until 2019, which was after Plaintiff's decedent received care at Heartland of Dublin in 2018. (Schutte Depo., 10:2-7; Lewis Depo., 8-9:25:1-6.)

Therefore, the Court finds testimony Plaintiff relies on does not shed light on the facility's operations during the period of time Ramsey was under care. Furthermore, Plaintiff fails to point to any record evidence creating a fact issue in regard to specific instances of negligence on the part of the entity Defendants. As such, the Court finds Defendants are entitled to summary judgment on Plaintiff's direct liability claims.

C. Defendants Are Entitled to Summary Judgment on Plaintiff's Remaining Claims.

Next, Defendants move for summary judgment on Plaintiff's claims related to negligent hiring and retention, fraud, and civil conspiracy. Regarding Defendants' negligent hiring and retention argument, Plaintiff clarifies that he has not raised this claim and does not plan to pursue it at trial. Therefore, the Court deems the Defendants' argument as moot. Concerning the fraud claim, Plaintiff concedes that Defendants are entitled to summary judgment and therefore, the Court grants the same.

As for Plaintiffs' civil conspiracy claim, the Court finds that Defendants are entitled to summary judgment on this claim. As a predicate to this discussion, the Court notes that a civil conspiracy claim requires the involvement of two or more distinct "people". Further, it is black-

letter law that corporations are treated as people and furthermore that a corporation may act as agent for another corporation. *See Tokles & Son v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 627, 605 N.E.2d 936 (1992); *3 AmJur 2d Agency* §12.

Defendants assert that they are entitled to summary judgment based on the intra-corporate conspiracy doctrine. The intra-corporate conspiracy doctrine provides that where all defendants, allegedly co-conspirators, are members of the same collective entity, there are not two separate 'people' to form a conspiracy." *Ohio Vestibular & Balance Ctrs., Inc. v. Wheeler,* 2013-Ohio-4417, 999 N.E.2d 241, ¶ 28 (6th Dist. 2013) (internal citations omitted). "A parent and its wholly owned subsidiary have a unity of purpose or a common design. Therefore, a corporation generally cannot be deemed to have conspired with its wholly owned subsidiary, or its officers and agents." *Hometown Health Plan v. Aultman Health Found.,* Tuscarawas, No. 2006 CV 06 0350, 2009 Ohio Misc. LEXIS 550, *36 (Apr. 15, 2009).

Initially, the Court addresses Plaintiffs assertion that the intra-corporate conspiracy doctrine has not been adopted in Ohio. In *Bays v. Canty*, 330 F.App'x 594 (6th Cir.2009), the United States Court of Appeals for the Sixth Circuit explained:

> The Ohio Supreme Court has not addressed the intra-corporate conspiracy doctrine. This court must therefore predict whether the Ohio Supreme Court would embrace the intra-corporate conspiracy doctrine. *See Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450, 454 (6th Cir. 2001). We think it would. Most states endorse the doctrine, *see* Robin Miller, Annotation, *Construction and Application of "Intracorporate Conspiracy Doctrine" as Applied to Corporation and Its Employees--State Cases,* 2 A.L.R.6th 387 (2005), and at least one Ohio court has recognized it, *Scanlon v. Gordon F. Stofer & Bros., Co.*, Nos. 55467, 55472, 1989 Ohio App. LEXIS 2528, 1989 WL 69400, at *16 (Ohio App. 8 Dist. June 22, 1989). We thus conclude that the district court did not err by using the intra-corporate conspiracy doctrine to enter summary judgment on the Bayses' conspiracy claim.

Id. at 594-595. Subsequent to Sixth Circuit's decision in *Bays,* Ohio Courts, including the Franklin County Court of Common Pleas, have applied the intra-corporate conspiracy doctrine. See *Andrew v. Power Marketing Direct Inc.*, C.P. No. 08CVH-10-14309, 2010 Ohio Misc. LEXIS 594, at *4 (May 20, 2010) (Frye, J.); *Wells Fargo Bank, N.A. v. Cole*, C.P. No. 10CVE-8661, 2012 Ohio Misc. LEXIS 19572 (Mar. 7, 2012) (Schneider, J.); *Hawes v. Downing Health Technologies L.L.C.*, 8th Dist. Cuyahoga No. 110920, 2022-Ohio-1677, ¶ 66; *McCue v. Peninsula*, C.P. No. CV2010-03-2011, 2010 Ohio Misc. LEXIS 22683, at *19 (Aug. 25, 2010) (Gallagher, J.); *J.G. Ewing Sewer Contrs., Inc. v. City of Toledo*, C.P. No. G-4801-CI-0201204450-000, 2014 Ohio Misc. LEXIS 47, at *14 (Apr. 16, 2014) (Cook, J.). As such, the Court is not persuaded by Plaintiff's argument that Ohio has not adopted the doctrine.

In support of its position that the intra-corporate conspiracy doctrine bars Plaintiff's civil conspiracy claim, Defendants assert that the alleged conduct of Defendants did not involve two or more "people". Pointing to their discovery responses, Defendants meet their threshold summary judgment burden by demonstrating that Defendants, while operated separately are affiliated with each other and share a unity of purpose (See ManorCare Health Services, LLC's Resp. to Interrog. No 5, Exh. A, MSJ.). The Court finds Plaintiff failed to meet its reciprocal burden and therefore summary judgment is proper as to Plaintiff's civil conspiracy claim.

V. Decision

For the reasons discussed above the Court finds that Defendants Motion for Summary Judgment is **GRANTED IN PART,** and Defendants are entitled to summary judgment on Plaintiffs direct liability claims, fraud claim, and civil conspiracy claim.

IT IS SO ORDERED.

Copies to all counsel via electronic filing system.

Franklin County Court of Common Pleas

Date: 10-12-2023

Case Title: ESTATE OF TOMMIE LEE RAMSEY -VS- MANORCARE HEALTH SERVICES LLC ET AL

Case Number: 21CV006903

Type: ENTRY

It Is So Ordered.

/s/ Judge Carl A. Aveni II

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

DIANA L. MARTINEZ, Individually and as Special Administrator of the Estate of Frances Martinez, Deceased,	*	Case No. G-4801-CI-2023-1629-000
Plaintiff	*	**OPINION AND JUDGMENT ENTRY ON DEFENDANT THE TOLEDO HOSPITAL'S MOTION FOR SUMMARY JUDGMENT**
vs.		
PROMEDICA TOLEDO HOSPITAL, et al.,		
Defendants.	*	
	*	JUDGE GARY G. COOK

This matter is before the Court on Defendant The Toledo Hospital's (hereinafter "Defendant") Motion for Summary Judgment, filed July 26, 2023. Plaintiff Diana L. Martinez, Individually and as Special Administrator of the Estate of Frances Martinez, Deceased (hereinafter "Plaintiff") filed her Memorandum in Opposition to Defendant The Toledo Hospital's Motion for Summary Judgment on August 30, 2023. No reply brief appears to have been filed, and this motion is now decisional.

This instant case involves medical negligence claims arising from allegedly-deficient care provided to Plaintiff's decedent at both Defendant's facility and another facility, Swanton Healthcare & Retirement Center. Specifically, Plaintiff alleges deficient care by Defendant relating to "wounds, rash, and skin ulcers" and "a possible pressure sore on [Frances Martinez's] coccyx," all of which led to or contributed to "a stage IV pressure ulcer" which contributed to her death.[1] Plaintiff alleges Defendant is vicariously liable for medical negligence stemming from the actions of its agents and or employees while Ms. Martinez was in their care. By contrast, Defendant argues it cannot be held vicariously liable, because Plaintiff failed to name any of its specific agents or employees in her suit prior to expiration of the one-year statute of limitations for medical malpractice claims. Additionally, Defendant argues the instant refiled complaint was filed outside the applicable statute of limitations.

I. Legal Standard

Ohio Civ. R. 56 permits a party to move for summary judgment "with or without supporting affidavits . . . to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action." Ohio Civ. R. 56(A). "[T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment." *Dresher v. Burt*, 75 Ohio St. 3d 280, 292-93, 662 N.E.2d 264 (1996). If this initial burden is satisfied by the moving party, "the nonmoving party has a reciprocal burden" and "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as

[1] Plaintiff's Memorandum in Opposition to Defendant The Toledo Hospital's Motion for Summary Judgment, filed August 30, 2023, at 3-4.

otherwise provided . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *Id.* at 293, quoting Ohio Civ. R. 56(E).

The Ohio Civil Rules set forth the standard for granting summary judgment as follows:

> Summary judgment shall be rendered . . . if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Ohio Civ. R. 56(C). "Summary judgment may be granted only if the material facts are established and not in controversy." *State ex rel. N. Olmsted Fire Fighters Ass'n, Local 1267 v. N. Olmsted*, 64 Ohio St. 3d 530, 535, 597 N.E.2d 136 (1992). "'[T]he 'genuine issue' summary judgment standard is 'very close' to the 'reasonable jury' directed verdict standard: 'The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted' . . . In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Grau v. Kleinschmidt*, 31 Ohio St. 3d 84, 91, 509 N.E.2d 399 (1987), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986).

II. Analysis

A. Vicarious Liability

As Plaintiff correctly notes, this Court previously addressed an identical argument related to vicarious liability for medical claims in *Childers v. The Toledo Clinic, Inc.*, Case No. CI 2022-

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

RUBY BACHMAN, ET AL.,	:	
	:	CASE NO. 21CV-3509
Plaintiffs,	:	
	:	JUDGE KIM BROWN
v.	:	
	:	
DARYL SYBERT, DO, ET AL.,	:	
	:	
Defendants.	:	

DECISION AND ENTRY
GRANTING-IN-PART AND DENYING-IN-PART
DEFENDANT NEW ALBANY SURGERY CENTER'S
MOTION FOR SUMMARY JUDGMENT;

DENYING AS MOOT PLAINTIFFS' RULE 56(F) MOTION;

and

DENYING NASC'S MOTION TO STRIKE

This matter comes before the Court on Defendant New Albany Surgery Center, LLC's ("NASC") motion for summary judgment, filed March 25, 2024. Plaintiffs filed their combined memorandum contra and Civ.R. 56(F) motion on April 22, 2024. NASC filed its combined reply in support of its motion for summary judgment and opposition to Plaintiff's Civ.R. 56(F) motion on April 30, 2024. Plaintiffs filed their reply in support of their Rule 56(F) motion on May 7, 2024.

NASC also requested that the Court strike Plaintiffs' combined memorandum contra and motion for exceeding 15 pages pursuant to Loc.R. 12.01. Plaintiffs filed their memorandum contra to NASC's motion to strike on May 13, 2024. This matter is now ripe for the Court's consideration.

RELEVANT PROCEDURAL HISTORY AND STATEMENT OF FACTS

This professional tort action was initiated on June 4, 2021 with the filing of the Complaint. Plaintiffs allege on December 9, 2019, Defendants acted negligently in the care of Plaintiff Ruby Bachman and caused her permanent injuries. (*Pls.' Compl.* ¶ 7, 16.) Defendants Daryl R. Sybert, D.O., Donald W. Miller, P.A., and OrthoNeuro filed their Answers on June 25, 2021. Defendant NASC filed its Answer on July 16, 2021.

NASC seeks summary judgment on Plaintiffs' claims. NASC argues that it has no vicarious liability for Defendants Dr. Sybert and P.A. Miller. NASC further argues it has no vicarious liability for any employees because none of them were named and the statute of limitations and statute of repose have now run. For the following reasons, Defendant NASC's motion for summary judgment is **GRANTED** as to Plaintiffs' claims of vicarious liability against NASC for Defendants Dr. Sybert and P.A. Miller but is **DENIED** as to Plaintiffs' claims of vicarious liability against NASC for NASC's employees.

LAW AND ANALYSIS

Civ.R.56(C) Standard

To prevail upon a motion for summary judgment, the moving party must inform the court of the basis for the motion and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. Ohio Supreme Court precedent explains,

> ... the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. ... These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law ... If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.

Dresher v. Burt, 75 Ohio St. 3d 280, 292-93 (1996).

Accordingly, summary judgment is proper only when the parties moving for summary judgment demonstrate (1) no genuine issue of material fact exists, (2) the moving parties are entitled to judgment as a matter of law, and (3) reasonable minds viewing the evidence most strongly in favor of the nonmoving party could reach but one conclusion, and that conclusion is adverse to the nonmoving party. *Brehm v. Macintosh Co.*, 2009-Ohio-5322, ¶ 10 (10th Dist.) citing Civ.R. 56 and *State ex rel. Grady v. State Emp. Rels. Bd.*, 78 Ohio St.3d 181, 183.

The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record demonstrating the absence of a genuine issue of material fact by pointing to specific evidence of the type listed in Civ.R. 56(C). *Id.*, ¶ 11 citing *Dresher* at 293. It may at first appear that this Rule sets forth an exclusive list of material that may be considered; however, in the event a document is not one of the types listed, it may be introduced as evidentiary material incorporated by reference in a properly framed affidavit under Civ.R. 56(E). *Buzzard v. Pub. Emples. Retirement Sys.*, 139 Ohio App.3d 632, 636, (10th Dist. 2000).

These evidentiary materials must show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law ... If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. *Dresher* at 292-93

If the moving party fails to satisfy its initial burden, the court must deny the motion for summary judgment; however, if the moving party satisfies its initial burden, summary judgment is appropriate unless the nonmoving party responds, by affidavit or as otherwise provided under Civ.R. 56, with specific facts demonstrating a genuine issue exists for trial. *Id.* "A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media*, 59 Ohio St. 3d 108, 111 (1991). Placing the above-mentioned requirements on the moving party does not mean the nonmoving party bears no burden. Requiring that the moving party provide specific reasons and evidence gives rise to a reciprocal burden of specificity for the nonmoving party. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 65-66 (1978).

In ruling on a motion for summary judgment, the court must resolve all doubts and construe the evidence in favor of the non-moving party. *Premiere Radio Networks, Inc. v. Sandblast, L.P.*, 2019-Ohio-4015, ¶ 6 (10th Dist.) citing *Pilz v, Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-4040, ¶ 8 (10th Dist.).

No genuine issue of material fact exists as to Plaintiffs' claims against NASC for vicarious liability for Defendants Sybert and Miller

Plaintiffs' memorandum contra to the motion for summary judgment and their Rule 56(F) motion do not address NASC's request for summary judgment as to vicarious liability for Defendants Sybert and Miller. Accordingly, Plaintiffs do not dispute that Ms.

Bachman was a patient of Dr. Sybert, Dr. Sybert selected NASC as the location for Ms. Bachman's surgery, Ms. Bachman would have gone to any facility recommended by Dr. Sybert, and P.A. Miller worked for Dr. Sybert and his practice OrthoNeuro. As Plaintiffs do not dispute that Ms. Bachman looked to Dr. Sybert, as opposed to NASC, for her decision on her surgery location, there is no genuine issue of material fact and NASC is entitled to summary judgment on Plaintiffs' claims against NASC for vicarious liability for Defendants Sybert and Miller.

NASC is not entitled to summary judgment as to Plaintiffs' claims against NASC for vicarious liability for employees

NASC argues that Plaintiffs failed to individually name NASC's employees, the statute of limitations has run against such employees, and *Clawson v. Heights Chiropractic*, 2022-Ohio-4154 and *Nat'l Union Fire Ins. Co. v. Wuerth*, 2009-Ohio-3601, require dismissal of Plaintiffs' claims against NASC for vicarious liability for those employees. The Court disagrees.

In *Clawson*, the plaintiff filed claims against a chiropractic clinic, but was unable to achieve service on the treating chiropractor within the one-year of refiling her complaint. *Clawson* at ¶ 4-6. The statute of limitations expired, leaving claims against the employer for vicarious liability. *Id.* at ¶ 7. The Supreme Court expanded *Wuerth* from legal malpractice to medical malpractice and held that if a direct claim against a physician is barred by the statute of limitations, then the employer cannot be held vicariously liable for the physician's malpractice.

Defendants argue that *Clawson* has broad application and applies to all vicarious liability claims, including the vicarious liability claims in this case. The Court finds decisions by other courts of common pleas rejecting such arguments persuasive.

Specifically, the Court agrees with and adopts Lucas County Common Pleas Judge McNamara's decision in *Mickhail v. Garden II Leasing Co, LLC,* Lucas C.P. No. CI-21-2737, (Mar. 14, 2023), where he held:

> the Court cannot agree that *Clawson* is as broad as Defendants suggest. Defendants emphasize that, in applying *Wuerth*, the Ohio Supreme Court stated: "There is no basis for differentiating between a law firm and *any other principal* to whom Ohio law would apply [emphasis added]." *Clawson*, 2022-Ohio-4154 at ¶32, quoting *Wuerth*, 2009-Ohio-3601 at ¶24. Based on this passage, Defendants urge the Court to find that the *Wuerth* rule applies to all "causes of action against an employer for vicarious liability[.]" However, *Clawson* is not a wholesale rejection of the doctrine of respondeat superior. To the contrary, *Clawson* approvingly quotes *Losito v. Kruse*, 136 Ohio St. 183, 186, 24 N.E.2d 705 (1940) for the proposition that, in vicarious liability cases, "the plaintiff has a right of action against *either* the master or the servant, or against both, in separate actions, as a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied [emphasis added]." 2022-Ohio-4154 at ¶13. Rather than reject this longstanding principle, the *Clawson* Court held as follows:
>
> > In *Wuerth*, we applied basic principles of agency law and held, 'A law firm may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice.' Not only did we emphasize the similarities between the legal and medical professions with respect to liability for malpractice, but we also stated, 'There is no basis for differentiating between a law firm and any other principal to whom Ohio law would apply.' Today, we hold that the rule stated in *Wuerth* applies equally *to claims of vicarious liability for medical malpractice* [emphasis added].
>
> *Id.* at ¶32.
>
> *Clawson* clearly expands the *Wuerth* rule to medical malpractice cases. However, Plaintiff argues, there is a distinction between medical malpractice and "medical claims," and "[b]ecause claims against nurse-employees are not medical malpractice claims, they are not subject to the same requirements." Here, the Court is inclined to agree with Plaintiff. As the Ohio Supreme Court has recognized, "the common meaning and legal definition of the term 'malpractice' [i]s limited to the professional misconduct of members of the medical profession and attorneys." *Hocking Conservancy Dist. v. Dodson-Lindblom Assoc*, 62 Ohio St.2d 195, 197, 404 N.E.2d 164 (1980) (interpreting the scope of R.C. 2305.11). The Ohio Revised Code also makes a distinction between 'malpractice' and 'medical

claims' as set forth in R.C. 2305.11(A) and 2305.113(A), respectively. Pursuant to R.C. 2305.11(A), 'an action for malpractice *other than an action upon a medical...claim*...shall be commenced within one year after the cause of action accrued." R.C. 2305.113(A) states that "an action upon a medical...claim shall be commenced within one year after a cause of action accrued."

Based on the distinction between "medical malpractice" and "medical claims," several appellate districts have found *Wuerth* inapplicable as to claims against hospitals and their non-physician employees. *Stanley v. Cmty. Hosp.*, 2nd Dist. Clark No. 2010CA53, 2011-Ohio-1290 ¶¶ 22-23 ("Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under R.C. 2305.11."); *Henik v. Robinson Mem. Hosp.*, 9th Dist. Summit No. 25701, 2012-Ohio-1169, ¶18 ("[t]he Ohio Supreme Court has held that the negligence of nurses employed by a hospital does not fall under the definition of 'malpractice' as discussed in R.C. 2305.11(A). Rather, the alleged negligence of a nurse employee falls under the definition of a 'medical claim' in R.C. 2305.113(A). Thus, a suit against a hospital under a theory of respondeat superior may proceed where an alleged negligent employee was not named as a defendant."); *Cobbin v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 107852, 2019-Ohio-3659, ¶30 ("...it is true that hospitals can be vicariously liable for the negligence of its nurses even if the nurses are not named in a plaintiff's complaint[.]").

The holding of *Clawson* does not undermine the reasoning *of Stanley, Henik* and *Cobbin*. *Clawson* clarified that the *Wuerth* rule "applies equally to claims of vicarious liability for medical malpractice." 2022-Ohio-4154 at ¶32. Had the Ohio Supreme Court also intended for *Wuerth* to apply vicarious liability claims based on medical claims, it could have said so. However, *Clawson*'s holding specifically extends *Wuerth* to include "claims of vicarious liability for medical malpractice," specifically. In absence of authority indicating that *Wuerth* also applies to medical claims, this Court declines to do so.

Moreover, reading *Clawson* as broadly as Defendants suggest would fundamentally alter the doctrine of respondeat superior, depriving plaintiffs of the "right of action against *either* the master or the servant, or against both" in all instances. The implications of such a reading would be profound, particularly in a medical claim such as the instant case. Here, Plaintiff's cause of action arises not from a readily identifiable act or omission by a particular licensed medical practitioner, but rather, is based upon allegations of collective negligence by numerous employees, taking place over several months. Defendants' proposed reading of *Clawson* would require Plaintiff to name as defendants every employee in Defendants' facilities, rather than simply naming Defendants, as

> permitted by the long-standing doctrine of respondeat superior. Again, if the *Clawson* court intended the scope of its holding to include medical claims as well as medical malpractice, it would have said so.

Id. at *7-11.

Similarly, as concluded by Cuyahoga County Common Pleas Judge Saffold in *McCoy v. Avon Place Skilled Nursing & Rehabilitation Center*, Cuyahoga C.P. No. CV-21-950678 (Oct. 11, 2023):

> *Wuerth* does not control all agency relationships in the legal and medical malpractice fields. Only those involving malpractice. The agency relationship in this medical claim case against a skilled nursing facility does not involve liability for an employee's medical malpractice. Plaintiff's claims against [defendant Avon] allege it is vicariously liable for its employees' negligence. The agency relationship involves the liability of non-physicians: a nurse and respiratory therapist for negligence.
>
> "While the *Clawson* court suggests that the scope of its opinion in *Wuerth* and *Clawson* could be extended to all principals, the court specifically chose not to abrogate the doctrine of respondeat superior. Rather, it limited its holding to the malpractice of physicians, and not to the negligence of nurses or other hospital employees." *Estate of Sandra Jean Drenser*, 04/04/2023.
>
> . . .
>
> Neither *Wuerth* nor *Clawson* preclude plaintiffs' medical claims. ...

Id. at 5.

CONCLUSION

For the reasons above, Defendant NASC's Motion for Summary Judgment is **GRANTED** as to Plaintiffs' claims of vicarious liability against NASC for Defendants Dr. Sybert and P.A. Miller but is **DENIED** as to Plaintiffs' claims of vicarious liability against NASC for NASC's employees. Plaintiffs' Rule 56(F) Motion is **DENIED** as moot. NASC's Motion to Strike is **DENIED**.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 07-29-2024

Case Title: RUBY BACHMAN ET AL -VS- DARYL R SYBERT DO ET AL

Case Number: 21CV003509

Type: ENTRY

It Is So Ordered.

/s/ Judge Kim Brown

Court Disposition

Case Number: 21CV003509

Case Style: RUBY BACHMAN ET AL -VS- DARYL R SYBERT DO ET AL

Motion Tie Off Information:

1. Motion CMS Document Id: 21CV0035092024-03-2599980000
   Document Title: 03-25-2024-MOTION FOR SUMMARY JUDGMENT - DEFENDANT: NEW ALBANY SURGERY CENTER LLC
   Disposition: MOTION GRANTED IN PART