[Cite as *Badra-Muniz v. Vinyl Carpet Serv., Inc.*, 2025-Ohio-1280.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

PEDRO BADRA-MUNIZ Appellant v. VINYL CARPET SERVICE INC. et al. Appellee	C.A. No. 29942 Trial Court Case No. 2021 CV 01031 **ORDER ON APPLICATION FOR EN BANC CONSIDERATION**

PER CURIAM:

{¶ 1} On November 22, 2024, this Court issued a decision affirming a judgment of the Montgomery County Court of Common Pleas, which had granted summary judgment to Defendant-Appellee Vinyl Carpet Service Inc. ("Vinyl & Carpet") on the negligence claims of Plaintiff-Appellant Pedro Badra-Muniz. *Badra-Muniz v. Vinyl Carpet Serv. Inc.*, 2024-Ohio-5507 (2d Dist.). On December 2, 2024, Badra-Muniz timely filed a combined "Application for Reconsideration and Reconsideration En Banc." Vinyl & Carpet opposed the combined application. For purposes of clarity and convenience, the application for en banc consideration will be addressed in this order and the application for reconsideration will be addressed in a separate order.

{¶ 2} The Ohio Rules of Appellate Procedure explain the circumstances under which en banc consideration should be accorded. "Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may

order that an appeal or other proceeding be considered en banc." App.R. 26(A)(2)(a). "Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." *Id.*

{¶ 3} "An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions." App.R. 26(A)(2)(b). The Supreme Court of Ohio has made it apparent that conflicting decisions are those that conflict on the same legal issue or question of law. *In re J.J.*, 2006-Ohio-5484, ¶ 18, citing *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594 (1993). However, "courts of appeals have discretion to determine whether an intradistrict conflict exists." *McFadden v. Cleveland State Univ.*, 2008-Ohio-4914, paragraph two of the syllabus. Yet, "if the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict." *Id.*

{¶ 4} Badra-Muniz contends that the resolution of his second assignment of error in our November 22, 2024 decision "squarely contradicted" our holdings in *Cope v. Miami Valley Hosp.*, 2011-Ohio-4869 (2d Dist.), and *Stanley v. Community Hosp.*, 2011-Ohio-1290 (2d Dist.). Application for Reconsideration and Reconsideration En Banc, p. 6. According to Badra-Muniz, "Notably, the November 22 Opinion does not overrule *Cope* or *Stanley* even though its holding squarely contradicts those decisions. Even more notably, nowhere in the Opinion is either *Cope* or *Stanley* mentioned despite Mr. Badra-Muniz's reliance upon them in his briefs and at oral argument." Reply, p. 3.

{¶ 5} Vinyl & Carpet responds that Badra-Muniz has not met any of the requirements for en banc review. According to Vinyl & Carpet, our November 22, 2024 decision did not conflict with any of our prior decisions, because we had not previously applied *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2022-Ohio-4154, "to hold any employer vicariously liable after a trial court properly dismissed the alleged negligent employee." Vinyl & Carpet's Response, p. 3. Further, the *Cope* and *Stanley* decisions were decided years before the Ohio Supreme Court issued its decision in *Clawson*. Finally, Vinyl & Carpet argues that since our November 22, 2024 decision affirmed the trial court's judgment on multiple bases, the issue involving vicarious liability was not dispositive for purposes of App.R. 26(A)(2).

{¶ 6} In our November 22, 2024 decision, we summarized many of the Ohio Supreme Court's decisions that have addressed the doctrine of respondeat superior since *Losito v. Kruse*, 136 Ohio St. 183 (1940). *Badra-Muniz*, 2024-Ohio-5507, at ¶ 22-29 (2d Dist.). We then analyzed the Ohio Supreme Court's recent decision in *Clawson*. Based on the *Clawson* decision, we concluded:

> The Ohio Supreme Court's recent guidance regarding vicarious liability in the principal-agent context is clear. Once liability has been extinguished against an agent due to the expiration of the statute of limitations, as in the case before us, the trial court is required to dismiss the derivative claim against the principal if the principal raises and establishes this defense. As the Ohio Supreme Court has emphasized twice, this principle applies to any principal to whom Ohio law would apply. . . . While we understand Badra-Muniz's attempt to limit the Ohio Supreme Court's

> holdings in *Wuerth* and *Clawson* to only cases involving professional negligence, the language contained in the Ohio Supreme Court's recent decisions is not so limited. Therefore, we cannot conclude that the trial court erred in granting Vinyl & Carpet's motion for summary judgment.

Id. at ¶ 31.

{¶ 7} Notably, the Ohio Supreme Court's *Clawson* decision reversed our decision in *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, 2020-Ohio-5351 (2d Dist.). Although we did not cite *Cope* or *Stanley* in that decision, we applied the same reasoning in *Clawson* that we had applied in *Cope* and *Stanley*. In each of those three cases, we narrowly construed the Ohio Supreme Court's decision in *Natl. Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 2009-Ohio-3601, to apply only to certain professional malpractice relationships rather than to all traditional employer-employee relationships. *See Clawson*, 2020-Ohio-5351, at ¶ 21 (2d Dist.) ("Significantly, the relationship in *Wuerth* was that of partner and law firm, not a traditional employer-employee relationship."); *Stanley v. Community Hosp.*, 2011-Ohio-1290, ¶ 20, 22 (2d Dist.) ("Physicians and attorneys are not typically considered 'employees' at their respective businesses. . . . The holding in *Wuerth* must be given a narrow application."); *Cope v. Miami Valley Hosp.*, 2011-Ohio-4869, ¶ 18 (2d Dist.) ("*Wuerth* instead carves a careful distinction—that individuals (attorneys and physicians) commit malpractice, but whole entities (firms and hospitals) do not, meaning that a *malpractice* claim cannot be maintained directly against an entity when all the relevant principals and employees have either been dismissed or were never sued.").

{¶ 8} The Ohio Supreme Court summarily rejected this reasoning in its review of

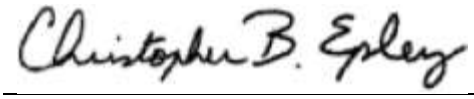
our *Clawson* decision. In its decision, the Ohio Supreme Court made it clear that we could no longer apply the narrow reading of *Wuerth* that we had applied in *Cope* and *Stanley*. We made this plain in our resolution of Badra-Muniz's second assignment of error. *Badra-Muniz* at ¶ 31 ("As the Ohio Supreme Court has emphasized twice, this principle applies to any principal to whom Ohio law would apply."), citing *Clawson*, 2022-Ohio-4154, at ¶ 32, and *Wuerth*, 2009-Ohio-3601, at ¶ 24.

{¶ 9} Our resolution of the second assignment of error was mandated by an Ohio Supreme Court decision that was issued well after the *Cope* and *Stanley* decisions. Therefore, this is not a situation in which one panel of this Court disagrees with a previous panel of this Court, which resulted in a conflict. Rather, we are constrained by an intervening Ohio Supreme Court decision to not follow a line of reasoning expressed in three of our prior decisions, the most recent of which the Supreme Court reviewed and reversed. This is not the type of "intradistrict conflict" that may be resolved by en banc consideration. Regardless of what panel of this Court hears this case, we are required to follow the clear mandate of the Ohio Supreme Court. Instead, at this point, only a successful appeal to the Ohio Supreme Court could change our November 22, 2024 resolution of Badra-Muniz's second assignment of error.

{¶ 10} We acknowledge that the recent enactment of R.C. 2307.241 may alleviate going forward the need to apply the plain language in the Ohio Supreme Court's *Clawson* decision. However, as explained in our separate order resolving Badra-Muniz's application for reconsideration, the legislature showed no intent to apply that statute retroactively to Badra-Muniz's situation. Therefore, we must deny Badra-Muniz's application for en banc reconsideration.

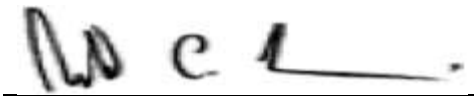
{¶ 11} Badra-Muniz's application for en banc reconsideration is DENIED.

SO ORDERED.

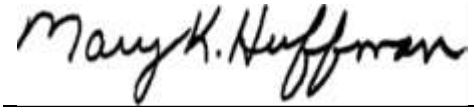


CHRISTOPHER B. EPLEY, PRESIDING JUDGE

MICHAEL L. TUCKER, JUDGE



RONALD C. LEWIS, JUDGE



MARY K. HUFFMAN, JUDGE

I do not join the order as both the Court's prior decision of November 22, 2024, and the Appellant's application for en banc reconsideration occurred before my term of office began, and therefore I express no opinion.

ROBERT G. HANSEMAN, JUDGE