[Cite as *Badra-Muniz v. Vinyl Carpet Serv., Inc.*, 2025-Ohio-1281.]

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 RECONSIDERATION**

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 reconsideration will be addressed in this order and the application for en banc consideration will be addressed in a separate order.

{¶ 2} "App.R. 26, which provides for the filing of an application for reconsideration

in this court, includes no guidelines to be used in the determination of whether a decision is to be reconsidered and changed." *Matthews v. Matthews*, 5 Ohio App.3d 140, 143 (10th Dist. 1981). "The test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Id.* "An application for reconsideration is not designed for use in instances where a party simply disagrees with the conclusions reached and the logic used by an appellate court." *State v. Owens*, 112 Ohio App.3d 334, 336 (11th Dist. 1996). Rather, "App.R. 26 provides a mechanism by which a party may prevent miscarriages of justice that could arise when an appellate court makes an obvious error or renders an unsupportable decision under the law." *Id.*

{¶ 3} Badra-Muniz contends that we should reconsider our resolution of his second assignment of error because we based our decision on dictum in *Clawson v. Hts. Chiropractic Physicians, LLC*, 2022-Ohio-4154. According to Badra-Muniz, "on October 24, 2024, the Ohio General Assembly abrogated that dictum by enacting Section 2307.241 of the Ohio Revised Code." Application for Reconsideration, p. 8. Vinyl & Carpet responds that the General Assembly did not state that it intended to retroactively apply R.C. 2307.241. Therefore, this Court's November 22, 2024 decision was correctly decided based on *Clawson*.

{¶ 4} In overruling Badra-Muniz's second assignment of error, we held:

> 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.

Badra-Muniz, 2024-Ohio-5507, at ¶ 31 (2d Dist.), citing *Clawson* at ¶ 32 and *Natl. Union Fire Ins. Co. of Pittsburgh v. Wuerth*, 2009-Ohio-3601, ¶ 24.

{¶ 5} R.C. 2307.241 went into effect on October 24, 2024, and states, in pertinent part: "(B) In a tort action alleging respondeat superior or vicarious liability, the following apply: (1) If liability arises against both a principal and agent, master and servant, employer and employee, or other persons having a vicarious liability relationship, the injured party may sue either the primarily liable agent, servant, employee, or person or the secondarily liable principal, master, employer, or person, or both." R.C. 2307.241(B)(1). If applicable to the pending appeal, R.C. 2307.241 arguably would require us to reconsider our resolution of Badra-Muniz's second assignment of error, because that statute appears to limit the language in the *Clawson* decision on which we relied in resolving Badra-Muniz's second assignment of error. To determine whether R.C. 2307.241 is applicable to the pending appeal, we must examine whether the statute may be applied retroactively to Badra-Muniz's appeal.

{¶ 6} "The Ohio Constitution provides that the 'general assembly shall have no power to pass retroactive laws.' " *State v. Brooks*, 2022-Ohio-2478, ¶ 9, quoting Ohio Const., art. II, § 28. "And the Revised Code provides that a 'statute is presumed to be prospective in its operation unless expressly made retrospective.' " *Id.*, quoting R.C. 1.48. Therefore, the Ohio Supreme Court has held that "[a] statute may not be applied retroactively unless the General Assembly expressly makes it retroactive." *Id.* at ¶ 10, citing *Hyle v. Porter*, 2008-Ohio-542, ¶ 9. "[T]o overcome the presumption that the statute applies prospectively, it must 'clearly proclaim' its retroactive application." *Hyle* at ¶ 10, quoting *State v. Consilio*, 2007-Ohio-4163, paragraph one of the syllabus. We find no language in R.C. 2307.241 that would indicate the legislature clearly intended the statute to be applied retroactively.

{¶ 7} Badra-Muniz argues that the General Assembly enacted R.C. 2307.241(B)(1) specifically to address the Ohio Supreme Court's *Clawson* decision. Assuming this is true, at the time of the enactment of R.C. 2307.241(B)(1), the legislature would have been aware of the *Clawson* decision and its effect on cases that were currently pending in the court system. Despite this, the legislature made no attempt to extend R.C. 2307.241 to pending cases. This easily could have been done with a simple statement as to retroactivity. *See Marysville Exempted Village Schools Bd. of Edn. v. Union Cty. Bd. of Revision*, 2023-Ohio-2020, ¶ 32 (3d Dist.) ("Pursuant to this rule, the General Assembly is presumed to know that it must include expressly retroactive language to create that effect, and the legislature has indeed done so in the past."). Since the General Assembly did not specify that R.C. 2307.241 would apply retroactively, it is not appropriate for us to reconsider our resolution of Badra-Muniz's second assignment

of error based on the enactment of R.C. 2307.241.

{¶ 8} Badra-Muniz also contends that we should reconsider our resolution of the third assignment of error because the issues of possession and control of the premises and whether work was inherently dangerous were questions of fact for a jury's determination. Application for Reconsideration, p. 11. Vinyl & Carpet responds we should not reconsider our resolution of Badra-Muniz's third assignment of error because there was no genuine issue of material fact that Vinyl & Carpet did not control any of Badra-Muniz's work or the area where Badra-Muniz's injury occurred and as a matter of law construction sites are inherently dangerous.

{¶ 9} In our November 22, 2024 decision, we addressed the same arguments that Badra-Muniz raises in his application for reconsideration. After summarizing the evidence of record, the parties' arguments, and the relevant law, we held:

> Based on our review of the evidence of record, including the deposition testimony summarized above, we conclude that the trial court did not err in granting summary judgment in favor of Vinyl & Carpet on Badra-Muniz's negligence claims that were based on premises liability law. There was no evidence that Vinyl & Carpet had custody or control of the injured employee, the employment, or the place of employment. . . . Badra-Muniz was the employee of the general contractor. Vinyl & Carpet was a subcontractor that had no control over Badra-Muniz or his employment. Further, no evidence was presented that Vinyl & Carpet had control over the place of Badra-Muniz's employment. While Badra-Muniz argues that Dixon had control over the area where Badra-Muniz was injured, he

presented no evidence that Vinyl & Carpet actively participated in any control that Dixon was exercising over that area at the time of the injury. As we explained in our resolution of the second assignment of error, Badra-Muniz cannot establish liability under a respondeat superior theory because Dixon was dismissed from the lawsuit based on the expiration of the statute of limitations. The Ohio Supreme Court stressed in its *Wuerth* decision that the rule that a principal is vicariously liable only when an agent could be held directly liable applies not only to claims of respondeat superior but also to other types of vicarious liability. . . .

The record also contains no evidence establishing the necessary privity between Badra-Muniz's employer and Vinyl & Carpet. . . . We also note that the factual scenarios involving the frequenter statutes typically involve an employee of a subcontractor who sued the general contractor or owner of the building where the construction project was being completed. In those instances, an argument can be made that the general contractor or owner exercised some control over the work of the subcontractor and the place of employment. Such control seems to be inherently lacking in the instant case where an employee of a general contractor sued a subcontractor. Typically, a subcontractor has much less control (if any) over the construction area and the general contractor's employees than the owner of the building or the general contractor does. Although Dixon testified in this case that the employees of the various subcontractors appeared more experienced than Badra-Muniz, this in no way created a

> genuine issue as to whether Vinyl & Carpet exercised any active control over Badra-Muniz's employment or place of employment. Finally, the Ohio Supreme Court has made it clear that the duty to frequenters does not typically extend to situations involving hazards that are inherently and necessarily present, like those present at a construction site.

(Citations omitted.) *Badra-Muniz*, 2024-Ohio-5507, at ¶ 55-56 (2d Dist.)

{¶ 10} Our November 22, 2024 decision considered and rejected the arguments raised by Badra-Muniz in his third assignment of error. In his application for reconsideration, Badra-Muniz has not called to our attention an obvious error in our resolution of his third assignment of error or raised an issue for our consideration that we did not fully consider in our November 22, 2024 decision. Rather, Badra-Muniz simply disagrees with the conclusions we reached and the logic we used. This is an insufficient basis on which to grant an application for reconsideration.

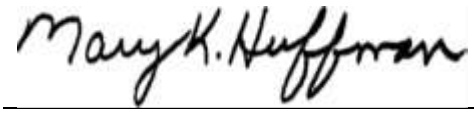
{¶ 11} The application for reconsideration is DENIED.

SO ORDERED.

Christopher B. Epley

CHRISTOPHER B. EPLEY, PRESIDING JUDGE

RONALD C. LEWIS, JUDGE



MARY K. HUFFMAN, JUDGE