[Cite as *Mellon v. O'Brien*, 2023-Ohio-2393.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MICHAEL MELLON, :

Plaintiff-Appellant, :

No. 112418

v. :

AARON A. O'BRIEN, ET AL., :

Defendants-Appellees. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 13, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-21-956042

Appearances:

Randy J. Hart, *for appellant*.

Gallagher Sharp LLP, Monica A. Sansalone, Carla M. Tricarichi, and Shane A. Lawson, *for appellee* Mansour Gavin LPA.

Collins, Roche, Utley & Garner, LLC, and Kurt D. Anderson, *for appellee* Aaron A. O'Brien.

FRANK DANIEL CELEBREZZE, III, P.J.:

{¶ 1} Plaintiff-appellant Michael Mellon ("Mellon") appeals two judgments of the Cuyahoga County Court of Common Pleas granting (1) defendant-appellee

Aaron A. O'Brien's ("O'Brien") motion to dismiss and (2) defendant-appellee Mansour Gavin, LPA's ("Mansour") motion for summary judgment. After a review of the relevant law and facts, this court affirms.

I. Factual and Procedural History

{¶ 2} In November 2021, Michael Mellon filed a complaint naming O'Brien and O'Brien's employer, Mansour, as defendants ("the November complaint"). The November complaint asserted legal malpractice claims against O'Brien, and alleged that as his employer, Mansour was vicariously liable for his alleged malpractice.

{¶ 3} The November complaint detailed that Mellon was a member of Halo Event Group, LLC ("Halo") that was involved in a legal dispute beginning in February 2018. O'Brien, an attorney, allegedly represented Halo and Mellon in the resulting arbitration proceedings. In November 2018, while the arbitration was ongoing, O'Brien joined Mansour and asked Mellon and Halo to sign an engagement letter allowing Mansour to represent them alongside O'Brien. Around January 2019, O'Brien left Mansour, and Mellon was allegedly not informed of this fact by either O'Brien or Mansour. The November complaint ultimately alleged that O'Brien did not adequately represent Mellon's interests in the arbitration proceeding, and the arbitrator granted full judgment in the amount of $624,661.62, plus interest, costs, and fees against Mellon and Halo.

{¶ 4} O'Brien and Mansour each answered through separate counsel. After answering, O'Brien filed a Civ.R. 12(C) motion for judgment on the pleadings ("the January motion" or "O'Brien's January motion") on statute of limitations grounds.

O'Brien's January motion relayed that Mellon's complaint was refiled and that Mellon initially filed a complaint relating to this matter on January 31, 2020, which Mellon voluntarily dismissed on November 25, 2020. Mellon opposed the January motion, asking for an opportunity to amend the November complaint to indicate that the matter was refiled. The court denied O'Brien's January motion and instructed Mellon to file an amended complaint with more accurate facts indicating that this case was refiled. Mellon filed an amended complaint ("the amended complaint") that was identical to the November complaint except for a single sentence noting that the action was refiled. O'Brien and Mansour each timely answered the amended complaint.

{¶ 5} In November 2022, O'Brien filed a second Civ.R. 12(C) motion for judgment on the pleadings ("the November motion" or "O'Brien's November motion") asking the court to dismiss the action for insufficiency of service of process. O'Brien and Mansour also filed separate motions for summary judgment. Mansour's summary judgment motion contained arguments that Mansour was not liable on the theory of vicarious liability, that Mellon would be unable to establish proximate cause as to his claims against Mansour, and asserted that Mellon's failure to serve O'Brien was dispositive as to any vicarious liability against Mansour.

{¶ 6} The trial court granted O'Brien's November motion and granted Mansour's motion for summary judgment, rendering all remaining motions moot, and completely disposing of Mellon's case against the parties. It is from these two

judgment entries that Mellon appeals, assigning the following two errors for our review:

> 1. The trial court erred in granting O'Brien's motion to dismiss and Mansour's motion for summary judgment because O'Brien waived its defense of lack of service.
>
> 2. The trial court erred in granting summary judgment for Mansour.

II. Law and Analysis

{¶ 7} In the instant appeal, Mellon contests the trial court's rulings granting O'Brien's November motion and Mansour's motion for summary judgment. A ruling on a motion alleging insufficient service of process presents a question of law that we review de novo. *Kraus v. Maurer*, 8th Dist. Cuyahoga No. 83182, 2004-Ohio-748, ¶ 12. A ruling granting summary judgment is also reviewed de novo. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

{¶ 8} We first address the necessity of reviewing O'Brien's November motion and Mansour's motion for summary judgment together. In *Natl. Union Fire Ins. Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 1-2, the Ohio Supreme Court held that a legal malpractice claim based on a theory of vicarious liability cannot be maintained directly against a law firm when the relevant attorney has been dismissed from the lawsuit or never sued in the first place. *Wuerth* involved a legal malpractice claim against Wuerth, a partner at a law firm, and a vicarious liability claim against the law firm. The United States District Court for the Southern District of Ohio dismissed all claims against Wuerth on summary judgment due to the plaintiff's failure to file the complaint within the statute of

limitations. Because there were no longer any cognizable claims against Wuerth, the district court also dismissed the claims for vicarious liability against the law firm. On appeal before the United States Court of Appeals for the Sixth Circuit, the appeals court determined that Ohio law was unsettled on this issue and certified the question to the Ohio Supreme Court. The holding in *Wuerth* therefore instructs that whether Mellon can maintain his vicarious liability claims against Mansour is entirely dependent on whether Mellon can maintain a cause of action against O'Brien.

{¶ 9} O'Brien's November motion was labeled as a Civ.R. 12(C) motion to dismiss. Civ.R. 12(C) provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." While reviewing this appeal, this court noted that review of Civ.R. 12(C) motions are restricted to the allegations and evidence contained in the pleadings. *Peterson v. Teodosio*, 34 Ohio St.2d 161, 166, 297 N.E.2d 113 (1973). Because O'Brien's November motion asserted insufficient service of process, it necessarily required the court to look beyond the allegations contained in the pleadings to the extent that service information is not contained within the pleadings. As a result, this court sua sponte asked the parties to file supplemental briefs addressing whether the trial court appropriately considered matters beyond the pleadings in reviewing the November motion.

{¶ 10} After reviewing the supplemental briefs, this court concludes that labelling the November motion as a Civ.R. 12(C) motion does not impact our analysis. Based on circumstances unique to this case, the trial court did not err in

arriving at its conclusion to dismiss O'Brien from the underlying proceeding, regardless of how the motion asserting it was styled.

{¶ 11} Regarding the evidence that may be considered, the Tenth District has noted that the requirement that Civ.R. 12(C) motions are constrained to the pleadings exists in tandem with the proposition that "'it is axiomatic that a trial court may take judicial notice of its own docket.'" *Whitehead v. Skillman Corp.*, 12th Dist. Butler No. CA2014-03-061, 2014-Ohio-4893, ¶ 8, citing *Indus. Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St.3d 576, 580, 635 N.E.2d 14 (1994). In determining whether O'Brien was served, this case does not require the court to look at evidence beyond what is apparent from its own docket. Further, the issue of service was properly raised and preserved in Mansour's motion for summary judgment, which allows courts to consider evidence outside of the pleadings. Civ.R. 56(C).

{¶ 12} Further, appellate courts "shall affirm a trial court's judgment that is legally correct on other grounds, that is, one that achieves the right result for the wrong reason, because such error is not prejudicial." *Gunton Corp. v. Architectural Concepts*, 8th Dist. Cuyahoga No. 89725, 2008-Ohio-693, ¶ 9, citing *Cook Family Invests. v. Billings*, 9th Dist. Lorain Nos. 05CA008689 and 05CA008691, 2006-Ohio-764, ¶ 19. Even though the Civ.R. 12(C) was arguably not the proper vehicle to raise insufficiency-of-service arguments, we conclude that no prejudice results in this particular case from analyzing the content of the motion when it appears that it was mislabeled and the issue was also incorporated into a pending motion for summary judgment. *See Hubiak v. Ohio Family Practice Ctr., Inc.*, 2014-Ohio-

3116, 15 N.E.3d 1238, ¶ 7 (9th Dist.). We are also persuaded that Mellon was not prejudiced because he was given an opportunity to and indeed did respond to O'Brien's November motion, Mansour's motion to dismiss, and all arguments briefed and argued on appeal, including our sua sponte request for supplemental briefing.

{¶ 13} We therefore proceed to our de novo review of whether O'Brien was properly dismissed from the case, as was raised in both O'Brien's November motion and Mansour's motion for summary judgment.

A. O'Brien's Dismissal from the Case

{¶ 14} The civil rules dictate that an action commences when service is perfected. Civ.R. 3(A). "[T]he duty to perfect service of process is upon the plaintiffs[.]" *Maryhew v. Yova*, 11 Ohio St.3d 154, 159, 464 N.E.2d 538 (1984).

{¶ 15} In the trial court and on appeal, Mellon did not ever dispute that he did not perfect service upon O'Brien, and we therefore need not consider that issue. Instead, Mellon consistently argues that O'Brien waived his insufficiency-of-service-of-process defense because it was not raised with O'Brien's January motion pursuant to Civ.R. 12(G) and (H). In his reply brief, Mellon asserted, for the first time, that O'Brien's November motion pertained only to the November complaint, not the amended complaint, and therefore, O'Brien waived his insufficiency-of-service defense as it pertained to the amended complaint.[1]

---

[1] We decline to consider any arguments raised for the first time in a reply brief. *See, e.g., Naiman Family Partners, L.P. v. Saylor*, 2020-Ohio-4987, 161 N.E.3d 83, ¶ 25 (8th Dist.). We further note that Mellon still did not dispute service of the amended

{¶ 16} Mellon directs us to the plain text Civ.R. 12(G) and (H) in arguing that we should find that O'Brien waived his ability to contest service. He also directs us to this court's holding in *Leotta v. Great Lakes Pain Mgt. Ctr.*, 2020-Ohio-4995, 161 N.E.3d 91 (8th Dist.).

{¶ 17} The Ohio Supreme Court has already interpreted Civ.R. 12(G) and (H) in this context and unequivocally held that while there are some instances where a party may submit to a court's jurisdiction and waive the defense of insufficiency of service of process, "[t]he only way in which a party can voluntarily submit to a court's jurisdiction is by failing to raise the defense of insufficiency of service of process in a responsive pleading or by filing certain motions *before any pleading*." (Emphasis added.) *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 13, citing *Maryhew*, 11 Ohio St.3d at 157-158, 464 N.E.2d 538. *Gliozzo's* holding derives from the plain text of Civ.R. 12(H)(1), which provides that a defense of insufficiency of service of process is waived "if omitted from a motion in the circumstances described in subdivision (G)," or "if it is neither made by motion under this rule nor included in a responsive pleading or amendment thereof[.]" Civ.R. 12(G), in its entirety, reads

> A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading,

---

complaint and only set forth a waiver argument. As such, the November complaint and amended complaint are only discussed to the extent they inform Mellon's waiver argument.

> any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

{¶ 18} Neither of the two situations that waive the affirmative defense of insufficiency of service of process are applicable here. In both his initial answer and his answer to the amended complaint, O'Brien properly raised and asserted the affirmative defense of insufficiency of service of process. Mellon argues that the January motion, filed between the November complaint and the amended complaint, was included in the language contemplated by Civ.R. 12(G) and therefore, should have consolidated the defense of insufficiency of service into such motion. Mellon points us to the plain text of Civ.R. 12(G) and (H) and asks us to give meaning to the plain text that uses the language "motions under this rule," and would thus include the Civ.R. 12(C), as opposed to the Supreme Court's interpretation in *Gliozzo* that restricts the waiver of the insufficiency-of-service-of-process defense to pre-answer motions. We decline such invitation; so long as *Gliozzo* controls, we are constrained to find that there are only two situations where O'Brien could have waived service, and neither are applicable in this case. O'Brien did not make any pre-answer motions, as contemplated by *Gliozzo*. We therefore find that O'Brien properly raised the defense of insufficiency of service of process and preserved it for when the defense materialized, a year after the complaint was filed.

{¶ 19} Mellon's second argument is that the holding in *Leotta*, 2020-Ohio-4995, 161 N.E.3d 91, requires us to reverse the trial court's judgment. We are

unpersuaded by this argument; *Leotta* follows *Gliozzo*. In *Leotta,* the defendant filed a pre-answer Civ.R. 12(B)(6) motion that included a footnote asserting the remainder of the affirmative defenses available in Civ.R. 12(B) and later reasserted the affirmative defenses in its answer. The *Leotta* Court, applying *Gliozzo*, found that the defendant did not waive the defense of insufficiency of service of process because the defense was asserted in a footnote in the pre-answer motion and then again in the answer. Here, there was no pre-answer motion. At the time that a Civ.R. 12(C) is filed, the pleadings are closed and any affirmative defenses would have already been asserted in the answer, as was the case in the instant matter. This court has previously concluded the same.

> While Civ.R. 12(G) provides that the failure to assert certain defenses results in waiver, thus prohibiting the further assertion of such defenses, that rule does not apply here. The defenses asserted herein are not those which would be subject to waiver for failure to assert them in a pre-answer motion. They were properly asserted as affirmative defenses in the answer. Since the "motion to dismiss" filed here was filed after the answer, it was more in the nature of a motion for judgment on the pleadings and may therefore be treated as such.

Barile v. Univ. v. Virginia, 30 Ohio App.3d 190, 192, 507 N.E.2d 448 (8th Dist.1986).

{¶ 20} We therefore find that the January motion did not operate as a waiver of the defense of the insufficiency-of-service argument, and O'Brien properly preserved it by including it in his answer to both the November complaint and the amended complaint. Because our review concludes that O'Brien was properly dismissed from the case, we overrule Mellon's first assignment of error.

B. Mansour's Motion for Summary Judgment

{¶ 21} In his second assignment of error, Mellon argues that the trial court erred in granting Mansour's motion for summary judgment. In support of his argument, Mellon acknowledges that Mansour's motion for summary judgment is dependent upon O'Brien's presence in the case and urges us to reverse the trial court's holding on the motion for summary judgment to the extent that we find error in Mellon's dismissal from the case.

{¶ 22} In order to obtain summary judgment, the moving party must show that "(1) there is no genuine issue of material fact; (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 when viewing evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party." *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219, 631 N.E.2d 150 (1994).

{¶ 23} "[A] law firm is not vicariously liable for legal malpractice unless one of its principals or associates is liable for legal malpractice." *Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, at ¶ 2. All of Mellon's claims against Mansour allege that it is vicariously liable for O'Brien's alleged legal malpractice. Because our disposition of the first assignment of error concluded that O'Brien was properly dismissed from the case due to Mellon's failure to serve him, we are constrained to apply the Supreme Court's holding in *id.* at ¶ 1-2.

{¶ 24} We therefore find that the trial court did not err in granting summary judgment in favor of Mansour and overrule Mellon's second assignment of error.

III. Conclusion

{¶ 25} The trial court did not err in determining that O'Brien did not waive his insufficiency-of-service argument. Based on O'Brien's dismissal from the case, the trial court also did not err in granting Mansour's motion for summary judgment.

{¶ 26} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK DANIEL CELEBREZZE, III, PRESIDING JUDGE

EMANUELLA D. GROVES, J., CONCURS;
SEAN C. GALLAGHER, J., CONCURS (WITH SEPARATE CONCURRING OPINION)

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 27} Ohio is in uncharted waters with respect to the necessity of naming both the agent and the principal for the purposes of pursuing vicarious liability claims against the principal, which includes employers. No longer can a plaintiff choose to hold an agent or their principal responsible for the misconduct of the

agent, but they must timely pursue both in order to preserve the claim against the principal under the unambiguous conclusion reached in *Clawson v. Hts. Chiropractic Physicians, L.L.C.*, Slip Opinion No. 2022-Ohio-4154, ¶ 40. I fully concur with the majority's opinion but am compelled to write separately given the ramifications of the Supreme Court's recent decision.

{¶ 28} *Clawson* concluded, citing "basic principles of agency law," that the failure to timely serve a complaint on the agent is dispositive as to the derivative claims advanced against the principal. *Id.* at ¶ 33. Primarily relying on *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, ¶ 24, and *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, *Clawson* concluded that based on the failure to timely serve a complaint upon the agent, the right to pursue a claim against the principal was extinguished even though the action was commenced against the principal within the statute of limitations applicable to the agent. And compounding the magnitude of that conclusion, according to *Wuerth* there is no "basis for differentiating between a law firm and any other principal to whom Ohio law would apply." *Clawson* at ¶ 32, citing *Wuerth*. The impact of *Clawson* is, therefore, broad.

{¶ 29} Both *Wuerth* and *Comer* represent what can best be described as the most misunderstood cases in recent memory. Neither case presents a shift from the general principles of agency law, and in fact, both applied fundamental concepts. The problem with both cases is that the procedural history guiding the outcome became buried, and the general conclusions reached within each case became the

overriding principles divorced from the procedural histories that necessitated the result.

{¶ 30} *Wuerth* was simple on its face. It set forth two guiding principles: (1) "[a] law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice"; and (2) "[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* at ¶ 18, 26. Neither of those statements of black-letter law are novel. Under general principles, a corporation or partnership acts only through its agents or employees. *See Comer* at ¶ 22 ("employer's liability is dependent on the negligence of the employee").

{¶ 31} The novelty of *Wuerth* was in the question presented for review: whether a law firm can be held directly liable for legal malpractice. *Id.* at ¶ 8, 24. *Wuerth* held that it cannot based on general principles of agency law. In *Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, the lawyer had left the firm after committing the alleged malpractice, but the law firm continued representing the plaintiff through its other lawyers. *Id.* at ¶ 6 (The attorney, Wuerth, became physically incapacitated during trial and was replaced by other lawyers from the firm.). The plaintiff sued Wuerth (the attorney) and his firm for legal malpractice for acts committed by the individual attorney, but based on the statute of limitations established through the firm's continued representation, not the statute of limitations that applied to the individual attorney who ceased representations earlier. *Id.* at ¶ 7-8. The trial court in that action determined that the one-year

statute of limitations for the lawyer (Wuerth) had expired before the action against the law firm was commenced. *Id.* Because the statute of limitations for the acts of the agent had expired before the action was initiated against the law firm, the federal court determined that the law firm, as the principal, could not be held liable for that misconduct in the belated action unless the firm itself was considered to have independently committed the malpractice. *Id.* *Wuerth* concluded that claims against the law firm are derivative, and thus depend upon the statute of limitations applicable to the agent.

{¶ 32} *Comer* followed the same pattern. *Comer* concluded that an action against a hospital for the acts of its doctor, its agents though agency by estoppel, is derivative in nature. But the timeliness of the action solely depended on the period of limitations applicable to the agent, not the hospital. The plaintiff in *Comer* sent the hospital a 180-notice letter to extend the one-year statute of limitations against the hospital, under the version of R.C. 2305.11 then applicable, for a claim arising based on the conduct of two doctors (independent contractors) that had occurred a year prior. *Clark v. Risko*, 5th Dist. Knox No. 03CA14, 2003-Ohio-7272, ¶ 10. The individual doctors were not served with the 180-day notices, and as a result, similar to *Wuerth*, the statute of limitations against the agents expired before the plaintiff initiated the lawsuit against the principal, the hospital. *Id.* The plaintiff initiated the lawsuit against the hospital alone, and in that context, the appellate court determined that the negligence claims against the hospital were independent and based on the extended statute of limitations. *Id.* at ¶ 13. The Ohio Supreme Court

disagreed, concluding that the vicarious liability claims against the hospital were derivative in nature, and because the action was not brought within the statute of limitations applicable to the agents, that expired due to the lack of the 180-day notices, the action against the principal was not timely initiated. *See Comer,* 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, at ¶ 25.

{¶ 33} In both *Comer* and *Wuerth*, the initial action against the principal was filed after the expiration of the statute of limitations applicable to the agent's conduct, and it is for that reason that the derivative liability against the principal was extinguished.

{¶ 34} Under basic tenets of agency law, a principal can raise any defense to a claim to which the agent would be entitled. The statute of limitations as to the agent applies to the principal since the principal's liability is derivative in nature. *Doe v. First United Methodist Church*, 68 Ohio St.3d 531, 537, 629 N.E.2d 402 (1994), *superseded on other grounds by enactment of* R.C. 2305.111(C), citing *Grimm v. White*, 70 Ohio App.2d 201, 203, 435 N.E.2d 1140 (10th Dist.1980). But despite this, a plaintiff has always maintained the choice to sue (or hold liable) the agent, the principal, or both — so long as the action was timely commenced based on the statute of limitations applicable to the agent. *See Losito v. Kruse*, 136 Ohio St. 183, 187, 24 N.E.2d 705 (1940) ("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"); *Maple v. Cincinnati Hamilton & Dayton RR. Co.,* 40 Ohio St. 313, 316

(1883) (a judgment against the agent does not extinguish liability against the principal although separately pleaded, a plaintiff is not required to choose which to sue).

{¶ 35} *Wuerth*, and *Comer* for that matter, understood and adhered to this basic premise. *Wuerth* at ¶ 22; *see also Tisdale v. Toledo Hosp.*, 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 280, ¶ 25 (6th Dist.), citing *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034, ¶ 18 (2d Dist.), ("Claims for the negligence of a hospital's employee, such as a nurse, or here, a technician, are still governed by the law of respondeat superior and indeed *Wuerth* acknowledges that a plaintiff may sue a master, or servant, or both.").

{¶ 36} For unknown reasons, the procedural backgrounds of *Comer* and *Wuerth* are often overlooked. In both *Comer* and *Wuerth*, the lawsuit against the principal was initiated after the statute of limitations had already expired as against the agent. The statute of limitations issue became distilled into the question of whether an action was maintained against the agent. *See Clawson,* Slip Opinion No. 2022-Ohio-4154, at ¶ 42 (Brunner, J., dissenting).

{¶ 37} *Clawson* differed. In *Clawson,* the action was timely commenced against the agent and the principal, but voluntarily dismissed without prejudice. Upon timely refiling under Ohio's saving statute, service was again perfected against the principal, the effect of which meant the action relating back to the original filing. Under traditional principles of agency, the plaintiff had discretion to hold the principal liable for the conduct of its agent so long as the action was commenced

within the statute of limitations applicable to the agent. Through a procedural quirk, service in the refiled action was not perfected against the agent. Under the oft-cited maxim that a plaintiff may sue the agent, the principal, or both, the action could have proceeded under *Wuerth* and *Comer*.

{¶ 38} *Clawson* extended *Wuerth* to an outcome that upends that basic premise:

> 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." 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939, at paragraph two of the syllabus. 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.
>
> 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. As a result, Heights Chiropractic, as Dr. Bisesi's employer, may not be held vicariously liable for Dr. Bisesi's alleged malpractice.

(Emphasis added.) *Id.* at ¶ 32-33. This conclusion represents a dramatic shift in Ohio law. Following *Clawson,* a plaintiff must imitate an action against both the agent and the principal in order to impose liability against the principal. The discretion to choose has been removed.

{¶ 39} I fear the pendulum has swung far from the basic tenets of agency law. *Clawson* announced a general rule based on "basic principles of agency law" that apply to all respondeat superior claims (think employee negligence, product

liability, or any other action based on some form of vicarious liability). How this will play out is yet to be seen.

{¶ 40} *Clawson* is based the same procedural background presented herein. I am obligated to conclude that no claim against Mansour can exist since the plaintiff failed to timely perfect service of the refiled complaint against O'Brien. Accordingly, I fully concur with the majority.