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Proponent Testimony to HB 179

Curtis Fifner, Legislative Chair

Senate Judiciary Committee

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Chair Manning, Vice-Chair Reynolds, Ranking Member Hicks-Hudson, and members of the Ohio Senate Judiciary Committee, thank you for the opportunity to testify on this important legislation.

My name is Curtis Fifner, and I am an attorney with Elk & Elk here in central Ohio. I am also the Legislative Chair for the Ohio Association for Justice, (OAJ). As a voice of the plaintiff's bar in Ohio, OAJ is dedicated to preserving individuals' right under the Seventh Amendment and Article I of Ohio's Constitution, both of which guarantee the citizens of Ohio the inviolate right to trial by a jury of their peers in civil cases.

HB 179 seeks to solve a problem created by former Chief Justice Maureen O'Connor's decision in *Clawson v Heights Chiropractic.* In summary, the decision established judicial requirement for shotgun-type lawsuits. OAJ believes the civil justice system can and should be more efficient. The bill will restore Ohio common law, previously recognized for centuries and around the country, which is the basis of our Seventh Amendment right in the US Constitution.

Overview

The US Constitution's Seventh Amendment states:

> *In Suits **at common law*** [emphasis added]*, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.*

As most tort cases are brought under common law, the judicial doctrine of respondeat superior or vicarious liability (which are colloquially synonymous) are most typically followed. Cornell Law School's Legal Information Institute defines respondeat superior as:

> *A legal doctrine, most commonly used in tort, that holds an employer or principal legally responsible for the wrongful acts of an employee or agent, if such acts occur within the scope of the employment or agency. Typically when respondeat superior is invoked,*

a plaintiff will look to hold both the employer and the employee liable. As such, a court will generally look to the doctrine of joint and several liability when assigning damages.

Chief Justice O'Connor's decision in *Clawson v Heights Chiropractic* dangerously changes over a century of legal precedent, by differentiating the acts of employees from acts of employers. Moving forward, due to the newly created uncertainty, the quantity of defense motions to dismiss filed in all types of cases, and out of an abundance of caution, plaintiff lawyers feel compelled to sue every possible individual involved in the negligent action in order to sue the employer for the employee's act.

Thus, to promote judicial efficiency, a legislative fix to restore this previously-settled, well-recognized common law doctrine is needed.

Background on *Clawson v Heights Chiropractic*

The original case was a potential negligence claim for medical malpractice filed by a patient, Cynthia Clawson, against the alleged chiropractic practitioner and his employer, a chiropractic practice. The Supreme Court's decision however was regarding a motion for summary judgment made by the practice.

The trial court dismissed the case against the chiropractor for failure to timely serve the complaint. After that dismissal, Heights Chiropractic moved for summary judgment by claiming their vicarious liability was contingent on the chiropractor's direct liability, which was no longer in question.

The Ohio Supreme Court's decision relied on a prior decision in *National Union Fire Insurance Company of Pittsburgh v. Wuerth ("Wuerth")*, which created a rule that: "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." The *Clawson* decision attempted to extended that rule to apply to vicarious liability claims for medical malpractice.

Ramifications, uncertainty and questions

While we do not dispute the facts of *Clawson* or *Wuerth*, the practical ramifications are unknown. Paragraph 26 in *Clawson* suggests that employers cannot be vicariously liable if no individual employees are liable or have been named. Additionally, paragraph 28 clearly states that a claim for vicarious liability is only possible if at least one principal or employee is also held liable.

Past Vicarious Liability Claims

To illustrate this issue, I'll share two common types of vicarious liability claims: wrongful termination and a wrongful death claim for patient who was left overnight in a transportation van at a nursing home.

My first-ever trial was for Mr. Graf who, along with his two nephews, was wrongfully terminated because he filed and pursued a workers' compensation claim for an injury he suffered while on the job. ORC 4123.90 clearly prohibits reactionary firings for the filing of a Workers' Compensation claim. I filed the claim against the employer only, and my client was awarded roughly $7000 plus attorneys and court fees. If I received this case after *Clawson*, I fear I would have had to file against every possible human resource manager, supervisor, director, and officer of the company for their involvement in making the decision to fire my client. Suing only the company was the most effective and efficient pathway, but the *Clawson* decision will change future cases.

Recently, in the case of *Parks v. Solivita of Summits Trace, Franklin County Case Number 23 CV 942*, Mr. Parks was a resident of the nursing home. The nursing home's employee left Mr. Parks in the van and clocked out. Mr. Parks could not exit the van on his own because he was in a wheelchair, and the doors could not be opened while the van was off. As a result, Mr. Parks was trapped for 17 hours in the van, while the weather dipped to 18 degrees. His absence for meals, bed checks, medication administration, and other interventions somehow went unnoticed. When he was finally found, he was extremely lethargic, slumped over in his wheelchair, and mumbling that he was cold. Sadly, the nursing home did not even arrange for emergency transport to a hospital. Mr. Parks waited another two hours before he arrived at Grant Medical Center, where his temperature was too low to be detectable. Only after a warming blanket and warmed IV fluids, his temperature was finally detectable at 86.8 degrees. He eventually died from the profound effects of his severe hypothermia.

The case had previously been filed against the nursing home only, but the two year wrongful death statute of limitations was approaching. Plaintiff's counsel attempted to avoid having to sue every potential employee, but the nursing home refused any stipulation. Instead, they provided a list of 134 employees who, according to time sheets, would have been responsible for providing "medical care, treatments, assessments, medication administrations, and routine rounding" during the period of time Mr. Parks was left in the van. Thus, Mr. Park's attorney filed a new complaint naming all 134 employees on February 10, 2023 to preserve the case and protect against legal malpractice.

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Excessively naming defendants does nothing to support a claim or damages. However, failing to appropriately name defendants may be considered legal malpractice. In fact, there have been countless motions to dismiss pending cases filed all over the state by the defense bar based on *Clawson* because every potentially negligent employee was not sued. Therefore, OAJ members are in a catch 22: over-name and burden the courts OR under-name and risk legal malpractice.

As a final important matter, courts throughout this state are still trying to get through the backlog created by the COVID-19 pandemic. Inundating judges, court personnel, and county clerks with cases involving 50-100 defendants who need to be accounted for at the initial Rule 26 status conference does nothing but add costs to the litigants and time and stress for the already overworked court staff. It also creates logistical nightmares like scheduling depositions, trial dates, and even timely exchanging and responding to 50 sets of written discovery just to move cases forward.

Solution

OAJ recommends a simple solution of defining vicarious liability in the Ohio Revised Code, which is seen in HB 179. This bill provides legal certainty that only employees who commit "malpractice" need to be named or served in the initial filing of the case, as described in the *Wuerth* decision. The reason for this distinction is that Ohio law has always recognized that professionals who are capable of committing malpractice, such as attorneys and doctors, have a level of autonomy and independence that other employees, like nurses, technicians, paralegals, laborers, and truck drivers, do not have. This is because, as *Wuerth* noted, "the term 'malpractice' refers to professional misconduct, namely the failure of one rendering services in the practice of a profession to exercise that degree of skill and learning normally applied by members of that profession in similar circumstances."

It is also important to note that this legislation, which codifies *Wuerth*, is the exact interpretation 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 their amicus brief in *Clawson* asked for from the Ohio Supreme Court. As they so presciently noted, "including nurses and technicians would result in nearly all hospital employees being named individually in medical malpractice cases." They advocated for this interpretation because they "**recognized 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**." This legislation accomplishes exactly that.

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While nearly every other state in the country recognizes vicarious liability as common law[1], Ohio will most clearly define the doctrine into our Revised Code.

Finally, please be reassured that this language does nothing to change the burden of the plaintiff to prove negligence or other wrongdoing during the case. HB 179 is specifically about who must be named as a party to a lawsuit, with no impact to the four elements of negligence: duty, breach, causation, or damages.

As I previously stated, this language returns Ohio to common law previously recognized for centuries and around the country, which is the basis of our 7th amendment right in the US Constitution.

Thank you to the sponsors and co-sponsors for your leadership on this important bill, and I am happy to answer any questions the committee may have.

[1] See e.g. *Kocsis v. Harrison*, 249 Neb. 274, 280, 543 N.W.2d 164 (1996) ("when a plaintiff initiates an action under the theory of respondeat superior against an employer before the statute of limitations has run as to the employee, the plaintiff need not sue both the employer and employee to prevent his action from being time barred."), *Abshure v. Methodist Healthcare-Memphis Hosps*., 325 S.W.3d 98, 111 (Tenn.2010) (where the plaintiff has initially filed a vicarious liability claim against the principal, and the plaintiff's claims against the principal's agents are later extinguished by operation of law, the plaintiff's claims are not barred based on agency principles allowing the plaintiff to sue the master or servant), *Wiedenfeld v. Chi. & N. W. Transp. Co*., 252 N.W.2d 691, 695 (Iowa 1977) (the servant is not a necessary party to an action against the master), citing *Losito*, 136 Ohio St. at 187, *Austin v. Specialty Transp. Services, Inc*., 358 S.C. 298, 319, 594 S.E.2d 867 (App. 2004) (observing that under the doctrine of respondeat superior the plaintiff "had the choice to sue either the agent or principal or join both."), *Helms v. Rudicel*, 986 N.E.2d 302, 312 (Ind.App.2013) ("While Indiana has not addressed this specific issue, we observe that some of our sister states have concluded that the running of a statute of limitations with respect to a physician does not preclude a complaint against a hospital on a theory of vicarious liability and apparent authority.")