Testimony of Ohio Hospital Association and
Ohio State Medical Association re: HB 179
Senate Judiciary Committee
May 7, 2024

Chair Manning, Vice Chair Reynolds, Ranking Member Smith, and members of the Senate Judiciary Committee, thank you for the opportunity to provide Interested Party testimony regarding HB 179 on behalf of the Ohio Hospital Association and the Ohio State Medical Association.

On behalf of the OHA and OSMA, we first want to thank Representative Mathews for the transparent and inclusive process in which he has invited stakeholder participation. We appreciate being involved in that process and being able to participate in constructive dialogue.

HB 179 has two key components:

1) The first component relates to the Statute of Repose and would reverse what we believe to be an erroneous Ohio Supreme Court decision issued in 2022, *Elliott v. Durrani*. The OHA and OSMA are supportive of the portion of the bill regarding the Statute of Repose.
2) The second component relates to Vicarious Liability and purports to overturn a different Ohio Supreme Court decision issued last year, *Clawson v. Heights Chiropractic*. The health care provider community has some concerns about this portion of the bill, which is where we would like to focus our testimony.

As we understand the intent of the bill, the intent is to revert to the state of the law prior to the Court's decision in *Clawson*. However, we believe that HB 179 as currently written goes far beyond just reversing *Clawson*.

Vicarious Liability

In order to consider HB 179, it is necessary to first understand the different forms of vicarious liability. Both forms involve the imposition of liability on one for the actions of another for public policy reasons, but there are very significant differences that we believe warrant different treatment:

Respondeat superior is liability once removed. This is liability imposed on an employer/principal for the negligence of an employee/agent. In the context of a hospital, this would include imposing liability on a hospital for the negligence of an employed nurse. Importantly, liability coverage for employed nurses is provided by or through the hospital. As such, the employed nurse and hospital share the same coverage and their interests are necessarily aligned. They also share the same attorney, which permits them both to mount a proper defense.

Agency by Estoppel is liability twice removed. This is liability imposed on one for the negligence of another who is employed by yet another. For example, hospitals often contract with staffing agencies to provide temporary nursing staff and other providers. Those nurses and other providers are employed by the staffing agencies and not the hospitals. Liability coverage and defense counsel are provided by the staffing agencies. Not only does this impede the ability of the hospital to adequately defend claims arising out of care provided by the agency providers, but it creates a situation where their interests may actually be at odds. This would interfere with both the provider and the hospital mounting a proper defense.

As it is drafted, HB 179 blurs the lines between hospital liability under Respondeat Superior and Agency by Estoppel. Specifically, in several places in the bill, it refers to a "tort action alleging respondeat superior or vicarious liability." Because respondeat superior is a form of vicarious liability, it appears that the reference to vicarious liability is intended to implicitly encompass Agency by Estoppel, which is the other form of vicarious liability. That would go beyond simply returning the state of the law to what it was prior to the *Clawson* decision. As the bill is written, hospitals would now also face the equivalent of primary liability for providers that it does not employ, insure, or represent, which was not the state of the law prior to *Clawson*.

The Law Pre-Clawson

Vicarious liability in the context of medical claims has been addressed over the years in Ohio starting with *Clark v Southview* in 1992, followed by *Comer v. Risko* in 2005, and then most recently in *Clawson v. Height Chiropractic* in 2022. Notably, *Clawson* essentially applied the analysis set forth in *National Union Fire Ins, Co. v. Wuerth* (2009) to medical claims. *Wuerth* was a case involving legal negligence.

Prior to *Wuerth/Clawson*, the practice in Ohio was for Plaintiffs to individually name as a Defendant each physician and advanced practice provider (particularly physician assistants and advanced practice nurses) who was alleged to have been negligent when filing a medical claim. When Plaintiffs were alleging that a nurse employed by a hospital was negligent, some attorneys would name just the hospital and others would name the hospital as well as the individual nurses. Whether the employed nurse was individually named or not, the hospital had the ability to defend both itself and the employed nurse as they still shared liability coverage and representation. By comparison, when Plaintiffs were alleging that a nurse employed by a staffing agency was negligent, the individual nurse and/or the staffing agency that employed her were named along with the hospital. The nurse and agency would have different liability coverage and have separate counsel from the hospital. Their interests may or may not be aligned.

Plaintiffs counsel reads *Clawson* to stand for the proposition that any licensed provider must be individually named by a Plaintiff when asserting a medical claim in order to maintain a claim of vicarious liability against a hospital, and this would be a change in practice for some Plaintiff's attorneys as it relates to employed nurses. For those attorneys, concern has been raised that *Clawson* now requires them to resort to shotgunning, or naming absolutely everyone involved in the care of a hospitalized patient, but we offer the following observations in response to that suggestion:

1) *Wuerth/Clawson* only speak to licensed professionals facing claims of professional negligence. Therefore, the only change would be that Plaintiffs would now need to consistently name all licensed providers, but they would still not need to name other hospital employees.

2) To the extent that Plaintiffs need to conduct further inquiry to determine all of the licensed professionals who they are alleging were negligent, there are existing mechanisms in place already that were created for that purpose at the urging of the Plaintiff's bar. Specifically, Plaintiffs can extend the limitations period by 180 days by either serving a notice letter under R.C. § 2305.113 or by filing suit against at least one defendant under R.C. § 2323.451.

Notably, Civil Rule 10(D)(2) was created to prevent a Plaintiff from naming anyone unless they submit an Affidavit from a qualified expert who opines that there is merit to the allegations against them. This was intended to prevent shotgunning and/or frivolous lawsuits. The Rule requires an Affidavit as to each Defendant, but it is not clear how this would apply if a single Defendant (the hospital) could include dozens/hundreds of individuals in various different specialties.

We believe that the existing mechanisms provide an appropriate balance between the Plaintiffs ability to identify and timely name in a lawsuit those individuals who they allege were negligent when filing a medical claim, the Defendants ability to defend themselves against those claims and the mutual desire to include the appropriate parties on both sides of that equation. In that regard, we believe that the proponents of HB 179 are overstating the impact of *Clawson* on medical negligence litigation.

That said, if the committee and legislature believe that *Clawson* created a problem that requires legislative intervention and want to return to a pre-*Clawson* state, <u>and in the spirit of compromise</u>, our suggestions for improving the bill are as follows:

1) Limit the application of the bill to vicarious liability in the form of respondeat superior by deleting all references to "or vicarious liability."

   As currently written, the bill significantly changes and expands vicarious liability under Agency by Estoppel by imposing the equivalent of primary liability on hospitals for the actions of individuals that it does not employ or insure. This goes far beyond merely reversing *Clawson* and creates more problems than it solves. Plaintiffs seeking to impose vicarious liability should be required to name either the individual or their actual principal/employer in order to involve the appropriate liability coverage and to allow for the various parties to be able to defend their interests.

   Though we believe deleting "or vicarious liability" as described above is the cleanest way to address this issue, in the alternative, we have suggested language that would simply require independent contractors to be named.

2) Adding Advanced Practice Registered Nurse, as defined in section 4723.01, and Physician Assistant, as defined in Chapter 4730, to the list of carve outs in lines 66-67. Those providers have historically been named in lawsuits prior to *Clawson,* so including them returns us to a pre-*Clawson* situation.

We have provided suggested language to Representative Mathews and Chair Manning to accomplish both of these points and it is our understanding that language is being drafted by LSC. We look forward to reviewing that language and are hopeful it will become part of the bill as this process moves forward.

Thank you again for the opportunity to share OHA's and OSMA's feedback regarding HB 179.