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# Using It For All It's Wuerth: A Critical Analysis of National Union Fire Insurance Company of Pittsburgh v. Wuerth as Applied to Medical Malpractice in Ohio

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**USING IT FOR ALL IT'S WUERTH: A CRITICAL  
ANALYSIS OF *NATIONAL UNION FIRE INSURANCE  
COMPANY OF PITTSBURGH V. WUERTH* AS APPLIED TO  
MEDICAL MALPRACTICE IN OHIO**

*Christy L. Wesig\**

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## I. INTRODUCTION

An important tort liability issue currently under debate in Ohio is whether negligent agents must be named as defendants in any action seeking to hold a principal liable for medical malpractice.<sup>1</sup> Both plaintiffs and defendants have requested clarification of the current law in Ohio.<sup>2</sup> This article takes the position that the Ohio Supreme Court should not require a negligent agent be a named defendant in order to extend liability to the principal.

The purpose of tort liability for medical malpractice is two-fold: “to deter inappropriate, incompetent or unprofessional conduct” and to make victims whole by compensating them for the losses they incur.<sup>3</sup> One method of achieving this purpose is to place responsibility on the one who has the most to gain through the employee’s actions. *Respondeat superior* is a doctrine that imputes to the employer the actions of the tortfeasor, if those acts were performed within the scope of employment.<sup>4</sup> It is a doctrine that has changed and developed over time,

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1. There is currently a split between the circuits regarding how to answer this question. *See, e.g., Taylor v. Belmont Cmty. Hosp.*, 2010-Ohio-3986 (Ohio Ct. App. 7th Dist.) (allowing a claim to proceed against the hospital without the addition of the negligent agents); *Henry v. Mandell-Brown*, 2010-Ohio-3832 (Ohio Ct. App. 1st Dist.) (claim barred for failure to name negligent physician as a party defendant), *appeal not accepted*, 940 N.E.2d 987 (Table); *Tisdale v. Toledo Hosp.*, No. CI 03-4247 (Ohio C.P. Lucas Cnty. 2010), *appeal filed*, No. 11-1005 (Ohio Ct. App. 6th Dist. Jan. 10, 2011) (trial court found claim barred because of failure to name negligent parties); *Stanley v. Cmty. Hosp.*, 2011-Ohio-1290 (Ohio Ct. App. 2nd Dist.) (allowing a claim to proceed against the hospital where the parties not named were nurses and therefore employees of the hospital), *appeal not accepted*, 951 N.E.2d 1047 (Ohio 2011). *See also infra* Part IV.A. By declining jurisdiction recently in both *Mandell-Brown* and *Stanley*, the Ohio Supreme Court missed two opportunities to clarify the current state of the law.

2. *See Mandell-Brown*, No. 2010-1861 (Ohio filed Feb. 2, 2011), *appeal not accepted*, 940 N.E.2d 987 (Ohio 2011). Plaintiff appealed to the Ohio Supreme Court after the court of appeals affirmed the trial court’s grant of summary judgment in favor of the medical facility, based on the decision in *National Union Fire Insurance Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939 (Ohio 2009). *See also Stanley*, No. 2011-0711 (filed Aug. 24, 2011), *appeal not accepted*, 951 N.E.2d 1047 (Ohio 2011). Plaintiff sued the hospital and unnamed nurses and the trial court granted summary judgment relying on *Wuerth. Id.* The Court of Appeals for the Second District reversed. *Id.* Defendant, Community Hospital, appealed to the Supreme Court of Ohio, requesting clarification of *Wuerth. Id.* *See infra* note 220. The Supreme Court of Ohio denied jurisdiction in both cases and the question remains open for the court to resolve.

3. Thomas May & Mark P. Aulisio, *Medical Malpractice, Mistake Prevention, and Compensation*, 11 KENNEDY INSTITUTE OF ETHICS JOURNAL, 135, 135-46 (2001).

4. *State ex rel. Sawicki v. Lucas Cnty. Ct. of Com. Pl.*, 931 N.E.2d 1082, 1088-89 (Ohio 2010). “The doctrine of *respondeat superior* operates by imputing to the employer the acts of the tortfeasor, not the tortfeasor’s liability.” *Id.* (emphasis added).

especially regarding a hospital's liability for the medical malpractice of those treating hospital patients.

In 2009, the Ohio Supreme Court decided a case that had the power to make a drastic change in the application of *respondeat superior* to medical malpractice cases.<sup>5</sup> The case merely analogized to medical malpractice, not deciding any issues of medicine, hospitals, or medical malpractice. Yet it created a sharp divide between Ohio's appellate courts regarding how to handle medical malpractice cases. The case that set the stage for massive confusion regarding the current law of *respondeat superior* was *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*.<sup>6</sup> In *Wuerth*, the certified question presented was "whether a law firm may be held vicariously liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants."<sup>7</sup> The Ohio Supreme Court answered the question in the negative.<sup>8</sup> In determining whether malpractice liability existed for a law firm without the individual lawyer-defendant, the court analogized to medical malpractice law, then cited the Restatement (Third) of the Law Governing Lawyers,<sup>9</sup> relying on the commentary in determining that there was no liability for the law firm.<sup>10</sup> The court determined that the negligent lawyer must be a named defendant and created a new limitation on the doctrine of *respondeat superior*.

This essay discusses the application of this new limitation to the field of medical malpractice, the divergent results reached by Ohio's appellate courts in the medical negligence and malpractice context since *Wuerth*, and the various treatments by other jurisdictions. This essay argues that the holding in *Wuerth* narrowly applies only to law firms, and that applying it to medical malpractice results in a reversal of the

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5. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939 (Ohio 2009). The case addressed both direct and vicarious liability. This essay examines the effect of the portion of the decision applying specifically to vicarious liability as it applies to medical malpractice. *Wuerth* held that a vicarious liability claim against a law firm could not stand unless the negligent partner or associate was a named defendant in the suit. *Id.* at 945.

6. *Id.* at 939. *See infra* Part III.

7. *Id.* at 942.

8. *Id.*

9. *Id.* at 945 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58.1 (2000) (stating that a "law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual or apparent authority")).

10. *Id.* at 945 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58 cmt. a (2000)). The Ohio Supreme Court found that the comment emphasized that the vicarious liability of a law firm "presupposes that a firm principal or employee is liable on one or more claims . . . and considers when the firm itself and each of its principals share in that liability." *Id.*

settled Ohio law and injustice for those injured by the negligence of medical professionals.

Part II examines the history of hospital liability and traces the changes in vicarious liability up to the *Wuerth* decision. Part III discusses the *Wuerth* case, laying out the foundation for a change in the accepted doctrines of medical malpractice. Part IV examines the various interpretations of *Wuerth*, the results of applying the narrow decision laid out in *Wuerth* to medical malpractice, and the policies behind *respondeat superior* that caution against this expanded interpretation of *Wuerth*'s holding. Part V of this essay concludes that *Wuerth* should not be applied in the medical malpractice context.

## II. HISTORY OF HOSPITAL LIABILITY IN OHIO

### A. *The historical hospital was a charity organization, servicing the poor and unwanted in society.*

Hospitals did not start out as the pristine and efficient buildings we see today. Made of glass and steel with their polished floors and sterilized environments, the hospital of today is only a distant cousin of the original hospitals of the United States. Most hospitals in the early nineteenth century functioned as temporary emergency institutions that were set up to address epidemic outbreaks.<sup>11</sup> As permanent hospitals developed, they became places for people who had nowhere else to go, such as immigrants or those with “morally suspect diseases.”<sup>12</sup> Most people who fell sick or were injured were treated in their own homes by doctors who made visits, bringing their equipment and medication with

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11. See David Rosner, *Moral Medicine: New York Hospitals in the 1800's*, FATHOM (2002), <http://www.fathom.com/feature/121638/index.html> (last visited Oct. 16, 2011) (discussing the evolution of hospitals from the 1800's). David Rosner is a Ronald H. Lauterstein Professor of Sociomedical Sciences and professor of history at Columbia University and is also Co-Director of the Center for the History & Ethics of Public Health at Columbia's Mailman School of Public Health. He was a University Distinguished Professor of History at the City University of New York. Rosner is the author of *A Once Charitable Enterprise* (1982; 1987) and the editor of *Hives of Sickness: Epidemics and Public Health in New York City* (1995) and *Health Care in America: Essays in Social History* (with Susan Reverby). Mailman School of Public Health, *Our Faculty: David Rosner*, COLUMBIA UNIVERSITY (2011), <http://www.mailman.columbia.edu/our-faculty/profile?uni=dr289> (last visited Oct. 16, 2011).

12. Rosner, *supra* note 11. Often, when the ports would close for the winter, the laid-off workers who were sick or despondent would end up in the city hospitals, seeking refuge, shelter, and care. Syphilis and tuberculosis patients are two examples of patients that were viewed as “morally suspect.” *Id.* It was believed that the only remedy was “long term, intensive retraining, moral persuasion, and praying.” *Id.*

them.<sup>13</sup> Most Americans even gave birth and endured surgery at home.<sup>14</sup> “Respectable” people would never go to a hospital; the lowest classes of society sought help in these facilities, which were often only a separate wing of an almshouse.<sup>15</sup>

Most hospitals were private charities run by trustee boards.<sup>16</sup> The public hospital, like the private one, was historically a charity—a community effort to “shelter and care for the chronically ill, deprived, and disabled.”<sup>17</sup> These hospitals served a meritorious function, providing refuge for the poor and the dying.<sup>18</sup> Patients seeking help from these locations could not pay and had nowhere else to go.<sup>19</sup>

Funds were extremely low for these facilities and most of the hospital’s “staff” were former patients.<sup>20</sup> “Doctors, who were not paid, tended the ill for a few hours per week out of a sense of charity mixed with the knowledge that they could ‘practice’ their cures on the poor and charge young medical students for instruction in the healing arts.”<sup>21</sup> “The hospital[s] of this time were dirty, crowded and full of contagious disease.”<sup>22</sup>

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13. *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 51 (Ohio 1994).

14. *History of Public Hospitals in the United States*, NAT’L ASS’N OF PUBLIC HOSP. AND HEALTH SYSTEMS (NAPH) (2009), <http://naph.org/homepage-sections/explore/history.aspx> (last visited Oct. 16, 2011).

15. *Southview*, 628 N.E.2d at 51. An almshouse was a house for the poor, endowed by charity for the aged and infirm who had no family to take care of them. *Almshouse*, DICTIONARY.COM (2011), <http://dictionary.reference.com/browse/almshouse> (last visited Oct. 16, 2011) (based on the Random House Dictionary, Random House, Inc. 2011).

16. Rosner, *supra* note 11. Private hospitals were often built as religious and moral institutions that served the poor as charity cases, attempting to heal their spiritual as well as physical ails. *Id.*

17. NAPH, *supra* note 14.

18. *Id.*

19. *Id.*

20. Rosner, *supra* note 11. “[T]he average stay at a private hospital was two to three months; some patients stayed for years.” *Id.* The patients could not just lie around for such an extended period of time, and so as patients began to heal, they would be expected to attend to the more critical patients. *Id.*

21. *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 51 (Ohio 1994).

22. *Id.* See also Rosner, *supra* note 11. Rosner explains that the germ theory was not adopted until the late 1800s. *Id.* Until this time, hospitals lacked the understanding of how to create sterile environments. *Id.* During surgery nurses would be covered from head to foot and wear rubber gloves because they were morally suspicious while doctors, who were viewed as too moral to transmit disease, would operate in bare hands with no mask or cap. *Id.* Instead, the hospitals used “efficiency” means such as reusing patient bandages, rinsing and drying them before applying them to the next patient. *Id.*

B. *The doctrine of charitable immunity developed from the nature of historical hospitals.*

Hospitals were considered charities based on the willingness of a small number of doctors to volunteer their time to treat destitute patients.<sup>23</sup> Because of this, courts tended to view hospitals as immune from liability for any negligence.<sup>24</sup> The doctrine of charitable immunity for hospitals was established in 1876.<sup>25</sup> It served to protect hospitals as charitable institutions and granted them absolute immunity from any and all negligent acts of physicians, nurses, and hospital personnel.<sup>26</sup> The concept of charitable immunity derived from “the theory that charitable funds could not be diverted from the use intended by their donors.”<sup>27</sup> This common law immunity included the idea that *respondeat superior* did not apply to hospitals because “the hospital derived no benefit from the physicians’ services.”<sup>28</sup>

Even after some patients began paying for services, the doctrine of charitable immunity continued.<sup>29</sup> Courts considered the hospital a “Good Samaritan.”<sup>30</sup> The courts reasoned that one who accepted the benefit from a charity unconditionally agreed to an implied waiver, which exempted the charity from liability for the negligence of its servants.<sup>31</sup> Although the implied waiver theory began with patients who received services free of charge, it soon reached all people seeking

23. Elizabeth Isbey, Note, *Diggs v. Novant Health, Inc. and the Emergence of Hospital Liability for Negligent Independent-Contractor Physicians in North Carolina*, 43 WAKE FOREST L. REV. 1127, 1130 (2008).

24. *Id.*

25. Roger N. Braden & Jennifer L. Lawrence, *Medical Malpractice: Understanding the Evolution—Rebuking the Revolution*, 25 N. KY. L. REV. 675, 678 (1998) (discussing how malpractice litigation has changed, and its impacts on society).

26. *Id.*

27. *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 50 (Ohio 1994). The theory originated in mid-nineteenth century England. *Id.*

28. *Id.*

29. *Id.* at 50-51.

30. *Id.* at 51 (citing *Morrison v. Henke*, 160 N.W. 173, 175 (Wis. 1917) (overruled by *Kojis v. Doctors Hosp.*, 107 N.W. 2d 131 (Wis. 1961)). The court stated that “[s]ince [a hospital] ministers to those who cannot pay as well as those who can, thus acting as a Good Samaritan, justice and sound public policy alike dictate that it should be exempt from the liability attaching to masters whose only aim is to engage in enterprises of profit or of self-interest.” *Id.*

31. Jane Elaine Ballerini, Comment, *The Apparent Agency Doctrine in Connecticut’s Medical Malpractice Jurisprudence: Using Legal Doctrine as a Platform for Change*, 13 QUINNIPIAC HEALTH L.J. 317, 322 (2010) (discussing the results of the application of vicarious liability to hospitals). See also *Puma v. St. Vincent’s Hosp. & Med. Ctr.*, No. 98 Civ 2130, 2000 U.S. Dist. LEXIS 12589, at \*6 (S.D.N.Y. Aug. 25, 2000) (stating that prior to 1957, New York courts stated that “a person who seeks and accepts charity should be deemed to have waived any right to damages for injuries sustained through the negligence of his benefactor’s servants”).

service at the hospital—whether paying or not and regardless of whether they were conscious at the time of admittance.<sup>32</sup> The concept of a barrier between hospital activities and direct health care justified hospital immunity from liability.<sup>33</sup> Hospitals were seen as removed from the actual care of patients.<sup>34</sup> Instead, they were viewed as simply providing facilities where physicians practiced their art.<sup>35</sup>

*C. Changes in society resulted in changing norms, perceptions, and expectations regarding hospital care.*

In the early twentieth century, hospitals began to shift from charities to for-profit corporations.<sup>36</sup> As hospitals became business entities attempting to increase their profit margins, the original rationale for imposing charitable immunity dissipated.<sup>37</sup> Hospitals no longer merely provide the facilities where physicians practiced their professions.<sup>38</sup> The modern hospital is a “corporate institution that takes the role of a comprehensive health care center that must provide and monitor all aspects of health care.”<sup>39</sup> Hospitals address comprehensive and sophisticated health-care concerns, providing a plethora of services including research, teaching, diagnosis, and therapy.<sup>40</sup>

The public view of hospitals has also changed over time. “[T]he most important driver in the shift in public perception has been

32. Ballerini, *supra* note 31, at 322.

33. *Id.* The widespread assumptions about the relationship between “hospitals and physicians helped to blanket hospitals from liability when medical providers committed errors.” *Id.* at 323. This began to change as insurance became available to hospitals. *Id.*

34. *Id.* at 322. “Hospitals took an approach to health care services that was one step removed from patients, and as such, they were not generally considered direct health care providers.” *Id.*

35. *Id.*

36. Braden & Lawrence, *supra* note 25, at 681.

37. *Id.* See also Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46, 52 (Ohio 1994) (discussing the abolishment of the charitable immunity doctrine in Ohio). The court states that “[t]he average nonprofit hospital of today is a large well run corporation, and, in many instances, the hospital is so ‘businesslike’ in its monetary requirements for entrance, and in its collections of accounts, that a shadow is thrown upon the word ‘charity.’” *Id.* (quoting Avellone v. St. John’s Hosp., 135 N.E.2d 410, 415 (Ohio 1956)).

38. James W. Gustafson Jr. & Thomas D. Masterson, *Suing the Hospital when Superdoc Falls*, 38 TRIAL 20, 21-22 (May 1, 2002) (discussing the need to hold hospitals liable). “The concept is simple: A hospital that spends thousands of dollars a year advertising the quality of its physicians to attract patients should not escape liability for the negligence of those physicians, even when they are not hospital employees.” *Id.* at 20.

39. David H. Rutchik, Note, *The Emerging Trend of Corporate Liability: Courts’ Uneven Treatment of Hospital Standards Leaves Hospitals Uncertain and Exposed*, 47 VAND. L. REV. 535, 538 (1994) (suggesting that the appropriate level of hospital liability should be the highest level of hospital liability—corporate liability).

40. *Id.*

hospitals' marketing of themselves . . . as full-service healthcare providers."<sup>41</sup> Hospitals' advertisements encourage patients to choose them based on their state-of-the-art equipment and top rated physicians.<sup>42</sup>

[H]ospitals increasingly hold themselves out to the public in expensive advertising campaigns as offering and rendering quality health services. One need only pick up a daily newspaper to see full- and half-page advertisements extolling the medical virtues of an individual hospital and the quality health care that the hospital is prepared to deliver in any number of medial areas. Modern hospitals have spent billions of dollars marketing themselves, nurturing the image with the consuming public that they are full-care modern health facilities. All of these expenditures have but one purpose: to persuade those in need of medical services to obtain those services at a specific hospital.<sup>43</sup>

Hospitals spend billions of dollars each year to advertise their facilities and services.<sup>44</sup> Hospitals receive substantial benefits from granting physicians staff privileges, promoting them as "our doctors," and suggesting that their facility is better because of the doctors they "employ."<sup>45</sup> Consumers of medical services view the physicians who treat them as an integral part of the hospital and the hospital itself as a place to seek and receive quality medical care.<sup>46</sup> Hospitals are "in the *business* of providing medical treatment [and health care] . . . an individual enters the hospital for no other reason than to seek treatment."<sup>47</sup> The shifting perception of the role of hospitals has resulted in major changes in the law regarding hospital liability.

*D. The United States experienced a general movement toward increasing hospital liability for the negligent care of hospital patients.*

Throughout the mid-twentieth century, various states throughout the country struggled over what to do with the developing law of

41. Martin C. McWilliams, Jr. & Hamilton E. Russell, III, *Hospital Liability for Torts of Independent Contractor Physicians*, 47 S.C.L. REV. 431, 436 (1996).

42. See Gustafson & Masterson, *supra* note 38, at 21.

43. See *id.* (citing *Kashishian v. Port*, 481 N.W.2d 277, 282 (Wis. 1992)).

44. *Id.*

45. *Id.* at 20-21.

46. *Id.* at 21.

47. Braden & Lawrence, *supra* note 25, at 685 (emphasis added). The perception of hospitals has changed so that they are no longer seen to merely oversee the actions of doctors and nurses, but are responsible for the treatment provided. *Id.*

hospital liability. In 1957, the New York Court of Appeals decided the landmark case *Bing v. Thunig*.<sup>48</sup> In *Bing*, New York's highest court determined that "[t]he rule of nonliability [regarding hospitals] is out of tune with the life about us, at variance with modern-day needs and with concepts of justice and fair dealing. It should be discarded."<sup>49</sup> The *Bing* court established that hospitals should be subject to the same rules of *respondeat superior* as all other employers when determining liability for negligence or medical malpractice.<sup>50</sup>

Illinois began its shift in 1964 with the decision in *Darling v. Charleston Community Memorial Hospital*, in which the Illinois Supreme Court held that "charitable immunity [could] no longer stand."<sup>51</sup> Over the next forty years, the courts expanded upon the doctrines of hospital liability, including agency liability.<sup>52</sup> The changes resulted in "a quantum leap improvement over time in the quality of health care in the United States."<sup>53</sup>

Courts in Kentucky have held that hospitals owe a duty of care to their patients to protect them from negligence, whether from hospital employees, physicians, or from independent contractors.<sup>54</sup> As the law in Kentucky evolved, there was a general recognition that the changing role of hospitals meant a greater likelihood that patients would seek medical

48. 143 N.E.2d 3 (N.Y. 1957) (holding that the doctrine of hospital immunity for the negligence of its employees should be abandoned, and that hospital liability should be governed by the same principles of law as all other employee-employer relationships).

49. *Id.* at 9.

50. *See id.*

51. 211 N.E.2d 253, 257, 260 (Ill. 1965). *See also* Mitchell J. Wiet, J.D., *Darling v. Charleston Community Memorial Hospital and its Legacy*, 14 ANNALS HEALTH L. 399, 400 (2005) (discussing the impact of the *Darling* decision on hospital liability over four decades). In examining the ramifications of *Darling*, Wiet noted that "hospital entities themselves, acting through both their employees and independent (non-employed) medical staff members, undertake to treat patients and that in their capacity as providers of care, hospitals owe separate duties of care to their patients directly . . . which, if violated, will result in liability for the hospital entity." *Id.* at 400 (citing *Darling*, 211 N.E.2d at 257).

52. *See* Wiet, *supra* note 51, at 400-06. "The impact of *Darling* and its progeny over the last four decades has transformed hospital liability jurisprudence and will likely continue to do so." *Id.* at 408.

53. *Id.* at 408.

54. *See* Braden & Lawrence, *supra* note 25, at 682 (discussing the changing role of hospital liability in Kentucky). Braden also addresses the history of hospitals and the charitable immunity doctrine, the lack of incentive for hospitals to improve medical care as their focus shifted from assistance of the needy to the bottom line, and the shift in liability as perceptions of hospitals changed. *Id.* at 676-86. *See also* Williams v. St. Clair Med. Ctr., 657 S.W.2d 590 (Ky. Ct. App. 1983) (distinguished by Johnston v. Sisters of Charity of Nazareth Health Sys., No. 2002-CA-1812-MR, 2003 WL 22681562, at \*3 (Ky. Ct. App. Nov. 14, 2003)); Rogers v. Kasdan, 612 S.W.2d 133, 135-36 (Ky. 1981).

care from institutions rather than individual health care providers.<sup>55</sup> The law in Kentucky changed to reflect the changing role of hospitals within society, and the courts held that “today hospitals are responsible for the treatment provided.”<sup>56</sup>

North Carolina courts have adopted a less stringent standard to hold a hospital liable. However, its doctrine has several holes that await resolution and clarification by the North Carolina Supreme Court.<sup>57</sup>

Individual jurisdictions in Connecticut have applied agency theories for hospital liability, but the Connecticut Supreme Court has yet to create a uniform doctrine.<sup>58</sup>

Rhode Island has “joined the majority of states holding hospitals more accountable . . .”<sup>59</sup> The Rhode Island Supreme Court added corporate negligence and apparent authority as available theories to extend liability to hospitals, thereby striking a balance between

55. Braden & Lawrence, *supra* note 25, at 685 (citing *Hardy v. Brantley*, 471 So. 2d 358, 371 (Miss. 1985) (stating that hospitals are no longer “mere physical facilities where physicians practice their profession”)).

56. *Id.* (citing *Beeck v. Tucson Gen. Hosp.*, 500 P. 2d 1153, 1157 (Az. App. 1972)). *See, e.g.*, *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255 (Ky. 1985) (holding that a hospital was liable for the negligence of emergency room physicians using ostensible agency); *Williams*, 657 S.W.2d 590 (extending ostensible agency to create hospital liability).

57. *See generally* *Isbey*, *supra* note 23. *See, e.g.*, *Willoughby v. Wilkins*, 310 S.E.2d 90 (N.C. Ct. App. 1983) (holding that a hospital’s assertion that the independent-contractor physician would perform services in the “best interest” of the hospital was sufficient to create a question of fact regarding an employee-employer relationship); *cf.* *Hylton v. Koontz*, 532 S.E.2d 252, 257-58 (N.C. Ct. App. 2000) (refusing to find an employment relationship despite an agreement similar to that in *Willoughby*); *Diggs v. Novant Health, Inc.*, 628 S.E.2d 851, 857-63 (N.C. Ct. App. 2006) (discussing the changing role of hospitals and the application of apparent agency, finding that the hospital need only hold itself out as a provider of care to satisfy the reliance prong of agency by estoppel, thereby significantly lowering the burden of proof required to hold the hospital liable).

58. *See* *Ballerini*, *supra* note 31, at 353-54 (quoting *Franciso v. Hartford Gynecological Ctr., Inc.*, 1994 Conn. Super. LEXIS 521, at \*10 (Mar. 1, 1994) (reasoning that “a hospital holds itself out as performing a whole variety of medical procedures; [thus,] the doctrine of apparent authority is held to apply” when medical personnel negligently perform particular aspects of those procedures)); *see, e.g.*, *LeConche v. Elligers*, 1991 Conn. Super. LEXIS 1693, at \*8 (July 16, 1991) (holding that a hospital might be liable for its staff physician’s negligence based on the changing role of hospitals in society); *Menzie v. Windham Cmty. Mem’l Hosp.*, 774 F. Supp. 91, 96-97 (D. Conn. 1991) (impliedly recognizing the applicability of the apparent agency doctrine against a hospital for the negligence of a physician); *Franciso*, 1994 Conn. Super. LEXIS 521, at \*11-13 (dispensing with the need for showing reliance in order to prove an ostensible agency claim); *Kafi v. Greenwich Hosp. Ass’n*, No. 3:98cv720 (AHN), 2000 U.S. Dist. LEXIS 22657, at \*13 (D. Conn. Feb. 24, 2000) (requiring reasonable reliance to establish apparent agency).

59. Philip S. Lotane, Comment, *Tort Law—Rhode Island Considers Apparent Authority and Corporate Negligence Doctrines in Medical Malpractice Actions—Rodrigues v. Miriam Hospital*, 28 SUFFOLK U. L. REV. 474, 483-84 (1994).

protecting patients and holding hospitals responsible for the negligent acts of their physicians.<sup>60</sup>

*E. The doctrine of vicarious liability for hospitals developed in Ohio as the courts began to recognize the shift in perception and the growing need to hold hospitals liable.*

Consistent with the national trend, a hospital in Ohio was historically immune from negligence liability through the doctrine of charitable immunity.<sup>61</sup> The doctrine of charitable immunity “discouraged litigation, thus making it impossible for an innocent patient-victim who had received a devastating injury as a result of the hospital staff’s negligence to receive any compensation.”<sup>62</sup> At least one commentator has opined that “hospitals had little incentive to improve medical care”<sup>63</sup> or to establish standards of care for their employees because of this encompassing protection.<sup>64</sup> In time, patients began paying for their care and hospitals began to focus on the “bottom line,”<sup>65</sup> shifting focus from the charitable purpose of assisting the poor and downtrodden to the lofty goal of becoming “corporate giants and financial empires.”<sup>66</sup> At the same time, there was a recognized change in how hospitals were viewed by patients. They no longer believed that nurses and physicians were acting on their own authority; rather they had come to expect that the hospital itself would attempt to cure them.<sup>67</sup> As this shift took place, Ohio’s charitable immunity doctrine began to erode and hospitals gradually became liable for patient injuries caused by negligence.<sup>68</sup> Hospitals, as health care institutions, were held to owe

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60. *Id.* at 476-84. See *Rodrigues v. Miriam Hosp.*, 623 A.2d 456 (R.I. 1993) (established corporate negligence theory while holding the evidence failed to demonstrate the required knowledge and refusing to apply the new doctrine).

61. *Comer v. Risko*, 833 N.E.2d 712, 715 (Ohio 2005).

62. *Braden & Lawrence*, *supra* note 25, at 678.

63. *Id.*

64. *Id.* at 678-79. Because hospitals enjoyed this immunity, they were protected from responsibility for the negligent acts of the staff, including physicians, nurses, and all other hospital personnel. *Id.* at 678. This resulted in a lack of incentive to improve medical care or establish and enforce standards of care for their employees and independent contractors. *Id.* at 678-79.

65. *Id.* at 679.

66. *Id.* “As more and more hospitals grew into medical centers they disinherited their backgrounds as charitable organizations,” and began to focus on financial gain and growth. *Id.*

67. *Wiet*, *supra* note 51, at 404-05 (quoting *Darling v. Charleston Cmty. Mem’l Hosp.*, 211 N.E.2d 253, 257 (Ill. 1965)).

68. *Braden & Lawrence*, *supra* note 25, at 679.

a duty of care to the patients to whom they provided medical care.<sup>69</sup> “The evolution of this . . . liability . . . gradually extended to physicians, whether employees of the hospital or independent contractors.”<sup>70</sup>

In the 1950s, charitable immunity in Ohio was abolished, and the courts imposed liability on hospitals for the negligence of their employees through the theory of *respondeat superior*.<sup>71</sup> The adoption of this doctrine allowed patients to hold hospitals responsible for the actions of their employees, but the effects were limited because most physicians contracted with hospitals to provide services and were not considered employees.<sup>72</sup>

Beginning in 1990, Ohio courts began to look to agency theories to attempt to expand the liability of hospitals as they grew in size and importance within the community.<sup>73</sup> Ohio adopted agency by estoppel in order to hold a hospital liable for the actions of its independent contractors.<sup>74</sup> Four years later, based on the growth of the full-service hospital, its use of media advertising, and public expectations, the Ohio Supreme Court continued to extend hospital liability, creating a less stringent test for agency by estoppel.<sup>75</sup>

69. *Id.* at 682; *Albain v. Flower Hosp.*, 553 N.E.2d 1038, 1045 (Ohio 1990), *overruled on other grounds*, *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994).

70. *Braden & Lawrence*, *supra* note 25, at 682.

71. *Id.* at 680-82. *See, e.g.*, *Avellone v. St. John’s Hosp.*, 135 N.E.2d 410, 417 (Ohio 1956) (holding that a not for profit hospital was subject to the doctrine of *respondeat superior* and liable for the torts of its servants, but refusing to determine whether this liability extended to those actors for whom the hospital had no right of control); *Klema v. St. Elizabeth’s Hosp. of Youngstown*, 166 N.E.2d 765 (Ohio 1960) (removing the distinction between administrative and medical negligence for the purpose of extending liability through *respondeat superior*). However, the doctrine of *respondeat superior* did not provide hospital liability for independent contractors. *Braden & Lawrence*, *supra* note 25, at 680-81.

72. *Id.* at 684.

73. *Comer v. Risko*, 833 N.E.2d 712, 715 (Ohio 2005).

74. *Albain*, 553 N.E.2d at 1047-51. The Ohio Supreme Court determined that agency by estoppel would apply to independent contractors of hospitals if the plaintiff could show that “(1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital’s authority and (2) the plaintiff was thereby induced to rely upon the ostensible agency relationship.” *Id.* at 1049.

75. *Comer*, 833 N.E.2d at 716. *Comer* discussed how the decision in *Clark v. Southview Hospital & Family Health Center*, 628 N.E.2d 46, partially overruled *Albain v. Flower Hospital*, 553 N.E.2d 1038, holding that *Albain* made it almost impossible for a plaintiff to establish reliance and declaring that the test established in that case was too narrow. *Southview* relaxed the test for agency by estoppel and required only that a hospital hold itself out to the public as a medical services provider and that the patient look to the hospital for care, as opposed to a specific physician. *Comer*, 833 N.E.2d at 716.

1. The Ohio Supreme Court significantly expands Ohio's doctrine of hospital liability.

Although the Ohio Supreme Court took initial steps toward hospital liability for the acts of physicians, it was still a practical impossibility to hold a hospital responsible for the acts of its independent contractors under the stringent test the court established.<sup>76</sup> In the 1990 case, *Albain v. Flower Hospital*, a young girl in her eighth month of pregnancy began bleeding and went to the hospital emergency room.<sup>77</sup> She was assigned to the on call obstetrician, who was contacted at approximately 2:30 in the afternoon.<sup>78</sup> The obstetrician was contacted several times, but finished her normal office hours at her practice, went home and had dinner, and did not arrive at the hospital until approximately 8:00 in the evening.<sup>79</sup> She then ordered the girl to be transferred to another hospital that had a neonatologist on staff.<sup>80</sup> The baby was delivered by cesarean section and suffered complications due to the delay, which ultimately resulted in death.<sup>81</sup> The court found that, although agency by estoppel was an appropriate theory to extend liability to the hospital for physician negligence, in this case there was no evidence that the hospital held the obstetrician out as an employee, nor any evidence that the plaintiff relied on the relationship of the obstetrician as a hospital employee in choosing

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76. See *Albain*, 553 N.E.2d 1038. Justice Holmes discussed the development of the agency by estoppel theory as applied to hospitals in medical malpractice cases. *Id.* at 1048-51. He determined that although it did apply in this case, in order to prove agency by estoppel, a plaintiff must show: "(1) the hospital made representations leading the plaintiff to believe that the negligent physician was operating as an agent under the hospital's authority and (2) the plaintiff was thereby induced to rely upon the . . . agency relationship." *Id.* at 1049. The court then acknowledged in a footnote that this element of the reliance would be extremely difficult if not impossible to meet because most patients either choose their hospital based on convenience of location or occasionally by reputation, but few (if any) would choose their hospital based on the employment structure of the hospital, and if the physician was part of the consideration in choosing a specific hospital, it is more likely the expertise and skill of the physician rather than the employment status were the deciding factors. *Id.* at 1050 n.12. In making this determination, *Albain* effectively eliminated the use of agency by estoppel to hold hospitals liable for the negligence of independent-contractor physicians. *Id.*

77. *Id.* at 1040. Sharon Albain began bleeding vaginally and was transported by ambulance to the nearest hospital and arrived at Flower Hospital at 2:00 p.m. *Id.* at 1040-41.

78. *Id.* at 1041. Sharon's family practice physician was contacted but didn't have staff privileges at the hospital and wasn't permitted to assist. *Id.* Sharon's care was turned over to the on-call obstetrician for the hospital. *Id.* She had no choice in which physician attended her. *Id.*

79. *Id.* The obstetrician was advised regarding Sharon's condition and said that she would be in after she finished her regular office hours at 5:30. *Id.* She was contacted again at home at 7:00 and told she had been expected since 5:30. *Id.*

80. *Id.*

81. *Id.* The cesarean was not performed until 11:49 p.m. and the delay caused a prolonged lack of oxygen to the baby. *Id.*

the hospital.<sup>82</sup> Although the physician's negligence resulted in the death of the plaintiff's child, the hospital was not liable for the actions of the "staff physician" that provided for the care of its patient.<sup>83</sup> Thus the plaintiff was not permitted to recover for the negligent treatment she received.<sup>84</sup>

*Clark v. Southview Hospital*,<sup>85</sup> decided in 1994, overruled *Albain* and established a new test for agency by estoppel, allowing liability to attach to a hospital if the hospital held itself out to the public as a provider of medical services and the patient looked to the hospital, rather than a specific physician, to provide medical care.<sup>86</sup>

In this case, a young woman drove to Southview Hospital suffering from an asthma attack and died due to the allegedly negligent treatment of the emergency-room physician on duty.<sup>87</sup> The mother of the deceased filed a complaint alleging wrongful death as a result of "medical negligence on the part of Southview through its agents and/or employees, Dr. Mucci and [his corporate entity,] TMES."<sup>88</sup> The mother settled her claims against Dr. Mucci and TMES, and they were dismissed from the case.<sup>89</sup> The case then proceeded against Southview

82. *Id.* at 1050-51. "There is absolutely no indication in the record here that [Albain] would have refused [the on call obstetrician's] care if she had known [the obstetrician] was not an employee of the hospital." *Id.* at 1050.

83. *Id.* at 1042.

84. *Id.* at 1052. The Ohio Supreme Court recognized hospital liability for the actions of independent-contractor physicians, but expressed a limited test for liability that excluded Sharon Albain from recovery. *Id.* at 1042-52. See *supra* text accompanying note 74, explaining the test.

85. *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994).

86. *Id.* at 53. Syllabus by the court:

A hospital may be held liable under the doctrine of agency by estoppel for the negligence of independent medical practitioners practicing in the hospital when: (1) it holds itself out to the public as a provider of medical services; and (2) in the absence of notice or knowledge to the contrary, the patient looks to the hospital, as opposed to the individual practitioner, to provide competent medical care.

*Id.* at 46. The Syllabus in Ohio is the controlling law within the state. OHIO SUP. CT. R. REP. OPS. 1(B)(1), 1(B)(2).

87. *Southview*, 628 N.E.2d at 47. Mrs. Clark had told her daughter, Kimberly, that if she were ever in trouble she should go to Southview Hospital because they advertised that they had hospital doctors present twenty-four hours a day. *Id.* Kimberly arrived at the hospital at approximately 6:00 a.m., with her 18-month-old child, and was dead by 11:16 a.m. *Id.* Dr. Mucci was the emergency room doctor on duty the morning that Kimberly died. *Id.*

88. *Id.* at 47. Dr. Mucci was president and sole owner of the corporate entity, TMES, and had entered into an independent contractor relationship with Southview on behalf of TMES. *Id.*

89. *Id.* TMES had an agreement with Southview that TMES would provide qualified physicians to staff the emergency department at Southview twenty-four hours a day and that TMES would be an independent contractor for Southview Hospital. *Id.*

Hospital, and the jury returned a verdict in favor of the plaintiff.<sup>90</sup> The court of appeals reversed, holding that “reasonable minds could not conclude from the evidence that Dr. Mucci or TMES was an apparent agent of Southview.”<sup>91</sup> The Ohio Supreme Court reversed the court of appeals’ decision, reinstating the jury verdict, and holding that Southview Hospital was estopped from denying that Dr. Mucci was its employee.<sup>92</sup> The case was permitted to proceed against the hospital without including the principal in the suit.<sup>93</sup>

The Ohio Supreme Court began its analysis by stating the general proposition that “an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of *respondeat superior*.”<sup>94</sup> It then examined its earlier case, *Albain v. Flower Hospital*, which laid out the foundation and test for the agency by estoppel theory.<sup>95</sup> The court chose to revisit the decision in *Albain* because of the history of growth in hospital liability and “strong public policy” in favor of extending hospital liability.<sup>96</sup>

In *Southview*, the court found that *Albain* created a form of hospital liability that was “illusory,” failing to meet the need for a realistic method of holding a hospital liable for the actions of its physicians.<sup>97</sup> The court then found that “liability based on *respondeat superior* is the rule and immunity is the exception.”<sup>98</sup>

90. *Id.* at 47-48. The jury awarded her \$1,004,603.94. *Id.* Judgment was entered for \$729,603.94 with a \$275,000 set-off for the amount received by Clark through her settlement with Dr. Mucci and TMES. *Id.*

91. *Id.*

92. *Id.* at 54. The court found that “the record in this case reveals substantial competent evidence upon which reasonable minds could conclude, as the jury did, that Southview is estopped from denying that Dr. Mucci was its employee,” *id.*, and based on its advertising it held itself out as a provider of emergency medical care and that Kimberly looked to the hospital to provide care and not to any individual provider. *Id.*

93. *Southview*, 628 N.E.2d at 54.

94. *Id.* at 48 (citing *Council v. Douglas*, 126 N.E.2d 597, 599-600 (Ohio 1955)).

95. *Southview*, 628 N.E.2d at 48. See *Albain v. Flower Hosp.*, 553 N.E.2d 1038 (Ohio 1990); see also *supra* text accompanying note 74, explaining the test. The court examined *stare decisis* and determined that it “was not intended to effect a ‘petrifying rigidity,’ but to assure the justice that flows from certainty and stability.” *Southview*, 628 N.E.2d at 49.

96. *Southview*, 628 N.E.2d at 50. “[T]he public has every right to assume and expect that the hospital is the medical provider it purports to be.” *Id.* at 53.

97. *Id.* at 48-50.

98. *Id.* at 51 (quoting *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957)). Justice Resnik cites the first case where the Ohio Supreme Court applied the doctrine of charitable immunity to hospitals, *Taylor v. Protestant Hospital Ass’n*, 96 N.E. 1089, 1092 (Ohio 1911), stating that “[e]xperience has shown that the ends of justice are best secured by holding the master responsible for injuries caused by the wrongful acts of his servant, done in the prosecution of his private ends and for his benefit.” *Southview*, 628 N.E.2d at 51. The court repeated its prediction, made in 1911, that “the rule will be

The Ohio Supreme Court explained that modern hospitals regularly employ a large staff of physicians, nurses, interns, administrative staff, and manual workers and they charge patients for their services, even collecting by legal action.<sup>99</sup> These changes in the fundamental character of hospitals were sufficient to justify abolishing the doctrine of charitable immunity for hospitals throughout the nation.<sup>100</sup> The court then held that if a hospital presents itself to the public as a provider of medical services, the public has a right to expect that it is the medical provider it purports to be, and the hospital should not be able to escape liability for the negligent treatment of its patients.<sup>101</sup>

*Southview* was a monumental case in the development of the vicarious liability doctrine for medical malpractice law in Ohio. Significantly, the Ohio Supreme Court allowed the case to proceed against the hospital where the physician's negligence could be proven, but where the physician could not be held liable because the case against him had already settled. The court's decision in *Southview* clarified the law of hospital liability and allowed plaintiffs to hold a hospital liable for the negligent acts of its physicians without requiring that the negligent agent or principal be a named defendant in the case.

## 2. The Ohio Supreme Court limited hospital liability through agency by estoppel.

The 2005 decision *Comer v. Risko*<sup>102</sup> tempered the effects of *Southview*. In *Comer*, an elderly woman went to the hospital on two separate occasions for x-rays, and the hospital assigned physicians to handle the x-rays on both occasions.<sup>103</sup> She later filed a claim for medical negligence including failure to timely diagnose and treat

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extended to meet the requirements of manifold new conditions brought about by growth and advance." *Id.* The court explained that the ruling was reflective of the time but explains how the realities of the role of the hospital in society have changed, undermining the justifications underlying charitable immunity. *Id.*

99. *Id.*

100. *Id.* at 51-52 (referring to the landmark decision in *Bing*, 143 N.E.2d 3, which extended hospital liability through *respondeat superior*—abolishing charitable immunity in New York—and was quickly followed by other jurisdictions).

101. *Southview*, 628 N.E.2d at 52-54. The court held that the element of representation was satisfied if the hospital held itself out to the public as a provider of medical services and that reliance was satisfied if the patient looked to the hospital to receive those services, rather than looking to a specific, individual physician. *Id.*

102. *Comer v. Risko*, 833 N.E.2d 712 (Ohio 2005).

103. *Id.* at 714. The x-ray reports failed to mention "the presence of an enlarged mass on the x-ray films." *Id.* The large, cancerous mass was not detected until a third x-ray was taken several months later. *Id.*

cancer.<sup>104</sup> She did not join the independent-contractor physicians responsible for reading the x-rays as defendants.<sup>105</sup> After the statute of limitations applying to the physicians expired, “Knox [Community Hospital] moved for summary judgment on the basis that no viable claim existed against the hospital because the statute of limitations against [the physicians] . . . had expired.”<sup>106</sup> The trial court granted the motion and the court of appeals reversed, holding that “a plaintiff may pursue a claim based upon agency by estoppel against a hospital even if it has not named the independent-contractor tortfeasor as a party.”<sup>107</sup> The Ohio Supreme Court accepted a discretionary appeal, reviewed the matter *de novo*, and held that “there can be no viable claim for agency by estoppel if the statute of limitations against the independent-contractor physician has expired.”<sup>108</sup>

Beginning with an analysis of the history of vicarious liability for hospitals in Ohio, the *Comer* court focused heavily on *Albain*, which had been overruled by *Southview*.<sup>109</sup> It discussed the reasoning in *Albain* for extending liability to hospitals through the doctrine of agency by estoppel.<sup>110</sup> It then discussed how *Southview* had overruled *Albain* in favor of a “less stringent test.”<sup>111</sup> The court reaffirmed vicarious liability for employees through *respondeat superior*, but attacked the validity of liability for the acts of independent contractors.<sup>112</sup> The court cited several cases that were more than sixty years old, as well as some appellate level cases.<sup>113</sup> It reasoned that release of the employee

104. *Id.* at 713. Mrs. Clark filed a claim for medical negligence. *Id.* The failure to timely diagnose the cancer resulted in Mrs. Clark’s death. *Id.* Carmen Comer, the administrator of Clark’s estate, brought the appeal. *Id.* at 713.

105. *Id.* at 713-14.

106. *Id.* at 714.

107. *Id.* (quoting *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46 (Ohio 1994)). The appellate court relied on *Southview* to reverse the trial courts holding. *Id.*

108. *Comer*, 833 N.E.2d at 718 (reversing the appellate court and reinstating the trial court’s holding).

109. *Id.* at 714. Where *Southview* expanded access hospital liability over what was accomplished in *Albain*, *Comer* attempted return to the status as laid out in *Albain*. *Id.*

110. *Id.* at 715. There must be reliance by a third person, based on the appearance of agency, that results in harm for agency by estoppel to apply. *Id.*

111. *Id.* at 716. Asserting that *Southview* justified the new test by the “demands of public policy.” *Id.* The new, “less stringent” test set out in *Southview* required only that the hospital held itself out to be a medical provider and that the patient had looked to the hospital to provide medical care. *Southview*, 628 N.E.2d at 52-54.

112. *Comer*, 833 N.E.2d at 716 (explaining that agency by estoppel is a fictional agency relationship used to extend liability when there has been reliance on the appearance of agency).

113. *Id.* at 716-17. The court cites *Losito v. Kruse*, 24 N.E.2d 705 (Ohio 1940) and *Herron v. Youngstown*, 24 N.E.2d 708 (Ohio 1940), both more than sixty years old, for the proposition that if there is no liability assigned to the agent there can be no liability imposed upon the principal for the

functioned as a release of the employer.<sup>114</sup> The court quoted an unreported appellate decision that stated an “employer cannot be found to be liable for negligence he did not commit. The employer’s liability is dependent on the negligence of the employee.”<sup>115</sup> The court then drew the conclusion that releasing an employee from liability would “thwart the employer’s ability to seek reimbursement from the employee for payments made to the plaintiff by destroying the employer’s subrogation rights.”<sup>116</sup> In analyzing the application of this doctrine, the court held that agency by estoppel is a derivative claim of vicarious liability and that liability must flow through the independent-contractor physician to the hospital, essentially undermining the court’s previous decision in *Southview*.<sup>117</sup>

In his dissent, Justice Pfeifer sharply criticized the decision, asserting that the majority stretched unpersuasive precedent in order to undermine *Southview*.<sup>118</sup> The dissent stated that “[t]he success or failure of such a cause of action is dependent on the *negligence* of the medical provider at issue, but is not dependent on whether the provider is part of the lawsuit.”<sup>119</sup> It noted specifically that the negligent doctor at issue in *Southview* was not a part of the lawsuit and yet the negligence claim proceeded against the hospital as an agency by estoppel claim.<sup>120</sup> The

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agent’s actions. *Id.* It then cites several lower court opinions that had been decided since *Southview* that had held that a release of an employee resulted in release of an employer. These cases were *Radcliffe v. Mercy Hospital Anderson*, Nos. C-960424, C-960425, 1997 WL 249436 (Ohio Ct. App. 1st. Dist. May 14, 1997), *Dickerson v. Yetsko*, No. 77636, 2000 WL 1739298 (Ohio Ct. App. 8th Dist. Nov. 22, 2000), and *Wells v. Spirit Fabricating, Ltd.*, 680 N.E.2d 1046 (Ohio Ct. App. 8th Dist. 1996). *Id.* Two out of three of these cases were not reported.

114. *Comer*, 833 N.E.2d at 717.

115. *Id.* (citing *Wells*, 680 N.E.2d at 1046). The plain language of this quote indicates that the medical provider must have actually been negligent in order for the employer (hospital) to be liable, but does not suggest that actual liability must be imposed on the employee (physician) in order for the employer to be liable. *Id.*

116. *Comer*, 833 N.E.2d at 717. However, the subrogation rights of the principal against the agent are not extinguished even if the claim is barred against the agent if the agent has not been released. See *Indiana Ins. Co. v. Barnes*, 846 N.E.2d 73, 77 (Ohio Ct. App. 10th Dist. 2005) (“an implied right to indemnification arises . . . within the context of a relationship wherein one party is found to be vicariously liable for the acts of a tortfeasor.”); *Staffilino Chevrolet, Inc. v. Balk*, 813 N.E.2d 940 (Ohio Ct. App. 7th Dist. 2004) (“an employee impliedly agrees to indemnify his employer against loss.”).

117. *Comer*, 833 N.E.2d at 718.

118. *Id.* at 718-20 (Pfeifer, J., dissenting) (“[T]he majority’s citing . . . is less convincing in this context. Even if those cases were persuasive, they address an issue not at play in this case.”).

119. *Id.* (emphasis added).

120. *Id.* at 718.

dissent also noted the well-settled law<sup>121</sup> that a plaintiff need not sue both the primarily and secondarily liable parties in a *respondeat superior* case.<sup>122</sup> The dissent disputed the idea that all parties must be included in the lawsuit, noting that it cut directly against the Civil Rules of Procedure, which permit a defendant to bring in other defendants to protect a subrogation claim.<sup>123</sup> In fact, the dissent explicitly stated that a party's failure to sue an agent prior to the expiration of the statute of limitations does not destroy the hospital's right of indemnity against them, but that such a claim of indemnity arises upon payment of the claim.<sup>124</sup>

The dissent concluded that the extension of vicarious liability to situations where the agent is not a named defendant would not create a doctrine of strict liability for hospitals, but that when a hospital holds itself out as a provider of services as an institution, it is appropriate to subject it to liability.<sup>125</sup>

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121. *Losito v. Kruse*, 24 N.E.2d 705 (Ohio 1940), was decided in 1940 and has been the law in Ohio, and has been cited for this proposition, since that time. *Losito*, acknowledges that a plaintiff need not sue all parties, but may choose whom to include in the claim. *Id.* at 708.

122. *Comer*, 833 N.E.2d at 719 (Pfeifer, J., dissenting) (citing *Losito*, 24 N.E.2d at 707, the same case that the majority cited, “[f]or the wrong of a servant acting within the scope of his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions, as the judgment against one is no bar to an action or judgment against the other until one judgment is satisfied”). The idea that the plaintiff has a right of recovery against either the agent or principal individual or both together is a well-settled part of the law of vicarious liability in Ohio. The notion that you must sue the agent in order to sue the principal cuts directly against this law, set out in *Losito*, which has never been directly overturned, but has been cited with approval by each subsequent court who has addressed the issue. *E.g., id.* at 716-18 (majority opinion).

123. *Comer*, 833 N.E.2d at 719 (Pfeifer, J., dissenting)

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

*Id.* (quoting CIV. R. 14 (A)).

124. *Id.* at 719 (Pfeifer, J., dissenting). *See also* *Md. Cas. Co. v. Frederick Co.*, 53 N.E.2d 795 (Ohio 1944) (paragraph two of the syllabus) (“where judgment in a tort action is had against a party only secondarily or vicariously liable for the violation of a common duty owed by two persons, upon the payment of such judgment and necessary expenses by such party, there arises an implied contract of indemnity in favor of the person (or persons) primarily liable”).

125. *Comer*, 833 N.E.2d at 720 (Pfeifer, J., dissenting). The fact that an agent has been dismissed or has not been sued in the first place does not change the analysis or the hospital's responsibility for the negligence. *Id.*

3. The common law of vicarious liability continued to develop prior to the *Wuerth* case.

Ohio courts continued to explore and refine the doctrines as laid out in *Southview* and *Comer*. In 2007, the Eighth District Court of Appeals explained that the *Comer* decision applied to physicians who served as independent contractors but did not shield the hospital from liability for those agents for whom the hospital had direct control, such as nurses.<sup>126</sup> In *Doros v. Marymount Hospital*, the plaintiff had sued Marymount Hospital and John/Jane Doe, as agent of the hospital.<sup>127</sup> The statute of limitations had already expired when she moved the court to substitute a nurse for John Doe.<sup>128</sup> The hospital then moved for summary judgment based on *Comer*, and the trial court granted summary judgment.<sup>129</sup> On appeal, the Eighth District refused to apply *Comer*, which involved *respondeat superior* rather than agency by estoppel, holding that the trial court erred by granting summary judgment in favor of the hospital.<sup>130</sup>

The Ohio courts have also debated the limitations of the *Comer* ruling in cases other than medical malpractice. Following *Doros*, in 2007, the Twelfth District Court of Appeals addressed the issue in *Orebaugh v. Wal-Mart Stores, Inc.*<sup>131</sup> In *Orebaugh*, the plaintiff alleged that she was injured through the negligence of a Wal-Mart employee.<sup>132</sup> She filed a *respondeat superior* claim against Wal-Mart and the

126. *Doros v. Marymount Hosp., Inc.*, 2007-Ohio-1140, ¶ 20 (Ohio Ct. App. 8th Dist.). “Nurses are subject to the control of the hospital, they are not free to choose their patients, and patients are not free to choose their nurses. In addition, nurses must adhere to hospital guidelines, may be hired or fired at the hospital’s discretion, and are under the direct supervision of hospital administration.” *Id.*

127. *Id.* ¶ 4.

128. *Id.* ¶ 6-8. The trial court had granted the plaintiff leave to file the amended complaint substituting Nurse Madej for John Doe, but Nurse Madej filed a demand for dismissal, claiming the statute of limitations had run. *Id.* The court granted the motion. *Id.*

129. *Id.* ¶ 7-10. The court held that “Marymount could not be held vicariously liable for Nurse Madej’s actions when Van Doros failed to assert a timely claim against him.” *Id.*

130. *Id.* ¶ 22. The doctrine of agency by estoppel provides liability for the actions of an independent contractor while *respondeat superior* provides liability for the actions of an employee for whom the employer has direct control. In *Doros*, the negligent party was a nurse rather than a physician. Although *Comer* did not provide hospital liability for the actions of a physician for whom the statute of limitations had run, the Eighth District Court of Appeals found that *respondeat superior* was a separate doctrine that was not affected by the *Comer* decision, and was the appropriate doctrine to apply to a situation involving a negligent nurse. *Id.*

131. *Orebaugh v. Wal-Mart Stores, Inc.*, 2007-Ohio-4969 (Ohio Ct. App. 12th Dist.). Interpreting *Comer*, the court of appeals rejected the notion that *Comer* changed the law of *respondeat superior*. *Id.* ¶ 21.

132. *Id.* ¶ 2. As a Wal-Mart employee was attempting to help Orebaugh load a television, the employee dropped the television and caused serious injuries to Orebaugh’s right arm, shoulder, neck, and back. *Id.*

employee as Jane Doe.<sup>133</sup> The claim was never amended to include the name of the employee.<sup>134</sup> After the statute of limitations expired for the specific employee, Wal-Mart moved for summary judgment based on *Comer*.<sup>135</sup> The trial court granted the motion and the plaintiff appealed.<sup>136</sup>

The court of appeals refused to extend *Comer*.<sup>137</sup> It explained that the foundation for the theory of *respondeat superior* developed under the maxim “*qui facit per alium facit per se*,” which has been interpreted by the Ohio Supreme Court to mean “[t]he act of the servant, done within the scope and in the exercise of his employment, is in law the act of the master himself.”<sup>138</sup> The court explained that this rule is rooted and founded firmly in public policy.<sup>139</sup>

The *Orebaugh* court followed the traditional rule in Ohio under the principle of *respondeat superior* and stated that the plaintiff could choose to pursue an action against the agent, the principle, or both.<sup>140</sup> The court noted that “[t]here is no requirement that the employee be named as a party to the suit in order to prove his negligent acts.”<sup>141</sup>

The court then discussed the effect of *Comer* on the doctrine of *respondeat superior*.<sup>142</sup> The court distinguished the application of agency by estoppel from *respondeat superior*, then declared that extending *Comer* to other agency relationships “would overturn the extensive case law in Ohio on the issue of *respondeat superior*, master-servant liability, and agency liability in general” and would actually “overturn cases cited by *Comer* itself.”<sup>143</sup> *Orebaugh* illustrated the

133. *Id.*

134. *Id.* Orebaugh learned the employee’s name through discovery but never amended the complaint. *Id.* She voluntarily dismissed the claim and refiled within the savings period, but never added the employee as a named defendant. *Id.* ¶ 3.

135. *Id.*

136. *Id.*

137. *Id.* ¶ 17 (asserting that *Comer* does not apply to cases involving *respondeat superior* (direct employment rather than an independent contractor relationship)).

138. *Id.* ¶ 7 (emphasis added) (“This rule has been recognized as ‘legal unity of the principal and agent.’”) (quoting *Atl. & Great W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 168 (1869)).

139. *Id.* (the rule is based on “[t]he just responsibilities of persons or corporations acting through agents, and the needs of society”).

140. *Id.* ¶ 8 (holding an injured party may pursue damages against the employer of an agent acting within the scope of his employment under the doctrine of *respondeat superior*).

141. *Id.* (quoting *Billings v. Falkenburg*, No. L-86-017, 1986 WL 9582, at \*2 (Ohio Ct. App. 6th Dist. Sept. 5, 1986) (internal citations omitted)). The *Orebaugh* court found that *Comer* does not apply to liability under the theory of *respondeat superior*. *Id.* ¶ 22.

142. *See id.* ¶¶ 8-22.

143. *Id.* ¶ 21. The Twelfth District Court of Appeals rejected the idea that the Ohio Supreme Court in *Comer* had intended to overturn precedent, stating: “[h]ad the Ohio Supreme Court

narrowness of the *Comer* holding and explained that the *Comer* court “stated explicitly that its holding was limited to the narrow issue before it.”<sup>144</sup>

Even the Ohio Supreme Court continued to explore *Comer*’s applicability in different settings. Later in 2007, the court addressed the issue again in *Harris v. Mount Sinai Medical Center*.<sup>145</sup> While *Comer* precluded the application of agency by estoppel where the agent’s liability had been extinguished by law through the expiration of the statute of limitations, the court held that failure to join a negligent party does not render the doctrine of agency by estoppel inapplicable.<sup>146</sup> In *Harris*, the plaintiff made a claim against the medical center and alleged the negligence of the agents and employees of Mt. Sinai Hospital.<sup>147</sup> Although the case could not proceed against the hospital based on the negligence of the independent-contractor physician who had not been added as a party, the nurses, who were also not named parties to the suit, provided a basis for the case against the hospital under the theory of vicarious liability.<sup>148</sup> This clarified the court’s previous decision in *Comer*, suggesting that a negligent agent need not be added as a party for a claim of vicarious liability to go forward against the principal.

Other courts continued to discuss the issue. The Third District Court of Appeals addressed the issue in *Holland v. Bob Evans*<sup>149</sup> and cited the treatment by both the Eighth and Twelfth Districts in *Doros* and *Orebaugh*, as well as the Ohio Supreme Court’s more recent treatment of the issue in *Harris*.<sup>150</sup> The *Holland* court held that although the plaintiff failed to timely amend his complaint to name the agent

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intended to upset this well-settled area of the law, we believe it would have acknowledged the effects of its holding in *Comer*.” *Id.*

144. *Id.* ¶ 21. The court stated that the narrow issue in *Comer* was whether “a viable claim exists against a hospital under a theory of agency by estoppel for the negligence of an independent-contractor physician when the physician cannot be made a party because the statute of limitations has expired.” *Id.* (quoting *Comer v. Risko*, 833 N.E.2d 712, 713 (Ohio 2005)).

145. 876 N.E.2d 1201 (Ohio 2007). The court noted that the doctrine could also apply to the negligent acts of nurses who were not named in the suit. *Id.* at 1209. The nurses would subject the hospital to liability through *respondeat superior* rather than agency by estoppel. *Id.*

146. *Id.* at 1209.

147. *Id.* at 1203. The hospital argued that the trial court should have precluded evidence of the negligence of the anesthesiologist because he had not been joined as a party. *Id.* at 1208.

148. *Id.* at 1209. This decision demonstrates the intention of the Ohio Supreme Court to limit the decision in *Comer* to agency by estoppel and independent contractors.

149. *Holland v. Bob Evans Farms, Inc.*, 2008-Ohio-1487 (Ohio Ct. App. 3d Dist. March 31, 2008) (a timely filed *respondeat superior* claim was allowed to go forward against the principal when the claim against the agent (waiter) was barred by the expiration of the statute of limitations).

150. *Id.* ¶¶ 5-9. Although this case does not deal with medical malpractice, it illustrates the nature of the law in Ohio and the state of the doctrine of *respondeat superior* prior to *Wuerth*.

(waiter), the claim against the principal (Bob Evans) was a separate and timely filed claim and would be allowed to proceed.<sup>151</sup> The court interpreted the Ohio Supreme Court's decision in *Harris* to reaffirm the traditional doctrine of *respondeat superior*, holding that the negligence of an agent could be the basis of a vicarious liability claim against the principal whether or not the agent was a named party in the suit.<sup>152</sup>

Until 2009, the liability of a hospital could be asserted in three ways: *respondeat superior* (a hospital is liable for the negligent acts of its employees), agency by estoppel (a hospital is liable for the negligence of independent medical practitioners), and direct liability for its own negligent conduct.<sup>153</sup> The Ohio Supreme Court held that hospitals should "shoulder the responsibilities borne by everyone else. . . . The test should be . . . as it is for every other employer, *was the person who committed the negligent injury-producing act one of its employees and, if he was, was he acting within the scope of his employment.*"<sup>154</sup>

### III. WUERTH: THE TURNING POINT

*National Union Fire Insurance Co. of Pittsburg, PA. v. Wuerth* discussed principal liability within the context of legal malpractice.<sup>155</sup> Nationwide Insurance Co. hired McLarens Toplis, a claims adjusting company, to assess property damage for its insured, and McLarens hired Larry Wood to perform the work.<sup>156</sup> Nationwide then fired McLarens and Wood, claiming that Wood's improper appraisals had damaged

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151. *Id.* ¶10. The court of appeals referred to *Harris* and noted "the Supreme Court allowed a claim of negligence against the hospital when the negligence of its employees could be the basis of the claim even though the nurses were not named as defendants." *Id.* ¶ 9.

152. *See id.* ¶¶ 9-10.

153. *McGill v. Newark Surgery Ctr.*, 756 N.E.2d 762 (Ohio C.P. Licking Cnty. 2001) (holding that the expectations held by the community helped to shape the liability of the hospital).

154. *Klema v. St. Elizabeth's Hosp. of Youngstown*, 166 N.E.2d 765, 771 (Ohio 1960) (emphasis in original) (quoting *Bing v. Thunig*, 143 N.E.2d 3, 8 (N.Y. 1957)). This case was an action for wrongful death based on the negligence of a hospital staff anesthetist. *Id.* at 766. The Ohio Supreme Court held that the hospital was liable for the negligent acts of its employee. *Id.* at 771.

155. *Nat'l Union Fire Ins. Co. of Pittsburg, PA. v. Wuerth (Wuerth II)*, 913 N.E.2d 939 (Ohio 2009).

156. *Nat'l Union Fire Ins. Co. of Pittsburg, PA. v. Wuerth (Wuerth I)*, 540 F. Supp. 2d 900, 902-03 (S.D. Ohio 2007). Nationwide Insurance Co. entered into a contractual agreement with National Catastrophe Adjusters (NCA) in which NCA agreed to provide claims adjusting services to Nationwide and its subsidiaries. *Id.* at 903. Nationwide provided property damage insurance to Professional Hospitality Resources for six hotels, operated in Virginia Beach, which were damaged during the August 28, 1998 hurricane known as Bonnie. *Id.* Nationwide received notice of potential claims and contacted NCA for assistance with the claims. *Id.* NCA hired McLarens to assist with the adjusting and they retained Larry Wood. *Id.*

Nationwide.<sup>157</sup> McLarens had a professional liability policy with National Union, who hired the law firm, Lane Alton, to defend McLarens and Wood.<sup>158</sup> Richard Wuerth, an attorney for Lane Alton, assumed responsibility for the case and handled it almost exclusively himself.<sup>159</sup> Nationwide won the case against McLarens and Wood, and National Union attempted to recover the amount paid out in the settlement by filing a malpractice lawsuit against Lane Alton and Richard Wuerth.<sup>160</sup> National Union asserted legal malpractice claims against Richard Wuerth and against Lane Alton, claiming that the law firm was both directly liable for its own “wrongful acts, errors, and/or omissions,” and vicariously liable for the actions of Richard Wuerth.<sup>161</sup>

National Union moved for summary judgment on the issue of liability, and the defendants moved for summary judgment on multiple grounds, including the statute of limitations.<sup>162</sup> The court addressed the claims against Wuerth before turning to the claims against Lane Alton.<sup>163</sup> The court performed an extensive analysis of the relevant events and the time of termination and determined that the statute of

157. *Id.* After on 11 days on the job, Nationwide alleged that Mr. Wood had exceeded his authority and was negligent in adjusting the claims and Mr. Wood was removed from the job. *Id.* Nationwide claimed the Mr. Wood was responsible for a commitment of \$16 million more than it otherwise would have been obligated for if the claims had been properly adjusted. *Id.* Nationwide initiated a suit against NCA, McLarens, and Mr. Wood to reclaim the \$16 million that it overpaid. *Id.*

158. *Id.*

159. *Id.* at 903. The trial began on February 4, 2002. *Id.* Wuerth advised several of the partners as well as the court that he was feeling ill early in the second week of trial, but continued to represent National. *Id.* On February 14, 2002, Wuerth suffered from tremors and was rushed to the hospital. *Id.* He was later examined by his family physician and advised not to return to work. *Id.* He complied, producing an affidavit from his physician declaring that he was physically incapable of continuing with the trial. *Id.* The defendants moved for a mistrial based on Wuerth’s incapacity but were refused. *Id.* at 903-04.

160. *Id.* at 903. The jury decision was reached on February 21, 2002. Pursuant to a “High-Low” settlement agreement, National Union was directed to pay Nationwide \$8.25 million. *Id.* National was reimbursed for the settlement by its reinsurers for \$1,625,000. *Id.* National filed the action against Wuerth and Lane Alton on February 21, 2003. *Id.*

161. *Id.* at 904. The case was filed in the Federal District Court for the Southern District of Ohio.

162. *Id.* at 904-05. The defendants moved for summary judgment on the following grounds: “(1) Plaintiff’s claims are barred by the malpractice statute of limitations; (2) Plaintiff is unable to show a causal connection between the alleged malpractice and the resulting damage; (3) Plaintiff lacks standing to sue; and (4) Defendant Lane Alton is a non-lawyer and therefore cannot be directly sued for malpractice and is not vicariously liable because Defendant Wuerth and other Lane Alton attorneys are not liable.” *Id.*

163. *See id.* at 905. The two relevant claims are that Plaintiffs’ claims against Wuerth are barred by the malpractice statute of limitations, and that the defendant, Lane Alton, is a non-lawyer who cannot be directly sued for malpractice and is not vicariously liable because Defendant Wuerth and other Lane Alton attorneys are not liable. *Id.* at 905-10.

limitations had run with regard to Defendant Richard Wuerth, granting summary judgment in his favor and dismissing him from the case.<sup>164</sup> Following this analysis, the court addressed the plaintiff's vicarious liability claim against the remaining defendant, Lane Alton. Relying on Ohio law requiring liability of an agent in order to establish liability of a principal, the court held that Lane Alton could not be held liable for Defendant Wuerth's alleged malpractice because the case against Wuerth was barred by the expiration of the statute of limitations.<sup>165</sup>

The district court then addressed National Union's claim of direct liability against Lane Alton. The court defined malpractice as "professional conduct by members of the medical professions and attorneys,"<sup>166</sup> and explained that because Lane Alton was not an attorney, but a limited liability company, and an attorney-client relationship could never exist, there was no direct liability.<sup>167</sup> The court

164. *See id.* at 906-11 (citing *Smith v. Conley*, 846 N.E.2d 509 (Ohio 2006)). The court explained that the claim begins to accrue when "(1) a cognizable event occurred such that the client should have known he or she may have an injury caused by his or her attorney; and (2) when the attorney-client relationship terminated." *Wuerth I*, 540 F. Supp. 2d at 906. The court then analyzed the facts in the case under each contingency. *Id.* at 906-11. The court listed several specific instances where the plaintiffs indicated in their depositions that they thought Wuerth had acted with negligence early as February 11, 2002. *Id.* The court also discussed deposition testimony indicating that National intended to sue Wuerth and Lane Alton even before settlement discussions ensued or the jury verdict was rendered on February 21, 2002. *Id.* The court concluded that the relevant event occurred prior to February 21, 2002. *Id.* at 911. The court then went on to analyze time of termination of the attorney-client relationship. *Id.* at 911-12. Because it is undisputed that Wuerth was unable to work after the 14th, and although Wuerth never formally ended the relationship, there is clear evidence that National knew that he had been removed from the case and would provide no further assistance on the *Nationwide* case. *Id.* at 910-12. In fact, on February 20, 2002, the *Nationwide* court took judicial notice of the fact for the record that Mr. Rick Marsh was being substituted for Mr. Richard Wuerth. *Id.* The court concluded that the termination of the relationship occurred prior to February 21, 2002 and therefore the claim against Richard Wuerth was barred by Ohio's one-year statute of limitations with regard to malpractice cases. *Id.* at 910-11. Lane Alton continued to serve National Union however, and the claim against them was filed within the statutory period. *Id.* at 912-14.

165. *Id.* at 912-14 (citing *Soltis v. Wegman, Hessler, Vanderburg & O'Toole*, No. 69602, 1997 WL 64049, at \*3 (Ohio Ct. App. 8th Dist. Feb. 13, 1997)). *Soltis* held that "absent negligence on the part of the [defendant lawyer] as an employee, the law firm and its principals as the employer cannot be held liable." 1997 WL 64069 at \*3. The district court *did not* decide the issue of whether vicarious liability could apply without a liable defendant because the plaintiffs had not argued it, but instead the plaintiffs claimed that the "derivative claims against Lane Alton are not barred by the statute of limitations as the claims asserted against Defendant Wuerth were timely." *Wuerth I*, 540 F. Supp. 2d at 912. Because the court found that the claims against Wuerth were barred, it did not need to go further in its analysis. *Id.*

166. *Wuerth I*, 540 F. Supp. 2d at 912 (quoting *Dingus v. Kirwan*, No. E-05-082, 2006 WL 2384070, at \*10 (Ohio Ct. App. 6th Dist. Aug. 18, 2006)).

167. *Id.* at 913. "Malpractice occurs when a member of the medical profession or attorney fails to (1) treat a case professionally; or (2) fulfill a duty implied into the employment law; or (3) exercise the degree of skill or care exercised by members of the same profession practicing in the

reexamined the possibility of vicarious liability for Lane Alton based on the actions of the other attorneys who contributed to the case and found that it did not apply because they were not named parties in the suit.<sup>168</sup> The district court granted summary judgment for Lane Alton and dismissed the case.<sup>169</sup>

National Union appealed the decision to the Sixth Circuit Court of Appeals.<sup>170</sup> The court heard oral argument and then determined that Ohio law was “unsettled on this issue.”<sup>171</sup> Therefore, it certified the following question to the Ohio Supreme Court: “Under Ohio law, can a legal malpractice claim be maintained directly against a law firm when all of the relevant principals and employees have either been dismissed from the lawsuit or were never sued in the first instance?”<sup>172</sup>

The Ohio Supreme Court agreed to answer the question.<sup>173</sup> The court first divided the question into two main issues: “whether a law firm may be directly liable for legal malpractice . . . [and] whether a law firm may be held *vicariously* liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants.”<sup>174</sup>

In first addressing the issue of direct liability, the court considered National Union’s claim that an attorney-client relationship may exist between a law firm and a client, that a firm owes a duty of care to its clients, and that breach of the professional duties by the law firm should result in a claim for legal malpractice directly against the firm.<sup>175</sup> The

same locality.” *Id.* at 912-13 (quoting *Dingus*, 2006 WL 2384070 at \*10). The court went on to explain that defendant, Lane Alton, had never taken the bar examination, was not admitted to the bar, and could not be subject to professional discipline. *Id.* at 913. The attorney-client relationships are with the individual lawyers of the firm and the court found that the firm’s liability derived from those relationships and was based solely on vicarious liability. *Id.*

168. *See id.* at 913-14. Analogizing medical and legal malpractice, the court relied on *Albain* and *Comer* in determining that there was no liability saying, “Mr. Marsh, Mr. Hutson, and Ms. Lashuk cannot be liable because they have never been sued and it is too late to sue them now.” *Id.* at 914.

169. *Id.*

170. *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 349 Fed. Appx. 983 (6th Cir. 2009). The court did not set forth the facts of the case, but referred to the facts set out in the district court case.

171. *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth (Wuerth II)*, 913 N.E.2d 939, 941 (Ohio 2009).

172. *Id.*

173. *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 893 N.E.2d 514 (Ohio 2008) (granting certiorari).

174. *Wuerth II*, 913 N.E.2d at 942. In addressing two separate questions, the Ohio Supreme Court analyzed both vicarious liability and direct liability, that is, “[w]hether a law firm, as an entity, can commit legal malpractice.” *Id.*

175. *Id.* at 941-44.

court examined the similarities between the legal and medical fields regarding malpractice, explaining that both lawyers and physicians, by the nature of their fields, are often unable to fulfill expectations.<sup>176</sup> The court then concluded that they should have similar standards for determining when a cause of action should accrue in order to afford them similar protections from burdensome litigation.<sup>177</sup> The court focused on medical malpractice, explaining that only individuals could practice medicine and therefore, only individuals could be liable for medical malpractice.<sup>178</sup> The court then examined the nature of the

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176. *Id.* at 942 (citing *Richardson v. Doe*, 199 N.E.2d 878, 879-80 (Ohio 1964)). *Richardson* explained that malpractice was limited to physicians and attorneys and that nurses don't "practice" medicine, but are liable for negligence under traditional negligence law and do not deserve the protections that are set out for physicians because "it is the misfortune of both physicians and lawyers that, in a very considerable proportion of their cases, they are unable to accomplish the purposes desired . . . [and] are peculiarly susceptible to the charge of failure in the performance of their professional duties." *Wuerth II*, 913 N.E.2d at 942 (quoting *Richardson*, 199 N.E.2d at 879-80). The Ohio Supreme Court explained that the statute of limitations is lower for malpractice to protect lawyers and physicians from overly burdensome litigation. *Id.* See also *Richardson*, which attempted to extend hospital liability by declining to extend the protection afforded to the doctors (the reduced statute of limitations in medical malpractice cases) to the nurses, thereby providing that the malpractice case could go forward against the hospital if it depended on the nurses rather than the physician. 199 N.E.2d at 880-81.

177. *Wuerth II*, 913 N.E.2d at 942-43. The Court in *Wuerth II* uses the analogy set out in *Richardson* to accomplish the opposite goal, preventing negligence actions against a principal, rather than providing a way to extend liability against the principal responsible for a negligent actor. *Id.* at 942.

178. *Id.* The court relied on several cases to support this proposition. However, the cases they relied upon do not clearly stand for the proposition that a hospital or law firm can never be directly liable for malpractice. Instead the cases, based in medical malpractice, sought to expand or apply vicarious liability to hospitals by refusing to apply the limitations that the malpractice statute of limitations placed on doctors' liability to other professionals. *Id.* *Browing v. Burt*, 613 N.E.2d 993, 1003 (Ohio 1993), explains that only physicians and attorneys can commit malpractice, not other professionals such as engineers or nurses. *Lombard v. Good Samaritan*, 433 N.E.2d 162 (Ohio 1982), holds that the one year statute of limitations does not apply to hospital employees such as nurses and technicians. The case explained that "[t]here is no compelling reason for a nurse to be given the protection of a one-year statute of limitations. . . . Therefore, R.C. 2305.11 (A) [the statute defining the statute of limitations for medical malpractice] may not bar an action against the hospitals who are their employers." *Id.* at 163 (internal quotations omitted). *Propst v. Health Maintenance Plan, Inc.*, 582 N.E.2d 1142 (Ohio Ct. App. 1st Dist. 1990), examined a claim against Community Mutual Insurance Company and Health Maintenance Plan, two HMOs, and held that they could not be liable for the physicians' alleged medical negligence. The companies were authorized health maintenance organizations, essentially insurers, and did not practice medicine. *Id.* at 1143. The case was decided on vicarious liability standards and does not support a finding against direct liability for hospitals. *Id.*

The support cited by the Ohio Supreme Court to determine that "it is a well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys," and cannot be filed directly against a law firm, *Wuerth II*, 913 N.E.2d at 943 (quoting *Thompson v. Cmty. Mental Health Ctrs. of Warren*, 642 N.E.2d 1102 (Ohio 1994)), is very weak and subject to challenge at some point. *Hignite v. Glick, Layman & Assoc.'s, Inc.*, 2011-Ohio-1698 (Ohio Ct.

practice of law, explaining that Supreme Court Rules for the Government of the Bar of Ohio set forth “requirements that only individuals may satisfy” in order to be admitted to the practice of law.<sup>179</sup> The court then drew a direct analogy between the practice of medicine and law, stating: “in conformity with our decision concerning the practice of medicine, we hold that a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice.”<sup>180</sup>

The Ohio Supreme Court then addressed the second issue: “whether a law firm may be held vicariously liable for malpractice when none of its principals or employees are liable for malpractice or have been named as defendants.”<sup>181</sup> In answering this question, the court first discussed the doctrine of *respondeat superior*: “[g]enerally an employer or principal is vicariously liable for the torts of its employees or agents,”<sup>182</sup> and “[f]or the wrong of a servant acting within the scope of

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App. 8th Dist.), is a medical malpractice case that was decided on summary judgment based on *Wuerth*. Hignite appealed the decision to the Supreme Court of Ohio challenging the validity of the determination that a law firm, and by analogy a medical facility or hospital, cannot be directly liable for the negligence of its practitioners. *See Hignite v. Glick, Layman & Assoc’s, Inc.*, No. 2011-0878 (Ohio filed May 23, 2011). The Ohio Supreme Court again denied jurisdiction. *Hignite v. Glick, Layman & Assoc’s, Inc.*, 2011-Ohio-4751 (Ohio 2011). This demonstrates the breath of issues in the *Wuerth* decision that require clarification. However, this paper deals specifically with the court’s treatment of vicarious liability in *Wuerth* and the ramifications of possible interpretations of that decision and leaves discussion of the court’s ruling that there can never be direct liability against a law firm for another article.

179. The court referred to the Ohio Constitution, which grants jurisdiction to the court regarding the admission to the practice of law and the “discipline of persons so admitted.” *Wuerth II*, 913 N.E.2d at 943 (emphasis omitted) (quoting OHIO CONST. art. IV, §2(B)(1)(g)). Some of the rules set forth in the Gov. Bar. R. I referred to by the court include “earning the requisite degrees, possessing the requisite character and fitness, passing the bar exam, and taking the oath of office.” *Id.* The court stated that a “[l]aw firm includes a legal professional association, corporation, legal clinic, limited liability company, registered partnership, or any other organization under which a lawyer may engage in the practice of law.” *Id.* (emphasis omitted) (citing Code of Professional Responsibility, Definitions (2) (superseded by the Rules of Professional Conduct in Ohio in February of 2007 and includes a new definition of firm: “‘Firm’ or ‘law firm’ denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization,” Ohio Rules Of Professional Conduct, R.1(c), Effective Feb. 1, 2007 (emphasis added))).

180. *Wuerth II*, 913 N.E.2d at 943.

181. *Id.* at 942 (emphasis omitted).

182. *Id.* at 943 (quoting *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 51 (Ohio 1994)). “This doctrine of liability depends on the control by a principal (or master) over an agent (or servant).” *Id.* at 944.

his authority, the plaintiff has a right of action against either the master or the servant, or against both, in separate actions.”<sup>183</sup>

The court correctly elucidated the state of existing Ohio law in a neutral fashion before inexplicably shifting its focus from whether the liability could be adjudicated to whether the liability could be imposed.<sup>184</sup> The court explained that although “a party injured by an agent may sue the principal, the agent, or both, a principal is vicariously liable only when an agent could be held directly liable.”<sup>185</sup> The court found that if no liability is “assigned to the agent, it logically follows that there can be no liability imposed upon the principal for the agent’s actions.”<sup>186</sup> Referencing the Restatement (Third) of the Law Governing Lawyers, the court stated that a “law firm is subject to civil liability for injury legally caused to a person by *any wrongful act or omission of any principal or employee* of the firm who was acting in the ordinary course of the firm’s business or with actual or apparent authority.”<sup>187</sup> The court focused on the Restatement’s commentary, emphasizing that it “presupposes that a firm principal or employee is liable on one or more claims.”<sup>188</sup> The court then answered the certified question in the negative, holding that “a law firm may be vicariously liable for legal

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183. *Id.* (citing *Losito v. Kruse*, 24 N.E.2d 705, 707 (Ohio 1940)) (discussing the respective liabilities of master and servant and stating that “a judgment against one is no bar to an action or judgment against the other until one judgment is satisfied”). The court explained that “a mere judgment obtained against the former is not a bar to an action or judgment against the latter.” *Id.* (citing *State ex rel. Flagg v. Bedford*, 218 N.E.2d 601 (Ohio 1966)) (stating “[t]his court follows the rule that until the injured party receives full satisfaction, he may sue either the servant, who is primarily liable, or the master, who is secondarily liable, and a mere judgment obtained against the former is not a bar to an action or judgment against the latter”).

184. *Wuerth II*, 913 N.E.2d at 944. This shift in focus is critical to the interpretation of *respondeat superior* and has caused tremendous confusion as to the requirements to set forth and prove a proper case for vicarious liability.

185. *Id.* The court then cited several cases in support of this proposition from the early 1900s, prior to the development of hospital liability including *Bello v. Cleveland*, 138 N.E. 526 (Ohio 1922), and *Brown v. Louisburg*, 36 S.E. 166 (N.C. 1900).

186. *Wuerth II*, 913 N.E.2d at 944 (emphasis omitted) (citing *Comer v. Risko*, 833 N.E.2d 712 (Ohio 2005)). The court then extended this rule to other types of vicarious liability stating specifically that “an underlying requirement in actions for negligent supervision and negligent training is that the employee is individually liable for a tort or guilty of a claimed wrong against a third person, who then seeks recovery against the employer.” *Id.* (citing *Strock v. Pressnell*, 527 N.E.2d 1235, 1244 (Ohio 1988)). But, the language indicates that the party must be *guilty of a wrong* against the third party, *not personally liable in a court of law*.

187. *Wuerth II*, 913 N.E.2d at 945 (emphasis added) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58.1 (2000)).

188. *Id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 58.1 cmt. a (2000)).

malpractice only when one or more of its principals or associates are liable for legal malpractice.”<sup>189</sup>

In a concurring opinion, Chief Justice Moyer, joined by four other justices, wrote to address the narrowness of the opinion.<sup>190</sup> He found that the cases cited by the petitioner, National Union, did not directly apply or answer the certified question.<sup>191</sup> Moyer examined each of the cases cited by National Union in support of its case, demonstrating the weakness in each and how each case failed to prove the existence of direct law firm liability.<sup>192</sup> Moyer emphasized the importance of writing separately to “stress the narrowness” of the holding, explaining that the “opinion should not be understood to inhibit law-firm liability for acts like those alleged by the petitioner.”<sup>193</sup> Instead, he clarified that a law firm could be held vicariously liable for malpractice and possibly

189. *Id.*

190. *Id.* (Moyer, C.J., concurring). Chief Justice Moyer was joined by Justices Pfeifer, DeGenaro (sitting in for Justice Stratton), O’Connor, and Lanzinger in stating that “today we answer only the very narrow certified question before us.” *Id. Wuerth II* had two majority opinions because 5 out of 7 justices joined each opinion. *Id.* at 945, 948.

191. *Id.* Chief Justice Moyer discussed the weakness of the petitioner’s support, stating:

In fact, no case cited by the petitioner probes the nature of law firm liability for malpractice. Furthermore, in each case, at least one attorney was sued along with the law firm defendant, thereby obscuring the question of whether those courts even considered the law firm could be liable for malpractice in the absence of a culpable individual attorney.

*Id.*

192. *See id.* at 946-48. The majority of Chief Justice Moyer’s concurrence systematically undermines the cases propounded by the law firm, explaining that each of the cases cited in support do not actually address the narrow issue before the court. Some of the cases do not deal with malpractice at all as in *Biddle v. Warren General Hospital*, 715 N.E.2d 518 (Ohio 1999); some don’t address “whether the law firm could be directly liable for malpractice or whether the firm could be liable in the absence of an individual attorney’s malpractice” as in *Blackwell v. Gorman*, 142 Ohio Misc. 2d 50 (Ohio C.P. Franklin Cnty. 2007), *Rosenberg v. Atkins*, No. C-930259, 1994 WL 536568 (Ohio Ct. App. 1st Dist. Oct. 5, 1994), and *Baker v. Leboeuf, Lamb, Leiby & MacRae*, No. C-1-92-718, 1993 WL 662352 (S.D. Ohio Oct. 7, 1993); in some cases it was impossible to tell whether the court was referring to the individual attorneys or the law firm because it referred to all defendants collectively as in *North Shore Auto Sales, Inc. v. Weston Hurd, Fallon, Paisler & Howley, L.L.P.*, 2006-Ohio-456 (Ohio App. 8th Dist.); and in other cases, it was impossible to ascertain whether the liability was direct or vicarious because it was not discussed and several named attorneys were parties to the suit, as well as the firm itself, as in *Baker*, 1993 WL 662352. *Wuerth II*, 913 N.E.2d at 946-48. The plaintiffs provided weak support for their position and the concurrence seems to suggest that the decision of the court was based, at least in large part, on that fact and should not be understood to substantially change the current law of vicarious or direct liability. *Id.* at 947.

193. *Wuerth II*, 913 N.E.2d at 947 (Moyer, J., concurring). “Rather a law firm may be held vicariously liable for malpractice as discussed in the majority opinion.” *Id.*

directly liable for causes of action other than malpractice.<sup>194</sup> Four other justices concurred with this proposition, making Moyer's concurrence a majority opinion.<sup>195</sup>

#### IV. ANALYSIS

##### A. *Wuerth* radically changed the doctrine of *respondeat superior*.

The Ohio Supreme Court changed the law regarding vicarious liability for legal malpractice when it answered *Wuerth*'s certified question in the negative. A plaintiff could no longer hold a law firm liable without adding the negligent actor as a party defendant. Although *Wuerth* dealt specifically with legal malpractice, the court made particular references to medical malpractice.<sup>196</sup> If taken to apply to medical malpractice, *Wuerth* results in a drastic shift in the settled law of Ohio.<sup>197</sup> That shift imposes unreasonable, or even impossible, burdens on a plaintiff to name every possible individual who might have been involved in his or her care. This change could lead to multiple, and unnecessary, defendants being sued in an effort to ensure a suit's survival. With this change, if a plaintiff decides to sue only the employer for vicarious liability, the employer need only wait until the statute of limitations has expired for the employee and then move for summary judgment, relying on *Wuerth*.<sup>198</sup>

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194. *Id.* Chief Justice Moyer explained that a law firm may be directly liable for a cause of action other than malpractice, but the issue was not addressed due to the narrowness of the certified question. *Id.*

195. *Id.* at 948 (Justices Pfeifer, DeGenaro, O'Connor, and Lanzinger concurring).

196. *Wuerth II*, 913 N.E.2d at 942. *See supra* note 177. The analogy between legal and medical malpractice was made exclusively in the portion of the opinion dealing with direct liability, discussed as a separate issue from vicarious liability. *Wuerth II*, 913 N.E.2d at 942. In the section referring to vicarious liability, there were no specific references to medical malpractice, but it has been interpreted by some Ohio courts as standing for the proposition that the law of medical and legal malpractice are analogous in all respects, and that the *Wuerth* case applies to medical malpractice, effectively limiting the doctrine of *respondeat superior*. *Id.* at 943-45. *See Henry v. Mandell-Brown*, 2010-Ohio-3832, at \*3 (Ohio Ct. App. 1st Dist.) (applying *Wuerth* to medical malpractice and finding that if the suit against the agent is barred by the statute of limitations, then the suit against the principal is also barred).

197. *See Haney v. Barringer*, 2007-Ohio-7214, at \*8 (Ohio Ct. App. 7th Dist.) ("It is well-established in Ohio that '[u]nder the doctrine of *respondeat superior*, a hospital is liable for the negligent acts of its employees.'" (internal citation omitted); *see also Stevic v. Bio-Medical Application of Ohio*, 2008-Ohio-33, at \*3 (Ohio Ct. App. 5th Dist.) ("We also concede that the employee may not need to be a named party in the lawsuit against the employer.").

198. This is exactly what has happened in multiple cases since *Wuerth* was decided. *See, e.g., Stanley v. Cmty. Hosp.*, 2011-Ohio-1290, at \*5 (Ohio Ct. App. 2d Dist.) (court of appeals examined a case where the trial court had granted summary judgment in favor of the hospital because the

Since the decision in *Wuerth*, Ohio courts, including the Ohio Supreme Court, have struggled to apply it in the medical malpractice context. Courts have interpreted the decision in different ways on the issue of whether or not a plaintiff may use the doctrine of *respondeat superior* to hold a hospital liable when the negligent employee is not a named defendant.<sup>199</sup>

Following *Wuerth*, the Ohio Supreme Court addressed whether the immunity of an agent deprives the injured party of a medical malpractice claim of vicarious liability against the agent's employer in *Sawicki v. Lucas County*.<sup>200</sup> *Sawicki* dealt with the issue of whether the personal immunity of a physician absolved the hospital of liability for the negligent acts of the physician.<sup>201</sup> The court clarified the existing doctrine of *respondeat superior*, stating that it "operates by imputing to the employer the *acts of the tortfeasor*, not the tortfeasor's liability."<sup>202</sup> The court added that its prior holding in *Comer*—that "a hospital cannot be held liable under a derivative claim of vicarious liability when the physician cannot be held primarily liable"<sup>203</sup>—was a narrow holding that

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nurses, designated as Jane and John Does, had not been named and the statute of limitations against them had run); *Hignite v. Glick, Layman & Assoc's*, 2011-Ohio-1698, at \*8 (Ohio Ct. App. 8th Dist.) (court of appeals affirmed a judgment by the trial court granting summary judgment in favor of the dental practice because the plaintiff had not sued any of the dentists individually and the dentists could no longer be sued because the statute of limitations on an action against them had run, although the action against the practice was timely filed).

199. See, e.g., *Henry v. Mandell-Brown*, 2010-Ohio-3832, at \*3 (Ohio Ct. App. 1st Dist.) (if a suit against the agent is barred by the statute of limitations, then the suit against the principal is also barred); *Friedman v. Castle Aviation*, No. 2:09-cv-749, 2010 U.S. Dist. Lexis 80556, at \*7 (S.D. Ohio Aug. 9, 2010) (plaintiff need not name an agent as a defendant in order to proceed against the principal for the agent's negligence); *Taylor v. Belmont Cmty. Hosp.*, 2010-Ohio-3986, at \*9 (Ohio Ct. App. 7th Dist.) (distinguishing *Wuerth* and allowing a plaintiff to pursue a *respondeat superior* claim against the hospital without joining the negligent agent); *Scott v. McCluskey*, No. CV 2009-07-4941, 2010 WL 4997873 (Ohio C.P. Summit Cnty. Sept. 27, 2010) (holding that the principles set forth in *Wuerth* were not applicable to medical malpractice and "declin[ing] to eviscerate in one stroke the concept of vicarious liability that has been in legal existence for hundreds of years"); *Stanley*, 2011-Ohio-1290, at \*5 (medical employees need not be named parties to a suit in order to sue the hospital-employer). See also *infra* notes 205-07 and accompanying text for further explanation.

200. *State ex rel. Sawicki v. Lucas Cnty. Ct. Com. Pl.*, 931 N.E.2d 1082, 1086 (Ohio 2010).

201. *Id.* A negligent physician was employed both by the state and by a private entity (Peter N. Temesy-Armos, M.D., and Associated Physicians of MCO, Inc.) and the physician was personally immune from liability because of his status as a state employee. *Id.* at 1085. The Ohio Supreme Court held that his personal immunity did not absolve his private employer for his negligent acts committed while in the scope of employment. *Id.* at 1093. The suit was against the doctor's private employer only, and not against the physician as a state employee. *Id.* at 1085.

202. *Id.* at 1089 (emphasis added).

203. *Id.* (citing *Comer v. Risko*, 833 N.E.2d 712 (Ohio 2010)).

turned exclusively on the theory of agency by estoppel.<sup>204</sup> Although the *Sawicki* decision followed *Wuerth*, the court did not address whether, or how, the *Wuerth* decision should be applied to medical malpractice or medical negligence cases where an alleged individual tortfeasor is not, or cannot be, a defendant.

*Sawicki* failed to clarify the use of *Wuerth* in medical malpractice, and confusion is still evident throughout Ohio regarding the current law for the doctrine of *respondeat superior*. Some courts have followed *Wuerth* with regards to both legal malpractice and medical malpractice.<sup>205</sup> Some Ohio courts, specifically considering medical malpractice and negligence, have rejected the theory that the employer could not be liable under the doctrine of *respondeat superior* unless the agent was also a named party. Other courts, citing *Wuerth* as support, have come to the opposite conclusion of that stated in *Wuerth*,<sup>206</sup> while others have relied on the narrowness of the *Wuerth* decision and refused to extend it to medical malpractice.<sup>207</sup>

204. *Id.*

205. *See, e.g.,* Hildebrant v. Provident Bank, 2010-Ohio-2712 (Ohio Ct. App. 12th Dist) (holding that when no individual attorneys or employees from the law firms were named as defendants in the complaint, no claim for vicarious liability by the law firm existed); *see also* Mandell-Brown, 2010-Ohio-3832 (Ohio App. 1 Dist.). In *Mandell-Brown*, the court applied *Wuerth* to medical malpractice in determining that the *respondeat superior* claim against “Mandell-Brown Plastic Surgery Center” was barred because there was no suit filed against the individual physician responsible for the negligence, noting that the Ohio Supreme Court in *Wuerth* acknowledged that legal and medical malpractice issues are analogous. *Id.* ¶ 14. The named defendant in the case was “The Mandell-Brown Plastic Surgery Center” and not the physician “Mark Mandell-Brown, M.D.” *Id.* ¶ 2. By the time the plaintiff learned of the deficiency, the statute of limitations had run against the physician and the plaintiff could not amend his claim to include a claim against the individual physician. *Id.* ¶ 3. The trial court granted summary judgment in favor of Mark Mandell-Brown Surgery Center because of the failure of the vicarious liability claim due to the inability of the plaintiff to add Mark Mandell-Brown to the claim. *Id.* The First District Court of Appeals upheld the verdict. *Id.* ¶ 14. Lavar Henry was not able to pursue a claim for restitution for the damage he had suffered due to the negligence of Mark Mandell-Brown. *Id.*

206. Friedman v. Castle Aviation, No. 2:09-cv-749, 2010 U.S. Dist. Lexis 80556, at \*7 (S.D. Ohio Aug. 9, 2010) (citing *Wuerth* for the proposition that “Ohio law allows an injured party to sue the principal, the agent, or both” and holding that the “[p]laintiff need not name that agent as a defendant in order to proceed against [the principal]”).

207. *See, e.g.,* Taylor v. Belmont Cmty. Hosp., 2010-Ohio-3986 (Ohio Ct. App. 7th Dist.). The court specifically addressed the issue of “whether *Wuerth* should be extended to the case before us and/or whether it would preclude suit against the hospital where the employees were not sued and where the statute of limitations ran against them after suit had been filed against the hospital.” *Id.* ¶ 29. Noting that “*Wuerth* acknowledged the basic premise that the plaintiff can choose to sue the master, the servant, or both,” the court distinguished *Wuerth*, stating that a partner’s relationship with his law firm is not really that of an employer-employee because he is part owner and therefore was different from a claim against a hospital for *respondeat superior*. *Id.* ¶ 34 (citation omitted). The court specifically refused “to extend a Supreme Court case regarding law firm liability for the acts of partners and associates to the arena of hospital liability for the acts of its employees.” *Id.* ¶

The Sixth District Court of Appeals has before it a case that illustrates the drastic change in Ohio law created by *Wuerth*.<sup>208</sup> The plaintiff in this case claimed that “Toledo Hospital provided negligent care through physicians and other medical personnel acting within the scope and course of their employment.”<sup>209</sup> The case was originally filed in 2003, and a jury returned a verdict in favor of Toledo Hospital in 2007.<sup>210</sup> The Sixth District Court of Appeals reversed in December 2008 and remanded for a new trial.<sup>211</sup>

While the case was awaiting a new trial, *Wuerth* was decided on July 29, 2009.<sup>212</sup> On September 30, 2009, Toledo Hospital filed a

35. The court addressed the narrowness of the holding in *Wuerth*, noting that a majority of the justices signed onto the concurrence in *Wuerth*, which stressed the narrow holding, making it part of the majority decision. *Id.* Justice DeGenaro, in her concurrence, stated that the plaintiff could “directly pursue the hospital for their damages under the theory of respondeat superior, without joining the employees as party defendants.” *Id.* ¶47.

*See also* Scott v. McCluskey, No. CV 2009-07-4941 (Ohio C.P. Summit Cnty. Aug. 13, 2010) (holding that “the principals set forth in *Wuerth* are not applicable . . . as the negligence of its agents and/or employees could be the basis of the claim even though individual nurses or other individual employees and/or agents involved in the care of [the plaintiff] were not individually named as defendants”).

*See also* Stanley v. Cmty Hosp., 2011-Ohio-1290 (Ohio Ct. App. 2nd Dist.). The court examined the applicability of *Wuerth* and determined that *Wuerth* “must be given a narrow application.” *Id.* at \*4. The court interpreted *Wuerth* as not precluding a suit against a hospital for the negligence of its employee nurses who were not named as defendants. *Id.* at \*5. The defendant appealed the decision to the Ohio Supreme Court. In its Memorandum in Support of Jurisdiction, the appellee, Community Hospital, argued that:

[c]larification is necessary concerning general medical malpractice precedent and vicarious liability of hospitals. There is clearly a split among courts on this issue. . . . This case presents a perfect opportunity for this Court to address the documented and pervasive confusion before it develops into further inconsistent decisions. The inconsistent decisions which are making it impossible for medical malpractice plaintiffs and defendants to predict with any certainty whether liability flows to a hospital where its agents or employees are never named as defendants.

Stanley v. Cmty Hosp., No. 2011-0711, 2011 WL 1786890, at \*8-10 (Ohio filed Apr. 29, 2011). The supreme court again declined to grant jurisdiction, *see* Stanley v. Cmty. Hosp., 951 N.E.2d 1047 (Ohio 2011), however, it is clear that the demand for clarity comes from both plaintiffs and defendants and this issue continues to resurface before the Ohio Supreme Court.

208. *See* Tisdale v. Toledo Hosp., No. L-11-1005 (Ohio Ct. App. 6th Dist.) (filed Jan. 10, 2011).

209. Notice of Appeal at 2, Tisdale v. Toledo Hosp., No. L-11-1005 (Ohio Ct. App. 6th Dist. Jan. 10, 2011), CI 03-4247 (Lucas Cnty Ct. Comm. Pl, Notice filed Jan. 10, 2011) (internal quotes omitted). The Plaintiffs voluntarily dismissed the individual physicians that had been named defendants. *Id.* The nurses were not named as defendants. *Id.*

210. *Id.* at \*1-2.

211. *Id.* at \*3. The court of appeals found that the trial court had abused its discretion in denying the plaintiffs’ motion to excuse a juror for cause. *Id.* Toledo Hospital appealed and the Ohio Supreme Court denied jurisdiction in April 2009. *Id.*

212. *Wuerth II*, 913 N.E.2d 939 (Ohio 2009).

motion to dismiss the case based on *Wuerth*, claiming that the plaintiffs failed to name an employee or agent of the hospital as a party defendant.<sup>213</sup> The court examined the motion, stating that:

Plaintiffs [found] themselves in an untenable predicament. At the time their initial suit was filed, it was presumed that a cause of action could be maintained against a hospital alone when one or more of its employees were alleged to have been negligent in performing duties within their scope of employment. However. . . . [*Wuerth*] turned that presumption on its head.<sup>214</sup>

The trial court granted the dismissal, holding that prior to *Wuerth*, “plaintiffs could sue the hospital directly and did not have to name any of the hospital employees in order to hold the hospital liable for the employees’ negligent acts. The *Wuerth* decision change[d] that.”<sup>215</sup>

The Ohio Supreme Court was recently provided with the opportunity to examine and clarify the doctrine of vicarious liability following *Wuerth*. This is an important issue of great public and general interest that has a substantial effect on the doctrine of medical malpractice in Ohio. In *Henry v. Mandell-Brown*,<sup>216</sup> the plaintiff sued only the principal, a corporate surgery center, using the theory of *respondeat superior*.<sup>217</sup> The case was timely filed.<sup>218</sup> The case was dismissed without prejudice, and the plaintiff later attempted to refile, including a claim against the physician.<sup>219</sup> The claim against the principal was preserved under the savings statute, but the claim against

213. Notice of Appeal at 3, *Tisdale*, No. L-11-1005. The statute of limitations had run against the nurses several years before. *Id.*

214. *Id.* at \*5 (emphasis added). The court explained how the shift in Ohio law created a difficult, if not impossible, situation for the plaintiffs. *Id.* This also raises the problem of retroactive application of *Wuerth*.

215. *Id.* at \*6. This court noted that the Ohio Supreme Court in *Wuerth* analogized to medical malpractice and found that the rule set forth in *Wuerth* applies equally to legal and medical malpractice. *Id.* at \*11. The plaintiffs made an appropriate claim against the hospital based on the well-settled Ohio law of *respondeat superior*, but because of the confusion created by *Wuerth*, they were denied a right to recover for their injuries. *Id.* at \*11-12.

216. 2010-Ohio-3832 (Ohio Ct. App. 1st Dist.). Dr. Mandell-Brown performed surgery on Levar Henry, who then filed a pro se complaint ten months later against the Mandell-Brown Plastic Surgery Center alleging medical malpractice and fraud related to surgery. *Id.* ¶ 2.

217. *Id.* ¶ 2.

218. *Id.*

219. *Id.* Henry failed to file the required affidavit of merit and the trial court dismissed the complaint without prejudice. *Id.* Henry, represented by counsel, refiled within the savings period. *Id.* ¶ 3. The new claim specifically named the physician, Dr. Mandell-Brown, and sought to recover from The Plastic Surgery Experts (Mandell-Brown Plastic Surgery Center) under a doctrine of *respondeat superior*. *Id.*

the physician was time barred by the statute of limitations.<sup>220</sup> Relying on *Wuerth*, the First District Court of Appeals held that “[the physician] cannot be held directly liable for the alleged malpractice because the claims against him were not filed within the limitations period. And, the *respondeat superior* claim against the surgery center could not survive the dismissal of the claims against [the physician].”<sup>221</sup>

This interpretation of *Wuerth* completely reverses the settled Ohio doctrine that the plaintiff has a right choose who to proceed against—a doctrine that was affirmed in *Wuerth*.<sup>222</sup>

The plaintiff in *Henry v. Mandell-Brown* recently appealed the case to the Ohio Supreme Court in *Henry v. The Plastic Surgery Experts*.<sup>223</sup> However, the court declined to hear the case on February 2, 2011, declining the opportunity to clarify how *Wuerth* should apply to medical malpractice.<sup>224</sup>

Following this decision, the Ohio Supreme Court was presented with another case that raised the issue of the application of *Wuerth* in the medical malpractice context. In *Stanley v. Community Hospital*,<sup>225</sup> a suit was brought against the hospital and against Jane and John Doe as nurses and physicians.<sup>226</sup> The plaintiff did not amend the complaint, and after the statute of limitations had expired against the nurses, the hospital moved for summary judgment based on *Wuerth*, claiming that the hospital could not be vicariously liable because the nurses were never sued and the statute of limitations had run against them so that they could not be sued.<sup>227</sup> The trial court granted summary judgment, relying on the holding in *Wuerth*.<sup>228</sup> The Second District Court of Appeals reversed, distinguishing *Wuerth* as involving *malpractice* rather than a *medical claim*, and distinguishing the negligence of nurses as employees

220. *Id.* at \*1-3.

221. *Id.* at \*3 (emphasis added).

222. *Wuerth II*, 913 N.E.2d 939, 944 (Ohio 2009) (citing *Losito v. Kruse*, 24 N.E.2d 705 (Ohio 1940) with approval for the proposition that “the wrong of a servant acting within the scope of his authority, 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”).

223. *Henry v. Plastic Surgery Experts*, No. 2010-1861 (Ohio filed Oct. 29, 2010) (Notice of Appeal).

224. *Henry v. Mandell-Brown*, 940 N.E.2d 987 (Ohio 2011) (Table), *reconsideration denied*, 944 N.E.2d 697 (Ohio 2011).

225. 2011-Ohio-1290 (Ohio Ct. App. 2d Dist.).

226. *Id.* ¶ 3.

227. *Id.* ¶ 4.

228. *Id.* ¶ 6.

from that of physicians as independent contractors.<sup>229</sup> The appellate court stated that “[t]he holding in *Wuerth* must be given a narrow application.”<sup>230</sup> The court held that “*Wuerth* does not preclude a suit against [the hospital] for the negligence of its employee nurses despite the fact that the nurse or nurses were not named as defendants in [the plaintiff’s] complaint.”<sup>231</sup>

The hospital appealed the case to the Ohio Supreme Court.<sup>232</sup> In its memorandum in support of jurisdiction, Community Hospital argued “it is unclear whether plaintiff’s lawyers are required to sue the actual medical providers.”<sup>233</sup> The memorandum discusses the split in Ohio decisions following *Wuerth* and claims that “clarification is necessary concerning general medical malpractice precedent and vicarious liability of hospitals.”<sup>234</sup> The Supreme Court of Ohio again denied jurisdiction.<sup>235</sup> The state of the doctrine of *respondeat superior* remains unsettled in Ohio.

This recent case, along with the split among lower state courts, demonstrates the need for clarification; both plaintiffs and defendants are unclear regarding the current status of the law in Ohio concerning *respondeat superior* in the context of medical malpractice.

#### B. *Other States’ treatments of the issue.*

As discussed above, there is a general movement throughout the United States to hold hospitals liable for the negligent acts of their doctors, and the courts have continued to act consistently with that theory. Some courts have directly addressed the question at issue here.<sup>236</sup> In 2007, for example, the Virginia Supreme Court held that the

229. *Id.* ¶¶ 20-22. The court of appeals stated that “physicians and attorneys are not typically considered ‘employees’ at their respective business.” *Id.* The court also stated that malpractice is limited to the professional misconduct of “members of the medical profession and attorneys” and cannot describe the actions or negligence of employees. *Id.* Thus the Second District Court of Appeals limited the reach of *Wuerth* to those who could not be considered employees. *Id.*

230. *Id.* ¶ 22.

231. *Id.* ¶ 23.

232. *Stanley v. Cmty. Hosp.*, No. 2011-0711 (Ohio filed Apr. 29, 2011). Community Hospital filed its Notice of Appeal and Memorandum in Support of Jurisdiction on April 29, 2011. *Id.* The Supreme Court of Ohio declined jurisdiction on August 24, 2011. *Stanley v. Cmty. Hosp.*, 951 N.E.2d 1047 (Ohio 2011).

233. Memorandum in Support of Jurisdiction at \*3, *Stanley v. Cmty. Hosp.*, No. 2011-0711 (Ohio Apr. 29, 2011), 2011 WL 1786890.

234. *Id.* at \*8.

235. *Stanley v. Cmty. Hosp.*, 951 N.E.2d 1047 (Ohio 2011).

236. Whether an agent (employee) must be a named defendant in order to proceed against the principal (hospital).

dismissal of an employee on statute of limitations grounds does not bar an action against the employer for the dismissed employee's negligence because it does not amount to an "affirmative finding of non-negligence" against the employee.<sup>237</sup>

Even those states that do not appear eager to expand hospital liability recognize a *respondeat superior* claim without the requirement that the negligent agent be sued.<sup>238</sup> South Carolina reluctantly recognizes the doctrine of *respondeat superior*.<sup>239</sup> And in the context of a hospital, South Carolina recognizes that the plaintiff must prove malpractice against the physician, that a physician is the hospital's agent, and that tortious acts generally occur within the scope of that agency relationship.<sup>240</sup> There is no specific requirement that the plaintiff sue the employee in order to sue the employer under a theory of *respondeat superior*.<sup>241</sup>

In 2010, the Supreme Court of Tennessee directly addressed the issue of whether a hospital may be sued when the claim against the agent is barred by operation of law or the agent was never sued.<sup>242</sup> The court considered *Wuerth* in its analysis, but did not adopt the holding.<sup>243</sup> The court cited *Wuerth* for the proposition that "a plaintiff is free to sue the agent, the principal, or both,"<sup>244</sup> and explained that, "[e]ven where the agent's conduct is the sole basis for the principal's liability, the agent

237. *Hughes v. Doe*, 639 S.E.2d 302, 304 (Va. 2007). The court also noted that a plaintiff need not file a lawsuit against an employee in order to attack the employer on a theory of *respondeat superior*, explaining that "[n]o judgment against the employee individually is necessary for recovery [against an employer on a theory of *respondeat superior*]; only a finding that the employee was negligent." *Id.* See also Sean P. Byrne & Paul Walkinshaw, *Health Care Law*, 42 U. RICH. L. REV. 441-42, 461-62, 462 n.152 (2007).

238. See *McWilliams & Russell*, *supra* note 41, at 438-45, 472. South Carolina is an example of a state where the courts have not appeared eager to embrace the movement toward greater hospital liability, but this state still is not "immune to the changing tide of perception and . . . policy." *Id.* See, e.g., *Shuler v. Tuomey Reg'l Med. Ctr.*, 437 S.E.2d 128, 129 (S.C. Ct. App. 1993) (setting out a strict test for agency requiring detrimental reliance); *Strickland v. Madden*, 448 S.E.2d 581, 585 (S.C. Ct. App. 1994) (declining to consider agency because there was no evidence to support detrimental reliance).

239. *McWilliams & Russell*, *supra* note 41, at 438-45.

240. *Id.* In spite of its reluctance, it does recognize the doctrine of *respondeat superior* as applied to medical malpractice and has no requirement that the negligent agent be a named party in the suit. *Id.*

241. See *id.*

242. *Abshire v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 105-06 (Tenn. 2010).

243. *Id.* at 105.

244. *Id.* at 105 n.9 (citing *Wuerth II*, 913 N.E.2d at 944 among several other cases that stand for the same proposition).

remains a 'proper, but not a necessary' party."<sup>245</sup> The court found in favor of the plaintiff because, although the claim against the negligent physician was extinguished by the operation of law, the vicarious liability claim against the hospital was properly filed. The long-standing law of Tennessee regarding vicarious liability is very similar to the settled law of Ohio and is persuasive authority that is instructive regarding the appropriate interpretation and use of the *Wuerth* decision.<sup>246</sup>

C. *Where do we go from here?*

The history of Ohio law shows an expansion of hospital liability, and an attempt to protect the innocent patient-victim, through the development of vicarious liability. The law regarding *respondeat superior* prior to the *Wuerth* decision was well-settled regarding the ability of a plaintiff to hold a principal liable through vicarious liability without adding the agent as a named defendant.<sup>247</sup> Even in cases where

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245. *Id.* at 105 (citation omitted). The Tennessee Supreme Court analyzed the issue of whether a procedural bar of claims against a physician (expiration of the statute of repose) should bar a vicarious liability claim against the employer. *Id.* at 105-06. The court explained that when an agent is exonerated (not negligent), it is "contradictory and absurd to find the principal guilty on the same evidence," and when a plaintiff fails to timely file a suit against a principal until after a claim against the agent is barred by expiration of the statute of repose, the plaintiff is barred from doing an "end run" around the statute by later filing a suit against the principal. *Id.* at 107-11. The court explains that this exception (inability to sue the principal) is "triggered only when a plaintiff belatedly attempts to amend its complaint to add a new vicarious liability claim against the principal after its claims against the agent have become barred by operation of law." *Id.* at 111. The doctrine is then clarified, and the question of whether the agent must be an active defendant in the suit is answered, when the court states:

The limitation does not apply in circumstances where the plaintiff has initially filed a vicarious liability claim against the principal, and the plaintiff's claim against the principal's agents are later extinguished by operation of law. . . . In circumstances where the plaintiff has properly asserted a vicarious liability claim against the principal, the extinguishment of the plaintiff's claims against the agent, by voluntary dismissal or otherwise, "merely produces the same effect as if the agent had never been sued.

*Id.* (citation omitted). The court recognized the plaintiff's option to sue only the principal in a *respondeat superior* case. *Id.*

246. *Id.* "It has long been recognized in Tennessee that a principal may be held vicariously liable for negligent acts of its agent . . . [and] that a plaintiff may sue a principal based on its vicarious liability for the tortious conduct of its agents without suing the agent."

247. *See, e.g., Krause v. Case W. Reserve Univ.*, No. 70712, 1996 WL 732537, at \*6 (Ohio Ct. App. 8th Dist. Dec. 19, 1996). In this case, the plaintiff had a derivative claim against MetroHealth. The court explained the state of the law in Ohio:

MetroHealth's liability is strictly based on the doctrine of *respondeat superior*, i.e., if the defendant doctors are not liable, MetroHealth cannot be liable. Under the doctrine of *respondeat superior*, without an underlying tort claim against an employee, a plaintiff has no claim against the employee's employer. . . . Regardless of the fact that the seven

the negligent employee had been dismissed, the plaintiff was permitted to move forward against the defendant hospital based on a theory of *respondeat superior*.<sup>248</sup> Ohio's appellate courts were generally consistent in their interpretations of the prior cases and the state of the law at that time.<sup>249</sup>

The Ohio courts have demonstrated a clear intention to expand hospital liability and to provide protection for patients harmed through negligence while in the care of the hospital.<sup>250</sup> The Ohio Supreme

doctors were not formally made parties defendant, plaintiff is entitled to the benefit of her allegations against them for the purposes of testing the merits of the dismissal against MetroHealth. . . . *There is no requirement that an employee be named as a party to a suit in order to prove his negligent acts.*

*Id.* (emphasis added). The court explicitly states that a party need not be a part of a lawsuit for liability to be based on his negligence. *Id.* See also *Haney v. Barringer*, 2007-Ohio-7214, ¶ 46 (Ohio Ct. App. 7th Dist.) (citing *Berdyck v. Shinde*, 613 N.E.2d 1014 (Ohio 1993) (“It is well-established in Ohio that [under the doctrine of *respondeat superior*], a hospital is liable for the negligent acts of its employees”)); *Stevic v. Bio-Medical Application of Ohio*, 2008-Ohio-33, at \*3 (Ohio Ct. App. 5th Dist.) (citing *Comer v. Risko*, 833 N.E.2d 712, 715 (Ohio 2005) for the proposition that the “employee may not need to be a named party in the lawsuit against the employer”).

248. See, e.g., *Sullins v. Univ. Hosps. of Cleveland*, 2003-Ohio- 398, at \*2 (Ohio Ct. App. 8th Dist.) (although the plaintiff settled with and dismissed his claim against the doctor, he was permitted to “proceed[] against UH on the alleged negligence of Dr. Woolley and the nursing staff,” who were never party defendants); *Perry v. Univ. Hosp. of Cleveland*, 2004-Ohio-4098, at \*10 (Ohio Ct. App. 8th Dist.) (the court recognized that the dismissal of the doctors for whom the vicarious liability is predicated does not impact the claims against the hospital). The *Perry* court stated:

The claims against [University Hospital (UH)] were based on the doctrine of *respondeat superior*, under which the hospital could be held liable for injuries caused by the negligence of its employees. Although Perry was required to prove the negligence of the doctors to prevail on her claims against UH, she could do so without the doctors being present in the actions. Indeed, we have previously held that there is no requirement that an employee be named as a party in a suit in order to prove his negligent acts.

*Id.*

249. See, e.g., *Sullins*, 2003-Ohio-398, at \*2 (holding that a claim went forward against the principal when the agent had been dismissed); *Perry*, 2004-Ohio-4098 (holding that employers may be held vicariously liable when the employee has been voluntarily dismissed from the case); *Ferfuson v. Dyer*, 777 N.E.2d 850, 852 (Ohio Ct. App. 10th Dist. 2002) (holding that the hospital was responsible for the negligence of the nurse, rather than the physician supervising her); *Grimm v. Summit Cnty. Children Servs. Bd.*, 2006-Ohio-2411, at \*6 (Ohio Ct. App. 9th Dist.) (holding the hospital vicariously liable for failure to report by the agents who were not named defendants); *Stevic*, 2008-Ohio-33, at \*3 (“the employee may not need to be a named party in the lawsuit against the employer”); *Haney*, 2007-Ohio-7214, at \*8 (“It is well-established in Ohio that under the doctrine of *respondeat superior*, a hospital is liable for the negligent acts of its employees”); *Ind. Co. v. Barnes*, 846 N.E.2d 73, 80 (Ohio Ct. App. 10th Dist. 2005) (employer held liable through a theory of *respondeat superior* after the case against the negligent employee was dismissed).

250. *Grimm*, 2006-Ohio-2411, at \*6 (holding a hospital liable for the negligence of the nurses to report suspected child abuse, upholding an award of \$224,000 against the hospital based on a vicarious liability claim of *respondeat superior* where the nurses were not named parties in the suit,

Court's decision in *Wuerth* has "turned that presumption on its head" and disrupted the settled state of the doctrine of *respondeat superior* with regard to hospital liability.<sup>251</sup> There is an immediate need for the Ohio Supreme Court to clarify the doctrine of *respondeat superior* and the application of *Wuerth* to medical malpractice cases.

#### 1. Weaknesses in the argument to extend *Wuerth*.

It is not appropriate to extend *Wuerth* to medical malpractice on the reasoning that it will lower insurance and medical costs. While the new interpretation of the law could possibly reduce hospital liability, and thereby reduce the cost of hospital insurance, the reality is that medical malpractice insurance costs are not a major cost of the health care profession, constituting only one half of one percent (0.5%) of the "total American health care bill."<sup>252</sup>

The changed doctrine, resulting in barring a substantial number of medical malpractice claims against hospitals, could result in relaxed quality standards by hospitals and increased injuries.<sup>253</sup> The increased injuries could result in overall higher healthcare costs.<sup>254</sup>

Rather, modern hospitals need "strong financial incentives to exercise tight control over physicians' treatment decisions."<sup>255</sup> Patients,

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and demonstrating the general view that hospitals should not escape liability for the negligence of their employees).

251. *Tisdale v. Toledo Hosp.*, No. CI 03-4247, slip op. at 5 (Ohio C.P. Lucas Cnty. 2010), *appeal filed*, No. L-11-1005 (Ohio Ct. App. 6th Dist. Jan. 10, 2011).

252. *See Braden & Lawrence, supra* note 25, at 694.

Many states have attempted to limit the number of medical malpractice claims filed by shortening their respective statutes of limitation. . . . The Ohio legislature expressly provided that one purpose behind the tort reform legislation was to reduce medical care and insurance-related costs. . . . Tort reform principles were not enacted for the benefit of the innocent patient-victim . . . [but] to lower insurance costs associated with medical care.

*Id.* at 695.

253. *Id.* The relaxed standards would be due to the fact that the hospitals would be less likely to be held accountable for the actions of their employees. *Id.* According to the 1990 *Harvard Medical Practice Study to the State of New York*, fifty-one percent (51%) of deaths from medical injury resulted from negligent treatment. HARVARD PRACTICE MEDICAL STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK Ch. 6, at 1-2 (1990). Although the study is specific to New York, it demonstrates the magnitude of the medical negligence problem, and the need for hospital liability in an effort to ensure that hospitals take the appropriate measures to protect their patients from negligent treatment. *Id.*

254. *Id.*

255. *See* Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 394 (this article is part of a larger study of enterprise liability for medical malpractice). During the time that the courts

who have trusted their lives to the care of a hospital and have been injured due to negligence of those who represent the hospital, should be able to recover for their injuries. Increased hospital liability through *respondeat superior* “assures [both] payment of an obligation to the person injured and gives warning that justice and the law demand the exercise of care.”<sup>256</sup> Applied properly, *respondeat superior* ensures that injured people are able to recover if they prove their claim and does not allow hospitals to escape liability, merely because of the absence of a party from the lawsuit, when negligence is clear.

Without caution and clarification by its supreme court, Ohio could take a step backwards in the advances it has made in protecting patient-victims harmed by negligence, and in ensuring continued improvements in hospital care through deterrence.

It is also inappropriate to extend *Wuerth* based on the argument that there can be no secondary liability without primary liability.<sup>257</sup> It should not be the ability to hold a particular employee liable *as a defendant* that creates liability through *respondeat superior*, but the ability to prove that a particular employee acted negligently during the course and scope of employment. The negligent individual need not be present in the suit for the hospital to fully litigate the issue of negligence.<sup>258</sup>

The doctrine of *respondeat superior* is based upon the principle of extending the responsibility for the negligent acts of an employee to the party who has the most to gain through the actions of that employee.<sup>259</sup> As mentioned above, hospitals benefit tremendously through the physicians they affiliate with or employ.<sup>260</sup> The “malpractice of physicians and other health care personnel [remains] a prerequisite to the imposition of liability on the hospital.”<sup>261</sup> The Ohio Supreme Court could eliminate the problem of allowing hospitals to avoid liability where they should be held accountable, while at the same time ensuring that hospitals are not held liable in situations where the employee was

extended malpractice liability to hospitals, the health care system was developing into a trillion-dollar industry. *Id.* at 381.

256. *Id.* at 386 (internal citation omitted).

257. *See, e.g.,* *Comer v. Risko*, 833 N.E.2d 712, 715 (Ohio 2005).

258. *E.g.,* *Stevic v. Bio-Medical Application of Ohio*, 2008-Ohio-33, at \*3 (Ohio Ct. App. 5th Dist.).

259. *Beth Bates Holiday et al.*, 39 OHIO JUR. 3D *Employment Relations* §407 (2011) (the theory behind *respondeat superior* liability is that “the employee’s acts are imputed to the employer because the employee, acting within the course and scope of employment, is assumed to do only those acts which benefit the employer”).

260. *Supra* Part II.C.

261. *Abraham & Weiler*, *supra* note 255, at 393.

not negligent during the scope of employment, by clarifying *Wuerth* and limiting it to legal malpractice.

2. Public policy weighs in favor of restricting the *Wuerth* decision to legal malpractice.

Requiring that a plaintiff must name the agent as a defendant in a *respondeat superior* claim against a hospital is contrary to settled Ohio law and goes against the public policy behind extending liability to hospitals.<sup>262</sup>

When examining negligence within the hospital setting, it is difficult to separate the failures of individual physicians from the larger environments or systems in which they work.<sup>263</sup>

In modern medicine, a patient is a mouse in a maze. Upon reporting to the hospital, the patient is dropped into the labyrinth. There is one circuitous path to treatment—the path set out by the hospital. Along the path, a variety of things happen to the patient at the hands of well-meaning folks who are trying to make him well, but they have all different kinds of connections to the hospital.<sup>264</sup>

The breakdowns that lead to injuries often occur across multiple stages of care involving two or more clinicians.<sup>265</sup> Often errors by the system precipitate, activate, or amplify the error by the individual physician.<sup>266</sup> Many details regarding the injury, its causes, sources, and results are often unknown at the time the lawsuit is filed.<sup>267</sup> This can make determining which physician or hospital employee is responsible for the negligence very difficult for the patient-victim.<sup>268</sup>

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262. See, e.g., *Losito v. Kruse*, 24 N.E.2d 705 (Ohio 1940); *Comer v. Risko*, 833 N.E.2d 712, 718 (Ohio 2005); *Clark v. Southview Hosp. & Family Health Ctr.*, 628 N.E.2d 46, 53 (Ohio 1994).

263. Michelle M. Mello & David M. Studdert, *Deconstructing Negligence: The Role of Individual and System Factors in Causing Medical Injuries*, 96 GEO. L.J. 599, 600-01 (2008). This article is based on a large empirical study of closed malpractice claims conducted from 2001-2006 called, The Malpractice Insurers Medical Error Prevention and Surveillance Study (MIMEPS). *Id.* at 601. "Among 1452 reviewed files, 889 were judged to involve injury to a patient due to one or more medical errors." *Id.*

264. *Comer*, 833 N.E.2d at 719 (Pfeifer, J, dissenting).

265. Mello & Studdert, *supra* note 263, at 605. 60% of injuries involved 2 or more clinicians, 25% involved 3 or more. *Id.*

266. *Id.* at 609-13.

267. *Id.* at 613.

268. May & Aulisio, *supra* note 3, at 140-42.

The burden of "discovery" of injury due to medical errors is placed solely on the victim. Patients' lack of expertise in identifying when a medical error has occurred coupled with the "culture of silence" induced by the current malpractice system, makes obtaining appropriate compensation very difficult. Indeed, it is estimated that less than 2 percent

This is in direct contrast to legal malpractice. There will usually be very little difficulty in determining the negligent party in a law firm.<sup>269</sup>

[A]lmost all plaintiffs will be able to identify a specific attorney who committed some wrong on their case. More than seventy percent of all legal malpractice claims filed between 2004 and 2007 were filed against firms with less than five attorneys. Slightly more than thirty-seven percent of all claims over the same span were filed against sole practitioners.<sup>270</sup>

There is not a substantial burden placed on plaintiffs by *Wuerth* as applied to legal malpractice, but the same is not true for medical malpractice.

If the law as laid out in *Wuerth* is applied to medical malpractice, the patient-victim may feel obligated to include everyone involved in his or her care as a defendant in the suit. The practice of predicating hospital liability on the requirement that the negligent physician be a named defendant can lead to a “broad sweep of potential defendants” increasing the cost, and complexity, of litigation in general.<sup>271</sup> This result stems from multiple innocent parties being dragged into litigation, lengthening of the court process and the time for recovery for the injured party, increasing medical malpractice insurance, and preventing hospitals from instituting self-insurance systems because they would be forced to undergo huge defense costs due to the number of defendants sued.<sup>272</sup>

Requiring the individual agent or practitioner to be named as a defendant in order for a derivative claim of vicarious liability to go forward against the hospital could result in a disproportionate share of the damages associated with medical injuries to be borne by individual health care workers rather than hospitals.<sup>273</sup> It is appropriate for hospitals to bear their share of the damages resulting from medical

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of injuries due to negligence result in malpractice claims.

*Id.* at 142.

269. Jesse T. Mosser, Survey of Ohio Law, *C. Legal Malpractice: Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 36 OHIO N.U. L. REV. 1209, 1214 (2010).

270. *Id.* The statistics indicate that in a large majority of legal malpractice cases, the plaintiff should not have trouble identifying the appropriate defendant because they know exactly who to blame for the malpractice. *Id.*

271. Mello & Studdert, *supra* note 263, at 613.

272. *Id.* at 615-20.

273. *Id.* at 615.

malpractice.<sup>274</sup> Hospitals provide the most complex services, they are the most organized medical sites, they treat the sickest patients, and their care gives rise to the most cases addressed by malpractice liability, yet “individual physicians bear the lion’s share of liability costs.”<sup>275</sup> Hospitals and other large entities are directly implicated in the majority of harmful medical errors, and tort deterrence—one of the primary goals of malpractice liability—is best targeted at the institutional level.<sup>276</sup> Targeting individuals results in lost opportunities to use the legal system to improve patient safety.<sup>277</sup> Thus the goal of deterrence is undermined by effectively eliminating hospital liability in a large proportion of cases, as the application of the *Wuerth* doctrine to medical malpractice will do.

Public policy also favors limiting *Wuerth* in order to avoid unjust results in those medical malpractice cases that have merit. Under *Wuerth*, an injured plaintiff who is unable to discover—or who failed to name—the negligent party prior to the expiration of the statute of limitations, will be unable to collect on their claim against the hospital, medical center, or employer regardless of the merits of the claim. If *Wuerth* is limited, a medical malpractice case that has merit will have the opportunity to go forward, while a case without merit will ultimately fail. In order for a medical malpractice claim to succeed against a hospital, the plaintiff must “first prove malpractice against the physician . . . [then] the agent’s negligence is imputed to the principal, without regard to fault on the principal’s part.”<sup>278</sup> This is the standard and accepted doctrine of *respondeat superior*. This standard will continue to protect hospitals, resulting in liability only where negligence can be proven.

In examining the issue of whether *Wuerth* should be extended to apply to medical malpractice cases, the Ohio Supreme Court should

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274. Randall R. Bovbjerg, Robert H. Miller & David W. Shapiro, *Paths to Reducing Medical Injury: Professional Liability and Discipline vs. Patient Safety—and the Need for a Third Way*, 29 J.L. MED. & ETHICS 369, 371 (2001).

275. *Id.*

276. Mello & Studdert, *supra* note 263, at 618. Health care institutions are in the best position to prevent accidents; hospitals would be more responsive than individual physicians in implementing changes that would result in less injuries because there would not be the stigmatism of failure that individual liability for a physician carries; physician efforts may be less effective in preventing injury especially where the injury results from breakdowns in care between physicians or by multiple clinicians; and many system-wide inefficiencies could only be addressed on a systemic level. *Id.* at 620-22.

277. *Id.* at 621. Individual physicians, although they may heighten their individual vigilance, are powerless to effect systemic change. *Id.* at 619. “Hospitals would be more responsive . . . to incentives sent by the tort system.” *Id.* at 618.

278. McWilliams & Russell, *supra* note 41, at 439-40.

clarify the use of the word “liability” as used in *Wuerth*. Is liability based on the actual ability to hold the agent liable—as *Wuerth* seems to suggest and cases since have held? Or must the plaintiff only prove the negligence of the agent in order to attribute liability to the principal as indicated in *Sawicki*?<sup>279</sup> The court should affirm the proposition that an injured party has a “right of action against either the master or the servant, or against both, in separate actions” as has been held in Ohio for nearly a century.<sup>280</sup>

If *Wuerth* requires an adjudication of liability of the individual, then applying it to medical malpractice creates a new law with harsher consequences. There may be several reasons that a plaintiff may not include a negligent tortfeasor as a party: the plaintiff may fail to discover the tortfeasor, choose not to include him or her in the suit, voluntarily dismiss the tortfeasor from the case, or the tortfeasor may have personal immunity. To hold that a claim against an employer under a theory of *respondeat superior* is barred if an injured party does not name the negligent employee as a defendant goes against the great weight of the settled law in Ohio and throughout the nation. It also serves to seriously limit the ability of the injured parties to recover for the damages inflicted upon them through negligence. To hold differently has absurd and unjust results.<sup>281</sup>

#### IV. CONCLUSION

*Respondeat superior* is designed to place the responsibility for an employee’s actions on the person who has the most incentive to control those actions and who tends to benefit the most from the relationship.<sup>282</sup> Historically, it has been held that an employer is the person who will benefit the most from the actions of the employee, and therefore, should also be the one who is responsible for injuries that are caused by that

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279. *State ex rel. Sawicki v. Lucas Cnty. Ct. Com.Pl.*, 931 N.E.2d 1082, 1088-89 (Ohio 2010) (the doctrine of *respondeat superior* operates by imputing to the employer the acts of the tortfeasor, not the tortfeasor’s liability).

280. *Losito v. Kruse*, 24 N.E.2d 705, 707 (Ohio 1940). *Losito* relies on an Ohio Supreme Court decision from 1883, which holds that “a judgment against an agent for a fraud committed while acting in the scope of his agency . . . is not bar to an action against the principal for the same fraud.” *Losito*, 24 N.E.2d at 707; *Maple v. Cincinnati, H. & D. R.R. Co.*, 40 Ohio St. 313, Reporter Holdings (1883). It is settled law that the master is liable for the actions of the servant acting within the scope of his agency or employment. *E.g., Losito*, 24 N.E.2d at 705.

281. *See Henry v. Mandell-Brown*, 2010-Ohio-3832, at \*3 (Ohio Ct. App. 1st. Dist.). *See also Tisdale v. Toledo Hosp.*, No. CI 03-4247 (Ohio C.P. Lucas Cnty. 2010), *appeal filed*, No. L-11-1005 (Ohio Ct. App. 6th Dist. Jan. 10, 2011).

282. *See text accompanying supra* note 4.

employee during the scope of employment.<sup>283</sup> The doctrine ensures that an injured party is made whole and that burdens and costs are effectively distributed throughout society.<sup>284</sup>

Hospitals were historically able to avoid this liability through charitable immunity, but as the role of hospitals in society changed, so did the public's desire to insulate hospitals from taking responsibility for protecting their patients.<sup>285</sup> Ohio has demonstrated a strong policy of ensuring that an injured party is compensated. The courts systematically removed hospitals' protections and enforced increasing levels of liability upon hospitals for the negligence and malpractice of the physicians and staff they chose to employ.<sup>286</sup>

If not limited, *Wuerth* could invalidate the progress made by Ohio courts. The application of the narrow decision in *Wuerth* to medical malpractice removes some of the protections that have been built into the medical system to ensure that the injured party is made whole.<sup>287</sup> This goes against the trend of cases both in Ohio and throughout the nation and reverses the substantial gains that have been made in this area over the past several decades. The results of reversing these advances will be inequitable and will prevent injured parties from having their day in court. The Supreme Court of Ohio should clearly limit *Wuerth* to its facts and thereby allow medical malpractice plaintiffs to plead and prove their cases.

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283. See Holiday, *supra* note 259, §407.

284. See May & Aulisio, *supra* note 3, at 138.

285. See text accompanying *supra* note 54.

286. See *supra* Part II.E.

287. See, e.g., text accompanying *supra* note 207.

