IN THE SUPREME COURT OF OHIO

Cynthia Clawson,	:	
	:	**Case No. 2020-1574**
Plaintiff-Appellee,	:	
	:	
v.	:	**On Appeal from the Second**
	:	**Appellate District, Montgomery**
Heights Chiropractic Physicians, LLC, et al.,	:	**County**
	:	
	:	**Court of Appeals**
Defendants-Appellants.	:	**Case No. CA 028632**

MERIT BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION, OHIO STATE MEDICAL ASSOCIATION, OHIO OSTEOPATHIC ASSOCIATION, OHIO STATE CHIROPRACTIC ASSOCIATION, OHIO ALLIANCE FOR CIVIL JUSTICE, OHIO RADIOLOGICAL SOCIETY, OHIO INSURANCE INSTITUTE, AND ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICI CURIAE AND INTRODUCTION

The Ohio Hospital Association ("OHA") is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For the past 100 years, the OHA has provided a mechanism for Ohio's hospitals to come together and advocate for healthcare legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of 243 hospitals and 15 health systems, collectively employing more than 280,000 employees in Ohio.

The Ohio State Medical Association ("OSMA") is a nonprofit professional association established in 1835 and is comprised of approximately 16,000 physicians, medical residents, and medical students in Ohio. The OSMA's membership includes most Ohio physicians engaged in the private practice of medicine.

Established in 1898, the Ohio Osteopathic Association ("OOA") works to advance the distinctive philosophy and practice of osteopathic medicine and promote public health. The OOA, a non-profit professional association and divisional society of the American Osteopathic Association, advocates for the more than 7,500 licensed osteopathic physicians ("DOs") in Ohio as well as approximately 1,000 medical students who attend Ohio University Heritage College of Osteopathic Medicine.

The Ohio State Chiropractic Association ("OSCA") is the largest state-wide organization in Ohio representing Doctors of Chiropractic. Established in 1968, OSCA currently serves over 800 members. Its mission is to advance the chiropractic profession in the modern healthcare model, advocate for its future, promote unity among all Doctors of Chiropractic, and protect the welfare of the patients they serve.

The Ohio Radiological Society ("ORS") is the Ohio Chapter of the American College of Radiology and is composed of nearly 1300 members who are radiologists, radiation oncologists,

nuclear medicine physicians, and radiation medical physicists. ORS is dedicated to promoting and protecting access to radiology, nuclear medicine, and radiation oncology services across Ohio. Its missions include advocating statewide for radiologists and patients on regulatory and economic issues and maintaining high medical and ethical standards in the practice of radiology, radiation oncology, and nuclear medicine.

The Academy of Medicine of Cleveland & Northern Ohio ("AMCNO") is a non-profit, professional organization representing Northern Ohio's medical community. The mission of AMCNO is to support physicians as advocates for all patients and promote the practice of the highest quality of medicine. With a membership of over 5,000 physicians, AMCNO is one of the largest regional medical associations in the country, with a rich history of working on behalf of physicians and the patients they serve for over 195 years.

The Ohio Alliance for Civil Justice ("OACJ") is a group of small and large businesses, trade and professional associations, professionals, non-profit organizations, local government associations, and others. The OACJ leadership includes members from the Ohio Manufacturers Association, Ohio Council of Retail Merchants, NFIB Ohio, Ohio Chamber of Commerce, Ohio Association of Certified Public Accountants, Ohio Hospital Association, Ohio State Medical Association, and other organizations. OACJ members support a balanced civil justice system that provides sufficient safeguards to ensure that defendants are not unjustly penalized and plaintiffs are fairly compensated, but not unjustly enriched.

The Ohio Insurance Institute ("OII") is the professional trade association for property and casualty insurance companies in the State of Ohio. Its members include thirty-nine property and casualty insurers and reinsurers, seven insurance trade associations, and four insurance-related organizations. OII members have an interest in stability and predictability in the legal system.

Together, the OHA, OSMA, OOA, OSCA, ORS, and AMCNO represent the vast majority of hospitals and physicians in Ohio, spanning the medical, osteopathic, chiropractic, and radiology fields. They have a strong interest in legal and legislative developments impacting their thousands of members, including developments that impact medical malpractice claims based on vicarious liability. All Amici recognize the need to strike a proper balance between the right of injured persons to recover against medical employers and ensuring that medical employers and the delivery of healthcare as a whole are not jeopardized due to expanded liability.

Amici urge this Court to reverse the Second District's decision in *Clawson v. Heights Chiropractic Physicians, LLC*, 2nd Dist. Montgomery No. 28632, 2020-Ohio-5351 because it misinterprets this Court's decision in *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601, 913 N.E.2d 939. More specifically, the Second District determined that *Wuerth* is not applicable to this case because it applies to only part-owners, as opposed to employees. *Clawson*'s reliance on the fact that attorney Richard Wuerth was a part-owner of Lane, Alton & Horst, L.L.C. is misplaced. As *Wuerth* makes clear, this Court was tasked with resolving a certified question of state law concerning both attorney-principals (*i.e.*, part-owners) and attorney-employees *(i.e.*, associates).

The certified question in *Wuerth* was: "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?" (Emphasis added.) *Wuerth*, 122 Ohio St.3d at paragraph one of the syllabus. This Court answered that question in the negative, holding that "a law firm is not vicariously liable for legal malpractice unless one of its ***principals or associates*** is liable for legal malpractice." (Emphasis added.) *Id.* at paragraph two

of the syllabus and ¶ 26. Nowhere in the majority's opinion in *Wuerth* did this Court state that its decision applies to only part-owners.

Amici urge the Court to hold that *Wuerth* applies here and the proper application of *Wuerth* is that when a physician-employee's primary liability is extinguished, so too is the secondary liability of the physician's corporate employer under the doctrine of respondeat superior. Interpreting *Wuerth* in this manner is both logical and consistent with this Court's holding in *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 20 (holding that under an agency by estoppel theory of vicarious liability, "if there is no liability assigned to the [independent contractor] agent, it logically follows that there can be no liability imposed upon the principal for the agent's actions").

Importantly, Amici's use of the term "physician" throughout this brief is intended to include not only physicians such as medical doctors (M.D.s) and doctors of osteopathic medicine (D.O.s), but also dentists, optometrists, and chiropractors. Each of these specialties require the achievement of a doctoral degree, and these practitioners have unique and independent roles in their respective fields in making diagnoses and dictating treatment plans and should thus be treated similarly. Further, the Ohio Revised Code contemplates that these types of medical professionals are capable of committing professional malpractice (*see e.g.*, R.C. 2305.11 and R.C. 2305.113). Amici's use of the term "physician" does not, however, include nurses or technicians or other types of medical professionals who are not capable of committing professional malpractice under Ohio law.

Reading *Wuerth*'s holding to apply to physicians who are part-owners ***and*** physicians who are employees strikes a proper balance between public policy and existing Ohio case law. This result allows injured persons to sue hospitals and other medical employers for the negligence of

non-physician employees whom they are responsible for hiring, training, and supervising without being forced to name every single non-physician provider as a defendant, while also respecting the unique and independent roles physicians have in making decisions about patient care and directing the delivery of that care to patients.

STATEMENT OF THE CASE AND FACTS

Amici defer to the Statement of the Case and the Statement of Facts as set forth in the Brief of Appellant Heights Chiropractic Physicians, LLC ("Heights Chiropractic").

LAW AND ARGUMENT

> **Proposition of Law**: Once a physician-employee's liability has been extinguished for alleged acts of malpractice, the claimant can no longer pursue vicarious liability claims sounding in respondeat superior against the corporate employer of the physician.

As noted by Heights Chiropractic in its Memorandum in Support of Jurisdiction, this case hinges on how *Wuerth* is interpreted. Although many intermediate courts in Ohio have attempted to interpret and apply *Wuerth*, they have done so inconsistently, which has created confusion in the law that is ripe for this Court to resolve. For the reasons set forth below, Amici urge this Court to hold that *Wuerth* applies to physician-employees and that once a physician-employee's liability has been extinguished for alleged acts of professional malpractice, a plaintiff can no longer pursue a claim against the physician's employer under the doctrine of respondeat superior.

A. *Wuerth* applies to physician-employees and precludes a plaintiff from pursuing a claim for vicarious liability sounding in respondeat superior against the physician's corporate employer where the physician-employee cannot be liable for malpractice.

1. *Wuerth* applies to medical malpractice cases.

As an initial matter, although *Wuerth* concerned legal malpractice, it is appropriate to apply its holding to cases concerning medical malpractice. As this Court emphasized in *Wuerth*, "when analyzing issues that relate to malpractice by attorneys and physicians, we have often drawn upon

the similarities between the legal and medical professions." *Wuerth*, 122 Ohio St.3d at 596-97. As a result, the Court looked to precedent in medical malpractice cases when it decided *Wuerth*. Citing *Browning v. Burt*, 66 Ohio St.3d 544, 556, 613 N.E.2d 993 (1993), the Court noted that "because only individuals practice medicine, only individuals can commit medical malpractice." *Wuerth* at 597; *see also Propst v. Health Maintenance Plan, Inc.*, 64 Ohio App.3d 812, 814, 582 N.E.2d 1142, 1143 (1st Dist. 1990) (a corporation cannot be held liable for medical malpractice because it does not practice medicine). The Court applied the same principle to the legal profession in *Wuerth* and held that "a law firm does not engage in the practice of law and therefore cannot directly commit legal malpractice." *Wuerth* at 598. The Court then concluded, "[t]here is no basis for differentiating between a law firm and ***any other principal to whom Ohio law would apply***." (Emphasis added.) *Id.* at ¶ 24.

2. The Second District improperly concluded that *Wuerth* does not apply to this case.

This Court has recognized two types of derivative claims of vicarious liability that are relevant to its review of the Second District's decision in *Clawson*: (1) agency by estoppel; and (2) respondeat superior. In *Comer v. Risko*, 106 Ohio St.3d 185, 833 N.E.2d 712, 2005-Ohio-4559, ¶ 2, this Court held that a hospital may be vicariously liable for the malpractice of an independent contractor physician under the doctrine of agency by estoppel. Under the doctrine of respondeat superior, an employer can be vicariously liable for the torts of its employees. *Wuerth* at ¶ 10, citing *Clark v. Southview Hosp. & Family Health Ctr.*, 68 Ohio St.3d 435, 438, 628 N.E.2d 46 (1994).

Here, the Second District improperly concluded that *Wuerth* does not apply to this case because "the relationship in *Wuerth* was that of partner and law firm, not a traditional employer-employee relationship." *Clawson*, 2020-Ohio-5351, at ¶ 21. In so doing, the Second District relied

upon a case from the Sixth District: *Tisdale v. Toledo Hosp.*, 197 Ohio App.3d 316, 2012-Ohio-1110, 967 N.E.2d 280 (6th Dist.).

In *Tisdale*, the Sixth District remarked that "the nature of Wuerth's relation to his firm suffices to place this type of agency in a third classification—one that is distinguishable from both respondeat superior and agency by estoppel. Wuerth was a senior partner and ***part-owner*** of Lane Alton. While attorneys are generally independent contractors in relation to their clients, Wuerth himself, ***in relation to Lane Alton,*** was neither an independent contractor nor an employee." (Emphasis sic.) *Tisdale* at 327; *see also Taylor v. Belmont Community Hosp.*, 7th Dist. Belmont No. 09 BE 30, 2010-Ohio-3986, ¶ 34 ("As to the partner in *Wuerth*, his relationship with the firm was not that of employer-employee. Rather, each partner in a law firm is a part owner."); *Dinges v. St. Luke's Hosp.*, 2012-Ohio-2422, 971 N.E.2d 1045 (6th Dist.), ¶ 36 (stating that Wuerth's relationship to his firm fell into a third category distinguishable from both respondeat superior and agency by estoppel and that "Wuerth's actual holding may best be limited to those types of cases").

This overly narrow interpretation of *Wuerth* is incorrect and is belied by both the language of the decision in *Wuerth* and the rationale for its holding. The certified question in *Wuerth* was: "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?" (Emphasis added.) *Wuerth*, 122 Ohio St.3d at paragraph one of the syllabus. In other words, the Court was asked to determine "whether a law firm may be vicariously liable for legal malpractice when ***no individual attorneys*** [not just part-owners] are liable or have been named." (Emphasis added.) *Id.* at ¶ 19.

The Court answered this question in the negative, holding that "a law firm may be vicariously liable for legal malpractice only when one or more of its ***principals or associates*** are

liable for legal malpractice." (Emphasis added.) *Wuerth* at ¶ 26. Nowhere in the majority's opinion in *Wuerth* did this Court state that its decision applies to only part-owners, nor did the Court distinguish among the various types of attorneys who may work for a law firm (*e.g.*, equity partners, guaranteed payment/non-equity partners, contract attorneys, employed associates). Rather, the Court referred to attorneys collectively, regardless of their ownership or employment status.

And for good reason: the rationale for the Court's decision in *Wuerth* makes clear that it does not matter whether the attorney or physician is a part-owner, an independent contractor, or an employee:

> [A] law firm is a business entity through which ***one or more individual attorneys*** practice their profession. While clients may refer to a law firm as providing their legal representation or giving legal advice, in reality, it is in every instance the attorneys in the firm who perform those services and with whom clients have an attorney-client relationship. Thus, in conformity with our decisions 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.

(Emphasis added.) *Wuerth* at ¶ 18. Part-owner-attorneys, independent contractor-attorneys, and employee-attorneys all practice law. They all form attorney-client relationships. They are all capable of committing legal malpractice. Likewise, part-owner-physicians, independent contractor-physicians, and employee-physicians all practice medicine. They all form physician-patient relationships. They are all capable of committing medical malpractice.

Further, if *Wuerth* applied to only part-owners, the Court would not have discussed the concept of respondeat superior in detail in that decision because respondeat superior applies to the traditional employer-employee relationship. *See Wuerth* at ¶¶ 20-24. As noted, the Court explicitly stated that *Wuerth*'s holding applied to partners ***and associates***, which Wuerth was not. *Wuerth* at ¶¶ 2, 5, 26. Associates are not typically part-owners. There is no indication that the Court arrived at its decision because Wuerth was a part-owner. Wuerth's status as a partner was not even

discussed by the Court outside of the facts and procedural history section of the opinion. *See Wuerth* at ¶¶ 13-26.

The Second District's conclusion in *Clawson*, and those of the Sixth District in *Tisdale* and *Dinges* and the Seventh District in *Taylor*, thus tighten the scope of *Wuerth* too far by limiting its application to just part-owners. The Second District should have determined that because the decision in *Wuerth* extends to both "principals and associates," once the primary liability of Heights Chiropractic's employee-physician (Dr. Bisesi) was extinguished, Clawson could no longer pursue, through respondeat superior, secondary liability against Dr. Bisesi's corporate employer for Dr. Bisesi's alleged medical malpractice. *White v. Durrani*, 1st Dist. Hamilton No. C-190402, 2021-Ohio-566 (absent direct liability for a tort on the part of an employee physician, the corporation that employed the physician cannot be vicariously liable under respondeat superior); *Rush v. Univ. of Cincinnati Physicians, Inc.*, 2016-Ohio-947, 62 N.E.3d 583 (1st Dist.) (where the claims against a doctor are not filed within the statute-of-limitations period, the plaintiff cannot pursue vicarious-liability claims against the doctor's employer); *Wilson v. Durrani*, 1st Dist. Hamilton No. C-130234, 2014-Ohio-1023 (a settlement with the physician barred recovery against his employer under *Wuerth*); *Henry v. Mandell-Brown*, 1st Dist. Hamilton No. C-090752, 2010-Ohio-3832 (same as *Rush*, *supra*); *Brittingham v. Gen. Motors Corp.*, 2nd Dist. Montgomery No. 24517, 2011-Ohio-6488[1]; *Smith v. Wyandot Mem. Hosp.*, 3rd Dist. Wyandot No. 16-14-07, 2015-Ohio-1080 (because plaintiffs did not timely file their claim against radiologist, their imputed action against the radiologist's employer was also barred); *Whitcomb v. Allcare Dental & Dentures*,

[1] *Brittingham* appears to be in conflict with *Clawson*. In *Brittingham*, the Second District concluded that the employer could not be held vicariously liable for the company physician's negligence where, because employee failed to timely file her medical claim against physician in the one-year period of limitation, the physician could not be held directly liable.

8th Dist. Cuyahoga No. 97141, 2012-Ohio-219 (because the patient's claim against the dentist was time-barred, dental office could not be held vicariously liable for the dental malpractice claims); *Doby-Robinson v. Kaiser Permanente Found.*, 8th Dist. Cuyahoga No. 97495, 2012-Ohio-1548 (claims against the individual physicians were time-barred, and thus the medical facilities could not be held vicariously liable); *Hignite v. Glick, Layman & Assoc., Inc.*, 8th Dist. Cuyahoga No. 95782, 2011-Ohio-1698 (the dental practice could not be vicariously liable for alleged malpractice in absence of action against any individual dentist).

This Court has already established the bounds of a hospital's vicarious liability for the malpractice of an independent contractor physician under an agency by estoppel theory in *Comer*, *supra*, at ¶ 20. Applying *Wuerth* to both part-owner physicians and employee-physicians is not only consistent with *Comer*, but also consistent with the plain language of *Wuerth* and the aforementioned rationale underlying *Wuerth* that ***all*** physicians practice medicine and ***all*** physicians are capable of committing medical malpractice, regardless of their ownership or employment status.

B. Only medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors can be held liable for malpractice.

As noted above, this Court has long "[r]ecognized that because only individuals practice medicine, only individuals can commit medical malpractice." *Wuerth* at ¶ 14. In *Browning*, 66 Ohio St.3d at 556, the Court explained that "[a] hospital does not practice medicine and is incapable of committing malpractice." The *Browning* decision cites *Lombard v. Good Samaritan Med. Ctr.*, 69 Ohio St.2d 471, 433 N.E.2d 162 (1982) and *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964), both of which held that only physicians can commit medical malpractice. *See also Youngstown Park & Falls St. Ry. Co. v. Kessler,* 84 Ohio St. 74, 77, 95 N.E. 509 (1911) ("a railroad company cannot be guilty of malpractice. It is not authorized to practice

medicine or surgery * * * "); *Propst*, 64 Ohio App.3d 812, 814, 582 N.E.2d 1142 (a corporation cannot be held liable for medical malpractice because it does not practice medicine).

In *Wuerth*, the Court observed that "this precedent concerning medical malpractice is consistent with the general definition of 'malpractice' that we set forth in *Strock v. Pressnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988) wherein we stated, 'The term "malpractice" refers to professional misconduct, *i.e.,* the failure of *one rendering services in the practice of a profession* to exercise that degree of skill and learning normally applied *by members of that profession* in similar circumstances." (Emphasis sic.) *Wuerth* at ¶15 citing *Strock* at 211.

The question then becomes: ***which*** individuals are capable of committing malpractice? In *Wuerth*, this Court further noted that "[w]e have traditionally taken a narrow view of who may commit malpractice. As we explained in *Thompson v. Community Mental Health Ctrs. of Warren* (1994), 71 Ohio St.3d 194, 195, 642 N.E.2d 1102, '[i]t is well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys.'" *Wuerth* at ¶15, citing *Richardson,* 176 Ohio St. at 372–373, 27 O.O.2d 345, 199 N.E.2d 878; *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 179–180, 546 N.E.2d 206 (1989)).

While *Wuerth's* reach extends beyond part-owners, it is not so broad as to encompass all employees; it applies to only employees who can commit malpractice – i.e., physicians. In the healthcare context, only certain professional employees fall into this category. *See Lombard*, 69 Ohio St.2d 471, 433 N.E.2d 162, syllabus, citing *Hocking Conservancy Dist. v. Dodson-Lindblom Assoc., Inc.*, 62 Ohio St.2d 195, 197, 404 N.E.2d 164, 166 (1980) (stating the common-law definition of "malpractice * * * was restricted to only physicians and lawyers.").

This Court has already held the negligence of a non-physician employee is not within R.C. 2305.11(A)'s definition of malpractice. "The one-year statute of limitations of R.C. 2305.11(A)

does not apply to hospital employees (nurses and laboratory technicians) whose conduct does not fall within the common-law definition of 'malpractice.'" *Lombard*, *supra*, at syllabus. Rather, R.C. 2305.11(A) and R.C. 2305.113 define malpractice as encompassing "medical, dental, optometric, or chiropractic claim[s]."

"Nowhere in *Wuerth* does the Court conclude that a medical claim brought against a hospital for the alleged negligence of one of its [non-physician] employees constitutes a malpractice claim." *Cope v. Miami Valley Hosp.*, 195 Ohio App.3d 513, 2011-Ohio-4869, 960 N.E.2d 1034 (2d Dist.), ¶¶ 25, 37 (rejecting application of *Wuerth* to employee radiological technicians).

Thus, in the healthcare context, this Court should continue to apply *Wuerth* to only physicians (medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors) because "no other medical employees are subject to malpractice." *Cope* at ¶ 22; *see also Tisdale* at ¶ 40 ("medical *employees*, such as nurses, technicians or other assistants, are not subject to malpractice claims but are amenable to '*medical* claims,' including those that assert that they negligently acted or omitted 'in providing medical care'") (Emphasis sic.); *Stanley v. Community Hosp.*, 2nd Dist. Clark No. 2010 CA 53, 2011-Ohio-1290, ¶ 22 (same); *Henik v. Robinson Mem. Hosp.*, 9th Dist. Summit No. 25701, 2012-Ohio-1169, ¶ 19 (same).

As explained by the Second District in a decision preceding *Clawson*, wherein it held that *Wuerth* did not preclude a respondeat superior claim against the hospital for the negligence of its employee radiological technicians who were not timely named in the Complaint:

> Ultimately, this court's decision to give *Wuerth* a narrow application is supported by the public-policy considerations found at the heart of the "respondeat superior" doctrine, which supports vicarious liability. A hospital employs a wide range of people who provide a variety of medical service to patients. The hospital is in exclusive control of hiring criteria, training, and routine performance evaluation and review. A hospital should be responsible for the negligence of its [non-

> physician] employees who perform medical services and act in the scope of their employment.

Cope at ¶ 25; *see also Moore v. Mt. Carmel Health Sys.*, 2020-Ohio-6695, 164 N.E.3d 1041 (10th Dist.), ¶ 36. Thus, "[t]here is no reason to treat a medical technician differently from a nurse—neither is considered a physician." *Cope* at ¶ 26. In other words, the Second District agreed in *Cope* that *Wuerth* should be read to not require plaintiffs to sue every single potential non-physician employee who might be primarily liable in order to maintain their respondeat superior claims against their medical employers.

Physicians are different from other medical employees due to the notable differences in their duties and roles vis-à-vis their patients. For example, "[a] nurse, although obviously skilled and well trained, is not in the same category as a physician who is required to exercise his independent judgment on matters which may mean the difference between life and death * * *." *Lombard*, 69 Ohio St.2d at 473, quoting *Richardson,* 176 Ohio St. 370, 372–73. "A nurse is not permitted to exercise judgment in diagnosing or treating any symptoms[.] * * * Any treatment or medication must be prescribed by a licensed physician. * * * It is in the areas of diagnosis and prescription that there is the greatest danger of unwarranted claims." *Richardson* at 373.

Amici urge this Court to affirm longstanding Ohio common and statutory law and to maintain the important public policy considerations described above by concluding that "physician" encompasses medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors but not other medical professionals such as nurses or technicians. Including nurses and technicians would result in nearly all hospital employees who interact with a patient potentially being named individually in medical malpractice lawsuits, contrary to the well-reasoned rationale of the Second District in *Cope*.

C. If affirmed, the Second District's decision in *Clawson* will create more confusion in the law and may result in unintended consequences.

As explained above, if this Court affirms the Second District's decision in *Clawson*, whether a plaintiff must name a physician as a defendant in a medical malpractice lawsuit to hold a corporate entity vicariously liable for that physician's conduct will depend solely on the physician's legal relationship to the entity. A plaintiff must name independent contractor physicians and part-owner physicians as defendants and establish their direct liability to hold a corporate entity vicariously liable under *Comer* and *Clawson*, respectively. But also under *Clawson*, a plaintiff need not name an employed physician as a defendant. This defies logic, especially because a plaintiff is unlikely to know the relationship between physician and corporate entity (i.e., whether employee, independent contractor, or owner) until after filing a lawsuit and engaging in discovery.

Vicarious liability "[d]epends on the existence of control by a principal (or master) over an agent (or servant), terms that we have used interchangeably." *Wuerth* at ¶ 20, citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173, 494 N.E.2d 1091, 1093 (1986).

As this Court has long held, hospitals and other corporate entities cannot practice medicine. Only physicians (as defined above) can practice medicine, and only physicians can commit malpractice. *Wuerth* at ¶14; *Browning,* 66 Ohio St.3d at 556. That is because unlike other medical providers, such as nurses or technicians, physicians exercise their unique and independent judgment when diagnosing patients and making life-or-death decisions about treatment. This is true regardless of whether a physician is a part-owner, employee, or independent contractor of a corporate healthcare entity. Regardless of a physician's employment status, the corporate entity cannot dictate how the physician performs the duties and obligations of his profession that could lead to potential liability for malpractice because a corporate entity cannot practice medicine.

Clawson's holding is nonsensical from this perspective, particularly when taken together with *Comer*. Under *Comer,* a corporate entity can be vicariously liable for the malpractice of its independent contractor physician ***only if*** that physician is directly liable for malpractice. But under *Clawson*, a corporate entity can be vicariously liable for the malpractice of its employed physician ***regardless of whether*** that physician is directly liable for malpractice. This is true despite the fact that in ***both*** instances, the corporate entity cannot control the physician's conduct giving rise to the alleged malpractice because only physicians can practice medicine. Affirming *Clawson* will render the most basic concept underlying vicarious liability (i.e., the existence of control) irrelevant and instead improperly place the focus on a physician's employment status, which has no bearing on the unique duties and obligations inherent to the practice of medicine.

Moreover, upholding *Clawson* will require a plaintiff to know – before filing a lawsuit – whether the physician is a part-owner, employee, or independent contractor of the corporate entity. Given the rarity of pre-suit discovery, such a scenario would likely result in plaintiffs naming all individual physicians as defendants in an abundance of caution in order to pursue a judgment holding them liable. There would be no incentive for plaintiffs to later voluntarily dismiss the employed physicians after discovery. So as a practical matter, in most cases, *Clawson* will not save employed physicians the hassle and expense of being named as defendants because plaintiffs will not know their employment status prior to filing suit.

And finally, upholding *Clawson* could be interpreted as permitting joint and several liability in cases of malpractice despite the modified approach taken by the General Assembly when it enacted Ohio's modified joint and several liability statute, R.C. 2307.22. Under *Clawson*, a corporate entity could be liable for 100% of a plaintiff's economic ***and*** noneconomic damages resulting from an employed physician's malpractice even though the physician is not named as a

defendant. But R.C. 2307.22(A) provides that a defendant can be held jointly and severally liable for a loss with respect to only economic damages and only if the defendant is (a) found to be more than fifty percent liable for a plaintiff's injury or loss or (b) found to have committed an intentional tort. For noneconomic damages, a defendant must pay only its proportionate share, regardless of what percentage of negligence is allocated to that defendant. R.C. 2307.22(C).

Reversing *Clawson* and requiring plaintiffs to not only name physician-employees as defendants, but also establish liability against them in order to hold a corporate entity vicariously liable for their malpractice, will avoid the aforementioned confusion regarding whether a physician must be named as a defendant based upon his or her employment status and will avoid an unintentional, judicially created exception to Ohio's modified joint and several liability statute in malpractice cases.

CONCLUSION

The Second District's decision in *Clawson* holding that *Wuerth* applies to only part-owners neither follows the plain language of the *Wuerth* decision nor comports with this Court's rationale underlying that decision. Under *Wuerth*, a corporate entity such as Heights Chiropractic cannot be vicariously liable for the alleged malpractice of its employed physician if the employed physician is not also liable. Under Ohio law, medical doctors, doctors of osteopathic medicine, dentists, optometrists, and chiropractors are all capable of committing malpractice and therefore should be included in the definition of "physician" for purposes of interpreting *Wuerth* and *Comer*.

This approach strikes a balance between holding medical employers responsible for the negligent acts of their non-physician employees, on the one hand, and recognizing the consequential duties and independent roles physicians have in diagnosing and treating patients, on the other hand. This view, already endorsed by most Ohio appellate courts, ensures that plaintiffs will not be forced to sue all of a hospital's non-physician employees at the outset of the case or

otherwise risk the lawsuit being dismissed. It also recognizes the unique position physicians hold in the care of patients and in our healthcare system, and it protects corporate healthcare entities from being held secondarily liable when no primary liability for malpractice has been (or can be) established.

This Court should reverse the Second District's decision in *Clawson*, consistent with this Court's prior holding in *Wuerth.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via regular U.S. mail, postage prepaid on May 28, 2021 to the following:

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