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Life After *Wuerth* – What's Really Changed In the World of *Respondeat Superior* Liability?

by Brenda M. Johnson

In 2009, the United States Court of Appeals for the Sixth Circuit certified to the Ohio Supreme Court what appeared to be a fairly limited question of state law – namely, whether a legal malpractice claim could be maintained directly against a law firm when the relevant principals and employees had either been dismissed from the lawsuit or never sued in the first instance.

The response to this question, set forth in the Court's opinion in *National Union Fire Insurance Co. of Pittsburgh, PA v. Wuerth,*[1] was twofold. First, the Court held that a law firm cannot be held directly liable for legal malpractice for the simple reason that only individuals may practice law, and thus only individuals may directly commit legal malpractice.[2] This holding is consistent with, and indeed drawn from, the position the Court has taken with respect to medical malpractice.[3] The second phase of the Court's response, however, has been construed by some as a radical departure from traditional principles of *respondeat superior* liability, under which it has always been understood that a plaintiff may sue the employer or the employee, and need not join the employee in an action against the employer. This article is an attempt to determine whether, in fact, that is the case, and more importantly, to determine whether the Supreme Court and other Ohio courts have treated *Wuerth* as a departure from these traditional principles.

What *Was* The Holding In *Wuerth* Anyway?

Having determined that a law firm cannot be held directly liable for legal malpractice, the Court in *Wuerth* went on to determine whether a law firm could be held liable for malpractice when the relevant principals had either been dismissed from the action or had not been sued in the first instance, and the answer has been a source of confusion ever since.

The simple answer, presented in an opinion authored by Justice O'Donnell with which four justices concurred, was a statement that, under the principles of *respondeat superior,* an employer may be held liable only when an employee or agent may be held directly liable, and that, in the absence of liability on the part of a firm principal or employee, a law firm may not be held liable for legal malpractice.[4]

This statement, in and of itself, is not problematic unless and until it is applied to the facts presented in the underlying federal action. In that case, as noted by the Ohio Supreme Court, summary judgment had been granted in favor of the attorney responsible for the alleged legal malpractice on the grounds that the statute of limitations had elapsed as to any claims against him.[5] Thus, *Wuerth* has been grasped upon by defendant employers as a globalizable pronouncement that

no employer of any sort may be subject to *respondeat superior* liability if the statute of limitations has expired with respect to a direct claim against the employee or employees upon whose negligence the employer's liability is premised.

There are very good arguments based on the opinions of the justices themselves and on the specific facts of the underlying federal case that *Wuerth* cannot be read so broadly. For one, an argument can be made, based on the facts set forth in the district court opinion granting summary judgment in favor of the law firm and its (by then former) attorney, that the statute of limitations for a legal malpractice action had run with respect to both the firm *and* the attorney whose conduct was at issue when the initial complaint had been filed.[6] Perhaps more importantly, however, a majority of the justices who participated in addressing the questions posed in *Wuerth* stressed the narrowness of the Court's holding.

In a concurring opinion joined by Justices Pfeifer, O'Connor and Lanzinger, along with Judge Mary DeGenaro of the Seventh Appellate District who was sitting by assignment for Justice Lundberg Stratton, the late Chief Justice Thomas J. Moyer wrote "to emphasize that today we answer only the very narrow certified question before us."[7] In so doing, Chief Justice Moyer stressed that the issue being addressed was limited to liability issues involving law firms, and even then only to the narrow question of a law firm's direct liability when premised on the alleged negligence of a single principal in the firm. Among other things, Chief Justice Moyer, who had concurred in the Court's opinion as well, noted that

> [w]e do not address today the complex attorney-client relationship that arises when a client employs several different or successive attorneys in the same firm, nor do we confront the interplay of those relationships and the tolling events listed in *R.C. § 2305.11(A)*. Similarly, our opinion does not reach questions of the duties and liabilities of a law firm that may arise from a general engagement agreement with a client. Those questions are beyond the scope of the question of state law certified by the Sixth Circuit Court of Appeals.[8]

After distinguishing a number of opinions advanced in favor of the proposition that law firms may be held directly liable for malpractice under Ohio law, Chief Justice Moyer again stressed the narrowness of the Court's holding:

> I stress the narrowness of our holding today. This opinion should not be understood to inhibit law-firm liability for acts like those alleged by the petitioner. Rather, a law firm may be held vicariously liable for malpractice as discussed in the majority opinion. Further, our holding today does not foreclose the possibility that a law firm may be directly liable on a cause of action other than malpractice. Yet the limited record and the nature of answering a certified question do not permit us to entertain such an inquiry in this case.[9]

This concurring opinion, in which a majority of the panel joined, is a very strong indicator that the Court did not believe it was making a sweeping pronouncement about the nature and scope of potential law firm liability, let alone imposing a sweeping (and revolutionary) change in *respondeat superior* liability in general. Nevertheless, defendants have argued that *Wuerth* did, in fact, radically change *respondeat superior* liability in Ohio. So far, however, Ohio courts – including the Ohio Supreme Court – appear to be disinclined to give *Wuerth* the broad reading that some defendants have urged.

Lower Courts Have Applied *Wuerth* Narrowly

To date, Ohio courts of appeals have had several opportunities to address the scope and ramifications of *Wuerth*, and so far they have limited its scope to cases in which the vicarious liability at issue arises from claims of malpractice on the part of doctors or lawyers.[10] Where the negligence involved is that of an employee who does not fall within either of these professions, courts have declined to hold that individual employees must also be sued in order for *respondeat superior* liability to apply.

In *Taylor v. Belmont Community Hospital*,[11] the Seventh District declined to extend *Wuerth* to a medical negligence case involving negligence on the part of a doctor and nurses employed by the hospital. In that case, the hospital was sued within the statute of limitations for the negligence of its employee doctor and two employee nurses, but these employees had not been named as defendants.[12] The trial court granted summary judgment in favor of the hospital based on *Wuerth*.[13]

The Seventh District reversed, holding that *Wuerth* should not be extended to cases in which the employees of a hospital had not been sued and the statute of limitations had run as to claims against those employees.[14] In so holding, the Seventh District repeatedly noted that the majority concurrence in *Wuerth* stressed its narrow application – a point made even more salient by the fact that Judge Mary DeGenaro, who sat by assignment on the *Wuerth* panel, was also a member of the panel that decided *Taylor*. Indeed, Judge DeGenaro wrote her own concurrence in *Taylor*, in which she stressed that *Wuerth* had no bearing on the issues in that appeal, and went so

far as to say that "*Wuerth* does not even tangentially touch on the issue of the statute of limitations."[15]

The Second District also has limited *Wuerth's* scope, holding that it applies only to cases involving *respondeat superior* liability for acts of traditional legal or medical malpractice, and does not extend to medical claims involving negligence on the part of non-physicians. *Stanley v. Community Hospital*,[16] decided earlier this year, involved claims of negligence on the part of nurses employed by the defendant hospital. While the complaint included Jane and John Doe nurses as defendants, no individual hospital employee was ever specifically named as a defendant.[17] Based on this, the trial court granted summary judgment in favor of the hospital, which the Second District reversed.[18]

On appeal, the plaintiff argued that *Wuerth* did not apply because the employees at issue were nurses, rather than physicians who tend to have a more independent relationship with hospitals, and also noted that the action against the hospital had been commenced within the applicable statute of limitations.[19] The hospital argued otherwise, asserting that *Wuerth* extended to claims involving nurses as well as physicians, but the Second District rejected this interpretation as being "too expansive," on two related grounds.

First, the Second District agreed with the plaintiff's observation that physicians commonly have a more independent relationship with hospitals than nurses do:

> Specifically, physicians and attorneys are professionals who are generally hired to perform services for their clientele as independent contractors. Physicians and attorneys are not typically considered "employees" at their respective businesses. The law partner and attorney in *Wuerth* was a part owner of his firm and worked as an independent contractor for his clients. Physicians, as well, are often not employees of the hospitals where they have privileges.[20]

Second, the court noted that "malpractice," which was the type of misconduct at issue in *Wuerth*, traditionally has been limited to professional misconduct on the part of doctors and lawyers, and does not necessarily encompass negligence on the part of others, even in a medical context. In support of this proposition, the court also noted that the Ohio Revised Code makes distinctions between "malpractice" and "medical claims" for purposes of the applicable statute of limitations:

> Specifically, R.C. 2305.11(A) states that "an action for malpractice *other than a medical *** claim* *** shall be commenced within one year after the cause of action accrued." *R.C. 2305.113(A)* states that "an action upon a medical *** claim shall be commenced within one year after a cause of action accrued."[21]

The hospital argued that the distinction made no difference in the case at bar because R.C. § 2305.113(A) controlled; however, the Second District rejected this contention based on Ohio Supreme Court precedent holding that the negligence of nurses does not constitute "malpractice" for purposes of R.C. § 2305.11(A):

> While the statute of limitations for malpractice *and* medical claims are both one year, only physicians and attorneys can commit malpractice under *R.C. 2305.11(A)*. The Ohio Supreme Court has held that the negligence of nurses does not fall under the definition of "malpractice" as discussed in *R.C. 2305.11(A)*. Rather, the alleged negligence of a nurse employee falls under the definition of a "medical claim" in *R.C. 2305.113(A)*. The holding in *Wuerth* must be given a narrow application. Nowhere in the *Wuerth* decision does the Supreme Court conclude, expressly or otherwise, that a medical claim brought against a hospital for the alleged negligence of one of its nurse employees constitutes a claim for malpractice under *R.C. 2305.11*.[22]

On September 23, 2011, the Second District issued another opinion involving *Wuerth* – this time addressing hospital liability for the negligence of MRI technicians who had not been named as defendants in the action against the hospital – and in so doing elaborated on the practical and public policy considerations informing its analysis.

In *Cope v. Miami Valley Hospital*,[23] the Second District reiterated its position that medical malpractice and legal malpractice stand on a different footing than ordinary negligence, even when the negligence occurs in a medical setting, and reprised the statutory and common law analysis set forth in *Stanley*.[24] The court emphasized that public policy considerations support a narrow reading of *Wuerth*, even in the medical context:

> 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 services 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 employees who perform medical services and act in the course and scope of their

employment. To allow a hospital to be shielded from the rule of "respondeat superior" liability due to a court's liberal application of the distinction carved out by *Wuerth* would effectively allow the distinction to swallow the rule.[25]

Signals from the Supreme Court?

Though they are not dispositive, there are indications beyond Chief Justice Moyer's concurring opinion that the Ohio Supreme Court supports a narrow reading of *Wuerth*. In an order entered on August 24, 2011, the Ohio Supreme Court declined to allow a discretionary appeal of the Second District's decision in *Stanley*, which, while not an endorsement of the Second District's reasoning, nonetheless leaves the Second District's disposition undisturbed.[26] In addition, in *State ex rel. Sawicki v. Lucas County Court of Common Pleas*,[27] decided July 21, 2010, the Court addressed what, on first blush, might seem to be a similar issue in a strikingly different manner, without even addressing *Wuerth*.

Sawicki addressed the propriety of an order granting a writ of *procedendo* to compel a court of common pleas to proceed with a medical malpractice case brought against the private employer of a physician who had provided the treatment in question both as a private employee and as an employee of a state hospital.[28] The trial court had dismissed the individual doctor for lack of jurisdiction based on his status as a state employee, and had stayed the remaining *respondeat superior* claim pending a determination by the Court of Claims as to whether the doctor was entitled to personal immunity as a state employee.[29]

In affirming the writ of *procedendo*, the Court looked to *Adams v. Peoples*,[30] a 1985 opinion in which the Court held that a municipal employee's statutory immunity from personal liability did not automatically insulate his municipal employer from liability.[31] In so doing, the Court relied on the Restatement of the Law 2d, Agency, Section 217, which provides in pertinent part that

> In an action against a principal based on the conduct of a servant in the course of employment:
>
> * * *
>
> (b) The principal has no defense because of the fact that:
>
> * * *
>
> (ii) the agent had an immunity from civil liability as to the act.[32]

Based on this, the Court held in *Adams* that an employee's personal immunity cannot shield his or her employer from liability under the doctrine of *respondeat superior*.[33] In *Sawicki*, the Court embraced this principle again, regardless of its surface inconsistency with both *Wuerth* and *Comer v. Risko*.[34] Indeed, the inconsistency was given relatively short shrift – *Comer* was distinguished as follows, while *Wuerth* was not mentioned at all:

> We have held that a hospital cannot be held liable under a derivative claim of vicarious liability when the physician cannot be held primarily liable. *Comer v. Risko, 106 Ohio St.3d 185, 2005 Ohio 4559, P 20, 833 N.E.2d 712*. But that case does not decide the issue before us. That case was decided narrowly and turned on a theory of agency by estoppel. *Id. at P 1*. The claim against the hospital was extinguished by the statute of limitations, not by the application of immunity. *Id. at P 2*. As we held in *Johns [v. Univ. of Cincinnati Med. Assocs.], 101 Ohio St.3d 234, 2004 Ohio 824, 804 N.E.2d 19, P 37*, "a determination of immunity is not a determination of liability. Rather, it is an initial step in litigation to determine whether the state will be liable for any damages caused by the employee's actions." *Adams*, however, specifically does not allow an immunity defense to a claim for an employer's liability under respondeat superior. *Adams, 18 Ohio St.3d at 142-43, 18 OBR 200, 480 N.E.2d 428*.[35]

The Supreme Court's opinion in *Sawicki* was a ruling on a procedural question – namely, whether the trial court had erroneously stayed the underlying proceedings – and not a disposition on the merits. Thus, upon remand, the trial court rejected the plaintiff's assertion that the Supreme Court's analysis of *respondeat superior* principles was, in fact, a substantive ruling as to the employer's potential liability, and conducted its own independent analysis of the issue.[36] The trial court then went on to reject the employer's argument that *Wuerth* had changed agency law to require both the employee and the employer to be named in order for *respondeat superior* liability to arise.[37] Then, based on the Supreme Court's analysis in *Sawicki*, the trial court held that any personal immunity to which the physician might be entitled was not dispositive of the employer's *respondeat superior* liability.

The Supreme Court's apparent limitation of *Comer* to cases involving agency by estoppel is consistent with the treatment *Comer* has received in the lower courts,[38] and though far from dispositive, the Court's complete failure to even mention *Wuerth* suggests that the Court did not consider *Wuerth* to be germane to the issue presented. The trial court's opinion in *Sawicki*, in turn, suggests that there may still be room to argue employer liability in cases involving physician employees, even when the physician employee herself may have a technical defense to liability.

Sawicki may have repercussions outside the medical malpractice context, since it also has been relied on in at least one instance to permit a principal in a non-medical field to be held liable in a case where the "employee" whose conduct was at issue was entitled to immunity under Ohio's workers' compensation laws. In *Friedman v. Castle Aviation,*[39] the United States District Court for the Southern District of Ohio recently permitted the family of an employee of an airport contractor who was killed by alleged negligence on the part of his employer to pursue an action against the Columbus Regional Airport Authority (CRAA) alleging that CRAA was vicariously liable for the airport contractor's negligence. The CRAA claimed it was entitled to judgment in its favor as a matter of law because the plaintiff's decedent had been an employee of CRAA's agent, a company providing de-icing services at the airport, and thus the agent was entitled to invoke worker's compensation immunity. Based on *Sawicki,* the district court rejected this argument, holding that the immunity to which the decedent's immediate employer was entitled under Ohio's workers' compensation statutes did not necessarily extinguish any potential liability CRAA might have for the employer's negligence under principles of agency law.[40]

So What's The Lay of the Land?

Given that *Wuerth* was a response to a certified question of law as opposed to an analysis of specific facts, the opinion was unavoidably vague as to how the principles enumerated therein should be applied to specific facts. By its own terms, however, *Wuerth* was intended to be a narrow ruling, to be narrowly applied, and there is no indication in either the Court's opinion or the majority concurring opinion that the justices deciding *Wuerth* believed they were drastically revising the rules of *respondeat superior* liability. To date, lower courts have, for the most part, heeded these directions and have endeavored to limit *Wuerth* to cases involving traditional professional malpractice, namely malpractice on the part of physicians or attorneys. And so far the Supreme Court has not signaled any disapproval of this approach. ■

End Notes

1. 122 Ohio St.3d 594, 2009 Ohio 3601.
2. *Id.* at ¶¶ 16-17.
3. *Id.* at ¶ 18 ("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.")
4. *Id.* at ¶¶ 19-26.
5. *Id.* at ¶ 8 (citing *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth* (S.D. Ohio 2007), 540 F. Supp.2d 900, 911).
6. An examination of the opinion in *National Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth* (S.D. Ohio 2007), 540 F. Supp.2d 900 indicates that the plaintiff had sued the attorney and the law firm in the same complaint, and that arguments as to the timeliness of the complaint as to both defendants focused solely on the timeliness of plaintiff's claims against the individual attorney. *See id.* at 912 (plaintiff's argument limited to asserting that claims against the attorney had been timely). At least one trial court has found this to be a meaningful distinction, and has held that *Wuerth* does not apply when the employer has been sued within the statute of limitations. *See* Order filed Oct. 8, 2009, *York v. Kokosing Construction Co.,* Summit Cty. No. CV-2007-10-7079 at 3-4 (Rowland, J). The argument that a law firm can be held liable as long as it is sued within the statute of limitations for a claim against an individual attorney, however, did not persuade the Tenth District. *See Illinois Nat. Ins. Co. v. Wiles, Boyle, Burholder & Brimgardner Co. L.P.A.* (10th Dist.), 2010 Ohio 5872 at ¶ 21, ¶ 25 (rejecting argument).
7. *Wuerth*, 2009 Ohio 3601 at ¶ 27 (Moyer, C.J, concurring).
8. *Id.* at ¶ 30, n. 3.
9. *Id.* at ¶ 35.
10. To date, the following opinions involving medical or legal malpractice have applied *Wuerth* to claims made against practice groups or law firms, and have held that failure to name the professional whose conduct was at issue within the statute of limitations was fatal to the claim: *Henry v. Mandell-Brow*n (1st Dist.), 2010 Ohio 3832 (suit against plastic surgery center failed when surgeon was not named within the statute of limitations); *Hignite v. Glick, Layman & Assoc., Inc.* (8th Dist.) 2011 Ohio 1698 (suit against dental practice failed when dentist was not named within statute); *Kilko v. Walter & Haverfield* (8th Dist.), 2010 Ohio 6364 (suit against law firm failed when lawyer not named within statute); *Bohan v. Dennis C. Jackson Co., L.P.A.* (8th Dist.), 188 Ohio App.3d 446, 2010 Ohio 3422 (legal malpractice claim against law firm failed when individual attorney not named within statute); *Fisk v. Rauser & Assoc. Legal Clinic Co.* (10th Dist.), 2011 Ohio 5465 (same); *Illinois Nat. Ins. Co. v. Wiles, Boyle, Burholder & Brimgardner Co. L.P.A.* (10th Dist.), 2010 Ohio 5872 (same); *Hildebrant Family Partnership v. Provident Bank* (12th Dist.), 2010 Ohio 2712 (same).
11. (7th Dist.), 2010 Ohio 3986.
12. *Id.* at ¶¶ 3-4.
13. *Id.* at ¶¶ 6-8.
14. *Id.* at ¶¶ 29-36.
15. *Taylor,* 2010 Ohio 3986 at ¶ 46 (DeGenaro, J., concurring).
16. (2d Dist.), 2011 Ohio 1290, *discretionary appeal not allowed*, 2011 Ohio 4217.
17. 2011 Ohio 1290 at ¶ 3.
18. *Id.* at ¶¶ 6, 23.
19. *Id.* at ¶ 14.
20. *Id.* at ¶ 20.
21. *Id.* at ¶ 21.
22. *Id.* at ¶ 22, citing *Hocking Conservancy Dist. v. Dodson-Lindblom Assoc.* (1980), 62 Ohio St.2d 195 (only doctors and attorneys can commit malpractice) and *Lombard v. Good Samaritan Med. Center* (1982), 69 Ohio St.2d 471 (negligence of nurses does not constitute "malpractice" for purposes of R.C. § 2305.11(A)). An argument has been made that amendments made to R.C. §§ 2305.11(A) and 2305.113(A) after *Hocking* and *Lombard* were decided undermine this analysis, since malpractice claims against physicians now fall within the ambit of the statute of limitations for "medical claims" under R.C. § 2305.113(A). However, the statutes as written still distinguish "malpractice" from "medical claims," and do not purport to extinguish the traditional distinctions between the two. Moreover, the traditional distinction between malpractice and other forms of negligence was acknowledged in *Wuerth* itself. *See Wuerth*, 2009 Ohio 3601 at ¶ 15 ("It is well-established common law of Ohio that malpractice is limited to the negligence of physicians and attorneys." (quoting *Thompson v. Community Mental Health Centers of Warren Cty., Inc.*, 71 Ohio St.3d 194, 195, 1994 Ohio 223)).
23. (2d Dist.), 2011 Ohio 4869.

24. *Id.* at ¶¶ 20-24.

25. *Id.* at ¶ 25. The Second District also rejected the hospital's argument that MRI technicians should be treated like physicians rather than nurses, noting that neither technicians nor nurses are considered physicians even when they perform tasks similar to those performed by physicians:

> There is no reason to treat a medical technician differently than a nurse – neither is considered a physician. While MVH urges this court to treat radiological technicians as physicians due to some similarities between the two (e.g., Ohio certification and continuing education requirements), a radiological technician is not a physician. Even if a technician or nurse is doing similar work to a physician, "the fact that a particular act is within the duty of care owed to a patient by an attending physician does not necessarily exclude it from the duty of care owed to the patient by a nurse [or technician]." *Berdyck v. Shinde, 66 Ohio St.3d 573, 1999 Ohio 183, 613 N.E.2d 1014, paragraph five of the syllabus.*

Id. at ¶ 26.

26. *Stanley v. Community Hosp.*, 2011 Ohio 4217 (discretionary appeal not allowed).

27. 126 Ohio St.3d 198, 2010 Ohio 3299.

28. *Sawicki* at ¶ 3.

29. *Id.* at ¶¶ 3-8 (discussing procedural history).

30. (1985), 18 Ohio St.3d 140.

31. *See Sawicki* at ¶¶ 22-28 (applying *Adams*).

32. REST. (2D) AGENCY § 217 (1958), quoted in *Adams, supra*, at 142-43.

33. *Adams* at 142-43.

34. 106 Ohio St.3d 185, 2005 Ohio 4559.

35. *Sawicki* at ¶ 29.

36. *See* Opinion and Judgment Entry filed August 18, 2011, *Sawicki v. Temesy-Armos*, Lucas County Court of Common Pleas No. G-4801-CI-200602823-000.

37. *Id.* at 10 ("Here, . . APMCO appears to argue that *Wuerth* changed agency law, requiring a plaintiff to name both the principal and agent as defendant. There is nothing within *Wuerth*, however, expressly overriding long-standing principles of agency law.").

38. *See, e.g., Holland v. Bob Evand Farms, Inc.* (3d Dist.), 2008 Ohio 1487; *Orebaugh v. Wal-Mart Stores, Inc.* (12th Dist.), 2007 Ohio 4969.

39. (S.D. Ohio May 5, 2011), No. 2:09-cv-749, 2011 U.S. Dist. LEXIS 48377.

40. *Id.* at *20-*24.