The AMCNO has filed an Amicus brief urging that the Ohio Supreme Court consider this appeal because the decision of the appellate court has expanded the “scope of employment” for healthcare professionals to now include the willful violation of the Health Insurance Portability & Accountability Act (HIPAA) or the unauthorized access of patient information. This decision would potentially subject hospitals, physicians, nursing homes or other medical provider employers to civil liability, and potential criminal charges, under a strict liability analysis in contravention of well-established Ohio law. In the matter Pontius v. Riverside Radiology, et al., 10th Dist. No. 15AP-906, 2016-Ohio-1515, the Tenth District Court of Appeals reversed a jury verdict in favor of the defendants. In Pontius, the mother of the decedent requested that a non-party physician employed by the defendant radiology group review a CT scan performed on her son. This non-party physician had no involvement in the care of the decedent or the review of the CT scan at issue during the events in question; apparently, he was social friends with the decedent through the local country club. The purported review was performed by this non-party employee at the request of the decedent’s mother and for his own curiosity. He did not review the CT scan for any purpose to promote or facilitate the defendants’ business, nor was he participating in the official peer-review process for this patient.

As part of this review, the non-party physician allegedly advised the plaintiff and friends of the decedent that after reviewing the CT scan he believed that the film evidenced a clot which was not appreciated by the defendant physician who interpreted the film, and that the decedent died due to a pulmonary embolism. Further, the plaintiff claimed that the non-party physician advised her of his opinion that “they blew it.”

At trial, the plaintiff sought to testify as to the communications she had with this non-party physician. The trial court prevented the plaintiff’s attempts, finding that any communications constituted hearsay statements that did not fall under the party-opponent admission exception to the hearsay rule. It was the defendants’ position that since the non-party’s alleged statements were a result of unauthorized access to the films, done on a volunteer basis, absent a patient-physician relationship and under no circumstance relating to his employment, that the statements could not be related to any acts within the scope of his employment as to impute liability upon the defendants.

On appeal, the Tenth District reversed the jury’s verdict in favor of the defendants, finding that the lower court erred in refusing to permit testimony related to statements allegedly made by the non-party physician. The Tenth District concluded that his actions fell within the course and scope of his employment and his statements should have been considered by the jury as an exception to the hearsay rule. The Tenth District essentially held that any action taken by an employee, despite the absence of any beneficial interest for the employer, falls within the definition of the “scope of employment.”

On behalf of the AMCNO, Jason A. Paskan, Esq., and Bret C. Perry, Esq. filed an Amicus brief (literally “Friend of the Court”), with the Ohio Supreme Court urging that the Court accept and consider the decision of the Tenth District Court of Appeals. An Amicus filing generally allows individuals and entities who are not parties to a case, but who have an interest in the outcome, to have an opportunity to be heard. The Amicus brief on behalf of the AMCNO encouraged the Ohio Supreme Court to accept the defendants’ appeal, and reverse the decision of the appellate court, because the “scope of employment” for healthcare professionals does not include the willful violation of HIPAA or the unauthorized access of patient information. To permit the decision of the Tenth District to stand would subject hospitals, physicians, nursing homes or other medical provider employers to civil liability, and potentially criminal charges, under a strict liability analysis in contravention of well-established Ohio law.

The AMCNO argued that the most concerning aspect of the Tenth District Court of Appeals’ analysis is that so long as a medical provider has access to medical records and utilizes the same for legitimate business purposes as part of their duties and responsibilities to the employer, their own self-serving acts, or actions that are detrimental to the employer, would also fall within the “scope of employment,” thereby subjecting the employer to civil liability or criminal penalty. This conclusion is contrary to Ohio and federal law, particularly in the realm of health care and protected health information, and would subject employers of all types to strict liability when their employees act in a manner that has a tenuous connection with their job description, but in reality is unsanctioned, self-serving or even harmful to the employer’s interests.

By irreparably damaging well-established precedent pertaining to vicarious liability, Ohio employers would be left without protection from individuals who abuse their ability to access information for their own purposes if the decision of the Tenth District Court of Appeals were permitted to stand. Accordingly, the AMCNO requested that this Court accept jurisdiction of this case to ensure that employers are only held liable for the actions of employees that fall within the scope of their employment as defined under long-standing Ohio law.

The AMCNO is the only organization to file an Amicus brief, at the jurisdictional stage, noting the potential negative impact on its members if left undisturbed. The decision of the Tenth District, if not reversed, will subject healthcare providers to potential liability due to the actions of a rogue employee in accessing protected patient information for no purpose other than curiosity. This is not the law in Ohio, and, if left undisturbed, physicians, nursing homes or other medical provider employers will undoubtedly be subject to liability.