The Ohio Supreme Court Refuses to Consider Whether a Medical Provider is Vicariously Liable for a Rogue Employee’s Unauthorized Use of a Patient’s Medical Record

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The AMCNO Medical Legal Liaison Committee tracks cases for the AMCNO Board of Directors that come before the Ohio Supreme Court (OSC) and could impact or change the law in Ohio concerning our physician members. As a result, the AMCNO became aware of such a case and we have filed an amicus brief on behalf of our members in the case described below.

The OSC recently declined to consider an appeal from the Tenth District Court of Appeals wherein the appellate court determined a non-treating employee’s decision to access a patient’s medical records, and communicate his opinions regarding the same to third-party individuals, is binding on the employer in a subsequent medical malpractice action. The Tenth District Court of Appeals concluded that the unauthorized access of the medical records for the purpose of getting “to the bottom” of what transpired was within the scope of the employment and, therefore, the hearsay statements regarding the employee’s opinions were admissible at trial.

In support of the appeal, the AMCNO filed an amicus brief urging the OSC to 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 and Accountability Act (HIPAA) or the unauthorized access of patient information. Despite the adverse impact the Tenth District’s conclusion that a non-treating physician’s actions within the “scope of employment” constitutes willful violation of HIPAA or the unauthorized access of patient information to third-party individuals, is binding on the employer, falls within the definition of the “scope of employment.”

The AMCNO is the only organization that filed an amicus brief, at the jurisdictional stage, urging the OSC to accept and consider the decision of the Tenth District Court of Appeals. The amicus brief encouraged the 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. 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 healthcare 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 is rather unsanctioned, self-serving or even harmful to the employer’s interests.

By irreparably damaging well-established precedent pertaining to vicarious liability, Ohio employers are now left without protection from individuals who abuse their ability to access information for their own purposes. In declining to accept jurisdiction, the OSC left undisturbed the Tenth District’s conclusion that a non-treating physician’s review of a decedent’s medical chart, on his own time without knowledge or authorization from his employer, constitutes conduct within the “scope of employment.” This type of conduct is undoubtedly against policy and in clear violation of HIPAA laws enacted to protect a patient’s right to privacy. The Tenth District Court of Appeals’ decision ostensibly condones unauthorized, unsanctioned and

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self-serving actions and places the same within the scope of employment will result in an erroneous expansion of the definition of “scope of employment.”

This decision is troublesome and wholly inconsistent with Ohio’s longstanding law that correctly defines the “scope of employment.” It cannot be emphasized enough the grave ramifications of the Tenth District’s expansion of the definition of the “scope of employment,” to the point that all unauthorized and unsanctioned actions of rogue employees, especially hospital and physician group employees, will be imputed to an employer and hold the employer strictly responsible and accountable for that employee’s actions.

Based upon the conclusion of the Tenth District Court of Appeals, and the Supreme Court of Ohio’s decision to not review the Pontius matter, healthcare employers must now be as vigilant as ever regarding the unauthorized access of medical records. Further, efforts should be made to reiterate to employees and others with potential access to protected patient information, that under state and federal law, such records are only to be utilized for patient care. ■