

Minding Your P's and Q's: How to Properly Assert and Maintain the Empty Chair Defense

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The “Empty Chair” defense, or so it has been called, is an affirmative defense under Ohio law that allows a defendant in a tort action to seek an allocation of fault to one or more parties that are not a party to the lawsuit under R.C. 2307.23. This is an effective tool that can be used to deflect wrongdoing to a party that is immune, like the plaintiff’s employer, for example, or a party that has already settled with the plaintiff and has been dismissed from the suit already. However, certain procedural and substantive requirements must be followed in order to properly use the Empty Chair defense.

For example, it is an affirmative defense that must be raised before trial and defendants must specifically state the person, persons, or entities for which an allocation of fault will be sought at trial. Best practice is to assert this defense in a responsive pleading like an Answer. But the requirements do not end there—a defendant must further put on evidence demonstrating tortious conduct on the part of the Empty Chair defendants. In negligence cases, this means that there must be testimony or some other admissible evidence that the non-party breached a duty owed to the plaintiff and caused them harm. This last step was overlooked by the defendants in *Farrow v. OhioHealth Corporation*, resulting in a trial court refusing to allow the defendants to use the Empty Chair defense. The appellate court affirmed, holding it is not enough to simply assert the affirmative defense and seek an allocation of fault. 10th Dist. Franklin No. 19AP-828, 2020-Ohio-5595, ¶ 52.

Defense counsel must instead proactively think about how to demonstrate tortious conduct by the Empty Chair defendant and introduce evidence of that wrongdoing at trial to ensure that the jury has the opportunity to allocate fault to non-parties under R.C. 2307.23. Failure to follow these P's and Q's of the Empty Chair defense will preclude a defendant from seeking an allocation of fault to a non-party and result in an unjust or disproportionate award of damages against a defendant so it is important to retain counsel that knows how to navigate these requirements.

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