In the

Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2007-0754
Plaintiff-Appellant,	:	
	:	On Appeal from the
v.	:	Clark County
	:	Court of Appeals,
WILLIAM NUCKLOS	:	Second Appellate District
	:	
Defendant-Appellee.	:	Court of Appeals Case
	:	No. 06-CA-23
	:	

MEMORANDUM IN OPPOSITION TO APPELLEE NUCKLOS'S MOTION TO DISMISS

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INTRODUCTION

The Court should deny Appellee Nucklos's motion to dismiss this appeal. William Nucklos, the defendant-physician in this case, had a medical practice in Springfield, Ohio that consisted almost entirely of prescribing OxyContin, a powerful and often-abused painkiller, and other controlled substances. He was convicted on twenty counts of drug trafficking and illegal processing of drug documents.

The Court of Appeals reversed the convictions partly because it incorrectly shifted to the State the burden of proving that Nucklos acted outside the minimal standards of medical care. The State of Ohio appealed to this Court by timely filing its Memorandum in Support of Jurisdiction. Nucklos's attorney filed a Memorandum in Opposition, but it was stricken because the attorney is not licensed to practice before this Court, and had not submitted a proper motion *pro hac vice*. The Court accepted jurisdiction on one of the two proposed issues—the question whether the "doctor's exception" to trafficking is an affirmative defense—presented as Proposition of Law No. 1.

The State of Ohio timely filed its brief on the merits, but Nucklos's attorney once again failed to timely file a brief, this time because of a series of unfortunate weather-related events that made delivery of the brief to the Court a day late. Nucklos then filed two motions: first, a motion to participate in and expand the time for oral argument, and second, a motion to dismiss the case as improvidently allowed. The Court dismissed the first motion *sua sponte*. This memorandum responds to the second motion.

The Court should deny the motion for two reasons. First, Nucklos submits to the Court arguments in his stricken Memorandum in Opposition to Jurisdiction and his untimely merits brief. Second, even if Nucklos's arguments had merit—which they do not—they would justify a decision on the merits, not a dismissal.

A. The Court should deny Nucklos's motion because it submits to the Court arguments in his stricken Memorandum in Opposition to Jurisdiction and his untimely merits brief.

Nucklos's Motion to Dismiss, in part, attempts to get before the Court the arguments he raised in his attempted filing of a Memorandum in Response Opposing Jurisdiction Requested by Appellant—a filing that this Court rejected. The Court rejected the filing because his attorney was not licensed to practice before the Court, and he had not filed a proper motion *pro hac vice* at the jurisdictional stage of the case. Nucklos says as much in the first paragraph of the motion, when he asks the Court to "dismiss the State's appeal as improvidently granted as there is no substantial constitutional question or question of public or great general interest." Motion at 1. He reiterates similar language in the Introduction section of the motion. Motion at. 2. This is the exact language in Sup. Ct. Rule 2(A)(3), setting forth the standard by which this Court accepts or rejects discretionary jurisdiction. But the time for such arguments was at the jurisdictional stage, and the Court should not allow a "motion to dismiss" at the merits stage to re-raise jurisdictional arguments.

Moreover, in his motion Nucklos does not indicate—nor can he—that any change in the circumstances of the parties or the status of this case renders the Court's original decision to accept jurisdiction moot or no longer a question of public or great general interest. No new case on the issue at hand has been issued, and nothing of legal significance has occurred to change the parties' circumstances or relationship since this Court granted jurisdiction.

In addition to attempting to re-argue the jurisdictional stage of this case, Nucklos's motion attempts to get before the Court the arguments in his untimely merits brief. This is illustrated by the headings under the motion's Argument section. The heading under "Summary" states:

> This Court should permit Defendant-Appellee the opportunity to argue that the trial court wrongly instructed the jury that Dr. Nucklos had the burden to prove he acted in good faith.

Motion at 21. In other words, Nucklos asks for the opportunity to make his merits arguments before the Court. This is further illustrated by the next level headings in the Argument section: "A. Ohio's drug trafficking statute did not create an affirmative defense for physicians; the statutory exemption is not an affirmative defense." Motion at 21. Subsection A states precisely the merits issue accepted in Proposition of Law No. 1. Subsections B and C are similarly about the merits: "B. Shifting the burden of proof to the accused was unconstitutional and violative of the accused's due process rights." Motion at 29. "C. The jury instruction caused confusion." Motion at 33. Thus, subsections B and C develop further Nucklos's merits arguments.

In short, the motion attempts to raise jurisdictional and merits arguments before the Court that were precluded by Nucklos's failure to file either a jurisdictional memorandum or a merits brief. It should be denied on that ground alone.

B. Neither Nucklos's jurisdictional arguments nor his merits arguments justify dismissal.

Nucklos's arguments for dismissing the case "as improvidently allowed" lack merit. Indeed, these arguments consist entirely of three statements. First, the Introduction urges dismissal "because it is critically important that the State not lead this Court into constitutional error." Motion at 1. The Court is fully able to avoid being led into constitutional error when considering the merits of an argument. It need not take the drastic step of dismissing a case for fear the State will usher it down a constitutional primrose path.

Second, Nucklos mirrors some of the language of Rule 2(A)(3) in urging that "the argument not only does not raise a substantial constitutional question, . . . nor is it a question of public or great general interest . . .." But the Court already found otherwise when it granted review.

And third, the motion states in the Conclusion that "the State's argument that R.C. 2925.03(B) is an affirmative defense is a frivolous argument." Motion at 37. If the argument were truly frivolous, Nucklos would not have had to spend thirty-eight pages countering it. The Court is capable of recognizing a frivolous argument and would not have granted jurisdiction on one.

Finally, even if the merits arguments in the motion are persuasive—which they are not—they would not justify dismissal, but would justify oral argument and decision on the merits. Because Nucklos's motion is merely an attempt to get before the Court arguments that were procedurally precluded, it should be denied. The Court should proceed to oral argument and decision on the merits.

CONCLUSION

For the above reasons, this Court should deny the motion.

Respectfully submitted,

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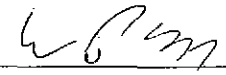

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Appellee Nucklos's Motion to Dismiss was served by U.S. mail, postage prepaid, this 21 day of December, 2007, upon the following counsel:

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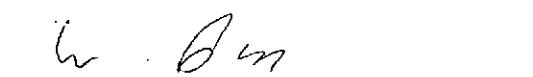

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