

# The Supreme Court of Ohio

ORIGINAL

Toledo Bar Association,  
Relator,

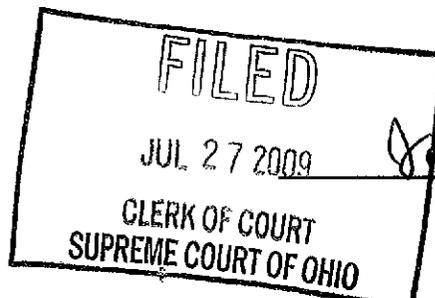
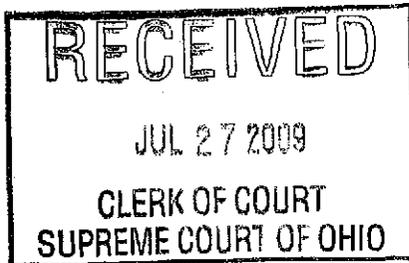
Case No. 2009-1171

v.

John G. Rust,  
Respondent.

**RESPONDENT'S OBJECTIONS  
TO FINDINGS OF FACT AND  
RECOMMENDATION: BRIEF  
IN SUPPORT; NOTICE OF  
APPEAL.**

Now comes Respondent, John G. Rust, individually, as Counsel and Richard M. Kerger is away on vacation, and this Counsel wants and does hereby, file his Objections To the Findings of Fact and Recommendation, and is filing herewith, as stated in the Court's Order to Show Cause of July 7, 2009 and also his Brief in Support of his Objections, which go only to the finding and recommendations, stated in this Court's July 7, 2009 Order to Show Cause; of Costs, as Respondent claims his filings in the Lucas County Probate Court of the Affidavit of Dr. Philip M. Lepkowski, Mrs. Tillimon's family doctor, which opined that Defendant Guardian Fisher had been chargeable with negligence causing Mrs. Tillimon's death, put a duty on Probate Judge Puffenberger to hold as a matter of law the filings before him, under RC2113.18, entitled son Duane Tillimon to be named as proper party Plaintiff as a "Successor Administrator," and then by the Supreme Court cases, son Tillimon would have become eligible to serve as a personal representative to bring the wrongful death action, just as was held in principle in *Douglas v. David Bros. Coal Co.* 135 Oh St. 641 (1939).



Respectfully submitted,

*John G. Rust*

Respondent John G. Rust

## CERTIFICATE OF SERVICE

A copy of the foregoing is served by U. S. Mail to Attorneys Jonathan B. Cherry, Esq. (0001126) Toledo Bar Association, 311 N. Superior St., Toledo, Ohio 43604-1454; Paul D. Giha, Esq. (0002533) 608 Madison Ave., Ste. 1400, Toledo, Ohio 43604-1121; and Yvonne Tertel, Principal Assistant Attorney General, Health & Human Services Section, 30 E. Broad St., 26<sup>th</sup> Floor, Columbus, Ohio 43215-3400

*John G. Rust*  
Respondent.

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## STATEMENT OF THE FACTS

Son, Duane J. Tillimon, and his mother, Mrs. Irene Tillimon, in time learned that Attorney Edward Fischer was appointed Guardian but neither the mother nor son was served with papers giving notice of hearing for appointment of Attorney Fischer as Guardian of Mrs. Irene Tillimon.

From the very start, son Duane J. Tillimon felt Guardian Fischer was not reporting the truth, nor disclosing what happened to all the mother's property at her home on Poinsetta Avenue in Toledo, Ohio.

Executor Taylor and Guardian Fischer have been at odds from the start. The three member commissioners hearing this grievance case was very adept, astute, and fair in noting that Administrator Taylor never really tried to find out what Guardian Fisher had done or not done in trying to save the life of Mrs.

Tillimon, and that in October 2004 Guardian Fischer had been told to take Mrs. ~~SON TILLIMON TO WRITE~~ Tillimon to get a doctor for a "stent" operation. After this, counsel recommended to ~~SON TILLIMON TO WRITE~~ Judge Puffenberger that Guardian Fischer get a doctor, he still didn't do anything

about a doctor until Judge Puffenberger ordered Guardian Fischer take Mrs. Tillimon to a doctor for a "stent" operation. It got too late and then gangrene had set in. When Mrs. Tillimon talked to the doctor after the Judge ordered a "stent" operation, the doctor said it was too late to help Mrs. Tillimon. The Grievance Panel has proceeded very adeptly, fairly, intelligently, and I think, outstandingly.

The Toledo Bar Association's attorneys has not justified any of the unlawful negligence by Guardian Fischer. Once the Toledo Bar Association's lawyers saw the affidavit of Mrs. Tillimon's doctor, Doctor Philip M. Lepkowski, I say a

**grievance should have been filed against Guardian Fischer by the Toledo Bar Association attorneys. Once there is notice about a lawyer's failings, then the Bar Association should have checked the relevant medical records at Harborside and the relevant hospitals.**

**ARGUMENT**

**PROPOSITION OF LAW I**

**ONCE THIS PROBATE COURT IS FURNISHED WITH THE AFFIDAVIT FROM THE DECEDENT'S DOCTOR, PHILLIP M. LEPKOWSKI THAT GUARDIAN FISCHER ISSUED ORDERS AT ST. LUKE'S HOSPITAL REMOVING MRS. TILLIMON FROM INTENSIVE CARE AT ST. LUKE'S, ALTHOUGH THE ST. LUKE'S DOCTORS HAD ORDERED SHE BE KEPT IN INTENSIVE CARE. GUARDIAN FISCHER ORDERED HER TO BE RETURNED TO HARBORSIDE AT SWANTON, WHICH AFFIDAVIT OF DR. LEPKOWSKI OPINED THAT THE IMMEDIATE PROXIMATE CAUSE OF MRS. TILLIMON'S DEATH, WAS WHEN GUARDIAN FISCHER REMOVED HER FROM INTENSIVE CARE AT ST. LUKE'S AND SENT HER BACK TO HARBORSIDE AT SWANTON. GUARDIAN FISCHER ORDERED MRS. TILLIMON TO BE REMOVED FROM INTENSIVE CARE AT ST. LUKE'S HOSPITAL, THE PROBATE JUDGE THEN HAD RECEIVED PRIMA-FACIE EVIDENCE MAKING A CASE AGAINST GUARDIAN FISCHER FOR THE WRONGFUL DEATH OF MRS. TILLIMON AND THE PROBATE COURT WAS UNDER A MANDATORY AND STATUTORY DUTY OF LAW TO GRANT THE MOTION FILED JUNE 10, 2008 BY SON DUANE TILLIMON TO BE APPOINTED AS SPECIAL ADMINISTRATOR TO BRING THE WRONGFUL DEATH ACTION AGAINST GUARDIAN FISCHER AND OTHERS AND ALSO TO ASSERT FOR THE ESTATE OF IRENE TILLIMON THE SUIT FOR ALL CLAIMS OF NEGLECT OF HER BY GUARDIAN FISCHER AND HARBORSIDE OF SWANTON.**

Involved here is "RC 2113.18 Removal of executor or administrator" which reads:

**"(A) The probate court may remove any executor or administrator if there are unsettled claims existing between him and the estate, which the court thinks may be the subject of controversy or litigation between him and the estate or persons interested therein.**

**(B) The probate court may remove any executor or administrator upon motion of the surviving spouse, children, or other next of kin of the deceased person whose estate is administered by the executor or administrator if both of the following apply:**

**(1) The executor or administrator refuses to bring an action for wrongful death in the name of the deceased person;**

**(2) The court determines that a prima-facie case for a wrongful**

death action can be made from the information available to the executor or administrator.

History: GC 10509-19; 114 v 320 (404); Bureau of Code Revision, 10-1-53; 139 v S 176. Eff 6-1-82.”

The controlling precedent here is Douglas, Admx., v. The Daniels Bros. Coal Co., et al., 135 Oh. St. 641 (1939) where the Opinion and Syllabus at Page 641 reads:

*“Limitation of actions-Amended petition relates back to date of filing petition-Widow mistakenly instituted action as administratrix for wrongful death of husband-Negligence-Sale of fuel oil mixed with gasoline or naphtha-Purchaser not guilty of contributory negligence as a matter of law, when.*

1. Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute.

2. In a wrongful death action based on negligence in selling fuel oil mixed with gasoline or naphtha, the purchaser, having asked for fuel oil, is not to be deemed guilty of contributory negligence as a matter of law in pouring such oil upon a fire in a stove, believing it to be fuel oil. (No. 27357 - Decided July 12, 1939.)”

The key issues of the statute of limitations, and the right <sup>AFTER</sup> offers the statute has run are stated in 135 Oh. at Page 641 as follows:

“This action was instituted in the Court of Common Pleas of Lake County for the recovery of damages for the wrongful death of Verne Douglas, husband of the plaintiff.

On October 27, 1935, the decedent, plaintiff and their children were living in a one-room building in the village of Kirtland, Ohio. This building had formerly been a garage, and was heated by means of a coal stove. The cooking was done on another stove which used oil for fuel. On that date, Verne Douglas was starting a fire in the heating stove and had placed kindling and paper inside the stove to ignite the coal. Having lighted the paper, he picked up a can containing oil and poured some of its contents on the flame. An explosion resulted, which sprayed burning oil over the

decedent and injured him so severely that he died from burns the next day, October 28, 1935.

A petition was filed in the same cause on October 27, 1937, by Frances A. Douglas, as administrator of the estate of Verne Douglas, deceased. A deposition of the administratrix was taken by the defendants on November 26, 1937, at which time it was found that Frances A. Douglas had not been appointed administratrix of the estate of her husband and was not an administrator at the time the petition was filed. Defendants then filed a motion to make the petition definite and certain by setting forth the date of the plaintiff's appointment as administrator. The motion being granted, the plaintiff filed an amended petition in which she alleged that she had been appointed by the Probate Court of Lake County and had qualified as administrator of the estate of Verne Douglas on the 27<sup>th</sup> day of November, 1937; that prior to the date of the filing of her first petition she had received forms from the Probate Court of Lake County which she had mistakenly thought were letters of administration, and had advised her attorneys that she had letters of administration; that the filing of the action was for the benefit of the estate and the persons named in the petition, and that as administrator she adopted and ratified her acts in commencing the action."

**In the Douglas case, in 135 O.S. Justice Day held at Page 644:**

"Day, J. The first question presented is whether the right of action is barred by the statute of limitation. It is conceded that the original petition was filed within the time limited by statute and that the amended petition was filed after the statutory period of limitation had expired.

It is well settled in Ohio that if an amended petition does not set up a new cause of action it will not be barred by the statute fixing a period of limitation for the institution of suit, but will relate back to the date of the filing of the original petition. See 25 Ohio Jurisprudence, 588, Section 241; *Louisville & N. Rd. Co. v. Greene, Admx.*, 113 Ohio St., 546, 149, N. E., 876, The rule of relation back was followed in *Archdeacon, admr., v. Cincinnati Gas & Electric Co.*, 76 Ohio St., 97, 81 N. E., 152 *Missouri, K. & T. Ry. Co. v. Wulf*, 226 U. S., 570, 57 L. Ed., 355, 33 S. Ct., 135, and *Clinchfield Coal Corp. bv. Osborne's Admr.*, 114 Va., 13, 75 S. E., 750, all of which were wrongful death cases.

In the instant case, the original petition alleges that plaintiff is the duly appointed and qualified administrator of the estate of her husband, Verne Douglas, deceased. The amended petition alleges that at the time of the filing of the original petition plaintiff erroneously believed herself appointed but was in fact not appointed and qualified as such administrator; that since the filing of her original petition, the error was discovered and she has been appointed and qualified as such administrator. The amended petition further states that she adopts and ratified her act in commencing the suit. In all other respects, the petition and amended petition are identical

insofar as they relate to the claims made against defendants. The amended petition in no manner changes the cause of action as originally stated, and does not set up a new cause of action.

Section 11363, General Code, authorizes a court, in the furtherance of justice, to amend any pleading, process or proceeding, before or after judgment, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other aspect, or by inserting other allegations material to the case when the amendment does not substantially change the claim. Under authority of Section 10214, General Code, the provisions of Section 11363, General Code, are to be liberally construed in order that the parties may be assisted in obtaining justice.”

The real basis of the court’s opinion is stated in 135 OS at page 646:

“Whether the substitution of a party plaintiff, having capacity to bring the suit, in the stead of the original plaintiff who filed the action without capacity to bring the suit, is a change in the original cause of action depends entirely upon the allegations in the amended petition. The mere substitution of parties plaintiff, without substantial or material changes from the claims of the original petition, does not of itself constitute setting forth a new cause of action in the amended petition. As was said in the opinion in the case of *Van Camp v. McCulley, Trustee, supra*: “The mere change of the name of the plaintiff in the title would not of course change the cause of action.”

In the instant case the cause of action set up in the petition is in no way affected by the correction contained in the amendment. The amendment corrects the allegations of the petition with respect to plaintiff’s capacity to sue and relates to the right action as contradistinguished from the cause of action. A right of action is remedial, while a cause of action is substantive, and an amendment of the former does not affect the substance of the latter. See 1 Bouvier’s Law Dictionary (Rawles Rev.), 295; Pomeroy’s Code Remedies (5 Ed.), 526 *et seq.*, Section 346 *et seq.* 1 Cyc., 642. An amendment which does not substantially change the cause of action may be made even after the statute of limitations has run.

The requirement of the wrongful death statute that the prosecution of the action be in the name of the personal representative is no part of the cause of action itself, but relates merely to the right of action or remedy. That requirement was obviously intended for the benefit and protection of the surviving spouse, children and next of kin of a decedent, the real parties in interest. The personal representative is only a nominal party. *Wolf, admr., v. Lake Erie & W. Ry. Co.*, 55 Ohio St., 517, 45, N. E., 708, 36 L. R. A., 812. Nor does the statute require that the personal representative shall bring the action (*wolf, Admr., v. Lake Erie & W. Ry. Co., supra*), but merely provides that the action, if brought, shall be brought in the name of the personal representative. The only concern defendants have is that the action be

brought in the name of the party authorized so that they may not again be haled into court to answer for the same wrong.

We hold that where a widow institutes an action as administratrix for damages for the wrongful death of her husband, under the mistaken belief that she had been duly appointed and had qualified as such, thereafter discovers her error and amends her petition so as to show that she was appointed administrator after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute." (Under scoring Rust's)

Respondent Rust attaches pages 3, 4, and 5 of his said Motion in Probate Court filed on June 10, 2008 to appoint son Duane Tillimon as the "special administrator" to assert the wrongful death action against Guardian Fischer, and against Harborside of Swanton for their neglect of Mrs. Tillimon.

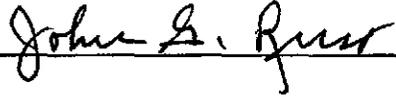
We claim Dr. Lepkowski's affidavit gave the Probate Judge the mandatory duty to appoint the son as "special administrator" as moved. Son Tillimon has appealed the Final Judgment of the Probate Court denying son's motion to be authorized to bring wrongful death action for his mother and briefs have been filed in that appeal, The Estate of Irene Tillimon v. Douglas A. Taylor, Administrator for the Estate of Irene Tillimon, Court of Appeals Case No. L-08-1953; Trial Court Case 2005 EST 0243. Due to Mr. Tillimon's going into Chapter 7 Bankruptcy the above are stayed.

### CONCLUSION

Respondent Rust claims once son Tillimon filed in the Probate Court his motion on June 10, 2008, that the Probate Judge was then under a mandatory duty to appoint son Tillimon as "special administrator." What Rust had done would

**then have been made valid and no grievance violation could rightly be asserted by relator because as hoped, everything would have turned out as Respondent Rust moved and wanted no violation.**

**Respectfully submitted,**

A handwritten signature in cursive script that reads "John G. Rust". The signature is written in black ink and is positioned above a horizontal line.

**John G. Rust**

the name of Administrator Douglas A. Taylor in order to preserve the lawsuit under the statute of limitations for refiling (**Exhibit #6**).

In *Burwell, Admr., Appellee v. Maynard, Admx., Appellant*, Supreme Court of Ohio, (No. 69-564 – Decided February 18, 1970), 21 Ohio St. 2d 108, the Supreme Court of Ohio decided:

Section 2125.02 Revised Code Parties-damages, provides, in part:

**“An action for wrongful death must be brought in the name of the personal representative of the deceased person., but shall be for the exclusive benefit of the surviving spouse, the children and other next of kin of the decedent.”**

In an action for wrongful death, the personal representative is merely a nominal party and **the statutory beneficiaries are the real parties in interest**. As this court stated in *Douglas v. Daniel Bros. Coal Co.* (1939) 135 OhioSt. 641, 647, 15 O.O. 12, 22 N.E.(2d) 195:

“The requirement of the wrongful death statute that the prosecution of the action be in the name of the personal representative is not part of the cause of action itself, but relates merely to the right of action or remedy. **The requirement was obviously intended for the benefit of the surviving spouse, children and next of kin of a decedent, the real parties in interest.** The personal representative is only a nominal party. *Wolf, Admr. v. Lake Erie & W. Ry. Co.* 55 OhioSt 517,45 N.E. 708, 36 L.R.A. 812.

**Nor does the statute require that the personal representative shall bring the action.** (*Wolf, Admr. Lake Erie & W. Ry., Co., supra*), **but merely provides that the action, if brought, shall be brought in the name of the personal representative.** The only concern defendants have is that the action be brought in the name of the party authorized so that they may not again be haled {hailed} into court to answer for the same wrong.

and

In the case at the bar, there is no doubt that the appellant-administratrix was notified of the existence of a claim against the estate of the alleged wrongdoer. Te claim by the minor, the sole statutory beneficiary under section 2125.02, Revised Code, was timely presented to appellant, and such presentation was sufficient to satisfy the notice requirements of Sections 2117.06 and 2117.07, Revised Code. To hold that one qualifies as a beneficiary under section 2125.02 Revised Code, is not qualified to present a claim to the executor or administrator of the estate of the deceased wrongdoer under sections 2117.06 and 2117.07, Revised Code, would be inconsistent

with the principles stated above. It would also be paying obedience to form rather than recognizing that the statutory beneficiary of the wrongful death action is the real party in interest and that the appellant had sufficient timely notice of a claim against the estate.

Under Ohio Revised Code Section 2125.02, and the cases cited above, Sole Heir Duane J. Tillimon had the right to prosecute the wrongful death lawsuit as long as he brought the action in the name of the personal representative, that is Douglas A. Taylor, Successor Administrator for the Estate of Irene T. Tillimon. This is precisely what Duane J. Tillimon did.

Duane J. Tillimon is the sole heir, and the Administrator that was nominated in the will of Irene T. Tillimon, and is also the sole beneficiary of the Estate of Irene T. Tillimon. A wrongful death lawsuit is not for the benefit of the Estate itself, but for the benefit of the beneficiaries of the Estate.

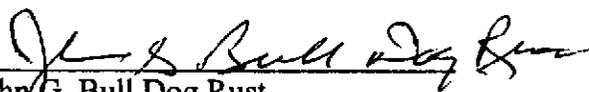
The Lucas County Court of Common Pleas is requiring that Duane J. Tillimon have the Probate Court appoint him as Special Administrator in order to prosecute the wrongful death lawsuit.

It would appear from the case cited, that the appointment of Special Administrator is not discretionary appointment, but mandatory appointment in order to properly bring the wrongful death lawsuit in the Court of Common Pleas. The appointment of Duane J. Tillimon as Special Administrator is "procedural" since he is not permitted to bring the wrongful death lawsuit in his name under Ohio Law, although under Ohio Law he is the injured person and the wrongful death lawsuit is brought solely for his benefit.

The only reason for either Administrator Douglas A. Taylor, or the Probate Court itself, to deny this motion would be to protect the Court Appointed Guardian Edward J. Fischer from the wrongful death lawsuit. Both Irene T. Tillimon, and her Heir Duane J.

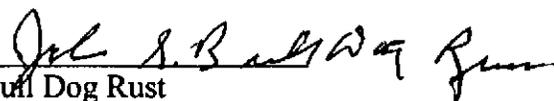
Tillimon, objected to the appointment of attorney Edward J. Fischer as Guardian. In hindsight, the Objection to the appointment of Edward J. Fischer as Guardian should have been granted and in all likelihood Irene T. Tillimon would be alive today. If Guardian attorney Edward J. Fischer did nothing wrong, he should be allowed to defend himself in the wrongful death lawsuit. The issue should be tried and decided in the Court of Common Pleas and not in the probate Court.

Respectfully submitted,

  
John G. Bull Dog Rust  
4628 Lewis Avenue  
Toledo, Ohio 43612  
PH: (419) 476-0347  
*Attorney for Duane J. Tillimon*

#### CERTIFICATE OF SERVICE

This is to certify that a true copy of this Motion was sent by ordinary U.S. Mail on the 10<sup>th</sup> day of June, 2008 to Douglas A. Taylor, Administrator for the Estate of Irene T. Tillimon, 421 N. Michigan Street, Suite B, Toledo, Ohio 43604.

  
John G. Bull Dog Rust

**BEFORE THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

*In re:* : *No.* \_\_\_\_\_

*Complaint against:* :

John G. Rust, Esq. :  
4628 Lewis Avenue :  
Toledo, Ohio 43612 :

**COMPLAINT  
AND  
CERTIFICATE**

***RESPONDENT,*** :

**(Rule V of the Supreme Court  
Rules for the Government of  
the Bar of Ohio.)**

*vs.* :

Toledo Bar Association :  
311 North Superior Street :  
Toledo, Ohio 43604-1454 :

***RELATOR.***

*Now comes the Relator and alleges that John G. Rust, an Attorney at Law, duly  
admitted to practice law in this State of Ohio is guilty of the following misconduct:*

**JURISDICTION**

1. The Toledo Bar Association, Relator, through its Certified Grievance Committee, is authorized to file this complaint pursuant to Rule V, Section (3)(C) and Rule V, Section (4) of the Supreme Court Rules for the Government of the Bar of Ohio.

2. John G. Rust ("Respondent"), Supreme Court Registration Number 0000098, was admitted to the practice of law in the State of Ohio on March 17, 1948, and is subject to the Supreme Court Rules for the Government of the Bar of Ohio.

### Count 1

3. Respondent represents Duane Tillimon ("Tillimon"), whose mother Irene Tillamon ("Mrs. Tillimon") passed away on January 20, 2005. It is undisputed that Duane Tillimon is his mother's sole heir.

4. Mrs. Tillimon's estate was filed with the Lucas County Probate Court (*Estate of Irene Tillimon*, Case No. 2005 EST 000243) on February 2, 2005. That estate is still open. Attorney Douglas A. Taylor ("Taylor") has served as Successor Administrator since being appointed to that position by the Court on October 14, 2005 and currently still serves in that capacity.

5. Prior to her death, Mrs. Tillimon was placed into a guardianship through the Lucas County Probate Court (*In re Irene Tillimon*, Case No. 2004 GDN 001350) effective May 25, 2004. Attorney Edward J. Fischer was appointed by the Court as her guardian. Mrs. Tillimon resided in a nursing home in Swanton, Ohio, Harborside Healthcare Rehabilitation & Nursing Center ("Harborside"), up until the time of her death.

6. Tillimon was dissatisfied with the treatment his mother had received at Harborside. He was also dissatisfied with the manner in which Attorney Fischer had performed his duties as guardian. Tillimon believed that a wrongful death action should be filed on behalf of his mother through her estate against Harborside and Attorney Fischer. The estate's previous fiduciary, Attorney Sarah McHugh, retained counsel on behalf of the estate. A wrongful death lawsuit was filed in the Lucas County Common Pleas Court on January 17, 2006 (*McHugh v. Harborside*, Case No. CI 2006 01259). This case was subsequently voluntarily dismissed without prejudice on April 12, 2006. Respondent was not involved in this action in any way.

7. Dissatisfied with the outcome of the wrongful death case, Tillimon sought counsel from Respondent. Respondent filed another wrongful death action against Harborside and

Attorney Fischer in Lucas County Common Pleas Court (*Taylor v. Harborside*, Case No. 2007 02795) on March 29, 2007, naming the estate's Successor Administrator Douglas Taylor as the plaintiff. Respondent did not consult with Taylor prior to filing this action. When Taylor discovered that the case had been filed without his knowledge and approval, he requested that Respondent immediately dismiss the case as Taylor had not authorized Respondent to file the action and Respondent was acting without authority in doing so.

8. Respondent refused to voluntarily dismiss the case and continued with his litigation efforts, seeking instead to have his client, Tillimon, appointed as the "substitute plaintiff" in the action in place of Administrator Taylor, in contravention of R.C. §2113.18. The case was dismissed by the Court on September 27, 2007.

9. Respondent's client, Tillimon, was declared a vexatious litigator pursuant to R.C. §2323.52 by Judge Charles J. Doneghy of the Lucas County Court of Common Pleas in orders issued on June 13, 2007 and July 3, 2007 (*Charter One Bank, F.S.B. v. Tillimon*, Case No. CI 2005 03345). Respondent was aware of these orders, but continued to file pleadings on behalf of Tillimon in Case No. 2007 02795 (*Taylor v. Harborside*) without seeking prior approval of the Court.

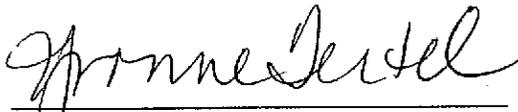
10. Respondent's conduct, as set forth herein, constitutes a violation of the following Ohio Rules of Professional Conduct:

- A. Prof. Cond. Rule 1.1 [A lawyer shall provide competent representation to a client];
- B. Prof. Cond. Rule 1.2(d) [A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is illegal or fraudulent];

- C. Prof. Cond. Rule 1.16(a)(1) [A lawyer shall not represent a client where the representation will result in violation of the Ohio Rules of Professional Conduct];
- D. Prof. Cond. Rule 1.16(a)(2) [A lawyer shall not represent a client when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client];
- E. Prof. Cond. Rule 3.1 [A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous].

**WHEREFORE**, Respondent is chargeable with misconduct and Relator requests that Respondent be disciplined pursuant to Government Bar Rule V.

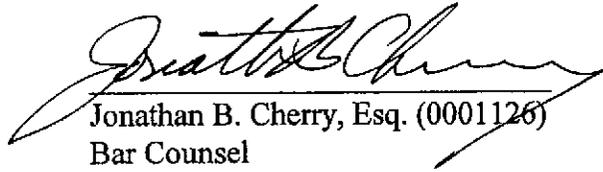
Respectfully submitted,



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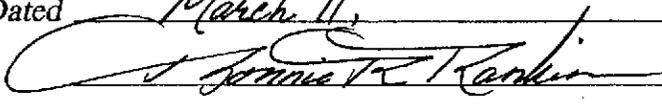
**CERTIFICATE**

The undersigned Bonnie R. Rankin, Chair  
(President, Secretary, Chairman of the Grievance Committee or Disciplinary Counsel)  
of the Certified Grievance Committee of the Toledo Bar Association

hereby certifies that Yvonne Tertel, Paul Giha and Jonathan Cherry

\_\_\_\_\_, are duly authorized to  
(is or are)  
represent Relator in the premises and \_\_\_\_\_ have \_\_\_\_\_ accepted the responsibility of  
(has or have)  
prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists  
to warrant a hearing on such complaint.

Dated March 11, ~~10~~ 2008



Chair, Certified Grievance Committee  
(Title)

**(Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.)**

**Section (11)**

(11) *The Complaint; Where Filed; By Whom Signed.* A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Complaints filed by a Certified Grievance Committee shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing, who shall be counsel for the Relator, and supported by a certificate in writing signed by the President, Secretary or Chairman of the Certified Grievance Committee, which Certified Grievance Committee shall be deemed the Relator, certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. It shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

Complaints filed by the Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as Relator.

Upon the filing of a complaint with the Secretary of the Board, Relator shall forward a copy thereof to Disciplinary Counsel, to the Certified Grievance Committee of the Ohio State Bar Association, to the local bar association and to any Certified-Grievance Committee serving the county or counties in which the Respondent resides and maintains his office and for the county from which the complaint arose.

**BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

<b>In Re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 08-026</b>
<b>John G. Rust</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0000098</b>	:	<b>Conclusions of Law and</b>
<b>Respondent</b>	:	<b>Recommendation of the</b>
<b>Toledo Bar Association</b>	:	<b>Board of Commissioners on</b>
<b>Relator</b>	:	<b>Grievances and Discipline of</b>
	:	<b>the Supreme Court of Ohio</b>
	:	
	:	

¶1. This matter was heard at the offices of the Toledo Bar Association on April 30, 2009, before a panel of the Board of Commissioners on Grievances and Discipline (Board) consisting of Shirley Christian, Alvin Bell, and Stephen C. Rodeheffer, Chair. None of the panel members resides in the appellate district from which this matter arose or served as a member of the probable cause panel in this matter.

¶2. Appearing on behalf of Relator, Toledo Bar Association, were Attorneys Jonathan Cherry, Paul Giha, and Yvonne Tertel. Respondent appeared represented by Richard M. Kerger.

¶3. This action was initiated with the filing of a Complaint with the Board on April 14, 2008. Thereafter, Relator filed an Amended Complaint on April 28, 2008. The Amended Complaint contained the identical factual allegations of misconduct that were set forth in the initial Complaint, but asked the Board to find that Respondent had violated certain additional rules of the Ohio Rules of Professional Conduct.

¶4. Respondent is a 92 year-old lawyer who still engages in the full time practice of law in Toledo. It would appear that his unconventional and eccentric conduct has led many of his colleagues to question his mental ability to practice law. Consequently, Relator requested a mental health examination shortly after the case was filed. Respondent, through his counsel, agreed to the examination, and Dr. Riaz N. Chaudhary, M.D., examined Respondent on September 22, 2008. Dr. Chaudhary's initial report contained a mixed bag of findings that failed to address the underlying concern as to whether Mr. Rust suffered from a mental illness within the definition of R.C. §5122.01(A). The Secretary of the Board sent the doctor a follow up letter dated October 23, 2008, asking him to supplement his prior report with a discussion of the issues that prompted the referral in the first place. Unfortunately, Dr. Chaudhary's response dated November 7, 2008, was less than enlightening. Indeed, he suggested that the Panel seek the answers it wanted from a psychiatrist or neurosurgeon. Having lost time waiting for a resolution of Respondent's mental health issues that it was not going to receive, the Panel and the attorneys decided to forego an evaluation and proceed to trial.

¶5. The Amended Complaint alleges the following violations of the Ohio Rules of Professional Conduct:

- a. Rule 1.1 [A lawyer shall provide competent representation to a client];
- b. Rule 1.16(a)(1) [A lawyer shall not represent a client where the representation will result in a violation of the Ohio Rules of Professional Conduct];
- c. Rule 3.1 [A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law or fact for doing so that is not frivolous];
- d. Rule 8.4(c) [Conduct involving dishonesty, fraud, deceit, or misrepresentation];

- e. Rule 8.4(d) [Conduct prejudicial to the administration of justice];
- f. Rule 8.4(h) [Conduct adversely reflecting on the lawyer's fitness to practice law].

### FINDINGS OF FACT

¶6. John G. "Bulldog" Rust began his legal career on March 17, 1948, after graduating from the University of Virginia Law School. Born John G. Rust, he legally changed his name to include "Bulldog" when he was given the moniker by a judge before whom he was trying a case. Despite his advanced age and sixty-one years of practicing law, Respondent's enthusiasm for the profession remains intact. As his legal counsel Mr. Kerger put it, there are no minor issues in Mr. Rust's cases. It is also clear that Respondent does not show any signs of being intimidated by the younger members of his profession, though he readily admits that his memory and hearing are not what they were "twenty years ago." (Tr. 121)

¶7. During his career Mr. Rust made the acquaintance of another individual of some repute in the Lucas County judicial system by the name of Duane Tillmon. From the testimony presented, it would appear that Mr. Tillmon (a non-lawyer) has extensive real property holdings in the Toledo area and has become a well known *pro se* litigant in the Lucas County courts. In fact, during Respondent's representation of him in the matters that gave rise to this proceeding Mr. Tillmon was declared to be a vexatious litigator as defined by R.C. §2323.52 by Judge Charles J. Donaghy. (Tr. 88)

¶8. Mr. Tillmon's mother was a lady by the name of Irene Tillmon who spent her last years as a resident of Harborside Healthcare where she died on January 25, 2005. The cause of death was testified to be gangrene. Mr. Tillmon, the only next of kin and sole heir of Ms. Tillmon's significant estate, came to the conclusion that his mother's guardian, an attorney by

the name of Edward "Ned" Fischer, and the nursing home were responsible for her death and he retained the law firm of Elk and Elk to prosecute a wrongful death action against the two.

¶9. The original administrator of the Irene Tillmon Estate was a lawyer by the name of Sarah McHugh who withdrew shortly after her appointment as the fiduciary because of a potential conflict she would have if the nursing home was sued.<sup>1</sup> On October 14, 2005, the Lucas County Probate Court appointed Attorney Douglas Taylor to replace her although he failed to communicate this fact to Mr. Tillmon until January 2006. As a result, when the Elk firm filed their lawsuit on January 17, 2006, it incorrectly named Sarah McHugh as the administratrix of the estate. An amended complaint identifying Douglas Taylor as plaintiff was filed on January 26, 2006.

¶10. Mr. Fischer, the former guardian, was served with the original complaint on January 20, 2006. (Ex. 3) Through his personal attorney, Fischer contacted Taylor and inquired whether he had authorized the action. Taylor denied having any knowledge of the suit and a few days later he signed an affidavit attesting to this fact. On March 20, 2006, Fischer's counsel used this affidavit as a basis for a motion to dismiss. Before a ruling was issued, Elk and Elk side stepped the challenge by filing a Civil Rule 41(A) dismissal without prejudice. Of course, this dismissal reduced the time for re-filing any claim on behalf of the estate to twelve months.

¶11. Mr. Taylor's actions regarding these events are somewhat disturbing. Taylor was well aware that there was a potential claim when he was appointed because it was this claim that prompted his predecessor's recusal. Furthermore, Duane Tillmon wrote the administrator a letter in early January 2006, describing his concerns regarding the death of his mother. Taylor, however, admitted that he made no attempt to inquire into the merits of the claim other than to

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<sup>1</sup> Ms. McHugh was appointed by the Lucas County Probate Court after a lengthy fight between Mr. Fischer and Duane Tillmon over their competing applications for the position.

leave a voice mail message with plaintiff's counsel. (Tr. 60) And what is even more remarkable is that this attempted inquiry was made after he had already signed the affidavit that he knew would be fatal to the pending litigation. Nonetheless, during his testimony he declined to acknowledge that he had any fiduciary responsibility to the estate or its only heir to make even a superficial inquiry as to whether the litigation should be pursued.

¶12. Following the dismissal of the first lawsuit, the claim remained dormant until Duane Tillmon appeared in Respondent's office about a week to ten days before the one year limitations period was to run. Respondent was staring at a very small window of time to renew the litigation, and apparently concluded from Taylor's prior conduct that the administrator was not going to cooperate. Undaunted by these realities he re-filed the case on March 29, 2007, without the administrator's consent using the identical complaint that had been filed by Elk and Elk and naming Douglas Taylor in his capacity as administrator as the plaintiff. (Tr. 50)

¶13. The events following the re-filing mirror those that followed the filing of the first complaint. Fischer's counsel contacted Taylor who signed yet a second affidavit on April 5, 2007, professing no knowledge of the suit and denying that he had authorized its initiation. Again, Taylor made no attempt to learn whether the suit had merit even though he knew that a second dismissal would be fatal to the claim. On the same day that Taylor signed the affidavit, he wrote Rust demanding that the suit be dismissed. Respondent realized he had a dilemma regarding the fiduciary's resistance to the proceeding, so he filed a motion with the trial judge assigned to the case asking that Duane Tillmon be substituted as plaintiff in the case. Remarkably, the trial judge sustained the motion by an order signed May 29, 2007, and

journalized June 6, 2007. (Ex. 6) The order was signed without notice and hearing, and prior to service having been perfected on Attorney Fischer.<sup>2</sup>

¶14. Mr. Fischer knew about the lawsuit prior to his being served because he was watching the Lucas County Common Pleas Court's on-line docket as the one year limitations period drew to a close. When he saw that the litigation had been re-filed he asked his legal counsel to solicit the second affidavit from the administrator. Then, when he saw the entry substituting Duane Tillmon as plaintiff appear on the docket, he personally authored and filed a motion for reconsideration on May 31, 2007, arguing that a judge of the general division of the Court of Common Pleas does not have jurisdiction to remove an estate fiduciary.<sup>3</sup> (Tr. 32) On July 19, 2007, the trial judge issued an order sustaining Fischer's motion effectively removing Tillmon as plaintiff. As a portent of things to come, the order also granted the defendants fourteen days to file their motion to dismiss.

¶15. Not to be out maneuvered, Respondent filed a motion the same day the order granting reconsideration was entered, asking that the trial court stay the proceedings until he could obtain an order from the probate court removing Taylor and appointing his client fiduciary. This motion was overruled by order dated August 8, 2007. (Ex. 6)

¶16. On July 25, 2007, Edward Fischer through his attorney filed a motion to dismiss. Respondent filed a pleading on August 17, 2007, entitled: "*SON AND SOLE HEIR DUANE J. TILLMON, BY HIS COUNSEL, ADVISING COURT OF OUR FOLLOWUP TO MOVE PROBATE COURT TO ACT ON MR. TILLMON'S MOTION FOR APPOINTMENT AS EXECUTOR OR SPECIAL ADMINISTRATOR PROMPTLY.*" (Ex. 19) Without ruling on or

<sup>2</sup> The nursing home's legal counsel had already filed an answer to the complaint on April 20, 2007, but it is not clear whether they were served with a copy of the motion. The motion (Exhibit 11) does not contain proof of service.

<sup>3</sup> Fischer filed the motion by making a limited appearance since service on him had yet to be completed.

otherwise acknowledging this pleading, the trial court entered an order dismissing the case on August 21, 2007. (Ex. 6)

¶17. Of additional importance to these proceedings is the fact that in a separate case involving Duane Tillmon in which Respondent was not involved, Judge Charles J. Doneghy of the Court of Common Pleas, Lucas County, entered an order on June 17, 2007, declaring Duane Tillmon to be a vexatious litigator under R.C. §2323.52. (Ex. 22) In that entry Judge Doneghy limited Tillmon's access to the courts in the following manner:

Pursuant to R.C.2323.52(D)(1), the Court further ORDERS that unless he first seeks leave of court, defendant Tillmon may not: 1) institute legal proceedings in Ohio State trial courts; 2) continue any legal proceedings that Defendant Tillmon has instituted in any of the state courts; or 3) making (sic) any application, other than an application to proceed, in any legal proceedings instituted by him in state courts. (Ex. 22, p. 8)

Judge Doneghy made the order effective for three years.

#### CONCLUSIONS OF LAW

¶18. The conduct which Relator believes violates the six provisions of the Ohio Rules of Professional Conduct as alleged in the Complaint can be reduced to two actions on the part of Respondent in his representation of Duane Tillmon: 1) his filing the wrongful death action in the name of the administrator of Eleanor Tillmon's Estate without his authorization, and 2) his filing pleadings in the case without court permission after Mr. Tillmon was declared to be a vexatious litigator. An analysis of each alleged Rule violation follows.

**Prof. Cond. R. 1.1 : Competence. *A lawyer shall provide competent representation to the client.***

¶19. Rule 1.1 of the Ohio Rules of Professional Conduct requires that a lawyer act competently. The rule further provides, however, that a lawyer must provide the skill reasonably necessary for the representation of the client. (Emphasis added.) Being an expert in a particular

particular field is not required so long as the attorney has the capability to recognize the legal problem involved and act accordingly.<sup>4</sup>

¶20. In the case of John Rust, it cannot be said by clear and convincing evidence that he acted in violation of this rule by handling his representation of Tillmon in an incompetent manner. He properly brought the wrongful death case in the name of the administrator of the estate. Following his having filed suit, he made an attempt to substitute his own client in place of the uncooperative administrator, Douglas Taylor. While one might criticize his having erroneously assumed that the trial court could change the administrator of the estate, one must also keep in mind that he initially succeeded in getting the trial judge to grant his request for a substitution. Following the trial judge rescinding that order, he then appropriately made application to the probate court for the substitution.

¶21. In reality, if the trial court had pursuant to Civil Rule 17(A)<sup>5</sup> granted Mr. Rust time to allow his probate motion for substitution to run its course, it is conceivable that in the end Tillmon could have been appointed administrator of his mother's estate and the claim would have proceeded toward a decision on the merits. Unfortunately, it appears that everyone involved, from the trial judge to the estate administrator, was looking for a shortcut in dealing with this case. As a result Respondent simply ran out of time and alternatives.

¶22. Nonetheless, a review of the record does not reveal that Respondent acted incompetently. Admittedly some of his pleadings were less than models of legal clarity, however, the underlying purpose for each was discernible and their goals appropriate for the circumstances that existed when they were filed.

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<sup>4</sup> See Comment to Rule 1.1

<sup>5</sup> Civil Rule 17(A) provides in part that: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest."

¶23. The Panel recommends that this charge be dismissed.

**Prof. Cond. R. 1.16(a)(1): Declining or Terminating Representation. A lawyer shall not represent a client or continue to represent a client where such representation would be a violation of the Ohio Rules of Professional Conduct or other law.**

¶24. Relator contends that once Judge Doneghy declared Duane Tillman to be a vexatious litigator pursuant to R.C. §2323.52 by order dated June 17, 2007, Respondent had a duty from that date forward to obtain the trial court's permission before he filed any additional pleadings on behalf of his client. Respondent, on the other hand, argues that the limitations that Judge Doneghy imposed on Tillmon's further participation in any litigation did not apply to a lawyer already representing him. In Respondent's mind the vexatious litigator declaration only proscribes *pro se* action on the part of the client.

¶25. A review of the limited cases that have dealt with R.C. §2323.52 would seem to support Respondent's position inasmuch as they all deal with *pro se* litigants. The Panel could not find any authority for the proposition that an attorney representing an individual declared to be a vexatious litigator has to have all of his pleadings approved before they can be filed. In further support of Respondent's position, R.C. §2323.52(A)(3) specifically excludes from the definition of vexatious litigator an attorney licensed to practice law in the courts of this state.<sup>6</sup> Without any persuasive authority that this statutory provision extends to an attorney in Mr. Rust's situation, the Panel cannot conclude that Mr. Rust's representation of Tillmon following the issuance of Judge Doneghy's order violated Prof. Cond. R. 1.16(a)(1).

¶26. Mr. Rust's filing the lawsuit without Douglas Taylor's consent presents a more problematic dilemma for determination. Mr. Rust would argue that in the end, the real party in interest is the individual whose right to compensation is recognized by R.C. §2125.02. In this

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<sup>6</sup> "Vexatious litigator" does not include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented himself *pro se* in the civil action or actions.

case there is only one such individual – Duane Tillmon. Respondent further argues that the administrator is simply a nominal party to the action particularly where, as in this case, the administrator has no financial stake in the outcome of the case. Consequently, Respondent would have the Panel conclude that his filing the lawsuit was warranted since he was acting on the authority of Duane Tillmon. Respondent argues that by-passing the administrator was a necessary course of action given the fact that the past history of the case clearly indicated that Mr. Taylor was not going to authorize the action, and not filing the lawsuit would have been fatal to the claim.

¶27. Respondent has referred the Panel to two cases in support of his position. In *Douglas v. Daniel Bros. Coal Co.* (1939), 135 Ohio St. 641, a widow brought suit against the defendant coal company for the wrongful death of her husband. She brought the lawsuit as the administratrix of her husband's estate even though she had never formally been appointed. Once she learned that she lacked the necessary authority to proceed, she filed an application for appointment with the probate court that was later approved. Following this, she was granted leave by the trial court to amend her complaint after the statute of limitations had passed. In ruling that the trial court had properly allowed the widow to amend and allow the amendment to relate it back to the date of the original complaint, the Supreme Court's opinion does make the observation that the requirement that a wrongful death action be brought in the name of the estate representative is procedural in nature "and no part of the cause of action itself." *Id.* at 647. The Supreme Court goes on to note that the requirement that a case be brought in the name of the estate fiduciary is for the benefit of the "surviving spouse, children and next of kin of the decedent, *the real parties in interest.*" *Id.* at 647. (Emphasis added.)

¶28. The Supreme Court made the same observation regarding the status of the administrator in *Burwell v. Maynard* (1970), 21 Ohio St.2d 108. This case involved a lawsuit brought by the estate of an individual who was killed in a plane crash against the estate of the pilot of that plane. R.C. §2117.06 at that time required that any claim against an estate be made within four months after the appointment of a fiduciary. In *Burwell*, a written claim was timely served on the administrator for the pilot's estate on behalf of the passenger's seven year old daughter. However, no claim was made within the statutory time period by an official, court appointed fiduciary of the passenger's estate because none had been appointed. When a fiduciary eventually was appointed and suit filed, the representative of the pilot's estate defended on the grounds that the claim was barred because it had not been timely filed. The Supreme Court repeated its analysis of the real party in interest concept that it had discussed in the *Douglas* case, *supra*, and held that the claim made on behalf of the child was sufficient. To do otherwise, said the Court

would ... be paying obedience to form rather than recognizing that the statutory beneficiary of the wrongful death action is the real party in interest and that the appellant had sufficient timely notice of a claim against the estate. *Burwell*, at 111.

¶29. The argument posited by Respondent and his counsel is certainly worthy of consideration. However, in the end, the argument ignores the fact that Respondent clearly filed a lawsuit in the name of Douglas Taylor as administrator without his permission. Furthermore, he did this knowing full well that Taylor was not interested in pursuing the claim. In the cases cited by Respondent the attorney for each plaintiff took action on behalf of an individual he actually represented. In their capacity as legal counsel for these plaintiffs, each attorney filed their case for their client and then proceeded to successfully correct the flaws in their client's legal status.

Respondent, on the other hand, took legal action on behalf of someone he clearly did not represent.

¶30. One can surely argue with some justification that Respondent was prompted by good motives in filing the action in that he was simply trying to preserve Duane Tillmon's right to be compensated for his mother's wrongful death. But while Mr. Taylor may, in fact, be a mere titular party to the wrongful death claim, in the final analysis he is cloaked with the discretion and authority to approve the filing of the claim. The Panel has concluded that the law and our disciplinary rules cannot condone lawyers filing lawsuits on behalf of individuals without their authorization. It is this Panel's recommendation that based upon the filing of this lawsuit the Board finds that Respondent violated Prof. Cond. R. 1.16(a)(1).

***Prof. Cond. R. 3.1: Meritrious Claims and Contentions.*** *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.*

¶31. The Panel does not find that the Relator has proven a violation of Prof. Cond. R. 3.1 by clear and convincing evidence. (The lawsuit filed by Respondent had a basis in both law and fact. Indeed, Respondent had an affidavit from a Dr. Lepkowski attesting to the fact that the conduct on the part of the decedent's guardian probably contributed to her death. As stated previously, some of the motions that Respondent filed in the case were less than artfully drawn, but the basis of each motions had merit. Further, this Panel declines to conjecture whether these motions would have met a better fate had they been drafted a different way.

¶32. The Panel recommends that this alleged rule violation be dismissed.)

***Prof. Cond. R. 8.4: Misconduct.*** *It is professional misconduct for a lawyer to do any of the following:*

\*\*\*\*\*

*(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.*

*(d) engage in conduct prejudicial to the administration of justice.*

\*\*\*\*\*

*(h) engage in any conduct that adversely reflects on the lawyer's fitness to practice law.*

¶33. The Panel has considered the remaining three allegations of the complaint collectively. Of course, the most serious of the three is the alleged violation of Prof. Cond. R. 8.4(c). In reviewing the entire record the Panel is unable to identify any action on the part of Respondent that arguably would involve dishonesty, fraud, deceit or misrepresentation. On the contrary, Mr. Rust was brutally honest both in his dealings with the court and opposing counsel throughout the case.

¶34. An argument possibly could be made that his representing to the trial court that he was the attorney for Douglas Taylor involved some element of deceit or misrepresentation. However, when one considers that Mr. Rust honestly believed that Taylor was merely a nominal player in the litigation, and that Respondent did in fact represent the individual who he believed was the real party in interest, it is difficult to conclude that this conduct is in violation of 8.4(c). This conclusion is made even easier when one notes that within weeks of filing the suit Mr. Rust attempted to correct his procedural dilemma by filing a motion to substitute Tillmon for Taylor as the named plaintiff.

¶35. For the same reasons the Panel declines to make a finding that Respondent violated 8.4(d) or (h).

¶36. The Panel recommends that these charges be dismissed.

### SANCTION

#### Aggravation

¶37. The Panel has considered the following aggravating factors:

¶38. Prior disciplinary action. BCGD Proc. Reg. 10(B)(1)(a). Respondent was disciplined with a public reprimand in 1996 for representing clients with competing interests when he handled a loan transaction between a personal injury client and another client. *Toledo Bar Assn. v. Rust* (1996), 74 Ohio St.3d 635.

¶39. Refusal to acknowledge the wrongful nature of his conduct. BCGD 10(B)(1)(g). Respondent to this day believes that what he did was both legally and ethically correct, and he offered no apology to the Board when he testified at the hearing. The Panel does not place a great deal of emphasis on this factor, however, inasmuch as his lack of remorse is based more on a difference of opinion regarding the law rather than a lack of disrespect for the law and the rules that govern our profession.

¶40. The remaining aggravating factors outlined in Section 10(B)(1) of Appendix II to the Rules for the Government of the Bar clearly do not apply. There is no dishonest or selfish motive, no pattern of misconduct, and there are not multiple offenses at issue.

#### Mitigation

¶41. The Panel believes there are a number of mitigating factors that support the stayed suspension that is being recommended.

¶42. Absence of a dishonest or selfish motive. BCGD Proc. Reg. 10(B)(2)(b). From the beginning Respondent's conduct was selfless in the extreme. He could very easily have shown Mr. Tillmon the door when the client sought his help at the eleventh hour of his claim. Indeed, it is difficult to see that Respondent gained anything from his conduct in this case other than being brought before the Supreme Court on a disciplinary violation.

¶43. Full and free disclosure to the Board and a cooperative attitude toward the proceedings. BCGD Proc. Reg. 10(B)(2)(d). Mr. Rust has cooperated in the disciplinary proceedings that have been brought against him. He timely responded to the initial inquiries regarding his conduct, he submitted to a deposition under oath, he voluntarily participated in a mental health examination, and he attended the hearing and testified.

¶44. Respondent presented no testimony regarding character or reputation, and he has been subjected to no other penalties or sanctions.

#### Sanction

¶45. Relator recommended an actual six month suspension with reinstatement conditioned on a doctor's opinion that he has the mental health to resume the practice of law. Respondent's counsel argued against a finding of any violations and, therefore, did not speak to any proposed sanction.

¶46. The Panel recommends a one year suspension with one year stayed and that Respondent be placed on two years probation. In the final analysis Mr. Rust acted on good intentions but simply ignored the bounds of his professional responsibilities. No evidence was presented that anyone was injured by the filing of the lawsuit other than being put through the inconvenience of filing pleadings to get the case dismissed. Under these circumstances an actual suspension would simply not be justified.

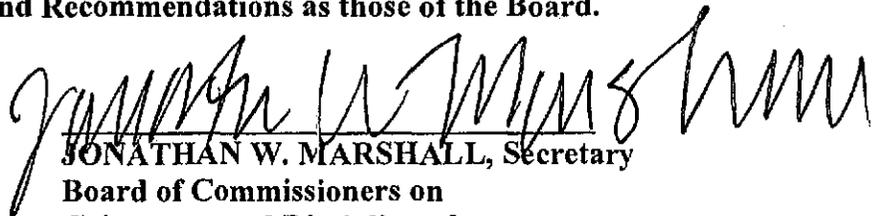
¶47. During the hearing Respondent admitted to needing help with some aspects of his practice. He also admitted to severe hearing problems and the need for a new hearing aid. In his report to the Panel, Dr. Chaudhry made mention of some minor health problems that may be causing a "minor cognitive disorder." Based upon this information the Panel would recommend that the conditions of Mr. Rust's probation include the following:

- a. That Respondent undergo an evaluation by the Ohio Lawyers Assistance Program, and that he participate in any programs or treatments that are recommended by that agency, and
- b. That Respondent not commit any further violations of the Ohio Rules of Professional Conduct, and
- c. That he pay the costs of these proceedings prior to the end of his probationary period.

**BOARD RECOMMENDATION**

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 11, 2009. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. Based on Respondent's limited misconduct and lack of harm, the Board recommends, with the agreement of the Panel, that Respondent, John G. Rust, be suspended from the practice of law for a period of six months with six months stayed followed by two years of probation on the conditions set forth by the Panel. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**

  
**JONATHAN W. MARSHALL, Secretary**  
**Board of Commissioners on**  
**Grievances and Discipline of**  
**the Supreme Court of Ohio**

FILED  
LUCAS CO. PROBATE COURT  
JACK R. PUFFENBERGER, JUDGE  
2005 JUN 10 P 1:39

IN THE PROBATE COURT OF LUCAS COUNTY, OHIO  
JACK R. PUFFENBERGER, JUDGE

IN THE MATTER OF THE ESTATE OF Irene T. Tillimon

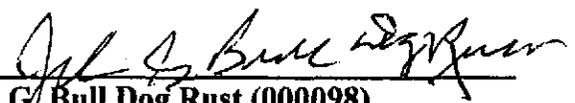
Case No. 2005 EST 0243

.....

MOTION OF SON AND SOLE HEIR DUANE J. TILLIMON  
TO BE APPOINTED SPECIAL ADMINISTRATOR  
FOR THE ESTATE OF IRENE T. TILLIMON  
FOR THE SOLE PURPOSE OF PROSECUTING A  
WRONGFUL DEATH LAWSUIT AGAINST  
GUARDIAN ATTORNEY EDWARD J. FISCHER  
AND  
HARBORSIDE HEALTHCARE OF SWANTON  
AND  
JOHN DOES #1 THROUGH #10

.....

Respectfully submitted,

  
John G. Bull Dog Rust (000098)  
4628 Lewis Avenue  
Toledo, Ohio 43612  
PH: (419) 476-0347  
*Attorney for Heir Duane J. Tillimon*

Now comes Duane J. Tillimon, son and sole heir to the Estate of Irene T. Tillimon, and respectfully moves this court to appoint Duane J. Tillimon Special Administrator to the Estate of Irene T. Tillimon for the purpose of prosecuting a wrongful death lawsuit against Irene T. Tillimon in Lucas County Common Pleas Court Case No. 200702795.

Since the prior filing of a similar motion, this Counsel has discovered an Ohio Supreme Court case directly "on point" with regard to Duane J. Tillimon's right to prosecute a wrongful death lawsuit as a result of the apparent wrongful death of his mother, Irene T. Tillimon.

This motion is supported by the affidavit of both Duane J. Tillimon (**Exhibit #1**), and Dr. Phillip Lepkowski (**Exhibit #2**), placing the responsibility for the wrongful death of Irene T. Tillimon directly upon Guardian Edward J. Fischer, and Harborside of Swanton, and others. Administrator Douglas A. Taylor was notified of the wrongful death lawsuit by letter from Duane J. Tillimon to Douglas A. Taylor dated January 9, 2006 (**Exhibit #3**), and the acknowledgment of that notice by Administrator Douglas A. Taylor by letter from Douglas A. Taylor to Duane J. Tillimon dated January 23, 2006 (**Exhibit #4**). The original wrongful death lawsuit Complaint in Lucas County Case No. CI 2006 01259 was Amended on February January 26, 2006 to substitute Douglas A. Taylor, Successor Administrator, for Sarah McHugh, Administrator, as Plaintiff (**Exhibit #5**). The case was Dismissed Without Prejudice by Administrator Douglas A. Taylor as to Harborside of Swanton on March 30, 2006 (**Exhibit #6**) and as to all defendants on April 12, 2006 (**Exhibit #7**), and the lawsuit subsequently abandoned and not refilled by Administrator Douglas A. Taylor.

On March 29, 2007 the wrongful death lawsuit was refilled by Duane J. Tillimon in

the name of Administrator Douglas A. Taylor in order to preserve the lawsuit under the statute of limitations for refiling (Exhibit #6).

In Burwell, Admr., Appellee v. Maynard, Admx., Appellant, Supreme Court of Ohio, (No. 69-564 – Decided February 18, 1970), 21 Ohio St. 2d 108, the Supreme Court of Ohio decided:

Section 2125.02 Revised Code Parties-damages, provides, in part:

**“An action for wrongful death must be brought in the name of the personal representative of the deceased person., but shall be for the exclusive benefit of the surviving spouse, the children and other next of kin of the decedent.”**

In an action for wrongful death, the personal representative is merely a nominal party and the statutory beneficiaries are the real parties in interest. As this court stated in *Douglas v. Daniel Bros. Coal Co.* (1939) 135 OhioSt. 641, 647, 15 O.O. 12, 22 N.E.(2d) 195:

“The requirement of the wrongful death statute that the prosecution of the action be in the name of the personal representative is not part of the cause of action itself, but relates merely to the right of action or remedy. The requirement was obviously intended for the benefit of the surviving spouse, children and next of kin of a decedent, the real parties in interest. The personal representative is only a nominal party. *Wolf, Admr. v. Lake Erie & W. Ry. Co.* 55 OhioSt 517,45 N.E. 708, 36 L.R.A. 812.

Nor does the statute require that the personal representative shall bring the action. (*Wolf, Admr. Lake Erie & W. Ry., Co., supra*), but merely provides that the action, if brought, shall be brought in the name of the personal representative. The only concern defendants have is that the action be brought in the name of the party authorized so that they may not again be haled {hailed} into court to answer for the same wrong.

and

In the case at the bar, there is no doubt that the appellant-administratrix was notified of the existence of a claim against the estate of the alleged wrongdoer. Te claim by the minor, the sole statutory beneficiary under section 2125.02, Revised Code, was timely presented to appellant, and such presentation was sufficient to satisfy the notice requirements of Sections 2117.06 and 2117.07, Revised Code. To hold that one qualifies as a beneficiary under section 2125.02 Revised Code, is not qualified to present a claim to the executor or administrator of the estate of the deceased wrongdoer under sections 2117.06 and 2117.07, Revised Code, would be inconsistent

with the principles stated above. It would also be paying obedience to form rather than recognizing that the statutory beneficiary of the wrongful death action is the real party in interest and that the appellant had sufficient timely notice of a claim against the estate.

Under Ohio Revised Code Section 2125.02, and the cases cited above, Sole Heir Duane J. Tillimon had the right to prosecute the wrongful death lawsuit as long as he brought the action in the name of the personal representative, that is Douglas A. Taylor, Successor Administrator for the Estate of Irene T. Tillimon. This is precisely what Duane J. Tillimon did.

Duane J. Tillimon is the sole heir, and the Administrator that was nominated in the will of Irene T. Tillimon, and is also the sole beneficiary of the Estate of Irene T. Tillimon. A wrongful death lawsuit is not for the benefit of the Estate itself, but for the benefit of the beneficiaries of the Estate.

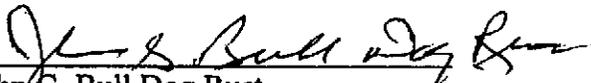
The Lucas County Court of Common Pleas is requiring that Duane J. Tillimon have the Probate Court appoint him as Special Administrator in order to prosecute the wrongful death lawsuit.

It would appear from the case cited, that the appointment of Special Administrator is not discretionary appointment, but mandatory appointment in order to properly bring the wrongful death lawsuit in the Court of Common Pleas. The appointment of Duane J. Tillimon as Special Administrator is "procedural" since he is not permitted to bring the wrongful death lawsuit in his name under Ohio Law, although under Ohio Law he is the injured person and the wrongful death lawsuit is brought solely for his benefit.

The only reason for either Administrator Douglas A. Taylor, or the Probate Court itself, to deny this motion would be to protect the Court Appointed Guardian Edward J. Fischer from the wrongful death lawsuit. Both Irene T. Tillimon, and her Heir Duane J.

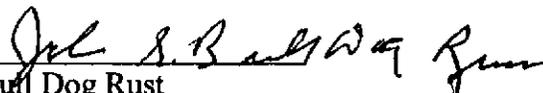
Tillimon, objected to the appointment of attorney Edward J. Fischer as Guardian. In hindsight, the Objection to the appointment of Edward J. Fischer as Guardian should have been granted and in all likelihood Irene T. Tillimon would be alive today. If Guardian attorney Edward J. Fischer did nothing wrong, he should be allowed to defend himself in the wrongful death lawsuit. The issue should be tried and decided in the Court of Common Pleas and not in the probate Court.

Respectfully submitted,

  
John G. Bull Dog Rust  
4628 Lewis Avenue  
Toledo, Ohio 43612  
PH: (419) 476-0347  
*Attorney for Duane J. Tillimon*

**CERTIFICATE OF SERVICE**

This is to certify that a true copy of this Motion was sent by ordinary U.S. Mail on the 10<sup>th</sup> day of June, 2008 to Douglas A. Taylor, Administrator for the Estate of Irene T. Tillimon, 421 N. Michigan Street, Suite B, Toledo, Ohio 43604.

  
John G. Bull Dog Rust

PROBATE COURT OF LUCAS COUNTY, OHIO  
JACK R. PUFFENBERGER, JUDGE

THE ESTATE OF IRENE TILLIMON  
CASE NO.: 2005 EST 0243

AFFIDAVIT OF MOVANT DUANE J. TILLIMON  
IN SUPPORT OF MOTION FOR NEW EXECUTOR  
OR SPECIAL ADMINISTRATOR.

STATE OF OHIO

SS:

COUNTY OF LUCAS

Duane J. Tillimon, being first duly sworn, deposes and states that he has read the attached Affidavit of Dr. Philip M. Lepkowski, M.D., of Movant's letter to Dr. Lepkowski, with the several pages of the St. Luke's records attached; and that all of his statements of what he observed, saw, heard, or did, are true to the best of his recollection; and are admissible in evidence.

  
DUANE J. TILLIMON

Sworn to before me and subscribed in my presence this 6<sup>th</sup> day of AUGUST, 2007.

  
NOTARY PUBLIC

**WILLIAM E. RUST**  
RETURNED BY MAIL  
Notary Public, State of Ohio  
My Commission Expires on 08/01/2010  
Notary Public

EXHIBIT

1

APP 3

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Douglas Taylor,  
Successor Administrator  
Of the Estate of  
Irene T. Tillimon, Deceased

PLAINTIFF

Vs.

Harborside Healthcare of  
Swanton, et al.

DEFENDANTS

Case No. G-4801-CI-0200702795-000

Judge :Ruth Ann Franks

**AFFIDAVIT OF DOCTOR  
PHILIP M. LEPKOWSKI, M.D.,  
FAMILY DOCTOR FOR DECEDENT  
IRENE T. TILLIMON, SHOWING  
BREACH OF DUTY OF PROPER  
CARE.**

John G. Bull Dog RUST (0000098)  
4628 Lewis Avenue  
Toledo, Ohio 43612  
PH: 419-476-0347

*Attorney for Duane J. Tillimon,  
Son, and only Heir.*

State of Ohio

SS:

County of Lucas

I, Philip M. Lepkowski, M.D., past family doctor for Decedent Irene T. Tillimon, state that I was the family doctor for her starting, on or before, 10-21-97, and continued to serve her as family doctor while she was a resident of the Heartland of Perrysburg and Harborside of Swanton Rehabilitation Centers here in the Toledo area.

I have been furnished a part of the St. Luke's Hospital records for the time leading up to her death; and based upon the entries therein, the immediate proximate cause of her death was her removal from the intensive care unit of St. Luke's Hospital.

EXHIBIT  
2

1  
APP 3

Pl. / St. Luke's Pl.

With a reasonable degree of medical certainty, I believe based upon the records I reviewed, that Irene T. Tillimon would have lived longer if she had not been removed from the intensive care unit at St. Luke's Hospital. The failure of the guardian to allow Irene T. Tillimon to be aggressively treated according to her wishes, and the wishes of her son, are in violation of orders and directives necessary for the ordinary care she was entitled to, and as such, a breach of the medical obligations necessary to meet her needs and desires, and as such for her responsible care.

If the Guardian refused to allow Irene T. Tillimon to have out-patient surgery to install a stint in her leg in order to improve circulation and <sup>Pl. / such as caused</sup> caused gangrene, the conduct is not only a medical breach of reasonable care, and a proximate cause of her pain, and probably hastened her death, but is abhorrent and inhumane conduct in itself.

As Irene Tillimon aged and her health deteriorated, I found Irene Tillimon unwilling to give up the fight. When Irene Tillimon had a stroke, she recovered and returned home to live by herself for another year. After two hip surgeries, she returned to an assisted living center to reside in an apartment by herself. Even after falling and breaking her neck, she subsequently recovered. In all the years that Irene Tillimon was under my care as a family doctor, she never expressed to me any desire that she wanted to give up on life, or die.

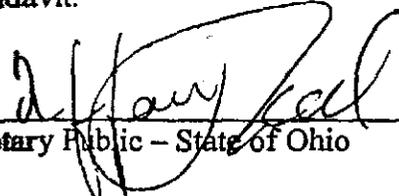
In my opinion, it was contrary to all that was decent or humane to deny her treatment to keep her alive. Irene Tillimon appears to have wanted to live, with or without, the need of a wheelchair. Our society does not kill people because they need a leg amputated. I believe her quality of life was her choice.

*Philip M. Lepkowski*  
Dr. Philip M. Lepkowski

NOTARY STATEMENT

On this 6<sup>th</sup> day of August, 2007 Dr. Philip M. Lepkowski came before me

and, after being duly sworn according to law, acknowledged his signature on this affidavit.

  
\_\_\_\_\_  
Notary Public - State of Ohio

11/13/10  
My commission expires:

TIFFANY KEEL  
Notary Public - State of Ohio  
My Commission Expires 11-13-2010