

IN THE SUPREME COURT OF OHIO

Paula Eastley, Adm. Of the
Estate of Steven Hieneman

Plaintiff-Appellee,

v.

Paul Volkman, M.D.

and

Denise Huffman, d\b\A
Tri-State Health Care

Defendants-Appellants.

Case No. 11-0606

On Appeal from the Scioto
County Court of Appeals,
Fourth Appellate District
Case No. 09-CA-3308

APPELLEE'S MEMORANDUM IN RESPONSE TO
APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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STATEMENT OF POSITION AS TO WHETHER THIS
CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

The documents filed by Appellant, Denise Huffman, d/b/a Tri-State Health Care, raise a preliminary question about the type of appellate jurisdiction that Ms. Huffman is seeking to invoke. S.Ct. Prac. R. 2.1., entitled “*Types of Appeals*,” provides that a party may seek to invoke the appellate jurisdiction of the Supreme Court as an appeal of right if the claim involves a substantial constitutional question. A party may also seek to invoke the Court’s discretionary jurisdiction on an appeal that involves a question of public or great general interest. (Art. IV, §2a&e, Ohio Const.)

Either type of appeal requires an appellant to submit an explanation about why leave to appeal should be granted. “A memorandum in support of jurisdiction shall contain all of the following: * * * (2) A thorough explanation of why a substantial constitutional question is involved [and/or] why the case is of public or great general interest.” S.Ct. Prac. R. 3.1 (B)(2). Ms. Huffman referenced both an appeal of right and a discretionary appeal in her memorandum’s table of contents: “STATEMENT AS TO WHY THIS CASE RAISES AN ISSUE OF CONSTITUTIONAL LAW AS WELL AS AN ISSUE OF PUBLIC OR GREAT GENERAL INTEREST.” In explaining why she should be granted leave to appeal, Ms. Huffman emphasized the constitutional aspect of her argument. But she concluded her memorandum without specifying what type of appeal she is seeking.

S.Ct. Prac. R. 2.2., entitled “*Institution of Appeal from Court of Appeals*,” provides that the notice of appeal shall state that one or more of the following are applicable: the case raises a substantial constitutional question; or, the case is one of public or great general interest. Ms. Huffman’s notice of appeal merely states: “This appeal involves a case of public or great general interest.” Therefore, despite the references in Ms. Huffman’s memorandum to a constitutional

issue, the notice of appeal establishes its essential nature as discretionary.

The subject matter of this appeal concerns a notorious pain management clinic in Portsmouth, Ohio. Multiple deaths by overdose were directly linked to this “pill mill” before the U.S. Attorney indicted the owner of the clinic, Appellant, Denise Huffman, d/b/a Tri-State Health Care and the doctor, Paul Volkman.¹ Appellee, Paula Eastley, Administrator the Estate of Steven Hieneman and mother of an overdose victim, brought a wrongful death action. The claim against the physician was based on professional negligence. However, the mother sought, and the jury returned, a verdict against Ms. Huffman based on an independent claim for ordinary negligence.

The widespread significance of this subject, itself, is beyond dispute, and Scioto County is at the epicenter of this contagion. The problem with Ms. Huffman’s request for an appeal, however, is that she will not help anyone other than herself if she succeeds. In other words, her appeal does not involve an issue of public or great general interest. She complains that the justice system is imperiled by the holding of the dissenting judge. That is not true. The Supreme Court’s caseload statistics for appellate courts in 2009 show that the Fourth Appellate District handled 56 out of a total of 2330 civil appeals state-wide. With a 4-judge court, the dissenting judge would be involved in less than 2% of all appeals heard in Ohio. Of that amount, very cases would involve challenges to jury verdicts based upon the manifest weight of the evidence.

The Ohio Constitution also provides that: “In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or

¹*The Columbus Dispatch*, May 11, 2011. On May 9, 2011, Dr. Volkman was found guilty by a federal jury in Cincinnati of 12 counts of unlawful distribution of a controlled substance. Four of those counts involved deaths.

reverse the judgment of the court of appeals.” Art. IV, §§ 2 and 6, Ohio Constitution. Upon the filing of a motion to certify, the Supreme Court must, except in the instances specially enumerated, first find that the case is one of great public or general interest before certification is authorized. If the case is not one of great public or general interest, then the judgment of the Court of Appeals, even if erroneous, is final and not subject to review. See *State ex rel. Faber, Rec'r, v. Jones et al., Judges*, 95 Ohio St. 357, at pages 365 and 366, 116 N.E. 456. *Kern v. Contract Cartage Co.*, 55 Ohio App. 481.

Ms. Huffman complains about an injustice. It appears that she is trying to move on with her life. She cut a deal with the Federal prosecutors to reduce her charges by testifying against Dr. Volkman at his trial. The Scioto County Clerk of Courts' website does not disclose any other lawsuits of a similar nature pending against her. All she needs to do now is overturn the civil judgment entered against her in this case. The fatal problem with this appeal, however, is that the lower appellate court's decision is final, even if in error, unless Ms. Huffman can show that relief would benefit someone other than herself. This she cannot do. Accordingly, it must be concluded that Ms. Huffman is merely pursuing the self-interested goal of obtaining relief from the decision entered against her in the lower court. Therefore, this Court should not exercise its discretion to grant jurisdiction to hear this case.

STATEMENT OF THE CASE AND FACTS

FOREWORD

The tort claims in this case were consolidated by the lower courts with a declaratory judgment action concerning the liability coverage available to Ms. Huffman. The trial court found that State Farm Fire and Casualty Company had an obligation to indemnify Ms. Huffman in this matter under her business liability policy. On appeal, the fourth district court combined that action (Case No. 09-CA-3309) with this matter (Case No. 09-CA-3308) and issued a single decision and judgment entry under both case numbers. The court of appeals affirmed the judgment on the jury verdict against Ms. Huffman but it reversed the judgment that required State Farm to cover Ms. Huffman's liability. Ironically, both parties again filed sequentially numbered notices of appeal. Apart from a few minor emendations and some abridgments concerning the insurance coverage, what follows is virtually the same statement of the case and facts which Ms. Eastley presented in her memorandum in support of jurisdiction in Case No. 11-0605. Ms. Eastley represents that said assemblage still represents her best effort at apprising the Court of the pertinent facts concerning this singular matter.

1. Prologue.

Denise Huffman achieved a sort of awful greatness during her brief reign as the head of the nation's most prolific pill mill. In 2004, Ms. Huffman's pain clinic in Portsmouth was the largest single practitioner-purchaser of Oxycodone in the United States.² Ms. Huffman quickly amassed other top rankings, including the most overdose deaths associated with a single pill mill,

²Extensive background information concerning Denise Huffman and the pain clinic she operated in Portsmouth with Dr. Paul Volkman is reported in the opinion of the Federal Court of Appeals for the Sixth Circuit Court of Appeals in *Volkman v. United States Drug Enforcement Agency*, 567 F.3d 215 (6th Cir. 2009), wherein Dr. Volkman unsuccessfully contested the DEA's denial of his application for a federal registration to dispense controlled substances.

(Nine deaths from overdoses directly associated with the Portsmouth clinic with a total of 13 deaths associated overall during a 22-month period);³ losing track of over one million Percocet tablets that passed through the clinic in a single year (“According to the DEA, the clinic could not account for over one million products or tablets of the audited controlled substances.”);⁴ and, she was the first owner of a pill mill to be indicted on criminal charges for the death of a patient.

2. The Beginning.

There was nothing about Denise Huffman’s background that suggested she would achieve such infamy as the proprietor of a pain management clinic.⁵ Ms. Huffman lacked any formal education or training in the operation of a medical clinic, or in anything else for that matter. She had dropped out of school after the eighth grade. As an adult, she obtained her GED but failed to finish a short training course in medical office procedures. Ms. Huffman eventually worked for about eighteen months in a doctor’s office where she learned some basic tasks such as patient reception, answering phones, record keeping, and charting. Later on, Ms. Huffman became privy to an insider’s knowledge about the pain clinic business after she befriended the owners of a pain clinic she patronized in Kentucky.

In 2001, Ms. Huffman opened a pain clinic in South Shore, Kentucky. She operated her clinic as a purported sole proprietor under the name “Tri-State Health Care.” (She never bothered to submit that name to the Ohio Secretary of State for approval as a formal business filing.) The business got off to a slow start, however, and Ms. Huffman soon began to look north of the Ohio River for less-saturated markets. As it happened, a medical doctor from Chicago named Paul

³Volkman v. United States Drug Enforcement Agency, 567 F.3d 215 (6th Cir. 2009).

⁴*Id.*, at 218.

⁵Portsmouth Daily Times, March 8, 2011. Last fall, Denise Huffman pled guilty in the federal district court in Cincinnati to criminal charges stemming from her clinic and agreed to cooperate in the prosecution of Dr. Volkman prior to her sentencing. Dr. Volkman’s trial commenced March 1, 2011.

Volkman was exploring the same idea. By 2003, after large medical malpractice settlements and judgments left him unable to purchase malpractice insurance, Dr. Volkman needed to find a practice where his lack of coverage would not be a hindrance.

3. The Setup.

Dr. Volkman found that place with Ms. Huffman. In 2003, Ms. Huffman moved her clinic to Portsmouth and entered into an association with Dr. Volkman. The combination of Denise Huffman and Dr. Volkman proved to have its own synergistic effect in producing a thriving business at the clinic. Ms. Huffman offered only one service at her clinic—the treatment of chronic pain with controlled substances and other scheduled drugs. Dr. Volkman immediately ramped up the business by obtaining a permit from the State pharmacy board which allowed Tri-State to buy controlled substances from suppliers and dispense them directly to its patients.⁶ The volume of business at the clinic exploded after they obtained the distribution license. “During the last six months of 2003, Tri-State purchased more than twenty-eight times the amount of Oxycodone purchased by the next largest Ohio-based practitioner.”⁷

Ms. Huffman specifically targeted her clinic’s services to rural customers. She followed a lean but strikingly effective business model in her operation of the clinic. A staffing company supplied her with physicians. Ms. Huffman never entered into any written agreements with the doctors, and she always paid them in cash. Ms. Huffman installed her daughter in the critical post of office manager and hired other relatives to fill the remaining positions.⁸

Ms. Huffman did not allow scheduled appointments and she did not accept insurance. Ms. Huffman operated the clinic as a walk-in facility that provided pain control services on a

⁶*Volkman v. United States Drug Enforcement Agency*, 567 F.3d 215, 217 (6th Cir. 2009).

⁷*Id.*, pp. 217-218.

⁸The daughter, Alice Huffman Ball, entered a guilty plea in the criminal case and had her sentencing postponed pending performance of her agreement to cooperate with the prosecution in Dr. Volkman’s trial.

strict “full-cash” basis. The doctors at her clinic were engaged for the sole purpose of prescribing controlled substances to the patients who presented themselves at the clinic. They did not provide any other forms of treatment, and none of them had local hospital privileges.

Ms. Huffman described her business as a facility that housed medical offices and offered medical services provided by doctors. She acted as the business administrator for the clinic. She maintained the patient’s medical records, collected payments from the patients, and paid the bills. Ms. Huffman admitted that she did not exercise any supervision, control or direction over the activities of the doctors who provided treatment at her clinic. Ms. Huffman operated the business and controlled which patients were granted access to the physicians. In particular, Ms. Huffman did not provide any record of the types or amounts of controlled substances prescribed to the patients, or keep accurate inventories and dispensing logs. She did not acknowledge, much less follow, any standards and procedures for the operation of a pain management clinic. In fact, the Ohio State Pharmacy Board determined that in 2004 Ms. Huffman failed to keep any records whatsoever for the entire year.

4. A Death by Overdose.

On April 20, 2005, a long-term customer of Ms. Huffman’s clinic named Steven Hieneman died from the acute combined effects of Oxycodone, Diazepam and Alprazolam.⁹ Dr. Volkman had prescribed those drugs to the decedent on the day before his death. An expert witness testified at trial that Volkman had prescribed a lethal combination of drugs to the decedent.¹⁰ That doctor reiterated that “*** had [the Decedent] taken [the drugs] as prescribed with his opiate receptors having been reset, that would have certainly been enough to cause his death.”

⁹Better known by the brand names Percocet, Valium, and Xanax.

¹⁰The combined potency produced by these drugs is greater than the sum of their individual effects.

The Decedent manifested learning and behavioral problems at a young age and was later diagnosed as being bipolar. He was held back a grade in primary school and was enrolled in a learning disability program. The Decedent dropped out of school in the 11th grade. When Mrs. Eastley found out that the Decedent was getting the drugs through Tri-State she contacted the pain clinic and spoke to Ms. Huffman. Mrs. Eastley asked Ms. Huffman to tell the doctor to stop seeing her son. Ms. Huffman hung up on her. Mrs. Eastley persisted and told Ms. Huffman that her son was bipolar and that the clinic should stop prescribing narcotics. Ms. Huffman replied to the effect that it was none of her business and that her son was a grown man who could make his own decisions. Mrs. Eastley even went to the pain clinic and tried to speak with Dr. Volkman, but he just told her to get away from him.

Ms. Huffman admitted that she personally knew the Decedent and had talked to him “quite a bit.” She had also seen his medical chart maintained at the pain clinic. The Decedent’s medical records revealed that he was mentally ill and are replete with instances of abusing controlled substances, overdosing, and narcotic addiction. On May 29, 2003, the Decedent contacted Ms. Huffman’s clinic and confessed to taking narcotic drugs at more than twice the prescribed dose and confessed that he had consequently run out of the medication. He wanted Tri-State to give him more drugs until his next appointment with Dr. Volkman. Ms. Huffman’s clinic promptly increased the Decedent’s supply of narcotics (Percocet) in order “to accommodate [patient].”

5. Civil Action.

On August 16, 2005, Mrs. Eastley filed a complaint for wrongful death against Dr. Volkman and Tri-State. In the amended complaint, Mrs. Eastley alleged that Ms. Huffman

operated Tri-State as a business where patrons could obtain and fill prescriptions for narcotics. Mrs. Eastley claimed that Ms. Huffman negligently operated her business by failing to exercise ordinary care for the safety of her invitees.

On September 20, 2007, State Farm filed its intervening complaint seeking a declaratory judgment as to whether it owed a defense and/or indemnification to Ms. Huffman under a business liability policy which it had issued to her for the claims asserted by Mrs. Eastley.

On February 25, 2008, the trial court filed an order granting the bifurcation of State Farm's declaratory judgment claim from the underlying action. The lower court also ordered that the motion to stay be held in abeyance until the resolution of the tort claims.

The parties commenced a jury trial on February 4, 2008. A jury returned verdicts in favor of the Decedent's estate as against Ms. Huffman and Dr. Volkman on separate claims of general and professional negligence. The jurors answered an interrogatory in which they expressly found that Ms. Huffman acted negligently and that her negligence was a proximate cause of the decedent's death.

ARGUMENT IN SUPPORT OF APPELLEE'S POSITION
REGARDING APPELLANT'S PROPOSITION OF LAW

Appellant's Proposition of Law No. 1:

“A party is not required to file a motion for a directed verdict, a motion notwithstanding the verdict and/or a motion for a new trial as a pre-requisite to asserting an assignment of error on appeal that a civil jury's verdict was against the manifest weight of the evidence.”

Ms. Huffman's complaints constitute much ado about nothing. The Dissent found that Ms. Huffman failed to renew her motion for a directed verdict at the close of all evidence. She further failed to file motions for a judgment notwithstanding the verdict or a new trial. As a result, the Dissent found that Ms. Huffman was limited to plain error on that assignment. Contrary to Ms. Huffman's arguments in her memorandum, the Dissent expressly applied a substantive review under the plain error standard. (See, Decision and Judgment Entry, at ¶61, ¶62, and ¶63.)

Moreover, the Dissent's affirmance of the jury's verdict is supported by the evidence. Mrs. Eastley's claim for general negligence against Ms. Huffman arises from her commercial activities in operating the business. Ms. Huffman operated a business where she functioned as an intermediary between patients and their doctor for the purpose of selling prescriptions for pain medicine. As a business owner she owed her patrons a duty to use ordinary care to insure that the invitee is not unnecessarily exposed to anything that threatens the invitee with an unreasonable risk of harm and to take reasonable precautions to protect patrons from dangers which are foreseeable from the arrangement or use of the business, including the conduct of a third party that endangers the safety of the invitee. Although these rules are commonly utilized in assessing premises liability, it is applicable to any “negligent activities” of the business owner.

A business owner may be held liable for injuries to its invitees caused by the negligent

performance of its commercial activities. See, for example, *Hayes v. Goldstein* (1997), 120 Ohio App.3d 116, 119 (discretionary appeal not allowed in (1997), 79 Ohio St.3d 1490); *Strayer v. Lindeman* (1981), 68 Ohio St.2d 32, 36, (in the context of non-delegable duties). In *Buckeye Ranch, Inc. v. Northfield Insurance Company*, 2005-Ohio-5316, a residential treatment facility for youths was found to be liable for assigning a boy to room with an older, larger and aggressive roommate who injured the weaker boy. In the context of resolving insurance coverage for the incident, the Court described the actionable conduct simply as “making a room assignment [which] was a generic, administrative decision.” *Id.*, at ¶47.

The distinction between the commercial activities of a business and professional services rendered on behalf of the business is particularly relevant to claims involving medical clinics. Professional acts and services are distinguished from commercial activity, which describes the business part of a practice that supplies professional services. Commercial activities would include such tasks as securing office space, hiring staff, paying bills, and collecting on accounts receivable. *Visiting Nurse Assn. v. St. Paul Fire and Marine Ins.* (3rd Cir.1995), 65 F.3d 1097, 1101. *Williams v. Crawford* (Ohio App. 8 Dist.), 2000 WL 1594114, at *4. (Emphasis added.)

In this case, the evidence showed that Ms. Huffman only operated the business part of the practice and did not provide any medical services to her patrons. She rented the office space, she hired the staff, including the physicians, she ordered the supplies, she paid the bills, and she collected the payments owed by the patients. Ms. Huffman’s commercial activities in running the business were completely separate from Dr. Volkman’s professional services and they provide the basis of the general negligence claim asserted against her.

Ms. Huffman’s liability stems from her generic, administrative decisions in operating the clinic. She neglected to provide utilization reviews, quality assurance performance or quality

standards, and internal review procedures. She failed to provide effective controls or oversight over the prescriptions for narcotics. She further possessed and maintained medical records which revealed the Decedent's mental illness and his struggles with drug abuse and addiction, and she had condoned the Decedent's misuse of narcotics in excess of the prescribed amounts and facilitated his access to more dangerous drugs. Under the totality of these circumstances an ordinarily careful and reasonable business owner should have foreseen that continuing to provide the Decedent with access to dangerous drugs without exercising any administrative oversight of the program was likely to injure him.

Negligent acts and omissions in a healthcare facility's intake procedures, patient assessment, environmental placement and lack of protective safeguards can constitute an independent tort and does not equate to the rendering of medical services. *United States Fid. & Guar. Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45, 57. Antecedent or concurrent commercial activity that arguably contributed to a loss (e.g., hiring, supervising, etc.) may constitute an independent tort claim. *Id.*

The record demonstrates that Hieneman had a drug problem, that Huffman was aware of Hieneman's drug problem, that Paul Eastley begged Huffman to stop supplying drugs to her son, and that these requests were ignored. Dr. Volkman was prescribing dangerous levels of narcotics to Hieneman with absolutely no oversight by the clinic. The Decedent's death resulted from his repeated exposure to harmful conditions created by Ms Huffman's commercial activities. he Decedent had a documented history of consuming narcotics in excess of the prescribed amount. Ms. Huffman facilitated that abuse by selling him more drugs whenever he ran out. Given the Decedent's history and problems, and the lack of ordinary care on the part of Ms. Huffman in supplying, documenting, and controlling the Decedent's use of narcotics, it was foreseeable that

providing access to vast amounts of the most powerful and dangerous narcotics manufactured without even a pretense of effective control or oversight was likely to injure him. That is, the Decedent would overdose or otherwise suffer harm from the medication regimen provided to him by Ms. Huffman. In view of these facts, the dissent's refusal to overrule the jury and find plain error does not merit a discretionary appeal.

Furthermore, refusing to accept jurisdiction does not constitute approval of the dissent's holding. It is commonly asserted that the overruling of such motion amounts to a determination by the Supreme Court that the judgment of the Court of Appeals is not erroneous. But this is not necessarily so, due to the constitutional provision which makes the judgment of the Court of Appeals final except in certain cases specifically pointed out by the Constitution. "The overruling of a motion to certify the record by the Supreme Court does not constitute an affirmance of the decision of the Court of Appeals, but amounts only to a determination that the case presented is not one of public or great general interest." *Kern v. Contract Cartage Co.*, 55 Ohio App. 481 (Ohio App. 1936), at syllabus paragraph two. "It has always been the law of Ohio that: ' * * * [T]he refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an adjudication of the question by this court as an established precedent for future cases.' Moreover, this is a nearly universal rule and is applied with equal force by the *Supreme Court of the United States*. *United States v. Carver* (1923), 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361." *City Of Rocky River v. State Employment Relations Board* (1989), 41 Ohio St.3d 602, 609-610.

CONCLUSION

For the reasons discussed above, this case does not involve any matters of public or great general interest. Thus, appellee urges this Court to decline jurisdiction to hear this case and refuse the appeal.

Respectfully submitted,

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Certificate of Service

I certify that true copies of this Memorandum in Support of Jurisdiction were sent by ordinary U.S. mail to Mark H. Gams and M. Jason Founds, Gallagher, Gams, Pryor, Tallan & Littrell LLP, Counsel for Denise Huffman, dba Tri-State Health Care, 471 East Broad Street, 19th Floor, Columbus, Ohio 43215, and James L. Mann, Mann & Preston LLP, Co-Counsel for Denise Huffman, dba Tri-State Health Care, 18 E. Second Street, Chillicothe, Ohio 45601, on this 16 day of May 2011.

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