

RECORD NO.

11-1457

IN THE OHIO SUPREME COURT

RENE MAYS, Individually and as
Fiduciary of the Estate of Galon Howard,
Deceased, et al.,

Plaintiff-Appellant,

-vs-

TOLEDO HOSPITAL, et al.,

and

Mercy St. Anne's Hospital, et al.

Defendants-Appellees.

Case No. CI0201102848
Court of Appeals No. 11-1145

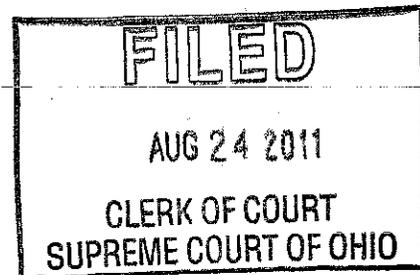
APPELLANT RENE MAYS MOTION FOR JUDICIAL NOTICE

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Rene Mays
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Appellant-Pro-se

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Toledo, Ohio 43604

Counsel for Appellee,
Mercy St. Anne's Hospital



Now comes Appellant, Rene Mays pursuant to S.Ct. R. 14.4(A) and Ohio Evidence Rule 201(D), respectfully request that this Court take judicial notice of the fact that Appellant has attached medical records from Toledo Hospital and Mercy St. Anne Hospital to her Complaint and that she has attached to her notice of appeal a July 27, 2011, dismissal order which is a final appealable order under R.C. 2505.02. The basis for this motion is set forth more fully in the following memorandum.

Respectfully submitted,


Rene Mays
328 E. Central Avenue
Toledo, OH 43608
Telephone: (419) 727-3538

Plaintiff-Appellant-pro-se

MEMORANDUM IN SUPPORT

Appellant, Rene Mays, filed a pro se application to take judicial notice of the attached medical records from Toledo Hospital and Mercy St. Anne Hospital that she had attached to her Complaint, in which the trial court denied all other pending motions including her application to take judicial notice as moot by Opinion and Judgment Entry journalized on July 27, 2011. (a copy of that Order is attached hereto as Exhibit 2 for this Court's review). Appellant also filed a renewed motion for judicial notice on July 21, 2011, which was included in her renewed motion for summary judgment on the issue of liability at page 11, in which the trial court denied all other pending motions including her application for her renewed motion for summary judgment on the issue of liability as moot by Opinion and Judgment Entry journalized on July 27, 2011.

Appellant also filed a timely pro se application for reconsideration of the Court of Appeals decision and judgment, journalized on July 20, 2011, in which it dismissed her

appeal for lack of a final appealable order. Also Appellant filed an amended notice of appeal on July 28, 2011, without leave of court, and an amended motion for reconsideration on August 2, 2011.

By the Court of Appeals decision and judgment, journalized on August 18, 2011, it struck from the record appellant's amended notice of appeal and the amended motion for reconsideration but treated appellant's July 29, 2011 motion for stay of the appellate court's July 20, 2011 Judgment pending amended notice of appeal and motion to vacate filed in the trial court on July 28, 2011 as a timely motion for reconsideration. (A copy of that Decision and Judgment is attached hereto as Exhibit 8 for this Court's review).

By the same decision and judgment, journalized on August 18, 2011, the Court of Appeals denied the said motion that it had previously treated as a timely motion for reconsideration. As such, Appellant respectfully request that this Court take judicial notice of the fact that Appellant has attached medical records from Toledo Hospital and Mercy St. Anne Hospital to her Complaint and that she has attached to her notice of appeal a July 27, 2011, dismissal order which is a final appealable order under R.C. 2505.02.

Ohio Evidence Rule 201(D) provides as follows;

(D) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

In this case, the Appellant has asked that the trial court and that this Court take ~~judicial notice of the fact that Appellant has attached medical records from Toledo Hospital and Mercy St. Anne Hospital to her Complaint and that she has attached to her notice of appeal filed in this Court a July 27, 2011, dismissal order which is a final~~

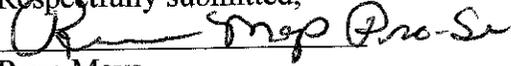
appealable order under R.C. 2505.02. Therefore, the Appellant has requested and supplied the Court with the necessary information. As such, this Court should follow Ohio Evidence Rule 201(D) and take judicial notice of the fact that Appellant has attached medical records from Toledo Hospital and Mercy St. Anne Hospital to her Complaint and that she has attached to her said notice of appeal a July 27, 2011, dismissal order which is a final appealable order under R.C. 2505.02.

Appellant notes that her medical malpractice complaint was dismissed by the trial court on July 27, 2011, without prejudice subsequent to the Court of Appeals July 20, 2011 dismissal. Appellant asserts that this transformed the interlocutory judgment into a final appealable order under R.C. 2505.02. To the extent Appellant moves this Court to determine and conclude that the trial court's judgment dismissing appellant's medical malpractice complaint without prejudice constitutes a final appealable order under R.C. 2505.02. See, e.g., *Hughley v. Southeastern Correctional Inst.*, 8th Dist. No. 10CA43, 2010-Ohio-5497, ¶ 46-47. Accordingly, the Appellant asks this Court to construe this motion as a motion for judicial notice. Therefore, the Appellant moves this Court to take judicial notice of the fact that Appellant has attached medical records from Toledo Hospital and Mercy St. Anne Hospital to her Complaint and that she has attached to her notice of appeal a July 27, 2011, dismissal order which is a final appealable order under R.C. 2505.02.

WHEREFORE, Appellant respectfully moves this Court to take judicial notice of the fact that Appellant has attached medical records from Toledo Hospital and Mercy St. Anne Hospital to her Complaint and that she has attached to her said notice of appeal a July 27, 2011, dismissal order which is a final appealable order under R.C. 2505.02, on

the grounds that the Appellant has requested and supplied the Court with the necessary information pursuant to Ohio Evidence Rule 201(D). An Order is respectfully requested.

Respectfully submitted,



Rene Mays
328 E. Central Avenue
Toledo, OH 43608
Telephone: (419) 727-3538

Plaintiff-Appellant-pro-se

PROOF OF SERVICE

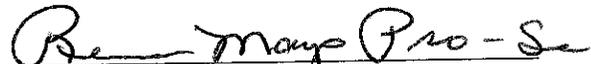
This is to certify that a copy of the foregoing of Rene Mays was sent via ordinary U.S. Mail or via facsimile this 22nd day of August, 2011 to:

Kristen A. Connelly, Esq.
Elizabeth E. Baer, Esq.
Stephen A. Skiver & Associates, LLC
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Toledo, Ohio 43604

Counsel for Defendant,
Mercy St. Anne's Hospital

Dated: 08/22/2011


Plaintiff-Appellant-pro-se

FILED
LUCAS COUNTY

2011 JUL 27 P 1:26

2011 JUL 27 P 1:26

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Rene Mays, Individually and as Fiduciary of
the Estate of Galon Howard, Deceased, et al.,

Case No. CI11-2848

Plaintiffs,

Judge James D. Bates

vs.

Toledo Hospital, et al.,

OPINION AND JUDGMENT ENTRY

Defendants.

* * * * *

This matter is before the court on the motions to dismiss filed by defendants, Toledo Hospital and Mercy St. Anne Hospital (hereinafter "defendants"). Upon a review of the parties' memoranda, the relevant evidence, and the applicable law, the court finds the motions well-taken.

STATEMENT OF FACTS

On April 19, 2011, Rene Mays filed a Complaint For Medical Negligence; Respondeat

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JUL 27 2011

APPELLANT'S
EXHIBIT 2

Superior; Wrongful Death Claims With, [sic] Jury Demand Endorsed Thereon Pursuant To R.C. 2305.113(V) and R.C. 2125.02(D)(1) against "Toledo Hospital, et al." and "Mercy St. Anne's Hospital, et al." Paragraph 9 of the complaint explained that the plaintiff was "Rene Mays the Medical Power of Attorney ("POA") or personal representative of the decedent Galon Howard and for the exclusive benefit of Galon Howard's surviving next of kin, who is his mother Adlean Howard
***."

On May 26, 2011, Toledo Hospital filed its motion to dismiss. Mercy St. Anne Hospital filed its own motion to dismiss on June 1, 2011.

Then, on June 8, 2011, Ms. Mays, individually and as fiduciary of the estate of Galon Howard (hereinafter "decedent"), filed a Rule 15(A) Amended Complaint for Medical Malpractice and Wrongful Death With Jury Demand Endorsed Hereon.

The defendants' motions to dismiss have been fully briefed and are decisional.

LAW AND APPLICABLE DISCUSSION

When ruling on a motion to dismiss, this court must presume all factual allegations in the complaint are true and make all reasonable inferences in favor of the nonmovant. Mitchell v. Lawson Milk Company (1988), 40 Ohio St.3d 190, 192. The motion will only be granted if it appears beyond a doubt that plaintiff can prove no set of facts which would entitle plaintiff to relief.
Id.

Both defendants argue that the claims of any plaintiff, other than Rene Mays' personal claims, must be dismissed based upon R.C. 4705.01, which states in relevant part that "[n]o person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any

action or proceeding in which the person is not a party concerned, either by using or subscribing the person's own name, or the name of another person, unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules." This rule prohibits a person who is not an attorney from representing any person other than him or herself. Tubalcain Trust v. Cornerstone Constr., Inc. (May 26, 1994), 10th Dist. No. 93APE12-1701. This includes banning an administrator of an estate from representing the estate when there are beneficiaries other than the administrator. Heath v. Teich, 10th Dist. No. 06AP-1018, 2007-Ohio-2529.

The amended complaint alleges a wrongful death claim and a survival claim based upon defendants' alleged medical negligence. These claims must be brought by the personal representative of the decedent. Peters v. Columbus Steel Castings Co., 115 Ohio St.3d 134, 2007-Ohio-4787; R.C. 2125.02. Although Ms. Mays is the personal representative, and thus is the proper party to bring these claims, she is merely a nominal party, not the real party in interest. In the case of the wrongful death action, Ms. Mays is acting on behalf of the statutory next of kin.¹ Decedent's next of kin include persons other than Ms. Mays. With respect to the survivorship action, Ms. Mays is representing decedent's estate, the beneficiaries of which include persons other than Ms. Mays. Peters, at ¶10. In both counts, Ms. Mays is acting for the benefit of persons other than herself, and therefore she is prohibited from bringing either action pro se. See, e.g., Heath, at ¶11. Further, the amended complaint does not state any claims that Ms. Mays may have individually. Accordingly,

¹ R.C. 2125.02(A)(1) states "a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent."

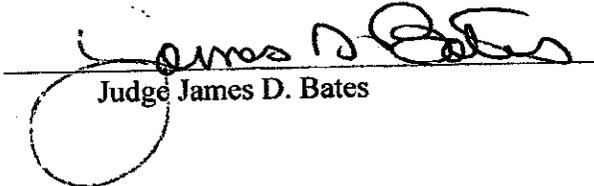
this court finds defendants' motions to dismiss well-taken.² Furthermore, the court finds all other motions pending in this case to be moot and therefore denied.

JUDGMENT ENTRY

It is **ORDERED, ADJUDGED, AND DECREED** that the motions to dismiss filed by defendants, Toledo Hospital and Mercy St. Anne Hospital, are hereby **GRANTED**.

It is further **ORDERED, ADJUDGED, AND DECREED** that Ms. Mays' amended complaint is hereby **DISMISSED** without prejudice.

July 26, 2011



Judge James D. Bates

cc: Rene Mays
Elizabeth E. Baer, Esq.
Peter N. Lavalette, Esq.

² In addition to the above, the court notes that Ms. Mays has not provided an affidavit of merit, as mandated by Civ.R. 10(D)(2). This also requires the court to dismiss the complaint. An affidavit of merit will be necessary if Ms. Mays refiles her complaint.

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COURT OF APPEALS
2011 AUG 18 P 1:11

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rene Mays, Individually and as
Fiduciary of the Estate of
Galon Howard, Deceased, et al.

Court of Appeals No. L-11-1145

Trial Court No. CI0201102848

Appellant

v.

Toledo Hospital, et al.

DECISION AND JUDGMENT

Appellees

Decided: **AUG 18 2011**

Appellant, Rene Mays, filed a timely pro se application for reconsideration¹ of this court's decision and judgment, journalized on July 20, 2011, in which we dismissed her appeal for lack of a final appealable order.

Additional Miscellaneous Filings

Appellant also filed an amended notice of appeal on July 28, 2011, without leave of court, and an amended motion for reconsideration on August 2, 2011. Because the

¹The court will treat appellant's July 29, 2011 "Ohio Civil Rule 62(A) Motion for Stay of the [Appellate] Court's July 20, 2011 Judgment Pending Amended Notice of Appeal and Motion to Vacate Filed in the Trial Court on July 28, 2011" as a timely motion for reconsideration.

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AUG 18 2011

APPELLANT'S
EXHIBIT 8

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amended notice of appeal was filed without leave of court and was filed after this court issued its July 21 dismissal, the July 28 amended notice of appeal is stricken from the record. See App.R. 3(F) and 6th Dist.Loc.App.R. 3(A)(2). Also, App.R. 26 does not provide for the filing of an amended motion for reconsideration. Therefore, the August 1 amended motion for reconsideration is also stricken from the record.

Reconsideration Test

In ruling on a motion to reconsider, this court follows *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, where paragraph two of the syllabus states:

"The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (App.R. 26, construed.)"

Appellant notes that her medical malpractice complaint was dismissed by the trial court on July 27, 2011, without prejudice subsequent to this court's July 20, 2011 dismissal. Appellant argues that this transformed the interlocutory judgment into a final appealable order. However, when this court dismissed appellant's appeal on July 20, 2011, the underlying matter was still pending before the trial court. Therefore, the July 20, 2011 dismissal was proper, and appellant has not called to the attention of the court an obvious error in its decision or raised an issue for consideration that was either

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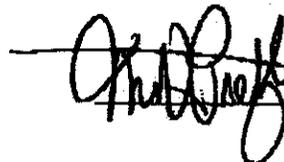
not considered at all or was not fully considered by the court when it should have been.²

All pending motions are denied as moot. The motion to reconsider is denied.

Mark L. Pietrykowski, J.

Thomas J. Osowik, P.J.

Stephen A. Yarbrough, J.
CONCUR.



JUDGE



JUDGE



JUDGE

²This court makes no finding as to whether the July 27, 2011 judgment by the trial court dismissing appellant's medical malpractice complaint *without prejudice* constitutes a final appealable order under R.C. 2505.02. See, e.g., *Hughley v. Southeastern Correctional Inst.*, 8th Dist. No. 10CA43, 2010-Ohio-5497, ¶ 46-47.