

ORIGINAL

RECORD NO. 2011-1457

IN THE OHIO SUPREME COURT

RENE MAYS, Individually and as	:	Case No. CI0201102848
Fiduciary of the Estate of Galon Howard,	:	Court of Appeals No. 11-1145
Deceased, et al.,	:	
	:	
Plaintiff-Appellant,	:	
	:	
-vs-	:	
	:	
TOLEDO HOSPITAL, et al.,	:	
	:	
and	:	
	:	
Mercy St. Anne's Hospital, et al.	:	
	:	
Defendants-Appellees.	:	

APPELLANT RENE MAYS MOTION TO VACATE THE TRIAL COURT'S  
OPINION AND JUDGMENT OF JULY 27, 2011

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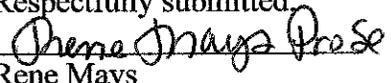
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SUPREME COURT OF OHIO

Now comes Appellant Rene Mays, pro-se pursuant to S.Ct. R. 14.4(A) and Ohio Civil Rule 60(B)(1) through (5) and respectfully requests that this Honorable Court vacate or set aside the trial court's final opinion and judgment dated July 27, 2011. The trial court improperly dismissed the Appellant's Amended Complaint without prejudice as to her, and improperly denied all other motions pending in the underlying case as moot, because the trial court had subject matter over Appellant's Amended Complaint regarding her personal claims *only* which were filed pro-se pursuant to R.C. 4705.01, the Appellant is legally entitled to relief from the trial court's clearly erroneous and unlawful judgment dated July 27, 2011 under one or more of the grounds enumerated in Ohio Civil Rule 60(B)(1) through (5). The basis for this motion is set forth more fully in the following memorandum.

Respectfully submitted,

  
Rene Mays

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Plaintiff-Appellant-pro-se

### **MEMORANDUM IN SUPPORT**

#### **I. BACKGROUND**

Rene Mays ("Appellant") filed an original pro-se medical malpractice complaint on April 19, 2011 in the trial court. At paragraph 32(e) of the original complaint explained that the plaintiff Rene Mays is "the next of kin ..."

On May 26, 2011, Toledo Hospital filed its motion to dismiss as to the original complaint. Mercy St. Anne Hospital filed its own motion to dismiss on June 1, 2011, which was construed as a motion for summary judgment as to the original complaint by

the court of appeals. It had come to Appellant's attention that she was prohibited from bringing any claim for another person other than herself or an estate in the Lucas County Court of Common Pleas.

Then, on June 8, 2011, Rene 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, paragraph two the Amended Complaint explained that the appellant "Rene Mays is the personal representative of the decedent Galon Howard..." Appellant Rene Mays corrected complaint brought the claims pro se for the benefit of herself, the Estate of the decedent for herself, pursuant R.C. §2305.113 (B) (medical claim) and R.C. §2125.02 (wrongful death). In addition, based upon R.C. §2305.113 (B), the Appellant had standing to recover for her own alleged damages pursuant to *Hosfelt v. Miller*, 7<sup>th</sup> Dist. No. 97-JE-50, 2000-Ohio-2619; *Williams v. Griffith*, 10<sup>th</sup> Dist. No. 09AP-28, 2009-Ohio-4045 as she was allowed to bring those claims for herself and on behalf of the estate for herself pro se.

On June 15, 2011, appellant filed a pro se notice of appeal from the June 7, 2011 judgment of the Lucas County Court of Common Pleas, which denied appellant's second motion for an extension of time to file an affidavit of merit in the Sixth District Court of Appeals pursuant to the provisions contained in R.C. 2505.02(B)(4).. On July 20, 2011, the Court of Appeals issued a decision and judgment with a mandate, in which it dismissed Appellant's appeal for lack of a final appealable order, ordered appellant to pay costs of the appeal pursuant to App. R. 24, and denied as moot all pending motions. The trial court granted Mercy St. Anne Hospital and Toledo Hospital's motions to dismiss

based of their argument that the claims of any plaintiff, other than Rene Mays' personal claims, must be dismissed based upon R.C. 4705.01 on July 27, 2011. On July 28, 2011, Appellant filed a motion to vacate or to set aside the trial court's judgment granting Mercy St. Anne Hospital and Toledo Hospital's motions to dismiss. Subsequently, on August 11, 2011, the trial court issued an Order denying Appellant's July 28, 2011 motion.

On July 29, 2011, Appellant filed an 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 in the Court of Appeals. In that Rule 62(A) motion Appellant claimed that the trial court's July 27, 2011 judgment which dismissed without prejudice her pro-se medical malpractice complaint transformed the interlocutory judgment into a final appealable order. Further Appellant claimed that the trial court's June 7, 2011 judgment denying appellant's second motion for extension of time to file her Civ. R. 10(D) affidavit of merit fell within the meaning of R.C. 2505.02(B)(4).

Subsequently, on August 18, 2011, the Court of Appeals issued a Judgment denying Appellant's July 29, 2011 motion that it had treated as a timely motion for reconsideration. In that judgment the Court of Appeals determined in a footnote (see footnote #2) that it made 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.

On August 24, 2011, the Appellant filed a timely notice of appeal from the Court of Appeals decision that it had treated as a timely motion for reconsideration in this Court

and a memorandum in support of this Court's jurisdiction over this appeal. On August 30, 2011, the Appellant filed a timely notice of appeal from 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.

## II. LAW AND ARGUMENT

Because granting a motion to dismiss results in a determination on the merits at an early stage of a plaintiff's case, the trial court "must take all well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings the plaintiff may be entitled to relief." *Colburn v. Upper Darby Twp.*, 838 F. 2d 663, 665-66 (3d Cir. 1988) (citations and internal quotations omitted).

In Count I, Appellant is acting for the benefit for herself and is therefore allowed to bring the wrongful death claim and survival claim based upon defendants' alleged medical negligence as the personal representative of the decedent. See, e.g., *Hosfelt v. Miller*, 7<sup>th</sup> Dist. No. 97-JE-50, 2000-Ohio-2619; *Williams v. Griffith*, 10<sup>th</sup> Dist. No. 09AP-28, 2009-Ohio-4045. At paragraph 32(e) of the original complaint explained that the plaintiff Rene Mays is "the next of kin ..." The Court in *Hosfelt* at ¶'s 25-26, 33 and *Williams* ¶ 14 allowed them to bring their claims for themselves and on behalf of the estate for themselves pro se. The *Hosfelt* case is appended hereto for this Court's review.

Unequivocally, a reasonable reading of the original complaint at ¶ 43, and other pleadings such as the affidavit in support of summary judgment at ¶ 9 (\$17,829.63) filed May 23, 2011 in the trial court, the affidavit in support of summary judgment at ¶2 (\$2,020.74) filed May 26, 2011 in the trial court and the amended complaint clearly

demonstrates sufficient evidence that appellant had stated such claims as to her reasonable and necessary expenses for the decedent's funeral, burial, and memorial services that she had incurred as a direct and proximate result based upon defendants' alleged medical negligence that would entitle her to relief or to recovery under R.C. §2305.113 (B) (medical claim) and R.C. §2125.02 (wrongful death). See, e.g., *Hosfelt v. Miller*, 7<sup>th</sup> Dist. No. 97-JE-50, 2000-Ohio-2619; *Williams v. Griffith*, 10<sup>th</sup> Dist. No. 09AP-28, 2009-Ohio-4045.

Accordingly, since the Appellant was authorized to commence this legal action on behalf of the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself to recover her damages associated with this action such as her valid pro-se claims as and for including her reasonable and necessary expenses for the decedent's funeral, burial, and memorial services that she had incurred as a proximate result based upon defendants' alleged medical negligence wherein such was supported by the pleadings, Appellant moves this Honorable Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011, that wrongfully concluded that her amended complaint be dismissed without prejudice in violation of R.C. 4705.01 and Section 16, Article 1 of the Ohio Constitution.

In her motion to vacate the trial court's July 27, 2011 Judgment, Appellant argued that her amended complaint made averments that she was "duly appointed by the Probate Court of Lucas County in Case No. EST 000826 as Administrator for the Estate of Galon Howard ..." **See Amended Complaint ¶ 2-6.** A complaint may not be dismissed for failure to state a claim upon which relief can be granted if the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v.*

*Twombly*, 550 U.S. 544, 570 (2007). It was plausible on the face of the amended complaint that appellant was “duly appointed by the Probate Court of Lucas County in Case No. EST 000826 as Administrator for the Estate of Galon Howard ...” **See Amended Complaint ¶ 2-6.** Consequently, the trial court erred by dismissing without prejudice the Appellant’s pro-se claims in light of the fact that she had stated a claim upon which relief can be granted R.C. §2305.113 (B) (medical claim) and R.C. §2125.02 (wrongful death). Pro se complaints are to be construed liberally in favor of the pro se party. *Haines v. Kerner*, 404 U.S. 519 (1972).

In the instant case, the trial court dismissed Appellant’s Amended Complaint pursuant to R.C. 4705.01, which provides that a court may dismiss without prejudice claims of any plaintiff, by a non-lawyer, but as alleged here other than Rene Mays personal pro-se claims. The exception to this Rule is a person who represents him or herself only. R.C. 4705.01. The Appellant asserts that the action alleged it was a pro-se action as the Appellant was representing herself. The Court held in *Williams v. Global Const. Co., Ltd.*, 1985 WL 9639 (Ohio App. 10 Dist.), that Williams could not represent another interested party and held that dismissal without prejudice was the proper disposition of such interested parties claims by a non-lawyer. Accordingly, since the Appellant was authorized to commence this action on behalf of the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself, Appellant moves this Court to vacate or set aside the trial court’s final opinion and judgment dated July 27, 2011.

Appellant further argued among other things that the dismissal without prejudice was not the proper disposition of Rene Mays viable amended pro-se claims that contained

enough facts so as to state a claim that were so plausible of the face of the amended complaint and because she properly commenced the Amended Complaint, she is a real party in interest and a statutory beneficiary of her brother's estate. The trial court rejected these arguments in its unreasonable August 11, 2011 judgment finding that the Appellant's Motion for the Court to Vacate its dismissal order of July 27, 2011 and her request for an order entering judgment in her favor and setting a trial date to assess damages not well-taken and denied. Appellant asserts that the trial court overlooked her personal pro-se claims, and her claim of common knowledge made in her amended motion to vacate at ¶s 1-3 filed in the trial court on June 14, 2011, and therefore wrongly concluded that her case should be dismissed without prejudice in violation of Ohio Civil Rule 60(B)(1) through (5). Accordingly, since the Appellant was authorized to commence this action on behalf of the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself, Appellant moves this Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011.

Appellant further asserts that the trial court erred by dismissing her Amended Complaint without prejudice. See, Ohio Civil Rule 60(B)(1). Specifically, Appellant asserts that the trial court's dismissal under R.C. 4705.01 was an adverse opinion without full knowledge or complete examination of the facts contained in the pleadings then before him. As a result, the appellant asserts that the July 27, 2011 dismissal order as to her personal pro-se claims resulted in substantial prejudice as it was not supported by the facts in the record. Clearly, the appellant had an absolute right to file a medical malpractice and wrongful death claim in the underlying civil proceedings pro-se. Thus, Appellant's constitutional due process and liberty rights have been violated by the trial

enough facts so as to state a claim that were so plausible of the face of the amended complaint and because she properly commenced the Amended Complaint, she is a real party in interest and a statutory beneficiary of her brother's estate.

The Appellant asserts that the common knowledge exception should have been applied by the trial court because the alleged negligence resulted from the miscommunication between the nurse and the doctor regarding the decedent's lung infection. See Complaint at ¶15 (where the hospital employees were negligent in their care of Galon Howard; that staff failed to take precautions to avoid malnutrition; and that the doctor failed to supervise the staff and recognize Galon Howard's nutritional needs. Plaintiffs assert that the standard of care required that the staff or the doctors not injure Galon Howard but to protect and avoid that kind of injury); see also Complaint at ¶26 (where the decedent Galon Howard was left unattended and had really defecated on himself and had expelled foreign material flowing from his esophagus out his mouth so much that it was running off the bed onto the floor of the hospital room as well as the possibility of Galon Howard not being tended to by Mercy St. Anne's Hospital, the hospital employees, the staff and the doctors thereof, as they were nowhere to be immediately found when they arrived for their visit. Plaintiffs assert that the standard of care required that the hospital employees, the staff or the doctors thereof not injure Galon Howard but to protect and avoid that kind of injury).

Appellant asserts that the common knowledge exception has been applied in cases dealing with gross inattention during a patient's care or miscommunication with a patient. *Lipp v. Kwyer*, Lucas App. No. L-02-1150, 2003-Ohio-3985, at ¶ 14. Many such cases deal with supervisory negligence and involve as here, fact patterns in which a patient

suffered injury after a medical provider has left the patient unattended. See, *LaCourse v. Flower Hosp.*, Lucas App. No. L-02-1001, 2002-Ohio-3816, at ¶16 (left patient unattended). The negligence alleged by Appellant in the Complaint at ¶'s 15 & 26 involved fact patterns in which a patient suffered injury after a medical provider had left the patient unattended, also involved a gross inattention during a patient's care or miscommunication with the patient and or involved or resulted from the miscommunication between the nurse and the doctor regarding the decedent's lung infection. Therefore, this Court should find the common knowledge exception is applicable here so as to obviate the need for expert witness testimony on the medical malpractice issue. See, *Schraffenberger v. Persinger, Malik & Haaf, M.D.'s Inc.*, (1996), 114 Ohio App. 3d 263, 267. Accordingly, since the Appellant was authorized to commence this action on behalf of the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself, Appellant moves this Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011.

In any event the trial court rejected these arguments in its unreasonable August 11, 2011 judgment finding that the Appellant's Motion for the Court to Vacate its dismissal order of July 27, 2011 and her request for an order entering judgment in her favor and setting a trial date to assess damages not well-taken and denied. Appellant asserts that the trial court overlooked her personal pro-se claims, and her claim of common knowledge made in her amended motion to vacate at ¶'s 1-3 filed in the trial court on June 14, 2011, and therefore wrongly concluded that her case should be dismissed without prejudice in violation of Ohio Civil Rule 60(B)(1) through (5). Accordingly, since the Appellant was authorized to commence this action on behalf of

the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself, Appellant moves this Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011.

Appellant further asserts that the trial court erred by dismissing her Amended Complaint without prejudice. See, Ohio Civil Rule 60(B)(1). Specifically, Appellant asserts that the trial court's dismissal under R.C. 4705.01 was an adverse opinion without full knowledge or complete examination of the facts contained in the pleadings then before him. As a result, the appellant asserts that the July 27, 2011 dismissal order as to her personal pro-se claims resulted in substantial prejudice as it was not supported by the facts in the record. Clearly, the appellant had an absolute right to file a medical malpractice and wrongful death claim in the underlying civil proceedings pro-se. Thus, Appellant's constitutional due process and liberty rights have been violated by the trial court under the provisions contained in Section 16, Article 1 of the Ohio Constitution. Accordingly, since the Appellant was authorized to commence this action on behalf of the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself, Appellant moves this Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011.

In her 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, Appellant argued among other things that on remand from the Court of Appeals, on July 27, 2011, the trial court issued an order granting Defendants motions to dismiss requesting the trial court grant their motions to dismiss plaintiffs' claims against them as Rene Mays, pro-se, is unable to represent any

person or entity other than herself in that matter pursuant to R.C. 4705.01 and that Rene Mays has no standing to individually recover damages, pursuant to R.C. 2305.113, for the alleged negligent medical care provided to her brother. Appellant contended that the trial court overlooked her viable personal pro-se claims, and her said claim of common knowledge, and therefore wrongly concluded that her case should be dismissed without prejudice in violation of Ohio Civil Rule 60(B)(1) through (5). Appellant indicated that her personal pro-se claims were made under R.C. 2305.113 and R.C. 2125.02 in paragraph 32(e) of her original complaint, which asserts Appellant is “next of kin.”

Appellant argued that this language constituted an assertion of a wrongful death and medical negligence claims because it demonstrated that she was acting on her own behalf pro-se in connection with her wrongful death and medical negligence claims. Appellant, in her motion to vacate the trial court’s judgment of July 27, 2011 made a similar argument that ¶ 32(e), constituted an assertion of a wrongful death and medical negligence claims because it demonstrated that she was acting on her own behalf pro-se in connection with her wrongful death and medical negligence claims.

She further indicated that the trial court issued such order delaying her lawful amended suit made against Toledo Hospital and Mercy St. Anne Hospital or otherwise dismissing Appellant’s Rene Mays lawful Amended Complaint without prejudice in violation of the provisions contained in Section 16, Article 1 of the Ohio Constitution; and denying as moot all of her pending meritorious motions. Thus, resulting in the premature closing of the Appellant’s meritorious medical negligence and wrongful death case made against Toledo Hospital and Mercy St. Anne Hospital filed pro-se.

The Court of Appeals rejected these arguments in its August 18, 2011, judgment, pointing out that 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 not considered at all or was not fully considered by the court when it should have been. When in fact she had indeed clearly called to the attention of the Court an issue such as that the trial court issued such order delaying her lawful amended suit made against Toledo Hospital and Mercy St. Anne Hospital in violation of the provisions contained in Section 16, Article 1 of the Ohio Constitution that was either not considered at all or was not fully considered by the court when it should have been. The Court of Appeals, as the trial court had done, inadvertently overlooked Appellant's personal pro-se claims, and her said claim of common knowledge, and therefore wrongly concluded that her pending motions are denied as moot and that her motion for reconsideration should be denied.

In her Notice of Appeal to this Court, the Appellant claimed among other things that the August 18, 2011 denial was improper, and the appellant had called to the attention of this Court an obvious error in the Court of Appeals decision or raised an issue for that Court's consideration that was either not considered at all or was not fully considered by it when it should have been. This appeal remains pending resolution before this Court.

In her Memorandum in Support of Jurisdiction filed in this Court on August 24, 2011, the Appellant claimed among other things that the Court of Appeals should have determined that the July 27, 2011 judgment by the trial court dismissing appellant's medical malpractice complaint without prejudice constituted a final appealable order under R.C. 2505.02. This memorandum remains pending resolution before this Court.

This Court therefore has subject matter jurisdiction over this appeal and thus the Appellant respectfully asks this Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011 on the authority of Section 16, Article 1 of the Ohio Constitution and on the basis that it violates the Ohio Constitution and other applicable legal provisions as stated herein which are incorporated herein by reference.

Accordingly, Appellant moves this Honorable Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011, that wrongfully concluded that her amended complaint be dismissed without prejudice in violation of R.C. 4705.01 and Section 16, Article 1 of the Ohio Constitution.

III. THE ISSUES THE APPELLANT INTENDS TO RAISE ON APPEAL TO THIS HONORABLE COURT

These issues will be presented for review once the Court accepts jurisdiction over this appeal: The Appellant respectfully asks that this Court decide the following issues herein on this appeal:

(1) Whether R.C. 4705.01 prohibits her from seeking wrongful death and survivorship claims on her own behalf and on behalf of the estate on her own behalf based upon the Defendants' alleged medical negligence when she is the Personal Representative of the decedent, and she is a real party in interest pro-se?

(2) Whether *Bruni v. Tatsumi* (1976), 46 Ohio St. 2d 127, 131 conflicts with Ohio Civil Rule 10(D) regarding an exception to the requirement that an affidavit of merit be filed in the underlying action exist when the proven negligence of the nurses in this case occurred in their observation and negligent reporting of the decedent's lung infection or condition of the doctor wherein this appeal involves matters within the common knowledge and experience of the jurist (trial court)?

(3) Whether the Court of Appeals decision of August 18, 2011 created confusion regarding Appellant's Rene Mays motions for reconsideration when she had called to the attention of the Court of Appeals an obvious error in the Court of Appeals decision or raised an issue for that Court's consideration that was either not considered at all or was not fully considered by it when it should have been and whether its decision of August 18, 2011 in direct conflict with R.C. 2505.02 and *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140?

Appellant asserts that given the opportunity to brief this appeal(s) that all of these issues will be fully briefed, the Appellant anticipates that she will file a 34 page brief exclusive of the table of contents, the table of authorities cited, and the appendix in compliance with S. Ct. Prac. R. 6.2(C). Accordingly, since the Appellant was authorized to commence this action on behalf of the Estate of Galon Howard, which was reopened on June 7, 2011, on behalf of herself, Appellant moves this Court to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011.

**WHEREFORE**, this Court should exercise its sound discretion in granting Appellant's undisputed motion to vacate or set aside the trial court's final opinion and judgment dated July 27, 2011, it is so requested.

Respectfully submitted,  
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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 31<sup>st</sup> day of August, 2011 to:

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Dated: 08/31/2011

Rene Mays Pro Se  
Plaintiff-Appellant-pro-se



{¶1} This timely appeal arises from a decision of the Jefferson County Court of Common Pleas granting summary judgment to Appellees in a legal malpractice action. Appellees were hired as legal counsel in the administration of the estate of Mr. William Schaefer, Sr. and were also called upon to give estate planning advice to Mrs. Mary Schaefer, the surviving spouse and personal representative of her deceased husband's estate. For the following reasons we reverse the judgment of the trial court and remand this cause for further proceedings.

{¶2} Mr. and Mrs. Schaefer hired attorney Andrew W. Miller ("Miller") in 1993 to draft wills for them. Miller prepared simple reciprocal wills in which each spouse devised and bequeathed all property to the other, with the Schaefer's three children named as contingent beneficiaries. Mrs. Schaefer was named as executrix of her husband's estate, and vice versa. Appellant Terry A. Hosfelt was named as the alternate executor in both wills.

{¶3} Mr. Schaefer died on January 28, 1995. Mrs. Schaefer was appointed as executrix of her deceased husband's estate. In early 1995, she contacted Appellee David E. Henderson ("Henderson"), a lawyer in Steubenville, Ohio, to perform legal services in the administration of the will.

She also sought advice regarding her own estate planning because of the substantial assets she would be inheriting from Mr. Schaefer's estate. Appellee Chalfant, Henderson and Dondzila ("Chalfant") is a law firm in Steubenville, Ohio, with which Henderson is associated through an expense-sharing agreement.

{¶4} Henderson consulted with Mrs. Schaefer and Appellant on May 5, 1995. Mrs. Schaefer indicated she wanted to make a new will, and Henderson suggested that she consider creating a living trust.

{¶5} Henderson admitted Mr. Schaefer's will to probate on May 25, 1995. He estimated the estate to be valued at \$1,009,500.00. At this time both Henderson and Mrs. Schaefer realized that her subsequent testamentary estate would be subject to significant federal estate taxes unless steps were taken to avoid such taxes.

{¶6} On June 16, 1995, Henderson filed the Inventory and Appraisal indicating that Mr. Schaefer's estate was valued at \$831,691.87.

{¶7} Henderson, Mrs. Schaefer and Appellant met at certain times in late 1995 to discuss estate administration and estate planning. They discussed the fact that Mrs. Schaefer was dying of cancer, that she was not sure that her children would be responsible enough to receive a large

inheritance outright and that she did not want her estate to pay federal taxes if possible. Henderson told her that she could reduce her estate taxes by making gifts of property or by refusing to accept some or all of her inheritance from Mr. Schaefer's estate. Henderson did not advise Mrs. Schaefer on the details or tax consequences of his suggestions, or on the differences between a federal tax disclaimer and an election against the will. Appellant also alleges that Henderson failed to draft trust documents for Mr. Schaefer, that he lost stock certificates, that he failed to effect securities transfers and that he delayed filing estate documents.

{18} On October 24, 1995, Mr. Schaefer's federal estate tax return was filed, listing the value of the gross estate at \$974,632.00. No federal taxes were due as a result of the unlimited federal marital deduction and the unified federal tax credit.

{19} Mrs. Schaefer died on December 27, 1995. Mrs. Schaefer had not revised her will, executed any trust documents, filed any disclaimers regarding Mr. Schaefer's estate, or elected to take against Mr. Schaefer's will. Appellant was appointed as administrator de bonis non with the will annexed of both Mr. and Mrs. Schaefer's estates. Mrs. Schaefer's federal gross estate, largely derived from stocks and other securities bequeathed from her late husband,

was valued at \$1,050,468.00. Her estate paid a federal estate tax of \$94,574.00. Mrs. Schaefer's children are the sole beneficiaries of her estate.

{¶10} On January 29, 1996, Appellant filed a complaint in the Jefferson County Court of Common Pleas alleging that Miller, Henderson and Chalfant committed legal malpractice in advising the Schaefers in their estate planning and in the administration of Mr. Schaefer's estate.

{¶11} Miller filed a Motion for Summary Judgment on January 21, 1997, which was denied on February 3, 1997. Miller filed a Motion for Reconsideration of the February 3, 1997, Journal Entry. His motion was granted on April 17, 1997, and the claim against Miller was dismissed.

{¶12} Appellees Henderson and Chalfant filed a Motion for Summary Judgment on July 9, 1997. The motion argued that the beneficiaries of Mrs. Schaefer's estate had no standing to sue Appellees for legal services rendered to Mrs. Schaefer while she was still alive. They argued that, at the time that they gave Mrs. Schaefer estate planning services, the beneficiaries were only potential beneficiaries. Therefore, they argued that these potential beneficiaries were not in privity with the client for whom the legal services were performed, Mrs. Schaefer, citing *Simon v. Zipperstein* (1987), 32 Ohio St.3d 74, in support. The trial court agreed with

Appellees' argument and granted their Motion for Summary Judgment on August 11, 1997. Appellant timely appealed that judgment on August 21, 1997.

{¶13} An appellate court reviews the decision to grant a motion for summary judgment *de novo*, using the same standards as the trial court as set forth in Civ.R. 56(C). *Brown v. Scioto Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Before summary judgment can be granted the court must determine that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably toward the party against whom the motion for summary judgment is made, that conclusion is adverse to the nonmoving party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327. "[T]he moving party bears the initial responsibility for informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact or material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296. The nonmoving party has the reciprocal burden of specificity and cannot rest on mere allegations or denials in the pleadings. *Id.* at 293.

{¶14} Appellants's only assignment of error states:

{¶15} "APPELLANT STATES AS HIS FIRST ASSIGNMENT OF ERROR THAT THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF BOTH DEFENDANTS ANDREW W. MILLER AND DEFENDANT DAVID E. HENDERSON AND AGAINST THE APPELLANT ADMINISTRATOR DBN WWA OF THE ESTATES OF WILLIAM H. SCHAEFER, SR. AND MARY E. SCHAEFER, BOTH DECEASED."

{¶16} Appellant's notice of appeal states that he is appealing the final judgment entered on August 11, 1997. Although Appellant mentions in his assignment of error that he is also appealing the decision to grant summary judgment in favor of Andrew W. Miller, Appellant has not taken sufficient steps to preserve his appeal of that judgment. App.R. 3(D) requires that the notice of appeal, "shall designate the judgment, order or part thereof appealed from \* \* \*". There is no mention in Appellant's notice of appeal of the April 17, 1997, Journal Entry granting Miller summary judgment. The Journal Entry states that Appellant did not even appear at the hearing on the motion. Appellant's notice of appeal does not list Miller as a party served with notice of the appeal. None of the briefs in this appeal were sent to Miller and there is no indication that any document relating to this appeal has been served on Miller. In fact, the cover page of Appellant's brief on appeal only lists Henderson as the party appellee.

{¶17} This Court is well aware that, "in construing the

Rules of Appellate Procedure, the law favors and protects the right of appeal and that a liberal construction of the rules is required in order to promote the objects of the Appellate Procedure Act and assist the parties in obtaining justice." *Maritime Mfrs., Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 258. The only jurisdictional requirement for the filing of a valid appeal is the timely filing of a notice of appeal. App.R. 3(A). Nevertheless, this Court is vested with the discretion, when presented with other defects in the notice of appeal, to determine whether sanctions are warranted, including the sanction of dismissing all or part of an appeal. *Transamerica Ins. Co. v. Nolan* (1995), 72 Ohio St.3d 320, at syllabus.

{¶18} The purpose of the notice of appeal is to apprise the opposite party of the taking of the appeal. *Maritime, supra*, 70 Ohio St.2d at 259. Appellant has not taken any steps to notify Miller of this appeal. Appellant's brief makes only a few passing references to Miller and its conclusion only refers to Appellees Henderson and Chalfant. Therefore, as Appellant has precluded Miller from appearing and defending in this matter, we dismiss the appeal as it relates to the April 17, 1997, decision to grant summary judgment in favor of Andrew W. Miller.

{¶19} Appellant's remaining argument on appeal is that

the trial court mistakenly interpreted this case as one where the disgruntled beneficiaries are attempting to sue the attorney of the decedent for malpractice. Appellant argues that it is the administrator of the estate, not the beneficiaries, who initiated and is prosecuting this action with a view towards preservation of estate assets.

{¶20} Appellees' argument, which was the same argument used by the trial court in granting Appellees' motion for summary judgment, is that there can be no liability for attorney malpractice if there is no privity between the attorney and the party alleging malpractice. Appellees argue that the beneficiaries of Mrs. Schaefer's estate are the real parties in interest in this case. Appellees contend that an attorney who drafts a will or gives estate planning advice is not in privity with intended beneficiaries of the will or estate plan unless the interests of the beneficiaries are vested at the time of the alleged malpractice, or unless there are special circumstances such as fraud, bad faith, collusion, or malicious conduct, citing *Simon v. Zipperstein*, *supra*, 32 Ohio St.3d at 77.

{¶21} Although Appellees state a correct point of law, we agree with Appellant that it is largely irrelevant to the case at bar. In the matter before us, the administrator of the estate, not the beneficiaries, has brought this claim in

order to preserve the assets of the entire estate. We agree with Appellant that the primary issue is whether or not a legal malpractice claim survives the death of the party injured by the malpractice, and, if so, whether the personal representative of the estate is the proper party to bring the claim.

{¶22} R.C. §2305.21 states:

{¶23} "In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto."

{¶24} Under the statute, a claim for legal malpractice survives the death of the injured party if it, "(1) is a cause of action that survives at common law or (2) constitutes an injury to [the injured party's] property interests." *Loveman v. Hamilton* (1981), 66 Ohio St.2d 183, 184. *Loveman* held that an action for legal malpractice meets both of the tests set forth in R.C. §2305.21. *Id.* Although *Loveman* involved the question of whether the malpractice action survived the death of the attorney who allegedly engaged in malpractice, the statute applies equally to "the death of the person entitled or liable thereto." R.C. §2305.21 (emphasis added). In *Loveman*, the deceased was liable for malpractice. In the instant case, the deceased is

the party entitled to assert the malpractice claim. The *Loveman* holding applies to mandate the survival of a legal malpractice claim after the death of the party entitled to assert the claim.

{¶25} The personal representative of decedent's estate may ordinarily prosecute, in a representative capacity, any cause which the decedent could have instituted and which survives the decedent. *Dawson v. Ohio Dept. of Human Services* (1990), 68 Ohio App.3d 262, 263; *Oncu v. Bell* (1976), 49 Ohio App.2d 109, 111. Thus, a personal representative of a decedent's estate stands in the shoes of the decedent to assert claims on behalf of the estate. *Santa v. State Dept. of Human Ser.* (Jan. 20, 2000), Cuyahoga App. No. 74690, unreported; *Hopper v. Nicholas* (1922), 106 Ohio St. 292, 302. Although no Ohio cases have specifically examined the issue, other jurisdictions have held that it is up to the personal representative of the estate to assert financial claims on behalf of the estate when these claims involve preparation of estate documents or estate planning. *Nevin v. Union Trust Co.* (Me. 1999), 726 A.2d 694, 701; *Olson v. Toy* (1996), 46 Cal.App.4th 818, 823.

{¶26} The outcomes of various Ohio cases seem to presume, without directly addressing the issue, that a personal representative of the estate has standing to assert legal

malpractice claims which arose during the decedent's lifetime. *Nix. v. Chalko* (Feb. 19, 1998), Cuyahoga App. No. 72023, unreported; *Higgins v. McDonnell* (1995), 105 Ohio App.3d 199, 1999; *Landis v. Hunt* (1992), 80 Ohio App.3d 662, 666; *Frost v. Jonson* (Jan. 29, 1982), Butler App. No. CA80-11-0124, unreported. In other areas of malpractice, such as medical malpractice, courts have held that a personal representative has standing to assert claims on behalf of the decedent's estate. *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 179; *Klema v. St. Elizabeth's Hospital of Youngstown* (1960), 170 Ohio St. 519, 521.

{¶27} Appellees argue that the primary harm alleged by Appellant is that Mrs. Schaefer's estate paid \$94,574.00 in federal estate taxes that she may not have had to pay but for Appellees' alleged negligence. Appellees maintain that the payment of taxes does not constitute legal harm. Appellees argument is not persuasive in this respect.

{¶28} To plead a cause of action for attorney malpractice, a plaintiff must allege: (1) an attorney-client relationship giving rise to a duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *Krahn v. Kinney* (1989), 43 Ohio St.3d 103 at syllabus. Appellant has alleged and provided sufficient evidence to create a genuine issue of material fact that Mrs. Schaefer's

estate would not have had to pay federal estate taxes but for Appellees' negligence. Every dollar paid by the estate in taxes means that there was one dollar less to distribute as Mrs. Schaefer intended. Mrs. Schaefer's estate was valued, for federal estate tax purposes, at over \$1,000,000.00. Mrs. Schaefer hired Appellees for estate planning advice so that as much of that amount would go to her children and as little as possible would be paid in estate taxes. Although necessary taxes may not constitute an injury to a client's interests, taxes which could have been avoided by the exercise of the knowledge, skill and ability ordinarily possessed and exercised by legal professionals under similar circumstances can be considered as an injury.

{¶29} An attorney who is specifically instructed by a client should follow those instructions with reasonable care, or he or she may be liable for all damages proximately caused by the failure. *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112, 112; see also 1 Mallen and Smith, *Legal Malpractice* (4 ed. 1996), 593, Section 8.8. Appellees argue that Mrs. Schaefer may not have chosen to follow their advice had they specifically told her about the tax consequences. Appellees' argument relates to an issue of fact concerning whether their negligence actually caused the alleged harm. Where factual allegations in the evidentiary materials are in

conflict, a genuine issue of material fact exists and summary judgment should not be granted. *Murray v. Murray* (1993), 89 Ohio App.3d 141, 145.

{¶30} Appellees also argue that, if Mrs. Schaefer had lived longer, she may have consumed more of her assets which would have reduced her tax liability. They maintain that any claim for damages is purely speculative because there was no way to know the amount of Mrs. Schaefer's actual estate tax liability while she was still alive. Appellees are attempting to create ambiguity when there is none. Mrs. Schaefer's federal tax liability became fixed at her death at \$94,574. It is that specific tax liability which is being claimed as damages. This is not a case of a living client attempting to prove potential estate tax liability.<sup>1</sup> This is

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Even if Mrs. Schaefer had realized Appellees' negligence while she was still alive, her potential federal estate tax damages may not have been speculative. A recent IRS Private Letter Ruling suggests that a remedy for legal estate planning malpractice would be to set up a trust, funded by the negligent attorney, equal to the present value of the expected future excess estate tax liability. Priv.Ltr.Rul. 97-36-032 (Sept. 5, 1997). When the time for actually paying the taxes arrived, presumably after the death of the complaining party, any funds remaining after the payment of the estate taxes could be returned to the attorney, law firm, or other designated party. See Martin D. Begleiter, First Let's Sue All the Lawyers - What Will We Get: Damages for Estate Planning Malpractice (2000), 51 *Hastings L.J.* 325, 361-362. Mrs. Schaefer could also have made the full gifts to her children while she was still living, generating presently payable gift taxes likely to be equal to the estate taxes paid by Appellant. See Linck v. Barokas & Martin (Alaska 1983), 667 P.2d 171.

a case of a decedent's estate attempting to recover the specific amount paid in estate taxes which the personal representative of the estate argues it would not have been necessary to pay but for Appellees' negligence.

{¶31} We conclude that a decedent's legal malpractice claim arising from errors by an attorney in rendering estate planning services is properly brought by the personal representative of the estate when excess estate taxes are paid by the estate in contravention of the decedent's intended estate plan. Thus, it was improper to dismiss this claim in summary judgment.

{¶32} Interestingly, Appellees' motion seeking summary judgment makes no argument nor points to any evidence indicating questions of material issues of fact exist regarding Appellant's claims of legal malpractice in the administration of Mr. Schaefer's estate. Instead, Appellees erroneously argue that Appellant is not the proper party to bring such a claim. We hold, however, that claims for losses to Mr. Schaefer's estate, such as increased administration costs or costs involved in correcting mistaken filings, are properly brought by the personal representative of the estate and are recoverable in a legal malpractice action. *Bingamon v. Curren* (1992), 83 Ohio App.3d 711, 713; *Keaton Co. v. Kolby* (1971), 27 Ohio St.2d 234, 235.

{¶33} For the foregoing reasons, we hold that Appellant's assignment of error has merit. We must reverse the August 11, 1997, Journal Entry of the Jefferson County Court of Common Pleas and remand this case to the trial court for further proceedings according to law and consistent with this Court's opinion as to Appellees Henderson & Chalfant.

Cox, P.J., dissents; see dissenting opinion.  
Donofrio, J., concurs.

COX, P.J., dissenting.

{¶34} I respectfully dissent.

{¶35} The trial court was correct in its ruling. There is no privity.