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SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

Tracy Ruther, Individually and as Administrator of the Estate of Timothy Ruther, Deceased, Plaintiffs/Appellees, vs. George Kaiser, D.O., et al., Defendants/Appellants.	:	Case No. 11-0899 On Appeal from the Warren County Court of Appeals, Twelfth Appellate District Case No. CA2010-07-066

MEMORANDUM CONTRA APPELLEES' COUNSEL'S MOTION FOR LEAVE TO WITHDRAW AS COUNSEL OF RECORD AND TO PARTICIPATE IN ORAL ARGUMENT AS AMICUS CURIAE

Appellants have no desire to involve themselves in whatever controversy has arisen between Appellee Tracy Ruther and her counsel which has prompted counsel's motion to withdraw as counsel. However, to the extent that controversy impacts these Appellants and this pending appeal, Appellants believe it necessary to respond to the relief sought by counsel's motion.

The motion filed by Appellee's counsel seeks not only leave to withdraw as counsel for Appellee Tracy Ruther but to continue to participate as an amicus curiae as counsel anticipates there will otherwise be no-one participating in briefing or arguing this case on behalf of Appellee. Appellants respectfully submit that if Appellee has chosen not to further pursue this matter, as appears to be the case by virtue of her consistent and repeated failures to communicate with her counsel as documented in the affidavits submitted to this court as well as by the lack of any activity in the wrongful death action which remains pending in the trial court below, there is in fact no actual controversy for

this court to decide in this appeal. In 25 years of practice, including substantial appellate practice, the undersigned has never participated in an appeal or heard of an appeal in which the opposing party failed in any way to participate. That would appear to be the very definition of a lack of a justicible controversy. While Appellants very much believe that the decision of the lower courts is in error and is deserving of this court's attention and decision, there must be an actual controversy for this court to decide.

Moreover, Appellants submit that it would be prejudicial for Appellee's counsel to further participate in this case in the guise of an amicus curiae particularly if Appellee herself is not participating in the case either as a pro se Appellee or with the assistance of new counsel. Counsel's motion to withdraw gives every indication that Appellee herself will not be participating in this appeal, either pro se or with new counsel, as the motion suggests that leave is sought to participate in oral argument after submitting an amicus brief as current counsel otherwise believes no-one will be presenting an argument in opposition to Appellants' position. As an individual law firm which is seeking to disassociate itself from the actual litigant who is apparently no longer pursuing the case, it would be highly irregular and inappropriate to permit such amicus participation.

Respectfully submitted,

ARNOLD TODARO & WELCH CO., L.P.A.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all parties or counsel of record by regular U.S. mail, postage prepaid, this 28TH day of December, 2011.

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