

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY J. HUEBENER RAICHYK,
PH.D., PERSONAL REPRESENTATIVE
OF E. MICHAEL RAICHYK,
DECEASED,

Supreme Court Case No. 2012-0775

Plaintiff

FILED

On Appeal from the Twelfth District Court of
Appeals, Brown County

v.

MAY 31 2012

Court of Appeals Case No. 2011-11-025

SHABBIR SABIR, M.D., et al.,

CLERK OF COURT
SUPREME COURT OF OHIO

Trial Case No. CV 20110399

Defendants.

MEMORANDUM IN OPPOSITION TO JURISDICTION
ON BEHALF OF DEFENDANT-APPELLEES, MERCY HOSPITAL CLERMONT,
DONNA L. PROCTOR, R.N., AND MELODY A. HAMILTON, R.N.

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STATEMENT IN OPPOSITION TO JURISDICTION

Plaintiff-Appellant's arguments as to "why this case is of public/great general interest," do not establish matters of great public interest and thus do not support a basis for jurisdiction. However, the Order of the Twelfth District Court of Appeals, from which Plaintiff-Appellant appeals, is grounded in well-settled case law and clearly illustrates why Plaintiff-Appellant's Memorandum does not present any issues of great public or general interest.

The pro se Plaintiff-Appellant initiated this action on behalf of her deceased son and his estate. Plaintiff-Appellant claims that Twelfth District Appellate Judges inflicted "an injustice" by requiring that she retain an attorney in order to prosecute her appeal. However, as more fully discussed below, the laws of the State of Ohio clearly prohibit the unauthorized practice of law by a non-lawyer.¹ Moreover, Ohio courts have spoken on the issue of whether a decedent's estate may be represented by a pro se litigant and have deemed such practice to constitute the unauthorized practice of law. In the case *sub judice*, Plaintiff-Appellant seems to argue that this case does not involve an "estate" but rather the rights of the decedent, Michael Raichyk, in who's shoes his mother stands, as well as the rights of the decedent's mother and sister, both of whom are represented as Plaintiffs in this litigation.² Despite Plaintiff-Appellant's confusion over the legal definition of "estate," this is exactly the situation which Ohio Courts have already addressed.³ This case invokes no public policy concerns and no further guidance on this issue is needed.

¹ See R.C. 4705.01.

² Notably, the decedent's sister, Mya Lee Raichyk, was not listed as a Plaintiff on the Complaint relative to this action, nor was the Complaint ever amended to add her as a Plaintiff. As such, she is not a party to this lawsuit. The pro se Plaintiff-Appellant, Mary J. Huebener Raichyk, Ph.D., apparently assumes that simply adding her name on a Notice of Appeal makes her a Plaintiff.

³ See *Williams v. Griffith*, 2009 WL 2469523 (Ohio App. 10 Dist.), 2009-Ohio-4045.

Plaintiff-Appellant further argues that cases of iatrogenically caused deaths are on the rise, and either there are not enough lawyers to handle these cases, or the cost of prosecuting such cases is too great. She appears to be claiming that she should be permitted to prosecute this action on behalf of her deceased son and his next of kin, pro se, because she is unable to find an attorney willing and/or able to accept her case. Not only are these claims unfounded, but they are certainly not of great public or general interest.

Notably, Plaintiff-Appellant's Complaint was initially dismissed at the trial court level due to her failure to file an Affidavit of Merit in accordance with Civ. R. 10(D)(2). Plaintiff argued then, and continues to argue, that this case is not one of medical malpractice, but rather is criminal in nature. Interestingly, her "explanation of why this case is of public/great general interest" clearly admits that the basis of her underlying lawsuit is, in fact, medical in nature.

In essence, there is no great general or public interest raised by the instant appeal. In ordering that Plaintiff-Appellant retain an attorney in order to prosecute her appeal, the Twelfth District Court of Appeals appropriately applied the laws of the State of Ohio; specifically, R.C. 4705.01. The Courts of this State have repeatedly applied R.C. 4705.01 in accordance with the clear language of the statute and in a manner appropriate to carry out its intent.⁴ The Twelfth District Court of Appeals decision below is no different. Because no further guidance on this issue is needed, this Court should decline to exercise jurisdiction and dismiss the appeal.

STATEMENT OF THE CASE

On April 29, 2011, Plaintiff-Appellant filed a Complaint stating a medical claim against the Defendant-Appellees. Plaintiff did not attach an Affidavit of Merit, as required by Civ. R. 10(D)(2). Accordingly, Defendants moved the Trial Court for Dismissal. Defendants' motions

⁴ See *Williams v. Griffith, supra*.

to dismiss were granted by Order of Magistrate Dexter Bastin, dated August 29, 2011. On September 9, 2011, Plaintiff filed an objection to the Magistrate's August 29th decision. On October 24, 2011, Judge Scott T. Gusweiler issued an order adopting in total the Magistrate's Decision filed on August 29, 2011 and overruling Plaintiff's objections filed on September 9, 2011.

Plaintiff-Appellant filed a notice of appeal to the Twelfth District Court of Appeals on November 7, 2011. All Defendant-Appellees jointly filed a motion to dismiss this appeal on the ground that the filing of same by the Pro Se Plaintiff-Appellant constituted the unauthorized practice of law in violation of R.C. 4705.01. By Order dated January 13, 2012, the Appellate Division instructed the Pro Se Plaintiff-Appellant to obtain an attorney to represent the interests of The Estate of E. Michael Raichyk, or else her appeal would be dismissed. Plaintiff-Appellant failed to obtain counsel in accordance with the Court's Order and, thus, the Twelfth District Court of Appeals dismissed her appeal via Order dated March 21, 2012. The instant appeal followed.

**DEFENDANT-APPELLEES' RESPONSE TO PLAINTIFF-APPELLANT'S
PROPOSITIONS OF LAW**

I. Defendants' Position on Plaintiff's Propositions of Law No. 1-4:

THE TWELFTH DISTRICT COURT OF APPEALS CORRECTLY DISMISSED PLAINTIFF-APPELLANT'S APPEAL SINCE THE FILING AND PROSECUTION OF THE APPEAL BY THE PRO SE PLAINTIFF-APPELLANT CONSTITUTED THE UNAUTHORIZED PRACTICE OF LAW

Section 2(B)(1)(g), Article IV of the Ohio Constitution grants the Ohio Supreme Court the power to regulate and control all matters related to the practice of law in this State. Gov. Bar. R. VII §2(A) defines the unauthorized practice of law as "the rendering of legal services for

another by any person not admitted to practice in Ohio.”⁵ Moreover, R.C. 4705.01 states as follows:

No 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.

Although the law recognizes that “a person has an inherent right to proceed pro se in any court...that right pertains only to that person.”⁶ The right to proceed pro se “does not extend to the person’s spouse, child, or solely owned corporation.”⁷

Contrary to Plaintiff-Appellant’s assertions, the case of *Williams v. Griffith* is directly on point with the case *sub judice*. In *Williams*, the pro se plaintiff, as the designated personal representative of the decedent (his daughter), filed a claim for wrongful death and medical malpractice.⁸ The Court dismissed the Plaintiff’s Complaint and determined that, while Williams could represent himself, he could not represent others “because to do so would constitute the unauthorized practice of law.”⁹ The Court further noted that “a personal representative of a decedent’s estate stands in the shoes of the decedent to assert claims on behalf of the estate.” As such, “the personal representative represents the interests of the statutory next of kin.”¹⁰ Despite being the personal representative of the decedent’s estate, since Williams was not an attorney, he could not “represent others that the statute designates as next of kin, because

⁵ *Williams v. Griffith*, 2009 WL 2469523 (Ohio App. 10 Dist.), 2009-Ohio-4045; quoting Gov. Bar. R. VII §2(A).

⁶ *State v. Block*, 2007 WL 1219292 (Ohio App. 8 Dist.), 2007-Ohio-1979.

⁷ *Id.*

⁸ *Williams v. Griffith*, *supra*.

⁹ *Id.* at ¶11. (Note – Plaintiff’s Complaint was dismissed, in part, due to the determination that her representation of the decedent’s estate constituted the unauthorized practice of law. It was also dismissed on the grounds that plaintiff failed to file an Affidavit of Merit.)

¹⁰ *Id.* at ¶13.

to represent others would constitute the unauthorized practice of law.”¹¹ Additionally, the *Williams* Court further held that the Plaintiff could not proceed pro se by representing himself, “because the action has to be maintained by the personal representative on behalf of the statutory next of kin in one action.”¹²

As in *Williams*, the Plaintiff-Appellant in the instant matter is acting as the personal representative of the Decedents’ (her son’s) Estate, thus she is asserting claims in the interests of the statutory next of kin. Plaintiff-Appellant attempts to distinguish *Williams* from the instant matter by arguing that the *Williams* estate included at least one minor next of kin. However, Plaintiff-Appellant misses the point of the case. The *Williams* court did not hold that the pro se Plaintiff could not represent the minor next of kin; rather, the court determined that to represent any other statutorily designated next of kin constitutes the unauthorized practice of law.¹³

Plaintiff-Appellant further argues that because she and her daughter are the decedent’s only next of kin, and both are representing their own interests in this lawsuit, there is no unauthorized practice of law. However, the initial Complaint relative to this matter was never amended to include Mya Raichyk, as a party to this litigation, thus she is not a party. Simply adding her name to the caption on a Notice to Appeal and claiming that she has assisted in the appellate efforts by performing such tasks as editing the Plaintiff-Appellant’s court submissions does not make one a party to a lawsuit and does not cure the problem as to the unauthorized practice of law.

As clearly set forth above, this representation by Plaintiff-Appellant, a non-attorney, constitutes the unauthorized practice of law and is, therefore, not permitted under the laws of the State of Ohio. Moreover, Plaintiff-Appellant should not be permitted to proceed pro se on her

¹¹ *Id.* at ¶15.

¹² *Williams v. Griffith, supra* at ¶15; *see also* R.C. 2125.02.

¹³ *Id.*

own behalf since such an action must necessarily be maintained on behalf of the statutory next of kin in one action.¹⁴

II. Even if Plaintiff-Appellant was Permitted to Proceed with this Litigation Pro Se, She has Still Failed to Provide an Affidavit of Merit, Thus, the Complaint Was Properly Dismissed by the Trial Court.

R.C. 2305.113(E)(3) defines a medical claim as follows:

"Medical Claim" means any claim that is asserted in any civil action against a physician, podiatrist, hospital, home, or residential facility, against any employee or agent of a physician, podiatrist, hospital, home, or residential facility, or against a licensed practical nurse, registered nurse, advanced practice nurse, physical therapist, physician assistant, emergency medical technician-basic, emergency medical technician-intermediate, or emergency medical technician-paramedic, and that arises out of the medical diagnosis, care or treatment of any person.

Despite Plaintiff's claims to the contrary, it is clear that the claims set forth in her Complaint are grounded in allegations of medical malpractice. Even Plaintiff-Appellant's "explanation of why this case is of public/great general interest" refers to her claims that this action involves an "iatrogenically caused" death and makes numerous references to "medical malpractice" and its public interest.¹⁵ Obviously, the Plaintiff-Appellant's claims against the Defendants qualify as medical claims, thus an Affidavit of Merit is required pursuant to Civ. R. 10(D)(2). As such, the dismissal of this action by the trial court was appropriate.

CONCLUSION

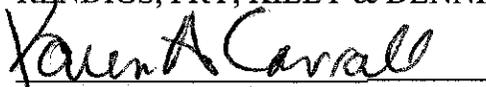
Plaintiff-Appellant has failed present facts or legal propositions to establish that this appeal involves a question of great general or public interest. The Twelfth District Court of Appeals applied well-established legal precedent to reach their decision. Although Plaintiff-Appellant's Memorandum in Support of Jurisdiction evinces her ongoing dissatisfaction with the

¹⁴ See *Williams v. Griffith*, *supra* and R.C. 2125.2.

¹⁵ See Plaintiff-Appellant's Memorandum in Support of Jurisdiction of Appellants, MJH Raichyk and Mya Lee Raichyk, Personal Representative and Next of Kin of E. Michael Raichyk.

Court of Appeals' decision, the propositions of law advanced in her Memorandum in Support of Jurisdiction are ill-founded and merely constitute a request for this Court to revisit well-established legal issues. For those reasons more fully set forth above, Defendant-Appellees Mercy Hospital Clermont, Donna L. Proctor, R.N. and Melody A. Hamilton, R.N., respectfully submit that this Court should decline to exercise jurisdiction over this case and dismiss the instant appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

30th A true copy of the foregoing was served via First Class U.S. Mail, postage prepaid, this day of May, 2012, to:

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