IN THE SUPREME COURT OF OHIO

SCOTT L. MELTON, ESQ. 1112 Harrow Hill Court Moon Township, Pennsylvania 15108 Relator, v. THE HONORABLE THOMAS A. SWIFT P.O. Box 158 Vienna, Ohio 44473 Respondent.	)))))))))))	CASE NO:_____ ORIGINAL ACTION IN PROHIBITION AND ALTERNATIVE WRIT

EXHIBITS I – P TO RELATOR SCOTT L. MELTON'S COMPLAINT FOR WRIT OF PROHIBITION

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The Honorable Judge Thomas A. Swift
c/o The Mahoning County Court of Common Pleas, Probate Division
120 Market Street
Youngstown, Ohio 44503

Respondent

The Honorable Judge Thomas A. Swift
P.O. Box 158
Vienna, OH 44473

Respondent

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

IN THE MATTER OF	)	CASE NO. 2013 ES 364
	)	
THE ESTATE OF RYAN EDWARD ZWINGLER	)	VISITING JUDGE
	)	HONORABLE THOMAS A. SWIFT
DECEASED	)	
	)	MOTION FOR SUMMARY
	)	DIRECT CONTEMPT OF COURT

Now comes the Fiduciary, Michele Zwingler, by and through undersigned counsel, who respectfully moves this Honorable Court for the summary decision that Attorney Scott L. Melton is in summary direct contempt of court. For cause, the attached brief in support is hereby submitted.

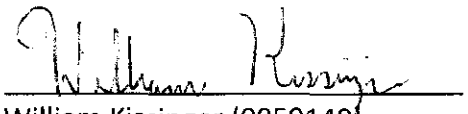
WHEREFORE, the Plaintiffs request this Honorable Court to set this matter for a sentencing hearing and require Attorney Scott L. Melton, counsel for Plaintiffs in the initial filing, by an order to appear for sentencing. As the Court has personal knowledge of the issue, a summary finding of direct contempt is appropriate with a sentencing hearing to be scheduled and all of Attorney Melton's due process rights for a sentencing hearing to be afforded to him as outlined in *In Re Contemnor Caron,*744 N.E.2d 787, 110 Ohio Misc.2d 58, 2001-Ohio-54 (Ohio Comm. 2000).

EXHIBIT
I

WHEREFORE, the Fiduciary moves this Honorable Court for the above requested orders and that Attorney Scott L. Melton be held in summary direct contempt for fraud upon the court with an order to appear for sentencing so this Honorable Court may take all appropriate action as permitted by Ohio law and also with an order for Attorney Scott L. Melton to have the following legal arguments to address the following actions done while acting under the direct authority of this Court:

1. He was excluded from the practice of law in Ohio from May 19, 2012 through October 23, 2017 pursuant to Ohio Rules For The Government Of The Bar Of Ohio XII.
2. He was practicing while under a suspension for failure to pay his renewal fee for his pro hac vice privileges from January 1, 2017 through October 12, 2017.
3. While under the authority of this Court, pursuant to having his contingent fee agreement approved, any complaints filed on behalf of the estate are void due to lack of subject matter jurisdiction pursuant to *State ex rel. Hadley v. Pike,* 2014-Ohio-3310, 14 CO 14.

Respectfully Submitted,



William Kissinger (0059149)
Attorney For Michele Zwingler
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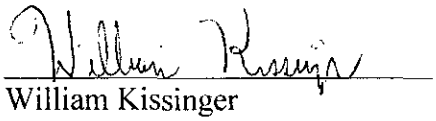
CERTIFCATE OF SERVICE

I hereby certify that a copy of this motion for summary contempt of court with attached brief was sent by regular U.S. mail this 12th day of December, 2018 to Attorney Paul D. Eklund at COLLINS, ROCHE, UTLEY & GARNER LLC, 875 Westpoint Parkway, STE 500, Westlake, Ohio 44145 and Attorney Monica Sansalone and Attorney Maia Jerin at Gallagher Sharp LLP, Sixth Floor-Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio 44115-2108.



William Kissinger
Attorney For Michele Zwingler

BRIEF IN SUPPORT

I. FORUM: This motion was initially filed in the Mahoning County Court of Common Pleas, General Division under Case Number 2018 CV 02518 on October 9, 2018. In that case, Attorney Melton's counsel filed a brief in opposition to this same motion and filed an additional brief insisting that Judge Sweeney recuse herself from the matter arguing that she could not be impartial as her court was already aware of the fact that Attorney Melton was practicing without privilege to do so. Attorney Melton's counsel insisted that a visiting judge from outside Mahoning County would be necessary in order for the matter to proceed further. On October 30, 2018, Judge Sweeney recused herself from the case on the grounds that her Court filed the complaint against Attorney Melton with the Mahoning County Bar Association.(See Exhibit A) Judge Sweeney stated she did not want any appearance of impropriety and assigned the matter to a visiting judge. The hearing on contempt was stayed. As of the date of this filing, December 12, 2018, a visiting judge has not been appointed.

The Mahoning County Court of Common Pleas Probate Division and the General Division both have concurrent jurisdiction over all of the unlawful actions committed by Attorney Melton that we are outlining for the Court. Attorney Melton's unlawful actions were committed in the General Division of the Mahoning County Common Pleas Court. However, on October 10, 2014, Attorney Melton filed an application with this Probate Court to allow him to represent Ryan Zwingler's estate. On October 16, 2014, Judge Rusu issued an order allowing Attorney Melton to represent Ryan's estate in the wrongful death action. Almost three years later, Attorney Kissinger discovered that Attorney Melton's pro hac vice privileges were suspended for failure to pay his renewal fee and mail in the accompanying affidavit for 2017. His renewal suspension was approximately nine months beginning on January 1, 2017. Upon Attorney Kissinger's discovery of Attorney Melton's practicing without a license, he promptly notified Judge Rusu of the situation. The Mahoning County Probate Court did an investigation and determined that Attorney Melton was practicing without valid pro hac vice privileges and had submitted a fraudulent pro hac vice number in his filing with the Court. Judge Rusu ordered Attorney Kissinger to get Attorney Melton's contract withdrawn immediately and get a new contract of his own filed immediately for approval of the Court. Attorney Kissinger was instructed to keep the Court notified of the consequences of Attorney Melton's actions and whether the claim was irreparably harmed from Attorney Melton's actions. Subsequently, Judge Rusu was forced to recuse himself from this matter as Attorney Melton's counsel at the time was also Judge Rusu's personal counsel and the Judge wanted to avoid any appearance of a conflict. At that point, Judge Thomas A. Swift was assigned over this case from that point as a visiting judge.

When Attorney Melton's contract had to be approved by this Honorable Court, Attorney Melton submitted his application to this Court with what appeared to be a valid pro hac vice number.

However, now we know it was fraudulently obtained. Attorney Melton acquiesced to the jurisdiction of this Honorable Court when he filed his application for approval of his wrongful death contract. The Zwingler claim has been put in what appears irretrievable jeopardy. If this was a basic negligence claim, then this Court wouldn't have jurisdiction to address this situation. However, Attorney Melton's handling of the Zwingler claim, though competently handled for the most part, was fatally flawed by his own **illegal acts while acting under the authority of this Court.**

An attorney-client relationship imposes a fiduciary duty upon an attorney representing an estate and requires the attorney to conduct business in good faith. *Peterson Painting & Home Improvement, Inc. v. Znidarsic.*, 75 Ohio App. 3d 265, 599 N.E. 2d 360 (11th Dist. 1991). The fiduciary duty exists either if the attorney is legal counsel, or serves as administrator for an estate. Among other matters, a probate court has the exclusive jurisdiction to direct and control the conduct and settle the accounts of executors and administrators and order the distribution of estates and to direct and control the conduct of **fiduciaries** and settle their accounts under R.C. 2102.24 (A)(1)(c) and (m). Although probate courts are courts of limited jurisdiction, they have plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code. *Ivancic v. Enos,* 2012-Ohio-3639 (Ohio App. 11 Dist. 2012) 978 N.E.2d 927. Probate courts have jurisdiction over claims of breach of fiduciary duty arising from the attorney-client relationship and award monetary damages. *Ohio Farmers Ins. Co. v. Bank One,*2d Dist. No. 169811998 WL 892255 (Aug. 21, 1998) and *Keith v. Bringardner,* 10th Dist. No. 07Ap-666, 2008-Ohio-950. Attorney Melton has a fiduciary duty to make sure he has valid pro hac vice privileges to practice law in the State of Ohio before doing so.

The jurisdiction of this Honorable Court is clear. Concurrent jurisdiction exists between the general division and the probate division. In the general division, Attorney Melton fought the motion for summary direct contempt upon the grounds that he was entitled to a visiting judge to address his matter of summary direct contempt. Judge Sweeney agreed and recused herself from the case and ordered that the matter be transferred to a visiting judge. This ruling by Judge Sweeney is exactly what Attorney Melton wanted and received. Now over a month has gone by and a visiting judge has not even been appointed yet. Attorney Kissinger has withdrawn his motion for contempt in the general division, hence there is nothing pending before that court on this matter of summary direct contempt (and without a new judge, it never will be resolved). The Mahoning County Probate Court has already appointed a visiting judge in the Honorable Thomas A. Swift to preside over this case. As a visiting judge has already been appointed to this case, Attorney Melton will receive the impartial judge he specifically requested and has been unable to get thus far in the general division.

This Honorable Court has jurisdiction over the unlawful acts of Attorney Melton. This Court's jurisdiction is unquestioned due to Attorney Melton's filing his application to approve his wrongful death contract, thereby acquiescing to this Court's jurisdiction over him pursuant to Ohio law. In addition, this Court has jurisdictions over fiduciaries, even attorneys. This Court's jurisdiction is also necessary as it is this Court's duty to address all issues regarding the enhancement and depletion of an estate. *Ivancic v. Enos,* 2012-Ohio-3639 (Ohio App. 11 Dist. 2012) 978 N.E.2d 927. Attorney Melton's unlawful acts took a wrongful death claim, which he himself valued at 9 million dollars (See Exhibit B) and made it worthless. This Court's jurisdiction over Attorney Melton provides him his visiting judge, puts issues that rightfully fall under the Probate Court's jurisdiction and promotes judicial economy.

Judicial economy is also furthered in that the Zwingler family is filing a complaint for breach of fiduciary duty action in this Court. While this contempt action is the best way to deal with Attorney Melton's illegal acts and the effect on the wrongful death claim, the separate breach of fiduciary duty lawsuit is necessary. Attorney Melton's insurance carrier, CNA, has committed an independent tort in this matter. CNA cannot be included in this contempt action against Attorney Melton. The breach of fiduciary action will address CNA's liability to Ryan Zwingler's estate since the contempt action cannot. As both matters would be before this Honorable Court, again judicial economy has been preserved.

Attorney Melton has a fiduciary duty to make sure he has valid pro hac vice privileges to practice law in the State of Ohio before undertaking legal matters. The Zwingler claim has been put in what appears irretrievable jeopardy. If this was a basic negligence claim, then this Court wouldn't have jurisdiction to address this situation. It was his failure to have current pro hac vice privileges to practice law in the State of Ohio for five years that this Court has jurisdiction over and must address.. Therefore, as this Honorable Court has jurisdiction to hear this matter, the Zwingler family is asking this Court for an immediate order finding Attorney Scott L. Melton in summary direct contempt of court and have a sentencing hearing availing to him all of his due process rights as required by Ohio law. We request this Honorable Court to order that Attorney Scott L. Melton be required to present his legal argument to the Court to address the three issues outlined above. After the sentencing hearing, if this Honorable Court finds no merit in Attorney Melton's arguments, we would request this Honorable Court to set the matter for a subsequent hearing on damages to address the damages that are attributed to the Estate of Ryan Zwingler by Attorney Melton's unlawful acts and order Attorney Melton to compensate the Estate of Ryan Zwingler for said damages immediately and without delay..

II. The Unlawful Act: The initial complaint, in the general division, was filed by Attorney Scott L. Melton under case number 2015 CV 1410 pursuant to his authority granted by the Mahoning County Probate Court. Attorney Melton filed a motion to appear pro hac vice on April 28, 2014 providing the Court with what appeared to be a current valid pro hac vice registration number. On May 2, 2014, the Court issued an order allowing Attorney Melton to appear pro hac vice as counsel for the Plaintiffs. In the general division, at the final pre-trial on October 6, 2017, Attorney Melton informed the Court that he would be dismissing the matter and would be refiling at a later date under the Ohio Savings Statute. Subsequent to the hearing, Attorney William Kissinger discovered that Attorney Melton's pro hac vice registration number was not valid as he was excluded from the practice of law since 2012. It was also discovered that he had been on inactive status since January 1, 2017 through October 12, 2017 due to failure to pay his renewal fee and submit a renewal affidavit to the bar admissions office (See Exhibit C, affidavit stamped received on October 12, 2017). After Attorney Kissinger confronted Attorney Melton regarding his license issues, Attorney Melton insisted on filing the dismissal entry as he had told the Court he would do. Attorney Kissinger stopped Attorney Melton and said that he would be filing a notice of appearance and filing the promised voluntary dismissal as it was an ethical violation to permit a non-lawyer to practice before the Court. Attorney Kissinger filed his notice of appearance and voluntary dismissal on October 11, 2017. Attorney Kissinger promptly notified both, Magistrate Dennis Sarisky in the general division, and Probate Judge Robert N. Rusu Jr. of Attorney Melton's license issues. Once he was informed , Judge Rusu did an investigation and found that Attorney Melton had failed to pay his pro hac vice renewal fee for 2017 and had been practicing for approximately the first nine months of 2017 while under a renewal suspension. Judge Rusu also confirmed that Attorney Melton was excluded from the practice of law by rule for approximately five years beginning in 2012. Attorney Kissinger was informed by Judge Rusu that he wanted Attorney Melton's contract , though previously approved by

the Court, to be immediately withdrawn. He also instructed Attorney Kissinger to get his own contract filed with the Court right away for approval. He was further instructed to keep the Court informed as to any damage that the Estate of Ryan Zwingler may have suffered from Attorney Melton's unlawful actions. Once his wrongdoing was discovered, on October 20, 2017, Attorney Melton self-reported to the Office of Attorney Services at the Ohio Supreme Court in which the notice of permission to be filed by rule was **time stamped received by the Office of Attorney Services on October 23, 2017.** (See Exhibit D) Attorney Melton disclosed that he had not sent in his Notice of Permission To Appear Pro Hac Vice in multiple cases going as far back as 2012 in the Columbiana Court of Common Pleas. On May 2, 2018, Attorney Kissinger sent a demand package to Attorney Melton's professional liability carrier in regards to a claim with complete details as to the unresolvable issues. On May 15, 2018, Attorney Paul D. Eklund, counsel for Central-Allied Enterprises, Inc., sent a correspondence to Attorney Kissinger to convey that he had been put on notice of Attorney Melton's license issues by CNA Professional Services, **Attorney Melton's professional liability carrier**. (See attached Exhibit E) He stated that based upon this new information, there would be no further negotiations regarding the claim. In the State of Ohio, **every out of state attorney** must be registered with the Ohio Supreme Court before they can petition a tribunal to enter an appearance as counsel on any matter. The law on pro hac vice admission is prescribed under Ohio Rules For The Government Of The Bar Of Ohio XII (See attached Exhibit F). Under Rule XII, Section 4, when an **out of state attorney** files for permission to appear before a tribunal, **a notice of permission to appear incorporating the court order granting permission to appear**, must be sent to the Office of Attorney Services with **thirty days from the date the tribunal gives permission to appear** in the case. **After thirty days, failure to file the notice of permission to appear results in the automatic exclusion from**

the practice of law in the State of Ohio until the same is filed. The Ohio Supreme Court's website provides a flow chart to avoid any confusion about the rule. (See attached Exhibit G) Based upon his own admission, Attorney Melton was practicing law for approximately five years while being excluded from the practice of law in Ohio. In addition, he was also on inactive status for approximately nine months in 2017 for failure to pay his renewal fee to the State of Ohio. When Attorney Melton filed his initial complaint, he had the status of a non-lawyer. Only a lawyer or a party may initiate an action by filing a complaint. *Williams v. Global Constr. Company Ltd.* 26 Ohio App.3d 119, 498 N.E.2d 500 (10th Dist. 1985). The Seventh District Court of Appeals has made its position quite clear. In *State ex rel. Hadley v. Pike,* 2014-Ohio-3310, 14 CO 14 (See attached Exhibit H), the Court made it clear that a Pennsylvania attorney's complaint is void *ab initio* and is treated as if it had never been filed unless he is properly registered with the Ohio Supreme Court. If the non-lawyer files a complaint, it is **not voidable, but null and void** as outlined in *Bureau of Support v. Brown,* 7th Dist. Carroll No. 00APO742, 2001 WL1497073 (Nov.6, 2001) (See attached Exhibit I) *Brown* also stated that the Court lacks subject matter jurisdiction when signed by the non-lawyer. As Attorney Melton was excluded from the practice of law when he filed the complaint, it is null and void thereby depriving the Court in the General Division of subject matter jurisdiction.

Since the complaint is a nullity, the Ohio Saving's Statute is no longer available to permit

a refiling of the case without a legitimate tolling argument. A complaint which becomes a nullity due to violations of 4705.01 (unauthorized practice of law) cannot protect subsequent filing with the Savings Statute. The complaint was never "attempted commenced". This principal was expressly brought out in the *Geiger* case as a necessity to keep from promoting the unauthorized practice of law. *Geiger v. King*, 2004-Ohio-2137, 04-LW-1829 (10th) (See Exhibit J). In this matter, the statute of limitations has long since expired due to the unlawful actions of Attorney Melton. Therefore, The Estate of Ryan Zwingler has suffered great loss as a result. The loss being initially valued by Attorney Melton at 9 million dollars (See Exhibit B).

III. Contempt: Ryan Zwingler's estate has submitted a motion for a finding of summary direct contempt of court and an order for Attorney Scott L. Melton to appear for sentencing and an order that he must provide the Court with legal arguments for his actions while acting under this Court's authority.

The Court has inherent power to punish for direct contempt which **may not** be limited by legislative authority. The penalty for direct contempt of court can result in up to one year of imprisonment other than to the penitentiary. *In re Neff*, 254 N.E.2d 25, 20 Ohio App.2d 213 (Ohio App. 5 Dist. 1969). Falsification of documents filed with the court is fraud upon the court and direct contempt. *Fidelity Finance Co. v. Harris*, 126 N.E.2d 812, 102 Ohio App. 497 (Ohio App. 8 Dist. 1955). *Fidelity* went on to say, "Done by an attorney of the court, it is more reprehensible than by others; for it is an abuse of his office, a betrayal of his trust, a violation of

his oath, infidelity to the court to which, and not to his client, his first duty lies and a profanation of the temple of justice". A Court's **personal knowledge** justifies a finding of summary direct contempt. Upon a finding of summary direct contempt, if there is no imminent threat, a sentencing hearing is necessary to address all due process rights. *In Re Contemnor Caron,*744 N.E.2d 787, 110 Ohio Misc.2d 58, 2001-Ohio-54 (Ohio Comm. 2000). The Court has verified through its own investigation that Attorney Melton was practicing law without privilege to do so. The Court's "personal knowledge" is all that is required for a finding of summary direct contempt. The Courts "personal knowledge" is verified as accurate by Attorney Melton's own admission in his letter marked as Exhibit "D",verifying Attorney Melton has presented this Court with what appeared to be a valid pro hac vice registration number. However, his pro hac vice registration number was obtained fraudulently as Attorney Melton had been excluded by rule to practice law in the State of Ohio for years. In *In Re The Estate of Wright*, 165 Ohio St. 15, 133 N.E.2d 350 (Ohio 1956), the Supreme Court of Ohio set up a test to determine fraud upon the court. The Court said regarding the act, if "it is such as to influence or persuade the court to make orders in its own courtroom, concerning which it probably would have done otherwise had the act not occurred, there is such an obstruction of justice as to constitute direct contempt.". Therefore, Attorney Melton is in direct contempt of Court due to his filing of his application to approve his contingent fee contract. If the Court had been aware that the pro hac vice number was not valid, it never would have approved Attorney Melton's contingent fee

contract. Therefore, Attorney Melton should be found in summary direct contempt of court and be required to present the Court with his legal argument explaining his unlawful conduct in addition to whatever additional action the Court deems appropriate and is appropriate under Ohio law.

Conduct can amount to both civil and criminal contempt. Both aspects may be dealt with in the same proceeding. The Ohio Supreme Court stated "Judicial sanctions in civil contempt proceedings may in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *City of Cincinnati v. Cincinnati Dist. Council 51*,35 Ohio St.2d 197 (Ohio 1973). Judicial sanctions in civil contempt proceedings may be employed to compensate the complainant for losses sustained where it can be proven that the damages were a direct result of the contempt. *First Bank of Marietta v. Mascrete, Inc.*,125 Ohio App.3d 257 (Ohio App. 4 Dist. 1998), 95CA4. Punitive damages are available in a contempt action. *Dombroski v. Dombroski,* 99-LW-4220, 506. Punitive damages are permitted in a contempt action under the inherent contempt power of the court which cannot be taken away by legislation. In this matter, Attorney Melton continued practicing in Ohio for five years without valid pro hac vice privileges, including but not limited to, a trial to a jury in Columbiana County. He kept his activities from the knowledge of the courts, opposing counsel and his clients. If

Attorney Kissinger had not inadvertently discovered Attorney Melton's unlawful acts, they could have continued to go on indefinitely. His clients, the Zwingler family, were treated with actual malice by Attorney Melton thereby allowing for the imposition of punitive damages.

Attorney Melton has not yet personally appeared before any Ohio court to explain his unlawful behavior for practicing without privilege to do so. Again, the Estate of Ryan Zwingler, moves this Honorable Court for an immediate order of direct contempt with a sentencing hearing thereafter set to afford Attorney Melton all the due process rights he is entitled to. The Estate asks this Honorable Court to order Attorney Melton to appear at the sentencing hearing for the Court to take all such actions as it deems legal and appropriate, and an order for Attorney Melton to provide his legal arguments for his actions while acting under the direct authority of this Court as outlined above. If this Court rules there is no merit in Attorney Melton's arguments, the estate would seek an order for a subsequent hearing to be set on damages, both compensatory and punitive, in which all sides may present their arguments before the Court.

Respectfully Submitted,

William Kissinger (0059149)
Attorney For Michele Zwingler
7631 South Avenue Suite F
Youngstown, Ohio 44512
(330) 629-8877

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MICHELE ZWINGLER, et. al.	:	**CASE NO. 2018 CV 02518**
Plaintiffs,	:	**JUDGE MAUREEN A. SWEENEY**
	:	**MAGISTRATE DENNIS SARISKY**
-VS-	:	
CENTRAL ALLIED ENT., et. al.	:	**JUDGMENT ENTRY**
Defendants	:	2018 CV 02518 00099971762 JUDENT

This matter came before the Court for consideration of the Non-Party Scott Melton's Motion to Disqualify filed on October 23, 2018. Upon review, the Court finds that this Court was under obligation to file a complaint with the Mahoning County Bar Association regarding the status of Attorney Scott Melton's pro hac vice appearance in the previous filed case. Based upon that action, this Court hereby recuses itself of any further proceedings in this matter to avoid any potential appearance of impropriety pursuant to Canon 1 of the Ohio Code of Judicial Conduct.

The hearing on contempt is stayed and the matter shall be forwarded to the Assignment Commissioner for further action.

All until further order.

Judge Maureen A. Sweeney

SCOTT L. MELTON

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September 20, 2017

VIA US EXPRESS MAIL
Paul Eklund, Esquire
Collins, Roche, Utley & Garner, L.L.C.
800 Westpoint Parkway, Suite 1100
Cleveland, OH 44145

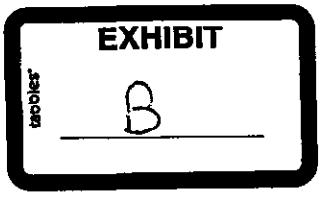
Re: Michele Zwingler, Administratrix of the Estate of Ryan E. Zwingler, deceased and Michele Zwingler and Robert Zwingler, Jr. vs. Central-Allied Enterprises, Inc.
In the Court of Common Pleas of Mahoning County, Ohio 15 CV 1410

Dear Paul,

Recently we revoked all settlement demands in this case. You wondered why and made inquiry as to our current position.

Several weeks ago, we learned that an Information charging Central Allied Enterprises, Inc. with a **felony** was filed on December 14, 2006 by the United States of America, Plaintiff, in the United States District Court for the Southern District of Ohio Eastern Division at docket 2:06-cr-00272 for knowingly violating 18 U.S.C. §1020 (Chapter 47 Fraud and False Statements) during its performance of work on Highway Project 209(99), a federally funded highway project pursuant to the Federal-Aid Road Act, as amended. I have enclosed and labeled as **Exhibit 1** a copy of the Information. On the same day, your client entered a Plea Agreement and jointly submitted with the United States Attorney a Statement of Facts to the allegations and charges contained in the Information, which were incorporated into the Plea Agreement. I have enclosed and labeled as **Exhibit 2** a copy of the Plea Agreement and a copy of the jointly submitted Statement of Facts. Finally, I enclose a copy of the docket in the criminal case, which is labeled as **Exhibit 3**.

As I will lay out for you, the discovery of the above information changed the posture of the case in favor of the plaintiffs so dramatically that we formally withdrew the outstanding settlement demand. You will understand why we revoked our settlement demand of $1.7 million dollars after reading this letter and understanding the full implications for your client in this case ("the



short game") as well as its future civil liability exposure to third parties ("the long game"), that it could not instruct you to accept the settlement demand and end the case at that settlement number.

You will note in the Plea Agreement, your client admitted that in 2000 it knowingly, intentionally, willfully and falsely made, or knowingly aided and abetted in the making of a false statement, representation or report, or false claim regarding its work on a highway project funded in part by the federal government. It pled guilty, freely and voluntarily, without threat, coercion or intimidation, to making false statements in documents in 2000 involving its participation in the disadvantaged business enterprise programs (DBE) participation which was part of the highway construction contract it entered into with the Ohio Department of Transportation (ODOT) and the Federal Highway Administration (FHWA) and United States Department of Transportation (DOT). In the Plea Agreement and jointly submitted Statement of Facts your client admitted that it acted willfully in making the false statement, representation and report as alleged and that its acts were willful, knowing, intentional, false, and fraudulent violations of the affirmative action programs (DBE) of Ohio and/or ODOT and/or DOT and/or FHWA.

Importantly, your client admitted that its knowing, willful, intentional and fraudulent violations of the affirmative action program should have been disclosed to ODOT, but instead, Central Allied Enterprises, Inc. fraudulently concealed the same from ODOT. See paragraph 7 of the Plea Agreement: "The parties have jointly submitted a statement of facts, and Central acknowledges the accuracy of said statement of facts and that its conduct violated 49 CFR Sec. 26.55 ***and should have been disclosed to ODOT***." That statement regarding the duty of a contractor to come forward and disclose its knowing violations of affirmative action programs is in keeping with the requirements that in completing forms and certifications necessary for bidding on a highway construction contract the bidder must reveal, not conceal, its violations of affirmative action programs with which it must comply. To wit: a bidder is solely responsible to inform the Coordinator of any violation of affirmative action programs with which it is required to comply to obtain their Certificate of Compliance with affirmative action programs with which the bidder is required to comply. Ohio Admin. Code §123:2-11-01.

So, how does Central's guilty plea in the criminal action filed in 2007 have any effect upon its liability or the damages in our case, in which its bidding on, being awarded and performing under the construction contract all took place three years earlier, in 2004? Similarly, how does Central's pleading guilty to knowingly, intentionally and willfully violating the DBE affirmative action programs of ODOT, DOT and FHWA, and fraudulently concealing the same from those entities in 2000, have any effect upon its liability or the damages in our case centered four years later in 2004?

It comes down to this. Ohio law clearly states that a person or company (here, Central) desiring to bid on a contract awarded by the Ohio Director of Transportation pursuant to Chapter 5525 of the Ohio Rev. Code (here, your client's contract with ODOT – Contract No. 40130) may make an application for a Certificate of Compliance with federal and state affirmative action programs to the Equal Opportunity Coordinator for the Department of Administrative Services and ***that a person or company who violates a federal or state affirmative action program during the five (5) years prior to the date the application was submitted for determination of compliance is INELIGIBLE to bid on a contract awarded pursuant to, among others, Chapter 5525 of the Ohio Revised Code.*** Ohio Rev. Code §9.47(A). Your client pled guilty in Federal District Court to knowingly, intentionally and willfully violating affirmative action programs in 2000, involving highway construction contracts, and concealing the same from all interested parties not only in 2000 but it continued to conceal the same until it was caught and brought to justice in 2007. When Central sought to bid on the construction project in our case in 2004 **it was an ineligible bidder** because it knowingly, intentionally and willfully violated, and fraudulently concealed its violation of the affirmative action program in 2000, which was within the five (5) years prior to the 2004 date of its application for Certificate of Compliance.

Additionally, in 2003 or 2004 (within 5 years of the violation of the affirmative action programs), pursuant to Ohio Rev. Code §5525.03, Central made an Application for Qualification to the Ohio Director of Transportation and its application was accompanied by a Certificate of Compliance with affirmative action programs issued pursuant to Ohio Rev. Code §9.47(A) which did not reflect that within the previous five (5) years Central had knowingly violated state and federal affirmative action programs. Had the true facts of Central's violations of the affirmative action programs in 2000 been known to and not actively concealed from the Director of Transportation the application for qualification would have been denied. Had the true facts of Central's violations of the affirmative action programs in 2000 been known to, and not actively concealed from, the Equal Opportunity Coordinator of the Department of Administrative Services no Certificate of Compliance with affirmative action programs could have been lawfully issued to Central.

Pursuant to Ohio Rev. Code §153.08 (Opening Bids and Awarding Contract), no contract shall be entered into unless the bidder possesses a valid Certificate of Compliance with Affirmative Action programs issued pursuant to Section 9.47(A) of the Ohio Rev. Code and dated no earlier than 180 days prior to the date fixed for the opening of bids for a particular project. Here, Central did not possess a valid Certificate of Compliance due to its knowing, intentional and willful violations of the affirmative action programs in the 5 years preceding the opening of bids and its continuing fraudulent concealment of its violations. As such, as a matter of law, the contract in our case should not have been entered into with Central.

Since, by operation of law, based upon its conviction, Central was ineligible to bid on the contract in our case and because the contract should not have been entered into pursuant to Section 153.08, above, under Ohio law the contract is void, not merely voidable. See, *Benefit Services of Ohio, Inc. v. Trumbull County Commissioners, et al.*, 2004 Ohio 5631, Court of Appeals (11th Dist.) (Paragraphs 26, 33). Public bidding is a creation of statute and the statute says that the State of Ohio (or ODOT) and an ineligible bidder lack capacity to enter into a contract, therefore the construction contract in our case never existed pursuant to the holding in *Benefit Services*, supra.

As Contract No. 40130 was void as a matter of law Central had no legal right to perform berm restoration work, or any work, to State Route 534. It has long been the law in Ohio that a private individual has no right to interfere with a highway or street without first obtaining permission from the proper authority and when it does so without such permission it constitutes an absolute public nuisance and renders itself liable as ***an insurer*** of the roadway, regardless of whether it performed prudently and carefully. See, *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944). Central's culpable and unlawful conduct allowed it to be continually considered as an eligible bidder and allowed it to unlawfully secure the contract and perform, or not perform, the work of the contract. Simply put, due to its knowing, intentional, willful and fraudulent violations of the affirmative action programs in 2000 and its continuing knowing, intentional, willful and fraudulent concealment of the same, Central is subject to strict liability as an insurer of those who become injured from its work regardless of how well that work was performed. The well-established law making Central an insurer moves the Plaintiffs' case from one grounded upon negligence to **strict liability**.

Moreover, Central's knowing, intentional, willful and fraudulent conduct and concealing its conduct from the relevant Ohio and federal agencies allows the imposition of punitive damages. See Ohio Rev. Code §2315.21(C) (Punitive or exemplary damages). That section states:

> "Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply: (1) The actions or omissions of that defendant demonstrate malice or aggravated or ***egregious fraud***, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate. (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant." [Emphasis added].

In addition to the Plaintiff now being able to recover punitive damages against Central the statutory cap on punitive damages, limited to two times the amount of the compensatory

damages awarded to the plaintiff from the defendant,[1] is inapplicable to the case against Central because of its knowing, intentional, willful and egregious fraud and fraudulent concealment conduct that allowed it to unlawfully perform, or fail to perform as is the case with the berm work on the western berm of SR 534. The inapplicability of the statutory cap on punitive damages as applied to Central's conduct is contained in Ohio Rev. Code §2315.21 (D)(6) which provides:

> "Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposefully and knowing as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action."

We will be seeking leave to file an amended complaint bringing causes of action for fraud and fraudulent concealment. These causes of action are not time barred as they will be brought within one year from the time of discovery of the fraud and fraudulent concealment, well within the one-year statute of limitations. We will also seek leave to file for punitive and exemplary damages based upon the knowing, intentional, willful and fraudulent conduct and fraudulent concealment.

We believe that after amendment to include fraud and fraudulent concealment that we can prevail on a Motion for Partial Summary Judgment on liability.

Ignoring for a moment that we can now proceed on a theory of strict liability, your defense to the negligence action is premised upon what you allege is the negligence of the driver, Jarod Cameron, in causing the truck he was driving to leave the roadway and paved shoulder; drive onto the berm of the westbound edge of SR 534; fail to properly control the truck by turning the wheel too sharply and too quickly to the left which caused the truck to suddenly remount the paved shoulder and cross into the opposing lane and strike the oncoming tractor trailer. However, for the reasons set forth below, the negligence of the driver/co-employee cannot be found by the jury nor can any evidence of his negligence be admitted at trial.

There is no dispute that at the time of the accident Ryan Zwingler and Jared Cameron were co-employees and were each employed by Bonnie Plants, Inc., a wholly owned subsidiary of Alabama Farmers Cooperative, Inc. and their actions in transporting plants and fertilizer in the truck were actions within the course and scope of their employment. Ryan Zwingler's death was found to be a compensable death under sections 4123.01 – 4123.94, inclusive of the Ohio

[1] See, Ohio Rev. Code §2315.21 (D)(2)(a). Subpart (b) of that subsection applies only to "small employer or individual". Central bills itself as the largest paver in Northeast Ohio and, as such, it is hardly a small employer.

Revised Code and the Ohio Bureau of Workers' Compensation (BWC) paid the sum of $2,299.11 in lost wages to the Estate of Ryan Zwingler. I have enclosed and labeled as **Exhibit 4** a copy of the letter dated October 8, 2013 from the BWC to Robert Zwingler informing him of its decision that his son's death was related to an industrial accident and, as such, the Workers' Compensation Claim No. 13-823277 was allowed as a compensable death claim. Further, I have enclosed and labeled as **Exhibit 5** a copy of the letter dated June 1, 2016 from BWC to me stating that lost wages of Mr. Zwingler were paid and it was asserting a subrogation claim for the payment from any recovery in our case. The Ohio Rev. Code §4123.741 (Employee's liability in damages) states:

> "No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee or such employer in the course of and arising out of the latter employee's employment, or for any death resulting from such injury, occupational disease, on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code."

In *Romig v. Baker Hi-Way Express. Inc. et al.*, 2012-Ohio-321 (Court of Appeals, Fifth District) the court held that a tortfeasor cannot raise the affirmative defense of the empty chair as to the negligence of a co-employee and to include the employee's negligence in the allocation of fault is completely inconsistent with the Ohio Workers' Compensation system, as structured by the constitution and the legislature and as construed by the courts. Also, pursuant to the holding in that case you cannot introduce any evidence at trial, whether by expert witness, lay witness or police witness of any alleged negligent conduct of Jarod Cameron and the jury may not make any finding of his negligence. Thus, the alleged negligent conduct of Mr. Cameron is not a legitimate issue for the jury's consideration because the statutory immunity of the Workers' Compensation Act shields him from any jury assessment of his negligence. In our case, the only party against whom the jury may make an assessment of negligent conduct, if any, is your client....and, if our assessment is correct, it will not be making an assessment of your client's *negligence* but it will be assessing damages against your client because it was found to be strictly liable.

Lest anyone jump to the conclusion that insurance coverage for this accident is somehow jeopardized under an intentional acts exclusion clause for Central's knowing, intentional and willful fraudulent acts and fraudulent concealment that conclusion would be unwarranted. An intentional acts exclusion clause relieves the insurer from the obligation to provide coverage when the harm alleged is intentionally caused by the insured. *Granger v. Auto-Owners Insurance*, 144 Ohio St. 3d 57 (Ohio 2015). Phrased another way, in order to avoid coverage on the basis of an exclusion for intentional injuries the insurer must demonstrate that the injury itself was expected or intended. *Physicians Insurance Company of Ohio v. Swanson*, 58 Ohio St. 3d

189, 569 N.E.2d 906 (1991). Here, Central's intentional acts of fraud and fraudulent concealment of its violation of affirmative action programs in 2000 were not acts that were intended to cause the harms alleged in this case which occurred in 2013 (injury and death of Ryan Zwingler and loss of consortium claims of his parents). As such, the $11 million dollars in insurance coverage remains available for the recoverable damages in this case.

What I have discussed so far in this case is what I have called the "short game", consisting of what might be recoverable by the Zwingler Estate and Mr. and Mrs. Zwingler in their own right as compensatory and punitive damages. In considering your response to this letter I urge you to consider the "long game" of your client's potential liability exposure outside of this case should the fact that it unlawfully secured the contract come to light. By its guilty plea Central insulated itself against further criminal liability for its fraudulent conduct and fraudulent concealment, however, it remained civilly liable for its conduct.

The fact of the matter is that it appears that Central was an ineligible bidder for construction contracts in which a Certificate of Compliance was required for part of 2000 and all of 2001-2005. That means every second place bidder for those contracts in that five year period should have been the successful bidder and been awarded the contract. Each of those bidders who lost the contract to Central due to Central's knowing, intentional, willful and fraudulent conduct, as described in the criminal case and in this letter, has a potential cause of action for civil liability for lost profits against Central. At this point, only Central knows how much profit was derived from those construction contracts it wrongfully and unlawfully secured over that five year period. I would hazard a guess that it would certainly be in the millions of dollars.

As things now stand, Central's conduct seems to remain largely unknown because the record was sealed in the criminal case. See **Exhibit 3**.

Obviously, as all the construction contracts that Central wrongly and unlawfully performed during the relevant five year period are void due to fraud, therefore its work on each of those contracts created an absolute public nuisance, for which it is now strictly liable, without regard to how well it performed its work.

I propose a settlement of the case for the total sum of $9 million dollars. This would provide compensation for the horrific burning to death of Ryan Zwingler and his other non-economic damages; compensation of his economic damages of approximately $1.5 million dollars; compensation to his mother and father for their loss of consortium damages. You were moved by their deposition testimony regarding their losses and the closeness of them to their son. By this settlement Central would avoid all risk of its UNCAPPED exposure to an award of punitive damages. Further, it would avoid Central having to answer punitive damage interrogatories forcing it to disclose its net worth prior to verdict so that the jury may fashion a punitive damage

award that would be large enough in regard to its net worth that it would be deterred from ever again engaging in similar conduct. Twice I have recovered substantial punitive damage awards at jury trial. The settlement I am proposing would involve my clients signing an appropriate confidentiality agreement preventing the release or discussion of information uncovered by us in this case. It is my belief that if this case is not settled at this time the overall damage exposure to Central that could flow from this case would exceed, by millions of dollars, our settlement demand.

We would like to schedule a status conference with Judge Sweeney at her first availability to discuss the changed circumstance of the case, which I have described above. We intend to ask for her to handle the hearing set for October 6th, do you have any objection to that? Would you like to respond to our overture before anything is revealed to the Judge as to why we are seeking a status conference, or, would you like to have a joint discussion about the above matters with her?

We look forward to hearing from you.

Very truly yours,

Scott L. Melton

William J. Kissinger

SLM/nrm
Enclosures

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

FILED

SCOTT L. MELTON, ESQUIRE

OCT 12 2017

AFFIDAVIT OF APPLICANT
Gov. Bar R. XII, Section 2(A)(3)

FOR PRO HAC VICE REGISTRATION

ADMISSIONS OFFICE
SUPREME COURT OF OHIO

AR ☑

SCOTT L. MELTON, ESQUIRE, being first duly cautioned, swears or affirms as follows:

a. I have never been disbarred from the practice of law.

b. I have been admitted to the practice of law in the following jurisdictions (attach additional page if necessary):

PENNSYLVANIA

c. Choose one:
- ☑ I am not currently suspended from the practice of law in any jurisdiction where I have been admitted to practice.
- ☐ I am currently suspended from the practice of law in the following jurisdictions:

d. Choose one:
- ☑ I have not resigned from the practice of law with discipline pending in any jurisdiction where I have been admitted to practice.
- ☐ I have resigned from the practice of law with discipline pending in the following jurisdiction(s):

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OCT 12 2017

ADMISSIONS OFFICE
SUPREME COURT OF OHIO

SIGNATURE OF APPLICANT

Sworn to or affirmed before me and subscribed in my presence the 27th day of September, 20 17, in the state of Pennsylvania and county of Beaver.

***Notary public's stamp/seal and commission expiration date are required.**

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Daniel M. D'Antonio, Notary Public
Conway Boro, Beaver County
My Commission Expires May 23, 2021
MEMBER, PENNSYLVANIA ASSOCIATION OF NOTARIES

SIGNATURE OF NOTARY P

EXHIBIT
C

SCOTT L. MELTON

ATTORNEY AT LAW
300 NINTH STREET
CONWAY, PENNSYLVANIA 15027-1647
(724) 869-2972
(724) 869-2246 facsimile
smeltonlawfirm@gmail.com
www.smeltonlaw.com

October 20, 2017

VIA EXPRESS MAIL
The Supreme Court of Ohio
Office of Attorney Services
Attention: Lee Ann Ward
Pro Hac Vice Registration
65 South Front Street
Columbus, Ohio 43215

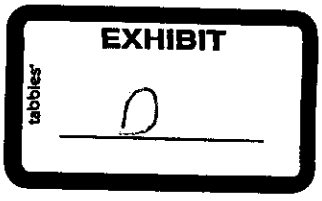
Re: Scott L. Melton, Esquire

Dear Ms. Ward:

Pursuant to our telephone call yesterday, I have enclosed a signed Notice Of Permission To Appear Pro Hac Vice In An Ohio Proceeding and a copy of the Court Order granting me permission to appear Pro Hac Vice for the following cases:

1. Michele Zwingler, Administratrix of the Estate of Ryan Zwingler, deceased et. al. vs. Central-Allied Enterprises, Inc. filed in the Court of Common Pleas of Mahoning County at No. 15 CV 1410;
2. Michele Zwingler, Administratrix of the Estate of Ryan Zwingler, deceased et al. vs. Ohio Department of Transportation filed in the Court of Claims at No. 2015-00525;
3. Franklin W. Shank, Sr., Individually and as Administrator of the Estate of Tammy L. Shank, deceased vs. Mark W. Swift, D.O. et al. filed in the Court of Common Pleas of Columbiana County, Ohio at No. 2011 CV 666.

The matter involving case no. 3 above was concluded a number of years ago when, on August 14, 2014, I moved for Voluntary Dismissal With Prejudice Pursuant to Ohio Rule of Appellate Procedure 28. Pursuant to Section 5 (B) of your Rules it appears that I was to inform your office that the matter was concluded by the end of that calendar year. Please accept the enclosed court-clocked copy of my Motion for Voluntary Dismissal With Prejudice as my notice to your office.



Lee Ann Ward
Office of Attorney Services
October 20, 2017

I believe that I should prepare a formal Petition for Reinstatement explaining my inadvertent and unintentional failure to send your office the Court Orders granting me permission to appear Pro Hac Vice in the above Ohio proceedings. I believe that I will have the Petition for Reinstatement done next week and I will send it to you. I will be seeking retroactive reinstatement.

Thank you for your time and advice yesterday.

Very truly yours,

Scott L. Melton

SLM/nrm
Enclosure

CC: William Kissinger, Esquire w/encl.

IN THE COURT OF CLAIMS OF OHIO

FILED
COURT OF CLAIMS
OF OHIO
2017 OCT 26 PM 12:42

MICHELE ZWINGLER, Admx., etc., et al.	Case No. 2015-00525
Plaintiffs	Judge Patrick M. McGrath
v.	ENTRY ASSESSING COSTS
OHIO DEPARTMENT OF TRANSPORTATION	
Defendant	

On October 16, 2017, plaintiffs dismissed the above-captioned matter by filing a notice of voluntary dismissal without prejudice pursuant to Civ.R. 41(A)(1)(a). Court costs are assessed against plaintiffs.

PATRICK M. MCGRATH
Judge

cc:

Scott L. Melton
300 Ninth Street
Conway, Pennsylvania 15027

William J. Kissinger, Jr.
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Jeanna V. Jacobus
Peter E. DeMarco
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

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SUPREME COURT OF OHIO

008

JOURNALIZED

IN THE COURT OF CLAIMS OF OHIO

MICHELE ZWINGLER, Admx., etc., et al. Plaintiffs v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2015-00525 Judge Patrick M. McGrath ENTRY

On May 2, 2016, Scott L. Melton, on behalf of plaintiffs Michelle Zwingler, Administratrix of the Estate of Ryan E. Zwingler, deceased, Michelle Zwingler, and Robert Zwingler, Jr., filed a motion for permission to appear pro hac vice. The court finds that the motion is in compliance with Gov.Bar R. XII, Section 2 and, for good cause shown, the motion is GRANTED.

PATRICK M. MCGRATH
Judge

cc:

Scott L. Melton
300 Ninth Street
Conway, Pennsylvania 15027

Jeanna V. Jacobus
Peter E. DeMarco
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

008

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

PHV- 2571-2017

NOTICE OF PERMISSION TO APPEAR PRO HAC VICE IN AN OHIO PROCEEDING

Due within 30 days after tribunal grants permission.

(last)	(first)	(middle)	(maiden)
Name: Melton	Scott	L	

Residential Address: [redacted]

Firm/Employer Name: Solo Practice

Firm/Employer Address: 300 Ninth Street Conway, PA 15027

Firm/Employer Telephone: 724-869-2972 Firm/Employer Fax: 724-869-2246

Firm/Employer e-mail: smeltonlawfirm@gmail.com

Ohio proceeding in which permission to appear pro hac vice was granted (include case caption):

Michele Zwingler, Administratrix of the Estate of Ryan Zwingler, deceased et al. vs. Ohio Department of Transportation

Case number: 2015-00525

Date of tribunal's order granting permission to appear pro hac vice: May 2, 20 16.

Name and attorney registration number of associating Ohio attorney (required):

William Kissinger ID# 0059149

COPY OF COURT ORDER GRANTING PERMISSION TO APPEAR PRO HAC VICE MUST BE INCLUDED WITH THIS NOTICE.

SIGNATURE OF PHV ATTORNEY:

DATE:

October 20, 2016

PRINT NAME:

Scott L. Melton, Esquire

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MICHELE ZWINGLER, ADMINISTRATRIX OF THE ESTATE OF RYAN E. ZWINGLER, DECEASED; MICHELE ZWINGLER and ROBERT ZWINGLER, Jr. in their own right, 7564 W. Pine Lake Road Salem, OH 44460, Plaintiff,	:	Judge: Sweeney
	:	Case No.: 15CV 1410
	:	**JUDGMENT ENTRY**
vs.	:	
CENTRAL-ALLIED ENTERPRISES, INC. 1243 Raff Road, S.W. Canton, OH 44708, Defendants.	:	

Upon consideration of the motion for permission to appear *pro hac vice* filed by Attorney Scott L. Melton, permission is granted for Attorney Melton to appear *pro hac vice* and participate as counsel of record for Plaintiffs Michele Zwingler, Administratrix of the Estate of Ryan E. Zwingler, Deceased, and Michele Zwingler and Robert Zwingler, Jr. in their own right.

April 28th, 2016

DTS Maureen A. Sweeney, Judge

THE CLERK SHALL SERVE NOTICE
OF THIS ORDER UPON ALL PARTIES
WITHIN THREE (3) DAYS PER CIV.R.5

cc: Paul D. Eklund, Esquire
William Kissinger, Esquire

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

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SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

PHV- 2571-2017

NOTICE OF PERMISSION TO APPEAR PRO HAC VICE IN AN OHIO PROCEEDING

Due within 30 days after tribunal grants permission.

(last)	(first)	(middle)	(maiden)
Name: Melton	Scott	L	

Residential Address: [redacted]

Firm/Employer Name: Solo Practice

Firm/Employer Address: 300 Ninth Street Conway, PA 15027

Firm/Employer Telephone: 724-869-2972 Firm/Employer Fax: 724-869-2246

Firm/Employer e-mail: smeltonlawfirm@gmail.com

Ohio proceeding in which permission to appear pro hac vice was granted (include case caption):

Michele Zwingler, Administratrix of the Estate of Ryan Zwingler, deceased et al. vs. Central-Allied Enterprises, Inc.

Case number: 15 CV 1410

Date of tribunal's order granting permission to appear pro hac vice: April 28, 20 16.

Name and attorney registration number of associating Ohio attorney (required):

William Kissinger ID# 0059149

COPY OF COURT ORDER GRANTING PERMISSION TO APPEAR PRO HAC VICE MUST BE INCLUDED WITH THIS NOTICE.

SIGNATURE OF PHV ATTORNEY:

DATE: October 20, 2016

PRINT NAME: Scott L. Melton, Esquire

IN THE COURT OF APPEALS
SEVENTH JUDICIAL DISTRICT
COLUMBIANA COUNTY, OHIO

FRANKLIN W. SHANK, SR., INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAMMY L. SHANK, DECEASED,

Plaintiff-Appellant,

vs.

VIKRAM A. RAVAL, M.D., ET. AL.,

Defendants-Appellees.

CASE NO. 14 CO 21

APPELLANT'S MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE PURSUANT TO OHIO RULE OF APPELLATE PROCEDURE 28

I, Scott L. Melton, Esquire, counsel for Plaintiff/Appellant, Franklin W. Shank, Sr., individually and as the Administrator of the Estate of Tammy L. Shank, deceased, request that this Honorable Court dismiss with prejudice the appeal taken in the above captioned case.

Scott L. Melton, Esquire
PA ID 26602
PHV No. 2571-2014
300 Ninth Street
Conway, PA 15027
(724) 869-2972
(724) 869-2246 (facsimile)
smeltonlawfirm@gmail.com
Counsel for Plaintiff-Appellant

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

FILED
OCT 23 2017
ADMISSIONS OFFICE
SUPREME COURT OF OHIO

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OCT 23 2017
ADMISSIONS OFFICE
SUPREME COURT OF OHIO

PHV- 2571-2017

NOTICE OF PERMISSION TO APPEAR PRO HAC VICE IN AN OHIO PROCEEDING

Due within 30 days that tribunal grants permission.

(last) (first) (middle) (maiden)

Name: Melton Scott L

Residential Address: [redacted]

Firm/Employer Name: Solo Practice

Firm/Employer Address: 300 Ninth Street Conway, PA 15027

Firm/Employer Telephone: 724-869-2972 Firm/Employer Fax: 724-869-2246

Firm/Employer e-mail: smeltonlawfirm@gmail.com

Ohio proceeding in which permission to appear pro hac vice was granted (include case caption):

Franklin W. Shank, Sr., Individually and as Admin. of Estate of Tammy L. Shank, deceased vs. Mark W. Swift, DO et al.

Case number: 2011 CV 666

Date of tribunal's order granting permission to appear pro hac vice: April 19 , 20 12

Name and attorney registration number of associating Ohio attorney (required):

Steven M. Goldberg, Esquire ID# 0041344

COPY OF COURT ORDER GRANTING PERMISSION TO APPEAR PRO HAC VICE MUST BE INCLUDED WITH THIS NOTICE.

SIGNATURE OF PHV ATTORNEY:

DATE: October 20, 2016

PRINT NAME: Scott L. Melton, Esquire

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

PHV- 2571-2017

OCT 30 2017

NOTICE OF PERMISSION TO APPEAR PRO HAC VICE IN AN OHIO PROCEEDING

Due within 30 days of tribunal's permission

ADMISSIONS ASSOC.
SUPREME COURT OF OHIO

(last)	(first)	(middle)	(maiden)
Name: Melton	Scott	Lewis	

Residential Address: [redacted]

Firm/Employer Name: solo practitioner

Firm/Employer Address: 300 Ninth Street

Conway, PA 15027

Firm/Employer Telephone: 724-869-2972 Firm/Employer Fax: 724-869-2246

Firm/Employer e-mail: smeltonlawfirm@gmail.com

Ohio proceeding in which permission to appear pro hac vice was granted (include case caption):

Franklin W. Shank, Sr. Administratrix of the Estate of Tammy L. Shank, deceased v. Ian Matsuura, M.D. et al.

Case number: 2011 CV 757

Date of tribunal's order granting permission to appear pro hac vice: April 19 , 20 12

Name and attorney registration number of associating Ohio attorney (required):

Steven M. Goldberg, Esquire ID# 0041344

COPY OF COURT ORDER GRANTING PERMISSION TO APPEAR PRO HAC VICE MUST BE INCLUDED WITH THIS NOTICE.

RECEIVED

OCT 30 2017

ADMISSIONS OFFICE
SUPREME COURT OF OHIO

SIGNATURE OF PHV ATTORNEY:

DATE: October 30, 2017

PRINT NAME: SCOTT L. MELTON

IN THE COURT OF COMMON PLEAS
COLUMBIANA COUNTY, OHIO

FRANKLIN W. SHANK, SR., Ind. and as Adm. of the Estate of Tammy L. Shank, deceased,	:	CASE NO. 2011 CV 757
	:	Judge Scott A. Washam
Plaintiff,	:	**JUDGMENT ENTRY**
vs.	:	
IAN MATSUURA, M.D., et al.,	:	
Defendants.	:	

Upon consideration of the motion to appear *pro hac vice* filed by Attorney Scott L. Melton, permission is granted for Attorney Melton to appear *pro hac vice* and participate as counsel of record for Plaintiff Franklin W. Shank, Sr., individually and as Administrator of the Estate of Tammy L. Shank, deceased.

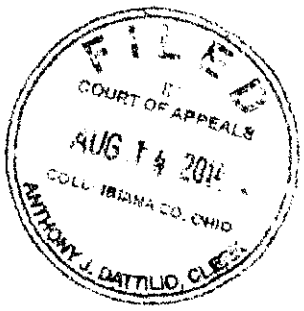
IT IS SO ORDERED

SCOTT WASHAM

April_____, 2012 Scott A. Washam, Judge

cc: Steven M. Goldberg, Esquire
Mark L. Schumacher, Esquire

IN THE COURT OF APPEALS
SEVENTH JUDICIAL DISTRICT
COLUMBIANA COUNTY, OHIO



FRANKLIN W. SHANK, SR., INDIVIDUALLY AND AS THE ADMINISTRATOR OF THE ESTATE OF TAMMY L. SHANK, DECEASED,

Plaintiff-Appellant,

vs.

VIKRAM A. RAVAL, M.D., ET. AL.,

Defendants-Appellees.

CASE NO. 14 CO 21

APPELLANT'S MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE PURSUANT TO OHIO RULE OF APPELLATE PROCEDURE 28

I, Scott L. Melton, Esquire, counsel for Plaintiff/Appellant, Franklin W. Shank, Sr., individually and as the Administrator of the Estate of Tammy L. Shank, deceased, request that this Honorable Court dismiss with prejudice the appeal taken in the above captioned case.

Scott L. Melton, Esquire
PA ID 26602
PHV No. 2571-2014
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May 15, 2018

VIA FACSIMILE: 330-629-2682
William J. Kissinger
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: Michele Zwingler, etc. v. Central-Allied Enterprises, Inc.
Mahoning County Court of Common Pleas Case No. 15CV1410
Our File No. A-0456/137.00016

Dear Mr. Kissinger:

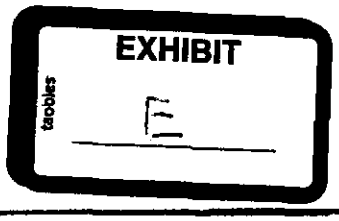
As you are aware, I am the attorney retained by Travelers to defend Central Allied Enterprises, Inc. with respect to the wrongful death claim presented by your clients, Michelle and Robert Zwingler. I have received a copy of your letter to "CNA Professional Services, Attn: Doug Ricci." Travelers has the primary layer of insurance for Central Allied, and I have been instructed to advise you that there will be no increase in the offer made on behalf of Central Allied to your clients at the mediation/settlement conference we attended with the Court Mediator in the Mahoning County Court of Common Pleas last fall.

Sincerely,

/s/ Paul D. Eklund

Paul D. Eklund

PDE/dmg



RULE XII. PRO HAC VICE ADMISSION

Section 1. Definitions

As used in this rule:

(A) *Tribunal*: A tribunal is defined as a court, legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(B) *Proceeding*: A proceeding is defined as an adjudicative matter pending before a tribunal.

Section 2. Requirements for Permission to Appear Pro Hac Vice

Section 2. Requirements for Permission to Appear Pro Hac Vice

(A) A tribunal of this state may grant permission to appear pro hac vice to an attorney who is admitted to practice in the highest court of a state, commonwealth, territory, or possession of the United States or the District of Columbia, or who is admitted to practice in the courts of a foreign state and is in good standing to appear pro hac vice in a proceeding.

(1) An attorney is eligible to be granted permission to appear pro hac vice pursuant to this rule if any of the following apply:

(a) The attorney neither resides in nor is regularly employed at an office in this state;

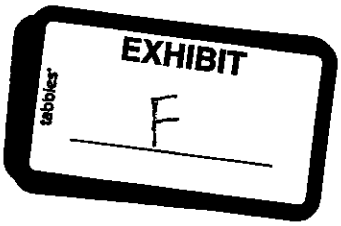
(b) The attorney is registered for corporate status in this state pursuant to Gov. Bar R. VI, Section 3;

(c) The attorney resides in this state but lawfully practices from offices in one or more other states;

(d) The attorney maintains an office or other systematic and continuous presence in this state pursuant to Prof.Cond.R. 5.5(d)(2);

(e) The attorney has permanently relocated to this state in the last 120 days and is currently an applicant pending admission under Gov. Bar R. I.

(2) A tribunal shall not grant permission to appear pro hac vice to an attorney who has taken and failed the Ohio bar examination, been denied admission without examination, or had an application for admission in this state denied on character and fitness grounds pursuant to Gov. Bar R. I within the last five years.



(3) Prior to being granted permission to appear pro hac vice by a tribunal, the attorney shall have applied for registration with the Supreme Court Office of Attorney Services, paid an registration fee of $300.00, and been issued a certificate of pro hac vice registration. The application for registration shall include the following information:

(a) The attorney's residential address, office address, and the name and address of the attorney's law firm or employer, if applicable;

(b) The jurisdictions in which the attorney has ever been licensed to practice law, including the dates of admission to practice, resignation, or retirement, and any attorney registration numbers;

(c) An affidavit stating that the attorney has never been disbarred and whether the attorney is currently under suspension or has resigned with discipline pending in any jurisdiction the attorney has ever been admitted;

(d) A statement the attorney satisfies the requirements in Section 2(A)(1) and (2) of this rule:

(e) A statement that the attorney will comply with the applicable statutes, law and procedural rules of this state and the rules, policies, and procedures of the tribunal before which the attorney seeks to practice and will be familiar with and comply with the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar.

(4) Of the $300 pro hac vice registration fee collected pursuant to Section 2(A)(3) of this rule, $150 shall be deposited into the Attorney Services Fund for use to fund civil legal aid services for low-income or disadvantaged populations in Ohio.

(5) An attorney representing an amicus curiae in support of an indigent defendant in a criminal matter may file with the Office of Attorney Services an application for a waiver of the pro hac vice registration fee. The waiver shall not apply to other proceedings in which the attorney seeks permission to appear pro hac vice.

(6) An attorney who has been granted permission to appear pro hac vice may participate in no more than three proceedings under this rule in the same calendar year the application is filed. In the event a proceeding continues to the next or subsequent calendar years, the proceeding will not count toward the annual limitation. An appeal from a trial court or court of appeals, an appeal of an administrative agency order or ruling, a transfer of an action to a court of competent jurisdiction, or the consolidation of two or more cases, where the attorney participated in the initial proceeding, shall not be counted toward the annual limitation. Participation for the first time by an attorney at any stage during a proceeding shall count toward the annual limitation.

(7) The attorney may file a motion for permission to appear pro hac vice accompanied by a copy of the certificate of pro hac vice registration furnished by the Office of Attorney Services, and includes the following information:

(a) The attorney's residential address, office address, and the name and address of the attorney's law firm or employer, if applicable;

(b) The jurisdictions in which the attorney has ever been licensed to practice law, including the dates of admission to practice, resignation, or retirement, and any attorney registration numbers;

(c) An affidavit stating that the attorney has never been disbarred and whether the attorney is currently under suspension or has resigned with discipline pending in any jurisdiction the attorney has ever been admitted;

(d) A statement that the attorney has not been granted permission to appear pro hac vice in more than three proceedings before Ohio tribunals in the current calendar year pursuant to Section 2(A)(6)(a) of this rule;

(e) The name and attorney registration number of an active Ohio attorney, in good standing, who has agreed to associate with the attorney.

(B) An attorney granted permission to appear pro hac vice in a pending proceeding shall inform each tribunal in which the attorney has been granted permission to appear of any disciplinary action taken against the attorney since the date permission was granted.

(C) Any party to a proceeding may object to the motion of an attorney in a manner and method prescribed by the tribunal.

(D) A motion to be granted permission to appear pro hac vice filed with a tribunal shall be served by the filing attorney on all known parties and attorneys of record.

(E) A tribunal may order a hearing on a motion to appear pro hac vice and enter an order granting or denying the motion.

Section 3. Leave to File a Motion Instanter

An attorney may file a motion to be granted permission to appear pro hac vice instanter with a tribunal if the attorney has previously filed an application with the Office of Attorney Services and the attorney is required to appear in a proceeding fewer than five business days from the date of filing the application. The attorney shall attach a time stamped copy of the application to the motion to be granted permission to appear pro hac vice instanter.

Section 4. Notice of Permission to Appear Pro Hac Vice

All attorneys granted permission to appear pro hac vice by a tribunal shall file a Notice of Permission to Appear Pro Hac Vice with the Office of Attorney Services within thirty days after a tribunal grants permission to appear in a proceeding. The Notice of Permission to Appear Pro Hac Vice shall include copies of the court or administrative order granting permission. Failure to file the notice within the time specified shall result in automatic exclusion from practice within this state. The Office of Attorney Services shall, by certified mail, notify all tribunals in which the attorney has appeared of the attorney's exclusion.

Section 5. Renewal of Registration

(A) If an attorney continues to appear on the basis of permission to appear pro hac vice in any proceeding pending as of the first day of a new calendar year, the attorney shall pay a renewal fee equal to the registration fee set forth in Section 2(A)(3) of this rule. This renewal fee shall be due within thirty days of the start of that calendar year and shall be tendered to the Office of Attorney Services and accompanied by an updated registration form.

(B) Failure to pay the required renewal fee and file a new registration form within the time specified shall result in automatic exclusion from practice within this state. The Office of Attorney Services shall, by certified mail, notify all tribunals in which the attorney has appeared of the attorney's exclusion. If the proceeding has concluded or if the attorney has withdrawn from the proceeding, the attorney must so notify the Office of Attorney Services by the deadline for renewal of registration.

Section 6. Reinstatement

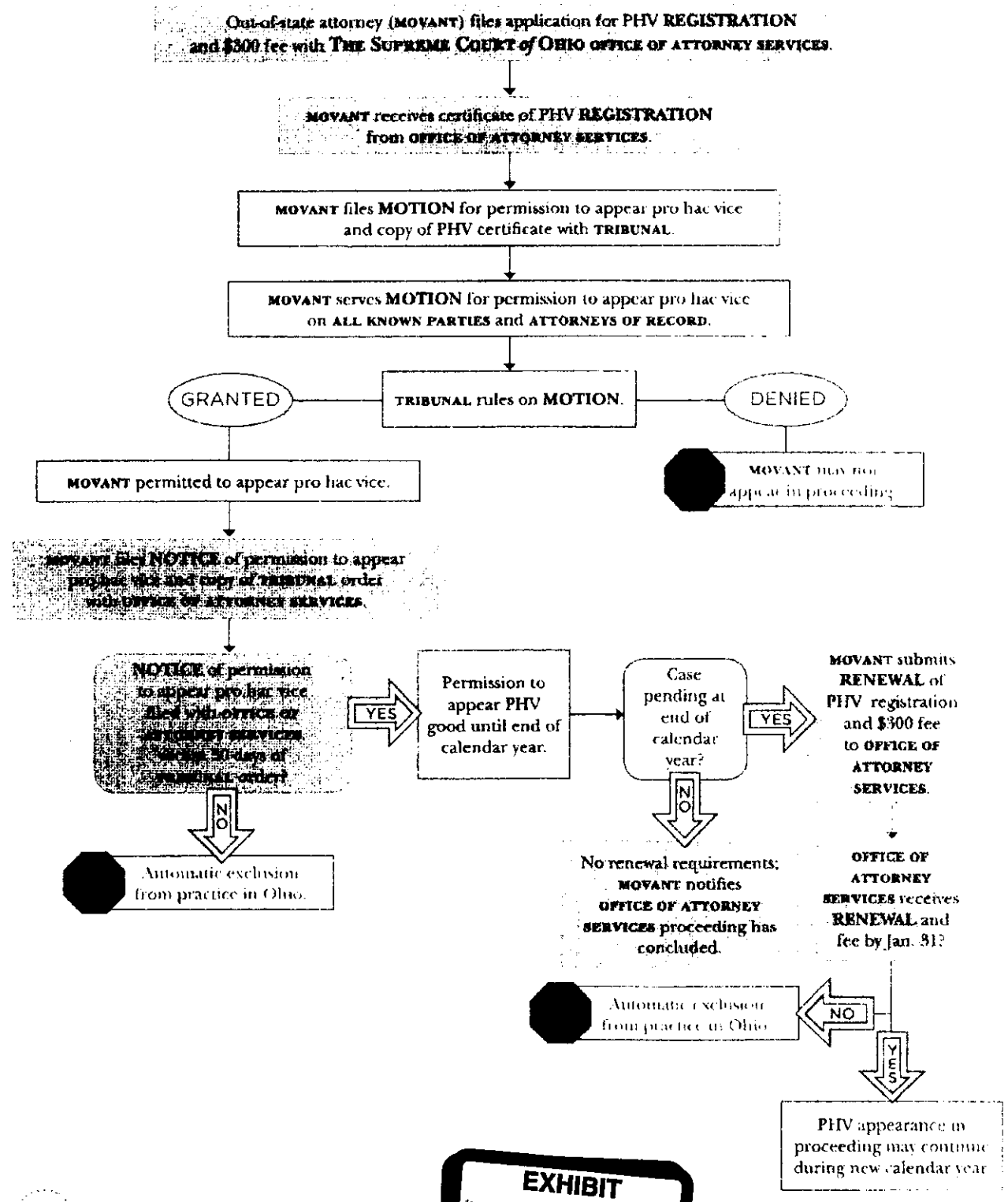
An attorney automatically excluded from practice in Ohio for failing to file a Notice of Permission to Appear Pro Hac Vice under Section 4 of this rule, or failing to pay a renewal registration fee required under Section 5 of this rule, may file a Petition for Reinstatement with the Office of Attorney Services. The petition shall describe the circumstances that resulted in the automatic exclusion, and a list of all proceedings in which the attorney had been permitted to appear pro hac vice, and shall be accompanied by the appropriate Notice of Permission to Appear Pro Hac Vice if the exclusion is under Section 4 of this rule, or a renewal registration fee if the exclusion is under Section 5 of this rule. The Office of Attorney Services shall inform all tribunals where the attorney appeared by certified mail if the attorney is reinstated.

Section 7. Admissions Fund

Payment of the registration fee shall be deposited in the Admissions Fund established under Gov. Bar R. I, Section 14(A).

[Effective: January 1, 2011; January 1, 2013; January 1, 2014; July 1, 2016; January 1, 2017; July 1, 2017.]

Ohio PRO HAC VICE Registration —



EXHIBIT
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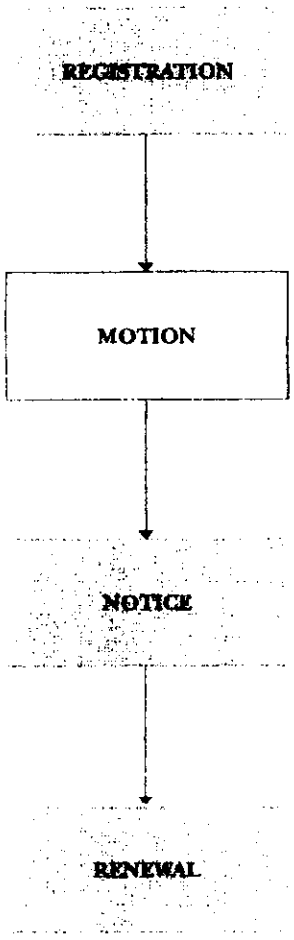

REGISTRATION
MOTION
NOTICE
RENEWAL

State ex rel. Hadley v. Pike, 072514 OHCA7, 14 CO 14 /**/ div.c1 {text-align: center} /**/

2014-Ohio-3310

STATE ex rel. ANDREW HADLEY, et al. RELATORS

v.

HONORABLE JUDGE C. ASHLEY PIKE RESPONDENT

No. 14 CO 14

Court of Appeals of Ohio, Seventh District, Columbiana

July 25, 2014

Complaint for Writs of Prohibition and Mandamus

For Relators: Atty. Ronald L. Mason Atty. Aaron T. Tulencik Mason

For Respondent Atty. Robert Herron Columbiana County Prosecutor Atty. Krista R. Peddicord Assistant Prosecuting Attorney

Hon. Cheryl L. Waite Hon. Joseph J. Vukovich Hon. Mary DeGenaro

OPINION AND JUDGMENT ENTRY

PER CURIAM.

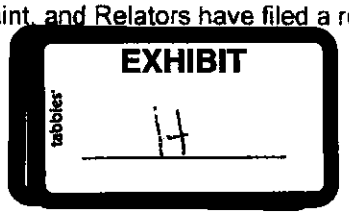
{¶1} Relators Andrew Hadley and Alsan Corporation have filed for a writ of mandamus and writ of prohibition against Respondent Judge C. Ashley Pike to prevent further action in Columbiana County Court of Common Pleas Case No. 13 CV 631, and to force the judge to dismiss the action for lack of subject matter jurisdiction. Relators argue that the attorney who filed the action is not licensed to practice law in Ohio and had not been granted *pro hac vice* status prior to filing the complaint. Respondent admits that the attorney was not licensed in Ohio and did not even begin applying for *pro hac vice* status until two weeks after filing the complaint. For the following reasons we grant both writs.

{¶2} On October 13, 2013, Melanie and Benjamin Woods filed a complaint, through their attorney John Lucas, against Andrew Hadley and Alsan Corporation (d/b/a "Dairy Queen"). Attorney Lucas was licensed in Pennsylvania but not in Ohio at the time the complaint was filed. Two weeks after the complaint was filed, Lucas registered for *pro hac vice* status with the Ohio Supreme Court. He was subsequently issued a certificate of *pro hac vice* registration on November 1, 2013.

{¶3} On November 21, 2013, Relators filed a motion to dismiss the complaint on the basis that Lucas was not admitted to practice in Ohio *pro hac vice* when he commenced the action by filing the complaint. Furthermore, Lucas had not yet requested to appear *pro hac vice* in the Columbiana County Court of Common Pleas.

{¶4} On November 25, 2013, Lucas filed a motion for permission to appear *pro hac vice* and participate as counsel in Columbiana County Common Pleas Case No. 13 CV 631.

{¶5} On December 26, 2013, the court granted Lucas's motion seeking permission to appear *pro hac vice* and overruled Relators' motion to dismiss. The court ruled that dismissal of the action was too drastic a measure in response to the failure of Lucas to obtain *pro hace vice* status prior to filing the complaint. The court overruled Relators' motion to dismiss and allowed Lucas to file an amended complaint that would relate back to the date of the original complaint. This action seeking a writ of mandamus and a writ of prohibition followed. Respondent has filed a Civ.R. 12(B)(6) motion to dismiss complaint, and Relators have filed a response.



{¶6} A writ of mandamus is defined as "a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. In order for a court to issue a writ of mandamus, a relator must have a clear legal right to the relief prayed for, the respondent must have a clear legal duty to perform the act requested, and the relator must possess no plain and adequate remedy at law. *State ex rel. Husted v. Brunner*, 123 Ohio St.3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, at ¶8.

{¶7} A writ of prohibition is a legal order under which a court of superior jurisdiction enjoins a court of inferior jurisdiction from exceeding the general scope of its inherent authority. *State ex rel. Feathers v. Hayes*, 11th Dist. No. 2006-P-0092, 2007-Ohio-3852, ¶9; *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998). A writ of prohibition may only be issued where the relator establishes that: (1) a judicial officer or court intends to exercise judicial power over a pending matter; (2) the proposed use of that power is unauthorized under the law; and (3) the denial of the writ will result in harm for which there is no other adequate remedy in the ordinary course of the law. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003, ¶14; *State ex rel. Sliwinski v. Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201 ¶7.

{¶8} "[A] court of superior jurisdiction may grant a writ of prohibition to prevent the attempted exercise of *ultra vires* jurisdiction by a court of inferior jurisdiction. Where the proceedings are void *ab initio, ultra vires* jurisdiction is invoked and the writ will lie." *Wisner v. Probate Court of Columbiana Cty.*, 145 Ohio St. 419, 422, 61 N.E.2d 889 (1945), citing *State ex rel. Young v. Morrow*, 131 Ohio St. 266, 2 N.E.2d 595 (1936).

The writ [of prohibition] may be invoked against any inferior courts or inferior tribunals, ministerial or otherwise, that possess incidentally judicial or *quasi*-judicial powers, to keep such courts and tribunals within the limits of their own jurisdiction. If such inferior courts or tribunals, in attempting to exercise judicial or *quasi*-judicial power, are proceeding in a matter wholly or partly outside of their jurisdiction, such inferior courts or tribunals are amenable to the writ of prohibition as to such *ultra vires* jurisdiction."

State ex rel. Nolan v. ClenDening, 93 Ohio St. 264, 112 N.E. 1029 (1915), paragraphs three and four of the syllabus.

If an inferior court is without jurisdiction whatsoever to act, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court. *See State, ex rel. Northern Ohio Telephone Co. v. Winter* (1970), 23 Ohio St.2d 6[, 260 N.E.2d 827]. *See, also, Hall v. American Brake Shoe Co.* (1968), 13 Ohio St.2d 11, 13[, 233 N.E.2d 582]."

State ex rel. Adams v. Gusweiler, 30 Ohio St.2d 326, 329, 285 N.E.2d 22 (1972).

Where there is a total want of jurisdiction on the part of a court, a writ of prohibition will be allowed to arrest the continuing effect of an order issued by such court, even though the order was entered on the journal of the court prior to the application for the writ of prohibition.

Id. at paragraph two of the syllabus.

{¶9} A Civ.R. 12(B)(6) motion to dismiss for failure to state a claim may be granted when it

appears beyond doubt from the face of the petition, presuming the allegations contained therein are true, that the relator can prove no facts which would warrant the relief sought. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (1989). On the other hand, if all the material facts are uncontroverted and it appears beyond doubt that a relator is entitled to the requested extraordinary relief in mandamus, a peremptory writ will be granted. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, at ¶14.

{¶10} In Ohio, a civil action is commenced by filing a complaint with the court. Civ.R. 3(A). Proper filing of a complaint invokes the jurisdiction of the court over a matter. *In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538, 978 N.E.2d 164, ¶25; *Bolinger v. Bolinger*, 49 Ohio St.3d 120, 551 N.E.2d 157 (1990). A trial court does not have jurisdiction over a complaint that is not properly commenced, and any judgment rendered is void *ab initio*. *McAbee v. Merryman*, 7th Dist. No. 13 JE 3, 2013-Ohio-5291, ¶16.

{¶11} R.C. 4705.01 states: "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."

{¶12} "When a non-attorney files a complaint in a court in violation of R.C. 4705.01, the court should dismiss the complaint without prejudice." *Williams v. Global Constr Co., Ltd.*, 26 Ohio App.3d 119, 498 N.E.2d 500 (10th Dist.1985), paragraph two of the syllabus.

{¶13} The Ohio Supreme Court has confined the practice of law to those who have met the prescribed requirements and have been regularly admitted to the bar. *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934), paragraph three of the syllabus. No person may practice law in this state who has not been admitted to the bar by order of the Ohio Supreme Court. *In re Unauthorized Practice of Law*, 175 Ohio St. 149, 192 N.E.2d 54 (1963), paragraph two of the syllabus. "[T]he preparation and filing of a pleading in court is an act of advocacy which must be undertaken by an attorney admitted to the bar and licensed to practice law in this state." *Washington Cty. Dept. of Human Serv. v. Rutter*, 100 Ohio App.3d 32, 36, 651 N.E.2d 1360 (4th Dist.1995).

{¶14} "[A] lawyer admitted to practice in another state, but not authorized to practice in Ohio, who counsels Ohio clients on Ohio law and drafts legal documents for them is engaged in the unauthorized practice of law in Ohio." *Cleveland Bar Assn. v. Moore*, 87 Ohio St.3d 583, 584, 722 N.E.2d 514 (2000).

{¶15} Gov.Bar R. XII sets forth the rules and procedures to allow an out-of-state attorney to practice in Ohio *pro hac vice*. *Pro hac vice* literally means "for this event" or "for this occasion." *Davis v. Marcotte*, 193 Ohio App.3d 102, 2011-Ohio-1189, 951 N.E.2d 117, ¶8 (10th Dist.). In order to be admitted *pro hac vice*, an out-of-state attorney must first register with the Ohio Supreme Court Office of Attorney Services. Gov.Bar R. XII(1)(A)(3). The attorney is then required to file a motion for permission to appear *pro hac vice* with the court in which the attorney wishes to appear as counsel. Gov.Bar R. XII(1)(A)(6). Only after these two prerequisites are fulfilled may the out-of-state attorney represent clients in court in Ohio.

{¶16} It is undisputed that Attorney Lucas did not register with the Ohio Supreme Court Office of Attorney Services until November 1, 2013, two weeks after the complaint was filed. We note that registering with the Ohio Supreme Court is only the preliminary step to being granted *pro hac vice* status. The attorney must subsequently file a motion with the trial court, and the trial court decides whether to grant *pro hac vice* admission. Lucas did not file his motion with the Columbiana County Court of Common Pleas until November 25, 2013, two days after Relators filed their motion to dismiss the complaint for lack of jurisdiction. The court did not actually grant Lucas's motion for *pro hac vice* status until December 26, 2013, the day it also overruled the motion to dismiss.
{¶17} Clearly, Attorney Lucas was not admitted to practice law in Ohio when he filed the complaint. Therefore, the complaint in Case No. 13 CV 631 was void *ab initio*. The trial court had no discretion in ruling on the motion to dismiss the complaint. The complaint should have been dismissed without prejudice for lack of subject matter jurisdiction. A writ of mandamus is appropriate because Relators have a clear legal right to dismissal of the complaint for lack of jurisdiction and Respondent has a clear legal duty to perform the act requested. In addition, a writ of prohibition is warranted because any further prosecution of the matter by Respondent is unauthorized and without jurisdiction under the law. Because the matters for review are jurisdictional in nature, it is unnecessary to determine whether Relators had other legal remedies available for relief.
{¶18} For the aforementioned reasons, we grant Relators' complaint for a writ of mandamus and a writ of prohibition. The court is ordered to dismiss the complaint in Columbiana County Court of Common Pleas Case No. 13 CV 631 without prejudice, and to take no further action in that case except for action in aid of or ancillary to the dismissal. Costs taxed against Respondent Final order Clerk to give notice on the parties as required by the Ohio Rules of Civil Procedure

Waite, J, concurs Vukovich, J, concurs DeGenaro, PJ, concurs

In the Matter Of: the Bureau of Support and Patsy Barber, Obligees- v. Walter Brown, Obligor-, 110601 OHCA7, 00APO742 /**/ div.c1 {text-align: center} /**/

2001-Ohio-3450

IN THE MATTER OF: THE BUREAU OF SUPPORT AND PATSY BARBER, OBLIGEES-APPELLEES,

v.

WALTER BROWN, OBLIGOR-APPELLANT.

No. 00APO742

01-LW-4424 (7th)

Court of Appeals of Ohio, Seventh District, Carroll

November 6, 2001

Hon. Joseph J. Vukovich, Hon. Gene Donofrio, Hon. Mary DeGenaro

Civil Appeal from Carroll County Common Pleas Court, Domestic Relations Division, Case No. 00APO742.

For Obligees-Appellees: Atty. Donald R., Burns, Jr., Prosecuting Attorney, 49 Public Square, Carrollton, OH 44615

For Obligor-Appellant: Attorney Nicholas Swyrydenko, 1000 S. Cleveland-Massillon, Suite 105, Akron, OH 44333

OPINION

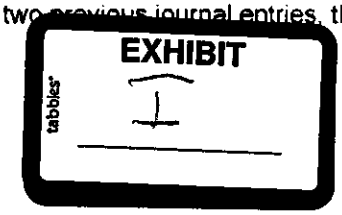
DeGenaro, J.

This timely appeal comes for consideration upon the record in the trial court and the parties' briefs. Appellant, Walter L. Brown (hereinafter "Brown"), appeals the trial court's decision reducing to judgment Brown's alleged child support arrearage. The issues before us are whether the alleged unauthorized practice of law by the director of the Carroll County Bureau of Support deprived the trial court of jurisdiction and whether Brown was given notice, as required by due process, of his alleged arrearage. For the following reasons, we reverse the decision of the trial court and remand for further proceedings.

Brown and his wife, Patsy Barber (hereinafter "Barber"), divorced on October 23, 1964. Brown was ordered to pay child support for the parties' three minor children. The last child reached the age of emancipation in 1981.

On December 3, 1984, the trial court journalized an order to the Carroll County Bureau of Support to forward all future support payments to Patsy Brown, less $9,712.50 owed to the Department of Human Services in arrearages. After a hearing held on March 30, 2000, the trial court entered a journal entry on April 3, 2000, confirming arrearages in the amount of $26,016 13. The record does not establish Brown was served with notice of either of these post decree proceedings. On August 9, 2000, the director of the Bureau filed a motion with the trial court to reduce the arrearages to judgment. The hearing was set for August 16, 2000. Notice of this hearing was sent to Brown by regular mail.

After a continuance, the court heard the matter on August 24, 2000. The Bureau's director appeared for the Bureau and on behalf of Barber. No evidence was presented to the court concerning arrearages. Based on the two previous journal entries, the trial court granted the



Bureau's motion and reduced the arrearages to judgment.

Brown challenges the trial court's decisions finding child support arrearages and reducing it to judgment, raising three assignments of error:

"The judgment of the trial court is void as a matter of law for lack of jurisdiction, as the Bureau of Support and Patsy Barber were represented in these proceedings by a person not authorized or licenced to practice law in the State of Ohio." "The arrearage judgments rendered by the trial court are void as a matter of law as all such judgments were rendered in violation of Appellant's due process rights to notice and an opportunity to be heard." "The final judgment was not supported by competent, credible evidence and was therefore against the manifest weight of the evidence."

Because we conclude Brown did not receive proper notice, we reverse the trial court's judgment and remand for further proceedings.

In his first assignment of error, Brown argues the Bureau's director is not licensed to practice law, therefore, the court lacks jurisdiction over any action or motion filed by the director on behalf of either the Bureau or Barber. Brown did not raise this objection in the trial court, arguing this court can rule on the issue *sua sponte*.

"The term jurisdiction refers to the authority conferred by law on a court to exercise its judicial power in a case or controversy before it. Jurisdiction is of two types. Subject matter jurisdiction refers to the authority that a court has to hear the particular claim brought to it and to grant the relief requested. Personal jurisdiction refers to the authority that a court has over the defendant's person, which is required before a court can enter a judgment adverse to his legal interests. *Pennoyer v. Neff* (1877), 95 U.S. 714, 24 L.Ed. 565. Whether a court has jurisdiction of the subject matter of an action and of the parties to that action is a question of law. *Burns v. Daily* (1996), 114 Ohio App.3d 693." (Emphasis in original) *Valmac Industries, Inc. v. Ecotech Machinery, Inc.* (2000), 137 Ohio App.3d 408, 411-2. "[I]t is axiomatic that subject-matter jurisdiction cannot be waived, cannot be conferred upon a court by agreement of the parties, and may be the basis for *sua sponte* dismissal." (Emphasis in original) *Nord Community Mental Health Ctr. v. Lorain Cty.* (1994), 93 Ohio App.3d 363, 365. "The lack of subject-matter jurisdiction is not a waivable defense and may be raised for the first time on appeal." *In re King* (1980), 62 Ohio St.2d 87, 89. In contrast, personal jurisdiction is a waivable defense. Civ.R. 12(H)(1). "Subject matter jurisdiction focuses on the court as a forum and on the case as one of a class of cases, not on the particular facts of a case or the particular tribunal that hears the case. In the civil context, the standard applied to determine whether to dismiss a case for lack of subject matter jurisdiction is whether the plaintiff has alleged 'any cause of action cognizable by the forum.'" *State v. Swiger* (1998), 125 Ohio App.3d 456, 462 quoting *Avco Fin. Serv. Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65, 67.

If the trial court lacked subject matter jurisdiction to hear the motion, we may reverse the trial court's decision on that basis *sua sponte*.

Ohio courts have recently been recognizing the difference between subject matter jurisdiction and the exercise of that jurisdiction.

"Indiana, Michigan, Virginia, and now some Ohio appellate courts recognize that there is a distinction between subject matter jurisdiction and jurisdiction of the particular case, otherwise referred to as the 'exercise' of jurisdiction. The exercise of jurisdiction refers to the authority

provided to a court to decide cases within its subject matter jurisdiction. 'Subject matter jurisdiction defines the power of the court over classes of cases it may or may not hear.' *State ex rel. Wright v. Griffin* (July 1, 1999), Cuyahoga App. No. 76299, unreported. More specifically, subject matter jurisdiction focuses on the court as the proper form to hear the cases, such as municipal court, common pleas, or juvenile court. [*Swiger, supra]* A judgment may only be declared void for lack of jurisdiction if the case does not fall within a class of cases over which the trial court has subject matter jurisdiction. *Adams Robinson [Ent. v. Envirologix Corp.* (1996), 111 Ohio App.3d 426] citing *Hitt v. Tressler* (1983), 4 Ohio St.3d 174; *Griffin, supra.*

"Conversely, the issue in this case involves the exercise of jurisdiction, which 'encompasses the trial court's authority to determine a specific case within that class of cases that is within its subject matter jurisdiction.' *Swiger, supra;* see, also, *Griffin, supra.*" *State v. Wilfong* (Mar. 16, 2001), Clark App. No. 2000-CA-75, unreported.

The Ohio Supreme Court has adopted an exercise of jurisdiction analysis, citing a Michigan decision as persuasive.

"'"[W]here it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the 'exercise of jurisdiction,' as distinguished from the want of jurisdiction in the first instance. * * * '"'[I]n cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. It may not be called into question collaterally.'" (Emphasis *sic.*) *In re Waite* (1991), 188 Mich.App. 189, 200, 468 N.W.2d 912, 917, quoting *Jackson City Bank & Trust Co. v. Fredrick* (1935), 271 Mich. 538, 544-546, 260 N.W. 908, 909." *State v. Filiaggi* (1999), 86 Ohio St.3d 230, 240.

In the present case, the Bureau's director, a non-attorney, filed the motion before the trial court on behalf of the Bureau and Barber. The Ohio Board of Commissioners on Grievances and Discipline has concluded only a staff attorney may properly file a motion with a court on behalf of a local child support enforcement agency. Ohio Bd. Of Commrs. on Grievances and Discipline Opinion No. 90-10 at 6-7. Furthermore, Civ.R. 11 provides "[e]very pleading, motion, or other paper of a party" shall be signed by either the party, if acting *pro se*, or by the party's attorney.

"No person shall be permitted to * * * conduct * * * any action or proceeding in which the person is not a party concerned * * * unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules." R.C. 4705.01.

Because the motion was signed neither by Barber *pro se*, nor an attorney representing her or the Bureau, the motion did not comply with Civ.R. 11, and violated R.C. 4705.01.

The Bureau, relying on *Hill v. Hill* (1993), 88 Ohio App.3d 447, contends this court should find no prejudice resulted from the unauthorized practice of law and, therefore, affirm the decision of the trial court. In *Hill*, a father moved the court to terminate his child support obligation because his youngest child was emancipated. At a hearing on the motion the child support agency was represented by a nonattorney employee who recommended the manner in which the father should

pay his child support arrearage. The Tenth District found that even though it was improper for the trial court to permit the nonattorney employee to make those recommendations, thereby engaging in the unauthorized practice of law, it was not prejudicial because there was no indication the trial court relied upon that recommendation when issuing its order.

The director in the case *sub judice* not only engaged in the same type of unauthorized practice of law as the nonattorney employee in *Hill* by appearing on behalf of the Bureau in the trial court, the director's actions were even more egregious. Here, the Bureau filed a motion signed by its director instead of merely responding to a motion with an appearance in court. It is this difference which does not allow us to overlook the trial court's error.

Any filing by a non-attorney on a corporation's behalf violates Civ.R. 11 and is a nullity which may be stricken from the record. *Union Sav. Assn. v. Home Owners Aid* (1970), 23 Ohio St.2d 60. A null motion is different than a motion outside the trial court's subject matter jurisdiction. "Complaints that are validly filed but do not confer subject-matter jurisdiction over the action are voidable -- they can be dismissed, or any defect in the complaint may be corrected by an amended complaint. Civ.R. 12(B)(1). However, a null and void complaint cannot be corrected -- it is null and void." *Alliance Group, Inc. v. Rosenfield* (1996), 115 Ohio App.3d 380, 388.

A corporation cannot be represented by its officers because, even though some statutes treat a corporation as a natural person, others "clearly reveal that the General Assembly did not intend a corporation to have all the attributes and powers of a natural person." *Union Sav. Assn.* at 62. Because a corporation does not have the rights of a person, it cannot appear *in propria persona*. Therefore, a corporation cannot proceed *pro se*. It must be represented by counsel.

For the purposes of Civ.R. 11, there is no reason to distinguish between corporate officers and officers of state agencies. Indeed, the two are to be treated similarly because both entities have standing to pursue certain matters in court. *Alliance Group* at 387. The Bureau's standing in this matter arises out of R.C. 3123.18 which allows it to "bring an action in the court of common pleas that issued the support order to obtain a judgment on the unpaid amount." However, neither a state agency nor a corporation may appear without legal representation because they are entities created by law, not an actual person. Therefore, the motion filed by the Bureau with the court is a nullity which may be stricken from the record. Brown did not raise this improper exercise of jurisdiction to the trial court and, therefore, may not challenge it for the first time here.

In the present case, the trial court has subject matter jurisdiction over the divorce and continuing jurisdiction over the child support order. R.C. 3115.07. However, it was incorrect for the trial court to exercise jurisdiction because the motion at issue here is a nullity, as it appears the Bureau director has engaged in the unauthorized practice of law. However, resolution of that issue is beyond the jurisdiction of this court, and the matter is left to the appropriate authority to decide. The incorrect exercise of jurisdiction may not be raised for the first time on appeal. Therefore, Brown's first assignment of error is meritless.

In his second assignment of error, Brown argues he was not properly notified of the motions leading to the judgments assessing arrearages against him. Pursuant to Civ.R. 75(J), when a party attempts to invoke the continuing jurisdiction of a court over a child support order it issues, the party must file a motion with the court and serve that motion on all parties in the manner

provided for the service of process under Civ.R. 4 to 4.6. "[T]he continuing jurisdiction of the court cannot be properly invoked by motion pursuant to Civ.R. 75(I) [now Civ.R. 75(J)] in the absence of service of notice on the opposing party * * * [and] the court is without power to issue a valid, binding judgment." *Rondy v. Rondy* (1983), 13 Ohio App.3d 19, 22. Such a judgment is void *ab initio* and subject to collateral attack because a lack of proper notice violates due process *Id.*

"Due process of law is essentially the right to be heard (See 11 Ohio Jur.2d 51), and involves only the essential rights of notice, hearing, or opportunity to be heard before a competent tribunal." *Rumora v. Board of Ed. of Ashtabula Area City School Dist.* (1972), 32 Ohio Misc. 165, 167. "Due process requires, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *State ex rel. Ballard v. O'Donnell* (1990), 50 Ohio St.3d 182, 183; see also, *Youngstown Steel Door Co. v. Kosydar* (1973), 33 Ohio App.2d 277 (Due process generally requires notice and a hearing be afforded whenever substantial rights may be affected). If a substantial right is not affected, due process does not require notice or a hearing. In order to decide whether notice was required, the court must decide whether the judgment affects a substantial right. Since a judgment void *ab initio* can be attacked collaterally, this court must examine all three judgment entries Brown challenges.

The December 3, 1984 Journal Entry merely journalizes the fact the Carroll County Department of Human Services was to be reimbursed for aid it had given to Patsy. Rather than affecting Brown's rights, it affects to whom Brown's previous obligation is owed It does not change Brown's obligation to pay in any way. This Journal Entry does not affect Brown's substantial rights and, therefore, a lack of proper notice to Brown does not violate due process.

This analysis does not apply to either the April 3, 2000 Judgment Entry or the present judgment, as the former entry confirms an arrearage in a certain amount and orders a withholding to pay the arrears, and the latter reduces to judgment the amount of the arrearages. These actions clearly affect Brown's obligations and, therefore, his substantial right to property. Due process requires he be given proper notice of the proceedings.

Civ.R. 4.3 requires service of process upon out-of-state parties "shall be by certified or express mail unless otherwise permitted by these rules." In order to prove service has been given correctly, "[t]he clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. * * * The clerk shall file the return receipt or returned envelope in the records of the action." Civ.R. 4.3(B)(1). In this case, the Bureau attempted to invoke the court's continuing jurisdiction, but did not comply with Civ.R. 4.3. Therefore, notice was improper and the April 2000 and the present judgment did not comply with due process and are void *ab initio*. Brown's second assignment of error is meritorious.

Because we find the present judgment void *ab initio*, we need not address Brown's third assignment of error, whether that judgment was against the manifest weight of the evidence, as moot.

In conclusion, because Brown did not receive proper notice prior to either the April 2000 judgment or the present judgment, those judgments are void *ab initio*. Therefore, the judgment of the trial court is reversed and this cause is remanded for further proceedings consistent with this

opinion.

Vukovich, P.J., Concurs., Donofrio, J., Concurs.

Geiger v. King, 042704 OHCA10, 03AP1228 /**/ div.c1 {text-align: center} /**/

2004-Ohio-2137

Steven M. Geiger, Morrison Road Development Company, Inc., And Geiger Excavating, Inc., Plaintiffs-Appellants,

v.

Ray J. King, Franklin Abstracting & Title Agency, Inc., D/B/A Northwest Title, And First American Title Insurance Company, Defendants-Appellees.

No. 03AP1228, 04-LW-1829 (10th)

Court of Appeals of Ohio, Tenth District

April 27, 2004

(C.P.C. No. 02CVA06-6182)

Kemp, Schaeffer, Rowe & Lardiere Co., L.P.A., Christopher L. Lardiere and Darren A. McNair, for appellants. Vorys, Sater, Seymour and Pease LLP, and John P. Gartland, for appellee Ray J. King. Thomas & Fulmer Co., L.P.A., and Amy M. Fulmer, for appellee Franklin Abstracting & Title Agency. McFadden & Associates Co., L.P.A., and Bradley P. Toman, for appellee First American Title Insurance Company. APPEAL from the Franklin County Court of Common Pleas.

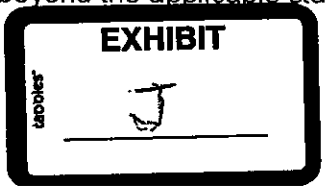
BOWMAN, J.

{¶1}. Plaintiffs-appellants, Steven M. Geiger, Morrison Road Development Company, Inc., and Geiger Excavating, Inc., appeal from a judgment of the Franklin County Court of Common Pleas granting separate motions to dismiss by defendants-appellees, Ray J. King, Esq., Franklin Abstracting & Title Agency, Inc., d.b.a. Northwest Title, and First American Title Insurance Company. The trial court granted the motions on the basis that appellants had failed to state a claim upon which relief could be granted because their re-filed complaint, having not been filed by an attorney in compliance with R.C. 4705.01, was a nullity, and rejecting appellants' argument that subsequent attempts by appellants to re-file the action through their counsel was untimely because the savings statute, R.C. 2305.19, could not be applied to protect a null action from application of the statute of limitations.

{¶2}. Appellants now assign the following as

The trial court improperly granted defendant-appellees' motions to dismiss where appellants commenced or attempted to commence their action before the expiration of the statute of limitations and properly re-filed within the time allowed by the Ohio Savings Statute, [R.C] § 2305.19.

{¶3}. In January 1999, appellants filed a complaint against appellees, asserting claims for legal malpractice, negligence, breach of fiduciary duty and fraud. This complaint was dismissed, pursuant to Civ.R. 41(A), in January 2001. In January 2002, essentially the same complaint was filed on behalf of Morrison Road Development Company, Inc., and Geiger Excavating, Inc., against appellees by Steven Geiger and Wendy Geiger, acting pro se. This complaint was dismissed in May 2002, on the basis that a complaint filed by a non-attorney on behalf of a corporation constituted the unauthorized practice of law and was a nullity. In June 2002, appellants, through counsel, again filed a complaint against appellees. The trial court dismissed the complaint on the basis it was filed beyond the applicable statute of limitations. The trial court



found that, because the May 2002 complaint was filed in violation of R.C. 4705.01, it did not constitute the commencement or attempt to commence an action, and, thus, appellants could not claim the benefit of the savings statute, R.C. 2305.19.

{¶4}. In O'Brien v. University Community Tenants Union (1975), 42 Ohio St.2d 242, syllabus, the Ohio Supreme Court held:

In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted (Civ.R. 12(B)(6)), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. (Conley v. Gibson, 355 U.S. 41, followed.)

{¶5}. In ruling on a motion to dismiss, pursuant to Civ.R. 12(B)(6), a court must presume all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. Mitchell v. Lawson Milk Co. (1988), 40 Ohio St.3d 190.

{¶6}. A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs. (1992), 65 Ohio St.3d 545, 548. The court will only look to the complaint to determine whether the allegations are legally sufficient to state a claim. Id. Under a de novo analysis, we must accept all factual allegations to the complaint as true, and all reasonable inferences must be drawn in favor of the nonmoving party. Byrd v. Faber (1991), 57 Ohio St.3d 56, 60.

{¶7}. R.C. 2305.19 provides, in part:

In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff is reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff * * * may commence a new action within one year after such date. * * *

{¶8}. R.C. 4705.01 provides, in part:

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. * * *

{¶9}. It is well-settled that "[a] corporation cannot maintain litigation in propria persona, or appear in court through an officer of the corporation or an appointed agent not admitted to the practice of law." Union Savings Assn. v. Home Owners Aid (1970), 23 Ohio St.2d 60, syllabus. Accordingly, courts have held that a complaint or other pleading undertaken on behalf of a corporation by a non-attorney is a nullity. See, e.g., Coburn v. Toledo Hosp. (Jan. 19, 2001), Lucas App. No. L-00-1215; Talarek v. M.E.Z., Inc. (Sept. 10, 1998), Lorain App. No. 98CA007088; Sheridan Mobile Village, Inc. v. Larsen (1992), 78 Ohio App.3d 203, 205; Palmer v. Westmeyer (1988), 48 Ohio App.3d 296, 297; Bd. of Trustees for the Memorial Civil Ctr. v. Carpenter Co. (Aug. 9, 1982), Allen App. No. 1-81-38. Accord Tubalcain Trust v. Cornerstone Constr., Inc. (May 26, 1994), Franklin App. No. 93APE12-1701 ("[a] trust, like a corporation, cannot act on its own behalf but, instead, must act through an individual. Since only attorneys can represent another party in litigation before a court, necessarily an attorney must be engaged to represent a trust"). See, also, Worthington City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision (1999), 85

Ohio St.3d 156.

{¶10}. Appellants do not deny that their May 2002 complaint, filed by a non-attorney, was improper. Rather, they argue that filing that complaint constituted an "attempted commencement" as that phrase is used in R.C. 2305.19, and, thus, an attorney's re-filing of the complaint, although outside the statute of limitations, was rendered timely by application of the savings statute.

{¶11}. The Ninth District Court of Appeals has addressed similar facts in Technical Constr. Specialties, Inc. v. Brouse & McDowell (July 17, 1996), Summit App. No. 17583, which stated, in part:

Appellant argues the savings statute is applicable because the April 11, 1994 complaint was filed within the statute of limitations. Although the complaint was dismissed by the parties, appellant argues it is entitled to the statute's one year grace period because the refiled complaint named the same parties as in the original complaint. The narrow issue raised by this argument is whether the April 11, 1994 complaint was a commencement of an action as envisioned by the savings statute. We find it was not.

* * *

* * * Clearly, the April 11, 1994 complaint violated the explicit dictates of R.C. 4705.01. * * *

* * * [A]ppellant on April 11, 1994 did not "commence" an action and therefore, is not entitled to the one year grace period afforded under R.C. 2305.09.

{¶12}. We agree with this analysis. Appellants' May 2002 complaint having been a nullity, subsequent filings which fulfilled the requirements of R.C. 4705.01 but were filed outside the statute of limitations could not take advantage of the savings statute. The phrase "attempted commencement" cannot apply to a complaint filed in violation of R.C. 4705.01. To do so would be to condone the unauthorized practice of law.

{¶13}. Based upon these considerations, we find the trial court did not err in finding that appellants' complaints failed to state a claim upon which relief could be granted. Thus, appellants' sole assignment of error is overruled and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed. WATSON and SADLER, JJ., concur.

WATSON, J., concurring in judgment only.

EXHIBIT
J

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MAHONING COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF:	)	**CASE NO: 2013 ES 00364**
	)	
	)	**JUDGE THOMAS A. SWIFT**
RYAN EDWARD ZWINGLER,	)	**Sitting by Assignment**
DECEASED	)	
	)	**JUDGMENT ENTRY**

This matter is before the Court on the Fiduciary's *Motion for Summary Direct Contempt of Court* and the *Motion of Non-Party Scott L. Melton for Leave Instanter to Exceed Page Limitations*.

The Court finds that neither *Motion* is well taken and hereby denies both *Motions*.

The Court further finds that a hearing should be scheduled to provide **Scott L. Melton** an opportunity to show cause why he should not be held in contempt.

Therefore, it is hereby Ordered that **Scott L. Melton** appear in open Court to show cause why she should not be held in contempt on **February 12, 2019 at 10:00 a.m.**

The Clerk is directed to serve a copy of the foregoing *Judgment Entry* upon **Scott L. Melton**, by certified United States mail, return receipt requested, and upon **Attorney William Kissinger, Attorney Paul D. Eklund, Attorney Monica Sansalone, Attorney Maia Jerin**, and **Michele Zwingler**, by regular United States mail, and to note the fact of such service upon the docket of the Court.

IT IS SO ORDERED.

Dated: January 9, 2019

Honorable Thomas A. Swift, Judge
Sitting by Assignment

FILED
MAH. CTY. PROBATE COURT
JAN 09 2019
Judge Robert N. Rusu, Jr.

2013 ES
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IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

IN RE THE ESTATE OF RYAN EDWARD ZWINGLER DECEASED	CASE NO: 2013 ES 364
	JUDGE THOMAS S. SWIFT
	NON-PARTY SCOTT L. MELTON'S MOTION FOR CLARIFICATION REGARDING SHOW CAUSE ORDER

Non-Party Scott L. Melton, by and through undersigned counsel, respectfully requests the Court clarify the scope of the show cause hearing currently scheduled for February 12, 2019 at 10:00 am so that he can adequately prepare for the issues to be addressed, and call and subpoena necessary witnesses.

William Kissinger, in his capacity as counsel for Fiduciary Michele Zwingler, filed a Motion for Summary Direct Contempt on December 13, 2018 which sought to hold Attorney Scott L. Melton in contempt for his failure to advise the Supreme Court of Ohio of his *pro hac vice* status with respect to wrongful death claims filed in other courts. Although the Fiduciary's contempt motion was denied by the Court on January 9, 2019, the Court scheduled a February 12, 2019 hearing "...to provide Scott L. Melton an opportunity to show cause why he should not be held in contempt." However, the Court's Order does not identify the basis or scope of the relevant alleged contemnible conduct or the issues to be addressed at the hearing.

The arguments presented in the Fiduciary's contempt motion, specifically the relief sought, raise important questions with respect to this Court's jurisdiction. This Court patently and unambiguously lacks jurisdiction to consider the merits of the wrongful death case currently

EXHIBIT
K

pending in the General Division, including whether the re-filed wrongful death claim is void *ab initio*. The Court further lacks jurisdiction to address any alleged breach of fiduciary duty arising outside the administration of an estate. Moreover, this Court patently lacks jurisdiction over the Fiduciary's contempt allegations as a whole because the Fiduciary chose to first file the contempt motion in the General Division, which obtained exclusive jurisdiction over the matter. For the following reasons, non-party Scott Melton respectfully requests the Court clarify which issues will be addressed at the show cause hearing so that he may adequately prepare a defense.

I. STATEMENT OF FACTS

A. The underlying wrongful death cases.

In 2014, Scott Melton, a Pennsylvania attorney, undertook the representation of Michele and Robert Zwingler and the Estate of Ryan Zwingler in connection with a trucking accident in which Ryan Zwingler was tragically killed. Kissinger acted as Melton's local co-counsel in the wrongful death case for matters of Ohio law and procedure. Kissinger and Melton agreed to share any attorney fees generated from their joint representation of the Zwinglers and the Estate of Ryan Zwingler (hereinafter collectively the "Zwinglers") in the wrongful death suits.

Melton filed one wrongful death complaint on behalf of the Zwinglers against Central-Allied Enterprises ("CAE"), a paving contractor, in the Court of Common Pleas of Mahoning County General Division, and a separate complaint against the Ohio Department of Transportation ("ODOT") in the Court of Claims of Ohio. Kissinger advised Melton that he could file the complaints over his own signature, before being admitted to practice in the case by the trial judge, because Melton possessed a current 2015 Ohio *pro hac vice* registration number. Relying upon this advice regarding Ohio civil procedure, Melton signed the complaints himself, did not file the Zwinglers' signed verifications, and timely filed the complaints in the Mahoning

Court of Common Pleas General Division, and the Court of Claims, respectively. The cases proceeded in the respective courts.

Melton filed motions to proceed *pro hac vice* in the Mahoning County Court of Common Pleas General Division and the Court of Claims, identifying William Kissinger as the active Ohio associating attorney on the cases. Both motions were granted by the respective courts without objection from either defense counsel. Throughout the course of litigation, Melton continually renewed his Ohio *pro hac vice* registration, although his registration and payment of the fee was several months late in 2017.[1]

Melton and Kissinger eventually notified defense counsel in the CAE case that they would be voluntarily dismissing the action with the intent to re-file it within one year under Civ.R. 41(A)(1)(a) in order to amend the complaint to add new theories of recovery against CAE. Shortly thereafter, Kissinger discovered a potential issue with Melton's *pro hac vice* status. Although Melton was registered with the Supreme Court of Ohio and had been granted *pro hac vice* admission in the Mahoning County Court of Common Pleas General Division and the Court of Claims, Melton had not mailed the judgment entries granting his permission to appear *pro hac vice* to the Office of Attorney Services. Also, although his registration fees for 2017 had been paid, the Office of Attorney Services was waiting for Melton's Affidavit, which had been prepared and notarized but which had not yet been mailed. Melton immediately mailed the Affidavit and was issued the 2017 registration certificate. Melton also immediately corrected his failure by sending the judgment entries to the Office of Attorney Services and self-reported his inadvertent lapses to the Office of Disciplinary Counsel of the Supreme Court of Ohio and the

[1] The 2013, 2014, 2015, 2016 and 2017 Certificates of *Pro Hac Vice* Registration are attached hereto as Exhibit A-1. Original affidavits will be filed separately with the Court.

Pennsylvania Disciplinary Board.[2] Melton told the clients of the lapses and that he was hiring other Ohio counsel to advise him of the proper steps to take to rectify the errors.[3]

Melton's representation of the Zwinglers was thereafter terminated. Kissinger filed a Notice of Appearance on behalf of the Fiduciary and Michele and Robert Zwingler in their individual capacities in both wrongful death cases, voluntarily dismissed the claim against CAE, and separately dismissed the claim against ODOT under the auspices of Civ. R. 41(A)(1)(a). On October 26, 2017, Kissinger filed in the Mahoning County Probate Court a Withdrawal of Approval for Wrongful Death Contract with Melton, which was granted the next day by the Probate Court. The Zwinglers signed a new Contingent Fee Agreement hiring Kissinger to exclusively pursue both previously filed wrongful death actions. Kissinger filed an application to approve the contingent fee contract in the Probate Court. On October 30, 2017, Judge Rusu entered a Judgment Entry and Order Allowing Agreement for Legal Representation for Kissinger to pursue the wrongful death cases. Kissinger remains the Zwinglers' sole counsel and has been so since October 2017.

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[2] Melton's Self-Reporting Letters are attached as Exhibit A-2.

[3] Kissinger also discovered the same oversight had occurred in connection with a 2012 lawsuit in which Melton was previously admitted to practice in Columbiana County Ohio *pro hac vice*. Kissinger was Ohio co-counsel with Melton on that case as well and had also failed to counsel Melton of the requirement to mail the judgment entry granting him permission to practice *pro hac vice* in that case to the Office of Attorney Services. That case settled with all but one defendant. Kissinger was paid a referral fee from the settlement proceeds. A jury trial was held as to the remaining defendant. After a defense verdict an appeal was taken but was then discontinued in August 2014. Thereafter, Melton did not practice law again in Ohio until the filing of the complaints in the Zwinglers' case in 2015.

B. Melton self-reports to the Ohio Office of Disciplinary Counsel and the Pennsylvania Disciplinary Board.

Melton self-reported this oversight to the Ohio Disciplinary Counsel and the Pennsylvania Disciplinary Board immediately upon discovery.[5] The Office of Attorney Services and the Office of Disciplinary Counsel ("ODC"), both arms of the Supreme Court of Ohio, have investigated and determined that Melton's conduct was "inadvertent" and that any lapse of Melton's *pro hac vice* status has since been "cured" without prejudice to Plaintiffs.[6] The Pennsylvania Disciplinary Board likewise closed its file without disciplining Melton.[7]

C. Kissinger threatens a legal malpractice action rather than pursuing the Zwinglers' wrongful death claim.

Rather than pursue his clients' wrongful death case and advocate on their behalf, Kissinger began a relentless campaign against Melton, alleging that Melton's conduct caused the Zwinglers' wrongful death complaint to be *void ab initio*, and that therefore, the statute of limitations barred re-filing. Rather than pursue his client's claims, Kissinger immediately began to threaten to file a potential legal malpractice claim against Melton, despite the fact that his clients' claims could still be re-filed under Ohio's Savings Statute. Kissinger was advised on multiple occasions by various attorneys to pursue his clients' wrongful death cases on the merits rather than seek retribution against Melton. In fact, he consulted with ethics counsel, Jonathan Coughlin, former disciplinary counsel, who urged Kissinger to preserve the Zwinglers'

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[5] Exhibit A-2, Self Reporting Letters.

[6] The ODC Letter is attached hereto as Exhibit A-3.

[7] Letter from Pennsylvania Disciplinary Board is attached hereto as Exhibit A-4.

underlying case as opposed to "just going after Scott."[8] Undersigned counsel further provided Kissinger with legal arguments supporting pursuing the Zwinglers' complaints in both courts and outlining why the original complaints were not void and could be re-filed.[9] Melton's insurance carrier even offered to pay experienced trial counsel to refile the cases on the Zwinglers' behalf.[10] Kissinger refused. Instead, he persisted with his threats to file a legal malpractice claim.

Further, according to Kissinger's own correspondence, he had *ex parte* discussions affirmatively raising Melton's *pro hac vice* status directly with Mahoning County Probate Court Judge Robert N. Rusu, who presided over Ryan Zwingler's estate, and Magistrate Dennis Sarisky, who presided over the October 2017 pretrial conference in the wrongful death case in Mahoning County.[11] Kissinger suggested to the courts that any re-filed complaint would be void, even though CAE never had the chance to raise the issue. Rather than advocate on behalf of his clients, Kissinger went to great lengths to undermine any potential success of the Zwinglers' wrongful death case in the Mahoning County Court of Common Pleas and never re-filed the Court of Claims case. The Court of Claims case is now time-barred.

D. Kissinger files a Motion for Summary Direct Contempt in the wrongful death action in the Mahoning County Court of Common Pleas, General Division.

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[8] Email from J. Coughlin, dated January 11, 2018, is attached hereto as Exhibit B-2. Mr. Coughlin continued, "You claim to want to help your client's (*sic*) by trying to preserve their case but all I see is your efforts to go after Scott [Melton]." *Id.*

[9] These arguments are set forth in Melton's Brief in Opposition to the Motion for Contempt filed by the Zwinglers in the General Division, which is attached hereto as Exhibit D and incorporated herein by reference.

[10] Letters from Monica Sansalone, dated July 30, 2018 and August 23, 2018, are attached hereto as Exhibits B-3 and B-4.

[11] Letter from Kissinger, dated May 2, 2018, attached hereto as Exhibit C-1.

Kissinger eventually re-filed the Zwinglers' wrongful death complaint against CAE on October 9, 2018 in the Mahoning County Court of Common Pleas General Division.[12] On the very same day, he filed a Motion for Direct Summary Contempt, asking the court to void his own complaint. Kissinger argued, as he argued in this Court, that the Zwinglers' original wrongful death complaint was void because Melton was not admitted to practice law in Ohio at the time it was filed, which is untrue. Melton opposed the motion and attached the Ohio Disciplinary Counsel's letter which conclusively determined that issues with Melton's *pro hac vice* status had been "cured" with respect to Melton's failure to file notices with the Supreme Court of Ohio.[13] Judge Maureen Sweeney thereafter recused herself from the case and requested a visiting judge be appointed. The wrongful death case is currently stayed pending that assignment.

E. Kissinger withdraws his first contempt motion and re-files it in the Probate Court.

On December 13, 2018, in a blatant exercise in forum shopping, Kissinger withdrew the pending motion for contempt in the General Division and re-filed it the same day in the Probate Court.[14] The sum and substance of the re-filed motion was unchanged. Kissinger sought an order finding Melton in summary direct contempt based on his failure to notify the Supreme Court of Ohio of his participation in the Ohio cases. Kissinger further asked this Court to make a substantive ruling as to the merits of the re-filed wrongful death case currently pending in the

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[12] Kissinger did not re-file the Zwinglers' claim against ODOT in the Court of Claims. The Savings Statute has now expired and the claim is lost as a result of Kissinger's inaction.

[13] Melton's Brief in Opposition to the Contempt Motion filed in the General Division explained why the refiled wrongful death claim is not void *ab initio*. Melton incorporates his Brief herein as if fully rewritten. It is attached hereto as Exhibit D for the Court's convenience.

[14] *See* Ex. B-1, General Division Docket.

General Division. Finally, Kissinger asked this Court to find that Melton breached his fiduciary duties to the Estate and award the Zwinglers damages based on the value of the pending wrongful death case. Melton filed a brief opposing the motion on December 26, 2018.

The Court denied Kissinger's contempt motion, but nevertheless scheduled a show cause hearing on the issue of Melton's purported contempt. However, the Court did not address the jurisdictional issues raised in Melton's opposition or set forth the scope of the contempt hearing. To clarify the record and allow Melton to adequately prepare for the hearing, undersigned counsel respectfully asks the Court to clarify the scope of conduct and relief to be considered at the hearing. In particular, Melton posits that the Court patently and unambiguously lacks jurisdiction to award the specific relief sought in Kissinger's contempt motion and further lacks jurisdiction with respect to any alleged breach of fiduciary duty claim arising from the wrongful death case.

II. LAW AND ARGUMENT

A. The re-filed contempt action is barred by the jurisdictional priority rule.

As a threshold matter, this Court lacks jurisdiction over the Fiduciary's contempt motion in its entirety. Proceedings in probate court are restricted to those actions permitted by statute and by the Constitution, since the probate court is a court of limited jurisdiction. *Corron v. Corron*, 40 Ohio St.3d 75, 77, 531 N.E.2d 708, 710 (1988).

Here, Kissinger argues in his Motion for Direct Summary Contempt that this Court has concurrent jurisdiction with the General Division over the instant controversy.[15] However, the contempt motion was first filed in the General Division, invoking the exclusive jurisdiction of that court. The second contempt motion is barred by the "jurisdictional priority rule."

[15] Mr. Melton does not waive any argument with respect to this Court's jurisdiction by referencing Mr. Kissinger's position on this issue.

"The jurisdictional priority rule provides that 'as between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, ***to the exclusion of all other tribunals***, to adjudicate upon the whole issue and to settle the rights of the parties.' " *Davis v. Cowan Sys.*, 8th Dist. Cuyahoga No. 83155, 2004-Ohio-515, 2004 WL 231803, ¶ 11. Kissinger chose to first file the Zwinglers' contempt motion in the General Division of the Mahoning County Court of Common Pleas. The General Division therefore has exclusive jurisdiction over the issues raised in that motion.

B. This Court does not have jurisdiction over any purported breach of fiduciary duty claim arising from the Zwinglers' wrongful death action.

As part of the contempt motion, Kissinger asked this Court to find that Melton breached his fiduciary duties to the Zwinglers and award them damages based on the alleged value of pending wrongful death claim. This Court patently and unambiguously lacks jurisdiction over breach of fiduciary claims arising from the wrongful death action.

While probate courts can direct and control the conduct of fiduciaries pursuant to R.C. 2101.24(A)(1)(m), jurisdiction over breach of fiduciary claims against attorneys are limited to actions arising from the **administration** of an estate. *Ivancic v. Enos*, 11th Dist. No. 2011-L-050, 2012-Ohio-3639, 978 N.E.2d 927, ¶ 37; *Cain v. Panitch*, 10th Dist. Franklin No. 16AP-758, 2018-Ohio-1595, ¶ 22. The Zwinglers do not allege that Melton was involved in the administration of Ryan Zwingler's Estate, nor was he. Melton was involved only in the two separate wrongful death actions. Kissinger was the Estate's attorney administering its affairs. Thus, this Court lacks jurisdiction over any alleged breach of fiduciary duty claim against Melton arising from his representation of the Zwinglers in the underlying wrongful death matter. Jurisdiction for such a claim, if it were to be filed, lies exclusively with the General Division.

Moreover, any "breach of fiduciary duty" claim against Melton must be treated as one for legal malpractice, over which this Court patently and unambiguously lacks jurisdiction. All claims against an attorney arising out of an alleged attorney-client relationship are, as a matter of law, claims for legal malpractice and must be analyzed as such. *See e.g.*, *Sandor v. Marks*, 9th Dist. Summit No. 26951, 2014-Ohio-685, ¶ 10 ("Claims arising out of an attorney's representation, regardless of their phrasing or framing, constitute legal malpractice claims. ... When the gist of a complaint sounds in malpractice, other duplicative claims are subsumed within the legal malpractice claim.").

Probate courts are courts of limited jurisdiction, and legal malpractice claims are not listed in R.C. 2101.24. *Cain v. Panitch*, 10th Dist. Franklin No. 16AP-758, 2018-Ohio-1595, ¶ 20. The general division of the common pleas court, rather than the probate court, has jurisdiction over a legal malpractice action. *See Gilpin v. Bank One Corp.*, 12th Dist. No. CA2003–09–073, 2004–Ohio–3012, ¶ 12 ("Actions alleging legal malpractice * * * are within the jurisdiction of the general division of the common pleas court, not within the jurisdiction of the probate court."); *Buckman–Peirson v. Brannon,* 159 Ohio App.3d 12, 2004–Ohio–6074, ¶ 26 (2d Dist.); *Elden v. Sylvania Sav. Bank,* 6th Dist. No. L–83–211 (Oct. 21, 1983); *Carpenter v. Levering,* 5th Dist. No. 86–CA–19 (Apr. 17, 1987).

At most, the Fiduciary claims that Melton violated Gov. Bar. R. XII regarding his obligation to notify the Supreme Court of his *pro hac vice* admission in this Court. However, just as this Court lacks jurisdiction to enforce the Rules of Professional Conduct, it lacks jurisdiction to issue a contempt order for violations of the Rules for the Government of the Bar. *See Petition of Green*, 369 U.S. 689, 692, 82 S.Ct. 1114, 1117, 89 Ohio Law Abs. 214, 8 L.Ed.2d 198 (1962) (a court cannot punish as a contempt the disobedience of an order the court is without

jurisdiction to issue). This Court lacks jurisdiction to entertain any argument regarding Melton's alleged breach of fiduciary duty not arising from the **administration** of the Estate.

C. This Court cannot adjudicate the merits of the Fiduciary's pending wrongful death claim in the General Division.

This Court patently lacks jurisdiction to render any judgment as to the merits of an action pending in another court. Thus, this Court cannot address whether the Zwinglers' re-filed wrongful death complaint is void *ab initio*, and cannot award any damages related thereto.

In general, this Court's authority, and the sanctions it may impose, is limited by law. The first question courts must address in considering contempt sanctions is whether the contempt is civil or criminal. *In re Estate of Mercurio*, 7th Dist. Mahoning No. 00 CA 108, 2003-Ohio-1437, ¶ 32. The two types of contempt can be distinguished primarily by the character and purpose of the punishment rendered in each case. *In re Sprankle*, 7th Dist. Carroll No. 678, 1999 WL 783980, *2. In the case of criminal contempt, it must be shown that the alleged contemnor intended to defy the court beyond a reasonable doubt. *Heinrichs v. 356 Registry, Inc.*, 2016-Ohio-4646, 70 N.E.3d 91 (Ohio Ct. App. 10th Dist. 2016).

On the other hand, civil contempt seeks a remedial sanction, which is one intended to coerce the termination of specific misconduct which constitutes a continuing contempt of court. *In re Sprankle*, 7th Dist. Carroll No. 678, 1999 WL 783980, *2; *Caron*, at 98. The purpose of sanctions in a case of civil contempt is to compel or coerce the contemnor to comply with the court's lawful orders. *Id.* Therefore, any sanction imposed for civil contempt must afford a contemnor the right to purge himself of the contempt. *Metcalf v. Kilzer*, 4th Dist. No. 15CA32, 2017-Ohio-5735, 94 N.E.3d 43, ¶ 22.

Here, there is no allegation that Melton is engaging in ongoing misconduct, so civil sanctions are inapplicable. Melton has not represented the Zwinglers since October 2017, and he

counsels no Ohio clients as to Ohio law. The only applicable contempt in this case is criminal, although there is no evidence that Melton acted intentionally and therefore no such contempt can be established. On the contrary, the Ohio Disciplinary Counsel specifically found that Melton's failure to file paperwork with the Supreme Court of Ohio was "inadvertent."[16] Kissinger acknowledged the contempt sought in the Fiduciary's motion was criminal, as it referenced "sentencing."

In a criminal contempt proceeding, a court may impose limited penalties. R.C. 2705.05. For a first offense, the court is limited to imposing a $250 fine or imprisonment up to thirty days. *Id.* This is the extent of the Court's authority; therefore, the Court lacks the power to impose the sanctions sought by the Fiduciary. The Court cannot declare the pending wrongful death complaint void. A substantive ruling on the merits of the re-filed wrongful death complaint is not an available remedy in a contempt proceeding. Moreover, the Court cannot assess damages related to the value of the wrongful death claim, and the Court cannot consider or decide whether Melton breached his fiduciary duty (which must be addressed as a legal malpractice claim). None of the relief sought in the contempt motion is available as a criminal contempt sanction as a matter of law.

Kissinger clearly sought these sanctions to circumvent having to prove the merits of a potential legal malpractice claim. This is only underscored by Kissinger's most recent motion asking the Court to impermissibly join CAE as a party to the Estate case. But a contempt proceeding is not the proper forum to determine this legal issue, which has not even been raised or argued by the only defendant to that action, CAE. Even if the Court had the power to dismiss

[16] Ex. A-3, ODC Letter.

the General Division complaint, there is no basis to do so. Ohio law permits the re-filed wrongful death case to proceed on its merits even in light of Melton's *pro hac vice* status.[17]

D. Kissinger's unclean hands prohibit his request for a contempt hearing.

"The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his prior-related conduct, the court will deny the remedy." *Marinaro v. Major Indoor Soccer League*, 81 Ohio App. 3d 42, 610 N.E.2d 450 (9th Dist. 1991).

Here, Kissinger was co-counsel with Melton when the original wrongful death complaint was filed. His role was to advise Melton as to Ohio law and procedure, including Ohio's *pro hac vice* admission requirements. Lawyers in different firms who share fees share joint responsibility for the representation. Thus, if liability arises from Melton's failure to mail the *pro hac vice* judgments to the Office of Attorney Services, Kissinger is also responsible. Further, Kissinger, as Melton's co-counsel, engaged in the same failing to properly steer him through the Ohio *pro hac vice* rules in the case they handled together that was filed in 2012 and which now serves as one of the lynchpins of his current attempt to dismiss the re-filed action. Kissinger's own unclean hands bar him from seeking criminal contempt sanctions against Melton.

Based on the foregoing, it is evident that the Fiduciary's Motion for Contempt was sought for no other purpose than to allow their current counsel to attack their former attorney rather than prosecute the merits of the Zwinglers' re-filed wrongful death claim. The lengthy correspondence between Kissinger and undersigned counsel demonstrates Kissinger's initial refusal to re-file the Zwinglers' case and his misplaced attacks on Melton, his former co-counsel. Kissinger's motivation is further underscored by his refusal to withdraw as counsel given his

[17] See, Ex. D, Brief in Opposition filed in General Division.

non-waivable conflict due to his own potential liability and status as a necessary fact witness regarding the issues raised in the contempt motion. As the associating and referring local attorney, Kissinger is potentially jointly liable to the Zwinglers for any misconduct arising out of the wrongful death case. Pursuant to Professional Conduct Rule 1.5(e), if an attorney agrees to share a fee with another attorney, both attorneys are jointly responsible for the representation. Joint responsibility includes both financial and ethical obligations, as if the attorneys were partners in the same law firm. Thus, any potential adverse ruling against Melton could potentially affect Kissinger as well, yet he refused undersigned counsel's offer to pay independent counsel to research, prepare, and re-file the Zwinglers' wrongful death claim against CAE and defend any potential motion to dismiss based on the research and arguments outlined above. Despite a duty to mitigate his clients' damages, Kissinger refused the offer, and moved for dismissal himself instead of waiting to see if CAE would seek to dismiss the re-filed case on the basis of subject matter jurisdiction. As it turned out, the only defendant did not move to dismiss the action on subject matter jurisdiction grounds.

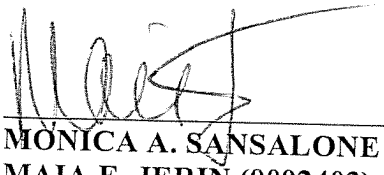
III. CONCLUSION

In its January 9, 2019 Judgment Entry, this Court denied the Fiduciary's Motion for Summary Direct Contempt of Court and yet set this matter for a show cause hearing on February 12, 2019. As discussed above, this Court is patently without jurisdiction to address the issues originally raised in Fiduciary's motion:

- whether Melton breached a fiduciary duty owed to the Fiduciary in the course of the wrongful death case, or
- whether the re-filed wrongful death claim pending in the General Division is void *ab initio* for Melton's inadvertent failure to notify the Ohio Supreme Court of his *pro hac vice* admissions.

Given the Court's unambiguous Judgment Entry and equally unambiguous lack of jurisdiction to address the two issues raised in the Fiduciary's motion, Melton and his undersigned counsel are unable to prepare for the scheduled hearing. It is therefore respectfully requested that this Court give notice of the issues which will be addressed at the show cause hearing set for February 12, 2019.

Respectfully submitted,



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Attorneys for Scott L. Melton

CERTIFICATE OF SERVICE

A copy of the foregoing *Motion for Clarification as to Show Cause Order* was sent via regular U.S. Mail, postage pre-paid, this 18th day of January, 2019 to the following:

William Kissinger
7631 South Avenue, Suite F
Youngstown, Ohio 44512
Tel: 330-629-8877
Attorney for Fiduciary

MONICA A. SANSALONE (0065143)
MAIA E. JERIN (0092403)
Gallagher Sharp LLP
Attorneys for Scott L. Melton

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

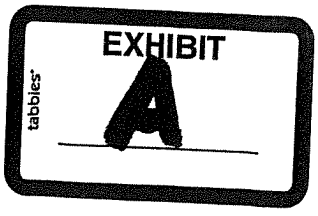
IN RE THE ESTATE OF RYAN EDWARD ZWINGLER DECEASED	)	CASE NO: 2013 ES 364
	)	JUDGE THOMAS S. SWIFT
	)	AFFIDAVIT OF SCOTT L. MELTON

1. I am Scott L. Melton, an attorney licensed to practice law in the State of Pennsylvania. I have personal knowledge of the facts set forth in this affidavit.

2. Attached hereto as Exhibit 1 are true and accurate copies of my Supreme Court of Ohio Certificates of Pro Hac Vice Registration for the years 2013, 2014, 2015, 2016, and 2017.

3. Attached hereto as Exhibit 2 are true and accurate copies of self-reporting letters I sent to the Office of Disciplinary Counsel of the Supreme Court of Ohio and the Pennsylvania Disciplinary Board.

4. Attached hereto as Exhibit 3 is a true and accurate copy of a letter I received from the Office of Disciplinary Counsel of the Supreme Court of Ohio regarding its investigation and decision concerning my *pro hac vice* registration.



5. Attached hereto as Exhibit 4 is a true and accurate copy of a letter I received from the Pennsylvania Disciplinary Board regarding its investigation and decision concerning my Ohio *pro hac vice* registration.

FURTHER AFFIANT SAYETH NAUGHT.

Scott L. Melton

SCOTT L. MELTON

SWORN TO AND SUBSCRIBED in my presence this 17th day of January, 2018. 9
2019

Donna M. Mignon

NOTARY PUBLIC

Commonwealth of Pennsylvania - Notary Seal
Donna M Mignon, Notary Public
Lehigh County
My commission expires October 03, 2022
Commission number 1340225

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2013

Registration Number:
PHV- 2571-2013

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2013

EXHIBIT 1

THE SUPREME COURT of OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2014

Registration Number:
PHV- 2571-2014

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2014

THE SUPREME COURT of OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION

2015

Registration Number:
PHV- 2571-2015

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2015

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2016

Registration Number:
PHV- 2571-2016

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2016

THE SUPREME COURT of OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2017

Registration Number:
PHV- 2571-2017

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Lee Ann Ward
Director, Bar Admissions

Expires December 31, 2017

SCOTT L. MELTON

ATTORNEY AT LAW
300 NINTH STREET
CONWAY, PENNSYLVANIA 15027-1647
(724) 869-2972
(724) 869-2246 facsimile
smeltonlawfirm@gmail.com
www.smeltonlaw.com

November 20, 2017

Disciplinary Board of the Supreme Court of Pennsylvania
District Four
437 Grant Street
Pittsburgh, PA 15219

Re: Scott L. Melton, Esquire
Ohio Pro Hac Vice 2571 - 2017

Dear Sir/Madam,

Today, I self-reported to the Ohio Office of Disciplinary Counsel (ODC) my possible unauthorized practice of law in Ohio due to my failure to comply with the technical requirements of *pro hac vice* registration in Ohio. I enclose a copy of my letter to ODC. I will keep you informed of any response I receive from ODC. In the interim, please contact me with any questions you may have.

Very truly yours,

Scott L. Melton

SLM/nrm
Enclosures
CC: George D. Jonson, Esquire w/encl.

EXHIBIT 2

SCOTT L. MELTON

ATTORNEY AT LAW
300 NINTH STREET
CONWAY, PENNSYLVANIA 15027-1647
(724) 869-2972
(724) 869-2246 facsimile
smeltonlawfirm@gmail.com
www.smeltonlaw.com

November 20, 2017

Office of Disciplinary Counsel – Ohio Supreme Court
250 South Civic Center Drive, Suite 325
Columbus, OH 43215

Re: Scott L. Melton, Esquire
Pro Hac Vice 2571 - 2017

Dear Sir/Madam,

I am an attorney licensed to practice in Pennsylvania. I represented Mr. and Mrs. Zwingler in a case filed in the Mahoning County Court of Common Pleas pursuant to a *pro hac vice* admission. The story actually begins with an earlier and entirely unrelated case which I handled in Columbiana County, Ohio in 2012. The following is a chronology of both of these matters.

In 2011 I signed a contingent fee agreement to represent Franklin W. Shank, Sr. and the Estate of Tammy Shank in a medical malpractice case seeking to recover damages for the death of Tammy Shank. The case had been reviewed and turned down by multiple prominent Ohio plaintiff medical malpractice firms. My fee agreement was approved by the Probate Court of Columbiana County.

The case of Franklin W. Shank, Sr., individually and as the Administrator of the Estate of Tammy L. Shank, deceased vs. Vikram A. Raval, M.D. et al. was filed on September 20, 2011 in the Court of Common Pleas of Columbiana County, Ohio at 2011 CV 666. The case was assigned to the Honorable Scott Washam. The complaint was filed for me by Steven M. Goldberg, Esq. an Ohio attorney, because my co-counsel in the case, Mr. Kissinger (referring attorney), had an earlier adverse experience with one of the judges of the Columbiana County court and did not want his name on the case. A companion medical malpractice case was filed by me on behalf of Mr. Shank and his wife's estate in the Court of Common Pleas of Allegheny County, Pennsylvania against medical practitioners in Pennsylvania that were felt to have rendered negligent care to Mrs. Shank in Pennsylvania, after her transfer from an Ohio hospital to a Pennsylvania hospital.

In early 2012 I obtained and reviewed the Ohio Rules for *pro hac vice* admission. I filed the necessary paperwork and paid the registration fee to the Office of Attorney Services for my *pro hac vice* registration. On March 28, 2012 a Certificate of Pro Hac Vice Registration was sent to me via email from the Office of Attorney Services. Enclosed and labeled as **Exhibit 1** is a copy of the 2012 Certificate. On or about April 5, 2012 I filed a Motion for Permission to Appear Pro Hac Vice in the Court of Common Pleas of Columbiana County. Proper notice was given to all counsel of record. Enclosed and labeled as **Exhibit 2** is a copy of the Motion. There was no objection to the Motion. On April 19, 2012 Judge Washam granted permission for me to appear *pro hac vice* in that action. Enclosed and labeled as **Exhibit 3** is a copy of the Judgment Entry granting permission.

During the course of discovery in that case, it was learned that the radiologic studies taken at the Ohio hospital where some of the events occurred may have been misread. As a result, a second lawsuit was filed at 2011 CV 757 in the Court of Common Pleas of Columbiana County against the radiology defendants. This Complaint was also filed by Attorney Steven M. Goldberg, Esq. for the same reasons as in the earlier case. The case was assigned to Judge Washam. On or about April 5, 2102 I filed a Motion for Permission to Appear Pro Hac Vice in that action. Proper notice was given to all counsel of record. There was no objection to the Motion. On April 19, 2012 Judge Washam granted permission for me to appear *pro hac vice* in that action. Enclosed and labeled as **Exhibit 4** is a copy of the Judgement Entry granting my motion.

At the time I studied the rules for *pro hac vice* practice, in early 2012, I became aware of the requirement to mail the Office of Attorney Services the Order granting permission to appear *pro hac vice*. However, by the time I presented my Motions in mid-April and received the Orders granting me permission I had forgotten the requirement to mail in the Orders and failed to do so.

On or about September 21, 2012 I presented a motion to consolidate both actions under the case filed at 2011 CV 666. By Order dated September 21, 2012 Judge Washam consolidated both action under 2011 CV 666. Enclosed and labeled as **Exhibit 5** is a copy of that Order.

In 2013 and 2014 I timely renewed my *pro hac vice* registration with the Office of Attorney Services. Enclosed and labeled as **Exhibit 6** is a copy of my Certificates of Pro Hac Vice registrations for those years.

In 2013 I settled the Shank matter with all but one defendant for a sum in excess of seven figures. In 2014 I tried the case against the remaining defendant. That case resulted in a defense verdict. I filed a motion for a new trial, which was denied. I filed an appeal to the Court of Appeals of Ohio, Seventh District simply to obtain time to study the case posture in more detail. Very shortly after filing the appeal I voluntarily discontinued it, with prejudice, as I did not see any reasonable prospect for success. Enclosed and labeled as **Exhibit 7** is a copy of the

Voluntary Dismissal and a copy of the Judgment Entry dismissing the appeal. I did not file a Motion for Permission to Appear Pro Hac Vice with the appellate court as I considered my earlier grant of Permission to appear *pro hac vice* to be sufficient to allow me to appeal the underlying matter. It should be noted that at no time did the Court of Appeals of Ohio, Seventh District, indicate, in any way, that I did not have the authority as a currently registered *pro hac vice* attorney to file the appeal, or to voluntarily dismiss the appeal, without having requested permission from it to appear *pro hac vice*. I did not mail a copy of my Voluntary Dismissal to the Office of Attorney Services, as I did not remember the requirement in the rules governing *pro hac vice* practice that I do so.

On Monday, August 25, 2014 I met with Ohio residents, Michele Zwingler and Robert Zwingler at the Youngstown law office of William Kissinger, Esquire, an Ohio attorney, regarding their son, Ryan Zwingler, who was killed in a truck accident on SR 534 in Mahoning County, Ohio on a dark rainy night on May 27, 2013. The truck in which he was a front seat passenger had gone off the shoulder of the road and remounted the pavement and entered the opposing lane where it struck, head-on, an oncoming tractor trailer. The driver of Mr. Zwingler's truck and Mr. Zwingler were both conscious following the collision, according to eye witnesses, but they were trapped in the cab. Their truck caught fire and neither man could be extracted from the cab. Both men burned to death.

This case was referred to me by Mr. Kissinger who had been my counsel and referring attorney on the Shank case. Mr. Kissinger made clear to me that the case had been thoroughly investigated and turned down by at least two well-known Ohio law firms. Mr. Kissinger provided me with a copy of the Ohio State Highway Patrol report. Upon my review of the police report I believed that the accident had some of the hallmarks of a shoulder drop off case but there was no mention of the condition of the berm of the roadway in the report. Further, I noticed that the road lanes were unusually narrow (9 feet) and the shoulder where the Zwingler truck left the road was also unusually narrow (20 inches). I also noticed that both oncoming trucks were very large, and each would likely have taken up the entire lane width of this very narrow road. I contacted the accident reconstruction officer from the Ohio Highway Patrol that investigated the case and asked him if he had ever considered that this accident could have been caused by a low shoulder. He had not considered that possibility in his investigation. However, he added, that he had taken very detailed measurements with a laser device of the scene of the accident and, if I was interested, he still had the raw data and could retrieve it to determine the height of the berm at the area where the Zwingler truck left the paved shoulder and went onto the berm and the height of the berm where it re-entered the paved shoulder. Reviewing his data with me over the phone, he discovered, much to his surprise, that there was a more than 5 inch drop off from the paved shoulder to the berm at the point where the Zwingler truck left the paved shoulder. There should be no drop off from the shoulder to the berm. The presence of the drop off can cause a

driver to easily lose control of their vehicle and when attempting to steer back onto the roadway cause their vehicle to be propelled into the opposing lane of traffic.

I determined that Mr. and Mrs. Zwingler may have a cause of action against the Ohio Department of Transportation (ODOT) for this dangerous shoulder drop off that I believed was the cause of the accident and their son's death. That action would need to be filed in the Ohio Court of Claims. However, my research revealed that every shoulder drop-off case brought before the Court of Claims resulted in a defense verdict, almost always on a Motion for Summary Judgment. At the meeting with them and Mr. Kissinger I presented them with an Attorney Retainer Agreement – Contingent Fee hiring me to represent them. Enclosed and labeled as **Exhibit 8** is a copy of that signed Agreement. [redacted]

My further investigation revealed that the roadway had been last repaved in the spring and summer of 2004, nine years before the accident, and my review of the repaving work contract that I obtained from the Ohio Department of Transportation included the contract requirement to bring the berm flush with the newly re-paved shoulder. I determined that Mr. and Mrs. Zwingler may have a cause of action against the pavement contractor, Central-Allied Enterprises, Inc. (CAE), for its failure to conform to the contract specifications and bring the berm flush to the paved shoulder. I informed the Zwinglers of my belief that they may have a cause of action against CAE and they consented to my filing the case. That action would have to be filed in the Court of Common Pleas of Mahoning County, Ohio.

On October 14, 2014 my co-counsel, Mr. Kissinger, filed on my behalf an Application to Enter into a Contingent Fee Contract with the Probate Court of Mahoning County. On October 16, 2014 the Honorable Robert N. Rusu, Jr. entered a Judgment Entry and Orders Allowing Agreement for Legal Representation. Enclosed and labeled as **Exhibit 9** is a copy of the Application and the Court's Judgment Entry.

As I knew that I would be filing the above referenced two actions in Ohio, on January 29, 2015, I timely complied with the Ohio *pro hac vice* registration requirements by filing the necessary papers to the Ohio Supreme Court Office of Attorney Services and submitting the required payment to it. Shortly thereafter, the Office of Attorney Services sent me a Certificate of Pro Hac Vice Registration and issued me number 2571-2015. Enclosed and labeled as **Exhibit 10** is a copy of that Certificate.

In working on a draft of the Complaint I prepared and mailed Verifications for Mr. and Mrs. Zwingler to sign to attach to the Complaint and told them that I would not file the Complaint with their signed verifications without them first reviewing it. These were signed and emailed back to me on May 24, 2015. After conferring with my local counsel, Mr. Kissinger, I learned

that, unlike Pennsylvania, client verifications are not filed with an Ohio complaint, so I did not attach the signed Verifications to the Complaints that I filed. Enclosed and labeled as **Exhibit 11** is a copy of the signed, dated verification pages. Mr. Kissinger also informed me that since I had my *pro hac vice* number current for 2015 that he did not have to sign the Complaint and that I could sign and file it alone.

On May 27, 2015 I hand delivered each Complaint for filing with the respective Clerk of Courts of each tribunal. Enclosed and labeled as **Exhibit 12** is a time-stamped copy of the Complaint filed in the Court of Common Pleas of Mahoning County, Ohio at 15 CV 1410 and in the Court of Claims of Ohio at 2015-00525.

On June 17, 2015 defense counsel filed an Answer to the Complaint in the Court of Claims action.

On or about July 2, 2015 defense counsel filed an Answer and discovery requests in the Mahoning County action.

On January 29, 2016 I timely renewed my *pro hac vice* registration by sending to the Ohio Supreme Court Office of Attorney Services the required paperwork and paid the registration fee. Shortly thereafter I received a Certificate of Pro Hac Vice Registration for 2016 which is enclosed and labeled as **Exhibit 13.**

Sometime in early April 2016, during preparation for the depositions of employees of Allied-Central Enterprises, counsel for ODOT, Jenna Jacoby, Esquire, pointed out to me during a phone call that I should file a Motion to Proceed *pro hac vice* in that action and the Mahoning County action, if I had not done so. I told her that my *pro hac vice* registration had been and was current for 2016 and, as such, I thought that I had been approved to practice in the Ohio courts for the calendar year. She told me that I was mistaken and that I should file the motions in the court in which I was practicing.

I looked in my closed files from the case of Franklin Shank, Sr. individually and as the Administrator of the Estate of Tammy Shank, deceased v. Vikram A. Raval, M.D. et al. filed in the Court of Common Pleas of Columbiana County at No. 666 and 757 of 2011 and simply reformatted the Motion for Permission to Appear Pro Hac Vice that I used in those actions and that had been approved by the Court in that action. I did not re-read the Rules for *pro hac vice* when I did that reformatting as I had no reason to believe that there were any problems with my *pro hac vice* procedure in the previous case.

On April 28, 2016 I mailed my Motion for Permission to Appear Pro Hac Vice to the Court of Common Pleas of Mahoning County and to the Court of Claims in the Zwingler cases. Enclosed

and labeled as **Exhibit 14 and 15**, respectively, are copies of the Motion that was filed in each case. Proper notice of the Motion was given to all counsel of record. No objection was filed to the relief requested in either motion.

On May 2, 2016 the Honorable Maureen Sweeney granted my Motion to Permission to Appear Pro Hac Vice. On May 16, 2016 the Honorable Patrick McGrath granted my Motion to Permission to Appear Pro Hac Vice. Enclosed and labeled as **Exhibit 16** is a copy of Judge Sweeney's and Judge McGrath's Orders granting the motions.

Once again, I had forgotten that Rule XII (Pro hac vice admission), Section 4, of the Supreme Court Rules for the Government of the Bar of Ohio required that within 30 days of the granting of the Motions for Permission to Appear Pro Hac Vice I was to send a copy of the Order granting permission to the Ohio Supreme Court Office of Attorney Services. Moreover, when I checked my computer file in the Shank case, to retrieve and reformat my Motion for Permission to Appear Pro Hac Vice, and in which I thought that I had properly handled the *pro hac vice* matters, there was no letter from me sending a copy of the Orders granting permission to appear *pro hac vice* to the Office of Attorney Services, so there was nothing in my file to remind me of the proper notification procedure.

Because of my failure to notify the Office of Attorney Services, the Ohio Supreme Court was unaware that I had been granted permission to appear *pro hac vice* in the Court of Common Pleas of Mahoning County or the Court of Claims and that I was proceeding with the litigation in each case.

I missed the January 29th deadline for *pro hac vice* registration for 2017 and did not pay the registration fee and send in my application for *pro hac vice* registration until September 29, 2017. I informed my co-counsel, Mr. Kissinger, about the late payment and registration.

On October 6, 2017 a Pretrial Conference was held in the Zwingler case in the action filed in the Court of Common Pleas of Mahoning County. Prior to the conference, we had informed defense counsel that shortly after the conference we would be filing a Motion for Voluntary Dismissal, Without Prejudice, Pursuant to RCP 41 and would be refiling the action within one year.

On October 9, 2017 my co-counsel, William Kissinger, checked the online *pro hac vice* website and called the Office of Attorney Services to make sure I was in compliance with its office due to my late payment and registration. They told him that they had received my payment and all my paperwork except they were waiting on my Affidavit. He met with me on October 10th and I showed him it had been prepared and notarized on September 29th, but I had not sent it in yet. I sent it in immediately. I was given my Certificate of Registration Pro Hac Vice for 2017 by the

Office of Attorney Services, effective September 29th. Enclosed and labeled as **Exhibit 17** is a copy of the Certificate.

Mr. Kissinger also told me at our meeting that the Office of Attorney Services did not show on its records that I was ever involved in litigation in Ohio. I could not understand how it had not known of the Shank and Zwingler cases as I had been granted permission by the respective judges to practice *pro hac vice*. Mr. Kissinger had checked the *pro hac vice* rules and determined that the Ohio Supreme Court was unaware of my litigation in these two cases because I had not mailed to the Office of Attorney Services a copy of the orders granting me permission to practice *pro hac vice* within 30 days of my receipt of the orders. Mr. Kissinger also discovered the sanction in the Rules of an automatic exclusion from the practice of law for the failure to mail the Orders granting me *pro hac vice* permission to the Office of Attorney Services and told me of the problem.

As stated earlier, we had intended to voluntarily discontinue the Zwinger case in both courts after the conclusion of the Pretrial Conference with the Court of Common Pleas of Mahoning County, scheduled for October 1, 2017, and had so advised defense counsel of our intention. Since the *pro hac vice* rule indicated that I was automatically excluded from the practice of law in Ohio 30 days after my having received the Order granting my *pro hac vice* appearance unless that Order was filed, Mr. Kissinger and I decided that I must not do any further legal work on either case and that he should enter his appearance in each case in order to voluntarily discontinue each action. On October 11, 2017 Mr. Kissinger filed his Notice of Appearance and a Voluntary Dismissal in the Mahoning County action. On October 12, 2017 Mr. Kissinger filed his Notice of Appearance for the Plaintiffs and filed a Notice of Voluntary Dismissal in the Court of Claims action. Enclosed and labeled as **Exhibits 18 and 19**, respectively are copies of those filings. On October 26, 2017 the Honorable Patrick M. McGrath filed an Entry acknowledging that the action in the Court of Claims had been voluntarily discontinued and assessed costs against the plaintiffs. Enclosed and labeled as **Exhibit 20** is a copy of Judge McGrath's Entry.

In addition to my immediately ceasing to perform any legal work in Ohio, through Mr. Kissinger, we promptly informed Judge Sweeney of the Mahoning County Court of Common Pleas, through her magistrate Dennis J. Sarisky, Esquire, of my discovery that I was supposed to have mailed a copy of her Order granting me permission to appear *pro hac vice* to the Office of Attorney Services and that I had inadvertently failed to do so.

Within two weeks of the discovery of my failure to send the Orders granting permission for *pro hac vice* appearance and the sanction of automatic exclusion Attorney Kissinger and I jointly met with the Zwinglers at his office and informed them of my error and the sanction. I informed them that I was working with the Office of Attorney Services to correct the matter and furnish it with the appropriate orders. I explained that at that juncture I did not know the full legal

ramifications of the error but that I would do everything in my power to correct the error. I further told them that I intended to refile their case and would ask the court for permission to practice *pro hac vice* on it.

Further, I informed, through Mr. Kissinger, Judge Rusu of the Mahoning County Orphans Court of my error. He suggested that Mr. Kissinger enter his appearance in the Probate Court matter and that my Contingent Fee Agreement with the Zwingler's be withdrawn by Mr. Kissinger and a new Contingent Fee Agreement between Mr. Kissinger and the Zwinglers be entered into and submitted to the Probate Court for Approval until the matters regarding my error were further clarified. Enclosed and labeled as **Exhibit 21** is a copy of Mr. Kissinger's Withdrawal of Approval for Wrongful Death Contract which was filed with the Mahoning County Probate Court on October 26, 2017. Enclosed and labeled as **Exhibit 22** is a copy of the Judge Rusu's Order, dated October 27, 2017, withdrawing his prior approval of the contingent fee contract between myself and the Zwinglers.

On October 26, 2017 Mr. and Mrs. Zwingler signed a new Contingent Fee Agreement with Attorney Kissinger. Enclosed and labeled as **Exhibit 23** is a copy of the Contingency Fee Agreement between the Zwinglers and Mr. Kissinger. Also on October 26, 2017 Mr. Kissinger filed an Application To Approve Contingent Fee Contract between himself and the Zwinglers regarding this case. Enclosed and labeled as **Exhibit 24** is a copy of the Application. On October 30, 2017 Judge Rusu filed a Judgment Entry and Orders Allowing Agreement for Legal Representation of Mr. Kissinger as counsel in this case. Enclosed and labeled as **Exhibit 25** is a copy of the Judgment Entry.

Since discovering my mistake(s) in failing to forward the Orders granting me permission to appear *pro hac vice* in the Shank and Zwingler cases I have sent the Orders to the Office of Attorney Services as well as my motion for voluntary dismissal from the appeal taken on the Shank case and the Voluntary Dismissal of the Zwingler case in the Court of Claims. In the Zwingler case filed in the Court of Common Pleas of Mahoning County that matter was discontinued by my co-counsel Mr. Kissinger, as outlined above.

I wanted to bring this matter to your attention and am happy to answer any questions you may have and to provide any additional documentation you wish to see.

Very truly yours,

Scott L. Melton
SLM/nrm
CC: George D. Jonson, Esquire w/encl.

Disciplinary Counsel
THE SUPREME COURT OF OHIO

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STACY SOLOCHEK BECKMAN
JENNIFER A. BONDURANT
MICHELLE R. BOWMAN
LIA J. MEEHAN
KAREN H. OSMOND
CATHERINE M. RUSSO
DONALD M. SCHEETZ
AMY C. STONE
AUDREY E. VARWIG

September 14, 2018

PERSONAL AND CONFIDENTIAL

George Demetrios Jonson, Esq.
Montgomery, Rennie & Jonson, LPA
36 East 7th Street, Suite 2100
Cincinnati, Ohio 45202

Re: Scott L. Melton
UPL File No. B7-2346U

Dear Mr. Jonson:

We have completed our investigation of the matter brought to our attention by your client. After a thorough investigation, we have determined that further action will not be taken regarding the allegations that Scott L. Melton engaged in the unauthorized practice of law.

As we understand it, Mr. Melton is a Pennsylvania licensed attorney. Since 2012, he has practiced law in Ohio in various matters under *pro hac vice* authority. According to our review of Mr. Melton's registration history with the Office of Attorney Services, he appropriately filed applications with the Office of Attorney Services and paid the required fees. Then, subsequent to motion, he was granted permission to practice *pro hac vice* before the Columbiana County Court of Common Pleas, Mahoning County Court of Common Pleas, and the Ohio Court of Claims.

However, in October 2017, Mr. Melton learned that, albeit inadvertently, he had failed to complete the final step of the Ohio Pro Hac Vice registration, pursuant to Gov. Bar R. XII, i.e., filing the court's notice of permission with the Office of Attorney Services. Upon learning of his error, Mr. Melton promptly reviewed the Gov. Bar Rule requirements and provided the Office of Attorney Services with the required paperwork. This action, according to my discussion with the Office of Attorney Services, cured any deficiencies or apparent lapse in his *pro hac vice* status. Moreover, he notified each court of his error and discussed the matter with his clients. He also was allowed to withdraw his contingent contract in the *Zwingler* wrongful death matter that was pending at that time. Further, new counsel assumed representation and we are unaware of any damages or prejudice that his clients may have suffered as a result of his conduct.

Nevertheless, our investigation revealed that Mr. Melton was "technically" excluded from the practice of law in Ohio from January 1, 2017 until September 27, 2017. This occurring simultaneously with his representation in the *Zwingler* matter. Hence, we believe that he

EXHIBIT 3

engaged in the unauthorized practice of law during that time frame. However, in light of Mr. Melton's inadvertent conduct, coupled with his prompt compliance with the Office of Attorney Services and Gov. Bar R. XII requirements, we are electing to exercise our jurisdiction and forgo prosecution of this matter. Moreover, we trust that, by his own admissions and with your trusted guidance, Mr. Melton will not make this mistake again.

Should we become aware of additional information regarding Mr. Melton's activities that might constitute the unauthorized practice of law, we will certainly reopen our investigation. At the present time, we have dismissed this matter and closed our file. Thank you for your cooperation.

Sincerely,

Michelle R. Bowman

Michelle R. Bowman
Assistant Disciplinary Counsel

MRB/ksl

Paul J. Killion
Chief Disciplinary Counsel

Paul J. Burgoyne
Deputy Chief Disciplinary Counsel

District IV Office
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September 24, 2018

Scott Lewis Melton, Esquire
300 Ninth Street
Conway, PA 15027

Re: File Reference #C4-17-868

Dear Mr. Melton:

This concerns the matter for which you self-reported in November of 2017. You stated in your report to this office that you were being investigated in Ohio for possible violation of the Ohio rules for admission *pro hac vice*. You self-reported to the Office of Disciplinary Counsel for the Supreme Court of Ohio. That matter was based upon your alleged failure to follow the rules concerning such admission for an action filed in the Mahoning County, Ohio, Court of Common Pleas.

We have been informed by Disciplinary Counsel in Ohio that, because that office could find no evidence that you intentionally engaged in the unauthorized practice of law in Ohio, it would not pursue any sanction against you. Therefore, they dismissed the action against you. Please be advised that, in accordance therewith, we are also closing our file.

You have stated in your communications with this office that you may have made certain mistakes with regard to seeking *pro hac vice* admission for the matter in Ohio. We are sure that, in the future, you will take care to scrupulously follow such rules, and avoid any appearance of impropriety in that regard.

EXHIBIT 4

I would like to thank you for your courtesy and professionalism in your communications with this office.

Very truly yours,

Samuel F. Napoli
Disciplinary Counsel

SFN/rm

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

IN RE THE ESTATE OF RYAN EDWARD ZWINGLER DECEASED	)	**CASE NO: 2013 ES 364**
	)	**JUDGE THOMAS S. SWIFT**
	)	**AFFIDAVIT OF MONICA A. SANSALONE**

1. I am Monica A. Sansalone, an attorney licensed to practice law in the State of Ohio. I represent Scott L. Melton with respect to the above captioned matter and have personal knowledge of the facts set forth in this affidavit.

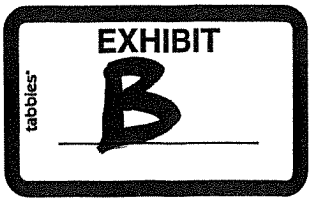
2. Attached hereto as Exhibit 1 is a true and accurate copy of the court docket in Mahoning County Court of Common Pleas Case No. 2018 CV 02518 captioned *Zwingler v. Central Allied Enterprises, Inc.* printed from the court's website on December 18, 2018.

3. A copy of the September 14, 2018 ODC letter was attached to the Brief in Opposition to the motion for contempt filed in the General Division, and a copy of same was served on the Zwinglers' counsel, William Kissinger.

4. Attached hereto as Exhibit 2 is a true and accurate copy of correspondence dated August 10, 2018 sent to me by William Kissinger and the referenced attachment.

5. Attached hereto as Exhibit 3 is a true and accurate copy of correspondence I sent to William Kissinger on July 30, 2018.

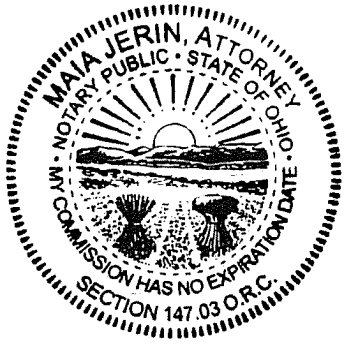
6. Attached hereto as Exhibit 4 is a true and accurate copy of Correspondence I sent to William Kissinger on August 23, 2018.



FURTHER AFFIANT SAYETH NAUGHT.

MONICA A. SANSALONE

SWORN TO AND SUBSCRIBED in my presence this 17th day of January, 2018.9



NOTARY PUBLIC

Skip to main content

2018 CV 02518 ZWINGLER, MICHELE -vs- CENTRAL ALLIED ENTERPRISES INC MAS

- Case Type:
- Civil - Common Pleas
- Case Status:
- REOPEN (RO)
- File Date:
- 10/09/2018
- DCM Track:
-
- Action:
- OTHER CIVIL
- Status Date:
- 10/30/2018
- Case Judge:
- SWEENEY, MAUREEN A.
- Next Event:
-

EXHIBIT 1

All Information | Party | Event | Docket | Financial | Receipt | Financial Dockets | Disposition

Party Information

ZWINGLER, MICHELE
- PLAINTIFF

- Disposition
- Disp Date

- Address
- INDV AND AS ADMR OF EST OF RYAN E. ZWINGLER
  AND ROBERT ZWINGLER JR. IN HIS OWN RIGHT
  7564 W. PINE LANE ROAD
  SALEM, OH 44460
- Phone

Alias

Party Attorney
- Attorney
- KISSINGER, WILLIAM J
- Address
- 7631 SOUTH AVE STE F
  YOUNGSTOWN, OH 44512

More Party Information

CENTRAL ALLIED ENTERPRISES INC
- DEFENDANT

- Disposition
- Disp Date

- Address
- % GERALD S. ORN, STATUTORY AGENT
  1246 RAFF ROAD, S.W.
  CANTON, OH 44708
- Phone

Alias

Party Attorney
- Attorney
- EKLUND, PAUL D
- Address
- COLLINS, ROCHE, UTLEY & GARNER LLC
  875 WESTPOINT PKWY., STE 500
  WESTLAKE, OH 44145

More Party Information

Events

Date/Time	Location	Type	Result	Event Judge
11/05/2018 02:00 PM	COURTROOM #2	HEARING	CASE STAYED	SARISKY, DENNIS J

Docket Information

Date	Description	Docket Text	Amount Owed	Image Avail.
10/09/2018	DEPOSIT RECEIVED	DEPOSIT RECEIVED Attorney: KISSINGER, WILLIAM J (59149) Receipt: 397969 Date: 10/09/2018	$60.00	
10/09/2018	COMPLAINT FILED	COMPLAINT FILED	$25.00	Image
10/09/2018	LEGAL AID (TOSCV) FILED	LEGAL AID (TOSCV) FILED Receipt: 397969 Date: 10/09/2018	$26.00	
10/09/2018	LEGAL NEWS	LEGAL NEWS Receipt: 397969 Date: 10/09/2018	$13.00	
10/09/2018	COURT COMPUTER RESEARCH (CIVIL)	COURT COMPUTER RESEARCH (CIVIL) Receipt: 397969 Date: 10/09/2018	$6.00	
10/09/2018	CLERK COMPUTERIZATION FEE (CIVIL)	CLERK COMPUTERIZATION FEE (CIVIL) Receipt: 397969 Date: 10/09/2018	$20.00	
10/09/2018	CV-COURT MEDIATION PROGRAM	CV-COURT MEDIATION PROGRAM Receipt: 397969 Date: 10/09/2018	$40.00	
10/09/2018	CV-SPECIAL PROJECTS FUND	CV-SPECIAL PROJECTS FUND Receipt: 397969 Date: 10/09/2018	$50.00	
10/09/2018	CV-TECHNOLOGY FUND	CV-TECHNOLOGY FUND Receipt: 397969 Date: 10/09/2018	$10.00	
10/09/2018	MOTION	MOTION FOR SUMMARY DIRECT CONTEMPT OF COURT FILED	$0.00	
10/12/2018	MEMO	CERTIFICATE OF SERVICE FILED BY PLNTF Attorney: KISSINGER, WILLIAM J (59149)		
10/15/2018	SUMMONS, COPY OF COMPLAINT	SUMMONS, COPY OF COMPLAINT MAILED BY CERTIFIED MAIL TO DEFT AT ADDRESS ON COMPLAINT	$2.00	
10/15/2018	CERTIFIED MAILER NUMBER P	Issue Date: 10/15/2018 Service: CIVIL SUMMONS Method: (CP) CERTIFIED MAIL Cost Per: $0.00 CENTRAL ALLIED ENTERPRISES INC % GERALD S. ORN, STATUTORY AGENT 1246 RAFF ROAD, S.W. CANTON, OH 44708 Tracking No: 94147266990421117442 5	$8.22	
10/16/2018	JE> SEE ATTACHED IMAGE	JE> THIS CASE IS ORDERED TRANSFERRED FROM COURTROOM 1 TO COURTROOM 2 (SWEENEY) SEE ATTACHED IMAGE	$2.00	Image
10/16/2018	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	$1.00	
10/19/2018	COPIES ISSUED	COPIES ISSUED OF 10/16/2018 JE	$0.20	

Date	Description	Docket Text	Amount Owed	Image Avail.
10/19/2018	REGULAR MAIL POSTAGE FEES	Issue Date: 10/19/2018 Service: COPIES OF 10/16/2018 JE Method: (CP) REGULAR MAIL Cost Per: $0.46 ZWINGLER, MICHELE c/o ATTY: KISSINGER, WILLIAM J 7631 SOUTH AVE STE F YOUNGSTOWN, OH 44512 Tracking No: R001102599 CENTRAL ALLIED ENTERPRISES INC % GERALD S. ORN, STATUTORY AGENT 1246 RAFF ROAD, S.W. CANTON, OH 44708 Tracking No: R001102600	$0.92	
10/19/2018	SUCCESSFUL SERVICE	SUCCESSFUL SERVICE Method : (CP) CERTIFIED MAIL Issued : 10/15/2018 Service : CIVIL SUMMONS Served : 10/17/2018 Return : 10/19/2018 On : CENTRAL ALLIED ENTERPRISES INC Signed By : CINDY MOORE Reason : (CP) SUCCESSFUL Comment : Tracking #: 9414726699042111744425		
10/22/2018	NOTICE	NOTICE OF LIMITED APPEARANCE OF COUNSEL FOR NON PARTY SCOTT L MELTON ESQ FILED Attorney: SANSALONE, MONICA A (65143)		
10/22/2018	NOTICE	NOTICE OF CHANGE OF ADDRESS FILED BY DEFT Attorney: EKLUND, PAUL D (1132)		
10/23/2018	MEMO	NON-PARTY SCOTT L MELTON'S BRIEF OPPOSING PLTFS MOTION FOR SUMMARY DIRECT CONTEMPT OF COURT FILED Attorney: SANSALONE, MONICA A (65143)		
10/23/2018	MOTION	NON PARTY SCOTT L MELTON'S MOTION TO DISQUALIFY MAGISTRATE SARISKY AND MOTION FOR RECUSAL OF JUDGMENT MAUREEN SWEENEY WITH RESPECT TO PLTFS MOTION FOR CONTEMPT AND MOTION FOR EMERGENCY STAY FILED Attorney: SANSALONE, MONICA A (65143)	$0.00	
10/24/2018	NOTICE	NON PARTY SCOTT MELTON'S NOTICE OF SUBSTITUTION OF EXHIBIT A-3 TO AFFIDAVIT OF SCOTT MELTON IN SUPPORT OF HIS MOTION FOR DISQUALIFICATION AND BRIEF IN OPPOSITION TO PLNTF'S MOTION FOR DIRECT SUMMARY CONTEMPT OF COURT FILED Attorney: SANSALONE, MONICA A (65143)		
10/30/2018	JE> SEE ATTACHED IMAGE	JE> THE HEARING ON CONTEMPT IS STAYED AND THE MATTER BE FORWARDED TO THE ASSIGNMENT COMMISSIONER FOR FOR ACTION. (SWEENEY) SEE ATTACHED IMAGE	$2.00	Image
10/30/2018	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	$1.00	
10/30/2018	NOTICE	NON-PARTY SCOTT L. MELTON'S NOTICE OF FILING ORIGINAL AFFIDAVIT OF SCOTT L. MELTON FILED Attorney: SANSALONE, MONICA A (65143)		

Date	Description	Docket Text	Amount Owed	Image Avail.
11/09/2018	JE> SEE ATTACHED IMAGE	JE> STIPULATION FOR LEAVE TO MOVE OR PLEAD (SWEENEY) SEE ATTACHED IMAGE	$4.00	Image
11/09/2018	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	$2.00	
11/19/2018	REGULAR MAIL POSTAGE FEES	Issue Date: 11/19/2018 Service: COPY OF 11/09/2018 JE (COPY PROVIDED) Method: (CP) REGULAR MAIL (SASE PROVIDED) Cost Per: $0.00 CENTRAL ALLIED ENTERPRISES INC c/o ATTY: EKLUND, PAUL D COLLINS, ROCHE, UTLEY & GARNER LLC 875 WESTPOINT PKWY., STE 500 WESTLAKE, OH 44145 Tracking No: R001107719	$0.00	
11/30/2018	MEMO	ANSWER OF DEFENDANT CENTRAL ALLIED ENTERPRISE FILE Attorney: EKLUND, PAUL D (1132)		

Financial Summary

Cost Type	Amount Owed	Amount Paid	Amount Adjusted	Amount Outstanding
Cost	$213.34	$165.00	$0.00	$48.34
Total	Total $213.34	Total $165.00	Total $0.00	Total $48.34

- **Money on Deposit with the Court**

Account	Applied Amount
DEPOSIT RECEIVED (CP)	$0.00
Total	Total $0.00

Receipts

Receipt Number	Receipt Date	Received From	Payment Amount
397969	10/09/2018	WILLIAM KISSINGER	$225.00
Total	Total	Total	Total $225.00

Financial Docket Information

Date	Description	Owed	Adjusted	Paid	Due	Due Date
10/09/2018	DEPOSIT RECEIVED	$60.00	$0.00	$60.00	$0.00	
10/09/2018	COMPLAINT FILED	$25.00	$0.00	$0.00	$25.00	
10/09/2018	LEGAL AID (TOSCV) FILED	$26.00	$0.00	$26.00	$0.00	
Total	Total	Total $273.34	Total $0.00	Total $225.00	Total $48.34	Total

Date	Description	Owed	Adjusted	Paid	Due	Due Date
10/09/2018	LEGAL NEWS	$13.00	$0.00	$13.00	$0.00	
10/09/2018	COURT COMPUTER RESEARCH (CIVIL)	$6.00	$0.00	$6.00	$0.00	
10/09/2018	CLERK COMPUTERIZATION FEE (CIVIL)	$20.00	$0.00	$20.00	$0.00	
10/09/2018	CV-COURT MEDIATION PROGRAM	$40.00	$0.00	$40.00	$0.00	
10/09/2018	CV-SPECIAL PROJECTS FUND	$50.00	$0.00	$50.00	$0.00	
10/09/2018	CV-TECHNOLOGY FUND	$10.00	$0.00	$10.00	$0.00	
10/09/2018	COPY OF HEARING NOTICE SENT BY COURT TO PARTIES BY REGULAR MAIL FILED	$0.00	$0.00	$0.00	$0.00	
10/09/2018	MOTION	$0.00	$0.00	$0.00	$0.00	
10/12/2018	MEMO	$0.00	$0.00	$0.00	$0.00	
10/15/2018	SUMMONS, COPY OF COMPLAINT	$2.00	$0.00	$0.00	$2.00	
10/15/2018	CERTIFIED MAILER NUMBER P	$8.22	$0.00	$0.00	$8.22	
10/16/2018	JE> SEE ATTACHED IMAGE	$2.00	$0.00	$0.00	$2.00	
10/16/2018	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	$1.00	$0.00	$0.00	$1.00	
10/19/2018	COPIES ISSUED	$0.20	$0.00	$0.00	$0.20	
10/19/2018	REGULAR MAIL POSTAGE FEES	$0.92	$0.00	$0.00	$0.92	
10/19/2018	SUCCESSFUL SERVICE	$0.00	$0.00	$0.00	$0.00	
10/22/2018	NOTICE	$0.00	$0.00	$0.00	$0.00	
10/22/2018	NOTICE	$0.00	$0.00	$0.00	$0.00	
10/23/2018	MEMO	$0.00	$0.00	$0.00	$0.00	
10/23/2018	MOTION	$0.00	$0.00	$0.00	$0.00	
10/24/2018	NOTICE	$0.00	$0.00	$0.00	$0.00	
10/30/2018	JE> SEE ATTACHED IMAGE	$2.00	$0.00	$0.00	$2.00	
10/30/2018	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	$1.00	$0.00	$0.00	$1.00	
10/30/2018	NOTICE	$0.00	$0.00	$0.00	$0.00	
11/09/2018	JE> SEE ATTACHED IMAGE	$4.00	$0.00	$0.00	$4.00	
11/09/2018	COST FOR JUDGMENT ENTRY FOR CLERK COMPUTERIZATION	$2.00	$0.00	$0.00	$2.00	
11/19/2018	REGULAR MAIL POSTAGE FEES	$0.00	$0.00	$0.00	$0.00	
11/30/2018	MEMO	$0.00	$0.00	$0.00	$0.00	
Total	Total	Total $273.34	Total $0.00	Total $225.00	Total $48.34	Total

Case Disposition

Disposition	Date	Case Judge
(A) TRANSFER TO ANOTHER JUDGE	10/09/2018	D'APOLITO, ANTHONY M
(A) BANKRUPTCY STAY OR APPEAL	10/30/2018	SWEENEY, MAUREEN A.
Undisposed		SWEENEY, MAUREEN A.

EXHIBIT
2

William J. Kissinger

Attorney at Law

7631 South Avenue, Suite F
Youngstown, OH 44512
(330) 629-8877
Fax: (330) 629-2682

FAX TRANSMISSION COVER SHEET

Date: August 10, 2018

To: Gallagher Sharp LLP Attn: Attorney Monica Sansalone

Fax: (216) 241-1608

Subject: RE: Estate of Ryan E. Zwingler against Scott L. Melton

Sender: Attorney William Kissinger

YOU SHOULD RECEIVE 7 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (330) 629-8877.

IF TRANSMISSION IS ILLEGIBLE OR INCOMPLETE, CONTACT AT 330-629-8877

WILLIAM J. KISSINGER

ATTORNEY AT LAW

7631 South Avenue Suite F
Youngstown, Ohio 44512
Phone: (330) 629-8877
Fax: (330) 629-2682

August 10, 2018

Attorney Monica Sansalone
Gallagher Sharp LLP
Sixth Floor Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

RE: Estate of Ryan E. Zwingler Claim Against Attorney Scott L. Melton

Dear Attorney Sansalone:

As I was preparing a response to you, I received your request for information supplied by Jonathan Coughlin regarding the claim. I am enclosing a copy of the email from Mr. Coughlin after my office retained him for assistance in finding a way to refile the Zwingler lawsuit. For two months, Mr. Melton was ignoring both myself and the clients. I sent him a correspondence insisting he respond with a legitimate tolling argument so the case could be refiled or the contact information for his insurance carrier. Upon supplying Mr. Coughlin with a copy of the letter, he was adamant that a way needed to be aggressively pursued to refile the case, but could not supply me with a way to accomplish it. I advised him that I had consulted with over a dozen litigators and none would refile the claim without the tolling argument to protect them from a court sanction. Mr. Coughlin stated that did not know how to resolve the issue of Mr. Melton's period of exclusion, but he would consult with Mr. Melton's counsel to find a way to do so. After consulting with Attorney Jonson, the only suggestion that they could provide was to have Attorney Steve Goldberg refile the case and he would deal with the issue. I spoke to Attorney Goldberg who said no one had discussed this matter with him and he was not willing to refile the case.

As grim as this issue had become, CNA actually made matters far worse. I am enclosing the correspondence from Attorney Paul Eklund that I received on May 15, 2018. For reasons I

cannot fathom, CNA immediately forwarded my demand package to Attorney Eklund. I contacted Attorney Eklund to inquire how he received the information. He said he was shocked when he received it and had no idea why it was sent to him. He had no idea about Mr. Melton's pro hac vice issues prior to this notification. Based on this information, his client would not agree to negotiate with me regarding the fraud claim in the future and he would respond to any refile with an immediate motion to dismiss as the statute of limitations had expired. I told CNA I would require a written explanation as to how this happened and a reason why they would not be liable for an independent tort for eliminating my ability to negotiate a settlement for the Zwingler family. I received my written explanation that this was a one in a million accident and they were still trying to discover how it happened. I received no reason why CNA does not have liability for the additional damages suffered by the Zwingler family. The same day, I received a separate package from CNA containing a forty page package containing confidential information for a claim my office has nothing to do with. Claim number HMA94112 for the insured, Elaine Chavez, was to be sent to Bighorn Law in Las Vegas, Nevada. In 25 years of practice, I have never seen a claim "botched" so badly by an insurance company.

As to your concerns regarding my liability, as we discussed, I put my carrier, OBLIC, on notice in December, 2017. Upon their thorough investigation, they assured me they had absolutely no concerns of any liability on my part. In addition, I have received ethics consultations from two different attorneys to insure there would be no ethical problems. As to your concerns regarding myself as a material witness, my testimony is completely unnecessary. I enclosed in my demand package to CNA, both, Mr. Melton's letter to the Supreme Court of Ohio admitting his period of exclusion and his letter to Attorney Eklund making a demand of nine million dollars with eight pages of detail explaining why the claim had this value. Mr. Melton's own hand has admitted both liability and the amount of damages. In regard to the case within a case doctrine you brought up, please review the Supreme Court's exception that was carved out for malpractice that results in lost opportunity to litigate.

My prior letter to CNA stated I would be filing against Mr. Melton if the matter was not resolved by August 1, 2018. I recognize that you did not have complete information when CNA turned this matter over to you and you did send me a response on July 31, 2018. I have spoken to my clients and have been instructed to delay filing until August 20, 2018. If this matter is not resolved by then, I will begin with filing an adversarial complaint with the Mahoning County Probate Court for fraud, breach of fiduciary duty and punitive damages due to Mr. Melton's clear actual malice and conscious disregard towards the Zwingler family with a great probability of causing them harm. This disregard is further proven by Mr. Melton's history of prior litigation without privileges to do so. By statute, Mr. Melton will not be permitted a jury in this court. Therefore his trier of fact will be the court that still has not addressed the issue of his "fraud upon this court" from his application to approve his wrongful death contract. As the probate court has exclusive jurisdiction over these claims, pursuant to the Court's plenary

power, I will also be listing CNA as a co-defendant for the same claims as they were acting on behalf of Mr. Melton regarding a probate asset when they put Attorney Eklund on notice. Attorney Craig Pelini has agreed to be co-counsel on the case and has told me he is ready to begin as soon as possible.

My office has gone to great lengths to try to find a way to rectify Mr. Melton's actions which have only magnified the pain of losing their son. The Zwingler family has suffered enough. I will await your response.

VERY TRULY YOURS,

Attorney William Kissinger
Counsel for The Estate of Ryan Edward Zwingler

WK
SENT BY FACSIMLE
cc: Attorney Craig Pelini
Robert Zwingler
Michele Zwingler

Subject: RE: Zwingler family claim

From: Coughlan, Jonathan (JCoughlan@keglerbrown.com)

To: kissinger4211@yahoo.com;

Date: Thursday, January 11, 2018 10:58 AM

Butch,

Your voice mail box is full so I am emailing you. You mentioned a new case you found in a voice mail message yet, I don't see any cite to a new case in this letter to Scott. This is just another demand for his carrier. You claim to want to help your client's by trying to preserve their case but all I see is your efforts to go after Scott. That is not what I have recommended. I have and continue to strongly recommend that you figure out a way to get your client's case refiled. George Jonson has agreed to have Scott contact Steve Goldberg about re-filing the case for the clients. He would then take on the tolling issue you have expressed concerns about. If that can happen that is a tremendous benefit to your client.

I am of the opinion that the statute of limitations for the malpractice case will not have started until at least the time the case was dismissed, if not later. And, if it will make you more comfortable, George is willing to sign a tolling agreement as to the statute of limitations for any possible malpractice claim. But you have to truly be interested in preserving your client's underlying case as opposed to just going after Scott. I strongly recommend that we see about letting Steve Goldberg re-file the case. If you are not interested in pursuing that, please let me know. I am here today if you want to call me.

Thanks, Jon

From: William Kissinger [mailto:kissinger4211@yahoo.com]
Sent: Tuesday, January 9, 2018 9:11 PM
To: Coughlan, Jonathan <JCoughlan@keglerbrown.com>
Subject: Zwingler family claim

Jon

I have attached a cover letter and a copy of

what I sent to Scott pursuant to the message I

left on the telephone on 1/8/18.

Thanks

Butch Kissinger

CRUG | COLLINS ROCHE UTLEY & GARNER LLC
ATTORNEYS AT LAW

CLEVELAND
800 Westpoint Parkway, Suite 1100
Cleveland, Ohio 44145
T. 216-916-7730
F. 216-916-7725

Paul D. Eklund
E-mail: peklund@cruglaw.com

May 15, 2018

VIA FACSIMILE: 330-629-2682
William J. Kissinger
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: Michele Zwingler, etc. v. Central-Allied Enterprises, Inc.
Mahoning County Court of Common Pleas Case No. 15CV1410
Our File No. A-0456/137.00016

Dear Mr. Kissinger:

As you are aware, I am the attorney retained by Travelers to defend Central Allied Enterprises, Inc. with respect to the wrongful death claim presented by your clients, Michelle and Robert Zwingler. I have received a copy of your letter to "CNA Professional Services, Attn: Doug Ricci." Travelers has the primary layer of insurance for Central Allied, and I have been instructed to advise you that there will be no increase in the offer made on behalf of Central Allied to your clients at the mediation/settlement conference we attended with the Court Mediator in the Mahoning County Court of Common Pleas last fall.

Sincerely,

/s/ Paul D. Eklund

Paul D. Eklund

PDE/dmg

Gallagher Sharp LLP

Established in 1912
www.gallaghersharp.com

PLEASE RESPOND TO CLEVELAND OFFICE

Monica A. Sansalone
Direct Dial: (216) 522-1154
msansalone@gallaghersharp.com

EXHIBIT 3

July 30, 2018

Via Federal Express

Mr. William Kissinger, Esq.
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: ***Ryan E. Zwingler Wrongful Death Claim/Potential Legal Malpractice Action***
Our Matter No. 00520-127876

Dear Mr. Kissinger,

Please be advised that I represent Scott Melton, Esq. with respect to the potential legal malpractice claim against him arising out of the underlying wrongful death action on behalf the Estate of Ryan Edward Zwingler. I have had the opportunity to review both your January 29, 2018 correspondence to Mr. Melton and your May 2, 2018 correspondence to Doug Ricci of CNA, Mr. Melton's professional liability carrier. Please note that the proposition outlined on page three of this communication has a response date of **August 10, 2018**.

According to your correspondence, you represent Mr. and Mrs. Zwingler with respect to the legal malpractice claim against Mr. Melton. However, you have non-waiveable conflicts of interest which prevent you from acting in the capacity as their attorney.

First, with respect to the legal malpractice claim, you are a material witness as you were directly involved in the underlying case as co-counsel and associating counsel, and you had multiple, material ex-parte conversations with the judicial officers which are highly relevant to the legal malpractice claim.[1] Professional Conduct Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. Here, should a legal malpractice claim be filed, your testimony will be necessary regarding all aspects of the underlying wrongful death case, including Mr. Melton's pro hac vice admission and your ex-parte discussions relative to same.

[1] You have outlined these ex-parte conversations in detail in your own correspondence. Relative to same, please see Rule 3.5(a)(3) of the Ohio Rules of Professional Conduct.

You are further disqualified from representing the Zwinglers relative to a claim of legal malpractice arising out of the underlying wrongful death case because you are potentially jointly liable to them for any such alleged malpractice. As you are aware, you are listed as the associating attorney on Mr. Melton's Motion for Permission to Appear Pro Hac Vice filed in the Zwinglers' wrongful death case, making you jointly responsible for the representation and thus, jointly liable for any purported legal malpractice. You are also jointly liable for any alleged malpractice in the wrongful death case by virtue of your fee sharing agreement with Mr. Melton. Pursuant to Professional Conduct Rule 1.5(e), if an attorney agrees to share a fee with another attorney, both attorneys are jointly responsible for the representation. Joint responsibility includes both financial and ethical obligations, as if the attorneys were partners in the same law firm. As a referring and associating attorney, you can be held vicariously liable for any alleged malpractice claim arising from the Zwingler representation. Should you file a legal malpractice claim against Mr. Melton on behalf of Mr. and Mrs. Zwingler, we will be obligated to name you as a necessary third party defendant and seek your disqualification at that time.

Based upon the foregoing, I am requesting that you immediately put your own professional liability insurance carrier on notice of the potential legal malpractice claim against you. Additionally, Mr. and Mrs. Zwingler also need to be notified by you that they have the right to seek the advice of independent counsel regarding the legal malpractice claim, not only with respect to Mr. Melton, but also due to your conflicts of interest.

Additionally, there is the issue of mitigation. As I am sure you are aware, an injured party has a duty to mitigate his or her damages and may not recover those damages that he or she could reasonably have avoided. *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St. 3d 270, 1999-Ohio-62, 719 N.E.2d 955 (1999). To that end, the Zwinglers cannot maintain a legal malpractice claim unless and until they have exhausted the underlying claim. *See U.S. Bank, N.A. v. 2900 Presidential Drive, L.L.C.*, 2d Dist. Greene No. 2013 CA 60, 2014-Ohio-1121, ¶ 32; *see, e.g., Bogart v. Gutman*, 2nd Dist. Miami No. 2017-CA-27, 2018-Ohio-2331, ¶ 19 (dismissing legal malpractice claim when underlying claim could still be pursued).

Although there has been ample time to do so, to date, Mr. and Mrs. Zwingler have yet to re-file the underlying wrongful death action. While it may be your opinion, based in part on your ex-parte conversations, that the trial courts will reject a refiled complaint due to Mr. Melton's failure to maintain pro hac vice status, the Zwinglers must pursue the underlying claims before asserting a legal malpractice action. If the Zwinglers' claim fails, then, and only then, can they pursue legal malpractice remedies.

Because you are ethically prevented from representing the Zwinglers in their wrongful death action, we propose the following solution aimed at fulfilling their obligation to mitigate damages. Mr. Melton's carrier, CNA, will pay to retain experienced independent counsel, subject to mutual agreement, to pursue the wrongful death action on behalf of the Zwinglers. The carrier will pay a reasonable hourly rate to re-file the complaint through the motion to dismiss phase, assuming the issue of the pro hac vice status is raised in a Civ. R. 12 or similar such motion. If

the case survives initial motion practice on the issue, the fee will convert to a contingency basis as negotiated independently by and between the Zwinglers and their chosen lawyer. At that time, CNA will cease being responsibility for any additional fees and/or expenses associated with the representation.

The following three lawyers are highly renowned trucking lawyers, any of whom CNA would be agreeable to for the purposes of re-filing the underlying wrongful death action:

1. Mike Liezerman: https://www.truckaccidents.com
2. Andrew Young: https://www.truckcrashvictimhelp.com/About/Andrew-R-Young.shtml
3. John Reagan: https://www.knrlegal.com/our-attorneys/john-j-reagan/

I have not had contact with any of these lawyers, nor have CNA and/or Mr. Melton. If one of these lawyers is retained by Mr. and Mrs. Zwingler pursuant to an agreement with CNA, the attorney-client relationship would be by and between them and the lawyer, and CNA would have no communications with the attorney or the Zwinglers and provide no direction and/or input.

If the wrongful death case is dismissed as a result of the pro hac vice issue, CNA and Mr. Melton will agree to mediate the potential legal malpractice claim with the Zwinglers and their independent legal malpractice attorney, along with and your own professional liability carrier.

Time is of the essence with respect to the Zwinglers' wrongful death claim. Pursuant to Ohio's Savings Statute, R.C.2305.19, the Zwinglers' claim must be re-filed by or before October, 26, 2018. We must be advised of the Zwinglers' intent to retain independent counsel, as outlined above, by **Friday, August 10, 2018**. Independent counsel must be retained by **August 30, 2018**.

Although you may dispute your own liability relative to a potential legal malpractice action, the non-waiveable conflicts identified above clearly prohibit you from continuing to represent the Zwinglers in any ongoing legal matters. The Ohio Rules of Professional Conduct require you to disclose both the conflicts and CNA's offer to retain counsel to the Zwinglers.

Very truly yours,

Monica A. Sansalone

Monica A. Sansalone, Esq.

cc: Maia Jerin, Esq. (Via Email: mjerin@gallaghersharp.com)

bcc: Holly Spurlock (Via Email: Holly.Spurlock@cna.com)
Douglas Ricci (Via Email: Douglas.Ricci@cna.com)
Claim No. LWA28411

Scott Melton (Via Email: smeltonlawfirm@gmail.com)

Gallagher Sharp LLP

Established in 1912
www.gallaghersharp.com

PLEASE RESPOND TO CLEVELAND OFFICE

Monica A. Sansalone
Direct Dial: (216) 522-1154
msansalone@gallaghersharp.com

August 23, 2018

Via Fax: (330) 629-2682 and Email: kissinger4211@yahoo.com

William Kissinger, Esq.
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: ***Ryan E. Zwingler Wrongful Death Claim/Potential Legal Malpractice Action***
Our File No. 520-127876

Dear Mr. Kissinger,

In your August 20, 2018 correspondence, you requested legal research concerning the ability to refile the Zwinglers' wrongful death action. I reiterate that the Rules of Professional Conduct prohibit you from representing the Zwinglers in any further legal matters or refiling the action on their behalf. However, as stated by your counsel, Jonathan Coughlin, refiling the complaint is in the Zwinglers' best interest, and required to mitigate their damages, if any, and we again advance that it should be done by independent counsel.

I. The Probate Court Lacks Jurisdiction Over Legal Malpractice Claims Even if they are Styled as Breach of Fiduciary Duty or Fraud.

As a threshold matter, however, let me address the breach of fiduciary duty and fraud claims you allegedly plan to file in the Mahoning County Probate Court. Under Ohio law, claims arising out of the manner in which a client is represented in the attorney-client relationship sound in legal malpractice regardless of the label attached. "Malpractice by any other name still constitutes malpractice." *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89, 446 N.E.2d 820 (10th Dist.1982). It makes no difference whether the professional misconduct of an attorney consists of negligence or breach of contract, it is still malpractice. *Id.; see also B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 7th Dist. No. 12 MA 5, 2012-Ohio-5981, ¶ 38; *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. No. 10AP-290, 2010-Ohio-5872, ¶ 13-17 (finding that claims for breach of contract and breach of fiduciary duty were subsumed within the plaintiff's malpractice claim for deficient legal representation).

EXHIBIT 4

The cases cited in your August 20, 2018 letter do not support your intention to file the above stated claims in probate court. First, *Ivancic v. Enos*, 11th Dist. No. 2011-L-050, 2012-Ohio-3639, 978 N.E.2d 927, ¶ 4, concerned claims against the attorney retained to administer an estate and who was the estate's single largest creditor. Recent decisions have confined *Ivancic's* holding to claims arising from the attorney's administration of an estate. *Cain v. Panitch*, 10th Dist. Franklin No. 16AP-758, 2018-Ohio-1595, ¶ 22. As you know, Mr. Melton was not involved in the administration of Ryan Zwingler's Estate. *Estate of Dombroski v. Dombroski*, 7th Dist. Harrison No. 14 HA 3, 2014-Ohio-5827, is even more inapposite as it does not concern claims against an attorney at all. Thus, the probate court lacks jurisdiction over a breach of fiduciary duty or fraud claim against Mr. Melton arising from his representation of the Zwinglers in the underlying wrongful death matter and the filing of same violates Civ.R. 11.

II. The *Hadley* Case is Distinguishable on its Facts and Analysis.

Now to the matter at hand — the basis for refiling the Zwinglers' wrongful death claim. You asked me to provide you with research regarding whether a complaint filed by an attorney who is not admitted to practice law in the State of Ohio is void *ab initio* such that Ohio's Savings Statute would not apply. There is no definitive case law on the subject and at least one court has found that a trial court lacks subject matter jurisdiction over a complaint filed by a non-admitted attorney. *See State ex rel. Hadley v. Pike*, 7th Dist. Columbiana No. 14 CO 14, 2014-Ohio-3310. However, there are valid arguments that differentiate the *Hadley* case from the situation at hand and further analysis beyond *Hadley's* conclusory language regarding subject matter jurisdiction is helpful.

We believe *Hadley* is distinguishable for several reasons. First, the attorney in *Hadley* had not registered with the Office of Attorney Services of the Supreme Court of Ohio at the time the complaint was filed. As you know, Mr. Melton not only applied for *pro hac vice* status, the Ohio Supreme Court granted his request. The trial courts in question further granted his subsequent motions to be admitted *pro hac vice*.[1] Thus, the holding in *Hadley* is based on distinct circumstances than those presented here.

Second, the Seventh District provided no analysis as to why it dismissed the complaint in *Hadley* for lack of subject matter jurisdiction. In fact, the court only summarily concluded that "[t]he complaint should have been dismissed without prejudice for lack of subject matter jurisdiction." *Id.* at ¶ 17. We believe that this conclusion is flawed based on other cases discussing subject matter jurisdiction. Since there are no Ohio cases applying Ohio's Savings Statute when the original complaint was arguably void *ab initio* based on the filing attorney's inability to practice law in the State of Ohio, cases in different contexts can help analyze this issue. For example, where a party's lack of standing destroys subject matter jurisdiction such that a judgment rendered in that case is void *ab initio*, the Supreme Court of Ohio has held that such judgments are voidable (subject to appeal) not void (subject to collateral attack). In doing so, the Supreme

[1] You were listed as the associating attorney on Mr. Melton's Motions to Appear Pro Hac Vice and received notice of same via court order.

Court discussed the distinction between the various types of jurisdiction. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18-19. The Court explained:

> The general term "jurisdiction" can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. The often unspecified use of this polysemic word can lead to confusion and has repeatedly required clarification as to which type of "jurisdiction" is applicable in various legal analyses.
>
> ***
>
> Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. . This latter jurisdictional category involves consideration of the rights of the parties. **If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void.** *** This court has long held that the court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to "all matters at law and in equity that are not denied to it."

(Emphasis added, internal citations omitted.) The court went on to differentiate between the court's subject matter jurisdiction and jurisdiction over the case:

> Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action. But an inquiry into a party's ability to *invoke* a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction. *** Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action, and any judgment on the merits would be subject to reversal on appeal. But a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief. Accordingly, Bank of America's alleged lack of standing to initiate a foreclosure action against the Kuchtas would have no effect on the subject-matter jurisdiction of the Medina County Court of Common Pleas over the foreclosure action.

(*Id.*, ¶ 22-23.) (Internal citations omitted.)

The above explanation throws into question the *Hadley* Court's determination that the lower court lacked subject matter jurisdiction based on the filing attorney's lack of *pro hac vice* status. *Lanzer v. Lanzer*, 5th Dist. Stark No. 2005CA00212, 2006-Ohio-1387, ¶ 20 ("A trial

court's subject matter jurisdiction is not determined by an attorney's status to practice law in this state."). Notably, the *Hadley* Court did not analyze jurisdiction or explain why the lower court lacked subject matter jurisdiction as opposed to one of the other types of jurisdiction discussed in *Kuchta*. Based on the *Kuchta* explanation, it does not appear there is any reason or basis to differentiate a party's lack of standing from an attorney's lack of *pro hac vice* status. Therefore, it can reasonably be argued that the *Hadley* Court's holding was incorrect as to the type of jurisdiction that the lower court lacked.

The above distinction is important because, as recognized by the *Kuchta* Court, "[i]f a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." "It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.'" *Deutsche Bank Natl. Trust Co. v. Finney*, 10th Dist. Franklin Nos. 13AP-198, 13AP-373, 2013-Ohio-4884, ¶ 19 (citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 12, 806 N.E.2d 992).

With respect to the Zwinglers' wrongful death claim, we believe the court in *Hadley* was wrong as to its holding that the lower court lacked subject matter jurisdiction. There does not seem to be any real distinction between the lack of standing of a party as explained in *Kuchta* and an attorney's lack of authority to practice law in Ohio. *Wells Fargo Bank, Natl. Assn. v. Elliott*, 5th Dist. Delaware No. 13 CAE 03 0012, 2013-Ohio-3690, ¶ 11 ("A lack of standing argument challenges the capacity of a party to bring an action, not the court's statutory or constitutional power to adjudicate the case and thus is distinguishable from a lack of subject matter jurisdiction argument."). Therefore, in the situation at hand, if the original court had subject matter jurisdiction over the case, the original complaint filed by Mr. Melton would be considered **voidable, not void**. We did not discover any Ohio cases that found an original complaint void *ab initio* based on an attack in a future, re-filed action, in any context.

Since Mr. Melton's original complaint was arguably voidable, not void, it cannot be attacked now because it was not voided while it was pending. In the original proceeding, there was no determination or argument that the complaint was void *ab initio*. The recent case of *Bayview Loan Servicing, L.L.C. v. Likely*, 9th Dist. Summit No. 28466, 2017-Ohio-7693, is another standing case where the defendant moved to dismiss a re-filed complaint based on the statute of limitations and inapplicability of the savings statute. One of the arguments put forth by the defendant was that the original complaint filed was void *ab initio* because the plaintiff never had standing to invoke the subject matter jurisdiction of the court. The Ninth District found, that the "factual findings stated that the complaint was dismissed, not vacated as void ab inito. Second, the trial court's finding of fact stated the dismissal was based on a lack of standing, not lack of subject matter jurisdiction." The court found it was bound by the procedural posture of the lower court's dismissal. Here, the original complaint was voluntarily dismissed without prejudice. Therefore, there was no determination that the original complaint was void *ab initio*.

III. Public Policy Supports Applying Ohio's Savings Statue to the Zwinglers' Refiled Complaint.

There are also policy reasons to apply the Savings Statute to this matter. It is well founded that Ohio's Savings Statute is a "remedial statute designed to provide a litigant a hearing of his case on the merits." *Wasyk v. Trent*, 174 Ohio St. 525, 528, 191 N.E.2d 58 (1963); R.C. 2705.19. The Supreme Court of Ohio in *Wasyk*, explained that the statute is to be given "liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure." The *Wasyk* case involved a litigant who had originally filed their complaint in federal court where it was dismissed for lack of subject matter jurisdiction. The defendant argued in the re-filed state court action that the lack of subject matter jurisdiction rendered the original proceeding a nullity and therefore, the plaintiff could not benefit from the savings statute. The Supreme Court found that the purpose of the savings statute would be "virtually abrogated" if a party could not refile a complaint in state court that had been dismissed in federal court for lack of subject matter jurisdiction. Similarly, not allowing the Zwinglers in this matter to refile their complaint would go against the very purpose of the saving statute and punish them for the purported action of their attorney, leaving them with no chance to be heard on the merits.

Furthermore, the plain language of R.C. 2705.19 states that it applies to "any action that is commenced or attempted to be commenced...if plaintiff fails otherwise than upon the merits...." "Commencement of an action occurs by filing a complaint and obtaining service on the named defendant(s) within one year of filing the complaint." *Bayview Loan Servicing, L.L.C. v. Likely*, 9th Dist. Summit No. 28466, 2017-Ohio-7693, ¶ 29 (Citing R.C. 2305.17; Civ.R. 3(A); *Richardson v. Piscazzi*, 9th Dist. Summit No. 19193, 1999 Ohio App. LEXIS 1998, 1999 WL 247765, *3 (Apr. 28, 1999)). Here, Mr. Melton properly commenced, or at least attempted to commence, the action pursuant to the requirements of R.C. 2305.17 and therefore, the Saving Statute should apply.

We believe the arguments in favor of refiling the Zwinglers' complaint have merit and should be pursued immediately. As you are aware, time is of the essence with respect to the Zwinglers' wrongful death claim, and I urge you to follow the advice of the attorney you retained, Mr. Coughlan, and to do what is in the best interests of your clients and facilitate the refilling of the complaint through independent counsel. Once independent counsel is selected, we are agreeable to sharing this research with him or her so that the Zwinglers can efficiently move forward with their next steps.

Very truly yours,

Monica A. Sansalone

Monica A. Sansalone, Esq.

cc: Maia Jerin, Esq.

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

IN RE THE ESTATE OF RYAN EDWARD ZWINGLER DECEASED	CASE NO: 2013 ES 364 JUDGE THOMAS S. SWIFT AFFIDAVIT OF DOUGLAS RICCI

1. I am Douglas Ricci, a Claims Consultant at CNA/Continental Casualty Company. I have personal knowledge of the facts set forth in this affidavit.

2. Attached hereto as Exhibit 1 is a true and accurate copy of correspondence dated May 2, 2018 faxed to me by William Kissinger with respect to Mahoning County Court of Common Pleas Case Number 2015 CV 01410 captioned *Zwingler v. Central Allied Enterprise, Inc.*

FURTHER AFFIANT SAYETH NAUGHT.

DOUGLAS RICCI

SWORN TO AND SUBSCRIBED in my presence this 18th day of January, 2019.

NOTARY PUBLIC

ROBIN D WOODLEY
NOTARY PUBLIC
GWINNETT COUNTY, GEORGIA
MY COMMISSION EXPIRES MAY 19, 2021

EXHIBIT
C

WILLIAM J. KISSINGER

ATTORNEY AT LAW

7631 South Avenue Suite F
Youngstown, Ohio 44512
Phone: (330) 629-8877
Fax: (330) 629-2682

May 2, 2018

CNA Professional Services
Attn: Doug Ricci
P.O. Box 8317
Chicago, IL 60680

RE: The Estate of Ryan Edward Zwingler File # LWA 2841

Dear Mr. Ricci:

Pursuant to our telephone conversation, I have completed this package to explain the above listed claim and the amount of our demand. Due to the large amount of supporting documentation, I have affixed exhibit stickers to each document to assist in your evaluation. Ryan [redacted]ingler was a passenger in an automobile accident on May 27, 2013. The driver of [redacted] went off the right side of the road and when the automobile recovered, he overcompensated and went left of center on the highway. The vehicle hit an approaching semi truck and killed both parties in the automobile. A claim against the driver was impossible due to his immunity under worker's compensation laws.

I have been a friend and attorney to Ryan's parents for many years. I shopped the claim around to wrongful death lawyers in Ohio. When I told Attorney Melton about the fact pattern, he stated it was a classic shoulder drop off case. He went that day to the scene to measure the drop off. When he later called me, he said the drop off was well beyond the allowable standard and asked if he could meet with the Zwingler family. Upon meeting with the Zwingler family, he signed a contract to represent the Estate of Ryan Edward Zwingler for a wrongful death claim. Attorney Melton had claimed he continued to follow state rules for pro hac vice status with the Supreme Court of Ohio. He filed an application with the Mahoning County Probate Court for his employment contract to be approved to pursue the claim. The contract was approved on October 16, 2014 (see attached Exhibit A). Just before the two year statute of limitations period expired, Attorney Melton filed the wrongful death action in the Mahoning County Court of Common Pleas on May 27, 2015, Case No. 2015 CV 1410 against Central Allied Enterprises

Inc. (See attached Exhibit B). On May 27, 2015, a companion lawsuit was filed by Attorney Melton in the Ohio Court of Claims against the Ohio Department of Transportation identified by Case Number 2015-00525JD (See attached Exhibit C). Both complaints were signed solely by Attorney Melton with what appeared to be a valid 2015 pro hac vice number (PHV2571-2015).

As both cases progressed Attorney Melton kept me informed as I was referring counsel. I was concerned about the behavior of the Defendant in the Mahoning County case, so I began extensive research for an explanation of this behavior. In August 2017, I discovered that the Defendant, Central Allied Enterprises Inc., had engaged in fraudulent conduct that changed the entire landscape of the case. The case was now a strict liability case with uncapped punitive damages due to the absolute public nuisance created wrongfully by the Defendant. I showed Attorney Melton the evidence and on September 20, 2017, I assisted him in compiling the large amount of information into a letter to defense counsel. The letter withdrew the current demand of 1.6 million dollars and due to the newly discovered information, made a new demand of 9 million dollars. The letter went into incredible detail as to the reasons for the high demand due to the nature of the wrongful conduct and the statutory uncapped punitive damages (See attached Exhibit D).

The Mahoning County case was set for jury trial on October 24, 2017 with a final pretrial on October 6, 2017. Knowing that a jury trial continuance by the Court would be impossible, Attorney Melton decided to attempt to settle at the next pretrial. If settlement would not be possible, he was going to dismiss both the Mahoning County case and the case in the Court of Claims. Since both cases had never been dismissed before, under the Ohio Savings Statute, they could both be refiled within one year of dismissal. I accompanied Attorney Melton to the final pretrial as it would be the first time the Court would be made aware of the Defendant's fraud. Attorney Melton and I agreed that it would be best coming from me as I have practiced locally for twenty-five years and the Court is familiar with me. Attorney Melton wanted to arrive at the courthouse early and give the Magistrate of copy of the letter of September 20, 2017 so he would be more familiar with the new claim. I told him it was an ex parte communication and he risked getting all of the information ruled as inadmissible. At the hearing, Attorney Melton cut me off every time I attempted to address the Magistrate. On two occasions I attempted to engage opposing counsel, and Attorney Melton interrupted me both times. I attempted to engage opposing counsel as we left the Magistrate's chambers and Attorney Melton jumped between us so I couldn't speak to him. The only thing accomplished at the hearing, was that Attorney Melton told the Court that he would be dismissing the case immediately so he could later refile the fraud action. Attorney Melton then went into the hallway and began to explain to Robert and Michele Zwinger (Ryan's parents) that they had a weak case to begin with but he would still work on the case despite how bleak it appeared.

Later that day, I was contacted by the Zwingler family with questions of why Attorney Melton's attitude toward the case had changed so rapidly. I told them I was unsure and would be

speaking with him about the issue. On Sunday, October 8, 2017, I was driving to church and trying to reconcile what had happened at the pretrial. I then recalled a few weeks earlier when in passing, Attorney Melton said he was going to check on his pro hac vice renewal status. I responded with, "check into that right away, its nothing to mess around with". Attorney Melton also mentioned to me at the courthouse on October 6, 2018 that he had checked his status and everything was fine. I began to wonder if he had lost enthusiasm for the case because of an issue with his privileges to practice in Ohio. When I arrived at church, I quickly checked my smart phone and found that his pro hac vice privileges had been on inactive status since January 1, 2017 due to failure to pay his renewal fee. The following day, I contacted the Ohio Supreme Court to verify that he was on inactive status during that time period. They confirmed the information was correct. The clerk then told me that he had been in the State's registry for many years. I responded that I believed that to be correct. She then went on to say that it was strange for someone to be in the registry for so long and never provide representation on a case during that time. I told her that Attorney Melton had done prior cases in Ohio going back to 2011 and was currently involved in two cases. She said there was no record of him ever having a case in the State of Ohio.

In the State of Ohio, every out of state attorney must be registered with the Ohio Supreme Court before they can petition a tribunal to enter an appearance as counsel on any matter. The law on pro hac vice admission is prescribed under Ohio Rules For The Government Of The Bar Of Ohio XII (See attached Exhibit E). Under Rule XII, Section 4, when an out of state attorney files for permission to appear before a tribunal, a notice of permission to appear incorporating the court order granting permission to appear, must be sent to the Office of Attorney Services with thirty days from the date the tribunal gives permission to appear in the case. After thirty days, failure to file the notice of permission to appear results in the automatic exclusion from the practice of law in the State of Ohio until the same is filed. As far as my knowledge of Attorney Melton's affairs in the State of Ohio, his applicable cases go as far back as 2011. Attorney Melton filed Shank v. Raval, 2011 CV 666 in the Columbiana County Court of Common Pleas, Columbiana County, Ohio (See attached Exhibit F-docket sheet), a case that would eventually become a jury trial. According to the docket sheet, Attorney Melton was granted an order to appear on April 19, 2012. According to Ohio law, he was required to file his notice of permission to appear with the Office of Attorney Services within thirty days or he would be automatically excluded from the practice of law. Attorney Melton never notified the Office of Attorney Services of this 2011 case, **or any case**, he had participated in until he self reported with a correspondence on October 20, 2017 admitting his failure to report his Ohio cases and requesting retroactive reinstatement (See attached Exhibit G). There is **no provision** in Ohio law for retroactive reinstatement. The period of exclusion is the period of exclusion and cannot be reconciled any other way. Therefore, Attorney Melton was on inactive status from January 1, 2017 until September 27, 2017 for failure to pay his renewal fee and excluded from the practice of law in the State of Ohio since May 19, 2012. During this time period he was actively providing representation in Ohio cases not just limited to the Zwingler family claim, but actually tried the Shank case to a jury verdict without privileges to practice law in the State of Ohio.

Once I confirmed this information, I immediately confronted Attorney Melton regarding his pro hac vice privileges. He admitted that he failed to pay his reinstatement fee for 2017 and had no record of filing any notice of permission on any case he had appeared as counsel in Ohio. He claimed he had two million dollars in malpractice insurance and hoped it would be enough to make the Zwingler family whole. I told him that the immediate issue was the fact he had been practicing in two current cases without a valid license and both courts were expecting voluntary dismissals in both cases. He stated he would get them filed immediately. I told him I could not permit that as I would be permitting the unauthorized practice of law if I allowed him to do so and would be subject to a disciplinary violation. I told him I would file a notice of appearance with a subsequent notice of voluntary dismissal in both the Mahoning County and Court of Claims cases, which I did. We agreed the Courts should be notified of his situation. He asked if I could approach them on his behalf. He said if I did not feel comfortable doing so, he would take the responsibility on himself to do so. I told him I would put the Courts on notice. I met with Judge Robert N. Rusu Jr. of the Mahoning County Probate Court immediately thereafter as this was the Court who approved Attorney Melton's application to approve the wrongful death contract and allow him to pursue the case. Judge Rusu did a quick check of the public records himself before becoming very angry that he had given Attorney Melton permission to appear in the courts on this claim and he was using a pro hac vice number that appeared current, but was fraudulently obtained. Judge Rusu insisted that Attorney Melton immediately get off the case and would not be permitted to represent the Zwingler family any further on this claim. I then approached Magistrate Dennis Sarisky, who was the Magistrate we appeared before on the October 6, 2017 pretrial. Upon learning of this information, he immediately checked the public record for himself and angrily said that Attorney Melton would not be permitted to appear in this matter again and the Court would be awaiting the refile to address it appropriately. Magistrate Sarisky told me not to address this with Judge Sweeney as he would inform her himself.

Subsequently, Attorney Melton met with the Zwingler family at my office and told them there may be an issue with his privileges to practice but he would clear it up. When they questioned him further, his reply was "we" would be researching the matter further. When the Zwingler's left my office, I told Attorney Melton that I had researched this issue for close to 90 hours and could not find a way around the period of exclusion. In State v. Hadley, 2014-Ohio-3310 (See attached Exhibit H), any pleading signed by a Pennsylvania attorney who is not valid in the registry is "ab initio", a nullity, and cannot be revived with a subsequent filing. Pursuant to Civil Rule 11, only an attorney or a party can sign a complaint. This is the controlling case in the State of Ohio and out of our district as well. In addition, subject matter jurisdiction cannot be waived in the State of Ohio and can be addressed by the Court at any stage of the proceedings. The law in Ohio is clear, if any attorney files a complaint that he knows is beyond the statute of limitations, without a legitimate tolling argument, is guilty of frivolous conduct and his license to practice is subject to sanction. I told Attorney Melton that a

plan needed to be formulated to address this matter and asked him to read the cases I had uncovered. He refused to read the cases and said, "we will just have to wait and see how things fall". I asked him how he expected me to respond to the Zwingler family when they call wanting a status on their case. Attorney Melton stated, "just tell them we are still researching it". After I told him that would only pacify them for so long and they would be demanding an answer, Attorney Melton responded, "they will just have to accept that answer". He said he was hiring a lawyer in Ohio who would "fix" this, but would not identify the lawyer or how his counsel would be fixing the matter. He said once his counsel "fixed" the problem then he would begin working on the Zwingler matter right away. I told him that he would first need to get Judge Rusu's permission before he could even begin anything on behalf of the Zwingler's. He said he would meet with Judge Rusu right away.

I informed the Zwingler's that I was still researching the matter day and night, but had not found a way to revive the case. I told them Attorney Melton claims he has counsel in Ohio who will fix this and he will continue to pursue the claim. I also told them he must get Judge Rusu's permission before he could begin. The Zwingler's asked me to continue looking for an answer to revive the case and follow up with Judge Rusu to see if Attorney Melton had requested permission to act on their behalf. After two months, I contacted Judge Rusu's secretary who informed me that Attorney Melton had not even attempted to make an appointment to see the Judge. I spoke to a number of litigators to see if they would be willing to refile the complaint. While they all liked the value of potential damages, they would not refile without a legitimate tolling argument available before the refile. With the Magistrate enforcing that he would be watching for it, without a legitimate tolling argument, any filing attorney is jeopardizing his license.

On December 2, 2017, the Zwingler's instructed me to put Attorney Melton on notice that they wanted a resolution to this matter. I was to inform Attorney Melton to provide me with a legitimate tolling argument so the case could be refiled or the contact information for his liability carrier (See attached Exhibit I). Attorney Melton responded without providing either one (See attached Exhibit J). I responded with a letter on January 9, 2018 insisting on the information I requested (See attached Exhibit K). When there was no response, I forwarded a draft of a malpractice complaint with a deadline for the information (See attached Exhibit L). At that point began a series of communications between myself and Attorney George Jonson, on behalf of Attorney Melton (See attached Exhibit M-Application For An Order To Disclose Insurance Information). Attorney Jonson stated my draft complaint had been forwarded to the carrier and wanted our settlement demands. I continued to insist the carrier information to verify coverage. I was told no contact with the insurer would be permitted. At that point, I filed The Application For An Order To Disclose Insurance Information with the Mahoning County Probate Court. Attorney Melton filed an opposition to it which was promptly denied. Attorney Melton provided his carrier information two days before the scheduled hearing which was subsequently canceled.

Attorney Melton's treatment of the Zwingler family is a disgrace. Not only have they lost their son, but they have been put through almost two years of agonizing litigation for nothing only to find out their claim has been extinguished due to Attorney Melton's carelessness. This family will have justice. Based upon Attorney Melton's letter of September 20, 2017 making a new demand of 9 million dollars with a thoroughly detailed explanation as to the justification for the value, we are making a demand of 9 million dollars to settle this claim.

Upon your review of this package, please feel free to contact me so we can attempt to resolve this matter. As I have been previously informed by a third party that I was not to communicate with you directly, please provide confirmation that all contact should only be through you as I do not wish to correspond in this matter inappropriately.

VERY TRULY YOURS,

WILLIAM KISSINGER
ATTORNEY AT LAW

WK
Attachments
Sent by regular mail and facsimile

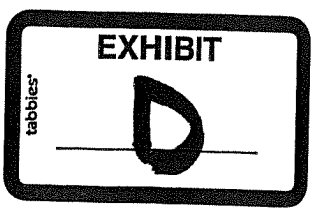
cc: Robert and Michele Zwingler
Attorney Craig G. Pelini

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MICHELE ZWINGLER, et al.	)	CASE NO: 2018 CV 2518
	)	
Plaintiffs	)	JUDGE MAUREEN A. SWEENEY
	)	
v.	)	
	)	NON-PARTY SCOTT L. MELTON'S
CENTRAL ALLIED ENTERPRISES, INC.	)	BRIEF OPPOSING PLAINTIFFS'
	)	MOTION FOR SUMMARY DIRECT
	)	CONTEMPT OF COURT
Defendant	)	

Rather than advocating on behalf his clients, counsel for the Plaintiffs seeks to hold attorney Scott Melton criminally responsible for his unintentional failure to complete the final step of the *pro hac vice* registration process. Melton, a Pennsylvania attorney, was associated with Plaintiffs' current counsel, William Kissinger, in filing a wrongful death case on Plaintiffs' behalf. Although he properly registered with the Supreme Court of Ohio Office of Attorney Services, and was granted permission to practice *pro hac vice* in the Mahoning County Court of Common Pleas, Melton inadvertently failed to mail the judgment entry to the Office of Attorney Services in accordance with Gov. Bar R. XII.

Melton self-reported to the Ohio Disciplinary Counsel and the Pennsylvania Disciplinary Board immediately upon discovering this oversight. The Office of Attorney Services and the Office of Disciplinary Counsel, both arms of the Supreme Court of Ohio, determined that Melton's conduct was "inadvertent" and that any lapse of Melton's *pro hac vice* status has since been cured without prejudice to Plaintiffs. Pennsylvania's Disciplinary Board also found no



evidence of intentional misconduct and closed their file on the matter. There is no contemnible conduct here, and absolutely no evidence that Melton acted with the intent necessary to impose criminal sanctions.

Despite having an obligation to his clients to refile and prosecute the Zwinglers' wrongful death claim, Kissinger now extraordinarily asks the Court to dismiss his own clients' complaint. He contends that Melton's *pro hac vice* status rendered the original complaint void *ab initio*, and the statute of limitations has now run on the Zwinglers' claims. The sole defendant, Central Allied Enterprises, Inc. has made no such argument nor has it sought to dismiss the claims asserted against it. Rather, Kissinger himself seeks to scuttle his own clients' case - presumably to use the ruling to support an eventual legal malpractice action without having to litigate the merits of the underlying case.[1]

Plaintiffs' motion should be denied, and the hearing set for November 5, 2018 should be cancelled.

I. BACKGROUND AND STATEMENT OF FACTS

A. The underlying wrongful death claim.

In 2014, Scott Melton, a Pennsylvania attorney, represented Michele and Robert Zwingler in connection with a trucking accident in which their son, Ryan Zwingler, was tragically killed. Plaintiffs' current counsel, William Kissinger, referred the Zwinglers to Melton, and was Melton's local counsel in the case for matters of Ohio law and procedure.

[1] Although Kissinger voluntarily dismissed both the CAE and ODOT cases, he chose only to refile the CAE action in this Court – and now seeks to have his own complaint dismissed based on alleged *ex parte* communications with Magistrate Sarisky. Kissinger did not seek the same sanctions in the Ohio Court of Claims. The ODOT claim was dismissed on October 16, 2017 and has not been refiled within Ohio's one year savings statute and is now time barred. Thus, Kissinger intentionally chose to not pursue the ODOT claim for which the same recovery could have potentially been awarded.

Kissinger and Melton agreed to share any attorney fees generated from their joint representation of the Zwinglers in the wrongful death suits. Melton agreed to advance all costs of prosecuting the case.

Melton filed one complaint on behalf of the Zwinglers against Central-Allied Enterprises ("CAE"), a paving contractor, in the Court of Common Pleas of Mahoning County, and a complaint against the Ohio Department of Transportation ("ODOT") in the Court of Claims of Ohio. Each complaint alleged that defects in the construction of the berm during CAE's repaving of the roadway, and ODOT's failures to properly inspect the repaving work performed by CAE and failure to erect signs warning of dangerous conditions of the roadway in addition to certain roadway design failures and improper traffic control measures, contributed to the accident that caused Ryan Zwingler's death.

Prior to the filing of the complaints, Kissinger advised Melton that he could file the complaints over his own signature, before being admitted to practice in the case by the trial judge, because he possessed a current 2015 Ohio *pro hac vice* registration number. Kissinger advised that his own signature on the complaint was unnecessary and further advised that Melton should not attach to the complaints the signed and dated verifications Melton had obtained from the Zwinglers for the express purpose of attaching them to the complaints. Relying upon this advice regarding Ohio civil procedure, Melton signed the complaints himself and timely filed them in the Mahoning Court of Common Pleas and the Court of Claims, respectively. The day after the complaints were filed, Melton transmitted them to Kissinger and requested that he review the complaints and contact him if there was any need for amendments. Kissinger never told Melton that the complaints needed to bear Kissinger's signature alone, or in conjunction with Melton's signature as the attorney of record on the case. Melton later filed motions to

proceed *pro hac vice* in this Court and the Court of Claims, identifying William Kissinger as the active Ohio associating attorney on the cases. Both motions were granted by the respective courts without objection from either defense counsel. The courts and defense counsel were both aware at the time of presenting the request to practice *pro hac vice* in the cases that the complaints were signed by Melton and were not co-signed by an Ohio counsel.

Melton worked diligently on the Zwinglers' wrongful death case, advancing over $48,000 of his own funds to prepare the case for trial. Melton retained experts and successfully defended a motion for summary judgment filed by CAE. Throughout this time, Melton continually renewed his Ohio *pro hac vice* registration, although his registration and payment of the fee was several months late in 2017. (*See* 2013, 2014, 2015, 2016 and 2017 Certificates of *Pro Hac Vice* Registration, attached hereto as Exhibit A-1.)

In August 2017 a court ordered mediation was conducted in which Kissinger participated with Melton.

Shortly prior to the October 6, 2017 pretrial conference in the Court of Common Pleas case, Melton recalled that he had not registered for that year's *pro hac vice* certificate. Prior to the pretrial conference, Melton registered for the certificate and paid the required fee. A couple of weeks prior to the pretrial conference, Melton and Kissinger notified defense counsel that they would be voluntarily dismissing the action with the intent to refile it within one year under Ohio Rule of Civil Procedure 41(A)(1)(a). At the pretrial conference, Kissinger and Melton both appeared on behalf of the Plaintiffs. Magistrate Dennis Sarisky presided over the proceeding. Kissinger and Melton jointly notified the court that the case was going to be dismissed and refiled within one year in order to amend the complaint to add new theories of recovery against

CAE. Melton and Kissinger advised the court and CAE that the complaint would be refiled pursuant to Ohio's Savings Statute.

Shortly after the pretrial conference, Kissinger discovered a potential issue with Melton's *pro hac vice* status. Although Melton was registered with the Supreme Court of Ohio and had been granted *pro hac vice* admission in this Court, Melton had not mailed the judgment entries granting his permission to appear *pro hac vice* to the Office of Attorney Services. Also, although his registration fees for 2017 had been paid, the Office of Attorney Services was waiting for Melton's Affidavit, which had been prepared and notarized but which had not yet been mailed. Melton immediately mailed the Affidavit and was issued the 2017 registration certificate. Melton also immediately corrected his failure by sending the judgment entries to the Office of Attorney Services and self-reported his inadvertent lapses to the Office of Disciplinary Counsel of the Supreme Court of Ohio and the Pennsylvania Disciplinary Board. (*See* Self-Reporting Letters, attached as Exhibit A-2, the ODC letter has been redacted for privilege.) Further, Melton told the clients of the lapses and that he was hiring other Ohio counsel to advise him of the proper steps to take to rectify the errors.[2]

Because of Melton's concern about appearing to practice law in Ohio until these issues could be resolved it was agreed that Kissinger would, and thereafter did, file a Notice of Appearance for Plaintiffs in both cases and voluntarily dismissed the claim against CAE and

[2] Kissinger also discovered the same oversight had occurred in connection with a 2012 lawsuit in which Melton was previously admitted to practice in Columbiana County Ohio *pro hac vice*. Importantly, Kissinger was Ohio co-counsel with Melton on that case as well and had also failed to counsel Melton of the requirement to mail the judgment entry granting him permission to practice *pro hac vice* in that case to the Office of Attorney Services. That case settled with all but one defendant. Kissinger was paid a referral fee from the settlement proceeds. A jury trial was held as to the remaining defendant. After a defense verdict an appeal was taken but was then discontinued in August 2014. Thereafter, Melton did not practice law again in Ohio until the filing of the complaints in the instant case in 2015.

separately dismissed Plaintiffs' claim against ODOT. Kissinger remains Plaintiffs' sole counsel of record.

B. Melton self-reports to the Ohio and Pennsylvania disciplinary council.

Melton self-reported this oversight to the Ohio Disciplinary Counsel and the Pennsylvania Disciplinary Board immediately upon discovery. The Office of Attorney Services and the Office of Disciplinary Counsel, both arms of the Ohio Supreme Court, have investigated and determined that Melton's conduct was "inadvertent" and that any lapse of Melton's *pro hac vice* status has since been cured without prejudice to Plaintiffs. (*See* Letter from Ohio Disciplinary Counsel, attached hereto as Exhibit A-3.) The Pennsylvania Disciplinary Board likewise closed its file without disciplining Melton. (*See* Letter from Pennsylvania Disciplinary Board, attached hereto as Exhibit A-4.)

C. Kissinger threatens a legal malpractice action rather than pursuing the Zwinglers' wrongful death claim.

Rather than pursue his clients' wrongful death case and advocate on their behalf, Kissinger began a relentless campaign against Melton, alleging that Melton's conduct caused the Zwinglers' wrongful death complaint to be *void ab initio*, and that the statute of limitations barred refiling. Kissinger immediately began to pursue a potential legal malpractice claim against Melton despite the fact that his clients' claims could still be refiled under Ohio's Savings Statute. (*See* Mar. 28, 2018 Application for Order to Disclose Insurance Information, attached hereto as Exhibit D.)[3] Kissinger was advised on multiple occasions by various attorneys to

[3] In the Application, Kissinger states that the Mahoning County Probate Court "determined that Melton had been on inactive status ... since January 1, 2017" and that the Court reviewed Melton's *pro hac vice* status and "discovered" he had not filed his notice of permission with the Office of Attorney Services. The Probate Court made no such ruling and entered no such judgment. The only authority to consider Melton's *pro hac vice* status, the ODC, determined that Melton cured the lapse.

pursue his clients' wrongful death case on its merits rather than seek retribution against Melton. In fact, his retained ethics counsel, Jonathan Coughlin, former disciplinary counsel, urged Kissinger to preserve the Zwinglers' underlying case as opposed to "just going after Scott." (Jan. 11, 2018 Email from J. Coughlin, attached hereto as Exhibit B-1.) Mr. Coughlin continued, "You claim to want to help your client's (*sic*) by trying to preserve their case but all I see is your efforts to go after Scott [Melton]." *Id.*

Undersigned counsel further provided Kissinger with legal arguments supporting pursuing the Zwinglers' complaint and outlining why the original complaint was not void and could be refiled. Melton's insurance carrier offered to pay experienced counsel to do so on the Zwinglers' behalf. (July 30, 2018 Letter from Monica Sansalone, attached hereto as Exhibit B-2; Aug. 23, 2018 Letter from Monica Sansalone, attached hereto as Exhibit B-3.) Kissinger refused.

Further, according to Kissinger's own correspondence, he had *ex parte* discussions regarding Melton's *pro hac vice* status directly with Mahoning County Probate Court Judge Robert N. Rusu, who presides over Ryan Zwingler's estate, and Magistrate Dennis Sarisky, who presided over the October 2017 pretrial in the wrongful death case in Mahoning County. (May 2, 2018 Letter from Kissinger, attached hereto as Exhibit C-1.) Kissinger also claims to have discussed the matter with Judge Kirchbaum of the Mahoning County Court of Common Pleas and several Mahoning County litigators. Rather than advocate on behalf of his clients, Kissinger went to great lengths to undermine any potential success of the Zwinglers' wrongful death case.

Kissinger's Motion for Direct Summary Contempt is solely based on Melton's unintentional failure to file a notice of permission to appear *pro hac vice* with the Supreme Court of Ohio Office of Attorney Services. Kissinger himself was Melton's local counsel for matters of

Ohio law and procedure in the Zwinglers' case, but never advised Melton of this filing requirement. Kissinger now seeks to hold Melton criminally responsible AND have his own clients' refiled complaint dismissed as a result. For the reasons that follow, Kissinger's motion should be dismissed.

II. LAW AND ARGUMENT

A. Melton's inadvertent failure to notify the Supreme Court of his permission to practice *pro hac vice* in this Court does not permit a summary contempt finding.

Plaintiffs, through Kissinger, seek to hold Mr. Melton in summary contempt of court for his failure to notify the Supreme Court of Ohio of his *pro hac vice* admission in this Court. Summary contempt holds an individual liable without affording the contemnor even the minimal procedural guarantees of prior notice and a hearing. Summary contempt is an exception to the safeguards of due process; but it is not an unlimited exception – it must be exercised within proper bounds. *See In re Oliver*, 333 U.S. 257, 275 (1948). Unless the conduct being punished occurs in open court and in the immediate view of the judge, a contemnor is entitled, as a matter of due process, to most of the procedural protections available to defendants in ordinary criminal prosecutions. *In re Oliver*, 333 U.S. 257 (1948); *Cooke v. United States*, 267 U.S. 517 (1925).

1. Summary contempt is not available here, where the alleged contempt was merely indirect, as occurring outside the presence of the court, and because there is no imminent threat to the court.

The dual essential elements of *summary* contempt are:

1. A contumacious act committed in open court in the judge's presence and immediate view that results in the judge's personal knowledge and makes further evidence unnecessary for a summary finding of contempt, and

2. The contumacious act constitutes an imminent threat to the administration of justice that may result in demoralization of the court's authority unless the court imposes a summary contempt sanction.

In re Contemnor Caron, 110 Ohio Misc.2d 58, 90, 744 N.E.2d 787, 809 (C.P.2000) (citing *Ex parte Terry*, 128 U.S. 289 (1888); *Cooke v. United States*, 267 U.S. 517 (1925); *In re Oliver*, 333 U.S. 257 (1948)). Neither prong is satisfied here.

The first element requires a finding that the conduct at issue is direct, rather than indirect. Direct contempt involves "misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." R.C. 2705.01. The usual example of a direct contempt occurring in the presence of the court is an act that occurs in the presence of the judge in the actual courtroom itself. *Catholic Social Serv. of Cuyahoga Cty. v. Howard*, 106 Ohio App. 3d 615, 666 N.E.2d 658 (8th Dist. 1995); *In re Purola*, 73 Ohio App. 3d 306, 596 N.E.2d 1140 (3d Dist. 1991). A direct contempt can be summarily punished because the contemnible act occurred in the presence of the judge and the facts are directly known by the court. *State v. Belcastro*, 139 Ohio App. 3d 498, 744 N.E.2d 271 (8th Dist. 2000).

Here, Melton's failure to notify the Office of Attorney Services of his permission to practice *pro hac vice* did not occur in the presence of the Court or its judicial officers. Rather, the Court was only later advised of Melton's registration status through an alleged *ex parte* conversation with Kissinger. (Mtn. for Contempt, 6; Exhibit C-1, 4, "[Kissinger] then approached Magistrate Sarisky" and "put the Courts on notice.") According to the Motion for Contempt, Kissinger has kept the Court informed on an ongoing basis as well. (Mtn. for Contempt, 4.) However, the conduct at issue did not take place in the courtroom or in the presence of the Court. Thus, there is no "direct" contempt in this case and a summary disposition is not permitted.

2. No immediate threat justifies summary disposition.

Even if the conduct at issue took place in the presence of the Court, the effect of the contumacious conduct must create a "need for speed" to immediately suppress the court-disrupting misbehavior and restore order to the proceedings. Absent that need, an evidentiary hearing is still required even though the contempt is "direct." *In re Lodico*, 5th Dist. Stark No. 2003-CA-00446, 2005-Ohio-172, ¶ 44. Only where the dual essential elements co-exist can summary (i.e., without due process procedures) sanction be imposed.

Here, the Motion for Contempt does not identify an "immediate threat," nor does one exist. Melton's inadvertent failure to complete his *pro hac vice* registration occurred in the past, and Melton is not currently practicing law in Ohio. He is not involved in any Ohio matters, and counsels no Ohio clients. Moreover, the ODC has already determined that Melton did not engage in unethical activities and has "cured" any lapse in his *pro hac vice* status. There is no "immediate" harm to prevent by imposing the court's extraordinary summary contempt power; therefore, the protections of due process must be afforded to Melton, including notice, a hearing, and the opportunity to be heard.

C. Criminal contempt requires the court to establish the contemnor's intent beyond a reasonable doubt. There is no evidence that Melton intentionally failed to notify the Office of Attorney Services of his *pro hac vice* permission.

The next question courts must address in considering a motion for contempt is whether the contempt is civil or criminal. *In re Estate of Mercurio*, 7th Dist. Mahoning No. 00 CA 108, 2003-Ohio-1437, ¶ 32. The two types of contempt can be distinguished primarily by the character and purpose of the punishment rendered in each case. *In re Sprankle*, 7th Dist. Carroll No. 678, 1999 WL 783980, *2. In the case of criminal contempt, it must be shown that the

alleged contemnor intended to defy the court beyond a reasonable doubt. *Heinrichs v. 356 Registry, Inc.*, 2016-Ohio-4646, 70 N.E.3d 91 (Ohio Ct. App. 10th Dist. 2016).

1. Plaintiffs' request for a "sentencing" hearing acknowledges that the contempt sought here is criminal. However, the motion must be denied because there is no evidence Melton intended to defy the Court.

Criminal contempt sanctions operate as punishment for the completed act of disobedience that is designed to vindicate the authority of the court. The sanctions are a punishment for conduct which has already occurred, as distinguished from civil contempt, where the sanctions are designed to coerce compliance. *In re McGinty*, 30 Ohio App. 3d 219, 507 N.E.2d 441 (8th Dist. Cuyahoga County 1986). For example, in *State v. Christon*, 68 Ohio App.3d 471, 589 N.E.2d 53 (2nd Dist.1990), the contempt was criminal in nature where the attorneys were punished for an act constituting a past affront to the court, and there was no way to purge the contempt after the commission of the act.

Intent to disobey the court's order is a condition precedent to a finding of criminal contempt. *Mercurio*, at ¶ 32. (citing *Midland Steel Prods. Co. v. U.A.W. Local 486*, 61 Ohio St.3d 121, 573 N.E.2d 98, (1991) paragraph two of the syllabus); *State v. Khong*, 29 Ohio App. 3d 19, 502 N.E.2d 682 (8th Dist. 1985). Criminal contempt also requires proof of a purposeful, willing, or intentional violation of a trial court's order. Thus, in cases of criminal contempt, it must be shown that the alleged contemnor intended to defy the court. *Heinrichs v. 356 Registry, Inc.*, 10th Dist. No. 15AP-532, 2016-Ohio-4646, 70 N.E.3d 91; *Bank One Tr. Co., N.A. v. Scherer*, 10th Dist. Franklin No. 08AP-288, 2008-Ohio-6910. "[A] litigant or his attorney is not to be punished for contempt for a mere mistake." *Hunt v. State*, 1904 WL 676, *14 (Dec. 10,

1904). The intent to disobey the court must be proven beyond a reasonable doubt. *Brown v. Executive 200, Inc.*, 64 Ohio St. 2d 250, 252, 416 N.E.2d 610 (1980).

Here, Plaintiffs' Motion for Contempt acknowledges that the sanction sought in this case is criminal. (*See* Mot. for Summ. Direct Contempt, referring to "sentencing.") There is no dispute that any alleged misconduct by Melton occurred in the past. Immediately upon discovering that his *pro hac vice* status was in question, he self-reported to the Supreme Court of Ohio's Office of Disciplinary Counsel and the Pennsylvania Disciplinary Board. This Court, through attorney Kissinger, was also immediately informed of the potential issue. Kissinger thereafter filed a notice of appearance and assumed sole responsibility for the Zwinglers' representation. Melton has taken no further action with respect to the Zwinglers or this Court, other than to encourage Kissinger, through counsel, to refile the Zwinglers' wrongful death action to afford his clients any potential available relief. Furthermore, the sanction requested here is not coercive in nature, an essential characteristic of civil contempt.

Plaintiffs' request for a finding of criminal contempt fails because there is no evidence that Melton intentionally failed to notify the Office of Attorney services of his permission to practice *pro hac vice* in this Court. The ODC itself determined that Melton's conduct was merely "inadvertent." (Ex. A-3, ODC Response Letter.) The Pennsylvania Disciplinary Board likewise acknowledges that Melton did not intend to violate the *pro hac vice* rules. (Ex. A-4, Pennsylvania Disciplinary Board Response Letter.) Plaintiffs, through Kissinger, have presented no evidence that the failure to properly file the *pro hac vice* notice was anything more than an unfortunate oversight. Moreover, it is simply inconceivable that Melton would intentionally fail to notify the Supreme Court of Ohio after he registered and paid the required fees and was granted permission to appear in the respective Ohio courts.

Finally, while Plaintiffs argue that Melton perpetrated a "fraud upon the court," there is simply no evidence to support a finding of fraud, which also requires a finding of knowing or intentional conduct. *Janiszewski v. Belmont Career Ctr.*, 7th Dist. No. 16 BE 0009, 2017-Ohio-855, 86 N.E.3d 613, ¶ 93, appeal not allowed. In the absence of any intentional conduct, no criminal sanction may be imposed.

2. Civil contempt is inapplicable here because it seeks to coerce the contemnor's action, not punish for past conduct.

On the other hand, civil contempt seeks a remedial sanction, which is one intended to coerce the termination of specific misconduct which constitutes a continuing contempt of court. *In re Sprankle*, 7th Dist. Carroll No. 678, 1999 WL 783980, *2; *Caron*, at 98. The purpose of sanctions in a case of civil contempt is to compel or coerce the contemnor to comply with the court's lawful orders. *Id.* Therefore, any sanction imposed for civil contempt must afford a contemnor the right to purge himself of the contempt. *Metcalf v. Kilzer*, 4th Dist. No. 15CA32, 2017-Ohio-5735, 94 N.E.3d 43, ¶ 22. Furthermore, to impose civil contempt sanctions the contemnor must have disobeyed a trial court's order. *Bd. of Ed. of Brunswick City School Dist. v. Brunswick Ed. Ass'n*, 61 Ohio St.2d 290, 295, 401 N.E.2d 440, 444 (1980) (finding prior disobedience of a trial court's order is a necessary antecedent to a court's imposition of civil contempt sanction).

Here, there is no allegation that Mr. Melton is engaging in ongoing misconduct, so there can be no need to impose coercive sanctions intended to terminate such conduct. Melton no longer represents the Zwinglers and he counsels no Ohio clients. Furthermore, there is no allegation that Mr. Melton disobeyed a trial court order. Plaintiffs point to no such order, nor does one appear on the court's docket. At most, Plaintiffs claim that Melton violated Gov. Bar. R. XII regarding his obligation to notify the Supreme Court of his *pro hac vice* admission in this

Court. However, just as this Court lacks jurisdiction to enforce the Rules of Professional Conduct, it lacks jurisdiction to issue a contempt order for violations of the Rules for the Government of the Bar. *See Petition of Green*, 369 U.S. 689, 692, 82 S.Ct. 1114, 1117, 89 Ohio Law Abs. 214, 8 L.Ed.2d 198 (1962) (a court cannot punish as a contempt the disobedience of an order the court is without jurisdiction to issue).

Finally, to the extent Mr. Melton violated Gov. Bar R. XII, his misconduct has been purged and no further sanction may be imposed. Mr. Melton corrected the flaw in his *pro hac vice* registration and self-reported to the ODC immediately upon discovering questions related to his *pro hac vice* status. The ODC thoroughly investigated the matter and found Melton's actions were "inadvertent" and that Melton, "cured any deficiencies or apparent lapse in his *pro hac vice* status" by notifying ODC of the oversight. (Exhibit A-3, ODC Response Letter.) Neither criminal nor civil contempt can be established here.

D. Dismissal of Plaintiffs' own complaint is not an available criminal contempt sanction.

In a criminal contempt proceeding, a court may impose limited penalties. R.C. 2705.05. For a first offense, the court is limited to imposing a $250 fine or imprisonment up to thirty days. *Id.* Here, Plaintiffs seek the extraordinary remedy of having their own complaint dismissed.[4] They ask the Court to determine in a contempt proceeding that, as a matter of law, their refiled complaint is barred by the statute of limitations because Melton's *pro hac vice* status was not current at the time it was filed. A substantive ruling on the merits of Plaintiffs' complaint is not an available remedy in a contempt proceeding.

[4] Because Kissinger failed to refile the ODOT claim within the Ohio Savings Statute, the CAE claim, which Kissinger seeks to dismiss, is the Zwinglers' only avenue of potential recovery.

Plaintiffs clearly seek this remedy to circumvent having to establish this element in an eventual legal malpractice claim. But a contempt proceeding is not the proper forum to determine this legal issue, which has not even been raised or argued by the only defendant, CAE. Even if the Court had the power to dismiss Plaintiffs' complaint at their own request in this action, there is no basis to do so. Ohio law permits the refiled wrongful death case to proceed on its merits even in light of Melton's *pro hac vice* status.

E. Melton's inadvertent failure to file a notice of admission in the Supreme Court of Ohio Office of Attorney Services does not render Plaintiffs' refiled complaint void *ab initio*.

Plaintiffs argue that their own case should be dismissed, presumably to allow them to pursue a legal malpractice claim against Melton rather than attempt to prosecute their wrongful death case. They contend that their original complaint, signed by attorney Melton, was void *ab initio* because Melton was excluded from the practice of law at the time it was filed and Ohio Savings Statute does not apply because the statute of limitations has expired.

1. Melton was not excluded from the practice of law when he filed Plaintiffs' original complaint because the Office of Attorney Services renewed his *pro hac vice* registration in 2013, 2014 and in 2015.

Gov. Bar. R. XII requires all attorneys granted permission to appear *pro hac vice* by a tribunal to file a Notice of Permission to Appear *Pro Hac Vice* with the Office of Attorney Services within thirty days after a tribunal grants permission to appear in a proceeding. Failure to file the notice within 30 days results in automatic exclusion from practice in Ohio. *Id.*

The crux of Kissinger's argument is that Melton's failure to notify the Supreme Court of Ohio Office of Attorney Services about his admission *pro hac vice* in a 2012 action automatically excluded Melton from the practice of law as of May 27, 2015, when he signed and filed the Zwinglers' original wrongful death complaint. However, even if Melton was excluded

from the practice of law in 2012[5] for failing to notify the Office of Attorney Services of his permission to appear within 30 days, the Supreme Court of Ohio subsequently renewed his *pro hac vice* status in 2013, 2014 and 2015 by issuing new Certificates of *Pro Hac Vice* Registration. (*See* Exhibit A-1.) Thus, even if Melton had been automatically excluded from practicing in Ohio in 2012, his registration was reinstated in 2013, 2014 and again in 2015. The Zwinglers' refiled complaint is not void and cannot be dismissed as a result of Melton's subsequent failure to file a notice of his *pro hac vice* admission in this Court 30 days after the complaint was filed.

2. Melton "cured" any lapse in his *pro hac vice* status.

There is no case law or guidance interpreting the term "exclusion," however, the Rules permit an attorney to be reinstated once he provides the required notice(s) and pays the required registration fees. Gov. Bar R. XII(6). Even if Melton's *pro hac vice* status had not been renewed by the Office of Attorney Services in 2014 and 2015, any "lapse" in his permission to practice in Ohio was subsequently cured when he notified the Office of Disciplinary Counsel of his prior admissions.

Upon discovering the potential issue with his *pro hac vice* registration, Melton immediately informed the Office of Attorney Services and provided the required notices. After the Office of Attorney Services, and the Ohio Disciplinary Counsel, considered the circumstances, they determined that Melton had "**cured**" any lapse in his *pro hac vice* status.

[5] As stated in note 2, Kissinger also discovered an oversight had occurred in connection with a 2012 lawsuit in which Melton was previously admitted to practice in Columbiana County Ohio *pro hac vice*. Importantly, Kissinger was Ohio co-counsel with Melton on that case as well and had also failed to counsel Melton of the requirement to mail the judgment entry granting him permission to practice *pro hac vice* in that case to the Office of Attorney Services. After that case was dismissed, Melton did not practice law again in Ohio until the filing of the complaints in the instant case in 2015.

Thus, according to the ODC, Melton's inadvertent failure to file the required notices did not prejudice the Zwinglers and does not void the 2015 complaint.

3. *Hadley* does not render the 2015 complaint void *ab initio* even if Melton did not "cure" issues relating to his *pro hac vice* status.

Kissinger bases his argument on a single case, *State ex rel. Hadley v. Pike*, 7th Dist. Columbiana No. 14 CO 14, 2014-Ohio-3310, which found a complaint void where an out of state attorney filed it before registering with the Office of Attorney Services. The Seventh District summarily concluded, without any explanation or analysis, that "[t]he complaint should have been dismissed without prejudice for lack of subject matter jurisdiction." *Id.* at ¶ 17. However, there are valid arguments that differentiate the *Hadley* case from the situation at hand and further analysis beyond *Hadley's* conclusory language establishing that a trial court does have subject matter jurisdiction over a complaint filed a non-attorney, rendering such a complaint voidable rather than void *ab initio*.

Hadley is distinguishable for several reasons. First, the attorney in *Hadley* had not registered with the Office of Attorney Services of the Supreme Court of Ohio at the time the complaint was filed. Here, Melton not only applied for *pro hac vice* status, but the Ohio Supreme Court granted his request before the original complaint was filed. The trial courts in question further granted his subsequent motions to be admitted *pro hac vice*, with Kissinger listed as his associating attorney. Thus, the holding in *Hadley* is based on different circumstances than those presented here.

Second, the Seventh District provided no analysis as to why it dismissed the complaint in *Hadley* for lack of subject matter jurisdiction. The *Hadley* reasoning is flawed based on other

cases discussing subject matter jurisdiction. Since there are no Ohio cases applying Ohio's Savings Statute when the original complaint was arguably void *ab initio* based on the filing attorney's inability to practice law in the State of Ohio, cases in different contexts are helpful in analyzing this issue. For example, where a party's lack of standing destroys subject matter jurisdiction such that a judgment rendered in that case is questioned, the Supreme Court of Ohio has held that such judgments are voidable (subject to appeal) not void (subject to collateral attack). In doing so, the Supreme Court discussed the distinction between the various types of jurisdiction. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18-19. The Court explained:

> The general term "jurisdiction" can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. The often unspecified use of this polysemic word can lead to confusion and has repeatedly required clarification as to which type of "jurisdiction" is applicable in various legal analyses.
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> ***
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> Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. . This latter jurisdictional category involves consideration of the rights of the parties. **If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void.** *** This court has long held that the court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to "all matters at law and in equity that are not denied to it."

Kuchta, ¶ 18-19 (emphasis added, internal citations omitted.) The court went on to differentiate between the court's subject matter jurisdiction and jurisdiction over the case:

> Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action. But an inquiry into a party's ability to *invoke* a court's

> jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction. *** Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action, and any judgment on the merits would be subject to reversal on appeal. But a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief. Accordingly, Bank of America's alleged lack of standing to initiate a foreclosure action against the Kuchtas would have no effect on the subject-matter jurisdiction of the Medina County Court of Common Pleas over the foreclosure action.

(*Id.*, ¶ 22-23.) (internal citations omitted.)

The above explanation throws into question the *Hadley* Court's determination that the lower court lacked subject matter jurisdiction based on the filing attorney's lack of *pro hac vice* status. *Lanzer v. Lanzer*, 5th Dist. Stark No. 2005CA00212, 2006-Ohio-1387, ¶ 20 ("A trial court's subject matter jurisdiction is not determined by an attorney's status to practice law in this state."). Notably, the *Hadley* Court did not analyze jurisdiction or explain why the lower court lacked subject matter jurisdiction as opposed to one of the other types of jurisdiction discussed in *Kuchta*. Based on the *Kuchta* explanation, it does not appear there is any reason or basis to differentiate a party's lack of standing from an attorney's lack of *pro hac vice* status. Therefore, the *Hadley* Court's holding was incorrect as to the type of jurisdiction that the lower court lacked.

The above distinction is important because, as recognized by the *Kuchta* Court, "[i]f a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." "It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.'" *Deutsche Bank Natl. Trust Co. v. Finney*, 10th Dist. Franklin Nos. 13AP-198, 13AP-373, 2013-Ohio-4884, ¶ 19 (citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 12, 806 N.E.2d 992).

In *Washington Cty. Dept. of Human Serv. v. Rutter*, 651 N.E.2d 1360, 1361–62 (Ohio App. 4th Dist. 1995), another case addressing documents filed by non-licensed individuals, the court of appeals found that dismissal is warranted, not that the filing was void *ab initio*:

> We note at the outset that "[n]o person shall be permitted to practice as an attorney * * * or to commence, conduct or defend any action or proceeding in which he is not a party concerned * * * unless he has been admitted to the bar by order of the Supreme Court in compliance with its * * * rules." R.C. 4705.01. **Dismissal is the proper remedy when a complaint has been filed by someone not admitted to the bar in contravention of that statute.** See, **1362 e.g., Sheridan Mobile Village, Inc. v. Larsen (1992), 78 Ohio App.3d 203, 205, 604 N.E.2d 217, 219; Williams v. Global Constr. Co., Ltd. (1985), 26 Ohio App.3d 119, 120, 26 OBR 330, 331, 498 N.E.2d 500, 501–502. There is no dispute in this case that Pouzide is not a licensed attorney admitted to the practice of law in the state of Ohio. Thus, **under the foregoing authorities, she is prohibited from commencing an action in court (except on her own behalf) and any complaint filed by her in a representative capacity for another party would be properly dismissed.**

(emphasis added). Thus at most, the Zwinglers' original complaint could have been dismissed due to Melton's *pro hac vice* status at the time of filing, but it is not void so as to render the Savings Statute inapplicable.

With respect to the Zwinglers' wrongful death claim, the court in *Hadley* was wrong as to its holding that the lower court lacked subject matter jurisdiction. There does not seem to be any real distinction between the lack of standing of a party as explained in *Kuchta* and an attorney's lack of authority to practice law in Ohio. *Wells Fargo Bank, Natl. Assn. v. Elliott*, 5th Dist. Delaware No. 13 CAE 03 0012, 2013-Ohio-3690, ¶ 11 ("A lack of standing argument challenges the capacity of a party to bring an action, not the court's statutory or constitutional power to adjudicate the case and thus is distinguishable from a lack of subject matter jurisdiction argument."). Therefore, in the situation at hand, if the original court had subject matter jurisdiction over the case, the original complaint filed by Melton would be considered **voidable, not void**.

Whether the original complaint was void cannot be raised now, after dismissal. The recent case of *Bayview Loan Servicing, L.L.C. v. Likely*, 9th Dist. Summit No. 28466, 2017-Ohio-7693 is instructive on this point. The defendant moved to dismiss a re-filed complaint based on the statute of limitations, arguing that the original complaint was void *ab initio* and could not be refiled pursuant to Ohio's Savings Statute. The Ninth District found that the "factual findings stated that the complaint was dismissed, not vacated as void ab initio. Second, the trial court's finding of fact stated the dismissal was based on a lack of standing, not lack of subject matter jurisdiction." *Bayview*, ¶ 34. **The court found it was bound by the procedural posture of the lower court's dismissal and could not determine on appeal that the original complaint was void *ab initio*.** Here, the original complaint was voluntarily dismissed without prejudice. Therefore, there was no determination that the original complaint was void *ab initio* while it was pending. Such determination cannot be made now.

There are also sound policy reasons to apply the Savings Statute to this matter. It is well founded that Ohio's Savings Statute is a "remedial statute designed to provide a litigant a hearing of his case on the merits." *Wasyk v. Trent*, 174 Ohio St. 525, 528, 191 N.E.2d 58 (1963); R.C. 2705.19. The Supreme Court of Ohio in *Wasyk*, explained that the statute is to be given "liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure." The *Wasyk* case involved a litigant who had originally filed their complaint in federal court where it was dismissed for lack of subject matter jurisdiction. The defendant argued in the re-filed state court action, as Plaintiffs do in this case, that the lack of subject matter jurisdiction rendered the original proceeding a nullity and therefore, the plaintiff could not benefit from the savings statute. The Supreme Court found that the purpose of the savings statute would be "virtually abrogated" if a party could not refile a complaint in state court that

had been dismissed in federal court for lack of subject matter jurisdiction. Similarly, not allowing the Zwinglers in this matter to refile their complaint would go against the very purpose of the savings statute and punish them for the purported action of their attorney, leaving them with no chance to be heard on the merits.

Furthermore, the plain language of R.C. 2705.19 states that it applies to "any action that is commenced or attempted to be commenced...if plaintiff fails otherwise than upon the merits...." "Commencement of an action occurs by filing a complaint and obtaining service on the named defendant(s) within one year of filing the complaint." *Bayview Loan Servicing, L.L.C. v. Likely*, 9th Dist. Summit No. 28466, 2017-Ohio-7693, ¶ 29 (citing R.C. 2305.17; Civ.R. 3(A); *Richardson v. Piscazzi*, 9th Dist. Summit No. 19193, 1999 WL 247765, *3 (Apr. 28, 1999)). Here, Melton properly commenced, or at least attempted to commence, Plaintiffs' original complaint pursuant to the requirements of R.C. 2305.17 and therefore, the Saving Statute should apply.

In sum, liberal application of Ohio's Savings Statute is warranted in this case to allow Plaintiffs to litigate the merits of their wrongful death case. No better scenario can be presented than here, where their former attorney's unintentional administrative error is argued to have voided their original complaint.

F. Kissinger's unclean hands prohibit his request for a contempt hearing.

"The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set in motion the judicial machinery to obtain some remedy but has violated good faith by his prior-related conduct, the court will deny the remedy." *Marinaro v. Major Indoor Soccer League*, 81 Ohio App. 3d 42, 610 N.E.2d 450 (9th Dist. 1991). "[T]he plaintiff must not be guilty

of reprehensible conduct with respect to the subject-matter of his suit." *Birr v. Birr*, 2012-Ohio-187, 969 N.E.2d 312, ¶ 33 (6th Dist.).

Here, Kissinger was co-counsel with Melton when the original wrongful death complaint was filed. His role was to advise Melton as to Ohio law and procedure, including Ohio's *pro hac vice* admission requirements. Kissinger now asks the Court to impose criminal sanctions against Melton based on Kissinger's own failure to properly advise Melton to mail a copy of the court *pro hac vice* judgments to the Office of Attorney Services. As co-counsel, Kissinger also agreed to share any attorney fees generated from the joint representation of the Zwinglers in the wrongful death suits. Lawyers in different firms who share fees share joint responsibility for the representation. Thus, if liability arises from Melton's failure to mail the *pro hac vice* judgments to the Office of Attorney Services, Kissinger is also responsible. Kissinger's own unclean hands bar him from seeking criminal contempt sanctions against Melton.

III. CONCLUSION

Based on the foregoing analysis, it appears that Plaintiffs' dismissal request is sought for no other purpose than to allow Plaintiffs to attack their former attorney rather than contend with the merits of their refiled claims. The lengthy correspondence between Kissinger and undersigned counsel demonstrates Kissinger's initial refusal to refile the Zwinglers' case, and his misplaced attacks on Melton, his former co-counsel. It is notable that neither Kissinger nor the Zwinglers have requested the extensive case file from Mr. Melton, which would be necessary if they had any intention of prosecuting the refiled wrongful death claims. And they failed to refile the Court of Claims case.

Kissinger has thwarted every invitation to properly refile his clients' case, instead choosing to vilify Melton in the Mahoning County Probate Court and undermine the merits of

his clients' own case. Kissinger's retained counsel, Jonathan Coughlin, urged Kissinger to preserve his clients' underlying case as opposed to "just going after Scott." (Jan. 11, 2018 Email from J. Coughlin, attached hereto as Exhibit B-1.) Mr. Coughlan continued, "You claim to want to help your client's (*sic*) by trying to preserve their case but all I see is your efforts to go after Scott [Melton]." *Id.*

Kissinger's motivation is further underscored by his refusal to withdraw as counsel given his non-waivable conflict due to his own potential liability in this case and status as a necessary fact witness regarding the instant contempt motion. As the associating and referring local attorney, Kissinger is potentially jointly liable to the Zwinglers for any misconduct arising out of the wrongful death case. Pursuant to Professional Conduct Rule 1.5(e), if an attorney agrees to share a fee with another attorney, both attorneys are jointly responsible for the representation. Joint responsibility includes both financial and ethical obligations, as if the attorneys were partners in the same law firm. Thus, any potential adverse ruling against Melton could potentially affect Kissinger as well, yet he refused undersigned counsel's offer to pay independent counsel to research, prepare, and refile the Zwinglers' wrongful death claim against CAE and defend any potential motion to dismiss based on the research and arguments outlined above. Despite a duty to mitigate his clients' damages, Kissinger refused the offer, and moved for dismissal himself instead of waiting for CAE to seek to dismiss the refiled case.

For all of the above stated reasons, Scott Melton submits that the Motion be denied. No evidentiary hearing or oral argument is necessary.

Respectfully submitted,

MONICA A. SANSALONE (0065143)
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E-mail: msansalone@gallaghersharp.com
mjerin@gallaghersharp.com

Attorneys for Scott L. Melton

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief in Opposition to Motion for Direct Summary Contempt* was sent via regular U.S. Mail, postage pre-paid, this 23rd day of October, 2018 to following:

William Kissinger
7631 South Avenue, Suite F
Youngstown, Ohio 44512
Tel: 330-629-8877
Attorney for Plaintiffs

Paul D. Eklund
Collins, Roche, Utley & Garner, LLC
800 Westpoint Parkway, Suite 1100
Cleveland, Ohio 44145
Tel: 440-438-3610
Attorney for Defendant
Central Allied Enterprises, Inc.

MONICA A. SANSALONE (0065143)
MAIA E. JERIN (0092403)
Gallagher Sharp LLP
Attorneys for Scott L. Melton

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

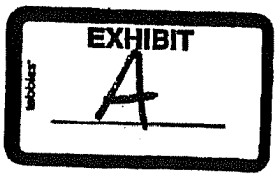
MICHELLE ZWINGLER, et al.	)	CASE NO: 2018 CV 2518
	)	
Plaintiffs	)	JUDGE MAUREEN A. SWEENEY
	)	
v.	)	
	)	AFFIDAVIT OF NON-PARTY
CENTRAL ALLIED ENTERPRISES, INC.	)	SCOTT L. MELTON
	)	
	)	
Defendant	)	

1. I am Scott L. Melton, an attorney licensed to practice law in the State of Pennsylvania. I have personal knowledge of the facts set forth in this affidavit.

2. Attached hereto as Exhibit A-1 are true and accurate copies of my Supreme Court of Ohio Certificates of Pro Hac Vice Registration for the years 2013, 2014, 2015, 2016, and 2017.

3. Attached hereto as Exhibit A-2 are true and accurate copies of self-reporting letters I sent to the Office of Disciplinary Counsel of the Supreme Court of Ohio and the Pennsylvania Disciplinary Board.

4. Attached hereto as Exhibit A-3 is a true and accurate copy of a letter I received from the Office of Disciplinary Counsel of the Supreme Court of Ohio regarding its investigation and decision concerning my *pro hac vice* registration.



5. Attached hereto as Exhibit A-4 is a true and accurate copy of a letter I received from the Pennsylvania Disciplinary Board regarding its investigation and decision concerning my Ohio *pro hac vice* registration.

FURTHER AFFIANT SAYETH NAUGHT

SCOTT L. MELTON

SWORN TO AND SUBSCRIBED in my presence this 23rd day of Oct, 2018.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Kimberly Joy Chalupiak, Notary Public
Baden Borough
Beaver County
My Commission Expires 03-30-2019

NOTARY PUBLIC

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2013

Registration Number:
PHV- 2571-2013

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2013

EXHIBIT
tabbies
A-1

THE SUPREME COURT of OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2014

Registration Number:
PHV- 2571-2014

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Susan B. Christoff
Director, Attorney Services

Expires December 31, 2014

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2015

Registration Number:
PHV- 2571-2015

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2015

THE SUPREME COURT *of* OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2016

Registration Number:
PHV- 2571-2016

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Susan B. Christoff
Director, Attorney Services

Expires December 31, 2016

THE SUPREME COURT of OHIO

OFFICE OF ATTORNEY SERVICES

IN THE MATTER OF THE APPLICATION OF

Scott Melton

FOR PRO HAC VICE REGISTRATION

per Gov. Bar R. XII, Section 2(A)(3)

Certificate of
PRO HAC VICE
REGISTRATION
2017

Registration Number:
PHV- 2571-2017

Scott Melton, having met the requirements of, and found to be in full compliance with, Section 2(A)(3) of Rule XII of the Rules for the Government of the Bar of Ohio, is hereby issued this certificate of pro hac vice registration in the state of Ohio.

To receive permission to appear pro hac vice in an Ohio proceeding, a motion requesting such permission must be filed with the tribunal in accordance with Section 2(A)(6) of Rule XII of the Rules for the Government of the Bar of Ohio.

Lee Ann Ward
Director, Bar Admissions

Expires December 31, 2017

SCOTT L. MELTON
ATTORNEY AT LAW
300 NINTH STREET
CONWAY, PENNSYLVANIA 15027-1647
(724) 869-2972
(724) 869-2246 facsimile
smeltonlawfirm@gmail.com
www.smeltonlaw.com

November 20, 2017

Disciplinary Board of the Supreme Court of Pennsylvania
District Four
437 Grant Street
Pittsburgh, PA 15219

Re: **Scott L. Melton, Esquire**
Ohio Pro Hac Vice 2571 - 2017

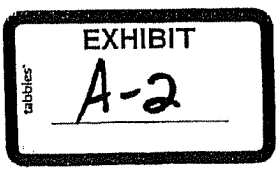
Dear Sir/Madam,

Today, I self-reported to the Ohio Office of Disciplinary Counsel (ODC) my possible unauthorized practice of law in Ohio due to my failure to comply with the technical requirements of *pro hac vice* registration in Ohio. I enclose a copy of my letter to ODC. I will keep you informed of any response I receive from ODC. In the interim, please contact me with any questions you may have.

Very truly yours,

Scott L. Melton

SLM/nrm
Enclosures
CC: George D. Jonson, Esquire w/encl.



SCOTT L. MELTON

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smeltonlawfirm@gmail.com
www.smeltonlaw.com

November 20, 2017

Office of Disciplinary Counsel – Ohio Supreme Court
250 South Civic Center Drive, Suite 325
Columbus, OH 43215

Re: Scott L. Melton, Esquire
Pro Hac Vice 2571 - 2017

Dear Sir/Madam,

I am an attorney licensed to practice in Pennsylvania. I represented Mr. and Mrs. Zwingler in a case filed in the Mahoning County Court of Common Pleas pursuant to a *pro hac vice* admission. The story actually begins with an earlier and entirely unrelated case which I handled in Columbiana County, Ohio in 2012. The following is a chronology of both of these matters.

In 2011 I signed a contingent fee agreement to represent Franklin W. Shank, Sr. and the Estate of Tammy Shank in a medical malpractice case seeking to recover damages for the death of Tammy Shank. The case had been reviewed and turned down by multiple prominent Ohio plaintiff medical malpractice firms. My fee agreement was approved by the Probate Court of Columbiana County.

The case of Franklin W. Shank, Sr., individually and as the Administrator of the Estate of Tammy L. Shank, deceased vs. Vikram A. Raval, M.D. et al. was filed on September 20, 2011 in the Court of Common Pleas of Columbiana County, Ohio at 2011 CV 666. The case was assigned to the Honorable Scott Washam. The complaint was filed for me by Steven M. Goldberg, Esq. an Ohio attorney, because my co-counsel in the case, Mr. Kissinger (referring attorney), had an earlier adverse experience with one of the judges of the Columbiana County court and did not want his name on the case. A companion medical malpractice case was filed by me on behalf of Mr. Shank and his wife's estate in the Court of Common Pleas of Allegheny County, Pennsylvania against medical practitioners in Pennsylvania that were felt to have rendered negligent care to Mrs. Shank in Pennsylvania, after her transfer from an Ohio hospital to a Pennsylvania hospital.

In early 2012 I obtained and reviewed the Ohio Rules for *pro hac vice* admission. I filed the necessary paperwork and paid the registration fee to the Office of Attorney Services for my *pro hac vice* registration. On March 28, 2012 a Certificate of Pro Hac Vice Registration was sent to me via email from the Office of Attorney Services. Enclosed and labeled as **Exhibit 1** is a copy of the 2012 Certificate. On or about April 5, 2012 I filed a Motion for Permission to Appear Pro Hac Vice in the Court of Common Pleas of Columbiana County. Proper notice was given to all counsel of record. Enclosed and labeled as **Exhibit 2** is a copy of the Motion. There was no objection to the Motion. On April 19, 2012 Judge Washam granted permission for me to appear *pro hac vice* in that action. Enclosed and labeled as **Exhibit 3** is a copy of the Judgment Entry granting permission.

During the course of discovery in that case, it was learned that the radiologic studies taken at the Ohio hospital where some of the events occurred may have been misread. As a result, a second lawsuit was filed at 2011 CV 757 in the Court of Common Pleas of Columbiana County against the radiology defendants. This Complaint was also filed by Attorney Steven M. Goldberg, Esq. for the same reasons as in the earlier case. The case was assigned to Judge Washam. On or about April 5, 2102 I filed a Motion for Permission to Appear Pro Hac Vice in that action. Proper notice was given to all counsel of record. There was no objection to the Motion. On April 19, 2012 Judge Washam granted permission for me to appear *pro hac vice* in that action. Enclosed and labeled as **Exhibit 4** is a copy of the Judgement Entry granting my motion.

At the time I studied the rules for *pro hac vice* practice, in early 2012, I became aware of the requirement to mail the Office of Attorney Services the Order granting permission to appear *pro hac vice*. However, by the time I presented my Motions in mid-April and received the Orders granting me permission I had forgotten the requirement to mail in the Orders and failed to do so.

On or about September 21, 2012 I presented a motion to consolidate both actions under the case filed at 2011 CV 666. By Order dated September 21, 2012 Judge Washam consolidated both action under 2011 CV 666. Enclosed and labeled as **Exhibit 5** is a copy of that Order.

In 2013 and 2014 I timely renewed my *pro hac vice* registration with the Office of Attorney Services. Enclosed and labeled as **Exhibit 6** is a copy of my Certificates of Pro Hac Vice registrations for those years.

In 2013 I settled the Shank matter with all but one defendant for a sum in excess of seven figures. In 2014 I tried the case against the remaining defendant. That case resulted in a defense verdict. I filed a motion for a new trial, which was denied. I filed an appeal to the Court of Appeals of Ohio, Seventh District simply to obtain time to study the case posture in more detail. Very shortly after filing the appeal I voluntarily discontinued it, with prejudice, as I did not see any reasonable prospect for success. Enclosed and labeled as **Exhibit 7** is a copy of the

Voluntary Dismissal and a copy of the Judgment Entry dismissing the appeal. I did not file a Motion for Permission to Appear Pro Hac Vice with the appellate court as I considered my earlier grant of Permission to appear *pro hac vice* to be sufficient to allow me to appeal the underlying matter. It should be noted that at no time did the Court of Appeals of Ohio, Seventh District, indicate, in any way, that I did not have the authority as a currently registered *pro hac vice* attorney to file the appeal, or to voluntarily dismiss the appeal, without having requested permission from it to appear *pro hac vice*. I did not mail a copy of my Voluntary Dismissal to the Office of Attorney Services, as I did not remember the requirement in the rules governing *pro hac vice* practice that I do so.

On Monday, August 25, 2014 I met with Ohio residents, Michele Zwingler and Robert Zwingler at the Youngstown law office of William Kissinger, Esquire, an Ohio attorney, regarding their son, Ryan Zwingler, who was killed in a truck accident on SR 534 in Mahoning County, Ohio on a dark rainy night on May 27, 2013. The truck in which he was a front seat passenger had gone off the shoulder of the road and remounted the pavement and entered the opposing lane where it struck, head-on, an oncoming tractor trailer. The driver of Mr. Zwingler's truck and Mr. Zwingler were both conscious following the collision, according to eye witnesses, but they were trapped in the cab. Their truck caught fire and neither man could be extracted from the cab. Both men burned to death.

This case was referred to me by Mr. Kissinger who had been my counsel and referring attorney on the Shank case. Mr. Kissinger made clear to me that the case had been thoroughly investigated and turned down by at least two well-known Ohio law firms. Mr. Kissinger provided me with a copy of the Ohio State Highway Patrol report. Upon my review of the police report I believed that the accident had some of the hallmarks of a shoulder drop off case but there was no mention of the condition of the berm of the roadway in the report. Further, I noticed that the road lanes were unusually narrow (9 feet) and the shoulder where the Zwingler truck left the road was also unusually narrow (20 inches). I also noticed that both oncoming trucks were very large, and each would likely have taken up the entire lane width of this very narrow road. I contacted the accident reconstruction officer from the Ohio Highway Patrol that investigated the case and asked him if he had ever considered that this accident could have been caused by a low shoulder. He had not considered that possibility in his investigation. However, he added, that he had taken very detailed measurements with a laser device of the scene of the accident and, if I was interested, he still had the raw data and could retrieve it to determine the height of the berm at the area where the Zwingler truck left the paved shoulder and went onto the berm and the height of the berm where it re-entered the paved shoulder. Reviewing his data with me over the phone, he discovered, much to his surprise, that there was a more than 5 inch drop off from the paved shoulder to the berm at the point where the Zwingler truck left the paved shoulder. There should be no drop off from the shoulder to the berm. The presence of the drop off can cause a

driver to easily lose control of their vehicle and when attempting to steer back onto the roadway cause their vehicle to be propelled into the opposing lane of traffic.

I determined that Mr. and Mrs. Zwingler may have a cause of action against the Ohio Department of Transportation (ODOT) for this dangerous shoulder drop off that I believed was the cause of the accident and their son's death. That action would need to be filed in the Ohio Court of Claims. However, my research revealed that every shoulder drop-off case brought before the Court of Claims resulted in a defense verdict, almost always on a Motion for Summary Judgment. At the meeting with them and Mr. Kissinger I presented them with an Attorney Retainer Agreement – Contingent Fee hiring me to represent them. Enclosed and labeled as **Exhibit 8** is a copy of that signed Agreement. [redacted]

My further investigation revealed that the roadway had been last repaved in the spring and summer of 2004, nine years before the accident, and my review of the repaving work contract that I obtained from the Ohio Department of Transportation included the contract requirement to bring the berm flush with the newly re-paved shoulder. I determined that Mr. and Mrs. Zwingler may have a cause of action against the pavement contractor, Central-Allied Enterprises, Inc. (CAE), for its failure to conform to the contract specifications and bring the berm flush to the paved shoulder. I informed the Zwinglers of my belief that they may have a cause of action against CAE and they consented to my filing the case. That action would have to be filed in the Court of Common Pleas of Mahoning County, Ohio.

On October 14, 2014 my co-counsel, Mr. Kissinger, filed on my behalf an Application to Enter into a Contingent Fee Contract with the Probate Court of Mahoning County. On October 16, 2014 the Honorable Robert N. Rusu, Jr. entered a Judgment Entry and Orders Allowing Agreement for Legal Representation. Enclosed and labeled as **Exhibit 9** is a copy of the Application and the Court's Judgment Entry.

As I knew that I would be filing the above referenced two actions in Ohio, on January 29, 2015, I timely complied with the Ohio *pro hac vice* registration requirements by filing the necessary papers to the Ohio Supreme Court Office of Attorney Services and submitting the required payment to it. Shortly thereafter, the Office of Attorney Services sent me a Certificate of Pro Hac Vice Registration and issued me number 2571-2015. Enclosed and labeled as **Exhibit 10** is a copy of that Certificate.

In working on a draft of the Complaint I prepared and mailed Verifications for Mr. and Mrs. Zwingler to sign to attach to the Complaint and told them that I would not file the Complaint with their signed verifications without them first reviewing it. These were signed and emailed back to me on May 24, 2015. After conferring with my local counsel, Mr. Kissinger, I learned

that, unlike Pennsylvania, client verifications are not filed with an Ohio complaint, so I did not attach the signed Verifications to the Complaints that I filed. Enclosed and labeled as **Exhibit 11** is a copy of the signed, dated verification pages. Mr. Kissinger also informed me that since I had my *pro hac vice* number current for 2015 that he did not have to sign the Complaint and that I could sign and file it alone.

On May 27, 2015 I hand delivered each Complaint for filing with the respective Clerk of Courts of each tribunal. Enclosed and labeled as **Exhibit 12** is a time-stamped copy of the Complaint filed in the Court of Common Pleas of Mahoning County, Ohio at 15 CV 1410 and in the Court of Claims of Ohio at 2015-00525.

On June 17, 2015 defense counsel filed an Answer to the Complaint in the Court of Claims action.

On or about July 2, 2015 defense counsel filed an Answer and discovery requests in the Mahoning County action.

On January 29, 2016 I timely renewed my *pro hac vice* registration by sending to the Ohio Supreme Court Office of Attorney Services the required paperwork and paid the registration fee. Shortly thereafter I received a Certificate of Pro Hac Vice Registration for 2016 which is enclosed and labeled as **Exhibit 13.**

Sometime in early April 2016, during preparation for the depositions of employees of Allied-Central Enterprises, counsel for ODOT, Jenna Jacoby, Esquire, pointed out to me during a phone call that I should file a Motion to Proceed *pro hac vice* in that action and the Mahoning County action, if I had not done so. I told her that my *pro hac vice* registration had been and was current for 2016 and, as such, I thought that I had been approved to practice in the Ohio courts for the calendar year. She told me that I was mistaken and that I should file the motions in the court in which I was practicing.

I looked in my closed files from the case of Franklin Shank, Sr. individually and as the Administrator of the Estate of Tammy Shank, deceased v. Vikram A. Raval, M.D. et al. filed in the Court of Common Pleas of Columbiana County at No. 666 and 757 of 2011 and simply reformatted the Motion for Permission to Appear Pro Hac Vice that I used in those actions and that had been approved by the Court in that action. I did not re-read the Rules for *pro hac vice* when I did that reformatting as I had no reason to believe that there were any problems with my *pro hac vice* procedure in the previous case.

On April 28, 2016 I mailed my Motion for Permission to Appear Pro Hac Vice to the Court of Common Pleas of Mahoning County and to the Court of Claims in the Zwingler cases. Enclosed

and labeled as **Exhibit 14 and 15**, respectively, are copies of the Motion that was filed in each case. Proper notice of the Motion was given to all counsel of record. No objection was filed to the relief requested in either motion.

On May 2, 2016 the Honorable Maureen Sweeney granted my Motion to Permission to Appear Pro Hac Vice. On May 16, 2016 the Honorable Patrick McGrath granted my Motion to Permission to Appear Pro Hac Vice. Enclosed and labeled as **Exhibit 16** is a copy of Judge Sweeney's and Judge McGrath's Orders granting the motions.

Once again, I had forgotten that Rule XII (Pro hac vice admission), Section 4, of the Supreme Court Rules for the Government of the Bar of Ohio required that within 30 days of the granting of the Motions for Permission to Appear Pro Hac Vice I was to send a copy of the Order granting permission to the Ohio Supreme Court Office of Attorney Services. Moreover, when I checked my computer file in the Shank case, to retrieve and reformat my Motion for Permission to Appear Pro Hac Vice, and in which I thought that I had properly handled the *pro hac vice* matters, there was no letter from me sending a copy of the Orders granting permission to appear *pro hac vice* to the Office of Attorney Services, so there was nothing in my file to remind me of the proper notification procedure.

Because of my failure to notify the Office of Attorney Services, the Ohio Supreme Court was unaware that I had been granted permission to appear *pro hac vice* in the Court of Common Pleas of Mahoning County or the Court of Claims and that I was proceeding with the litigation in each case.

I missed the January 29th deadline for *pro hac vice* registration for 2017 and did not pay the registration fee and send in my application for *pro hac vice* registration until September 29, 2017. I informed my co-counsel, Mr. Kissinger, about the late payment and registration.

On October 6, 2017 a Pretrial Conference was held in the Zwingler case in the action filed in the Court of Common Pleas of Mahoning County. Prior to the conference, we had informed defense counsel that shortly after the conference we would be filing a Motion for Voluntary Dismissal, Without Prejudice, Pursuant to RCP 41 and would be refiling the action within one year.

On October 9, 2017 my co-counsel, William Kissinger, checked the online *pro hac vice* website and called the Office of Attorney Services to make sure I was in compliance with its office due to my late payment and registration. They told him that they had received my payment and all my paperwork except they were waiting on my Affidavit. He met with me on October 10th and I showed him it had been prepared and notarized on September 29th, but I had not sent it in yet. I sent it in immediately. I was given my Certificate of Registration Pro Hac Vice for 2017 by the

Office of Attorney Services, effective September 29th. Enclosed and labeled as **Exhibit 17** is a copy of the Certificate.

Mr. Kissinger also told me at our meeting that the Office of Attorney Services did not show on its records that I was ever involved in litigation in Ohio. I could not understand how it had not known of the Shank and Zwingler cases as I had been granted permission by the respective judges to practice *pro hac vice*. Mr. Kissinger had checked the *pro hac vice* rules and determined that the Ohio Supreme Court was unaware of my litigation in these two cases because I had not mailed to the Office of Attorney Services a copy of the orders granting me permission to practice *pro hac vice* within 30 days of my receipt of the orders. Mr. Kissinger also discovered the sanction in the Rules of an automatic exclusion from the practice of law for the failure to mail the Orders granting me *pro hac vice* permission to the Office of Attorney Services and told me of the problem.

As stated earlier, we had intended to voluntarily discontinue the Zwinger case in both courts after the conclusion of the Pretrial Conference with the Court of Common Pleas of Mahoning County, scheduled for October 1, 2017, and had so advised defense counsel of our intention. Since the *pro hac vice* rule indicated that I was automatically excluded from the practice of law in Ohio 30 days after my having received the Order granting my *pro hac vice* appearance unless that Order was filed, Mr. Kissinger and I decided that I must not do any further legal work on either case and that he should enter his appearance in each case in order to voluntarily discontinue each action. On October 11, 2017 Mr. Kissinger filed his Notice of Appearance and a Voluntary Dismissal in the Mahoning County action. On October 12, 2017 Mr. Kissinger filed his Notice of Appearance for the Plaintiffs and filed a Notice of Voluntary Dismissal in the Court of Claims action. Enclosed and labeled as **Exhibits 18 and 19**, respectively are copies of those filings. On October 26, 2017 the Honorable Patrick M. McGrath filed an Entry acknowledging that the action in the Court of Claims had been voluntarily discontinued and assessed costs against the plaintiffs. Enclosed and labeled as **Exhibit 20** is a copy of Judge McGrath's Entry.

In addition to my immediately ceasing to perform any legal work in Ohio, through Mr. Kissinger, we promptly informed Judge Sweeney of the Mahoning County Court of Common Pleas, through her magistrate Dennis J. Sarisky, Esquire, of my discovery that I was supposed to have mailed a copy of her Order granting me permission to appear *pro hac vice* to the Office of Attorney Services and that I had inadvertently failed to do so.

Within two weeks of the discovery of my failure to send the Orders granting permission for *pro hac vice* appearance and the sanction of automatic exclusion Attorney Kissinger and I jointly met with the Zwinglers at his office and informed them of my error and the sanction. I informed them that I was working with the Office of Attorney Services to correct the matter and furnish it with the appropriate orders. I explained that at that juncture I did not know the full legal

ramifications of the error but that I would do everything in my power to correct the error. I further told them that I intended to refile their case and would ask the court for permission to practice *pro hac vice* on it.

Further, I informed, through Mr. Kissinger, Judge Rusu of the Mahoning County Orphans Court of my error. He suggested that Mr. Kissinger enter his appearance in the Probate Court matter and that my Contingent Fee Agreement with the Zwingler's be withdrawn by Mr. Kissinger and a new Contingent Fee Agreement between Mr. Kissinger and the Zwinglers be entered into and submitted to the Probate Court for Approval until the matters regarding my error were further clarified. Enclosed and labeled as **Exhibit 21** is a copy of Mr. Kissinger's Withdrawal of Approval for Wrongful Death Contract which was filed with the Mahoning County Probate Court on October 26, 2017. Enclosed and labeled as **Exhibit 22** is a copy of the Judge Rusu's Order, dated October 27, 2017, withdrawing his prior approval of the contingent fee contract between myself and the Zwinglers.

On October 26, 2017 Mr. and Mrs. Zwingler signed a new Contingent Fee Agreement with Attorney Kissinger. Enclosed and labeled as **Exhibit 23** is a copy of the Contingency Fee Agreement between the Zwinglers and Mr. Kissinger. Also on October 26, 2017 Mr. Kissinger filed an Application To Approve Contingent Fee Contract between himself and the Zwinglers regarding this case. Enclosed and labeled as **Exhibit 24** is a copy of the Application. On October 30, 2017 Judge Rusu filed a Judgment Entry and Orders Allowing Agreement for Legal Representation of Mr. Kissinger as counsel in this case. Enclosed and labeled as **Exhibit 25** is a copy of the Judgment Entry.

Since discovering my mistake(s) in failing to forward the Orders granting me permission to appear *pro hac vice* in the Shank and Zwingler cases I have sent the Orders to the Office of Attorney Services as well as my motion for voluntary dismissal from the appeal taken on the Shank case and the Voluntary Dismissal of the Zwingler case in the Court of Claims. In the Zwingler case filed in the Court of Common Pleas of Mahoning County that matter was discontinued by my co-counsel Mr. Kissinger, as outlined above.

I wanted to bring this matter to your attention and am happy to answer any questions you may have and to provide any additional documentation you wish to see.

Very truly yours,

Scott L. Melton
SLM/nrm
CC: George D. Jonson, Esquire w/encl.

Disciplinary Counsel
THE SUPREME COURT OF OHIO

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LIA J. MEEHAN
KAREN H. OSMOND
CATHERINE M. RUSSO
DONALD M. SCHEETZ
AMY C. STONE
AUDREY E. VARWIG

September 14, 2018

PERSONAL AND CONFIDENTIAL

George Demetrios Jonson, Esq.
Montgomery, Rennie & Jonson, LPA
36 East 7th Street, Suite 2100
Cincinnati, Ohio 45202

Re: Scott L. Melton
UPL File No. B7-2346U

Dear Mr. Jonson:

We have completed our investigation of the matter brought to our attention by your client. After a thorough investigation, we have determined that further action will not be taken regarding the allegations that Scott L. Melton engaged in the unauthorized practice of law.

As we understand it, Mr. Melton is a Pennsylvania licensed attorney. Since 2012, he has practiced law in Ohio in various matters under *pro hac vice* authority. According to our review of Mr. Melton's registration history with the Office of Attorney Services, he appropriately filed applications with the Office of Attorney Services and paid the required fees. Then, subsequent to motion, he was granted permission to practice *pro hac vice* before the Columbiana County Court of Common Pleas, Mahoning County Court of Common Pleas, and the Ohio Court of Claims.

However, in October 2017, Mr. Melton learned that, albeit inadvertently, he had failed to complete the final step of the Ohio Pro Hac Vice registration, pursuant to Gov. Bar R. XII, i.e., filing the court's notice of permission with the Office of Attorney Services. Upon learning of his error, Mr. Melton promptly reviewed the Gov. Bar Rule requirements and provided the Office of Attorney Services with the required paperwork. This action, according to my discussion with the Office of Attorney Services, cured any deficiencies or apparent lapse in his *pro hac vice* status. Moreover, he notified each court of his error and discussed the matter with his clients. He also was allowed to withdraw his contingent contract in the *Zwingler* wrongful death matter that was pending at that time. Further, new counsel assumed representation and we are unaware of any damages or prejudice that his clients may have suffered as a result of his conduct.

Nevertheless, our investigation revealed that Mr. Melton was "technically" excluded from the practice of law in Ohio from January 1, 2017 until September 27, 2017. This occurring simultaneously with his representation in the *Zwingler* matter. Hence, we believe that he

EXHIBIT A-3

engaged in the unauthorized practice of law during that time frame. However, in light of Mr. Melton's inadvertent conduct, coupled with his prompt compliance with the Office of Attorney Services and Gov. Bar R. XII requirements, we are electing to exercise our jurisdiction and forgo prosecution of this matter. Moreover, we trust that, by his own admissions and with your trusted guidance, Mr. Melton will not make this mistake again.

Should we become aware of additional information regarding Mr. Melton's activities that might constitute the unauthorized practice of law, we will certainly reopen our investigation. At the present time, we have dismissed this matter and closed our file. Thank you for your cooperation.

Sincerely,

Michelle R. Bowman

Michelle R. Bowman
Assistant Disciplinary Counsel

MRB/ksl

Paul J. Killion
Chief Disciplinary Counsel

Paul J. Burgoyne
Deputy Chief Disciplinary Counsel

District IV Office
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Anna Marie Ciardi
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September 24, 2018

Scott Lewis Melton, Esquire
300 Ninth Street
Conway, PA 15027

Re: File Reference #C4-17-868

Dear Mr. Melton:

This concerns the matter for which you self-reported in November of 2017. You stated in your report to this office that you were being investigated in Ohio for possible violation of the Ohio rules for admission *pro hac vice*. You self-reported to the Office of Disciplinary Counsel for the Supreme Court of Ohio. That matter was based upon your alleged failure to follow the rules concerning such admission for an action filed in the Mahoning County, Ohio, Court of Common Pleas.

We have been informed by Disciplinary Counsel in Ohio that, because that office could find no evidence that you intentionally engaged in the unauthorized practice of law in Ohio, it would not pursue any sanction against you. Therefore, they dismissed the action against you. Please be advised that, in accordance therewith, we are also closing our file.

You have stated in your communications with this office that you may have made certain mistakes with regard to seeking *pro hac vice* admission for the matter in Ohio. We are sure that, in the future, you will take care to scrupulously follow such rules, and avoid any appearance of impropriety in that regard.

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tabbies
A-4

I would like to thank you for your courtesy and professionalism in your communications with this office.

Very truly yours,

Samuel F. Napoli
Disciplinary Counsel

SFN/rm

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MICHELE ZWINGLER, et al.	)	CASE NO: 2018 CV 2518
Plaintiffs	)	JUDGE MAUREEN A. SWEENEY
v.	)	
CENTRAL ALLIED ENTERPRISES, INC.	)	AFFIDAVIT OF MONICA A. SANSALONE
Defendant	)	

1. I am Monica A. Sansalone, an attorney licensed to practice law in the State of Ohio. I represent Scott L. Melton with respect to the above captioned matter and have personal knowledge of the facts set forth in this affidavit.

2. Attached hereto as Exhibit B-1 is a true and accurate copy of correspondence dated August 10, 2018 sent to me by William Kissinger and the referenced attachment.

3. Attached hereto as Exhibit B-2 is a true and accurate copy of correspondence I sent to William Kissinger on July 30, 2018.

4. Attached hereto as Exhibit B-3 is a true and accurate copy of Correspondence I sent to William Kissinger on August 23, 2018.

FURTHER AFFIANT SAYETH NAUGHT.

MONICA A. SANSALONE

SWORN TO AND SUBSCRIBED in my presence this 22nd day of October, 2018.

MAIA JERIN, ATTORNEY - NOTARY PUBLIC - STATE OF OHIO - MY COMMISSION HAS NO EXPIRATION DATE - SECTION 147.03 O.R.C.

NOTARY PUBLIC

EXHIBIT B

William J. Kissinger

Attorney at Law

7631 South Avenue, Suite F
Youngstown, OH 44512
(330) 629-8877
Fax: (330) 629-2682

FAX TRANSMISSION COVER SHEET

Date: August 10, 2018

To: Gallagher Sharp LLP Attn: Attorney Monica Sansalone

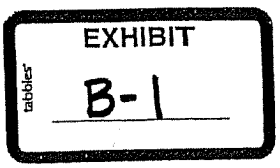
Fax: (216) 241-1608

Subject: RE: Estate of Ryan E. Zwingler against Scott L. Melton

Sender: Attorney William Kissinger

YOU SHOULD RECEIVE 7 PAGE(S), INCLUDING THIS COVER SHEET. IF YOU DO NOT RECEIVE ALL THE PAGES, PLEASE CALL (330) 629-8877.

IF TRANSMISSION IS ILLEGIBLE OR INCOMPLETE, CONTACT AT 330-629-8877



WILLIAM J. KISSINGER

ATTORNEY AT LAW

7631 South Avenue Suite F
Youngstown, Ohio 44512
Phone: (330) 629-8877
Fax: (330) 629-2682

August 10, 2018

Attorney Monica Sansalone
Gallagher Sharp LLP
Sixth Floor Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115

RE: Estate of Ryan E. Zwingler Claim Against Attorney Scott L. Melton

Dear Attorney Sansalone:

As I was preparing a response to you, I received your request for information supplied by Jonathan Coughlin regarding the claim. I am enclosing a copy of the email from Mr. Coughlin after my office retained him for assistance in finding a way to refile the Zwingler lawsuit. For two months, Mr. Melton was ignoring both myself and the clients. I sent him a correspondence insisting he respond with a legitimate tolling argument so the case could be refiled or the contact information for his insurance carrier. Upon supplying Mr. Coughlin with a copy of the letter, he was adamant that a way needed to be aggressively pursued to refile the case, but could not supply me with a way to accomplish it. I advised him that I had consulted with over a dozen litigators and none would refile the claim without the tolling argument to protect them from a court sanction. Mr. Coughlin stated that did not know how to resolve the issue of Mr. Melton's period of exclusion, but he would consult with Mr. Melton's counsel to find a way to do so. After consulting with Attorney Jonson, the only suggestion that they could provide was to have Attorney Steve Goldberg refile the case and he would deal with the issue. I spoke to Attorney Goldberg who said no one had discussed this matter with him and he was not willing to refile the case.

As grim as this issue had become, CNA actually made matters far worse. I am enclosing the correspondence from Attorney Paul Eklund that I received on May 15, 2018. For reasons I

cannot fathom, CNA immediately forwarded my demand package to Attorney Eklund. I contacted Attorney Eklund to inquire how he received the information. He said he was shocked when he received it and had no idea why it was sent to him. He had no idea about Mr. Melton's pro hac vice issues prior to this notification. Based on this information, his client would not agree to negotiate with me regarding the fraud claim in the future and he would respond to any refile with an immediate motion to dismiss as the statute of limitations had expired. I told CNA I would require a written explanation as to how this happened and a reason why they would not be liable for an independent tort for eliminating my ability to negotiate a settlement for the Zwingler family. I received my written explanation that this was a one in a million accident and they were still trying to discover how it happened. I received no reason why CNA does not have liability for the additional damages suffered by the Zwingler family. The same day, I received a separate package from CNA containing a forty page package containing confidential information for a claim my office has nothing to do with. Claim number HMA94112 for the insured, Elaine Chavez, was to be sent to Bighorn Law in Las Vegas, Nevada. In 25 years of practice, I have never seen a claim "botched" so badly by an insurance company.

As to your concerns regarding my liability, as we discussed, I put my carrier, OBLIC, on notice in December, 2017. Upon their thorough investigation, they assured me they had absolutely no concerns of any liability on my part. In addition, I have received ethics consultations from two different attorneys to insure there would be no ethical problems. As to your concerns regarding myself as a material witness, my testimony is completely unnecessary. I enclosed in my demand package to CNA, both, Mr. Melton's letter to the Supreme Court of Ohio admitting his period of exclusion and his letter to Attorney Eklund making a demand of nine million dollars with eight pages of detail explaining why the claim had this value. Mr. Melton's own hand has admitted both liability and the amount of damages. In regard to the case within a case doctrine you brought up, please review the Supreme Court's exception that was carved out for malpractice that results in lost opportunity to litigate.

My prior letter to CNA stated I would be filing against Mr. Melton if the matter was not resolved by August 1, 2018. I recognize that you did not have complete information when CNA turned this matter over to you and you did send me a response on July 31, 2018. I have spoken to my clients and have been instructed to delay filing until August 20, 2018. If this matter is not resolved by then, I will begin with filing an adversarial complaint with the Mahoning County Probate Court for fraud, breach of fiduciary duty and punitive damages due to Mr. Melton's clear actual malice and conscious disregard towards the Zwingler family with a great probability of causing them harm. This disregard is further proven by Mr. Melton's history of prior litigation without privileges to do so. By statute, Mr. Melton will not be permitted a jury in this court. Therefore his trier of fact will be the court that still has not addressed the issue of his "fraud upon this court" from his application to approve his wrongful death contract. As the probate court has exclusive jurisdiction over these claims, pursuant to the Court's plenary

power, I will also be listing CNA as a co-defendant for the same claims as they were acting on behalf of Mr. Melton regarding a probate asset when they put Attorney Eklund on notice. Attorney Craig Pelini has agreed to be co-counsel on the case and has told me he is ready to begin as soon as possible.

My office has gone to great lengths to try to find a way to rectify Mr. Melton's actions which have only magnified the pain of losing their son. The Zwingler family has suffered enough. I will await your response.

VERY TRULY YOURS,

Attorney William Kissinger
Counsel for The Estate of Ryan Edward Zwingler

WK
SENT BY FACSIMLE
cc: Attorney Craig Pelini
Robert Zwingler
Michele Zwingler

Subject: RE: Zwingler family claim

From: Coughlan, Jonathan (JCoughlan@keglerbrown.com)

To: klssinger4211@yahoo.com;

Date: Thursday, January 11, 2018 10:58 AM

Butch,

Your voice mail box is full so I am emailing you. You mentioned a new case you found in a voice mail message yet, I don't see any cite to a new case in this letter to Scott. This is just another demand for his carrier. You claim to want to help your client's by trying to preserve their case but all I see is your efforts to go after Scott. That is not what I have recommended. I have and continue to strongly recommend that you figure out a way to get your client's case refiled. George Jonson has agreed to have Scott contact Steve Goldberg about re-filing the case for the clients. He would then take on the tolling issue you have expressed concerns about. If that can happen that is a tremendous benefit to your client.

I am of the opinion that the statute of limitations for the malpractice case will not have started until at least the time the case was dismissed, if not later. And, if it will make you more comfortable, George is willing to sign a tolling agreement as to the statute of limitations for any possible malpractice claim. But you have to truly be interested in preserving your client's underlying case as opposed to just going after Scott. I strongly recommend that we see about letting Steve Goldberg re-file the case. If you are not interested in pursuing that, please let me know. I am here today if you want to call me.

Thanks, Jon

From: William Kissinger [mailto:kissinger4211@yahoo.com]
Sent: Tuesday, January 9, 2018 9:11 PM
To: Coughlan, Jonathan <JCoughlan@keglerbrown.com>
Subject: Zwingler family claim

Jon

I have attached a cover letter and a copy of

what I sent to Scott pursuant to the message I

left on the telephone on 1/8/18.

Thanks

Butch Kissinger

COLLINS ROCHE
UTLEY & GARNER LLC
ATTORNEYS AT LAW

CLEVELAND
800 Westpoint Parkway, Suite 1100
Cleveland, Ohio 44145
T. 216-916-7730
F. 216-916-7725

Paul D. Eklund
E-mail: peklund@cruglaw.com

May 15, 2018

VIA FACSIMILE: 330-629-2682
William J. Kissinger
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: Michele Zwingler, etc. v. Central-Allied Enterprises, Inc.
Mahoning County Court of Common Pleas Case No. 15CV1410
Our File No. A-0456/137.00016

Dear Mr. Kissinger:

As you are aware, I am the attorney retained by Travelers to defend Central Allied Enterprises, Inc. with respect to the wrongful death claim presented by your clients, Michelle and Robert Zwingler. I have received a copy of your letter to "CNA Professional Services, Attn: Doug Ricci." Travelers has the primary layer of insurance for Central Allied, and I have been instructed to advise you that there will be no increase in the offer made on behalf of Central Allied to your clients at the mediation/settlement conference we attended with the Court Mediator in the Mahoning County Court of Common Pleas last fall.

Sincerely,

/s/ Paul D. Eklund

Paul D. Eklund

PDE/dmg

Gallagher Sharp LLP

Established in 1912
www.gallaghersharp.com

PLEASE RESPOND TO CLEVELAND OFFICE

Monica A. Sansalone
Direct Dial: (216) 522-1154
msansalone@gallaghersharp.com

July 30, 2018

Via Federal Express

Mr. William Kissinger, Esq.
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: *Ryan E. Zwingler Wrongful Death Claim/Potential Legal Malpractice Action*
Our Matter No. 00520-127876

Dear Mr. Kissinger,

Please be advised that I represent Scott Melton, Esq. with respect to the potential legal malpractice claim against him arising out of the underlying wrongful death action on behalf the Estate of Ryan Edward Zwingler. I have had the opportunity to review both your January 29, 2018 correspondence to Mr. Melton and your May 2, 2018 correspondence to Doug Ricci of CNA, Mr. Melton's professional liability carrier. Please note that the proposition outlined on page three of this communication has a response date of **August 10, 2018**.

According to your correspondence, you represent Mr. and Mrs. Zwingler with respect to the legal malpractice claim against Mr. Melton. However, you have non-waiveable conflicts of interest which prevent you from acting in the capacity as their attorney.

First, with respect to the legal malpractice claim, you are a material witness as you were directly involved in the underlying case as co-counsel and associating counsel, and you had multiple, material ex-parte conversations with the judicial officers which are highly relevant to the legal malpractice claim.[1] Professional Conduct Rule 3.7 prohibits a lawyer from acting as an advocate at a trial in which the lawyer is likely to be a necessary witness. Here, should a legal malpractice claim be filed, your testimony will be necessary regarding all aspects of the underlying wrongful death case, including Mr. Melton's pro hac vice admission and your ex-parte discussions relative to same.

[1] You have outlined these ex-parte conversations in detail in your own correspondence. Relative to same, please see Rule 3.5(a)(3) of the Ohio Rules of Professional Conduct.

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You are further disqualified from representing the Zwinglers relative to a claim of legal malpractice arising out of the underlying wrongful death case because you are potentially jointly liable to them for any such alleged malpractice. As you are aware, you are listed as the associating attorney on Mr. Melton's Motion for Permission to Appear Pro Hac Vice filed in the Zwinglers' wrongful death case, making you jointly responsible for the representation and thus, jointly liable for any purported legal malpractice. You are also jointly liable for any alleged malpractice in the wrongful death case by virtue of your fee sharing agreement with Mr. Melton. Pursuant to Professional Conduct Rule 1.5(e), if an attorney agrees to share a fee with another attorney, both attorneys are jointly responsible for the representation. Joint responsibility includes both financial and ethical obligations, as if the attorneys were partners in the same law firm. As a referring and associating attorney, you can be held vicariously liable for any alleged malpractice claim arising from the Zwingler representation. Should you file a legal malpractice claim against Mr. Melton on behalf of Mr. and Mrs. Zwingler, we will be obligated to name you as a necessary third party defendant and seek your disqualification at that time.

Based upon the foregoing, I am requesting that you immediately put your own professional liability insurance carrier on notice of the potential legal malpractice claim against you. Additionally, Mr. and Mrs. Zwingler also need to be notified by you that they have the right to seek the advice of independent counsel regarding the legal malpractice claim, not only with respect to Mr. Melton, but also due to your conflicts of interest.

Additionally, there is the issue of mitigation. As I am sure you are aware, an injured party has a duty to mitigate his or her damages and may not recover those damages that he or she could reasonably have avoided. *Chicago Title Ins. Co. v. Huntington Natl. Bank*, 87 Ohio St. 3d 270, 1999-Ohio-62, 719 N.E.2d 955 (1999). To that end, the Zwinglers cannot maintain a legal malpractice claim unless and until they have exhausted the underlying claim. *See U.S. Bank, N.A. v. 2900 Presidential Drive, L.L.C.*, 2d Dist. Greene No. 2013 CA 60, 2014-Ohio-1121, ¶ 32; *see, e.g., Bogart v. Gutman*, 2nd Dist. Miami No. 2017-CA-27, 2018-Ohio-2331, ¶ 19 (dismissing legal malpractice claim when underlying claim could still be pursued).

Although there has been ample time to do so, to date, Mr. and Mrs. Zwingler have yet to re-file the underlying wrongful death action. While it may be your opinion, based in part on your ex-parte conversations, that the trial courts will reject a refiled complaint due to Mr. Melton's failure to maintain pro hac vice status, the Zwinglers must pursue the underlying claims before asserting a legal malpractice action. If the Zwinglers' claim fails, then, and only then, can they pursue legal malpractice remedies.

Because you are ethically prevented from representing the Zwinglers in their wrongful death action, we propose the following solution aimed at fulfilling their obligation to mitigate damages. Mr. Melton's carrier, CNA, will pay to retain experienced independent counsel, subject to mutual agreement, to pursue the wrongful death action on behalf of the Zwinglers. The carrier will pay a reasonable hourly rate to re-file the complaint through the motion to dismiss phase, assuming the issue of the pro hac vice status is raised in a Civ. R. 12 or similar such motion. If

the case survives initial motion practice on the issue, the fee will convert to a contingency basis as negotiated independently by and between the Zwinglers and their chosen lawyer. At that time, CNA will cease being responsibility for any additional fees and/or expenses associated with the representation.

The following three lawyers are highly renowned trucking lawyers, any of whom CNA would be agreeable to for the purposes of re-filing the underlying wrongful death action:

1. Mike Liezerman: https://www.truckaccidents.com
2. Andrew Young: https://www.truckcrashvictimhelp.com/About/Andrew-R-Young.shtml
3. John Reagan: https://www.knrlegal.com/our-attorneys/john-j-reagan/

I have not had contact with any of these lawyers, nor have CNA and/or Mr. Melton. If one of these lawyers is retained by Mr. and Mrs. Zwingler pursuant to an agreement with CNA, the attorney-client relationship would be by and between them and the lawyer, and CNA would have no communications with the attorney or the Zwinglers and provide no direction and/or input.

If the wrongful death case is dismissed as a result of the pro hac vice issue, CNA and Mr. Melton will agree to mediate the potential legal malpractice claim with the Zwinglers and their independent legal malpractice attorney, along with and your own professional liability carrier.

Time is of the essence with respect to the Zwinglers' wrongful death claim. Pursuant to Ohio's Savings Statute, R.C.2305.19, the Zwinglers' claim must be re-filed by or before October, 26, 2018. We must be advised of the Zwinglers' intent to retain independent counsel, as outlined above, by **Friday, August 10, 2018**. Independent counsel must be retained by **August 30, 2018**.

Although you may dispute your own liability relative to a potential legal malpractice action, the non-waiveable conflicts identified above clearly prohibit you from continuing to represent the Zwinglers in any ongoing legal matters. The Ohio Rules of Professional Conduct require you to disclose both the conflicts and CNA's offer to retain counsel to the Zwinglers.

Very truly yours,

Monica A. Sansalone

Monica A. Sansalone, Esq.

cc: Maia Jerin, Esq. (Via Email: mjerin@gallaghersharp.com)

bcc: Holly Spurlock (Via Email: Holly.Spurlock@cna.com)
Douglas Ricci (Via Email: Douglas.Ricci@cna.com)
Claim No. LWA28411

Scott Melton (Via Email: smeltonlawfirm@gmail.com)

Gallagher Sharp LLP

Established In 1912
www.gallaghersharp.com

PLEASE RESPOND TO CLEVELAND OFFICE

Monica A. Sansalone
Direct Dial: (216) 522-1154
msansalone@gallaghersharp.com

August 23, 2018

Via Fax: (330) 629-2682 and Email: kissinger4211@yahoo.com

William Kissinger, Esq.
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: *Ryan E. Zwingler Wrongful Death Claim/Potential Legal Malpractice Action*
Our File No. 520-127876

Dear Mr. Kissinger,

In your August 20, 2018 correspondence, you requested legal research concerning the ability to refile the Zwinglers' wrongful death action. I reiterate that the Rules of Professional Conduct prohibit you from representing the Zwinglers in any further legal matters or refiling the action on their behalf. However, as stated by your counsel, Jonathan Coughlin, refiling the complaint is in the Zwinglers' best interest, and required to mitigate their damages, if any, and we again advance that it should be done by independent counsel.

I. The Probate Court Lacks Jurisdiction Over Legal Malpractice Claims Even if they are Styled as Breach of Fiduciary Duty or Fraud.

As a threshold matter, however, let me address the breach of fiduciary duty and fraud claims you allegedly plan to file in the Mahoning County Probate Court. Under Ohio law, claims arising out of the manner in which a client is represented in the attorney-client relationship sound in legal malpractice regardless of the label attached. "Malpractice by any other name still constitutes malpractice." *Muir v. Hadler Real Estate Mgt. Co.*, 4 Ohio App.3d 89, 446 N.E.2d 820 (10th Dist.1982). It makes no difference whether the professional misconduct of an attorney consists of negligence or breach of contract, it is still malpractice. *Id.; see also B & B Contrs. & Developers, Inc. v. Olsavsky Jaminet Architects, Inc.*, 7th Dist. No. 12 MA 5, 2012-Ohio-5981, ¶ 38; *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 10th Dist. No. 10AP-290, 2010-Ohio-5872, ¶ 13-17 (finding that claims for breach of contract and breach of fiduciary duty were subsumed within the plaintiff's malpractice claim for deficient legal representation).

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The cases cited in your August 20, 2018 letter do not support your intention to file the above stated claims in probate court. First, *Ivancic v. Enos*, 11th Dist. No. 2011-L-050, 2012-Ohio-3639, 978 N.E.2d 927, ¶ 4, concerned claims against the attorney retained to administer an estate and who was the estate's single largest creditor. Recent decisions have confined *Ivancic's* holding to claims arising from the attorney's administration of an estate. *Cain v. Panitch*, 10th Dist. Franklin No. 16AP-758, 2018-Ohio-1595, ¶ 22. As you know, Mr. Melton was not involved in the administration of Ryan Zwingler's Estate. *Estate of Dombroski v. Dombroski*, 7th Dist. Harrison No. 14 HA 3, 2014-Ohio-5827, is even more inapposite as it does not concern claims against an attorney at all. Thus, the probate court lacks jurisdiction over a breach of fiduciary duty or fraud claim against Mr. Melton arising from his representation of the Zwinglers in the underlying wrongful death matter and the filing of same violates Civ.R. 11.

II. The *Hadley* Case is Distinguishable on its Facts and Analysis.

Now to the matter at hand — the basis for refiling the Zwinglers' wrongful death claim. You asked me to provide you with research regarding whether a complaint filed by an attorney who is not admitted to practice law in the State of Ohio is void *ab initio* such that Ohio's Savings Statute would not apply. There is no definitive case law on the subject and at least one court has found that a trial court lacks subject matter jurisdiction over a complaint filed by a non-admitted attorney. *See State ex rel. Hadley v. Pike*, 7th Dist. Columbiana No. 14 CO 14, 2014-Ohio-3310. However, there are valid arguments that differentiate the *Hadley* case from the situation at hand and further analysis beyond *Hadley's* conclusory language regarding subject matter jurisdiction is helpful.

We believe *Hadley* is distinguishable for several reasons. First, the attorney in *Hadley* had not registered with the Office of Attorney Services of the Supreme Court of Ohio at the time the complaint was filed. As you know, Mr. Melton not only applied for *pro hac vice* status, the Ohio Supreme Court granted his request. The trial courts in question further granted his subsequent motions to be admitted *pro hac vice*.[1] Thus, the holding in *Hadley* is based on distinct circumstances than those presented here.

Second, the Seventh District provided no analysis as to why it dismissed the complaint in *Hadley* for lack of subject matter jurisdiction. In fact, the court only summarily concluded that "[t]he complaint should have been dismissed without prejudice for lack of subject matter jurisdiction." *Id.* at ¶ 17. We believe that this conclusion is flawed based on other cases discussing subject matter jurisdiction. Since there are no Ohio cases applying Ohio's Savings Statute when the original complaint was arguably void *ab initio* based on the filing attorney's inability to practice law in the State of Ohio, cases in different contexts can help analyze this issue. For example, where a party's lack of standing destroys subject matter jurisdiction such that a judgment rendered in that case is void *ab initio*, the Supreme Court of Ohio has held that such judgments are voidable (subject to appeal) not void (subject to collateral attack). In doing so, the Supreme

[1] You were listed as the associating attorney on Mr. Melton's Motions to Appear Pro Hac Vice and received notice of same via court order.

Court discussed the distinction between the various types of jurisdiction. *Bank of Am., N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 18-19. The Court explained:

> The general term "jurisdiction" can be used to connote several distinct concepts, including jurisdiction over the subject matter, jurisdiction over the person, and jurisdiction over a particular case. The often unspecified use of this polysemic word can lead to confusion and has repeatedly required clarification as to which type of "jurisdiction" is applicable in various legal analyses.
>
> ***
>
> Subject-matter jurisdiction is the power of a court to entertain and adjudicate a particular class of cases. A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. . This latter jurisdictional category involves consideration of the rights of the parties. **If a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void.** *** This court has long held that the court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to "all matters at law and in equity that are not denied to it."

(Emphasis added, internal citations omitted.) The court went on to differentiate between the court's subject matter jurisdiction and jurisdiction over the case:

> Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action. But an inquiry into a party's ability to *invoke* a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction. *** Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action, and any judgment on the merits would be subject to reversal on appeal. But a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief. Accordingly, Bank of America's alleged lack of standing to initiate a foreclosure action against the Kuchtas would have no effect on the subject-matter jurisdiction of the Medina County Court of Common Pleas over the foreclosure action.

(*Id.*, ¶ 22-23.) (Internal citations omitted.)

The above explanation throws into question the *Hadley* Court's determination that the lower court lacked subject matter jurisdiction based on the filing attorney's lack of *pro hac vice* status. *Lanzer v. Lanzer*, 5th Dist. Stark No. 2005CA00212, 2006-Ohio-1387, ¶ 20 ("A trial

court's subject matter jurisdiction is not determined by an attorney's status to practice law in this state."). Notably, the *Hadley* Court did not analyze jurisdiction or explain why the lower court lacked subject matter jurisdiction as opposed to one of the other types of jurisdiction discussed in *Kuchta*. Based on the *Kuchta* explanation, it does not appear there is any reason or basis to differentiate a party's lack of standing from an attorney's lack of *pro hac vice* status. Therefore, it can reasonably be argued that the *Hadley* Court's holding was incorrect as to the type of jurisdiction that the lower court lacked.

The above distinction is important because, as recognized by the *Kuchta* Court, "[i]f a court possesses subject-matter jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void." "It is only when the trial court lacks subject matter jurisdiction that its judgment is void; lack of jurisdiction over the particular case merely renders the judgment voidable.'" *Deutsche Bank Natl. Trust Co. v. Finney*, 10th Dist. Franklin Nos. 13AP-198, 13AP-373, 2013-Ohio-4884, ¶ 19 (citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 12, 806 N.E.2d 992).

With respect to the Zwinglers' wrongful death claim, we believe the court in *Hadley* was wrong as to its holding that the lower court lacked subject matter jurisdiction. There does not seem to be any real distinction between the lack of standing of a party as explained in *Kuchta* and an attorney's lack of authority to practice law in Ohio. *Wells Fargo Bank, Natl. Assn. v. Elliott*, 5th Dist. Delaware No. 13 CAE 03 0012, 2013-Ohio-3690, ¶ 11 ("A lack of standing argument challenges the capacity of a party to bring an action, not the court's statutory or constitutional power to adjudicate the case and thus is distinguishable from a lack of subject matter jurisdiction argument."). Therefore, in the situation at hand, if the original court had subject matter jurisdiction over the case, the original complaint filed by Mr. Melton would be considered **voidable, not void**. We did not discover any Ohio cases that found an original complaint void *ab initio* based on an attack in a future, re-filed action, in any context.

Since Mr. Melton's original complaint was arguably voidable, not void, it cannot be attacked now because it was not voided while it was pending. In the original proceeding, there was no determination or argument that the complaint was void *ab initio*. The recent case of *Bayview Loan Servicing, L.L.C. v. Likely*, 9th Dist. Summit No. 28466, 2017-Ohio-7693, is another standing case where the defendant moved to dismiss a re-filed complaint based on the statute of limitations and inapplicability of the savings statute. One of the arguments put forth by the defendant was that the original complaint filed was void *ab initio* because the plaintiff never had standing to invoke the subject matter jurisdiction of the court. The Ninth District found, that the "factual findings stated that the complaint was dismissed, not vacated as void ab inito. Second, the trial court's finding of fact stated the dismissal was based on a lack of standing, not lack of subject matter jurisdiction." The court found it was bound by the procedural posture of the lower court's dismissal. Here, the original complaint was voluntarily dismissed without prejudice. Therefore, there was no determination that the original complaint was void *ab initio*.

III. Public Policy Supports Applying Ohio's Savings Statue to the Zwinglers' Refiled Complaint.

There are also policy reasons to apply the Savings Statute to this matter. It is well founded that Ohio's Savings Statute is a "remedial statute designed to provide a litigant a hearing of his case on the merits." *Wasyk v. Trent*, 174 Ohio St. 525, 528, 191 N.E.2d 58 (1963); R.C. 2705.19. The Supreme Court of Ohio in *Wasyk*, explained that the statute is to be given "liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure." The *Wasyk* case involved a litigant who had originally filed their complaint in federal court where it was dismissed for lack of subject matter jurisdiction. The defendant argued in the re-filed state court action that the lack of subject matter jurisdiction rendered the original proceeding a nullity and therefore, the plaintiff could not benefit from the savings statute. The Supreme Court found that the purpose of the savings statute would be "virtually abrogated" if a party could not refile a complaint in state court that had been dismissed in federal court for lack of subject matter jurisdiction. Similarly, not allowing the Zwinglers in this matter to refile their complaint would go against the very purpose of the saving statute and punish them for the purported action of their attorney, leaving them with no chance to be heard on the merits.

Furthermore, the plain language of R.C. 2705.19 states that it applies to "any action that is commenced or attempted to be commenced...if plaintiff fails otherwise than upon the merits...." "Commencement of an action occurs by filing a complaint and obtaining service on the named defendant(s) within one year of filing the complaint." *Bayview Loan Servicing, L.L.C. v. Likely*, 9th Dist. Summit No. 28466, 2017-Ohio-7693, ¶ 29 (Citing R.C. 2305.17; Civ.R. 3(A); *Richardson v. Piscazzi*, 9th Dist. Summit No. 19193, 1999 Ohio App. LEXIS 1998, 1999 WL 247765, *3 (Apr. 28, 1999)). Here, Mr. Melton properly commenced, or at least attempted to commence, the action pursuant to the requirements of R.C. 2305.17 and therefore, the Saving Statute should apply.

We believe the arguments in favor of refiling the Zwinglers' complaint have merit and should be pursued immediately. As you are aware, time is of the essence with respect to the Zwinglers' wrongful death claim, and I urge you to follow the advice of the attorney you retained, Mr. Coughlan, and to do what is in the best interests of your clients and facilitate the refilling of the complaint through independent counsel. Once independent counsel is selected, we are agreeable to sharing this research with him or her so that the Zwinglers can efficiently move forward with their next steps.

Very truly yours,

Monica A. Sansalone

Monica A. Sansalone, Esq.

cc: Maia Jerin, Esq.

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MICHELLE ZWINGLER, et al.	)	CASE NO: 2018 CV 2518
Plaintiffs,	)	JUDGE MAUREEN A. SWEENEY
v.	)	
CENTRAL ALLIED ENTERPRISES, INC.	)	AFFIDAVIT OF DOUGLAS RICCI
Defendant.	)	

1. I am Douglas Ricci, a Claims Consultant at CNA/Continental Casualty Company. I have personal knowledge of the facts set forth in this affidavit.

2. Attached hereto as Exhibit C-1 is a true and accurate copy of correspondence dated May 2, 2018 faxed to me by William Kissinger with respect to Mahoning County Court of Common Pleas Case Number 2015 CV 01410 captioned *Zwingler v. Central Allied Enterprise, Inc.*, which I received on or about May 15, 2018.

FURTHER AFFIANT SAYETH NAUGHT.

DOUGLAS RICCI

SWORN TO AND SUBSCRIBED in my presence this 22nd day of October, 2018.

NOTARY PUBLIC

PAMELA CHERRY
Notary Public, Georgia
Fulton County
My Commission Expires
August 28, 2021

EXHIBIT
C

WILLIAM J. KISSINGER

ATTORNEY AT LAW

7631 South Avenue Suite F
Youngstown, Ohio 44512
Phone: (330) 629-8877
Fax: (330) 629-2682

May 2, 2018

CNA Professional Services
Attn: Doug Ricci
P.O. Box 8317
Chicago, IL 60680

RE: The Estate of Ryan Edward Zwingler File # LWA 28411

Dear Mr. Ricci:

Pursuant to our telephone conversation, I have completed this package to explain the above listed claim and the amount of our demand. Due to the large amount of supporting documentation, I have affixed exhibit stickers to each document to assist in your evaluation. Ryan [redacted]ingler was a passenger in an automobile accident on May 27, 2013. The driver of the [redacted] went off the right side of the road and when the automobile recovered, he overcompensated and went left of center on the highway. The vehicle hit an approaching semi truck and killed both parties in the automobile. A claim against the driver was impossible due to his immunity under worker's compensation laws.

I have been a friend and attorney to Ryan's parents for many years. I shopped the claim around to wrongful death lawyers in Ohio. When I told Attorney Melton about the fact pattern, he stated it was a classic shoulder drop off case. He went that day to the scene to measure the drop off. When he later called me, he said the drop off was well beyond the allowable standard and asked if he could meet with the Zwingler family. Upon meeting with the Zwingler family, he signed a contract to represent the Estate of Ryan Edward Zwingler for a wrongful death claim. Attorney Melton had claimed he continued to follow state rules for pro hac vice status with the Supreme Court of Ohio. He filed an application with the Mahoning County Probate Court for his employment contract to be approved to pursue the claim. The contract was approved on October 16, 2014 (see attached Exhibit A). Just before the two year statute of limitations period expired, Attorney Melton filed the wrongful death action in the Mahoning County Court of Common Pleas on May 27, 2015, Case No. 2015 CV 1410 against Central Allied Enterprises

Inc. (See attached Exhibit B). On May 27, 2015, a companion lawsuit was filed by Attorney Melton in the Ohio Court of Claims against the Ohio Department of Transportation identified by Case Number 2015-00525JD (See attached Exhibit C). Both complaints were signed solely by Attorney Melton with what appeared to be a valid 2015 pro hac vice number (PHV2571-2015).

As both cases progressed Attorney Melton kept me informed as I was referring counsel. I was concerned about the behavior of the Defendant in the Mahoning County case, so I began extensive research for an explanation of this behavior. In August 2017, I discovered that the Defendant, Central Allied Enterprises Inc., had engaged in fraudulent conduct that changed the entire landscape of the case. The case was now a strict liability case with uncapped punitive damages due to the absolute public nuisance created wrongfully by the Defendant. I showed Attorney Melton the evidence and on September 20, 2017, I assisted him in compiling the large amount of information into a letter to defense counsel. The letter withdrew the current demand of 1.6 million dollars and due to the newly discovered information, made a new demand of 9 million dollars. The letter went into incredible detail as to the reasons for the high demand due to the nature of the wrongful conduct and the statutory uncapped punitive damages (See attached Exhibit D).

The Mahoning County case was set for jury trial on October 24, 2017 with a final pretrial on October 6, 2017. Knowing that a jury trial continuance by the Court would be impossible, Attorney Melton decided to attempt to settle at the next pretrial. If settlement would not be possible, he was going to dismiss both the Mahoning County case and the case in the Court of Claims. Since both cases had never been dismissed before, under the Ohio Savings Statute, they could both be refiled within one year of dismissal. I accompanied Attorney Melton to the final pretrial as it would be the first time the Court would be made aware of the Defendant's fraud. Attorney Melton and I agreed that it would be best coming from me as I have practiced locally for twenty-five years and the Court is familiar with me. Attorney Melton wanted to arrive at the courthouse early and give the Magistrate of copy of the letter of September 20, 2017 so he would be more familiar with the new claim. I told him it was an ex parte communication and he risked getting all of the information ruled as inadmissible. At the hearing, Attorney Melton cut me off every time I attempted to address the Magistrate. On two occasions I attempted to engage opposing counsel, and Attorney Melton interrupted me both times. I attempted to engage opposing counsel as we left the Magistrate's chambers and Attorney Melton jumped between us so I couldn't speak to him. The only thing accomplished at the hearing, was that Attorney Melton told the Court that he would be dismissing the case immediately so he could later refile the fraud action. Attorney Melton then went into the hallway and began to explain to Robert and Michele Zwinger (Ryan's parents) that they had a weak case to begin with but he would still work on the case despite how bleak it appeared.

Later that day, I was contacted by the Zwingler family with questions of why Attorney Melton's attitude toward the case had changed so rapidly. I told them I was unsure and would be

speaking with him about the issue. On Sunday, October 8, 2017, I was driving to church and trying to reconcile what had happened at the pretrial. I then recalled a few weeks earlier when in passing, Attorney Melton said he was going to check on his pro hac vice renewal status. I responded with, "check into that right away, its nothing to mess around with". Attorney Melton also mentioned to me at the courthouse on October 6, 2018 that he had checked his status and everything was fine. I began to wonder if he had lost enthusiasm for the case because of an issue with his privileges to practice in Ohio. When I arrived at church, I quickly checked my smart phone and found that his pro hac vice privileges had been on inactive status since January 1, 2017 due to failure to pay his renewal fee. The following day, I contacted the Ohio Supreme Court to verify that he was on inactive status during that time period. They confirmed the information was correct. The clerk then told me that he had been in the State's registry for many years. I responded that I believed that to be correct. She then went on to say that it was strange for someone to be in the registry for so long and never provide representation on a case during that time. I told her that Attorney Melton had done prior cases in Ohio going back to 2011 and was currently involved in two cases. She said there was no record of him ever having a case in the State of Ohio.

In the State of Ohio, every out of state attorney must be registered with the Ohio Supreme Court before they can petition a tribunal to enter an appearance as counsel on any matter. The law on pro hac vice admission is prescribed under Ohio Rules For The Government Of The Bar Of Ohio XII (See attached Exhibit E). Under Rule XII, Section 4, when an out of state attorney files for permission to appear before a tribunal, a notice of permission to appear incorporating the court order granting permission to appear, must be sent to the Office of Attorney Services with thirty days from the date the tribunal gives permission to appear in the case. After thirty days, failure to file the notice of permission to appear results in the automatic exclusion from the practice of law in the State of Ohio until the same is filed. As far as my knowledge of Attorney Melton's affairs in the State of Ohio, his applicable cases go as far back as 2011. Attorney Melton filed Shank v. Raval, 2011 CV 666 in the Columbiana County Court of Common Pleas, Columbiana County, Ohio (See attached Exhibit F-docket sheet), a case that would eventually become a jury trial. According to the docket sheet, Attorney Melton was granted an order to appear on April 19, 2012. According to Ohio law, he was required to file his notice of permission to appear with the Office of Attorney Services within thirty days or he would be automatically excluded from the practice of law. Attorney Melton never notified the Office of Attorney Services of this 2011 case, or any case, he had participated in until he self reported with a correspondence on October 20, 2017 admitting his failure to report his Ohio cases and requesting retroactive reinstatement (See attached Exhibit G). There is no provision in Ohio law for retroactive reinstatement. The period of exclusion is the period of exclusion and cannot be reconciled any other way. Therefore, Attorney Melton was on inactive status from January 1, 2017 until September 27, 2017 for failure to pay his renewal fee and excluded from the practice of law in the State of Ohio since May 19, 2012. During this time period he was actively providing representation in Ohio cases not just limited to the Zwingler family claim, but actually tried the Shank case to a jury verdict without privileges to practice law in the State of Ohio.

Once I confirmed this information, I immediately confronted Attorney Melton regarding his pro hac vice privlieges. He admitted that he failed to pay his reinstatement fee for 2017 and had no record of filing any notice of permission on any case he had appeared as counsel in Ohio. He claimed he had two million dollars in malpractice insurance and hoped it would be enough to make the Zwingler family whole. I told him that the immediate issue was the fact he had been practicing in two current cases without a valid license and both courts were expecting voluntary dismissals in both cases. He stated he would get them filed immediately. I told him I could not permit that as I would be permitting the unauthorized practice of law if I allowed him to do so and would be subject to a disciplinary violation. I told him I would file a notice of appearance with a subsequent notice of voluntary dismissal in both the Mahoning County and Court of Claims cases, which I did. We agreed the Courts should be notified of his situation. He asked if I could approach them on his behalf. He said if I did not feel comfortable doing so, he would take the responsibility on himself to do so. I told him I would put the Courts on notice. I met with Judge Robert N. Rusu Jr. of the Mahoning County Probate Court immediately thereafter as this was the Court who approved Attorney Melton's application to approve the wrongful death contract and allow him to pursue the case. Judge Rusu did a quick check of the public records himself before becoming very angry that he had given Attorney Melton permission to appear in the courts on this claim and he was using a pro hac vice number that appeared current, but was fraudulently obtained. Judge Rusu insisted that Attorney Melton immediately get off the case and would not be permitted to represent the Zwingler family any further on this claim. I then approached Magistrate Dennis Sarisky, who was the Magistrate we appeared before on the October 6, 2017 pretrial. Upon learning of this information, he immediately checked the public record for himself and angrily said that Attorney Melton would not be permitted to appear in this matter again and the Court would be awaiting the refile to address it appropriately. Magistrate Sarisky told me not to address this with Judge Sweeney as he would inform her himself.

Subsequently, Attorney Melton met with the Zwingler family at my office and told them there may be an issue with his privileges to practice but he would clear it up. When they questioned him further, his reply was "we" would be researching the matter further. When the Zwingler's left my office, I told Attorney Melton that I had researched this issue for close to 90 hours and could not find a way around the period of exclusion. In State v. Hadley, 2014-Ohio-3310 (See attached Exhibit H), any pleading signed by a Pennsylvania attorney who is not valid in the registry is "ab initio", a nullity, and cannot be revived with a subsequent filing. Pursuant to Civil Rule 11, only an attorney or a party can sign a complaint. This is the controlling case in the State of Ohio and out of our district as well. In addition, subject matter jurisdiction cannot be waived in the State of Ohio and can be addressed by the Court at any stage of the proceedings. The law in Ohio is clear, if any attorney files a complaint that he knows is beyond the statute of limitations, without a legitimate tolling argument, is guilty of frivolous conduct and his license to practice is subject to sanction. I told Attorney Melton that a

plan needed to be formulated to address this matter and asked him to read the cases I had uncovered. He refused to read the cases and said, "we will just have to wait and see how things fall". I asked him how he expected me to respond to the Zwingler family when they call wanting a status on their case. Attorney Melton stated, "just tell them we are still researching it". After I told him that would only pacify them for so long and they would be demanding an answer, Attorney Melton responded, "they will just have to accept that answer". He said he was hiring a lawyer in Ohio who would "fix" this, but would not identify the lawyer or how his counsel would be fixing the matter. He said once his counsel "fixed" the problem then he would begin working on the Zwingler matter right away. I told him that he would first need to get Judge Rusu's permission before he could even begin anything on behalf of the Zwingler's. He said he would meet with Judge Rusu right away.

I informed the Zwingler's that I was still researching the matter day and night, but had not found a way to revive the case. I told them Attorney Melton claims he has counsel in Ohio who will fix this and he will continue to pursue the claim. I also told them he must get Judge Rusu's permission before he could begin. The Zwingler's asked me to continue looking for an answer to revive the case and follow up with Judge Rusu to see if Attorney Melton had requested permission to act on their behalf. After two months, I contacted Judge Rusu's secretary who informed me that Attorney Melton had not even attempted to make an appointment to see the Judge. I spoke to a number of litigators to see if they would be willing to refile the complaint. While they all liked the value of potential damages, they would not refile without a legitimate tolling argument available before the refile. With the Magistrate enforcing that he would be watching for it, without a legitimate tolling argument, any filing attorney is jeopardizing his license.

On December 2, 2017, the Zwingler's instructed me to put Attorney Melton on notice that they wanted a resolution to this matter. I was to inform Attorney Melton to provide me with a legitimate tolling argument so the case could be refiled or the contact information for his liability carrier (See attached Exhibit I). Attorney Melton responded without providing either one (See attached Exhibit J). I responded with a letter on January 9, 2018 insisting on the information I requested (See attached Exhibit K). When there was no response, I forwarded a draft of a malpractice complaint with a deadline for the information (See attached Exhibit L). At that point began a series of communications between myself and Attorney George Jonson, on behalf of Attorney Melton (See attached Exhibit M-Application For An Order To Disclose Insurance Information). Attorney Jonson stated my draft complaint had been forwarded to the carrier and wanted our settlement demands. I continued to insist the carrier information to verify coverage. I was told no contact with the insurer would be permitted. At that point, I filed The Application For An Order To Disclose Insurance Information with the Mahoning County Probate Court. Attorney Melton filed an opposition to it which was promptly denied. Attorney Melton provided his carrier information two days before the scheduled hearing which was subsequently canceled.

Attorney Melton's treatment of the Zwingler family is a disgrace. Not only have they lost their son, but they have been put through almost two years of agonizing litigation for nothing only to find out their claim has been extinguished due to Attorney Melton's carelessness. This family will have justice. Based upon Attorney Melton's letter of September 20, 2017 making a new demand of 9 million dollars with a thoroughly detailed explanation as to the justification for the value, we are making a demand of 9 million dollars to settle this claim.

Upon your review of this package, please feel free to contact me so we can attempt to resolve this matter. As I have been previously informed by a third party that I was not to communicate with you directly, please provide confirmation that all contact should only be through you as I do not wish to correspond in this matter inappropriately.

VERY TRULY YOURS,

WILLIAM KISSINGER
ATTORNEY AT LAW

WK
Attachments
Sent by regular mail and facsimile

cc: Robert and Michele Zwingler
Attorney Craig G. Pelini

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

IN THE MATTER OF	)	CASE NO. 2013 ES 364
	)	
THE ESTATE OF RYAN EDWARD ZWINGLER	)	JUDGE ROBERT N. RUSU
	)	
DECEASED	)	
	)	APPLICATION FOR AN ORDER TO
	)	DISCLOSE INSURANCE INFORMATION

Now comes the Fiduciary, Michele Zwingler, by and through undersigned counsel, who respectfully moves this Honorable Court to issue an order requiring Attorney Scott Melton to supply his declaration page and professional liability insurance contact information within seven (7) days. For cause, the fiduciary states that the Estate is entitled to the information due to Attorney Melton's devaluing the wrongful death claim in the above captioned matter.

STATEMENT OF THE FACTS

On October 10, 2014, Attorney Scott Melton filed an application to ratify a contingent fee contract so he could represent the Estate regarding a wrongful death claim. On October 16, 2014, this Court issued an order that pursuant to his application, Attorney Scott Melton was given authority to represent the Estate on the wrongful death claim. Litigation proceeded on May 27, 2015 in the Mahoning County Court of Common Pleas. The case was dismissed on October 11, 2017. On October 12, 2017, the Mahoning County Probate Court determined that Attorney Melton had been on inactive status in the State of Ohio since January 1, 2017. As per the Court's review of the pro hac vice registration on the Ohio Supreme Court's website, the inactive status was due to failure to pay his reinstatement fee for his

13 ES384

pro hac vice registration and later discovered he had not filed his notice of permission on any of the cases he had done in Ohio going back to 2012, thereby devaluing the wrongful death claim. On October 27, 2017, the Court withdrew Attorney Melton's authorization to represent the Estate any further.

On December 2, 2017, Attorney Kissinger, on behalf of the Fiduciary and next of kin, requested in writing Attorney Melton's insurance contact information. Attorney Melton did not comply. On January 9, 2018, Attorney Kissinger requested the same information which was not complied with. On January 29, 2018, Attorney Kissinger and co-counsel, Attorney Craig Pelini, sent a draft of a malpractice complaint to Attorney Melton and informed him that if the information was not supplied, the complaint would be filed. On February 6, 2018 Attorney George Jonson, counsel for Attorney Melton, sent an email stating the drafted complaint had been forwarded to the carrier and Attorney Jonson requested a settlement demand. On February 7, 2018, Attorney Kissinger responded to Attorney Jonson's email and again requested the declaration page and the insurer contact information. On February 7, 2018, Attorney Jonson responded stating that the coverage was $2 million and all settlement communication would go through Attorney Jonson. On February 8, 2018, Attorney Kissinger, again, requested the same information and stated it was necessary for any negotiations. (See Exhibit A Email Chain). Based upon no further communication from Attorney Jonson, Attorney Kissinger sent a letter requesting the information again or Attorney Kissinger would seek assistance from the Mahoning County Probate Court (See attached Exhibit B). On February 22, 2018. Attorney Jonson sent a letter notifying the Estate that Attorney Kissinger was not permitted to negotiate with the insurer directly (See attached Exhibit C).

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LAW AND ARUGMENT

The Probate Court has jurisdiction to address the breach of fiduciary duty on behalf of an estate attorney. Ivancic v. Enos, 2012-Ohio-3639, (Ohio App. 11 Dist. 2012) The Probate Court is a court of limited jurisdiction but with plenary power at law and in equity to dispose fully of any matter that is properly before the court. Ohio Revised Code 2102.24(A). Ivancic v. Enos went on to state:

> "The plenary power situated in the probate court is a complete and total power to determine issues concerning the administration of an estate. This power extends to the right to determine the heirs and to order distribution to them. In other words, it is strictly limited to matters involved the enhancement or depletion of the estate and distribution of that estate to the proper heirs." Id at ¶ 38.

In addition, the Ohio Supreme Court recently stated in paragraph 10 of Columbus Bar Association v. Nyce, 2018-Ohio-9, that pursuant to Ohio Rule of Professional Conduct 8.4 (c), an attorney cannot ignore or evade his successor counsel's repeated and legitimate request that he provide information about his professional-liability insurance (See attached Exhibit D).

In this case, Attorney Melton acquiesced to the jurisdiction of the Mahoning County Probate Court when he filed his application to have his wrongful death contract approved. After Attorney Melton was removed by this Court, this Court retained its plenary power to issue orders regarding any decrease in valuation of the wrongful death claim as a chose in action of the estate due to Attorney Melton's actions. The Fiduciary is not asking this Court to determine any issues regarding damages, valuations or liabilities regarding the wrongful death claim. The Fiduciary is asking the Court to use its plenary power for assistance in obtaining the information necessary to investigate any potential sources of funding that would be available to restore any loss of valuation to the claim. In addition to the Estate's right to the information under this Court's plenary power, Attorney Melton is required under Ohio Rule of

13ES364

Professional Conduct 8.4 (c) to provide the information to Attorney Kissinger when it had been repeatedly requested.

Therefore, the Fiduciary is requesting an order that Attorney Scott Melton disclose the declaration page and professional liability insurance contact information to counsel within seven (7) days from the date of the order.

Respectfully Submitted:

William Kissinger

WILLIAM KISSINGER (ID#0059149)
Attorney For Michele Zwingler
Fiduciary
7631 South Ave. Suite F
Youngstown, Ohio 44512
(330) 629-8877

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular U.S. mail to Attorney George Jonson at MONTGOMER, RENNIE & JOHNSON, 36 East Seventh Street, Cincinnati, Ohio 45202-4452 and Attorney Craig G. Pelini at Pelini, Campbell & Williams LLC, 8040 Cleveland Ave. NW, Suite 400, North Canton, Ohio 44720 this 28th day of March, 2018.

William Kissinger

WILLIAM KISSINGER
Attorney For Michele Zwingler
Fiduciary

FILED
MAH, CTY, PROBATE COURT
MAR 28 2018

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MAHONING COUNTY, OHIO

IN THE MATTER OF:	)	CASE NO.: 2013 ES 00364
THE ESTATE OF:	)	JUDGE ROBERT N. RUSU, JR.
Ryan Edward Zwingler	)	NOTICE OF HEARING

FILED
MAHONING COUNTY PROBATE COURT
MAR [illegible] 2018
Judge Robert N. Rusu, Jr.

TO: Attorney Scott L. Melton
300 Ninth Street
Conway, PA 15027

Please take notice that on Thursday, April 19, 2018 at 9:30 am a hearing with a visiting Judge on the *Application for an Order to Disclose Insurance Information* will be held in the *Mahoning County Probate Court*, Mahoning County Court House, 1st Floor, 120 Market Street, Youngstown, Ohio 44503. Your attendance is ***mandatory*** at said hearing.

This notice shall be your only notice in this cause.

HON.: _____
Robert N. Rusu, Jr., Judge

Mailed March 29, 2018 by regular mail, with proof of mailing.

_____
DEPUTY CLERK

CC: Attorney William J. Kissinger
Michele Zwingler

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MAHONING COUNTY, OHIO

EXHIBIT L

IN THE MATTER OF THE ESTATE OF:	)	**CASE NO: 2013 ES 00364** **Related Case No.: 2019 CI 1**
RYAN EDWARD ZWINGLER, DECEASED	)	**JUDGE THOMAS A. SWIFT** **Sitting by Assignment**

JUDGMENT ENTRY

This matter is before the Court on the *Motion to Strike Judgment Entry Pursuant to Civil Rule 60* filed on February 7, 2019.

Upon review of the pleadings, the Court finds that the *United States District Court for the Northern District of Ohio* case number 4:19-cv-00247 has been dismissed as of February 2, 2019.

Therefore, the Court hereby vacates its February 5, 2019 *Judgment Entry* staying the Contempt proceedings in this matter as well as the related Civil action (2019 CI 1).

Further, it is the Order of this Court that the show cause hearing shall proceed. As such, it is the Order of this Court that **Scott L. Melton** appear in open Court to show cause why he should not be held in contempt on March 7, 2019 at 10:00 a.m.

The Clerk is directed to serve a copy of the foregoing *Judgment Entry* upon upon **Scott L. Melton**, by certified United States mail, return receipt requested, and upon **Attorney William Kissinger**, **Attorney Paul D. Eklund**, **Attorney Monica Sansalone**, **Attorney Maia Jerin**, and **Michele Zwingler**,, by regular United States mail, and to note the fact of such service upon the docket of the Court.

IT IS SO ORDERED.

Dated: February 12, 2019

Thomas A. Swift

Honorable Thomas A. Swift, Judge
Sitting by Assignment

FILED
MAH, CTY, PROBATE COURT
FEB 12 2019

Its copy cert mail to Scott Melton

Its copy reg mail to Attys: Kissinger, Eklund, Sansalone, Jerin & Michele

2013 ES 00364 00037821157 JE

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IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

IN RE THE ESTATE OF RYAN EDWARD ZWINGLER DECEASED	**CASE NO: 2013 ES 364** **JUDGE THOMAS S. SWIFT** **NON-PARTY SCOTT L. MELTON'S RENEWED MOTION FOR CLARIFICATION REGARDING SCOPE OF SHOW CAUSE HEARING AND REQUEST FOR PREHEARING CONFERENCE**

Non-Party Scott L. Melton, by and through undersigned counsel, respectfully requests the Court clarify the scope and issues to be addressed at the show cause hearing the Court is currently trying to reset. The Due Process Clause of the United States Constitution provides significant safeguards to an accused contemnor, including the right to notice of the charge against him. In order to satisfy these protections, Mr. Melton again seeks clarification as to the scope of such a hearing now that the Zwinglers have dismissed their case against him and in furtherance of same, request a pretrial conference.

I. STATEMENT OF FACTS

The facts pertinent to this Motion are set forth in Mr. Melton's January 18, 2019 Motion for Clarification, which is incorporated herein by reference. As set forth in Mr. Melton's initial Motion for Clarification, which remains pending, William Kissinger, in his capacity as counsel for Fiduciary Michele Zwingler, filed a Motion for Summary Direct Contempt on December 13, 2018 which sought to hold Attorney Scott L. Melton in contempt for his failure to advise the Supreme Court of Ohio of his *pro hac vice* status with respect to wrongful death claims filed in other courts. Although the Court denied the Fiduciary's contempt motion without explanation on

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January 9, 2019, the Court scheduled a February 12, 2019 hearing "...to provide Scott L. Melton an opportunity to show cause why he should not be held in contempt." However, the Court's Order did not identify the basis or scope of the relevant alleged contemnible conduct or the issues to be addressed at the hearing. In response, on January 18, 2019, Mr. Melton filed a Motion for Clarification Regarding Show Cause Order raising jurisdictional issues related to the Fiduciary's contempt motion. That motion remains pending, and has not been opposed.

On January 11, 2019, the Fiduciary improperly filed a Complaint in the Mahoning County Probate Court asserting breach of fiduciary duty claims against Mr. Melton which arose out of his involvement in the wrongful death actions. Mr. Melton properly removed the complaint to Federal Court, and the Fiduciary almost immediately dismissed the complaint pursuant to Fed.R.Civ.P. 41(a).[1] Mr. Melton filed a Notice of Removal in this Court as required by 28 U.S.C. § 1441 on February 4, 2019.[2] The Court thereafter stayed all contempt proceedings and cancelled the February 12, 2019 show cause hearing "pending the decision of the *United States District Court for the Northern District of Ohio*."

On February 11, 2019, undersigned counsel's assistant received a call from the Court indicating that it planned to reschedule the show cause hearing for March 7th or 8th, 2019. As an initial matter, undersigned counsel is unavailable on the suggested dates and Monica Sansalone will be out of the country from March 16th through March 25th. Likewise, necessary witnesses such as Michelle Bowman, Assistant Disciplinary Counsel, is unavailable April 4, 9, and 12th. But more importantly, and as set forth in Mr. Melton's initial Motion for Clarification, Mr. Melton has received no notice as to the specific issues to be addressed at the show cause

[1] The Fiduciary's unwillingness to litigate claims in any other court only highlights the blatant and improper forum shopping.

[2] Undersigned counsel sent the Notice via FedEx on Friday, February 1, 2019; however the Court received it on Monday, February 4th, 2019, after the case was already dismissed.

hearing.[3] The Court's failure to provide adequate notice as to the scope of the hearing contravenes the due process safeguards applicable to contempt proceedings.

The Fiduciary's counsel, William Kissinger, petitioned the Court to address issues well beyond its jurisdictional limits. In denying Mr. Kissinger's contempt motion, the Court failed to offer any guidance as to the issues it intends to address at the proposed show cause hearing. For the following reasons, Mr. Melton respectfully renews his request for clarification regarding the proposed show cause hearing to allow him to adequately prepare a defense and call necessary witnesses.

II. LAW AND ARGUMENT

A. Mr. Melton is Entitled to Notice Regarding the Scope of the Show Cause Hearing.

Due process of law, the "law of the land," applies to the law of contempt of court. *In re Contemnor Caron*, 110 Ohio Misc.2d 58, 109, 744 N.E.2d 787, 824 (C.P. 2000). The accused contemnor is entitled to a hearing that incorporates the guarantees of due process of law under the Fourteenth Amendment of the United States Constitution and the Ohio Constitution. *Id.*[4] These due process protections must be strictly construed. *Id.* (citing *White v. Gates*, 42 Ohio St. 109, 112 (1884)).

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[3] As set forth in Mr. Melton's January 18, 2019 Motion for Clarification, most of the issues raised in the Fiduciary's contempt motion are outside the jurisdiction of this Court. For example, and without limitation, the probate court may address breach of fiduciary duties arising from the administration of an estate, not litigation involving an estate. *Ivancic v. Enos*, 11th Dist. No. 2011-L-050, 2012-Ohio-3639, 978 N.E.2d 927, ¶ 37; *Cain v. Panitch*, 10th Dist. Franklin No. 16AP-758, 2018-Ohio-1595, ¶ 22. This Court must also address the Fiduciary's claims as "legal malpractice" over which the Court also lacks jurisdiction. *Sandor v. Marks*, 9th Dist. Summit No. 26951, 2014-Ohio-685, ¶ 10.

[4] Citing *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911); *Cooke v. United States*, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed (1925); *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Hicks v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423, 99 L.Ed.2d 721

Due process safeguards in indirect criminal contempt proceedings include: (1) the right to notice of the charge, (2) the right to service of notice, (3) the right to bail, (4) the right to counsel, (5) the right to sufficient time to prepare defense, (6) the right to be present at trial, (7) the right to a public trial, (8) the right to a speedy trial, (9) the (qualified) right to a jury trial, (10) the right to an impartial judge, (11) the right to call and subpoena witnesses, (12) the right to cross examine adverse witnesses, (13) the right to the presumption of innocence, (14) the right to invoke the privilege against self-incrimination, (15) the right to the proper standard of proof, and (16) the right to appeal. *Id.*

Relevant to this motion is Mr. Melton's due process right to notice of the charges against him. It is well settled that an accused contemnor has the due process right to notice of the contempt charge and its underlying factual basis. *Id.* (citing *Cooke v. United States*, 267 U.S. 517, 537 (1925)("Due process of law * * * requires that the accused should be advised of the charges * * *. The rule should [contain] enough to inform the defendant of the nature of the contempt charged."); *City of Cincinnati v. Cincinnati Dist. Council 51, Am. Fedn. of State, Cty. & Mun. Emp., AFL-CIO*, 35 Ohio St.2d 197, 202, 299 N.E.2d 686, 692 (1973) (purpose of notice is to apprise accused of charges so he is able to prepare defense)). Specifically, the party alleged to be guilty is entitled to notice of "when and where the contempt was committed, with such reasonable certainty as to inform him of the nature and circumstances of the charge and it must set out the facts constituting the contempt." *Id.*

Here, the Court has provided no such notice. The Court's January 9, 2019 Order setting the February 12, 2019 show cause hearing does not identify the nature of the alleged contemnible conduct or any facts giving rise to the alleged contempt. Indeed, the Judgment Entry offers no

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(1988); *In re Neff*, 20 Ohio App.2d 213, 49 O.O.2d 312, 254 N.E.2d 25 (1969); *In re Parker*, 105 Ohio App.3d 31, 663 N.E.2d 671 (1995).

clarification or notice as to the scope of the hearing, the issues to be addressed, or the basis for the alleged contempt. The Court has not indicated whether it will address the merits of the wrongful death case currently pending in the General Division, whether the Court intends to consider the Fiduciary's now-dismissed breach of fiduciary duty claim, or whether the court intends to limit the hearing to other matters. The Fiduciary's December 13, 2018 contempt motion was denied, but there is nothing identifying what issues will be addressed at the show cause hearing to allow Mr. Melton to adequately prepare for the hearing. Failure to provide such notice violates Mr. Melton's due process rights.

B. Mr. Melton Requests a Prehearing Conference.

Mr. Melton respectfully requests a prehearing conference to allow the Court and counsel to address the pending motions and other issues related to this proceeding.

III. CONCLUSION

In its January 9, 2019 Judgment Entry, this Court denied the Fiduciary's Motion for Summary Direct Contempt of Court and yet set this matter for a show cause hearing on February 12, 2019. This Court is patently without jurisdiction to address the issues originally raised in the Fiduciary's motion, but has offered no guidance or notice to Mr. Melton regarding the issues it plans to address at the proposed show cause hearing. Given the Court's unambiguous lack of jurisdiction to address the main issues raised in the Fiduciary's motion, Melton and his undersigned counsel are unable to prepare for the scheduled hearing without such notice. It is therefore respectfully requested that this Court give notice of the issues which will be addressed at the proposed show cause hearing or schedule a prehearing conference to address same.

Respectfully submitted,

MONICA A. SANSALONE (0065143)
MAIA E. JERIN (0092403)
Gallagher Sharp LLP
Sixth Floor - Bulkley Building
1501 Euclid Avenue
Cleveland, Ohio 44115-2108
(216) 241-5310 Telephone
(216) 241-1608 Facsimile
E-Mail: msansalone@gallaghersharp.com
mjerin@gallaghersharp.com
Attorneys for Scott L. Melton

CERTIFICATE OF SERVICE

A copy of the foregoing *Renewed Motion for Clarification and Request for Prehearing Conference* was sent via regular U.S. Mail, postage pre-paid, this 13th day of February, 2019 to the following:

William Kissinger (0059149)
7631 South Avenue, Suite F
Youngstown, Ohio 44512
(330) 629-8877 Telephone
Attorney for Fiduciary

Paul D. Eklund (0001132)
Collins, Roche, Utley & Garner, LLC
875 Westpoint Parkway, Suite 500
Westlake, Ohio 44145
(216) 916-7730 Telephone
(216) 916-7725 Facsimile
Attorney for Non-Party
Central Allied Enterprises, Inc.

MONICA A. SANSALONE (0065143)
MAIA E. JERIN (0092403)
Gallagher Sharp LLP
Attorneys for Scott L. Melton

The Supreme Court of Ohio

In re Disqualification of Hon. Thomas A. Swift

Supreme Court Case No. 19-AP-029

JUDGMENT ENTRY AND DECISION

ON AFFIDAVIT OF DISQUALIFICATION in *In re Estate of Ryan Edward Zwingler*, Mahoning County Court of Common Pleas, Probate Division, Case No. 13 ES 364.

Scott A. Melton has filed an affidavit with the clerk of this court pursuant to R.C. 2701.03 and 2101.39 seeking to disqualify Judge Thomas A. Swift, a retired judge sitting by assignment, from presiding over any further proceedings in the above-referenced case. Judge Swift recently scheduled a hearing for Mr. Melton to show cause why he should not be held in contempt. *See* Melton affidavit at Ex. T.

Mr. Melton claims that Judge Swift should be disqualified to avoid any appearance of impropriety created by the judge's relationship with Judge Robert Rusu, the current judge of the Mahoning County Probate Court, who recused himself due to a potential conflict of interest. *See id.* at ¶ 34-39, Ex. I. According to Mr. Melton, the judges have a close relationship and "[e]very single probate case in which Judge Rusu has recused himself during 2018 has been assigned to Judge Swift at Judge Rusu's direction." *See id.* at ¶ 37. Mr. Melton also asserts that by scheduling the show-cause hearing, Judge Swift has pre-judged the issues, and Mr. Melton believes that opposing counsel has engaged in forum shopping. *See id.* at ¶ 32-45.

EXHIBIT N

Judge Swift has responded in writing to the affidavit and requests that it be denied. The judge states that prior to being assigned to this case, he did not know any of the parties or attorneys, and he does not believe that his scheduling of a hearing demonstrates bias or prejudice.

For the reasons explained below, no basis has been established to order the disqualification of Judge Swift.

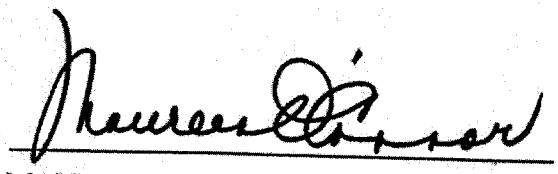
First, Judge Swift's assignment to this case does not create an appearance of impropriety. Mr. Melton is correct that a disqualified or recused judge ordinarily should not select his or her successor. *See* Guidelines for Assignment of Judges, Section 2.5 ("if the administrative judge has recused from a case, the administrative judge may not request a specific judge to be assigned to that case"); Flamm, *Judicial Disqualification*, Section 22.4, at 653 (2d Ed.2007) ("proper procedure ordinarily requires that a judge should not attempt to intervene in the selection of his successor—much less assign the case to another judge"). But here, the Chief Justice assigned Judge Swift to the underlying case—not Judge Rusu. *See* Certificate of Assignment 18JA0809. And although it is true that Judge Swift regularly hears cases in the Mahoning County Probate Court as a visiting judge, Mr. Melton has failed to sufficiently explain why Judge Swift's professional or personal relationship with Judge Rusu would cause an objective observer to harbor serious doubts about Judge Swift's impartiality in this matter. *See In re Disqualification of Lewis*, 117 Ohio St.3d 1227, 2004-Ohio-7359, 884 N.E.2d 1082, ¶ 8 (setting forth the proper test for disqualifying a judge based on an appearance of impropriety).

Second, the mere fact that Judge Swift scheduled the show-cause hearing does not establish that he is biased or that he has prejudged any issues in the case. Nor does Mr. Melton's belief that opposing counsel engaged in forum shopping support the judge's removal. "A judge is presumed to follow the law and not to be biased, and the appearance of bias or prejudice must be compelling

to overcome these presumptions." *In re Disqualification of George,* 100 Ohio St.3d 1241, 2003-Ohio-5489, 798 N.E.2d 23, ¶ 5. Mr. Melton's allegations have not overcome those presumptions. He may have other remedies if he believes that the probate court lacks jurisdiction over certain claims or if the court failed to properly notify him of the scope of the show-cause hearing. But it is well settled that an "affidavit of disqualification addresses the narrow issue of the possible bias or prejudice of a judge. It is not a vehicle to contest matters of substantive or procedural law." *In re Disqualification of Solovan,* 100 Ohio St.3d 1214, 2003-Ohio-5484, 798 N.E.2d 3, ¶ 4. Without more, it outside the scope of this proceeding to review a probate court's jurisdiction or the propriety of a judge's decision to schedule a hearing.

The affidavit of disqualification is denied. The case may proceed before Judge Swift.

Dated this 8th day of March, 2019.



MAUREEN O'CONNOR
Chief Justice

Copies to: Sandra H. Grosko, Clerk of the Supreme Court
Hon. Thomas A. Swift
Clerk, Mahoning County Court of Common Pleas, Probate Division
Paul Eklund
William Kissinger Jr.
Maia Jerin
Monica Sansalone

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IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO
PROBATE DIVISION

MICHELE ZWINGER individually and as the ADMINISTRATRIX OF THE ESTATE OF RYAN EDWARD ZWINGLER, DECEASED 7564 West Pine Lake Road Salem, Ohio 44460 and ROBERT ZWINGLER JR. 7564 West Pine Lake Road Salem, Ohio 44460 Plaintiffs, SCOTT L. MELTON 1112 Harrow Hill Court Moon Township, Pennsylvania 15027 and CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY 333 W. Wabash Avenue Chicago, Illinois 60604 Defendants,	CASE NUMBER: JUDGE THOMAS A. SWIFT **Complaint** **Breach of Fiduciary Duty,** **Fraud, Destruction of Estate** **Asset, Interference With Business Relations** **Demand For Punitive Damages** **Instructions to the Clerk**

Now comes the Plaintiffs, ROBERT ZWINGLER JR., individually and MICHELE ZWINGLER, both individually and as Administratrix of the Estate Of Ryan Edward Zwingler, Case Number 2013 ES 364

which is filed in the Mahoning County Probate Court in Mahoning County, Ohio, who state the following:

STATEMENT OF THE FACTS

1. On or about May 27, 2013, the decedent, RYAN EDWARD ZWINGER, was killed in a motor vehicle accident which appeared to be the result of actions or inactions of a paver, CENTRAL ALLIED ENTRERPRISES INC., thereby necessitating a wrongful death lawsuit be filed on behalf of the estate and the vested heirs;

2. The decedent died without a will and without a wife or children;

3. At all times relevant, ROBERT ZWINGLER JR. was the natural father of the deceased, RYAN EDWARD ZWINGER, and a vested beneficiary in Ryan's estate;

4. At all times relevant, MICHELE ZWINGER, was the natural mother of the deceased, RYAN EDWARD ZWINGER, and was a vested beneficiary in Ryan's estate;

5. The estate was opened in the Mahoning County Probate Court on June 21, 2013 under Case Number 2013 ES 364;

6. On July 1, 2013, MICHELE ZWINGLER was appointed administratrix of the ESTATE OF RYAN EWARD ZWINGLER by the Court;

7. On September 9, 2014, Defendant, ATTORNEY SCOTT L. MELTON signed a contingency fee contract

with MICHELE ZWINGLER ,in her capacity as the fiduciary for the ESTATE OF RYAN EDWARD. ZWINGLER, to represent the estate for the wrongful death claims (See attached Exhibit "A");

8. On October 16, 2014, pursuant to Defendant, SCOTT L. MELTON's application to the Court, the Probate Court approved the retainer agreement and gave Defendant, SCOTT L. MELTON, authority to appear as counsel on behalf of the estate (See attached Exhibit "B");

COUNT ONE
BREACH OF FIDUCIARY DUTY

9. Defendant, SCOTT L. MELTON, filed suit against the paver in the Mahoning County Court of Common Pleas in Case number 2015 CV 1410 on May 27, 2015 and against the OHIO DEPARTMENT OF TRANSPORTATION in the Court of Claims in Case number 2015-000525 on May 27, 2015;

10. On or about September 20, 2017, Defendant, SCOTT L. MELTON, discovered that due to fraudulent conduct of the Defendant in the Mahoning County case, the claim was worth far more than he originally evaluated. Therefore, Defendant, SCOTT L. MELTON, sent a letter to counsel for CENTRAL-ALLIED ENTERPRISES INC. withdrawing his prior demand of 1.7 million dollars and making a new demand of 9 million dollars (See attached Exhibit "C");

11. It was subsequently discovered that Defendant, SCOTT L. MELTON, had been excluded from the practice of law in the State of Ohio since May 19, 2012 through October 23, 2017 for failure to file **any** notices of permission on **any** case he handled in the State of Ohio in addition to being placed on inactive status from January 1, 2017 through October 23, 2017 for failing to pay his renewal fee for his pro hac vice status and file the renewal affidavit with the bar admission office;

12. Defendant, SCOTT L. MELTON, had the status of a non-lawyer in the State of Ohio from May 19, 2012 through October 23, 2017. The complaints filed by the Defendant, SCOTT L. MELTON, on behalf of

the ESTATE OF RYAN EDWARD ZWINGLER, in both the Common Pleas Court and the Ohio Court of Claims, were void as they were signed by a non-lawyer pursuant to Ohio Rule of Civil Procedure 11;

12. Once the contingency fee agreement was signed by the Defendant, SCOTT L. MELTON and MICHELE ZWINGLER, Administratrix for the ESTATE OF RYAN EDWARD ZWINGLER, by law, a fiduciary relationship was immediately created between the parties

13. The Defendant, SCOTT L. MELTON, owed specific fiduciary duties to the Plaintiffs in this action, Including, but not limited to, a duty to act in good faith towards his clients;

14. The Defendant, SCOTT L. MELTON, violated his fiduciary duties to the Plaintiffs by his actions, including, but not limited to, failure to obtain and maintain privileges to practice law in the State of Ohio, duty to initiate a lawsuit prior to the expiration of the statute of limitations, duty to keep his clients informed of his licensing issues and duty to cooperate with the clients once they become aware of the Defendant's unlawful acts;

15. Every violation of the Defendant, SCOTT L. MELTON's, fiduciary duty to the Plaintiffs are legally breaches of his fiduciary duties owed to Plaintiffs;

16. Plaintiffs have suffered damages including, but not limited to, severe mental and emotional distress and the inability to file a lawsuit against Central Allied Enterprises Inc. for the 9 million dollars which based upon the Defendant, SCOTT L. MELTON'S, own evaluation (See attached Exhibit "C");

WHEREFORE, Plaintiffs pray for compensatory damages in excess of $25,000.00 against the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT TWO
FRAUD

17. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein.

18. At all times relevant, the Defendant, SCOTT L. MELTON, represented himself as an attorney who had privileges to practice law in the State of Ohio;

19. At all times relevant, the Defendant, SCOTT L. MELTON'S representations that he had privileges to practice law in the State of Ohio were false, recklessly made, and with the intent of obtaining the Plaintiffs' reliance on said representations;

20. All parties, the Plaintiffs, the courts and opposing counsel, relied on these false representations made by the Defendant, SCOTT L. MELTON. However, only the Plaintiffs reliance on these representations resulted in damages to themselves and their claim;

21. Based upon Plaintiffs' reliance on the Defendant's false representations, Plaintiffs suffered severe mental and emotional distress and substantial monetary loss due to the Inability to file against the paver in the original lawsuit to recover the 9 million dollars as outlined by the Defendant in Exhibit C;

WHEREFORE, Plaintiffs pray for compensatory damages in excess of $25,000.00 against the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT THREE
WASTE AND DESTRUCTION OF A PROBATE ASSET

22. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein.

23. Due to the Defendant, SCOTT L. MELTON'S failure to have privileges to practice law in the State of Ohio, the complaint against the paver, CENTRAL-ALLIED ENTERPRISES INC., was void resulting in an expiration of the statute of limitations for said claim;

24. A wrongful death claim is an estate asset;

25. The Probate Court has a the complete duty of oversight with plenary power to determine issues concerning the administration of an estate (especially enhancement and depletion), to determine heirs and to order distribution of the entire estate to said heirs and addressing waste of an asset;

26. Due to Defendant, ATTORNEY SCOTT MELTON'S actions, the wrongful death claim which had a value of 9 million dollars (Exhibit C), is now worthless;

WHEREFORE, Plaintiffs pray for compensatory damages in excess of $25,000.00 against the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT FOUR
PUNITIVE DAMAGES

27.. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein;

28. At all times relevant, the Defendant, SCOTT L. MELTON, acted with actual malice;

29. At all times relevant, the Defendant, SCOTT L. MELTON, had a conscious disregard for the Plaintiffs' rights while being aware of the great probability of substantial harm to the Plaintiffs, thereby entitling them to punitive damages;

WHEREFORE, Plaintiffs pray for punitive damages in excess of $25,000.00 against the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT FIVE
INTERFERENCE WITH BUSINESS RELATIONS

30. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein;

31. At all times relevant, the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY is an insurance company authorized to write liability insurance in Ohio with offices in the State of Ohio and, was the professional liability carrier for the Defendant, SCOTT L. MELTON;

32. On or about May 2, 2018, Plaintiffs' counsel sent a 98 page detailed demand package to the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, with all of Defendant, SCOTT L. MELTON'S licensing issues and evidence of damages sustained; and addressing waste of an asset;

33. Subsequently, the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, forwarded the entire package to Attorney Paul D. Eklund, counsel for the original Defendant, CENTRAL ALLIED ENTERPRISES INC. (See attached Exhibit "D").

34. CENTRAL ALLIED ENTERPRISES INC., were still in settlement negotiations with Plaintiffs with a settlement offer of $25,000.00 still on the table, as they were unaware of Defendant, SCOTT L. MELTON'S issues;

35. The Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, forwarded the demand package to Attorney Eklund hoping he would pull the $25,000.00 off the table and refuse to negotiate any further. At that point, the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, could argue the claim actually had no value as the previous settlement offer had been withdrawn and no further offers would be forthcoming;

36. The Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, did not expect Attorney Eklund to notify Plaintiffs as to the reason he was taking a new position on settlement;

37. Until Plaintiffs demand package was forwarded to Attorney Eklund by the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, Plaintiffs still had the opportunity to continue to negotiate with CENTRAL ALLIED ENTERPRISES INC., even though the claim could not be refiled;

38. Due to the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY's interference with the business relations between CENTRAL ALLIED ENTERPRISES INC., and the Plaintiffs, the Plaintiffs have suffered severe mental and emotional damages in addition to extensive monetary damage.

WHEREFORE, Plaintiffs pray for compensatory damages in excess of $25,000.00 against

the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY joint and severally with the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT SIX
BREACH OF FIDUCIARY DUTY

39. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein;

40. At all times relevant, the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, was acting as an agent of Defendant, SCOTT L. MELTON and thereby acting in his stead, when it sent Plaintiffs' demand package to Attorney Paul Eklund attempting to devalue Plaintiffs' claim against the Defendant, SCOTT L. MELTON. If successful, they would have no insurable liability as Defendant, SCOTT L. MELTON's professional liability carrier;

41. Plaintiffs have suffered severe mental and emotional damage as well as extensive monetary loss as a result of Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY's actions.

WHEREFORE, Plaintiffs pray for compensatory damages in excess of $25,000.00 against the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY joint and severally with the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT SEVEN
WASTE AND DESTRUCTION OF A PROBATE ASSET

42. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein;

43. Due to the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY's actions in forwarding the demand package to Attorney Eklund, Plaintiffs were deprived the opportunity to attempt to recover anything more even though the negotiation had remained open and was not closed until the demand package was forwarded;

44. The Probate Court has a the complete duty of oversight with plenary power to determine issues concerning the administration of an estate (especially enhancement and depletion), to determine heirs and to order distribution of the entire estate to said heirs and addressing waste of an asset;

45. Due to the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY's actions, an estate asset was destroyed and the **open** opportunity to recoup the value was lost as well;

WHEREFORE, Plaintiffs pray for compensatory damages in excess of $25,000.00 against the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY joint and severally with the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

COUNT EIGHT
PUNITIVE DAMAGES

46. Plaintiffs, hereby adopt and incorporate herein by reference all claims, counts, allegations, and averments contained in this Complaint, whether stated before or after this claim or count, as if same were fully rewritten herein;

47. At all times relevant, the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, acted with actual malice;

48. At all times relevant, the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY, had a conscious disregard for the Plaintiffs' rights while being aware of the great probability of substantial harm to the Plaintiffs, thereby entitling Plaintiffs to punitive damages;

WHEREFORE, Plaintiffs pray for punitive damages in excess of $25,000.00 against

the Defendant, CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY joint and severally with the Defendant, SCOTT L. MELTON, plus attorney's fees, costs, prejudgment interest and such other relief as this Court deems appropriate.

Respectfully Submitted,

William Kissinger (0059149)
Attorney For Plaintiff
7631 South Avenue Suite F
Youngstown, Ohio 44512
(330) 629-8877

INSTURCTIONS TO THE CLERK

PLEASE SERVE A COPY OF THE FOREGOING COMPLAINT WITH ATTACHED MOTION FOR STAY by certified mail, return receipt requested, to Attorney Scott L. Melton c/o Attorney Monica Sansalone at Gallagher Sharp LLP, Sixth Floor-Bulkley Building, 1501 Euclid Avenue, Cleveland, Ohio 44115-2108 and Attorney Scott L. Melton at 1112 Harrow Hill Court ,Moon Township, Pennsylvania 15027 and CNA INSURANCE COMPANY aka CONTINENTAL CASUALTY COMPANY at 333 W. Wabash Avenue, Chicago, Illinois 60604.

Attorney William Kissinger
Attorney For Plaintiffs

PROBATE COURT OF MAHONING COUNTY, OHIO
ROBERT N. RUSU JR. , JUDGE

IN THE ESTATE OF Ryan Edward Zwingler, , DECEASED

CASE NO. 2013 ES 364

APPLICATION TO ENTER INTO A CONTINGENT FEE CONTRACT

The undersigned applies to the Court for authority to enter into the contingent fee contract attached as Exhibit A with:

Attorney: Scott L. Melton, Esquire

Address: 300 Ninth Street, Conway, Pennsylvania 15027-1647

Telephone: (724) 869 2972

The undersigned represents that legal services are necessary as a result of the following described matter:

Claims against multiple defendants for, wrongful death, medical expenses, and all other legal remedies available to Mrs.Michele Zwingler, Individually and as the Fiduciary of the Estate of Ryan. Edward Zwingler, Deceased and/or the surviving next-of-kin of Ryan Edward Zwingler., Deceased, arising out of alleged negligent acts to Ryan Edward Zwingler, which allegedly resulted in his death on May 27, 2013.

The undersigned further represents that no fees will be paid until reviewed by the Court and allowed by judgment entry.

10/10/14
Date

Michele Zwingler administratrix
Signature of Fiduciary Title

Michele Zwingler
Michele Zwingler, Individually and as the Fiduciary of the Estate of Ryan Edward Zwingler.,Deceased
Type or Print Name

FILED
MAH, CTY, PROBATE COURT
OCT 10 2014
Judge Robert N. Rusu, Jr.

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EXHIBIT
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COMMONWEALTH OF PA)
)
COUNTY OF BEAVER)

ATTORNEY RETAINER AGREEMENT - CONTINGENT FEE

1. For services rendered and to be rendered in this matter by Scott L. Melton, Esquire the undersigned client retains this law firm to assert claims against OHIO DEPARTMENT OF TRANSPORTATION, and whomever (including corporations or government bodies) is probably liable for all damages (actual, consequential, special and/or punitive) and injuries resulting from the incident which occurred on or about the 27th day of May, 2013, in Mahoning County, Ohio, hereafter referred to as the "claim."

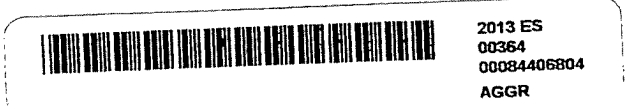
2. I agree to give my Attorneys, their agents and employees a Power of Attorney, authorizing them to take all steps deemed by them to be necessary and appropriate to obtain a satisfactory result, including but not limited to securing a complete investigation, instituting legal proceedings, employing consultants, expert witnesses, and associate counsel, entering into settlement negotiations, preparing settlement brochures, preparing for and/or PROCEEDING TO TRIAL and/or DISCONTINUING LITIGATION.

Attorneys agree not to settle or compromise the case without the client's approval of the terms and form of the settlement. Client agrees not to settle or adjust this claim or any legal action arising from it.

3. The attorneys' fee shall be contingent on what is recovered in this matter by way of settlement, judgment, or otherwise, to be computed as follows:

- ◆ Settlement of claim prior to filing of legal action: 33 and 1/3% of total sum recovered;
- ◆ Settlement of claim after filing of legal action: 40% of total sum recovered;
- ◆ In the event that post-trial motions are filed on this matter, or an appeal is taken, clients agree to pay attorneys for their services 45% of the total amount recovered.
- ♦ In the event that no recovery is obtained, the client will not be responsible to pay anything to the attorneys for their time or services.

IN ADDITION TO THE ABOVE FEES, client shall pay to attorneys, OUT OF THE CLIENT'S SHARE OF THE RECOVERY, after payment of attorney fees, all court costs and expenses advanced by the attorneys in connection with this matter. The attorneys are authorized to incur such expenses as they in their sole and exclusive judgment deem reasonable and necessary to accomplish a satisfactory resolution of the claim and are authorized to advance such expenses on behalf of client. Said expenses shall include, but not be limited to, investigation, travel and lodging, physician and/or expert witness fees, consultant fees, settlement and trial exhibits, models, diagrams, photography, copies, equipment expenses, and video tape



DATE: Sept. 9, 2014 INITIALS: Judge Robert N. Rusu, Jr.

In the event that no recovery is obtained, the client is only responsible for repayment of all costs and expenses if the client fails or refuses to follow the attorneys' advice regarding settlement of the claim.

4. At the final disposition of the case, the client agrees promptly to execute the settlement documents as are recommended by the attorney and properly and promptly to endorse any settlement drafts or checks, and the attorneys shall disburse to the client the client's share of the recovery after deducting their fee as described in paragraph 3, after deducting all expenses as defined in paragraph 3, and after deducting all debts incurred by the client remaining unpaid as defined in paragraph 7.

5. The client authorizes attorneys to explore all settlement alternatives, including a structured settlement, which employs the use of deferred periodic payments. Client agrees that if the claim is settled through a structured settlement, the attorney fees on the part that is structured shall be calculated in the percentages as set forth above based upon the cost of the structured settlement.

6. THE CLIENT HEREBY GRANTS THE ATTORNEYS A LIEN ON THIS CAUSE OF ACTION, and lien on any proceeds and any judgments recovered in connection with this cause of action as security for the payment of attorneys' fees and expenses as contracted for in this agreement.

7. Client acknowledges and agrees that, regardless of the outcome of this case, the attorneys do not assume liability for nor agree to pay from the attorneys' fee any debts incurred by the client including, but not limited to expenses incurred for medical care, nursing, special aids, and transportation, as well as any medical insurance and/or workers' compensation subrogation and/or hospital liens arising as a result of the incident giving rise to the claim.

8. The attorneys make no representations or guarantees regarding the tax consequences of any recovery obtained on behalf of the client and advise client to SEEK HIS/HER OWN TAX ADVICE FROM A QUALIFIED TAX ADVISOR.

9. The client acknowledges that the attorneys have made NO GUARANTEE regarding the successful resolution of said cause of action, and all expressions relative thereto are matters of attorneys' opinion only and shall not be considered as express or implied warranties of the claim's outcome.

10. Client and attorneys hereby agree that if a dispute arises out of or relates to this contract, or the breach thereof, and if said dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation before resorting to arbitration, litigation, or some other dispute resolution procedure.

11. In the event any health care subrogation interests, including but not limited to Medicare and The Department of Public Welfare are claimed with respect to actual or potential recoveries by the client, the client does hereby give permission to the attorneys to contract separately with the subrogee(s) for payment of attorneys' fees and expenses.

DATE: Sept. 9. 2014 INITIALS: MRZ

12. The client agrees to fully cooperate with attorneys in the handling of the claim. This includes but is not limited to, attending depositions, legal proceedings and conferences; keeping attorneys informed as to current mailing address, phone number and medical condition.

13. I understand that, given the accessibility of information disseminated via the Internet, any information that I put on social networking websites (including but not limited to Facebook, MySpace, Twitter, and LinkedIn) may be relevant to my case. Therefore, I agree to notify my attorneys of my use of any such social networking websites, to provide my attorneys with access to these site(s) so that they may review my online content to ensure that the content does not harm my case, and to remove any content as my attorneys deem necessary.

SIGNED this 9th day of September, 2014.

CLIENT: Michele Zwingler administratrix of the Estate of Ryan E. Zwingler.

Michele Zwingler, Administratrix of the Estate of Ryan Zwingler, deceased

Michele R. Zwingler

Scott L. Melton, Esquire

FILED
MAH, CTY, PROBATE COURT
OCT 10 2014
Judge Robert N. Rusu, Jr.

IN THE PROBATE COURT OF MAHONING COUNTY, OHIO
JUDGE ROBERT N. RUSU, JR.

IN THE MATTER OF	)	**CASE NO.: 2013 ES 0364**
X Estate	)	
☐ Guardianship/Conservatorship	)	
☐ Minor Settlement	)	
☐ Trust	)	
☐ Other	)	**JUDGMENT ENTRY AND ORDERS ALLOWING AGREEMENT FOR LEGAL REPRESENTATION**
OF: RYAN EDWARD ZWINGLER, DECEASED	)	

Upon application to enter into a representation agreement with a certain attorney or firm for the purpose of instituting or maintaining a claim or litigation on behalf of the estate and/or minor, the Court is satisfied that presently granting such authority may be beneficial, subject to the Court's continuing jurisdiction to determine and allow counsel fees, regardless of the parties' prior understanding or agreement.

WHEREFORE IT IS ORDERED, ADJUDGED and DECREED that the Applicant be and is hereby granted authority, effective as of the date of the journalization of the instant *Entry and Orders,* to employ and enter into a representation agreement with **Attorney Scott L. Melton** for the purposes of legal representation in the institution or maintenance of a claim or litigation on behalf of the within estate/minor, provided that the amount of attorney's fees for services rendered therein shall later be determined and paid according to the Orders of this Court.

The Clerk is directed serve copies of the foregoing Judgment Entry and Orders upon the Applicant, Counsel of Record for the within estate and/or the Litigation Counsel, via ordinary mail, and to enter the fact of such service upon the docket.

IT IS SO ORDERED.

FILED
MAH, CTY, PROBATE COURT
OCT 16 2014

Dated: 10-16-14

Judge Robert N. Rusu, Jr. Hon. Robert N. Rusu, Jr., Judge

TSC - mailed to - Attys Kissinger, Melton & Michele Zwingler 10-17-14 RR

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EXHIBIT
B

SCOTT L. MELTON

ATTORNEY AT LAW
300 NINTH STREET
CONWAY, PENNSYLVANIA 15027-1647
(724) 869-2972
(724) 869-2246 facsimile
smeltonlawfirm@gmail.com
www.smeltonlaw.com

September 20, 2017

VIA US EXPRESS MAIL
Paul Eklund, Esquire
Collins, Roche, Utley & Garner, L.L.C.
800 Westpoint Parkway, Suite 1100
Cleveland, OH 44145

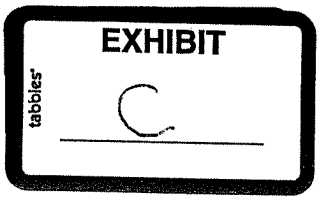
Re: Michele Zwingler, Administratrix of the Estate of Ryan E. Zwingler, deceased and Michele Zwingler and Robert Zwingler, Jr. vs. Central-Allied Enterprises, Inc.
In the Court of Common Pleas of Mahoning County, Ohio 15 CV 1410

Dear Paul,

Recently we revoked all settlement demands in this case. You wondered why and made inquiry as to our current position.

Several weeks ago, we learned that an Information charging Central Allied Enterprises, Inc. with a **felony** was filed on December 14, 2006 by the United States of America, Plaintiff, in the United States District Court for the Southern District of Ohio Eastern Division at docket 2:06-cr-00272 for knowingly violating 18 U.S.C. §1020 (Chapter 47 Fraud and False Statements) during its performance of work on Highway Project 209(99), a federally funded highway project pursuant to the Federal-Aid Road Act, as amended. I have enclosed and labeled as **Exhibit 1** a copy of the Information. On the same day, your client entered a Plea Agreement and jointly submitted with the United States Attorney a Statement of Facts to the allegations and charges contained in the Information, which were incorporated into the Plea Agreement. I have enclosed and labeled as **Exhibit 2** a copy of the Plea Agreement and a copy of the jointly submitted Statement of Facts. Finally, I enclose a copy of the docket in the criminal case, which is labeled as **Exhibit 3**.

As I will lay out for you, the discovery of the above information changed the posture of the case in favor of the plaintiffs so dramatically that we formally withdrew the outstanding settlement demand. You will understand why we revoked our settlement demand of $1.7 million dollars after reading this letter and understanding the full implications for your client in this case ("the



short game") as well as its future civil liability exposure to third parties ("the long game"), that it could not instruct you to accept the settlement demand and end the case at that settlement number.

You will note in the Plea Agreement, your client admitted that in 2000 it knowingly, intentionally, willfully and falsely made, or knowingly aided and abetted in the making of a false statement, representation or report, or false claim regarding its work on a highway project funded in part by the federal government. It pled guilty, freely and voluntarily, without threat, coercion or intimidation, to making false statements in documents in 2000 involving its participation in the disadvantaged business enterprise programs (DBE) participation which was part of the highway construction contract it entered into with the Ohio Department of Transportation (ODOT) and the Federal Highway Administration (FHWA) and United States Department of Transportation (DOT). In the Plea Agreement and jointly submitted Statement of Facts your client admitted that it acted willfully in making the false statement, representation and report as alleged and that its acts were willful, knowing, intentional, false, and fraudulent violations of the affirmative action programs (DBE) of Ohio and/or ODOT and/or DOT and/or FHWA.

Importantly, your client admitted that its knowing, willful, intentional and fraudulent violations of the affirmative action program should have been disclosed to ODOT, but instead, Central Allied Enterprises, Inc. fraudulently concealed the same from ODOT. See paragraph 7 of the Plea Agreement: "The parties have jointly submitted a statement of facts, and Central acknowledges the accuracy of said statement of facts and that its conduct violated 49 CFR Sec. 26.55 ***and should have been disclosed to ODOT***." That statement regarding the duty of a contractor to come forward and disclose its knowing violations of affirmative action programs is in keeping with the requirements that in completing forms and certifications necessary for bidding on a highway construction contract the bidder must reveal, not conceal, its violations of affirmative action programs with which it must comply. To wit: a bidder is solely responsible to inform the Coordinator of any violation of affirmative action programs with which it is required to comply to obtain their Certificate of Compliance with affirmative action programs with which the bidder is required to comply. Ohio Admin. Code §123:2-11-01.

So, how does Central's guilty plea in the criminal action filed in 2007 have any effect upon its liability or the damages in our case, in which its bidding on, being awarded and performing under the construction contract all took place three years earlier, in 2004? Similarly, how does Central's pleading guilty to knowingly, intentionally and willfully violating the DBE affirmative action programs of ODOT, DOT and FHWA, and fraudulently concealing the same from those entities in 2000, have any effect upon its liability or the damages in our case centered four years later in 2004?

It comes down to this. Ohio law clearly states that a person or company (here, Central) desiring to bid on a contract awarded by the Ohio Director of Transportation pursuant to Chapter 5525 of the Ohio Rev. Code (here, your client's contract with ODOT – Contract No. 40130) may make an application for a Certificate of Compliance with federal and state affirmative action programs to the Equal Opportunity Coordinator for the Department of Administrative Services and ***that a person or company who violates a federal or state affirmative action program during the five (5) years prior to the date the application was submitted for determination of compliance is INELIGIBLE to bid on a contract awarded pursuant to, among others, Chapter 5525 of the Ohio Revised Code.*** Ohio Rev. Code §9.47(A). Your client pled guilty in Federal District Court to knowingly, intentionally and willfully violating affirmative action programs in 2000, involving highway construction contracts, and concealing the same from all interested parties not only in 2000 but it continued to conceal the same until it was caught and brought to justice in 2007. When Central sought to bid on the construction project in our case in 2004 **it was an ineligible bidder** because it knowingly, intentionally and willfully violated, and fraudulently concealed its violation of the affirmative action program in 2000, which was within the five (5) years prior to the 2004 date of its application for Certificate of Compliance.

Additionally, in 2003 or 2004 (within 5 years of the violation of the affirmative action programs), pursuant to Ohio Rev. Code §5525.03, Central made an Application for Qualification to the Ohio Director of Transportation and its application was accompanied by a Certificate of Compliance with affirmative action programs issued pursuant to Ohio Rev. Code §9.47(A) which did not reflect that within the previous five (5) years Central had knowingly violated state and federal affirmative action programs. Had the true facts of Central's violations of the affirmative action programs in 2000 been known to and not actively concealed from the Director of Transportation the application for qualification would have been denied. Had the true facts of Central's violations of the affirmative action programs in 2000 been known to, and not actively concealed from, the Equal Opportunity Coordinator of the Department of Administrative Services no Certificate of Compliance with affirmative action programs could have been lawfully issued to Central.

Pursuant to Ohio Rev. Code §153.08 (Opening Bids and Awarding Contract), no contract shall be entered into unless the bidder possesses a valid Certificate of Compliance with Affirmative Action programs issued pursuant to Section 9.47(A) of the Ohio Rev. Code and dated no earlier than 180 days prior to the date fixed for the opening of bids for a particular project. Here, Central did not possess a valid Certificate of Compliance due to its knowing, intentional and willful violations of the affirmative action programs in the 5 years preceding the opening of bids and its continuing fraudulent concealment of its violations. As such, as a matter of law, the contract in our case should not have been entered into with Central.

Since, by operation of law, based upon its conviction, Central was ineligible to bid on the contract in our case and because the contract should not have been entered into pursuant to Section 153.08, above, under Ohio law the contract is void, not merely voidable. See, *Benefit Services of Ohio, Inc. v. Trumbull County Commissioners, et al.*, 2004 Ohio 5631, Court of Appeals (11th Dist.) (Paragraphs 26, 33). Public bidding is a creation of statute and the statute says that the State of Ohio (or ODOT) and an ineligible bidder lack capacity to enter into a contract, therefore the construction contract in our case never existed pursuant to the holding in *Benefit Services*, supra.

As Contract No. 40130 was void as a matter of law Central had no legal right to perform berm restoration work, or any work, to State Route 534. It has long been the law in Ohio that a private individual has no right to interfere with a highway or street without first obtaining permission from the proper authority and when it does so without such permission it constitutes an absolute public nuisance and renders itself liable as ***an insurer*** of the roadway, regardless of whether it performed prudently and carefully. See, *Taylor v. City of Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724 (1944). Central's culpable and unlawful conduct allowed it to be continually considered as an eligible bidder and allowed it to unlawfully secure the contract and perform, or not perform, the work of the contract. Simply put, due to its knowing, intentional, willful and fraudulent violations of the affirmative action programs in 2000 and its continuing knowing, intentional, willful and fraudulent concealment of the same, Central is subject to strict liability as an insurer of those who become injured from its work regardless of how well that work was performed. The well-established law making Central an insurer moves the Plaintiffs' case from one grounded upon negligence to **strict liability**.

Moreover, Central's knowing, intentional, willful and fraudulent conduct and concealing its conduct from the relevant Ohio and federal agencies allows the imposition of punitive damages. See Ohio Rev. Code §2315.21(C) (Punitive or exemplary damages). That section states:

> "Subject to division (E) of this section, punitive or exemplary damages are not recoverable from a defendant in question in a tort action unless both of the following apply: (1) The actions or omissions of that defendant demonstrate malice or aggravated or ***egregious fraud***, or that defendant as principal or master knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that so demonstrate. (2) The trier of fact has returned a verdict or has made a determination pursuant to division (B)(2) or (3) of this section of the total compensatory damages recoverable by the plaintiff from that defendant." [Emphasis added].

In addition to the Plaintiff now being able to recover punitive damages against Central the statutory cap on punitive damages, limited to two times the amount of the compensatory

damages awarded to the plaintiff from the defendant,[1] is inapplicable to the case against Central because of its knowing, intentional, willful and egregious fraud and fraudulent concealment conduct that allowed it to unlawfully perform, or fail to perform as is the case with the berm work on the western berm of SR 534. The inapplicability of the statutory cap on punitive damages as applied to Central's conduct is contained in Ohio Rev. Code §2315.21 (D)(6) which provides:

> "Division (D)(2) of this section does not apply to a tort action where the alleged injury, death, or loss to person or property resulted from the defendant acting with one or more of the culpable mental states of purposefully and knowing as described in section 2901.22 of the Revised Code and when the defendant has been convicted of or pleaded guilty to a criminal offense that is a felony, that had as an element of the offense one or more of the culpable mental states of purposely and knowingly as described in that section, and that is the basis of the tort action."

We will be seeking leave to file an amended complaint bringing causes of action for fraud and fraudulent concealment. These causes of action are not time barred as they will be brought within one year from the time of discovery of the fraud and fraudulent concealment, well within the one-year statute of limitations. We will also seek leave to file for punitive and exemplary damages based upon the knowing, intentional, willful and fraudulent conduct and fraudulent concealment.

We believe that after amendment to include fraud and fraudulent concealment that we can prevail on a Motion for Partial Summary Judgment on liability.

Ignoring for a moment that we can now proceed on a theory of strict liability, your defense to the negligence action is premised upon what you allege is the negligence of the driver, Jarod Cameron, in causing the truck he was driving to leave the roadway and paved shoulder; drive onto the berm of the westbound edge of SR 534; fail to properly control the truck by turning the wheel too sharply and too quickly to the left which caused the truck to suddenly remount the paved shoulder and cross into the opposing lane and strike the oncoming tractor trailer. However, for the reasons set forth below, the negligence of the driver/co-employee cannot be found by the jury nor can any evidence of his negligence be admitted at trial.

There is no dispute that at the time of the accident Ryan Zwingler and Jared Cameron were co-employees and were each employed by Bonnie Plants, Inc., a wholly owned subsidiary of Alabama Farmers Cooperative, Inc. and their actions in transporting plants and fertilizer in the truck were actions within the course and scope of their employment. Ryan Zwingler's death was found to be a compensable death under sections 4123.01 – 4123.94, inclusive of the Ohio

[1] See, Ohio Rev. Code §2315.21 (D)(2)(a). Subpart (b) of that subsection applies only to "small employer or individual". Central bills itself as the largest paver in Northeast Ohio and, as such, it is hardly a small employer.

Revised Code and the Ohio Bureau of Workers' Compensation (BWC) paid the sum of $2,299.11 in lost wages to the Estate of Ryan Zwingler. I have enclosed and labeled as **Exhibit 4** a copy of the letter dated October 8, 2013 from the BWC to Robert Zwingler informing him of its decision that his son's death was related to an industrial accident and, as such, the Workers' Compensation Claim No. 13-823277 was allowed as a compensable death claim. Further, I have enclosed and labeled as **Exhibit 5** a copy of the letter dated June 1, 2016 from BWC to me stating that lost wages of Mr. Zwingler were paid and it was asserting a subrogation claim for the payment from any recovery in our case. The Ohio Rev. Code §4123.741 (Employee's liability in damages) states:

> "No employee of any employer, as defined in division (B) of section 4123.01 of the Revised Code, shall be liable to respond in damages at common law or by statute for any injury or occupational disease, received or contracted by any other employee or such employer in the course of and arising out of the latter employee's employment, or for any death resulting from such injury, occupational disease, on the condition that such injury, occupational disease, or death is found to be compensable under sections 4123.01 to 4123.94, inclusive, of the Revised Code."

In *Romig v. Baker Hi-Way Express, Inc. et al.*, 2012-Ohio-321 (Court of Appeals, Fifth District) the court held that a tortfeasor cannot raise the affirmative defense of the empty chair as to the negligence of a co-employee and to include the employee's negligence in the allocation of fault is completely inconsistent with the Ohio Workers' Compensation system, as structured by the constitution and the legislature and as construed by the courts. Also, pursuant to the holding in that case you cannot introduce any evidence at trial, whether by expert witness, lay witness or police witness of any alleged negligent conduct of Jarod Cameron and the jury may not make any finding of his negligence. Thus, the alleged negligent conduct of Mr. Cameron is not a legitimate issue for the jury's consideration because the statutory immunity of the Workers' Compensation Act shields him from any jury assessment of his negligence. In our case, the only party against whom the jury may make an assessment of negligent conduct, if any, is your client....and, if our assessment is correct, it will not be making an assessment of your client's *negligence* but it will be assessing damages against your client because it was found to be strictly liable.

Lest anyone jump to the conclusion that insurance coverage for this accident is somehow jeopardized under an intentional acts exclusion clause for Central's knowing, intentional and willful fraudulent acts and fraudulent concealment that conclusion would be unwarranted. An intentional acts exclusion clause relieves the insurer from the obligation to provide coverage when the harm alleged is intentionally caused by the insured. *Granger v. Auto-Owners Insurance*, 144 Ohio St. 3d 57 (Ohio 2015). Phrased another way, in order to avoid coverage on the basis of an exclusion for intentional injuries the insurer must demonstrate that the injury itself was expected or intended. *Physicians Insurance Company of Ohio v. Swanson*, 58 Ohio St. 3d

189, 569 N.E.2d 906 (1991). Here, Central's intentional acts of fraud and fraudulent concealment of its violation of affirmative action programs in 2000 were not acts that were intended to cause the harms alleged in this case which occurred in 2013 (injury and death of Ryan Zwingler and loss of consortium claims of his parents). As such, the $11 million dollars in insurance coverage remains available for the recoverable damages in this case.

What I have discussed so far in this case is what I have called the "short game", consisting of what might be recoverable by the Zwingler Estate and Mr. and Mrs. Zwingler in their own right as compensatory and punitive damages. In considering your response to this letter I urge you to consider the "long game" of your client's potential liability exposure outside of this case should the fact that it unlawfully secured the contract come to light. By its guilty plea Central insulated itself against further criminal liability for its fraudulent conduct and fraudulent concealment, however, it remained civilly liable for its conduct.

The fact of the matter is that it appears that Central was an ineligible bidder for construction contracts in which a Certificate of Compliance was required for part of 2000 and all of 2001-2005. That means every second place bidder for those contracts in that five year period should have been the successful bidder and been awarded the contract. Each of those bidders who lost the contract to Central due to Central's knowing, intentional, willful and fraudulent conduct, as described in the criminal case and in this letter, has a potential cause of action for civil liability for lost profits against Central. At this point, only Central knows how much profit was derived from those construction contracts it wrongfully and unlawfully secured over that five year period. I would hazard a guess that it would certainly be in the millions of dollars.

As things now stand, Central's conduct seems to remain largely unknown because the record was sealed in the criminal case. See **Exhibit 3**.

Obviously, as all the construction contracts that Central wrongly and unlawfully performed during the relevant five year period are void due to fraud, therefore its work on each of those contracts created an absolute public nuisance, for which it is now strictly liable, without regard to how well it performed its work.

I propose a settlement of the case for the total sum of $9 million dollars. This would provide compensation for the horrific burning to death of Ryan Zwingler and his other non-economic damages; compensation of his economic damages of approximately $1.5 million dollars; compensation to his mother and father for their loss of consortium damages. You were moved by their deposition testimony regarding their losses and the closeness of them to their son. By this settlement Central would avoid all risk of its UNCAPPED exposure to an award of punitive damages. Further, it would avoid Central having to answer punitive damage interrogatories forcing it to disclose its net worth prior to verdict so that the jury may fashion a punitive damage

award that would be large enough in regard to its net worth that it would be deterred from ever again engaging in similar conduct. Twice I have recovered substantial punitive damage awards at jury trial. The settlement I am proposing would involve my clients signing an appropriate confidentiality agreement preventing the release or discussion of information uncovered by us in this case. It is my belief that if this case is not settled at this time the overall damage exposure to Central that could flow from this case would exceed, by millions of dollars, our settlement demand.

We would like to schedule a status conference with Judge Sweeney at her first availability to discuss the changed circumstance of the case, which I have described above. We intend to ask for her to handle the hearing set for October 6th, do you have any objection to that? Would you like to respond to our overture before anything is revealed to the Judge as to why we are seeking a status conference, or, would you like to have a joint discussion about the above matters with her?

We look forward to hearing from you.

Very truly yours,

Scott L. Melton

William J. Kissinger

SLM/nrm
Enclosures

COLLINS ROCHE UTLEY & GARNER LLC
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Paul D. Eklund
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May 15, 2018

VIA FACSIMILE: 330-629-2682
William J. Kissinger
7631 South Avenue, Suite F
Youngstown, Ohio 44512

Re: Michele Zwingler, etc. v. Central-Allied Enterprises, Inc.
Mahoning County Court of Common Pleas Case No. 15CV1410
Our File No. A-0456/137.00016

Dear Mr. Kissinger:

As you are aware, I am the attorney retained by Travelers to defend Central Allied Enterprises, Inc. with respect to the wrongful death claim presented by your clients, Michelle and Robert Zwingler. I have received a copy of your letter to "CNA Professional Services, Attn: Doug Ricoi." Travelers has the primary layer of insurance for Central Allied, and I have been instructed to advise you that there will be no increase in the offer made on behalf of Central Allied to your clients at the mediation/settlement conference we attended with the Court Mediator in the Mahoning County Court of Common Pleas last fall.

Sincerely,

/s/ Paul D. Eklund

Paul D. Eklund

PDE/dmg

EXHIBIT
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D

COPY

FILED
MAH. CTY. PROBATE COURT
FEB - 5 2019

IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
MAHONING COUNTY, OHIO

IN THE MATTER OF THE ESTATE OF:	)	**CASE NO: ~~2019 ES 00362~~** **Related Case No.: 2019 CI 1**
EDWARD ZWINGLER, DECEASED	)	**JUDGE THOMAS A. SWIFT** **Sitting by Assignment**

JUDGMENT ENTRY

This matter is before the Court on the *Defendant Scott L. Melton's Notice of Filing Notice of Removal of Civil Action to the United States District Court for the Northern District of Ohio* filed on February 4, 2019 in the related Civil action under case no. 2019 CI 1.

Upon review of the pleadings, the Court finds it necessary to stay all proceedings relative to the Contempt in the within matter as well as stay the proceedings in the related Civil action (2019 CI 1).

Therefore, it is the Order of this Court that the Contempt proceedings herein and the Civil action (2019 Ci 1) are hereby stayed pending the decision of the *United States District Court for the Northern District of Ohio*.

Further, the Court hereby cancels the hearing to show cause previously set for **February 12, 2019 at 10:00 a.m.**

The Clerk is directed to serve a copy of the foregoing *Judgment Entry* upon **Attorney William Kissinger, Attorney Paul D. Eklund, Attorney Monica Sansalone, Attorney Maia Jerin, Scott L. Melton** and **Michele Zwingler**, by regular United States mail, and to note the fact of such service upon the docket of the Court.

IT IS SO ORDERED.

Dated: February 5, 2019

Honorable Thomas A. Swift, Judge
Sitting by Assignment

EXHIBIT P

2019 CI 00001 00035716673 JE