

IN THE SUPREME COURT OF OHIO

Case No. 2019-1338

On Appeal from the Eighth Appellate District
Case No. CA 18 107946

DARRELL BAON, EXECUTOR OF THE ESTATE OF SUE ANN BAON,
DECEASED,

Plaintiff-Appellant

vs.

FAIRVIEW HOSPITAL., et al.

Defendants-Appellees

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF NORTH SHORE
GASTROENTEROLOGY, INC. AND ROBERT STRAUB, M.D.**

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I. THIS CASE DOES NOT RAISE ISSUES OF PUBLIC OR GREAT GENERAL INTEREST

Under Ohio law, a plaintiff who is not the sole beneficiary of a decedent's estate cannot file a *pro se* complaint on an estate's behalf for wrongful death because a *pro se* litigant's attempt to represent the interests of the estate beneficiaries amounts to the unauthorized practice of law. Here, both the trial court and the Eighth District Court of Appeals appropriately concluded that plaintiff's attempt to refile a medical malpractice complaint *pro se* was a legal nullity and subject to dismissal without prejudice. Subsequent action including an attorney's appearance did not cure the fatal flaw with the improper commencement of plaintiff's refiled complaint. No issues of public or great general interest are implicated by further review of this matter.

Plaintiff attempts to frame the issue presented by this case as one presenting a conflict at the "intersection between two important aspects of public policy and jurisprudence: the right to self-representation and the prohibition on the appearance and legal proceedings by non-lawyers on behalf of others." Memorandum in Support of Jurisdiction, pg. 1. Plaintiff's argument, however, is misguided for several reasons.

First, there can be no reasonable dispute that plaintiff's *pro se* complaint alleging a wrongful death action on behalf of estate beneficiaries constituted the unauthorized practice of law. Indeed, Ohio courts have uniformly agreed that a non-lawyer personal representative/beneficiary cannot bring and maintain a wrongful death action on behalf of a decedent's estate because doing so would require her to represent the interests of others in violation of R.C. 4705.01.

Second, Ohio law is well-settled that an action commenced in violation of R.C. 4705.01 that prohibits the unauthorized practice of law is a legal nullity. Towards that end, complaints filed in violation of R.C. 4705.01 are nullities that fail to commence actions and which should be dismissed without prejudice. See e.g., *Twelve Monkeys, supra; Cannabis for Cures, L.L.C. v. State of Ohio Board of Pharmacy*, 2nd Dist. Clark No. 2018-CA-12, 2018-Ohio-3193; *DiPaolo Industrial Development, LLC v. Blair & Latell Co., LPA*, 11th Dist. Trumbull No. 2014-T-0006, 2014-Ohio-4317; *Kinasz, supra; Mays v. Toledo Hospital*, 6th Dist. Lucas No. L-13-1233, 2014-Ohio-1991; *Williams v. Griffith, supra; In re Jerdine*, 8th Dist. Cuyahoga No. 91172, 2008-Ohio-1928; *Thompson, supra; Geiger v. King*, 10th Dist. Franklin No. 03AP-1228, 2004-Ohio-2137; *Coburn v. Toledo Hospital*, 6th Dist. Lucas No. L-00-1215, 2001 WL 42212 (January 19, 2001); *Sheridan Mobile Village, Inc. v. Larsen*, 78 Ohio App.3d 203, 604 N.E.2d 217 (4th Dist. 1992); *Williams v. Global*, 26 Ohio App.3d 119, 498 N.E.2d 500 (10th Dist. 1985).

Given that these principles are well established and embedded within R.C. 4705.01 and Ohio's common law, there is no need for this Court to further consider the issues raised in this appeal. To the contrary, this case does not present issues of public or great general interest warranting this Court's review.

II. STATEMENT OF THE CASE AND FACTS

Plaintiff, in his capacity as the executor of the estate of decedent Sue Ann Baon, originally filed this medical-negligence and wrongful-death action on April 26, 2017, alleging that defendants North Shore Gastroenterology, Inc. and Robert

Straub, M.D. (collectively referred to as “North Shore”) among others—provided negligent medical care and treatment to decedent “[o]n or about March 16, 2015 through on or about April 26, 2015[.]” *See Case No. CV-17-879458, Complaint, ¶ 18.* Although plaintiff claimed that defendants were liable for medical negligence, he failed to attach a required affidavit of merit to his complaint. On May 8, 2017, plaintiff voluntarily dismissed the matter without prejudice pursuant to Civ.R. 41(A). Notably, plaintiff was represented by counsel throughout the original matter.

On May 7, 2018, barely within the one-year window allowed by Ohio’s savings statute to refile, plaintiff refiled his complaint pro se. Transcript of Docket and Journal Entries (“T.d.”) 1, Complaint. Although plaintiff was named executor of decedent’s estate, he was not the sole beneficiary of her estate. *See Case No. 2106EST219661.*¹ T.d. 46, Brief in Opposition to Plaintiff’s Motion for Relief from Judgment, Exhibit A, Application for Authority to Administer Estate by Successor Fiduciary. He again did not attach the required affidavit of merit but rather sought an extension of time within which to file it. T.d. 14, Motion to Extend Period to File Affidavit of Merit.

Shortly after the refiling, Defendants Fairview Hospital, the Cleveland Clinic Foundation, Robert F. Straub, M.D., Diya Alaedeen, M.D., Timothy Barnett, M.D. Erin Nagrant, M.D., and Rami Hazzi, M.D. (collectively, the “Cleveland Clinic”) filed a motion to dismiss plaintiff’s complaint because plaintiff had engaged in the

¹ North Shore requested that the trial court take judicial notice of Cuyahoga County Probate Court No. 2016EST219661, which is public record not subject to reasonable dispute and is capable of accurate and ready determination pursuant to Evid.R. 201 and attached a certified copy of the probate court documents to its opposition to Plaintiff’s Motion for Relief from Judgment.

unauthorized practice of law by attempting to file his complaint on behalf of an estate pro se. T.d. 21, Cleveland Clinic's Motion to Dismiss. The Cleveland Clinic argued that the pro se complaint violated R.C. 4705.01—which prohibited a non-lawyer from commencing a lawsuit on behalf of others—rendering the refiled complaint null and void. *Id.*

One day later, counsel entered an appearance on behalf of plaintiff. T.d. 22, Notice of Appearance. Although the Cleveland Clinic's Motion to Dismiss was noted on the docket, plaintiff failed to oppose it. Subsequently, the court granted the motion, finding that plaintiff could not represent an estate pro se to which he was not the sole beneficiary. T.d. 38, Judgment Entry of Dismissal. The trial court determined that *Kinasz v. Southwest Gen. Health Ctr.*, 8th Dist. Cuyahoga No. 100182, 2014-Ohio-402 mandated the dismissal of plaintiff's pro se complaint. *Id.* The court's dismissal was without prejudice. *Id.*

Thereafter, plaintiff sought relief from the trial court's dismissal of his complaint. T.d. 45, Motion for Relief from Judgment. On October 16, 2018, North Shore opposed plaintiff's request for relief from judgment. T.d. 46, North Shore's Memorandum in Opposition to Plaintiff's Motion for Relief from Judgment. North Shore argued that plaintiff was not entitled to relief from judgment because his pro se attempt to refile his complaint within one year of the dismissal of his original action was a nullity and a violation of R.C. 4705.01. *Id.* Specifically, North Shore further argued that a pro se party lacks the ability to commence an action on behalf of an estate and that Ohio law treats such a filing as if it never existed. *Id.* Given that

it was as if the refiled complaint never existed, plaintiff failed to establish a meritorious claim justifying relief from judgment because his claim was now time barred. *Id.* The other defendants that plaintiff sued also opposed plaintiff's request for relief from judgment raising similar arguments. T.d. 49, 50, 52 and 53. The trial court concluded that plaintiff failed to establish an entitlement to relief from judgment and denied his motion. T.d. 57, Judgment Entry Denying Plaintiff's Motion for Relief from Judgment.

On appeal, a unanimous panel of the Eighth District Court of Appeals rejected plaintiff's argument that the trial court erred in refusing to grant relief from judgment. After thorough consideration of the arguments of the party and applicable law, the appellate court concluded that, under Ohio law, "a non-attorney personal representative of an estate may not litigate claims on behalf of the estate *pro se* because allowing a *pro se* litigant to represent others would constitute the unauthorized practice of law." Journal Entry and Opinion, ¶ 20, citing *Kinasz v. Southwest General Health Ctr.*, 8th Dist. Cuyahoga No. 100182, 2014-Ohio-402. The appellate court went on to conclude that a "complaint that is filed in violation of R.C. 4705.01 is a legal nullity and that plaintiff could not cure his failure to properly commence the re-filed action because it was time-barred." *Id.* ¶ 21, citing *DiPaolo Indus. Dev. LLC v. Blair & Latell Co.*, 11th Dist. Trumbull No. 2014-T-0006, 2014-Ohio-4317, ¶ 14. Finally, the appellate court concluded that, because plaintiff's refiled complaint was time-barred, he did not have a meritorious defense justifying

relief from judgment. *Id.*, ¶ 30, citing *Davis v. Upper Valley Med. Ctr.*, 2d Dist. Miami No. 05-CA-39, 2017-Ohio-1332, ¶ 10.

III. RESPONSE TO PROPOSITION OF LAW NUMBER 1

Under Ohio law, a plaintiff who is not the sole beneficiary of a decedent's estate cannot file a *pro se* complaint on an estate's behalf for wrongful death because a *pro se* litigant's attempt to represent the interests of the estate beneficiary amounts to the unauthorized practice of law.

A. Plaintiff's Claim was a Legal Nullity Because His Act of Filing on Behalf of an Estate *Pro Se* Amounted to the Unauthorized Practice of Law under R.C. 4705.01.

R.C. 4705.01 prohibits a person who is not an attorney from commencing an action in which the person is not the named party:

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. Except as provided in section 4705.09 of the Revised Code or in rules adopted by the supreme court, admission to the bar shall entitle the person to practice before any court or administrative tribunal without further qualification or license.

R.C. 4705.01.

Thus, a personal representative of an estate who is not the sole beneficiary of that estate from asserting claims on behalf of the estate. *Kinasz v. Southwest Gen. Health Ctr.*, 8th Dist. Cuyahoga No. 100182, 2014-Ohio-402., ¶ 14. In applying this statute, the *Kinasz* court reasoned that “[u]nder Ohio law, a non-attorney personal representative of an estate may not litigate claims on behalf of the estate *pro se*

because allowing a pro se litigant to represent others would constitute the unauthorized practice of law.” *Id.* at ¶ 14.

Plaintiff attempts to distinguish the Eighth District’s holding in *Kinasz v. Southwest Gen. Health Ctr.*, 8th Dist. No. 100182, 2014-Ohio-402 by asserting that the court dismissed plaintiffs’ pro se complaint because they refused to retain lawyers. Such an assertion is without merit. In *Kinasz*, the Eighth District upheld the trial court’s dismissal of plaintiffs’ claim because an estate cannot be represented by a non-attorney. *Id.* at ¶ 14. The court succinctly reasoned that “[t]he personal representative represents the interest of the statutory next of kin. Under Ohio law, a non-attorney personal representative of an estate may not litigate claims on behalf of the estate pro se because allowing a pro se litigant to represent others would constitute the unauthorized practice of law.” *Id.* (citing *Williams v. Griffith*, 10th Dist. Franklin No. 09AP-28, 2009-Ohio-4045, ¶ 13); *Heath v. Teich*, 10th Dist. Franklin No. 06AP-1018, 2007-Ohio-2529, ¶11-12 (administrator could not pursue appeal on behalf of estate pro se; requirement that wrongful death action be brought in the name of personal representative of the estate did not “override the limits” on who can practice law under R.C. 4705.01). Despite plaintiff’s contention, the complaint in *Kinasz* was dismissed based upon the undisputed fact that the plaintiff was attempting to represent the interests of others, which is exactly what plaintiff attempted to do when he refiled his complaint.

Further, plaintiff attempts to avoid the consequences of R.C. 4705.01 by relying upon *Thompson v. THC, Inc.*, S.D. Ohio No. C-1-07-231, 2008 U.S. Dist.

LEXIS 75632, at *4 (Sep. 30, 2008). Specifically, plaintiff argues that because he was filing the wrongful death complaint for his own benefit, rather than for the benefit of the estate, his complaint was not a nullity. Plaintiff's argument is misplaced.

In *Thompson v. THC, Inc.*, S.D. Ohio No. C-1-07-231, 2008 U.S. Dist. LEXIS 75632, at *3 (Sep. 30, 2008), the United States District Court reasoned that under an analogous federal provision prohibiting the unauthorized practice of law that an individual is “prohibited from appearing pro se where there are interests at stake other than that individual’s.” (citing *Shepard v. Wellman*, 313 F.3d 963, 970 (6th Cir.2003). Citing directly to Ohio law, “an estate’s fiduciary who is not an attorney is prohibited from representing an estate in a court of law.” *Id.* at *4, citing *O’Brien v. White & Getgey*, No. C-74610, 1975 Ohio App. LEXIS 6444, 1975 WL 182077 (Ohio Ct. App. Oct. 27, 1975). Although the court recognized that the plaintiff was a beneficiary of the estate, “the benefit of the action remains at all times with the Estate, not Plaintiff.” *Id.* at *4-5 (citing *Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 109 N.E.2d 855, 857 (1952), superseded by statute on other grounds). Thus, “where a plaintiff files a complaint on behalf of another party, and that complaint is not signed by an attorney, it is as if the complaint was never filed.” *Id.* at *7 (citing *Sheridan Mobile Village, Inc. v. Larsen*, 78 Ohio App.3d 203, 204, 604 N.E.2d 217 (1992)). Even though the pro se plaintiff was both an administrator and beneficiary, she could not represent the interests of other beneficiaries. *Id.* Absent an attorney signature, the complaint was a nullity. *Id.*

In so holding, the *Thompson* court rejected the argument that plaintiff was bringing suit on behalf of the estate in which she had a personal interest as a beneficiary. *Id.* at *5. The court rejected that plaintiff had properly filed a pro se complaint because the plaintiff was not the sole beneficiary of the estate. *Id.* Applying R.C. 4705.01, the court held that “an individual may appear in federal court pro se to represent his or her own case, but [that person] is prohibited from appearing pro se where there are interests at stake other than that individual’s.” *Id.* at *3 citing *Shepard v. Wellman*, 313 F.3d 963, 970 (6th Cir.2003). Indeed, “a pro se plaintiff may not represent an estate in litigation where there are estate beneficiaries other than the plaintiff.” *Id.* at *4. Thus, although the plaintiff was the administrator and a beneficiary of the estate, she could not assert her claims pro se and her attempt to do so was void and her complaint a nullity. *Id.* Because her complaint was deemed a nullity in violation of R.C. 4705.01, her action was never properly commenced under the civil rules, making her claims time barred. *Id.*

This same conclusion is unavoidable here. It was undisputed that plaintiff was not the sole beneficiary of the deceased’s estate. Indeed, there were several beneficiaries, all whose interests plaintiff attempted to represent when he refiled his complaint on behalf of the estate pro se. This was a clear violation of R.C. 4705.01, as there are interests at stake other than his own. Because plaintiff was not the sole beneficiary of the estate, he violated R.C. 4705.01 when he refiled the complaint pro se. This unauthorized practice of law made his complaint a nullity and the refiled action was never properly commenced as a matter of law.

B. R.C. 4705.01 Does Not Permit a “Party Concerned” to Commence an Action on Behalf of Others.

Plaintiff admits that he is not an attorney and that he was prohibited from representing his wife’s estate’s other beneficiaries in this action. He also admits that his complaint violated R.C. 4705.01. Nonetheless, plaintiff claims that his complaint was not a nullity because R.C. 4705.01 permits him as a “party concerned” to *commence* the action. According to plaintiff, Ohio case law is “bereft” of guidance on whether a “party concerned” is permitted to commence an action on behalf of others as well as himself. This is not so. The *Williams v. Global* case specifically addressed and rejected plaintiff’s meritless “party concerned” argument.

In *Williams v. Global*, Robert Williams filed a *pro se* case on behalf of the Tubalcain Trust for which he was a trustee. 26 Ohio App.3d at 120. Williams argued that he was a “party concerned” because he was personally liable for the trust assets and accordingly, he should be permitted to proceed *pro se*. *Id.* Relying on the plain language of the complaint which identified the plaintiff solely as a business trust, the court held that Williams was not a party to the action and therefore his filing the action on behalf of the trust violated R.C. 4705.01. *Id.* The Court went on to conclude that even if Williams had been a named party along with the trust, the action violated R.C. 4705.01 because “he could not represent himself and another interested party.” *Id.* at 120-121.

The *Williams v. Global* court reached the right result. The “party concerned” provision of R.C. 4705.01 obviously exists to permit individuals to represent themselves. R.C. 4705.01’s “party concerned” language did not carve out an exception to permit *pro se* litigants to represent the interests of others if they were also parties. Representation of others by non-attorneys is forbidden regardless of whether the non-attorney is a “party concerned” in the case or not. Indeed, if R.C. 4705.01 permitted *pro se* plaintiffs to bring actions on the behalf of others simply because they were concerned parties, the prohibition against the unauthorized practice of law would be obliterated. Not surprisingly, multiple Ohio courts have agreed with the sound reasoning of *Williams v. Global*: being a party concerned does not allow a *pro se* plaintiff to commence an action on behalf of others. *See Mays, supra* (sister who filed wrongful death claim individually and on behalf of the estate violated R.C. 4705.01; although she was a party, she could not file on behalf of the estate); *Dipaolo, supra* (corporate officer who filed individually and on behalf of corporation violated R.C. 4705.01; although he was a party, he could not file on behalf of the corporation). *See also Thompson, supra; Kinasz, supra; Williams v. Griffith, supra.*

Further, plaintiff’s argument that R.C. 4705.01 permitted him to *commence* a suit but not *litigate* the claim ignores the plain language of the statute. The statute prohibits a non-attorney from practicing law by *commencing, conducting or defending* an action or proceeding. It does not allow a non-attorney to commence an action on behalf of others and subsequently retain an attorney to litigate the claim. *See, e.g., Sheridan* 78 Ohio App.3d at 205 (complaint filed by non-attorney on behalf of

corporation was a nullity and subsequent representation by a licensed attorney did not “cure” a defect of complaint). Indeed, plaintiff’s statutory interpretation would not serve the purpose of the statute as it would allow a non-lawyer to practice law until he retained a lawyer. Indeed, here plaintiff did more than just file a complaint. He also filed a Motion for an Extension of Time to Obtain an Affidavit and practiced law for approximately three weeks – during which time he did significant damage to the beneficiaries’ interests.

In short, the Eighth District’s holding that the plaintiff violated R.C. 4705.01 when he filed a complaint on behalf of the estate’s other beneficiaries is simply one more decision in a long line of decisions confirming that non-attorneys cannot commence claims on behalf of others. Plaintiff’s “party concerned” argument has been addressed and properly rejected, both explicitly and implicitly, by multiple courts and fails to provide this Court with a reason to take up the case.

C. The Subsequent Filing of an Appearance of Counsel Does Not Cure the Fatal Defect Caused by the Improper Filing of a *Pro Se* Complaint.

Plaintiff’s assertion that his act of retaining counsel timely corrected his defect is similarly flawed. Although Civ.R. 15(A) allows a party to amend a pleading once as a matter of course within 28 days, there was no operative pleading to amend because plaintiff’s refiled complaint was a nullity. In other words, a complaint filed in violation of R.C. 4705.01 is treated as if it was never commenced. *Coburn v. Toledo Hosp.*, 6th Dist. Lucas No. L-00-1215, 2001 Ohio App. LEXIS 127, at *2 (Jan. 19,

2001). There is simply no complaint to amend because the pro se complaint was a nullity that was insufficient to initiate a suit. *Id.* at *3.

Applicable here, the court in *Coburn*, held that, by the time a plaintiff sought to remedy a violation of R.C. 4705.01, the statute of limitations had tolled and the trial did not err “in its refusal to permit amendment of a legally nonexistent suit.” *Id.* Thus, although plaintiff’s attempts to cure its violation of R.C. 4705.01 through its act of retaining counsel after the time period in which to refile had passed, plaintiff’s refiled complaint never commenced the action and there could be no amendment of “a legally nonexistent suit.” Plaintiff never properly commenced this action within the applicable time period as his refiled complaint was a nullity because it amounted to the unauthorized practice of law.

Here, plaintiff does not dispute that he filed his complaint on behalf of beneficiaries other than himself. His attempt to represent the interests of the remaining beneficiaries is a clear violation of R.C. 4705.01 because there are interests at stake other than his own. Because plaintiff was not the sole beneficiary of the estate, he violated R.C. 4705.01 when he refiled the complaint pro se. As established in *Kinasz* and *Thompson*, the complaint needed to be accompanied by an attorney’s signature because interests other than just plaintiff’s own are at issue. This lack of an attorney signature does in fact render the refiled complaint a nullity and was insufficient to properly commence this action.

IV. CONCLUSION

Based upon the foregoing, plaintiff's appeal does not present issues of public or great general interest. Consequently, defendants respectfully request that this Court decline to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2019, a copy of foregoing document was filed through the Court's electronic filing system. Notice of this filing will be sent to all parties and counsel of record via electronic mail.

/s/Brian D. Sullivan

Brian D. Sullivan (0063536)