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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jeffrey Wills Lusk, Individu- :
ally and as Executor of the :
Estate of Dorothy Jean :
Ross Lusk, Deceased, : No. 18AP-549
Plaintiff-Appellant, : (C.P.C. No. 18CV-2941)
v. : (ACCELERATED
Crown Pointe Care Center : CALENDAR)
et al., :
Defendants-Appellees. :

MEMORANDUM DECISION

Rendered on May 28, 2019

Jeffrey Wills Lusk, pro se.

*Poling Law and Brant E. Poling, for appellees
Central Ohio Hospitalists, Inc., DBA MedOne
Hospital Physicians, Daniel Miller, M.D., and
Brian Pulliam, C.N.P.*

Tucker Ellis LLP, Ernest W. Auciello, and Jeffrey C. Sindelar, Jr., for appellees Crown Pointe Care Center, SHCP Franklin, Inc., Foundations Health Solutions, Inc., Atlas Healthcare Solutions, Inc., Crista King, and Lynn Marie Gutridge.

ON APPLICATION FOR EN BANC
CONSIDERATION AND MOTION TO
CERTIFY A CONFLICT

LUPER SCHUSTER, J.

(¶ 1) On April 19, 2019, plaintiff-appellant, Jeffrey Wills Lusk, filed an application seeking en banc consideration, pursuant to App.R. 26(A)(2)(c), of this court's April 9, 2019 decision in *Lusk v. Crown Pointe Care Ctr.*, 10th Dist. No. 18AP-549, 2019-Ohio-1326, which dismissed Lusk's appeal from a judgment of the Franklin County Court of Common Pleas dismissing Lusk's wrongful death and survival claims against defendants-appellees, Crown Pointe Care Center, et al. On April 22, 2019, Lusk filed a motion requesting certification pursuant to App.R. 25(A) and Ohio Constitution, Article IV, Section 3(B)(4), of an alleged conflict between our decision and *O'Brien v. White & Getgey*, 1st Dist. No. C74610 (Oct. 27, 1975). For the following reasons, we deny Lusk's application and motion.

I. Application for En Banc Consideration

(¶ 2) “[I]f the judges of a court of appeals determine that two or more decisions of the court on which they sit are in conflict, they must convene en banc to resolve the conflict.” *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, paragraph two of the syllabus. App.R. 26(A)(2) outlines the standard for seeking en banc consideration. To apply for en banc consideration, a party “must explain how the panel’s decision conflicts with a prior panel’s decision

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on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions." App.R. 26(A)(2)(b). "Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed." App.R. 26(A)(2)(a).

(¶ 3) Lusk alleges our decision in this case is in conflict with this court's decision in *Heath v. Teich*, 10th Dist. No. 06AP-1018, 2007-Ohio-2529. However, in our decision we distinguished *Heath*. Lusk asserts he is the sole beneficiary of his mother's estate and therefore he can proceed pro se as the executor of the estate. In analyzing this issue, we acknowledged that the *Heath* decision suggested that if the non-attorney personal representative of an estate is the sole beneficiary of the estate, then that person may represent the estate in court pro se. *Lusk* at ¶ 11. But we further explained that because *Heath* involved multiple estate beneficiaries, any suggestion contained therein concerning circumstances involving only one beneficiary is dictum. Thus, the dispositive issue before us in this case was not decided on the facts in *Heath*.

(¶ 4) Because Lusk fails to establish the grounds necessary for en banc consideration, his application is denied.

II. Motion to Certify a Conflict

(¶ 5) Ohio Constitution, Article IV, Section 3(B)(4) gives the courts of appeals of Ohio the power to certify the record in a case to the Supreme Court of Ohio “[w]henever *** a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals.” Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, “there must be an actual conflict between appellate judicial districts on a rule of law before certification of a case to the Supreme Court for review and final determination is proper.” *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594 (1993), paragraph one of the syllabus. To meet this standard, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be “‘upon the same question.’” *Id.* at 596, quoting Section 3(B)(4), Article IV of the Ohio Constitution. Second, the alleged conflict must be on a rule of law, not facts. *Id.* Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by another district court of appeals. *Id.*

(¶ 6) Lusk argues our decision conflicts with *O'Brien v. White & Getgey*, 1st Dist. No. C-74610 (Oct. 27, 1975). In *O'Brien*, the First District Court of Appeals affirmed the trial court’s removal of the non-attorney estate administrator as the attorney of record in an action the administrator initiated to recover attorney fees paid by the decedent prior to her death. In

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that case, the administrator was not the sole beneficiary of the estate. As in *Heath*, the *O'Brien* case did not present the issue of whether an estate's non-attorney sole beneficiary may bring an action pro se as the estate's representative. Thus, *O'Brien* is also distinguishable from this case.

(¶ 7) Because our decision does not conflict with *O'Brien*, we deny Lusk's motion to certify a conflict.

III. Disposition

(¶ 8) Based on the foregoing, we deny Lusk's application for en banc consideration and motion to certify a conflict.

*Application for en banc consideration denied;
motion to certify a conflict denied.*

SADLER and DORRIAN, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jeffrey Wills Lusk, Individu- :
ally and as Executor of the :
Estate of Dorothy Jean :
Ross Lusk, Deceased, : No. 18AP-549
Plaintiff-Appellant, : (C.P.C. No. 18CV-2941)
v. : (ACCELERATED
Crown Pointe Care Center : CALENDAR)
et al., :
Defendants-Appellees. :
:

JOURNAL ENTRY

(Filed May 29, 2019)

For the reasons stated in the memorandum decision of this court rendered on May 28, 2019, it is the order of this court that the Motion to Certify, filed April 22, 2019, is denied. The application for en banc consideration, filed April 19, 2019, is also denied.

LUPER SCHUSTER, SADLER,
& DORRIAN, JJ.

By /S/ JUDGE
Judge Betsy Luper Schuster

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jeffrey Wills Lusk, Individu- :
ally and as Executor of the :
Estate of Dorothy Jean :
Ross Lusk, Deceased, : No. 18AP-549
Plaintiff-Appellant, : (C.P.C. No. 18CV-2941)
v. : (ACCELERATED
CROWN Pointe Care Center : CALENDAR)
et al., :
Defendants-Appellees. :

DECISION
NUNC PRO TUNC¹

Rendered on April 16, 2019

On brief: *Jeffrey Wills Lusk*, pro se. **Argued:**
Jeffrey Wills Lusk.

On brief: *Poling Law* and *Brant E. Poling*, for
appellees Central Ohio Hospitalists, Inc.,
DBA MedOne Hospital Physicians, Daniel

¹ This decision replaces, nunc pro tunc, the original decision released April 9, 2019, and is effective as of that date. This decision reflects the motion granted February 11, 2019, in which the case style was corrected to reflect executor, rather than administrator. Additionally, the decision notes Lusk as executor accordingly.

Miller, M.D., and Brian Pulliam, C.N.P. **Argued: Zachary Hoover.**

On brief: *Tucker Ellis LLP, Ernest W. Auciello, and Jeffrey C. Sindelar, Jr.*, for appellees Crown Pointe Care Center, SHCP Franklin, Inc., Foundations Health Solutions, Inc., Atlas Healthcare Solutions, Inc., Crista King, and Lynn Marie Gutridge.

APPEAL from the Franklin County Court of Common Pleas

LUPER SCHUSTER, J.

(¶ 1) Plaintiff-appellant, Jeffrey Wills Lusk, individually and as executor of the estate of Dorothy Jean Ross Lusk, deceased, appeals pro se from a judgment of the Franklin County Court of Common Pleas dismissing Lusk's wrongful death and survival claims against defendants-appellees, Crown Pointe Care Center et al. For the following reasons, we dismiss this appeal.

I. Facts and Procedural History

(¶ 2) In April 2018, Lusk, individually and as executor of the estate of his deceased mother, initiated this action pro se against appellees alleging wrongful death and survival claims. Appellees moved to dismiss Lusk's complaint because, as a non-lawyer, he was engaging in the unauthorized practice of law by filing the complaint pro se, the claims were time-barred, and the

medical negligence claims were not accompanied by the required affidavit of merit. On July 9, 2018, the trial court dismissed Lusk's wrongful death claim based on its finding that Lusk's filing of that claim constituted the unauthorized practice of law, and it dismissed his survival claim based on its finding that the statute of limitations had run as to that claim.

(¶ 3) On July 10, 2018, Lusk filed a notice of appeal. Two days later, appellees moved to dismiss the appeal on the basis that Lusk, a non-lawyer, may not litigate this appeal. On July 17, 2018, this court filed an entry agreeing that Lusk may not litigate the matter, but rather than dismissing the appeal at that time, permitted him a reasonable time to obtain counsel. The court noted that, if within 30 days, counsel had not made an appearance on Lusk's behalf, the appeal would be dismissed. On August 1, 2018, Lusk filed a motion to defer ruling on appellees' motion to dismiss the appeal until the case is submitted for decision. This court granted Lusk's motion, thereby permitting the appeal to be briefed and deferring a ruling on the issue of whether Lusk, as a non-lawyer, may prosecute any part of this appeal. On August 15, 2018, appellees moved for reconsideration of the decision to defer ruling on the pro se representation question, which this court denied. The appeal was argued and submitted to the court for decision on February 19, 2019.¹

¹ After this appeal was submitted for decision, Lusk moved to supplement the record with a document that purports to show that no creditor claims have been filed against the decedent's estate. However, because the submitted document was not part of

II. Assignments of Error

(¶ 4) Lusk assigns the following errors for our review:

[1.] The trial court erred to the prejudice of appellant by granting appellees' motion to dismiss, by failing to accept all allegations of the complaint as true, by failing to grant appellant all reasonable inferences from those facts, and by finding that it was beyond all doubt that appellant could prove no set of facts that would entitle him to relief.

[2.] The trial court erred to the prejudice of appellant by ruling non-attorney executor appearing pro se constituted the unauthorized practice of law by failing to: recognize wrongful death and survival actions are separate; follow the Ohio Supreme Court non-attorney executor pro se exception; respect the executor-beneficiary fiduciary relationship; recognize that executor has all the rights of decedent, including right to appear pro se; recognizes executor has management rights that belonged to decedent; recognize executor appearing pro se exercised his own management rights rather than rights of estate or beneficiaries; recognize

the record below, we deny Lusk's motion and do not consider it. *See Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13 ("a bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial").

executor's personal liability for mismanagement that ensures proper management-and not a requirement that he hire an attorney to represent the beneficiaries' interests; recognize distinction between vesting management rights in executor and beneficial interests in beneficiaries; recognize the role of the fiduciary duties in regulating the executor-beneficiary relationship; recognize executor owes no duties to the beneficiaries; recognize an estate is very much unlike a corporation because it is not a legal entity, as it cannot sue nor be sued; and recognize the executor is the beneficial interest in the corpus of the estate as its sole beneficiary.

[3.] The trial court erred to the prejudice of appellant by ruling non-attorney executor appearing pro se constituted the unauthorized practice of law by failing to recognize adult children are not presumed to have suffered from the loss of a parent, thus, are potential statutory beneficiaries not yet determined by Franklin County Ohio Probate Court to be real parties in interest.

[4.] The trial court erred to the prejudice of appellant by finding the statute of limitations had run before decedent knew her injuries were proximately caused by conduct of defendants despite the fact complaint conclusively shows on its face the action is not barred by the statute of

limitations under the authority of the “discovery rule.”

[5.] The trial court erred to the prejudice of appellant by failing to convert motion to dismiss to motion for summary judgment, as required by Civ.R. 12, because appellant introduced extrinsic evidence.

III. Discussion

(¶ 5) Before addressing Lusk’s assignments of error, we must first analyze the threshold issue of whether this matter is properly before this court. Lusk, a non-attorney, is proceeding pro se. He argues he is entitled to litigate this appeal of the trial court’s dismissal of the wrongful death and survival claims based on his status as the sole beneficiary under decedent’s will. We disagree.

(¶ 6) While a party may represent himself in a court proceeding without the assistance of a lawyer, the general rule is that a layperson may not represent another person in a legal action. *Norwalk MK, Inc. v. McCormick*, 170 Ohio App.3d 147, 2006-Ohio-4640, ¶ 8 (6th Dist.); *see Williams v. Griffith*, 10th Dist. No. 09AP-28, 2009-Ohio-4045, ¶ 14, quoting *State v. Block*, 8th Dist. No. 87488, 2007-Ohio-1979, ¶ 4 (A “‘person has the inherent right to proceed pro se in any court, but that right pertains only to that person. It does not extend to the person’s spouse, child, or solely owned corporation.’”); R.C. 1.59 (A “person” is generally defined to include “an individual, corporation, business

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trust, estate, trust, partnership, and association.”). This rule has developed from the statute prohibiting the unauthorized practice of law, R.C. 4705.01. *Wood Cty. Health Dist. v. Bauer*, 6th Dist. No. WD-17-043, 2018-Ohio-5203, ¶ 23. “The ‘practice of law’ consists of, *inter alia*, preparing documents and papers prior to commencement of actions, managing the resulting actions, and representing persons in court.” *Norwalk MK, Inc.* at ¶ 8, citing *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 28-29 (1934).

(¶ 7) Although there is no common-law action for wrongful death, R.C. 2125.01 establishes such a claim in Ohio. Under this statute, “[w]hen the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person who would have been liable if death had not ensued * * * shall be liable to an action for damages.” Such an action must be “brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, * * * the parents of the decedent, * * * [and] the other next of kin of the decedent.” R.C. 2125.02(A)(1). For the purpose of R.C. 2125.02, “personal representative” means either the executor or administrator of the decedent’s estate. *Slater v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 17AP-453, 2018-Ohio-1475, ¶ 16 (10th Dist.).

(¶ 8) The requirement that a wrongful death action be brought in the name of the decedent’s personal representative, who is generally represented by

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counsel, prevents a multiplicity of suits and facilitates distribution of any sums received from wrongful-death claims to the various beneficiaries. *Peters v. Columbus Steel Castings Co.*, 115 Ohio St.3d 134, 2007-Ohio-4787, ¶ 10, citing R.C. 2125.03; *Williams* at ¶ 12. In this capacity, the personal representative represents the interests of the statutory next of kin. *Williams* at ¶ 13, citing R.C. 2125.02(A)(1). Here, Lusk was appointed as the executor of his mother's estate. Generally, Lusk may independently represent his own interests, but, as a non-attorney, he may not represent in court the interest of others, including the decedent's other next of kin. While Lusk is one of decedent's next of kin, he is not her only next of kin as he has a sister, and representing the interests of his sister would constitute the unauthorized practice of law. Further, he cannot proceed in a wrongful death action only on behalf of himself individually because such an action must be "maintained by the personal representative on behalf of the statutory next of kin in one action." *Williams* at ¶ 15, citing R.C. 2125.02. Therefore, Lusk's attempt to proceed pro se in prosecuting the wrongful death action is impermissible because he necessarily would be representing the interests of at least one other statutory next of kin.

(¶ 9) Lusk's attempt to litigate the survival claim is also impermissible. "[A] survival action brought to recover for a decedent's own injuries before his or her death is independent from a wrongful-death action seeking damages for the injuries that the decedent's beneficiaries suffer as a result of the death, even

though the same nominal party [the personal representative] prosecutes both actions.” *Peters* at ¶ 7. “Under the general survival statute, R.C. 2305.21, a victim’s right of action for personal injuries survives and passes to her personal representative, and may be instituted for the benefit of the estate.” *Shinaver v. Szymanski*, 14 Ohio St.3d 51, 55 (1984); *Perry v. Eagle-Picher Industries, Inc.*, 52 Ohio St.3d 168, 169-70 (1990); *see LaMusga v. Summit Square Rehab, LLC*, 2d. Dist. No. 26641, 2015-Ohio-5305, 155 (“survival claims made by the personal representative are on behalf of the estate”); *Williams v. Barrick*, 10th Dist. No. 08AP-133, 2008-Ohio-4592, ¶ 10 (in bringing survival claims, the personal representative of the decedent’s estate was “standing in the shoes” of the decedent). Thus, as to the survival claim, Lusk, a non-lawyer, was acting on behalf of the decedent’s estate.

(¶ 10) Despite proceeding pro se on behalf of the estate, Lusk argues the fiduciary responsibilities associated with his status as the executor of decedent’s estate enable him, as a non-lawyer, to litigate matters for the benefit of the estate because there are sufficient checks on his management of the litigation. But this assertion fails to recognize the distinction between the administration of a decedent’s estate and a wrongful death or survival action being filed on behalf of the next of kin or the estate in the name of the administrator as the nominal party. An administrator’s duties pertaining to the administration of an estate do not change the principles precluding a non-lawyer from

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engaging in the practice of law. *Williams*, 10th Dist. No. 09AP-28, 2009-Ohio-4045.

(¶ 11) Lusk also contends, citing *Heath v. Teich*, 10th Dist. No. 06AP-1018, 2007-Ohio-2529, that because the decedent disinherited Lusk's sister by will, and because there are no creditors of decedent's estate, he is permitted to litigate this matter on behalf of the estate. Lusk is correct that this court in *Heath* suggested that if the personal representative of an estate is the sole beneficiary of the estate, then that person may represent the estate in court. *Id.* at ¶ 8. However, because *Heath* involved more than one beneficiary of the estate, any suggestion contained therein concerning circumstances involving only one beneficiary under a will is dictum. Therefore, Lusk's reliance on *Heath* is unavailing as it relates to the case before us. Even if Lusk is the sole beneficiary under the decedent's will and her estate has no creditors, these circumstances do not alter the fact that he is attempting to litigate this matter on behalf of the estate, which Ohio law generally treats as a "person" or an "entity." R.C. 1.59; *In re Estate of Villiers*, 10th Dist. No. 12AP-293, 2013-Ohio-2560, ¶ 3; *Estate of Barney v. Manning*, 8th Dist. No. 94947, 2011-Ohio-480, ¶ 16. Lusk fails to cite, and our independent research does not reveal, any Ohio case holding that a non-lawyer personal representative may litigate an action pro se on behalf of a decedent's estate. Conversely, at least one Ohio appellate court has expressly opined that R.C. 4705.01 prohibits a non-lawyer from litigating claims on behalf of an estate, pro se, without noting any possible exception to this rule if

there are no creditors or other beneficiaries to the estate. *See Mays v. Toledo Hosp.*, 6th Dist. No. L-13-1233, 2014-Ohio-1991, ¶ 8.

(¶ 12) When a non-attorney files a notice of appeal and attempts to prosecute the appeal in court as counsel on behalf of another, such constitutes the unauthorized practice of law for which the pleadings filed should be stricken and the proceeding thus attempted dismissed. *Bank of New York v. Miller*, 185 Ohio App.3d 163, 2009-Ohio-6117, ¶ 13 (5th Dist.); *Scott v. H.T.M. Trust*, 3d Dist. No. 12-90-4 (May 9, 1991). Therefore, because Lusk is not authorized to appeal pro se from the trial court's dismissal of the wrongful death and survival claims he filed against appellees on behalf of the decedent's statutory next of kin and her estate, we must dismiss this appeal.

IV. Disposition

(¶ 13) For the foregoing reasons, we dismiss this appeal.

Appeal dismissed.

SADLER and DORRIAN, JJ., concur.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Jeffrey Wills Lusk, Individu- :
ally and as Executor of the :
Estate of Dorothy Jean :
Ross Lusk, Deceased, : No. 18AP-549
Plaintiff-Appellant, : (C.P.C. No. 18CV-2941)
v. : (ACCELERATED
Crown Pointe Care Center : CALENDAR)
et al., :
Defendants-Appellees. :
:

NUNC PRO TUNC JUDGMENT ENTRY¹

(Filed Apr. 16, 2019)

For the reasons stated in the decision of this court rendered on April 9, 2019, having found appellant is not authorized to appeal pro se, we dismiss this appeal. It is the judgment and order of this court that this appeal is dismissed. Appellant's February 21, 2019

¹ This judgment entry replaces, nunc pro tunc, the original entry released April 9, 2019, and is effective as of that date. This entry reflects the motion granted February 11, 2019, in which the case style was corrected to reflect executor, rather than administrator.

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motion to supplement the record is moot and will not be considered. Costs are assessed against appellant.

LUPER SCHUSTER, SADLER,
& DORRIAN, JJ.

By /S/ JUDGE
Judge Betsy Luper Schuster

**IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO**

**Jeffrey Wills Lusk, Indi- :
vidually and as Adminis- :
trator of the Estate of :
Dorothy Jean Ross Lusk, : Case No.
Deceased, : 18 CV 2941
Plaintiff, : Judge David C.
v. : Young
Crown Pointe, *et al.*, :
Defendants. :
:**

Decision & Entry

(Filed Jul. 9, 2018)

I. Introduction

This matter is before the Court on the following filings:

- The Motion of Defendants Crown Pointe, SHCP Franklin, Inc., Atlas Healthcare Solutions, Foundations Health Solutions, Christa King, and Lynn Marie Gutridge to Dismiss filed April 26, 2018. Plaintiff filed a Memorandum Contra on May 9, 2018.
- Central Ohio Hospitalists, Inc. dba MedOne Hospital Physicians, Daniel Miller, M.D., and Brian Pulliam, CNP's Motion to Dismiss filed May 10, 2018. Plaintiff filed a Memorandum Contra on May 18, 2018. Movants filed a Reply on May 30, 2018.

- Defendants Crown Pointe, SHCP Franklin, Inc., Atlas Healthcare Solutions, Foundations Health Solutions, Christa King, and Lynn Marie Gutridge filed a Joinder in the Motion to Dismiss filed May 10, 2018. Plaintiff filed a Memorandum Contra on June 11, 2018.

II. Standard of Review

Defendants move to dismiss this action pursuant to Civ.R. 12(B)(6). A motion to dismiss for failure to state a claim is a procedural device designed to test the sufficiency of a complaint or cause of action. *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, ¶ 8, citing *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In making this evaluation, the court “must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiffs.” *Hamilton v. Ohio Dept of Health*, 2015-Ohio-4041, 42 N.E.3d 1261, ¶ 15 (10th Dist.), citing *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶ 11, 816 N.E.2d 1061. “When reviewing a Civ.R. 12(B)(6) motion to dismiss, the court may consider only the statements and facts considered in the pleadings and may not consider or rely on evidence outside of the complaint.” *Id.*, citing *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, ¶ 4. Ultimately, “[f]or the moving defendant to prevail, it must appear from the face of the complaint that the plaintiffs can prove

no set of facts that would entitle them to relief." *Id.*, citing *Maitland* at ¶ 11.

III. Unauthorized Practice of Law

The Court will first address Defendants' argument that Plaintiff cannot maintain a wrongful death action pro se. R.C. 2025.02(A)(1) provides that

a civil action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

In the context of wrongful death actions, "[t]he requirement set forth in R.C. 2125.02 that the wrongful death action be brought in the name of the personal representative of the decedent's estate does not supplant or override the limits on who may practice law set forth in R.C. 4705.01." *Heath v. Teich*, 10th Dist. Franklin No. 06AP-1018, 2007-Ohio-2529, ¶ 11.

R.C. 4705.01 provides in pertinent 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

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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.

* * *

The Eighth District stated as follows:

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. *See, e.g., id.* at ¶ 15 (administrator of a decedent's estate could not bring a wrongful death claim pro se on behalf of next of kin); *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); *Thompson v. THC, Inc.*, S.D. Ohio Case No. C-1-07-231, 2008 U.S. Dist. LEXIS 75632, *4-6 (Sept. 30, 2008) (dismissal of complaint filed by estate's administrator without prejudice was appropriate because even though administrator was a beneficiary, she was not the sole beneficiary and, therefore, could not represent the estate's interests pro se).

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Kinasz v. Southwest Gen. Health Ctr., 8th Dist. Cuyahoga No. 100182, 2014-Ohio-402, ¶ 14. Further, “[w]hen 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.*, 26 Ohio App.3d 119, 119, 498 N.E.2d 500 (10th Dist.1985), paragraph 2 of the syllabus. *See also Heath*, 2007-Ohio-2529; *Kinasz*, 2014-Ohio-402; *Williams v. Griffith*, 10th Dist. Franklin No. 09AP-28, 2009-Ohio-4045.

Plaintiff has filed the Complaint, and is proceeding, pro se. The Complaint states as follows:

2. Plaintiff was appointed Executor of the Estate of Dorothy Jean Ross Lusk, Deceased, by the Franklin County Probate Court on 13 September 2016 in Case No. 580770. He brings this wrongful death action as personal representative for the exclusive benefit of the surviving children, and other next of kin of the deceased.

(Comp. at ¶ 2.) Plaintiff is purporting to represent the interest of the estate, the surviving children, and other next of kin of the deceased. (*Id.*)

Plaintiff may not litigate the wrongful death claims on behalf of the estate because it constitutes unauthorized practice of law. Therefore, Plaintiff’s wrongful death claims must be dismissed.

IV. Statute of Limitations

Defendants also argue that the statute of limitations has run on the survivorship claims. “A complaint may be dismissed under Civ.R. 12(B)(6) as time-barred under the statute of limitations if the face of the complaint makes clear that the action is time-barred.” *LGR Realty, Inc. v. Frank & London Ins. Agency*, 2016-Ohio-5044, 58 N.E.3d 1179, ¶ 10 (10th Dist.). A Civ.R. 12(B)(6) motion to dismiss based upon statute of limitations should only be granted where the complaint demonstrates conclusively on its face that the action is time-barred. *Id.* “A party may assert a statute of limitations defense through a Civ.R. 12(B)(6) motion to dismiss if the defense is apparent in the complaint.” *Ibanez v. Mosser*, 10th Dist. Franklin No. 11AP-1100, 2012-Ohio-4375, ¶ 7.

Plaintiff argues that his claims are ordinary negligence claims, and Defendants argue that they are medical malpractice claims. The statute of limitations for bodily injury claims that are based upon ordinary negligence is two years. R.C. 2305.10(A). To the extent that the claims are based upon medical malpractice, they are subject to a one year statute of limitations. R.C. 2305.113.

The Court finds that the claims are time barred, even assuming, arguendo, that the two-year statute of limitations for bodily injury based upon ordinary negligence applies. “The statute of limitations commences to run as soon as the injurious act complained of is committed; delayed damage is ineffective to delay the

accrual of a cause of action predicated upon a wrongful act.” *Dublin v. Bansek*, 10th Dist. Franklin No. 10AP-14, 2010-Ohio-2372, ¶ 8, quoting *Ohio Assn. of Pub. School Employees v. Liberty Moving and Storage, Inc.* (Dec. 20, 1984), 10th Dist. No. 84AP-605, 1984 Ohio App. LEXIS 12114. The injurious act occurred, and the statute of limitations began running, on April 5, 2016. (Comp. at ¶ 3, 6.) The Complaint in this matter was filed on April 6, 2018. The two-year statute of limitations expired on April 5, 2018.

Further, the discovery rule does not apply in this matter. The alleged injurious act was committed on April 5, 2016, and bodily injury occurred immediately on that date. (Comp. at ¶ 3, 6; Pl.’s Aff.² at ¶ 8-11.) Further, Plaintiff has failed to allege facts in the Complaint which would toll the statute.

Moreover, the same result is reached if these claims were determined to be medical malpractice claims. In that case they would be subject to a one year statute of limitations. R.C. 2305.113. The injurious act occurred on April 5, 2016, and Ms. Lusk died on April 11, 2016. (Comp. at ¶ 3, 6, 9.) The statute of limitations, therefore, would have run in 2017.

Based on the foregoing, the Court finds that the statute of limitations has run, and the survivorship claims are time-barred on the face of the Complaint.

² The Affidavit is an attachment to the Complaint. “Attachments to the complaint are considered part of the complaint for all purposes.” *Agrawal v. Univ. of Cincinnati*, 10th Dist. Franklin No. 16AP-293, 2017-Ohio-8644, ¶ 11.

V. Conclusion

Therefore, the Court hereby **GRANTS** Defendants' Motions to Dismiss. Plaintiff's wrongful death claims are hereby **DISMISSED** without prejudice, and the survivorship claims are **DISMISSED** with prejudice. This Decision & Entry **TERMINATES** this matter. This is a final, appealable order.

IT IS SO ORDERED.

The Supreme Court of Ohio

Jeffrey Wills Lusk,
Individually and as
Executor of the Estate of
Dorothy Jean Ross Lusk,
Deceased

v.

Crown Pointe Care Center
et al.

Case No. 2019-0913
ENTRY
(Filed Sep. 17, 2019)

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 18AP-549)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice
