

No. 20-6672

IN THE SUPREME COURT OF THE UNITED STATES

ADAM COLEMAN,

Petitioner,

v.

EPHRAIM McDOWELL REGIONAL MEDICAL CENTER, INC.

Respondent.

*On Petition for a Writ of Certiorari to the Supreme Court
of Kentucky*

BRIEF IN OPPOSITION ON BEHALF OF EPHRAIM
McDOWELL REGIONAL MEDICAL CENTER, INC

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QUESTIONS PRESENTED FOR REVIEW

Whether a decedent's personal representative may proceed *pro se* in a wrongful death action under Kentucky law despite constituting the unauthorized practice of law.

CORPORATE DISCLOSURE STATEMENT

Respondent Ephraim McDowell Regional Medical Center, Inc. states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS AND ORDERS BELOW

The Kentucky Court of Appeals' dismissal below is reproduced at Appendix 1. It was not published. The Supreme Court of Kentucky's Order denying discretionary review is reproduced at Appendix 2. It was also not published.

JURISDICTIONAL STATEMENT

Respondent does not believe this Court has jurisdiction under 28 U.S.C. § 1257 for the reasons stated below. Additionally, it is believed the Petition was untimely filed.

STATUTORY AND REGULATORY PROVISIONS

1. KY. REV. STAT. (“KRS”) § 411.130 provides:

- (1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.
- (2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:
 - (a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.
 - (b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.
 - (c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.
 - (d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, “mother” and “father” shall mean the adoptive parents of the deceased.
 - (e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote

than those above named, according to the law of descent and distribution.

2. Kentucky Supreme Court Rule 3.020 provides:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

STATEMENT OF THE CASE

On March 1, 2018, siblings Adam L. Coleman and Ashley Coleman, individually filed suit *pro se* against Ephraim McDowell Regional Medical Center, Inc. (“Ephraim McDowell”) in the Boyle Circuit Court, Boyle County, Kentucky. App’x 3. The suit alleged that Ephraim McDowell, a healthcare provider, acted negligently in the care of decedent, Linda Coleman, Adam’s and Ashley’s mother, who died November 5, 2017.¹ The Complaint did not include the Estate of Linda Coleman as a party. The Complaint specifically cited Kentucky’s wrongful death statute, KY. REV. STAT. (“KRS”) § 411.130(1), as the basis for the cause of action against Ephraim McDowell. It did not make claims for loss of consortium and did not identify Adam Coleman as a party in his capacity as personal representative of the Estate of Linda Coleman, although attachments to the Complaint indicated that he had been appointed as personal representative.

On March 14, 2018, Ephraim McDowell moved the Boyle Circuit Court to dismiss the case or hold it in abeyance because the Coleman Plaintiffs failed to comply with the requirements of Kentucky’s Medical Review Panel Act (“MRPA”), KRS Chapter 216C. At the time, the MRPA required a plaintiff alleging medical malpractice to submit the claim to a medical review panel. Ephraim McDowell sought to enforce the procedural requirements of the MRPA and to hold the case in abeyance if the circuit court was unwilling to dismiss it pending completion of those requirements.

¹ Linda Coleman was diagnosed with inoperable stage IV metastatic bile duct cancer in April 2017 at the University of Kentucky Hospital.

On April 24, 2018, the Boyle Circuit Court entered an order holding the case in abeyance due to a pending case before the Kentucky Supreme Court concerning the constitutionality of medical review panels under Kentucky's constitution. App'x 4. On November 15, 2018, the Supreme Court of Kentucky abrogated the MRPA as unconstitutional. *See Commonwealth of Kentucky v. Claycomb*, 566 S.W.3d 202, 210 (Ky. 2018).

Thereafter, on November 27, 2018, Ephraim McDowell moved to dismiss the Colemans' claims on other grounds. Under Kentucky law, a wrongful death claim may only be prosecuted by the personal representative of the Estate. Adam and Ashley Coleman individually are not permitted to present wrongful death claims and cannot prosecute the claims on behalf of the Estate based on their status as beneficiaries. The Estate also must be represented by an attorney.

On December 10, 2018, the Boyle Circuit Court lifted the stay in the case but denied Ephraim McDowell's motion to dismiss. The court agreed with Ephraim McDowell's position concerning the *pro se* claims but granted the Colemans three months to locate and retain counsel in order to proceed. App'x 5. After three months expired, on March 19, 2019, Ephraim McDowell renewed its motion to dismiss.

On April 2, 2019, the Colemans also moved the Boyle Circuit Court to dismiss the case. App'x 6. On April 4, 2019, the Boyle Circuit Court granted the parties' requests for dismissal, entering an Order of Dismissal with prejudice based on the inability to secure counsel to handle the wrongful death claim. App'x 7.

Adam and Ashley Coleman *pro se* appealed as a matter of right to the Kentucky Court of Appeals on April 11, 2019. On May 20, 2019, Ephraim McDowell moved to dismiss the appeal for the same reasons the underlying case was dismissed—the unauthorized practice of law—and also for failing to name indispensable parties to the appeal. Namely, the Colemans failed to name the Estate or its personal representative as parties to the appeal. Ashley Coleman later asked to be dismissed from the appeal. On July 10, 2019, the Kentucky Court of Appeals dismissed the appeal on the basis that Adam Coleman could not represent the Estate of Linda Coleman *pro se*. App’x 1.

On August 9, 2019, Adam Coleman *pro se* moved the Supreme Court of Kentucky to grant discretionary review of the Court of Appeals’ dismissal. For the first time, Coleman identified the movant/appellant as “Adam L. Coleman for the Estate of Linda Coleman.” App’x 8. Ephraim McDowell objected to granting discretionary review. Coleman also sought to proceed *in forma pauperis*. On October 24, 2019, the Kentucky Supreme Court granted Coleman’s motion to proceed *in forma pauperis* under KRS 454.410 (pertaining to criminal defendants). The Supreme Court of Kentucky denied the motion for discretionary review on August 13, 2020.² App’x 2.

² Following dismissal of the claims in Boyle Circuit Court, Adam Coleman for the estate of Linda Coleman, *pro se*, unsuccessfully attempted to pursue claims arising from the Boyle Circuit Court Action against Ephraim McDowell’s attorneys in neighboring Lincoln County in a poor attempt to circumvent the outcome. On September 13, 2019, the Lincoln Circuit Court denied Coleman’s request to proceed *in forma pauperis*.

On November 14, 2020, counsel for Ephraim McDowell received a petition for a writ of certiorari from Adam Coleman. The petition was mailed on November 13, 2020. App'x 9. Both the petition and an accompanying motion to proceed *in forma pauperis* named “Adam L. Coleman for the estate of Linda Coleman” as petitioner. The Proof of Service accompanying this copy did not match the mailing date. On December 16, 2020, counsel for Ephraim McDowell received a second petition from Adam Coleman. It was mailed on December 15, 2020. App'x 10. The second petition identifies Adam L. Coleman as petitioner, *pro se*. The accompanying Proof of Service incorrectly swears that a copy of the petition was served on Ephraim McDowell’s counsel on December 12, 2020.

At no point in the proceedings did the Coleman Plaintiffs raise any federal question as an issue in this case. Likewise, Ephraim McDowell never raised any federal question in this case as a basis for dismissal. Accordingly, the Boyle Circuit Court, Kentucky Court of Appeals, and Supreme Court of Kentucky have never considered any federal question or issue of federal law in deciding this case.

Coleman’s Petition contains a plethora of misstatements. Most notably, the dismissal of his claims was not based on the constitutionality *vel non* of the MRPA. There is also nothing to suggest Coleman was aware of the MRPA prior to filing or that it had anything to do with deciding to file suit in the manner, as he suggests in the Petition. Additionally, contrary to the Petition, there is no evidence at all in the underlying record because the case was held in abeyance and then dismissed due to

the lack of attorney representation. Statements in the Petition about “the evidence” are thus incorrect.

REASONS FOR DENYING THE PETITION

The Court should deny the petition for several reasons. First, Petitioner Adam Coleman failed to state a compelling reason for review of an issue purely based in Kentucky law. Second, Coleman’s Petition, filed *pro se*, continues to improperly assert claims on behalf of the Estate of Linda Coleman. Third, Coleman’s Petition should be stricken because it appears untimely and violates a number of the Rules of this Court. Each issue is addressed in turn below.

I. THE PETITION FAILS TO STATE A COMPELLING REASON FOR REVIEW

Coleman’s Petition essentially asks the U.S. Supreme Court to review a state court decision concerning the application of Kentucky law that does not touch in any way on any federal question. The Kentucky courts below rightly decided this matter based on Kentucky’s wrongful death statute and the Supreme Court of Kentucky’s Rules concerning the practice of law. Regardless of whether Coleman has shown any error by the courts below, “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” SUP. CT. R. 10. In other words, the Court is not in the business of error correction. *See City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., dissenting). Coleman is merely unhappy with the outcome here, but that is not a “compelling reason” for this Court to grant the Petition. Perhaps most importantly, Coleman cannot claim a compelling reason when he asked for this outcome below.

Coleman's reference to the Fourteenth Amendment and the Equal Protection Clause does not make the case compelling. None of these arguments are preserved for review because this is the first time he has asserted them. Several of Petitioner's Questions Presented ("QP") purportedly rely on the Equal Protection Clause. *See* Petitioner QP Nos. 1, 5, 6, and 8. In QP 1, Coleman incorrectly claims that there was state legislation preventing him from having legal representation in a wrongful death action in contravention of some federal law. However, there is no right to counsel in the context of a civil claim of this nature and there is no state legislation that prohibited him from obtaining legal representation on behalf of the Estate as required. *May v. Coleman*, 945 S.W.2d 426, 427 (Ky. 1997) (citing *Parsley v. Knuckles*, 346 S.W.2d 1 (Ky. 1961)). QP 5 incorrectly conflates the abrogation of the Kentucky MRPA and his dismissal. The unconstitutionality of the Act had nothing to do with dismissal, again, for which he requested. His failure to procure counsel to represent the Estate was the basis for dismissal. *See* App'x 1 [COA Opinion]. In fact, the circuit court below generously gave Coleman three months to find counsel. In QP 6, Coleman contends that the Equal Protection Clause should make consortium claims universal across the states. However, he points to no fundamental right implicated here, and his suggestion that laws in each state should be uniform ignores our federal system of governance and the limited federal government created by the U.S. Constitution. In QP 8, Coleman misunderstands Kentucky wrongful death law. Under Kentucky law, a wrongful death claim may only be brought by the personal representative of the Estate. KRS 411.130. Coleman's age was not the issue.

As discussed below, the remaining questions presented are likewise not compelling reasons for granting the writ.

II. UNDER KENTUCKY LAW, COLEMAN CANNOT PROCEED ON THESE CLAIMS

There is no dispute and no controversy that Kentucky law applies to the claims asserted by Coleman below. In Kentucky, KRS 411.130 mandates that a wrongful death claim “be prosecuted by the personal representative of the deceased.” The personal representative is a nominal plaintiff representing the beneficiaries of the wrongful death claim. *Vaughn's Adm'r v. Louisville & N.R. Co.*, 179 S.W.2d 441, 445 (Ky. 1944). Coleman was appointed as personal representative of his mother’s intestate estate. Whether his siblings agreed that he act as personal representative for probate purposes is immaterial because they are still separate individuals with their own interests in any recovery.³ The personal representative also has competing obligations to ensure payment of costs of obtaining a recovery and attorney fees. KRS 411.130(2). The statute makes clear that Coleman and his sister could not individually recover for the wrongful death of their mother. Dismissal was proper on that basis alone.

The wrongful death statute promulgated by the Kentucky General Assembly does not alter the Kentucky Supreme Court’s rules concerning the practice of law. *See Azmat as Next Friend of Azmat v. Bauer*, 588 S.W.3d 441, 450 (Ky. 2018)

³ In Kentucky, a wrongful death recovery is apart from the probate laws of descent and distribution. The wrongful death recovery only becomes part of the decedent’s personal estate once the kindred of the deceased become sufficiently remote. Cf. KRS 391.010 and KRS 391.030 with KRS 411.130(2).

(addressing conflict between unauthorized practice of law rule and criminal statute prohibiting same, and holding a “next friend” cannot proceed *pro se* on behalf of real party in interest). Coleman does not deny that he is attempting to engage in the practice of law as defined by Kentucky Supreme Court Rule 3.020 as the personal representative *pro se*. Instead, he believes he has a right to represent the Estate as a beneficiary of any recovery. In *Baldwin v. Mollette*, 527 S.W.3d 830, 835 (Ky. App. 2017) the Kentucky Court of Appeals succinctly stated that:

In Kentucky, one may represent himself or herself *pro se* but that ability is limited to one's self. As stated in *Taylor v. Barlow*, 378 S.W.3d 322, 326 (Ky. App. 2012), "an individual may file and practice his own lawsuit in any court within the Commonwealth..." Our [Kentucky] Supreme Court clarifies the role of a *pro se* litigant by explaining if people represent themselves, they are bound by the same rules and procedures as a licensed lawyer. *Id.* But the [Kentucky] Supreme Court notes that only persons who are admitted to the bar may practice law and represent others. The sole exception is the person acting in his own behalf.

“The basic consideration in suits involving unauthorized practice of law is the public interest. Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law.” *Frazee v. Citizens Fidelity Bank & Tr. Co.*, 393 S.W.2d 778, 782 (Ky. 1964). Thus, unauthorized practice of law rules protect the public and are a valid exercise of authority. In *Thompson v. Jewish Hosp. & St. Mary's Healthcare, Inc.*, No. 2017-CA-676, 2018 WL 2078008, at *2-3 (Ky. App. May 4, 2018), the personal representative of an estate attempted to pursue a wrongful death suit *pro se*. The claims were dismissed as constituting the unauthorized practice of law despite the fact that she was a

beneficiary. The court reasoned that allowing her to proceed would not only violate the Kentucky Supreme Court Rule barring laypersons from representing others, but it would also infringe upon the legislature by ignoring the explicit statutory language demanding that the personal representative bring all claims.

Here, Coleman is not acting on his own behalf. As a result, the Estate is required to be represented by counsel. Coleman and his two siblings are each beneficiaries to Linda Coleman's Estate. Coleman, as personal representative, acts on behalf of each of them, and not simply his own behalf. In fact, a personal representative appointed to the Estate need not be a beneficiary and does not have any interest in the recovery by virtue of his appointment.

Coleman's Petition muddies the waters by purportedly claiming he sought to recover in his own name for the wrongful death of his mother or the loss of affection. *See* QP Nos. 2, 3, 4, 7, and 9. Coleman never asserted such loss of parental consortium claims below. The change in party names occurred only when it was noted that he had not brought claims in his capacity as personal representative. Before this Court, he first submitted a petition "for the Estate" and then filed a second petition in his own name. *Cf. App'x 9 & 10.* Regardless, the claim fails because Kentucky does not recognize a loss of parental consortium or affection claim beyond the age of majority. *Giuliani v. Guiler*, 951 S.W.2d 318, 323 (Ky. 1997); *Clements v. Moore*, 55 S.W.3d 838 (Ky. App. 2000) *discretionary review denied* Oct. 17, 2001. Again, an individual cannot recover for the death of another in Kentucky. KRS 411.130. His *pro se* Petition can thus only be read as an assertion of a wrongful death claim in his

capacity as personal representative for the Estate, for which attorney representation is required. KY. SUP. CT. R. 3.020. Coleman does not have a constitutional right to practice law, and Kentucky has a valid interest in protecting the public from the unauthorized and unlicensed practice of law. *See Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (no right to counsel in civil context and next friend or administratrix may not proceed *pro se* on claims on behalf of another); *May v. Coleman*, 945 S.W.2d 426, 428 (Ky. 1997) (“We have guarded the practice of law with strict governance”); KY. SUP. CT. R. 3.020.

Vacillating between Petitioners and claims does not make this a compelling case. Kentucky law does not permit Coleman to present individual claims arising from the wrongful death of his mother. It also does not permit him to act without an attorney in the capacity of a personal representative of the Estate because he is not acting *pro se*.

III. PETITIONER’S VIOLATIONS OF THIS COURT’S RULES AND UNTIMELY FILING OF THE PETITION WARRANT DENIAL

Petitioner failed to comply with the Rules of the Supreme Court, and denial is therefore appropriate. First, the Petition appears to be untimely filed. The Supreme Court of Kentucky denied Coleman’s motion for discretionary review on August 13, 2020. He had until November 12, 2020 to file the Petition. However, the mailing to Ephraim McDowell, which is required to be served at or before the deadline for filing pursuant to SUP. CT. R. 29, was sent on December 15, 2020. Accordingly, the Petition is believed to have been untimely filed. Additionally, a copy of a prior petition was mailed to counsel on November 13, 2020. Again, based on the requirement that

service be made at or before the filing of the served document, this filing also appears untimely. The Petition should be dismissed. 28 U.S.C. § 2101(c); SUP. CT. R. 13.2.

Petitioner has failed to comply with other Rules. In the past, Petitioner identified the claims variously as brought by himself (and his sister) or as Adam L. Coleman for the Estate of Linda Coleman. SUP. CT. R. 12.4 requires the parties having an interest to petition for a writ of certiorari. They may do so jointly or separately, but a party not shown on the petition may not later join the petition. *Id.* “Parties who file no document will not qualify for any relief from this Court.” *Id.* R. 12.6. Under Kentucky law, a claim for wrongful death can only be maintained by the personal representative of the Estate in that capacity. Accordingly, Coleman has failed to name an indispensable party in the Petition, and a party upon which the entire claim must necessarily rest if it were to be recognized. As stated above, Coleman individually has no legally-cognizable claims under Kentucky law flowing from the death of his mother. Kentucky does not recognize a loss of consortium, loss of affection, or similar claim for a surviving adult child. There is no other recognized claim. He simply cannot prosecute this appeal because he failed to bring it in his capacity as personal representative.

The Supreme Court Rules also contemplate that an attorney will sign filings on behalf of anyone not proceeding *pro se*. As explained above, Coleman is not proceeding *pro se* because as personal representative of the Estate, he acts on behalf of all beneficiaries of any wrongful death recovery. While not expressly stated, the

Court's Rules impliedly do not permit him to proceed without an attorney. *See also* Ky. SUP. CT. R. 3.020.

Likewise, as stated above, his failure to identify the claim in his capacity as personal representative means the Petition is untimely. SUP. CT. R. 13.1. Discretionary review of the appeal by Adam Coleman for the Estate of Linda Coleman was denied by the Supreme Court of Kentucky on August 13, 2020. No proper petition was docketed within 90 days of that denial by the court of last resort. Further, Coleman failed to comply with SUP. CT. R. 14.1(b)(i) requiring a list of all parties to the proceeding in the court whose judgment is sought to be reviewed.

Coleman failed to comply with the Supreme Court's Rules concerning service of documents. A petitioner for a writ of certiorari must comply with Rule 29. Rule 29.3 requires service of filed documents "on each party to the proceeding at or before the time of filing." Coleman was also required to provide Proof of Service of the Petition on Ephraim McDowell's attorneys. Coleman, however, failed to comply with these Rules. In the Proof of Service, Coleman swears that he served the Petition on counsel for Ephraim McDowell on December 12, 2020. Leaving aside that such a date evidences the untimely filing of the Petition, the Proof of Service does not match the actual mailing received by counsel. The mailing was received by counsel on December 16, 2020, and was not placed in the hands of the U.S. Postal Service until December 15, 2020. Accordingly, Coleman failed to comply with Rule 29 because he did not serve the Petition at or before its filing.

Finally, Petitioner claims to raise constitutional questions concerning the practice of law under the Equal Protection Clause of the Fourteenth Amendment but failed to notify the Kentucky Attorney General of such a challenge. SUP. CT. R. 29.4(c) requires a petitioner questioning the constitutionality of a state's laws to serve the petition on the Attorney General of that state. Coleman did not serve the Kentucky Attorney General and has not indicated service on him in the Proof of Service. Notably, Coleman was required to similarly notify the Kentucky Attorney General of a constitutional challenge under Kentucky law, but has never claimed such a challenge or taken steps to notify the Attorney General.

The Petition should be stricken and dismissed for failing to comply with this Court's Rules. The request for a writ should be denied.

CONCLUSION

For the foregoing reasons, Respondent Ephraim McDowell Regional Medical Center asks that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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