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PRO SE COMPLAINTS FOR WRONGFUL DEATH OR SURVIVAL DAMAGES: VOID OR AMENDABLE?

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Professional liability claims often involve complex substantive issues, such as medical or legal malpractice. Cases involving allegations of wrongful death and survival damages give rise to the most serious claims any professional will face in his/her career. These cases are typically brought by experienced lawyers, and allegations are established by expert witnesses in the appropriate field. But what happens when the next of kin tries to prosecute one of these claims *pro se* without the assistance of counsel? In many jurisdictions, such an attempt constitutes the unauthorized practice of law and the Complaint is void. In other jurisdictions, the pleading is defective, but the defect can be corrected if a properly amended pleading is signed by a licensed attorney. Depending on the applicable statute of limitations as well as other potential defenses, the legal significance to a defendant cannot be understated.

In many jurisdictions, courts have held that a *pro se* litigant is entitled to represent his/her own personal interests, but a non-attorney cannot represent the interests of another person or class of people. Since claims sounding in wrongful death or survival must, by definition, be brought in a representative capacity, bringing these claims in a *pro se* capacity amounts to the unauthorized practice of law. In some states, a pleading asserting wrongful death and/or survival claims signed by a person who is not licensed to practice law is a nullity. In other words, the pleading itself is void *ab initio*, and its filing does nothing to toll the statute of limitations or protect an estate's right

to recover damages. This is commonly known as "the nullity rule." In other states, a pleading asserting wrongful death and/or survival claims signed by a person who is not licensed to practice law is defective and subject to being stricken, but the defect is considered amendable.

The Illinois Appellate Court provides an excellent analysis of the "nullity rule" in *Ratcliffe v. Apantaku*, 742 N.E.2d 843 (Ill.Ct.App. 2000). In *Ratcliffe*, the plaintiff - a non-lawyer and the daughter of the decedent - filed a medical malpractice complaint against numerous defendants *pro se* alleging causes of action under the Illinois Wrongful Death Act and the Illinois Survival Act. The defendants moved to dismiss the complaint on a number of



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grounds. The court considered, among other issues, whether it was proper for a *pro se* litigant to represent a decedent's estate in a wrongful death or survival action. *Id.* at 845-46. Even though the *pro se* litigant had been appointed by the trial court as the administrator of the decedent's estate, the appellate court held that the *pro se* complaint was improper. *Id.* at 847.

In its analysis of the issue before it, the *Ratcliffe* court relied upon another Illinois Appellate Court's decision in *Blue v. People of the State of Illinois*, 585 N.E.2d 625 (Ill.Ct.App. 1992). In *Blue*, the father of a minor child filed a "Complaint for an Order of *Habeus Corpus*" on behalf of his son regarding certain custody issues. The *Blue* court held that "[o]ne not duly authorized to practice law may not represent another in a court of law." *Id.* at 626. In support of its holding, the court cited the Illinois Attorney Act, 705 ILCS 205/1 (West 2012) which provides, in pertinent part:

No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State.

Id. The *Blue* court went on to hold: "A pleading signed by a person who is not licensed to practice law in this State is a nullity even if a duly licensed attorney subsequently appears in court.

Generally, states that apply the nullity rule without permitting amendment to cure the defect view the nullity rule as a deterrent against improper *pro se* representation.

Where one not licensed to practice law has instituted legal proceedings on behalf of another, the suit should be dismissed; if the suit has proceeded to judgment, the judgment is void and will be reversed." *Blue*, 585 N.E.2d at 596 (internal citations omitted) (quoted with approval in *Ratcliffe*, *supra.* at 846). The *Blue* court also held that the plaintiff could not sue *pro se* in a representative capacity, a decision based on the rationale that all litigants who lack capacity to represent themselves are entitled to the protection and expertise of an attorney. *Id.*

The *Ratcliffe* court agreed with the *Blue* court in all respects. The *Ratcliffe* court further explained that wrongful death and survival cases simply may not be brought *pro se*:

Because claims for both wrongful death and survival actions are brought in a representative capacity we find that they may not be brought *pro se*.

Ratcliffe, 742 N.E.2d at 847. The court also explained that medical malpractice and wrongful death cases are complex matters that require the expertise of an attorney, and a non-lawyer cannot properly represent the interests of others (i.e. heirs) because such representation amounts to the unauthorized and illegal practice of law by a non-lawyer. *Id.* (citing, with approval, *Waite v. Carpenter*, 496 N.W.2d 1 (Neb.Ct.App. 1992)). A number of states have taken the same approach as Illinois in strictly applying the nullity rule, including Arkansas (see *Davenport v. Lee*, 72 S.W.3d 85 (Ark. 2002)), Nebraska (see *Waite v. Carpenter*, 496 N.W.2d 1 (Neb.Ct.App. 1992)), and Virginia (see *Kone v. Wilson*, 630 S.E.2d 744 (Va. 2006)).

On the other hand, some states have found that, while these types of *pro se* complaints are technically improper, the defect is amendable. For example, South Carolina, "like other jurisdictions, limits the practice of law to licensed attorneys," and the practice of law specifically includes the preparation of pleadings. *Brown v. Coe*, 616 S.E.2d 705, 706 (S.C. 2005), *order clarified* at 620 S.E.2d 323 (September 22, 2005). The South Carolina Supreme Court noted that the prohibition against the unauthorized practice of law is designed "...to protect the public from incompetent, unethical, or irresponsible representations." *Id.* at 707. Although the *pro se* pleading was technically improper, the South Carolina Supreme Court allowed the appellant a reasonable time to retain counsel to correct the defective pleading and continue the appeal. It is worth noting that the court was persuaded by the fact that the appellant had been led to believe that her *pro se* representation of the estate was acceptable because she had been permitted to represent the estate in three prior appellate proceedings. Additionally, the court recognized that the issue had never been addressed by a South Carolina court. Other states that have permitted amendment of the defect under certain circumstances include Missouri (see *Mikesic v. Trinity Lutheran Hosp.*, 980 S.W.2d 68 (Mo.Ct. App. 1998)), New Jersey (see *Kasharian v. Wilentz*, 226 A.2d 437 (N.J. App.Div. 1967)) and Kentucky (see *Richardson v. Dodson*, 832 S.W.2d 888 (Ky. 1992)).

Generally, states that apply the nullity rule without permitting amendment to cure the defect view the nullity rule as a deterrent against improper *pro se* representation. On the other hand, states that permit parties to cure these defective pleadings allow amendment in order to protect the interests of the individuals represented by the *pro se* plaintiff by refusing to penalize the represented individuals for another person's unauthorized practice of law. The Supreme Court of Arkansas nicely summarized the importance of prohibiting the defect from being cured by amendment:

While we too disfavor dismissing actions on technical grounds, this court must remain cognizant of our duty to protect the interests of the public through the regulation of the practice of law. The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. Amendment 28 to the Arkansas Constitution specifically details our duty in this regard and states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." This court accepted the responsibility assigned to it by the constitution and set the standards high in order to protect the public, as well as the integrity of the legal profession. In light of our

duty to ensure that parties are represented by people knowledgeable and trained in the law, we cannot say that the unauthorized practice of law simply results in an amendable defect. Where a party not licensed to practice law in this state attempts to represent the interests of others by submitting himself or herself to jurisdiction of a court, those actions such as the filing of pleadings, are rendered a nullity.

Defense counsel and anyone engaged in the defense of professional liability claims must be aware of the existence of the nullity rule as a defense to *pro se* claims

Davenport v. Lee, 72 S.W.3d 85, 93-94 (Ark. 2002) (internal citations omitted). A Nebraska appellate court provided additional rationale for nullifying the *pro se* pleading and aptly noted that allowing a *pro se* plaintiff additional time or opportunities to retain counsel and cure the defect permits the “unauthorized practice of law to the possible detriment of the heirs, the defendants, and the courts with complete impunity.” *Waite v. Carpenter*, 496 N.W.2d 1, 7 (Neb.Ct.App. 1992).

However, even in states that strictly adhere to the nullity rule and have not permitted curing the defect by amended pleadings when the applicable statute of limitations has expired, there are examples where reviewing courts have wavered from that prohibition in fairly obscure or convoluted factual scenarios. See *Janiczek v. Dover Management Co.*, 481 N.E.2d 25 (Ill. Ct.App. 1985) (Court permitted reinstatement of a complaint filed by disbarred lawyer on behalf of his former client where the attorney was duly licensed at the time he was initially retained and the client was not aware of the subsequent disbarment; *Pratt-Holdampf v. Trinity Med. Ctr.*, 789 N.E.2d 882 (Ill.Ct. App. 2003) (Court allowed reinstatement of a complaint filed *pro se* where the *pro se* litigant consciously chose to be represented by counsel, made reasonable and diligent efforts to secure the services of a licensed attorney, and filed and signed the complaint at the direction of her attorney who made an appearance shortly after the Complaint was filed).

Defense counsel and anyone engaged in the defense of professional liability claims must be aware of the existence of the nullity rule as a defense to *pro se* claims. A careful review of your jurisdiction’s adherence to the nullity rule and any departures from applying it is necessary to exhaust all possible defenses to the professional liability claim.