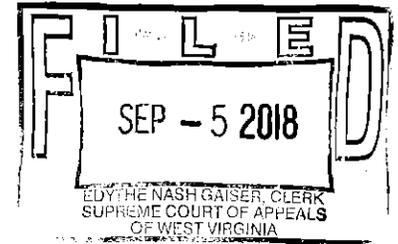


DO NOT REMOVE
FROM FILE

FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**Mark Andrew Gomez, Executor of the
Estate of Aurelio Rafael Gomes, M.D.
Petitioner**



vs.) No. 18-0426

**David Brent Gomez, Robert Brian Gomez,
Andrea Gomez Smith, and Matthew
Eric Gomez, D.O.
Respondents**

**Response Brief of Appellees Andrea Gomez Smith
and Matthew Eric Gomez, D.O.**

Richard Neely (W. Va. State Bar # 2709)
Charles W. Neely (W. Va. State Bar # 13357)
NEELY & CALLAGHAN
159 Summers St.
Charleston, WV 25301-2134
304-343-6500 voice
304-343-6528 fax
RNeely@NeelyCallaghan.com

TABLE OF CONTENTS

First Assignment of Error.....	Page 1
Second Assignment of Error.....	Page 7
Conclusion.....	Page 9

TABLE OF AUTHORITIES

Cases:

- Arkansas Bar Ass v. Union Nat. Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954)
- Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002)
- Ellis v. Cohen*, 118 Conn. App. 211, 216, 982 A.2d 1130, 1134 (2009)
- Ex Parte Ghafary*, 738 So.2d 778 (Ala. 1998)
- Kasharian v. Wilentz*, 93 N.J.Super. 479, 226 A.2d 437 (1967)
- Lathner v. Mechling*, 171 W.Va. 729, 733, 301 S.E.2d 819, 823 (1983)
- McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991)
- McMahon v. Advanced Title Services Co.*, 216 W.Va. 413, 607 S.E.2d 519 (2004)
- Morris v. Gates*, 124 W.Va. 275, 20 S.E.2d 118 (1942)
- In re Otterness*, 181 Minn. 254, 232 N.W. 318 (1930)
- Ratcliffe v. Apantaku*, 318 Ill.App.3d 621, 742 N.E.2d 843 (2000)
- Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 228 W.Va. 762, 724 S.E.2d 733 (2012)
- State ex rel. Baker v. County Ct. of Rock Cnty.*, 29 Wis.2d 1, 8, 138 N.W.2d 162, 166 (1965)
- State v. Sbnanonok*, 539 A.2d 211 (Me. 1988)
- Steele v. McDonald*, 202 S.W. 3rd 926 (2006)
- Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992)

West Virginia State Bar v. Earley, 144 W.Va.504, 518, 109 S.E.2d 420, 430 (1959).

Williams v. Precision Coil, 194 W.Va.52, 459 S.E. 2d 329 (1995)

Constitution and Statutes:

W. Va. Const. Art. 8.

West Virginia Code, 30-2-4.

Rules:

West Virginia Trial Ct. Rule 4.03.

Rule 11(a), *West Virginia Rules of Civil Procedure*

Miscellaneous:

West Virginia Attorney General Opinion "Regarding the Authority of Unlicensed Individuals to Practice Law in West Virginia Circuit Courts on Behalf of Limited Liability Companies", 2014 WL 1875638

West Virginia State Bar Unlawful Practice of Law Committee Advisory Opinion 2010-002

Executive Summary

- (1) Throughout America the authority is universal that a person not licensed to practice law in a given state may not appear on behalf of other parties in a court of record. Accordingly, the Circuit Court did not err in striking the pleadings of an executor who was not licensed to practice law in the State of West Virginia when the executor sought to litigate on behalf of the estate in circuit court.
- (2) A motion for summary judgment is ripe only after all reasonable discovery has been conducted; therefore, the Circuit Court did not err when he declined to award to appellant summary judgment based on *ex parte* affidavits under circumstances where the appellant, as moving party, had refused to participate in discovery and there were still unresolved issues of fact.

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**Mark Andre Gomez, Executor of the
Estate of Aurelio Rafael Gomez, M.D. decease,
Defendant/Third-Party Plaintiff & Counter
Claimant Below, Petitioner**

And

**David Brent Gomez and
Robert Brian Gomez,
Defendants Below**

vs.

Docket No: 18-0426
(Underlying Kanawha
County Civil Action Nos.
17-P-402 & 17-C-1292
Honorable Thomas Evans, III,
Judge
Pro tempore

**Andrea Gomez Smith and Matthew Eric
Gomez, D.O.,
Plaintiffs and Counter Defendants Below,
Respondent**

**RESPONSE BRIEF OF APPELLEES
ANDREA GOMEZ SMITH and MATTHEW ERIC GOMEZ, D.O.**

Come now Andrea Gomez Smith and Matthew Eric Gomez, D.O. and respond to the Appellant's brief on behalf of all appellee parties as follows:

First Assignment of Error

The Appellant's first assignment of error is that the circuit court erred in holding that Appellant Mark Gomez's filing of documents on behalf of the estate of which he is executor constitutes the unauthorized practice of law. Appellant Gomez is a former lawyer who was disbarred in the State of Georgia based on conviction for a felony. Therefore, although Mr. Gomez has had some legal training, he is not licensed to practice law in the State of West Virginia or anywhere else in the United States.

- A. The practice of law, both in court and out of court, by a person not licensed to practice is an illegal usurpation of the privilege of a duly licensed attorney at law; and the privilege to practice law is personal to the holder of such privilege. *West Virginia State Bar v. Earley*, 144 W.Va.504, 518, 109 S.E.2d 420, 430 (1959)**

The third-party defendants below who raised the issue of whether Mr. Gomez was authorized to appear in court on behalf of the estate when he is not a lawyer have every right to raise the objections.

A party who has suffered or may likely suffer a legally cognizable injury, wrong, or other actionable violation of his or her personal rights and interests as a proximate result of the unlawful and unauthorized practice of law by another has standing to assert a claim alleging unlawful and unauthorized practice and seeking relief appropriate to the actual or threatened injury, wrong, or violation.

Syl. Pt. 1, *McMahon v. Advanced Title Services Co.*, 216 W.Va. 413, 607 S.E.2d 519 (2004).

Mr. Gomez cites only one case as authority for his position that a non-lawyer executor may appear *pro se* on behalf of the estate in court, and that is the dissenting opinion of Justice Grey in *Steele v. McDonald*, 202 S.W. 3rd 926 (2006). Apparently, there is virtually no authority in the entire United States that would allow someone in Mr. Gomez's position to appear on behalf of an estate when there are multiple beneficiaries.

By statute it is a misdemeanor for any person to practice law in West Virginia without first having been duly licensed and admitted to practice in a court of record in this State. *West Virginia State Bar v. Earley*, *supra* at 515, 109 S.E.2d at 429; *West Virginia Code*, 30-2-4. "The exclusive authority to define, regulate and control the practice of law in West Virginia is vested in the Supreme Court of Appeals." Syl. Pt. 1, *Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 228 W.Va. 762, 724 S.E.2d 733 (2012). The *West Virginia Constitution* provides that the Supreme Court of Appeals has "the power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants,

process, practice and procedure, which shall have the force of law." Id at 770, 724 S.E.2d at 741 quoting *W. Va. Const. Art. 8*.

It is a well settled legal principle that corporations must be represented by a lawyer in a court of record. See, e.g., *Shenandoah Sales, supra* at 766, 724 S.E.2d at 737. The reason for such a determination is that a corporation is not a natural person but is an artificial entity created by law. *Ibid* at 767, 724 S.E.2d at 738. As such, a corporation cannot act *pro se*, but must act, in all its affairs, through an agent or representative. *Ibid*, citing *West Virginia Trial Ct. Rule 4.03*. When a corporate entity seeks legal representation, such representation must be by a person admitted to practice law before the Supreme Court of Appeals of West Virginia. *Ibid.* at 768, 724 S.E.2d at 739. This prohibition also applies to closely held or sole shareholder corporate entities. *Ibid*, at 771, 724 S.E.2d at 742. See also, West Virginia Attorney General Opinion "Regarding the Authority of Unlicensed Individuals to Practice Law in West Virginia Circuit Courts on Behalf of Limited Liability Companies", 2014 WL 1875638 (May 6, 2014) (An LLC is no less a corporation, an artificial legal entity, that is distinct from its members and cannot act in court on its own behalf without the aid of a duly licensed attorney.); West Virginia State Bar Unlawful Practice of Law Committee Advisory Opinion 2010-002 (Though individuals have the right to represent themselves, there is no right to represent another in legal matters unless the person seeking to represent that person is a licensed attorney at law.).

A licensed attorney at law engages in the practice of law in three principal types of professional activity: 1) legal advice and instructions to clients to inform them of their rights and obligations; 2) preparation for clients of documents requiring knowledge of legal principles which is not possessed by an ordinary layman; and 3) appearance for clients before public tribunals, which possess the power and authority to determine rights of life, liberty, and property

according to law. *West Virginia State Bar v. Earley* at 520, 109 S.E.2d at 431. The unauthorized practice of law is not limited to the conduct of cases before courts but also includes services rendered outside of court such as:

the preparation and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.

Ibid.

A personal representative of an estate is in exactly the same position as the representative of a corporation or an LLC; that person acts in a fiduciary capacity and is entrusted with the duty to manage the estate to the advantage of those interested in it and to act on its behalf. See *Lathner v. Mechling*, 171 W.Va. 729, 733, 301 S.E.2d 819, 823 (1983); see also *McClure v. McClure*, 184 W.Va. 649, 403 S.E.2d 197 (1991). An estate is an artificial legal entity and it can sue nor be sued only through its representatives exactly like a corporate entity. The appointment of a personal representative does not create an individual right of action, but creates only a representative, fiduciary relationship. *Ellis v. Cohen*, 118 Conn. App. 211, 216, 982 A.2d 1130, 1134 (2009). As such, a personal representative of an estate cannot act *pro se* in adversarial proceedings in courts of record and, unless he or she is a lawyer, cannot represent the estate in matters generally thought to come within the definition of the “practice of law.” *Ellis v. Cohen, supra*.

The courts of many other jurisdictions have applied the above reasoning of legal representation to the role of an executor or personal representative of an estate and have found that such a representative may conduct legal proceedings only through a licensed attorney:

[An executor has a duty to protect] the rights of the beneficiaries which conforms to the law, as applied to the facts which can be ascertained with reasonable diligence. Where he is in doubt, he has a duty to pose the legal questions to the court. He has this duty whether or not the beneficiaries are represented by counsel individually retained, We think that in performing the duties just mentioned, the executor is sufficiently in the role of a representative of the beneficiaries so that his submission of such matters to the court for adjudication constitutes the practice of law. It follows that when the executor is not an attorney, such matters must be presented for him by an attorney licensed to practice law. *** [A]n executor's appearance in the conduct of a probate proceeding is not to be deemed the mere appearance of an individual in his own behalf, but is also a representation of others, and therefore an executor not licensed to practice law must appear by an attorney.

State ex rel. Baker v. County Ct. of Rock Cnty., 29 Wis.2d 1, 8, 138 N.W.2d 162, 166 (1965);
Accord: *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002); *Ex Parte Ghafary*, 738 So.2d 778 (Ala. 1998); *Ratcliffe v. Apantaku*, 318 Ill.App.3d 621, 742 N.E.2d 843 (2000); *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992); *State v. Sbnanonok*, 539 A.2d 211 (Me. 1988); *Kasharian v. Wilentz*, 93 N.J.Super. 479, 226 A.2d 437 (1967); *In re Otterness*, 181 Minn. 254, 232 N.W. 318 (1930); *Arkansas Bar Ass v. Union Nat. Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954); *Ellis v. Cohen*, 118 Conn.App. 211, 982 A.2d 1130 (2009).

For the reasons stated herein, Defendant prays this Honorable Court find that Mark Gomez as Executor of the Estate of Aurelio Rafael Gomez cannot represent the beneficiaries of the Estate in a legal proceeding before this Court and that Mark Gomez is engaged in the unauthorized practice of law in his representation of the Estate of Aurelio Rafael Gomez and in his actions filing pleadings and other papers to that effect within the state and federal courts of West Virginia.

B. The Pleadings Filed by Mark Gomez, As Executor of the Estate of Aurelio Rafael Gomez, Must Be Stricken and Disallowed As They Are Not Properly Before The Court.

Rule 4.03 of the West Virginia Trial Court Rules states:

Every party to proceedings before any court, except parties appearing pro se, shall be represented by a person admitted to practice before the Supreme Court of Appeals of West Virginia and in good standing as a member of its bar and may be represented by a visiting attorney as provided by Rule 4.02.

The pleadings filed by Mark Gomez in the instant action are not signed by a duly licensed attorney admitted to practice before the Supreme Court of Appeals. As such, all pleadings filed by Mark Gomez in this action have been improper and are defective on their face as their filing constitutes the unauthorized practice of law.

Rule 11 (a) of the *West Virginia Rules of Civil Procedure* requires that "every pleading, motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party." *See, also, Morris v. Gates*, 124 W.Va. 275, 20 S.E.2d 118 (1942) (An unverified complaint that is not signed in the name of the complainant nor by responsible counsel acting for him cannot be treated as a pleading upon which either to grant or decline relief.)

The other beneficiaries to the Estate are entitled to the protection and expertise of an attorney as a matter of public policy. *Ratcliffe, supra*, at 846, 742 N.E.2d at 308.

It is our conclusion, after reviewing many decisions of other jurisdictions and from a study of our own statutes, that an individual or a corporation, is not looking after its own business when, acting as an administrator, an executor, guardian or in a similar fiduciary capacity, it undertakes to use the processes of the courts of this state in administering and settling the affairs of its *cestui que trust*. Stated specifically we hold that a person who is not a licensed attorney and who is acting as an administrator, executor or guardian cannot practice law in matters relating to his trusteeship on the theory that he is practicing for himself. *** The very term itself it seems to us implies that a trustee or personal representative is not acting for himself and in connection with his own business affairs but on the contrary is acting for others who ordinarily would be the beneficiaries.

Akransas Bar Ass 'n, supra, at 51-52, 273 S.W.2d 410-11.

C. Mark Gomez Was Enjoined from Filing Further Pleadings in a Representative Capacity When He Was Not Authorized to Practice Law in the State of West Virginia.

The strict regulation and control of persons who render legal services is necessary and essential to the welfare of the public at large.

A court of equity has jurisdiction to prevent by injunction the unlawful practice of law by a layman when such relief is sought by attorneys at law acting for themselves and other affected members of the legal profession or by a duly constituted and recognized bar association.

Syl. Pt. 1, *West Virginia State Bar v. Earle*, 144 W.Va. 504, 109 S.E.2d 420 (1959). Though the right to practice law is not a natural or constitutional right or an absolute or *de jure* right, it is a valuable special privilege in the nature of a franchise which may be protected by injunction against invasion. *Ibid* at 516, 109 S.E.2d at 429.

Second Assignment of Error

In his second assignment of error, the appellant asserts that the Court failed to follow the holding of *Williams v. Precision Coil*, 194 W.Va.52, 459 S.E. 2d 329 (1995) in declining to grant to the appellant summary judgment based on: (1) David Gomez's affidavit testifying to one version of contested facts; (2) Mark Gomez's affidavit testifying to the same version of contested facts; (3) a letter from Dr. Jennifer Hancock, PsyD indicating that, although she had not done a formal "capacity evaluation," she believed that Dr. Rafael Gomez was competent to make medical decisions and consent to treatment; and, (4) a purported handwritten letter from Dr. Rafael Gomez to his daughter, Appellee Andrea Gomez, allegedly asserting that he had not been unduly influenced by anyone in the making of his will.

None of these documents (or the version of the truth for which they stood) had ever been challenged by cross examination, nor was there any opportunity to offer expert testimony that the purported letter of Dr. Gomez was a forgery.

What the *Precision Coil* case stands for is stated in Syl. Pt. 1, which says:

A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

The Complaint in this case, (A. 18-22) clearly shows that there are numerous contested issues of fact to be resolved through discovery; indeed, the so-called “affidavits” cited above of interested parties have no more weight in this case than the unsworn complaint of the Appellee, Andrea Smith.

Interestingly for the case now before the Court, the *Precision Coil* syllabus then goes on to assert in Syl. Pt. 2:

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier to fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Well... there was never an opportunity in this case to develop “the totality of the evidence” because various procedural issues prevented discovery from being conducted. Indeed, the Plaintiff sent detailed written discovery requests to the Appellant, Mark Gomez, to which the Appellant declined to respond. Then, on 23 February 2018 the Appellee, Andrea Smith, made a motion to compel responsive answers, and in the 2 April 2018 hearing at which the motion to compel was heard by Judge Evans, Judge Evans ordered that Defendant answer the written discovery within 30 days or suffer a judgment by default. (A. 264-266) Thereafter, Defendant did not answer the discovery requests, and Appellee moved on 22 May 2018 for default by virtue

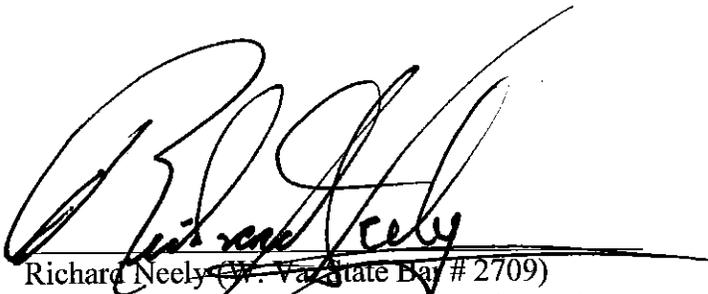
of the failure to answer (A. 268-272) and gave notice that the motion would be heard by Judge Evans on 26 June 2018.

The motion for default was never heard because on 31 May 2018 this Honorable Court entered a stay (A.273), which stopped all further proceedings in the circuit court. However, it is obvious from the motions and proceedings had below that there were still issues of material fact that needed to be developed. Therefore, the Appellant's assertion that the Court erred in failing to grant summary judgment based on untested *ex parte* representations is entirely without merit.

Conclusion

Wherefore, Appellees pray that this Honorable Court deny Appellant's appeal, dismiss this case from the docket of the Court, and remand this case for further proceedings in the Circuit Court of Kanawha County.

Respectfully submitted
Andrea Gomez Smith and
Matthew Eric Gomez, D.O.
by counsel



Richard Neely (W. Va. State Bar # 2709)
Charles W. Neely (W. Va. State Bar #13357)
NEELY & CALLAGHAN
159 Summers St.
Charleston, WV 25301-2134
304-343-6500 voice
304-343-6528 fax
RNeely@NeelyCallaghan.com