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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 18-0426

(Underlying Kanawha County Civil Action Nos. 17-P-402 & 17-C-1292)

MARK GOMEZ, Executor of the Estate of Aurelio Rafael Gomez, M.D.

Petitioner

and

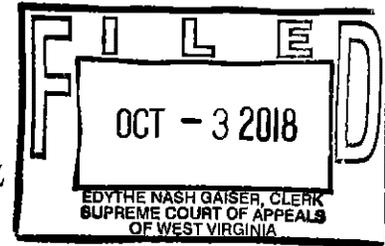
DAVID BRENT GOMEZ; and ROBERT BRIAN GOMEZ

Defendants Below

v.

ANDREA GOMEZ SMITH and MATTHEW ERIC GOMEZ, D.O., et al.

Respondents.



**JOINT RESPONSE BRIEF OF RESPONDENTS WESTERN SURETY CO.,
KAYLA ADDISON, AND EMPOWER RETIREMENT**

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DATED: October 4, 2018

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I. ASSIGNMENTS OF ERROR

Petitioner asserts the following assignments of error:

1. The trial court erred when it found, “as a matter of law, that all pleadings, including the Complaint, filed by the non-lawyer Mark Gomez as “*pro se* Executor,” are void *ab initio* and are hereby deemed a nullity....”

2. The trial court erred by failing to apply the holding of Syllabus Pt. 3 of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995) which shifts the burden of proof and production to the non-moving parties when the moving party has made a properly supported motion for summary judgment and abused its discretion by not requiring the plaintiffs to produce evidence showing the existence of a genuine issue for trial or submit an affidavit explaining why further discovery is necessary before denying defendant’s properly supported motion for summary judgment.

II. MOTION TO DISMISS THE APPEAL

Petitioner has failed to perfect the Appeal by failing to timely file the Petitioner’s Brief and the same should be dismissed according to Rule 5(g) of the West Virginia Rules of Appellate Procedure.

III. STATEMENT OF THE CASE

The Gomez siblings are at war with each other and their feud is playing out in legal proceedings for all to see. That is unfortunate. However, this Court is presented with a simple appeal involving Petitioner Mark Gomez’s (“Petitioner”) obvious unauthorized practice of law. Petitioner, as executor of the estate (the “Estate”) of his late father, Aurelio Rafael Gomez, M.D. (“Aurelio Gomez”), is attempting, in a *pro se* capacity, to both defend claims brought against the

Estate and brings claims on behalf of the Estate.¹ The Circuit Court, consistent with case law throughout the country, correctly held that Petitioner cannot do this and that any pleadings or other filings that he has signed as executor are nullities and are void *ab initio*.

Aurelio Gomez died on May 4, 2017,² leaving behind four children: Petitioner, Andrea Gomez Smith, Matthew Eric Gomez, David Brent Gomez, and Robert Brian Gomez.³ On September 13, 2017, Petitioner filed a *Demand for Return of Estate Property and Complaint for Conversion and Request for Immediate Relief*, on behalf of the Estate as “Executor,” without the benefit of counsel (“17-C-1292.”)⁴

On October 25, 2017, Andrea Gomez Smith and Matthew Eric Gomez sued Petitioner, both individually and as the executor of the Estate (“17-P-402”),⁵ alleging that Petitioner manipulated their ailing father into leaving them out of his last will and testament (the “Will”) and asking the Circuit Court to both remove Petitioner as executor of the Estate and to invalidate the Will.⁶ A First Amended Complaint was filed in 17-P-402 on November 28, 2017.⁷

On December 12, 2017, Petitioner signed and filed an *Answer & First Amended*

1 Petitioner spends considerable time in his “Statement of the Case” describing the various problems involving his family members and his attempts to administer the Estate. However, the only question relevant to this case is whether an executor, as Petitioner has done in 17-P-402 and 17-C-1292, can defend and prosecute claims *pro se* on behalf of an estate. As thoroughly addressed in this brief, he may not and to do so constitutes the unauthorized practice of law. Petitioner’s Appendix consists of two volumes. Unless otherwise noted, any citations to Petitioner’s Appendix are to Volume 1 of 2.

2 Pet’r App. at 19.

3 Pet’r App. at 18, 26.

4 Pet’r App. at 279.

5 Pet’r App. at 18-22.

6 *Id.*

7 Pet’r App. at 45-49. While the Gomez siblings do not agree on who should inherit from their late father’s Estate, it is undisputed that Petitioner is not the sole beneficiary of the Estate. Pet’r App. at 26-30.

Counterclaims & First Amended Third Party Complaint, in 17-P-402, on behalf of the Estate as “*pro se* Executor,” without the benefit of counsel.⁸ In addition, Petitioner filed claims on behalf of the Estate against Empower Retirement (“Empower”), Kayla Addison (“Addison”), and Western Surety Company (“Western Surety”) (collectively the “Third-Party Defendants” or “These Respondents”) as “*pro se* Executor” (the “Third-Party Complaint”) in 17-P-402.⁹

Addison was served with the Third-Party Complaint on December 20, 2017.¹⁰ On December 21, 2017, Robert Gomez, without aid of counsel, removed 17-P-402 to the United States District Court for the Southern District of West Virginia (“District Court.”)¹¹ On January 9, 2018, Addison timely filed a substantive motion to dismiss (“Addison MTD”) the claims made against her in 17-P-402.¹² The Addison MTD argued, in part and with substantial legal authority in support of its argument, that Petitioner was engaged in the unauthorized practice of law.¹³

Andrea Smith and Matthew Eric Gomez moved to remand 17-P-402 to Circuit Court, pointing out that there was clearly no diversity of citizenship and that the District Court therefore

8 Pet’r App. at 77-99.

9 Pet’r App. at 81-99. Addison and Empower were not made parties to 17-C-1292.

10 Pet’r App. at 15, at lines 31-32.

11 Resp’t App. at 034. As this Court knows, These Respondents were forced to submit an appendix after Petitioner refused to include various filings in his appendix, including, but not limited to, the filings that were submitted while the matter was before the District Court. Prior to 17-P-402’s removal to federal court, Petitioner filed numerous submissions *pro se* on behalf of the Estate. *See, e.g.*, Pet’r App. at 28, 31, 33, 39, 44, 58, 102, 103; Resp’t App. at 010, 25, 30, 90, 94.

12 Resp’t App. at 114-134.

13 *Id.* at 124-27.

lacked jurisdiction over the parties' claims.¹⁴ The District Court agreed and remanded 17-P-402 to the Circuit Court on January 16, 2018.¹⁵

14 Resp't App. at 050.

15 Resp't App. at 149. Petitioner claims that Addison did not timely file a responsive pleading in 17-P-402 and that he is entitled to default. (Pet'r Br. at 7.) This assertion is patently false. As noted, the Addison MTD was filed on January 9, 2018, prior to the responsive pleading deadline and while the case was pending in District Court. In remanding 17-P-402, the District Court declined to consider the substantive grounds of the Addison MTD *precisely because the District Court understood that it did not possess jurisdiction*. Petitioner – whose appendix conveniently omitted the Addison MTD, along with other filings before the District Court – appears to believe that Addison was required to file a separate responsive pleading after the case was remanded. He is wrong. *See, e.g., Swarey v. Stephenson*, 222 Md. App. 65, 90–91, 112 A.3d 534, 549 (2015) (“State courts presented with this issue have routinely chosen to give full effect to pleadings filed in federal court prior to a remand to state court.”) (citations omitted); *Doe ex rel. his Parents, Nat. Guardians v. E. Greenwich Sch. Dep't*, 2004 WL 2821639, at *4 (R.I. Super. Dec. 3, 2004), *aff'd sub nom. Doe ex rel. His Parents & Nat. Guardians v. E. Greenwich Sch. Dep't*, 899 A.2d 1258 (R.I. 2006) (“Motions pending in the federal court at the time of removal remain pending before the state court subsequent to remand. Upon remand, the State Court may properly determine the disposition of motions filed when the suit was under federal jurisdiction.”); *Banks v. Allstate Indemnity Co.* 143 Ohio App.3d 97, 757 N.E.2d 776, 777–78 (2001) (holding that the state trial court, on remand, should have given effect to the answer filed in federal district court); *Hunter, Keith, Indus., Inc. v. Piper Capital Management, Inc.*, 575 N.W.2d 850, 853 (Minn.App.1998) (concluding in remanding action to state district court, federal court also remanded party's pending motion filed in federal court); *Crumpton v. Perryman*, 956 P.2d 670, 672 (Colo. App. 1998) (“Interests of efficiency and judicial economy favor a policy of giving continued effect to pleadings and motions filed in federal court prior to remand. This rule mirrors the federal post-removal procedure of picking the case up where it left off and avoids the necessity of duplicative filings.”); *Teamsters Local 515 v. Roadbuilders, Inc.*, 249 Ga. 418, 291 S.E.2d 698, 701 (1982) (holding that a timely answer filed in district court following timely removal of the action is sufficient to prevent a default in a state court if the case is subsequently remanded by the district court); *Williams v. St. Joe Minerals Corp.*, 639 S.W.2d 192, 194–95 (Mo.Ct.App.1982) (holding that the amended complaint filed in federal court was properly before state court on remand even absent refiling); *Armentor v. Gen. Motors Corp.*, 399 So.2d 811, 812 (La.Ct.App.1981) (treating an answer filed in federal court as if filed in state court for purposes of ruling); *Edward Hansen, Inc. v. Kearny P.O. Assoc.*, 166 N.J.Super. 161, 399 A.2d 319, 323 (Ch.Div.1979) (adopting the pleadings filed in federal court “as if they had been originally filed in [state] court”); *Shelton v. Bowman Transp., Inc.*, 140 Ga.App. 248, 230 S.E.2d 762, 764 (1976) (holding that the trial court acted within its discretion in relieving from default a defendant who had filed an answer in federal court before remand); *Citizens Nat. Bank'l Grant City v. First Nat. Bank, Marion*, 165 Ind.App. 116, 331 N.E.2d 471, 476–77 (1975) (holding that following remand, the state court appropriately ruled on a motion to dismiss filed in federal court and therefore defendants were not in default); *Bolden v. Brazile*, 172 So.2d 304, 310 (La.Ct.App.1965) (treating answer and motion to dismiss filed in federal court as a form of responsive pleading upon remand to state court); *Grono v. N. Ins. Co. of New York*, 388 Pa. 169, 130 A.2d 452, 453 (1957) (holding that after removal to federal court “when, a year and a half later, the case was remanded to the State Court, the answers to the complaint, which had been duly filed in the Federal Court, were a part of the record upon its return to the State Court”) Petitioner's failure to understand this point of procedure certainly lends additional support for the overwhelming authority, discussed *infra*, that recognizes that courts must diligently supervise the

Once back in Circuit Court, Petitioner continued to sign and file numerous pleadings and other filings *pro se* as Executor on behalf of the Estate.¹⁶ While Petitioner was at one time an attorney in Georgia, he long ago surrendered his law license as part of a guilty plea to a charge of felony theft by conversion¹⁷ and not a single submission to the Circuit Court by the Estate in either 17-P-402 or 17-C-1292 was signed by an attorney.

practice of law and not permit executors to *pro se* represent estates in legal proceedings.

16 See, e.g., Resp't App. at 154, 183; Pet'r App. at 126, 163, 226, 274, 316, 320, 327.

17 The Amended Complaint filed by Andrea Gomez Smith and Matthew Eric Gomez in 17-P-402 states that Petitioner "is a convicted felon and disbarred lawyer." Pet'r App. at 48, at ¶ 13. While Petitioner has taken issue with this description, he in fact pleaded guilty to felony theft by conversion and, as part of that plea, agreed to surrender his law license. See *In re Gomez*, 273 Ga. 783, 546 S.E.2d 487 (2001). In that decision, the Supreme Court of Georgia stated, in full, that:

This disciplinary matter is before the Court pursuant to Respondent Mark Andrew Gomez's petition for voluntary surrender of license which he filed pursuant to Bar Rule 4-227(b) prior to the issuance of a Formal Complaint. In the petition, ***Gomez admits that he knowingly, freely and voluntarily entered a plea of guilty to a single count of the criminal offense of theft by conversion, a felony violation of the Criminal Code of Georgia***, and that the entry of judgment on this plea constitutes a violation of Rule 8.4(a)(2) (formerly Standard 66) (violation of rules for a lawyer to be convicted of a felony) of Bar Rule 4-102(d). The maximum penalty for a violation of Rule 8.4(a)(2) is disbarment.

We have reviewed the record and agree to accept Gomez's petition for the voluntary surrender of his license. Accordingly, the name of Mark Andrew Gomez is hereby removed from the rolls of persons entitled to practice law in the State of Georgia. Gomez is reminded of his duties under Bar Rule 4-219(c) to timely notify all clients of his inability to represent them, to take all actions necessary to protect their interests and to certify to this Court that he has satisfied the requirements of the rule.

Voluntary surrender of license accepted.

All the Justices concur.

(emphasis added). Petitioner was later suspended from practicing before the Supreme Court of the United States. See *In re Discipline of Gomez*, 541 U.S. 985(2004) ("Mark Andrew Gomez, of Newnan, Georgia, is suspended from practice of law in this Court, and a rule will issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.") Petitioner was subsequently disbarred from practice before the Supreme Court of the United States. See *In re Disbarment of Gomez*, 542 U.S. 956(2004) ("Disbarment order entered.") Petitioner's history as an attorney, and the fact that he pleaded guilty to a felony crime of dishonesty, is particularly relevant considering the rationale given by courts across the country (including this Court) for ensuring that the practice of law is properly supervised, as discussed in this brief.

On January 26, 2017, These Respondents moved to strike all pleadings filed by Petitioner in 17-P-402¹⁸ and to enjoin Petitioner from filing any other pleadings.¹⁹ These motions were premised on overwhelming case law recognizing (1) that an executor cannot represent an estate *pro se* when the executor is not the sole beneficiary of the estate or if the estate has creditors;²⁰ and (2) that any filings by a *pro se* executor while engaged in the unauthorized practice of law are nullities and are void *ab initio*.²¹ Western Surety filed identical motions in the 17-C-1292.²² Petitioner, who, again, is not the sole beneficiary to the Estate (and the question of who in fact is a beneficiary to the Estate is a central dispute the underlying litigation involving the Gomez siblings) declined to file a written response to these motions.

On April 2, 2018, the parties to this appeal appeared before the Circuit Court.²³ The Circuit Court recognized that the motion to strike and to enjoin, filed in 17-P-402 and 17-C-1292, if granted, would result in the striking of all of Petitioner's pleadings and filings and would negate the need to hear other pending motions.²⁴

18 Pet'r App. at 52-54; 115-22 (Petitioner omitted the certificate for service for this filing as part of his appendix, as well as various other certificates of service filed by These Respondents.)

19 Pet'r App. at 115-22. Addison joined in these motions when filing her Amended Motion to Dismiss. Pet'r App. at 182, at note 1. This Amended Motion to Dismiss was filed in order to supplement the Addison MTD with additional West Virginia specific case law subsequent to 17-P-402's remand to Circuit Court. *Id.* Empower joined these motions as well. Pet'r App. at 218-25.

20 Pet'r App. at 116-19.

21 *Id.* at 119-22.

22 Pet'r App. at 331-41, 342-58.

23 *See* Transcript of April 2, 2018 Hearing ("Hearing Transcript"), attached to Volume 2 of 2 to Petitioner's Appendix. Petitioner failed to number any of the pages in Volume 2 of 2.

24 *Id.* at 5-6 (page 1 beginning with case caption.)

Counsel for These Respondents made clear that the law unanimously supported their positions and that their motions to strike and enjoin should be granted.²⁵ When pointedly asked for any legal authority to the contrary, Petitioner could only cite to a single dissenting opinion from another state.²⁶ In other words, Petitioner sole legal authority in opposition to These Respondents' motions to strike and enjoin actually supported These Respondents' position. The Circuit Court addressed the issues in detail and orally granted the motions to strike and enjoin.²⁷

On May 11, 2018, prior to the parties' receipt of any order on These Respondents motions to strike and enjoin, Petitioner filed a Notice of Appeal with respect to both 17-P-402 and 17-C-1292. This Court entered a Scheduling Order on May 16, 2018, that required Petitioner to perfect his appeal by August 17, 2018. The Scheduling Order, consistent with R.A.P. 5(g), clearly informed Petitioner that a failure to timely perfect his appeal would result in its dismissal.²⁸

On May 7, 2018, the Circuit Court entered two orders (the "Orders") granting the motions to strike and enjoin in both 17-P-402 and 17-C-1292.²⁹ The Orders were not received by the parties until on or about May 18, 2018. The Circuit Court's Orders held that Petitioner had been engaged in the unauthorized practice of law, struck the Third-Party Complaint and all

25 *Id.* at 8-19, 28-30.

26 *Id.* at 24-25.

27 *Id.* at 30-32, 49-50.

28 R.A.P. 5(g) clearly states that "[f]ailure by the petitioner to perfect an appeal will result in the case being dismissed from the docket of the Court."

29 Petitioner failed to include copies of the Orders, as signed and entered by the Circuit Court, as part of his appendix. Petitioner did include a signed order in 17-C-1292 as Exhibit 1 to his Motion to Amend Notice of Appeal, which, as discussed, was filed prior to the submission Petitioner's Brief and Appendix. A copy of the corresponding order in 17-P-402 can be found at Resp't App. at 186-95.

subsequent pleadings filed by Petitioner, and enjoined Petitioner from submitting additional filings.³⁰

On May 21, 2018, Petitioner filed a Motion to Amend Notice of Appeal in light of the entry of the Orders. This Court granted that request, and Petitioner submitted an Amended Notice of Appeal that, in all material respects, was identical to the initial Notice of Appeal.

Petitioner failed to timely perfect his appeal in accordance with the Court's Scheduling Order. Instead, Petitioner attempted to perfect his appeal by filing his brief ("Petitioner's Brief") on August 20, 2018, along with a motion seeking to excuse his untimely filing based on alleged good cause (the "Extension Motion.")³¹

On August 30, 2018, These Respondents timely objected to the Extension Motion,³² noting in detail that Petitioner had been provided with ample time to perfect his appeal and that the events mentioned in the Extension Motion did not constitute good cause, as required. *See* R.A.P. 5(f) ("A motion that is filed with this Court to extend time to perfect an appeal must comply with Rule 29 and must state with particularity the reasons why an extension is necessary.")³³ These Respondents also noted that Petitioner failed to file his Extension Motion until after the deadline for perfecting the appeal, contrary to this Court's prior guidance. *See W.*

30 *See generally* the Orders (containing detailed findings of fact and law).

31 Petitioner did not sign his Brief. *See* Pet'r. Brief at 28.

32 R.A.P. 29(a) directs that responses to motions be filed within 10 days.

33 In *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W. Va. 406, 412–13, 541 S.E.2d 1, 7–8 (2000), this Court recognized that any request to enlarge the time for an appeal requires "a showing of good cause." In *W. Va. Dep't of Energy v. Hobet Min. & Const. Co.*, 178 W. Va. 262, 264, 358 S.E.2d 823, 825 (1987), this Court, in discussing good cause, recognized that "[t]hese rules allow the court to take into account the parties' administrative problems such as lack of a transcript or the death or reassignment of an attorney." As discussed in this brief, Petitioner simply claimed he got busy and prioritized another civil case over this appeal.

Va. Dep't of Energy v. Hobet Min. & Const. Co., 178 W. Va. 262, 264, 358 S.E.2d 823, 825 (recognizing that a party's request "to enlarge time must usually be made before the fact.")

On the same date that These Respondents filed their objection to the Extension Motion, this Court entered an order seeming to accept Petitioner's appeal. However, it is not clear if the order was signed prior to receiving These Respondents' objection to the Extension Motion, insofar as this Court's order (1) did not address the substance of the Extension Motion; (2) did not determine that Petitioner had demonstrated good cause for failing to timely perfect his appeal, as required by this Court's precedent; and (3) did not acknowledge receipt of, or discuss any of the issues raised in, These Respondents' objection to the Extension Motion.

Petitioner's Brief asserts two errors for this Court's consideration. The first assignment of error claims that the Circuit Court incorrectly ruled that Petitioner had engaged in the unauthorized practice of law and that his pleadings were null and void *ab initio*.³⁴ The second assignment of error deals exclusively with claims between Andrea Gomez Smith and Matthew Smith and the Estate and Mark Gomez.³⁵ Only the first assignment of error has any connection or relevance to These Respondents.

As with his argument before the Circuit Court, Petitioner offers this Court no legal authority in support for his position that he was permitted to represent the Estate *pro se*. Indeed, in the four and a half months between the date of the hearing before the Circuit Court and the filing of his appeal, Petitioner still only cites to one dissenting opinion from another state in support of his position.³⁶

34 Pet'r Br. at 1.

35 *Id.*

36 *Id.* at 15-17.

IV. SUMMARY OF ARGUMENT

The Circuit Court properly found that West Virginia law does not permit a non-attorney executor to file legal pleadings on behalf of an estate for the reason that such action constitutes the unauthorized practice of law on behalf of another. Petitioner has brought the instant Appeal, and the underlying actions, in the stated capacity as the executor of the estate of his late father, Aurelio Gomez, as a *pro se* litigant. Petitioner formerly practiced law prior to pleading guilty to felony theft by conversion in 2001 whereby he surrendered his law license as part of a disciplinary proceeding before the Georgia Bar – Petitioner is not a licensed attorney in this state.

The majority of states have found that an executor cannot engage in *pro se* legal representation of an estate for the reasons that the beneficiaries and creditors to the estate are owed a duty of competent legal representation. Petitioner has attempted to cure this issue by joining two of his brothers, David and Robert, as claimed beneficiaries to the estate as named parties to the civil action. However, a beneficiary cannot be a proper party to such litigation as beneficiaries only have an expectant interest and do not have standing to proceed as a stand-in for the legal entity of the estate. By law, it is the executor who is charged with the exclusive duty to represent the interests of an estate, however a non-lawyer executor is not permitted to practice law in the representation of the interests of another in the courts of West Virginia. Thus, this Honorable Court should affirm the decision of the Circuit Court that an executor cannot proceed *pro se* in the legal representation of an estate in a West Virginia court.

The Circuit Court properly struck all pleadings filed on behalf of the Estate of Aurelio Gomez as improperly filed and dismissed the Third Party Complaints against These Respondents, in addition to other pleadings that were also improperly filed. The West Virginia

Trial Court Rules and the Rules of Civil Procedure specify that all pleadings in legal proceedings must be filed by a licensed attorney except when filed in a *pro se* capacity. An estate cannot represent itself in a *pro se* capacity where it is not a natural person. Thus, any pleadings filed for the estate must be signed by a licensed attorney. Any pleading filed by a non-attorney is in contempt of court and is void *ab initio*. Where a pleading is improperly filed, it is a nullity upon which no relief may be granted. Thus, this Honorable Court should affirm the decision of the Circuit Court to strike all pleadings improperly filed by Petitioner on behalf of the Estate as nullities.

Lastly, Petitioner has improperly brought the instant Appeal where, again, he is a non-lawyer seeking to represent the legal interests of the Estate in a West Virginia Court and in violation of the *Order* of the Circuit Court to cease further legal representation of the Estate without the benefit of a licensed attorney. Additionally, Petitioner has untimely filed his *Petitioner's Brief* beyond the expiration of the deadline to perfect the appeal without demonstrating "good cause" pursuant to Rule of Appellate Procedure 5. Thus, this Honorable Court should dismiss the instant appeal as defective and counter to the West Virginia Rules of Appellate Procedure.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure, Respondent does not believe that the deliberation process would be aided by oral argument in this matter as the facts and legal arguments are adequately presented in the briefs and record on appeal.

VI. STANDARD OF REVIEW

This Court has previously determined that when reviewing a motion to strike: “challenges to findings of fact are reviewed under a clearly erroneous standard; conclusions of law are reviewed de novo.” *State v. Hedrick*, 236 W.Va. 217, 223, 778 S.E.2d 666, 672 (2015) *citing* Syl. Pt. 1, *State v. Messer*, 223 W.Va. 197, 672 S.E.2d 333 (2008); Syl. Pt. 1, *State v. Davis*, 199 W.Va. 84, 483 S.E.2d 84 (1996).

Rule 12(b)(1) of the West Virginia Rules of Civil Procedure provides that a defendant may assert as a defense by motion raising lack of jurisdiction over the subject matter. Once it is determined that a court has no jurisdiction to entertain the subject matter of a civil action, the court must take no action other than to dismiss it from the docket. *See* Syl. Pt. 1, *Hinkle v. Bauer Lumber & Home Bldg. Center, Inc.*, 158 W.Va. 492, 211 S.E.2d 705 (1975). Hearing matters outside of the pleadings of a rule 12(b)(1) motion does not convert the motion into a Rule 56 summary judgment motion. *See* Cleckley, Davis, and Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, §12(b)(1)[2] (2006) *citing* *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379 (Fed. Cir. 2002). The burden of proving subject matter jurisdiction is always upon the party asserting subject matter jurisdiction exists. *See* *Litigation Handbook* at §12(b)(1)[2] *citing* *Robinson v. Overseas Military Sales Corp.*, 21 F.3d 502 (2d Cir. 1994).

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure provides that the defendants may assert as a defense by motion failure to state a claim upon which relief can be granted. In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, the Court must construe the complaint in a light most favorable to the plaintiff, and its allegations are to be taken as true. *See* *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245

S.E.2d 157, 158 (1978). This liberal standard does not relieve a plaintiff of his or her obligation to present a valid claim. *See Wilhelm v. West Virginia Lottery*, 198 W.Va. 92, 96-97, 459 S.E.2d 602, 606-07 (1996). If the Court finds beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief, the court should dismiss the complaint. *See Owen v. Board of Educ.*, 190 W.Va. 677, 678, 441 S.E.2d 398, 399 (1994). Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations in the complaint. *See W.Va. R. Civ. P. 12(b)(6); Estate of Hough v. Estate of Hough*, 205 W.Va. 537, 544, 519 S.E.2d 640, 647 (1999). The singular purpose of a motion to dismiss for failure to state a claim is to seek a determination as to whether the plaintiff is entitled to offer evidence to support claims made in the complaint. *See Dimon v. Mansy*, 198 W.Va. 40, 479 S.E.2d 339, n.5 (1996) *citing Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Lastly, a court may consider exhibits attached to or referred to in the complaint without converting a Rule 12 Motion to Dismiss into a Rule 56 Motion for Summary Judgment. *See Syl. Pt. 1, Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008). A court may also consider, without such conversion, those matters susceptible to judicial notice. *See id.*, 222 W.Va. at 748, 671 S.E.2d at 753.

Rule 12(f) of the West Virginia Rules of Civil Procedure functions as a motion to strike to avoid the expenditure of time and money that arises from litigating spurious issues, by dispensing with those issues prior to trial. *See Cleckley, Davis, and Palmer, Litigation Handbook on West Virginia Rules of Civil Procedure*, §12(f)[2] (2006) *citing Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986). The trial court has the discretion to extend the time to permit a motion to strike and has authority to consider the motion on its own initiative. *See*

Litigation Handbook at §12(f)[2] citing *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977). A motion under Rule 12(f) goes to whether a particular defense is proper based upon the conduct alleged in the complaint and the law applicable thereto. See *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 231, 539 S.E.2d 478, 491 (2000).

Lastly, West Virginia Rule of Appellate Procedure 5(f) specifies that “A motion that is filed with this Court to extend time to perfect an appeal must comply with Rule 29 and must state with particularity the reasons why an extension is necessary.” W.Va. R. App. P. 5(f). In *Rose v. Thomas Mem'l Hosp. Found., Inc.*, 208 W.Va. 406, 412–13, 541 S.E.2d 1, 7–8 (2000), this Court recognized that any request to enlarge the time for an appeal requires “a showing of good cause.” In *W.Va. Dep't of Energy v. Hobet Min. & Const. Co.*, 178 W.Va. 262, 264, 358 S.E.2d 823, 825 (1987), this Court, in discussing good cause, recognized that “[t]hese rules allow the court to take into account the parties’ administrative problems such as lack of a transcript or the death or reassignment of an attorney.” However, this Court also stated that a party’s request “to enlarge time must usually be made before the fact.” *Id.*

VII. ARGUMENT

A. ASSIGNMENT OF ERROR NO. 1: THE CIRCUIT COURT DID NOT ERR WHEN IT FOUND, AS A MATTER OF LAW, THAT ALL PLEADINGS AND OTHER SUBMISSIONS FILED BY THE NON-LAWYER PETITIONER, AS *PRO SE* EXECUTOR, ARE VOID *AB INITIO* AND ARE HEREBY DEEMED A NULLITY.

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. See *West Virginia State Bar v. Earley*, 144 W.Va. 504, 518, 109 S.E.2d 420, 430 (1959). 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. *See id* 144 W.Va. at 515, 109 S.E.2d at 429; West Virginia Code §30-2-4. The West Virginia Code sets forth the statutory conditions for the misdemeanor unauthorized practice of law:

(a) It is unlawful for any person to practice or appear as an attorney-at-law for another in a court in this state or to make it a business to solicit employment for any attorney, or to hold himself or herself out to the public or any member thereof as being entitled to practice law ... without first having been duly and regularly licensed and admitted to practice law in the courts of this state, and without having subscribed and taken the oath required by the provisions of section three of this article.

(b) Any person violating the provisions of subsection (a) of this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$5,000, or confined in jail not more than ninety days, or both fined and confined....

West Virginia Code §30-2-4. 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.

Id. Further, 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.

Lastly, 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.” 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. *See Morris v. Gates*, 124 W.Va. 275, 20 S.E.2d 118 (1942).

The Estate's initial pleadings in 17-P-402 or 17-C-1292 were not signed by a duly licensed attorney admitted to practice before the Supreme Court of Appeals. As such, all subsequent actions in those cases have been improper as the operative pleadings are defective on their face as their filings constitutes the unauthorized practice of law where Petitioner is seeking to represent the Estate, and its beneficiaries and creditors, without the assistance and counsel of a licensed attorney of record.

1. A Non-Lawyer Engaging in the Representation of Another Does Not Have Standing

Standing “is an element of jurisdiction over the subject matter.” *State ex rel. Abraham Linc Corp. v. Bedell*, 216 W.Va. 99, 111, 602 S.E.2d 542, 559 (2004). 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. Earley*, 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. *See id* 144 W.Va. at 516, 109 S.E.2d at 429. Rule 4.03 of the West Virginia

Trial Court Rules requires that every party to proceedings before any court must be represented by a person admitted to practice law before the West Virginia Supreme Court of Appeals unless that party appears *pro se*.

The pleadings filed by Petitioner in the instant appeal are not signed by a duly licensed attorney admitted to practice before the West Virginia Supreme Court of Appeals. As such, all pleadings filed by Petitioner in these actions have been improper and are defective on their face as their filing constitutes the unauthorized practice of law where Petitioner is seeking to represent the Estate, and its beneficiaries and creditors, without the assistance and counsel of a licensed attorney of record.

2. Neither an Estate Nor Its Personal Representative Can Appear in a *Pro Se* Capacity to Represent the Interests of Others in a West Virginia Court

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. *See West Virginia State Bar v. Earley* 144 W.Va. at 520, 109 S.E.2d at 431. For the reasons stated herein, it is not possible for an estate, a legal entity much like that of a corporation, to represent itself in a *pro se* capacity. A duly appointed Executor or Administrator is the only party authorized to represent the interests of beneficiaries and creditors to an estate. However, such an Executor or Administrator is not authorized by the laws of West Virginia to represent the legal interests of an estate and its beneficiaries or creditors in a representative capacity such as that which exists between a lawyer and a client.

In West Virginia the “executor or administrator is the proper representative of the personal estate, and generally all suits should be brought against him in relation thereto.” Syl. Pt. 10, *Richardson v. Donehoo*, 16 W.Va. 685 (1880). West Virginia Code §44-1-22 permits a personal representative to “sue or be sued upon any judgment for or against, or any contract of or with, his decedent.” *State ex rel. Remke v. Falland*, 145 W.Va. 364, 368, 115 S.E.2d 326, 339 (1960). “[W]hen a party to a pending lawsuit in the state of West Virginia dies, the only parties with standing to represent the estate of the decedent in a West Virginia court ... are personal representatives of the estate who were duly appointed in West Virginia.” *Glucksberg v. Polan*, No. Civ.A. 3:99-0129 (S.D.W.Va., Dec. 16, 2002). The “personal representative of the estate has the exclusive right to maintain an action” and any assets of the estate “are assets of the estate of the beneficiary for which the administrator thereof alone can maintain a suit.” *Johnson v. U.S.*, 102 F.2d 729, 730 (5th Cir. 1939) citing *Singleton v. Cheek*, 284 U.S. 493 (1932). However, having the exclusive power to administer the affairs of an estate does not permit a non-lawyer executor to appear *pro se* in court or to practice law without being a duly licensed attorney admitted to practice law before the courts of West Virginia.

A personal representative of an estate acts in a fiduciary capacity and holds a duty to manage the estate to the advantage of those interested in it and to act on its behalf. See *Latimer 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 can neither sue nor be sued, but speaks only by virtue of personification, much like a corporate entity. See *Ballard v. Bank of Am.*, No. 2:12-2496, *10 (S.D.W.Va., Nov. 7, 2013), *aff’d sub nom Ballard v. Bank of Am.*, 578 F.Appx. 226 (4th Cir. 2014) (Interpreting the West Virginia Consumer Credit Protection Act finding that

estates are defined in a group with other artificial legal entities, such as corporations, which reinforces the conclusion that estates are not natural persons.); *see also*, *Horton v. Proff'l Bureau of Coll. of Maryland, Inc.*, No. 13-C-273, *2 (W.Va. Cir. Ct., June 18, 2015).

Expectant heirs have an interest in the assets of the estate, but such interest is future and contingent to the satisfaction of other obligations: thus “[a]n expectant heir cannot maintain an action for the enforcement or adjudication of a right in the property the heir may subsequently inherit.” *Inlow v. Henderson*, 787 N.E.2d 385, 395 (Ind. 2003) *quoting* Am.Jur.2d *Parties* §37, at 442 (2002). Beneficiaries are expectant heirs who do not have a statutory right to bring suit for any matter involving the administration of the estate except to bring suit against the executor or administrator for neglect in the administration of the estate. *Cf. id.*

While individuals have a statutory right to prosecute their own cases *pro se* in federal courts, an administrator or executor of an estate may not act *pro se* unless, unlike Petitioner in this case, he or she is the sole beneficiary and the estate has no creditors. *See Bailey v. Beckley VA Med. Cntr.*, No. 5:16-02959, *2 (S.D.W.Va., Apr. 7, 2016) *citing Witherspoon v. Jeffords Agency, Inc.*, 88 Fed. Appx. 659 (4th Cir. 2004) (Where an estate has creditors or the executor is not the sole beneficiary an action cannot be described as the litigant’s own, because the personal interest of the estate, other survivors, and possible creditors will be affected by the outcome of the proceedings.); *Beyer v. N. Carolina Div. of Mental Health*, No. 1:01CV50-T, (W.D.N.C. Oct. 16, 2001) (Courts are concerned with the legal interests of all parties and the public’s overriding interest in continued confidence in the judicial process; thus, a non-attorney that seeks to represent an estate must do so by and through a lawyer.); *Carver v. Citifinancial*, No. 1:14CV-00168-GNS (W.D.Ky., Feb. 27, 2015) (An executor or administrator of an estate cannot act on

behalf of an estate *pro se* where the estate has beneficiaries or creditors other than the litigant.); and *Allman v. Correct Care Solutions*, 3:14CV-P707-DJH (W.D.KY, Jan. 8, 2015) (To the extent an administrator may claim to be the power of attorney of the decedent, a power of attorney does not authorize the representation of another in litigation.)³⁷

The courts of many other jurisdictions have applied the above reasoning of legal representation of another to the role of an executor or personal representative of an estate and have found that such a representative must only conduct legal practice 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.

Cf. e.g., State ex rel. Baker v. County Ct. of Rock Cnty., 29 Wis.2d 1, 8, 138 N.W.2d 162, 166 (1965); *Brown v. Coe*, 365 S.C. 137, 616 S.E.2d 705 (2005) (An executor who files legal

³⁷ Certain jurisdictions completely forbid an executor from representing an estate *pro se*. Other jurisdictions may permit such representation if the executor is the sole beneficiary and there are no creditors. Regardless, Petitioner is quite clearly not the sole beneficiary. Aside from Petitioner, four other Gomez siblings – with Andrea Smith Gomez and Matthew Eric Gomez claiming fraud by Petitioner - have claimed to have rights as beneficiaries. As such, it is hard to see how Petitioner can be said to be representing the rights of these potential beneficiaries by acting *pro se* and he would clearly be forbidden from representing the Estate in every jurisdiction cited to in the Brief.

pleadings on behalf of an estate is engaged in the practice of law and cannot do so without being an attorney who is admitted to the practice of law before the tribunal.); *Davenport v. Lee*, 348 Ark. 148, 72 S.W.3d 85 (2002) (Administrators and other fiduciaries cannot proceed *pro se* in their representative capacity without being a licensed attorney.); *Ex Parte Ghafary*, 738 So.2d 778 (Ala. 1998) (A nonlawyer executrix cannot represent the interests of an estate, which is a separate legal entity with interests other than her own, in a legal action.); *Ratcliffe v. Apantaku*, 318 Ill.App.3d 621, 742 N.E.2d 843 (2000) (A nonlawyer personal representative cannot represent the legal interest of the decedent's estate in a *pro se* capacity.); *Waite v. Carpenter*, 1 Neb.App. 321, 496 N.W.2d 1 (1992) (A nonlawyer personal representative is engaged in the unauthorized practice of law who files a complaint on behalf of an estate in a legal action.); *State v. Simanonok*, 539 A.2d 211 (Me. 1988) (An executor's appearance in 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 such that an executor not licensed to practice law must appear by an attorney in court.); *Kasharian v. Wilentz*, 93 N.J.Super. 479, 226 A.2d 437 (1967) (A legal action brought by a nonlawyer administrator acting on behalf of an estate was required to be brought by an attorney duly qualified to practice law.); *Arkansas Bar Ass'n v. Union Nat. Bank of Little Rock*, 224 Ark. 48, 273 S.W.2d 408 (1954) (A personal representative of an estate does not act for himself and cannot appear before a court, or in connection with any pending litigation, without being a licensed attorney or he is engaged in the unauthorized practice of law.); *Ellis v. Cohen*, 118 Conn.App. 211, 982 A.2d 1130 (2009) (The appointment of a personal representative does not create an individual right of action, but only creates a representative, fiduciary relationship such that a personal representative of an estate does not act *pro se* and

cannot represent the estate in matters of law without being duly a licensed attorney admitted to practice before the court.); *Prigden v. Andresen*, 113 F.3d 391 (2d. Cir. 1997) (An administratrix or executrix of an estate may not proceed *pro se* when the estate has beneficiaries or creditors other than the litigant.); *Shepherd v. Wellman*, 313 F.3d 963 (6th Cir. 2002) (An executor cannot proceed *pro se* with a legal action where he is not the sole beneficiary of the decedent's estate.); *Pearce v. City of Yuma*, No. 1 CA-CV 16-0574 (Ariz. Ct. App., Dec. 5, 2017) (Where an estate's special administrator is not an attorney, the administrator was not legally authorized to file a reply brief without counsel.); and *Hawthorne v. VanMarter*, 279 Va. 566, 576, 692 N.E.2d 226, 233 (2010) (Administrators do not have a right to file an appeal in a *pro se* capacity for a cause of action belonging to the estate's beneficiaries.)

In the instant case, the represented party, the Estate, is incapable of signing any pleading in a *pro se* capacity as it is not a "natural person." *Cf. Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty.*, 228 W.Va. 762, 767, 724 S.E.2d 733, 738 (2012). Further, the signatory of the pleadings of the Estate, Petitioner, is not licensed to practice law before the courts of West Virginia. The lack of an attorney's signature on these pleadings indicates an intention to proceed *pro se*, which is not an available option in the instant case due to the fiduciary relationship that a personal representative has with an estate. *Cf. Davenport*, 348 Ark. at 159, 72 S.W.2d at 90. This type of representation must be prohibited due to the fiduciary and representative nature of the personal representative to the other beneficiaries and creditors that are separate and distinct from any personal interest that the representative may have in the affairs of the estate. *Cf. Ex parte Ghafary*, 738 So.2d at 779-80. The other beneficiaries and creditors

to the Estate are entitled to the protection and expertise of an attorney as a matter of public policy. *Cf. Ratcliffe*, 318 Ill.App.3d 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 administrating 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.

Cf. Arkansas Bar Ass'n 224 Ark. at 51-52, 273 S.W.2d at 410-11.

It is the duty of this, and every other court, to ensure that parties are represented by people who are qualified and trained in the law. *See West Virginia State Bar v. Earley*, 144 W.Va. at 518, 109 S.E.2d at 430; *Shenandoah Sales*, 228 W.Va. at 527-28, 109 S.E.2d at 435. In order to protect the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the courts could exercise little, if any, control, only duly-licensed persons meeting the qualifications for admission to the bar may provide legal representation. *See State ex rel. Frieson v. Isner*, 168 W.Va. 758, 769, 285 S.E.2d 641, 650 (1981). *See also; Metro Bank v. Howard*, No. 975 MDA 2017 (Pa. Super. Ct., June 1, 2018) (While some estates are small and might struggle to hire counsel, “[g]iven the complex legal issues that may arise during the representation of an estate, such as challenging a judicial sale, prohibiting a non-attorney from representing an estate is essential to protecting the interests of the public.”); *Mayer v. Lindenwood Female Coll.*, 453 S.W.3d 307, 313 (Mo. Ct. App. 2014)

(“[I]t is the judiciary’s duty to regulate the practice of law and a *sua sponte* strike of the filings of a nonattorney who purports to represent another in court is entirely consistent with the judiciary’s duty.”); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (It is essential to the administration of justice and the proper protection of society that unlicensed persons be not permitted to prey upon the public by engaging in the practice of law.).

3. Improper Legal Pleadings are a Nullity and Must Be Stricken as Void *Ab Initio*

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 unauthorized practice of law is also a contempt of court.” *West Virginia State Bar v. Earley*, 144 W.Va. at 516, 109 S.E.2d at 429.

Where a non-attorney engages in the unauthorized practice of law, the result of such practice should not be an amenable defect. *Cf. Davenport*, 348 Ark. at 160, 72 S.W.2d at 94. “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.” *Ratcliffe*, 318 Ill.App.3d at 626, 742 N.E.2d at 308. *See also, Kone v. Wilson*, 272 Va. 59, 64, 630 S.E.2d 744, 746 (2006) (The court was unable to grant the non-lawyer plaintiff an amended pleading because “an amendment to a pleading presupposes a valid instrument as its object” and found that the original pleading, signed in a representative capacity by one unauthorized to practice law within Virginia, was

invalid and without legal effect.); *Carlson v. Workforce Safety & Ins.*, 765 N.W.2d 691, 702 (ND 2009) (“The proper remedy when a corporation is represented by a non-attorney agent is to dismiss the action and strike as void all legal documents signed and filed by the non-attorney” for the reason that when a case is commenced by a non-attorney not authorized to practice law “all documents signed by the non-attorney are void from the beginning.”); *Matter of Estate of Nagel*, 950 P.2d 693, 694 (Colo. App. 1997) (A petition is null and void because it was not signed by an attorney such that the lower court erred by denying the motion to strike the petition.); *Berg v. Mid-Am. Indus., Inc.*, 688 N.E.2d 699, 704 (Ill. App. 1997) (“Any proceedings that ensue in a case involving laypersons representing a corporation are null and void *ab initio* [t]his rule applies even where the lay agent merely filed the complaint over his own signature, and all subsequent court appearances are made by a duly licensed attorney.”); *Hansen v. Hansen*, 114 Cal. App. 4th 618, 619 (2003) (A conservator, executor, or personal representative of a decedent’s estate who is unlicensed to practice law cannot appear in *propria persona* on behalf of the estate in matters outside of probate proceedings: when a nonlawyer brings a nonprobate action in *propria persona* on behalf of the estate, the proper appellate remedy is to reverse with directions for the trial court to strike the complaint.); and *Kelly v. Saint Francis Med. Ctr.*, 295 Neb. 650, 656-8, 889 N.W.2d 613, 618-19 (2017) (Where a non-attorney seeks to affect the legal rights of an estate, this constitutes the unauthorized practice of law; where the non-attorney files a complaint seeking to represent the interests of an estate in a *pro se* capacity, this act is sufficient to find the complaint to be a nullity.)³⁸

For the reasons stated above, Petitioner must be barred from continuing to practice law without a license by representing others before the courts and tribunals of this State. As such,

38 It should be noted that Petitioner has offered no case law to the contrary.

Petitioner's Assignment of Error No. 1 must be denied and the *Orders* of the Circuit Court must be affirmed as to these points.

B. ASSIGNMENT OF ERROR NO. 2: THE CIRCUIT COURT PROPERLY APPLIED THE HOLDING OF *Williams v. Precision Coil, Inc.* IN DETERMINING THE RESPECTIVE BURDERNS OF PROOF BETWEEN THE PARTIES AS TO PETITIONER'S MOTION FOR SUMMARY JUDGMENT IN DENYING THE SAME.

These Respondents (Third Party Defendants below) have no argument to present to this point as Petitioner has not alleged this claim against any of These Respondents. However, These Respondents defer to the *Response Brief of Appellees Andrea Gomez Smith and Matthew Eric Gomez, D.O.* in this matter on September 4, 2018 in this appeal. To that extent, These Respondents assert that the Circuit Court was correct in denying Appellant's *Motion for Summary Judgment* as presented against Appellees Andrea Gomez Smith and Matthew Eric Gomez for the reasons articulated in the *Order* issued in civil action 17-P-402 in the Circuit Court of Kanawha County. As such, Petitioner's Assignment of Error No. 2 must be denied and the *Orders* of the Circuit Court must be affirmed as to these points.

C. MOTION TO DISMISS THE APPEAL: PETITIONER HAS FAILED TO PERFECT THE APPEAL BY FAILING TO TIMELY FILE THE PETITIONER'S BRIEF AND THE SAME SHOULD BE DISMISSED ACCORDING TO RULE 5(G) OF THE WEST VIRGINIA RULES OF APPELLATE PROCEDURE.

Petitioner has failed to perfect the instant appeal within the timeline established by the West Virginia Rules of Appellate Procedure. This Court has made it clear that will only extend the deadline for perfecting an appeal if (1) the petitioner demonstrates good cause for his or her request; *and* (2) the petitioner's request is made prior to the expiration of the deadline for perfecting the appeal. Petitioner has failed to satisfy either element of this test.

1. Failure to Demonstrate Good Cause

First, Petitioner has not demonstrated good cause for his delay in filing his Petitioner's Brief. Instead, Petitioner's Extension Motion cites to (1) his decision to prioritize another matter that he filed as a *pro se* plaintiff ahead of this appeal, and (2) events that occurred long before his appeal was required to be perfected. As discussed in detail in the Objection of These Respondents to the Extension Motion, Petitioner had more than 90 days from both his Notice of Appeal and the entry of the Scheduling Order until the deadline for perfecting his appeal. Petitioner does not claim that he was unaware of this deadline.³⁹ Nor does he claim that some personal emergency, employment obligation, or failure to have a transcript or other record prevented him from being able to timely perfect his appeal.

As evidenced by this Court's examples in *W.Va. Dep't of Energy v. Hobet Min. & Const. Co.*, 178 W.Va. 262, 358 S.E.2d 823 (1987) Petitioner's excuses do not constitute good cause. Petitioner claims that he had to "devote time and resources" to respond to a pleadings filed in other matters that are unrelated to this one. This is of no consequence to the instant appeal. Petitioner had more than three months to perfect his appeal. He had every record he needed to do so and does not claim otherwise. Moreover, Petitioner does not claim that there were other significant obstacles – such as a death of an assistant or family member – that precluded him from being able to dedicate his time to diligently working on and perfecting his appeal. While Petitioner asserts that he has demonstrated good cause by listing several events that required some amount of time on his part, the reality is that all but one of these events concluded some 39

³⁹ Indeed, as shown in Exhibit A to These Respondents' Response to the Extension Motion, Petitioner clearly understood what the deadline was for perfecting his Appeal, but felt it more appropriate to use his time to insult counsel for wanting to provide this Honorable Court with a complete and accurate record.

days before the deadline for perfection. The other event – Magistrate Judge Tinsley’s issuance of findings and recommendations – did not arise until 75 days after the Court issued its Scheduling Order and that event merely required him to work on two filings (without any other claimed impediments or obligations) over the span of two weeks.

The Circuit Court, in striking the Third-Party Complaint and all claims filed by Petitioner, agreed with courts across the nation that an executor cannot represent an estate *pro se* and that to do so constitutes the unauthorized practice of law. These courts all recognized the inherent problems that would arise if a non-attorney were to be permitted to bring and defend claims in court on behalf of others. Petitioner’s inability to timely perfect his appeal because he had other minor tasks over a three-month period and became confused and overwhelmed is one more reason in support of the Circuit Court’s decision and, regardless, Petitioner’s excuses do not constitute good cause to grant his Extension Motion. As such, the Extension Motion should be denied and, consistent with R.A.P. 5 and this Court’s Scheduling Order, Petitioner’s Appeal should be dismissed.

2. Petitioner Filed his Petition after the Expiration of the Deadline to Perfect the Appeal.

Second, Petitioner, without explanation or excuse, did not file his Extension Motion until after the deadline to perfect his appeal. This Court should reject Petitioner’s Extension Motion and, consistent with W.Va. R. App. P. 5 and the directives in the Scheduling Order, dismiss the instant appeal. As this Court has previously noted, a party’s request “to enlarge time must usually be made before the fact.” *Hobet Min. & Const. Co.*, 178 W.Va. at 264, 358 S.E.2d at 825 (1987). Petitioner readily admits in his Extension Motion that his appeal was not in proper form, that he was aware of this fact when he attempted to file his Brief, and that his Brief was

rightfully rejected by the Court when he attempted to file it on August 17, 2018. Yet, despite knowing of these deficiencies and his apparent inability to perfect his appeal, Petitioner did not file his Extension Motion until August 20, 2018. Petitioner has offered no excuse for failing to file his Extension Motion before the deadline for perfecting his appeal had already passed. Tellingly, Petitioner does not claim that he was unable to do so or offer any excuse for his failure. Not only is the failure grounds to deny the Extension Motion, but it is yet more evidence in support of the Circuit Court's holding – which is consistent with courts across the country – that an executor cannot *pro se* represent an estate in litigation. Petitioner's Extension Motion should be denied and, consistent with W.Va. R. App. P. 5 and this Court's Scheduling Order, his Appeal should be dismissed.

VIII. CONCLUSION

For the reasons stated herein, These Respondents pray that this Honorable Court affirm the Circuit Court's *Orders* as to the merits of the action. In the alternative, These Respondents pray that the instant appeal should be dismissed for the reasons that the Petitioner failed to perfect the appeal.

Respectfully submitted,

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