IN THE SUPREME COURT OF IOWA
SUPREME COURT NO. 24-0720
Polk County No. LACL157176

ESTATE OF KARA B. TORNELL, PRESTON H. TORNELL, Administrator, and PRESTON H. TORNELL, Individually,

Plaintiffs-Appellants,

vs.

TRINITY HEALTH CORPORATION; CATHOLIC HEALTH INITIATIVES – IOWA CORP. d/b/a MERCYONE WEST DES MOINES; WILLIAM E. NOWYSZ; WILLIAM NOWYSZ P.C.; DES MOINES RIVER PHYSICIANS, LLC; RYAN BRIMEYER; and THE IOWA CLINIC, P.C.,

Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
HON. JEANIE VAUDT, PRESIDING

DEFENDANT-APPELLEES' JOINT APPELLEE BRIEF

/s/ *Ryan P. Tunink*
Ryan P. Tunink AT0014964
Frederick T. Harris AT0003198
LAMSON DUGAN & MURRAY LLP
6400 Westown Parkway, Suite 280
West Des Moines, IA 50266
Phone: 515-513-5003
Fax: 515 298-6536
Email: rharris@ldmlaw.com
rtunink@ldmlaw.com

ATTORNEYS FOR DEFENDANTS-APPELLEES CATHOLIC HEALTH INITIATIVES—IOWA CORP.

/s/ *Eric P. Martin*
JENNIFER E. RINDEN AT0006606
VINCENT S. GEIS AT0013055
ERIC P. MARTIN AT0014859
SHUTTLEWORTH & INGERSOLL,P.L.C.
235 6th Street SE
P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461
FAX: (319) 365-8443
E-mail: jer@shuttleworthlaw.com
vsg@shuttleworthlaw.com
epm@shuttleworthlaw.com

ATTORNEYS FOR DEFENDANTS-APPELLEES WILLIAM E. NOWYSZ, WILLIAM NOWYSZ, P.C., and DES MOINES RIVER PHYSICIANS, LLC.

/s/ *Peter R. Lapointe*
Stacie M. Codr AT0001502
Jeffrey R. Kappelman AT0012719
Peter R. Lapointe AT0014952
FINLEY LAW FIRM, P.C.
699 Walnut Street, Ste 1700
Des Moines, IA 50309
Telephone: 515-288-0145
Facsimile: 515-288-2724
E-mail: scodr@finleylaw.com
jkappelman@finleylaw.com
plapointe@finleylaw.com

ATTORNEYS FOR DEFENDANT-APPELLEES RYAN BRIMEYER, D.O. and THE IOWA CLINIC, P.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Court Rules

Secondary Sources

STATEMENT OF THE ISSUES

I. THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS' MOTIONS TO DISMISS BECAUSE PRESTON WAS ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW

II. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' THIRD MOTION FOR LEAVE TO AMEND.

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals because it involves the application of existing legal principles and is appropriate for summary disposition. *See* Iowa R. App. P. 6.1101(3).

NATURE OF THE CASE

This appeal involves a medical malpractice claim pursued *pro se* by Preston Tornell individually and as administrator of his late-wife Kara's Estate. Plaintiffs sought damages for Kara's alleged wrongful death, loss of spousal consortium, and loss of parental consortium on behalf of Preston and Kara's children. The Defendants, through separate but materially similar motions, sought to dismiss the claims on the grounds that Preston was engaged in the unauthorized practice of law by presenting claims that, by statute, only Kara's Estate's administrator could pursue with the assistance of counsel. Plaintiffs resisted and filed a Motion for Leave to Amend their Petition—their third motion for leave to amend. Following hearing, the district court granted the Defendants' motions to dismiss—treating them as motions for judgment on the pleadings—and denied Plaintiffs' Motion for Leave to Amend.

STATEMENT OF FACTS

Preston Tornell instituted these proceedings *pro se* on November 14, 2023. *See* D0001, Petition (11/14/2023). The Petition listed three plaintiffs: (1) the Estate of Kara B. Tornell (hereinafter, "The Estate"), Preston Tornell as an individual, and Preston Tornell as administrator of Kara Tornell's Estate. *Id.* The Petition alleged claims of medical malpractice by the several named defendants. *Id.* Counts I-V. Plaintiffs sought damages related to Kara's injuries and loss of parental and spousal consortium.[1] *See, e.g.*, *id.* ¶ 54-57.

Defendant Catholic Health Initiatives—Iowa Corp. (hereinafter, "CHI") filed their Answer, including as an affirmative defense: "Plaintiff's Petition amounts to the illegal practice of law."[2] D0020, CHI Answer, p. 6 (12/11/2023). Dr. Brimeyer and The Iowa Clinic, P.C. (collectively "Brimeyer") filed their Answer on December

---

[1] The district court found the Petition to be "prolix," expressing its uncertainty as to whether Plaintiffs sought loss of consortium damages on behalf of Kara's children. *See* D0054. Order Granting Defendants' Motions to Dismiss & Order Denying Plaintiffs' Motion for Leave to Amend Petition, at p. 3 n. 1 (4/2/2024). However, Plaintiffs expressly argued that Preston could assert his children's loss of consortium claim in their resistances to the Defendants' motions to dismiss. *See, e.g.*, D0043, Pltf's Resistance to Motion to Dismiss—With Clarification, at p. 4 (1/23/2024) ("[T]here is no reason to dismiss the claims of the children . . .").

[2] CHI also noted that the Petition had misnamed CHI in the caption. *Id.* Plaintiffs subsequently moved to amend the caption, which was granted by the district court. *See* D0022, Pltf. Motion To Amend Caption (12/12/2023); D0026, Order Granting Leave to Amend Caption, (12/21/2023). Plaintiffs again moved for leave to amend the next day to reflect CHI's d/b/a moniker. *See* D0022, Motion for Leave to Amend, (12/22/2023). The district court did not rule on that motion.

14. D0024, Brimeyer's Answer (12/14/2024). Defendants Nowysz, Des Moines River Physicians, LLC, and Nowysz, P.C. (collectively "Nowysz") filed their Answer on December 26. *See* D0028, Nowysz Answer (12/26/2023).

CHI filed their Motion to Dismiss on January 10, 2024, alleging Preston's conduct in pursuing claims *pro se* that could only lawfully be pursued by the Estate amounted to the unauthorized practice of law, voiding the Petition. *See* D0033, CHI M.T.D. (1/10/2024). Nowysz joined the motion. *See* D0035 Nowysz's Joinder in M.T.D. (1/15/2024). Brimeyer filed their motion on January 18, raising the same issues as presented in CHI's motion. *See* D0039, Brimeyer's M.T.D. (1/18/2024).

Plaintiffs resisted each motion, asserting the same legal arguments in resistance to CHI's motion to dismiss, Nowysz's joinder of that motion, and Brimeyer's separate motion to dismiss. *See* D0043, Pltf's Rest. to CHI's M.T.D. With Clarification (1/23/2024); D0044, Pltf's Rest. to Nowysz Joinder (1/23/2024); D0046, Pltf's Rest. to Brimeyer's M.T.D. (1/24/2024). CHI filed a Reply, which Brimeyer joined. *See* D0047, CHI Reply to M.T.D., (1/29/2024); D0050, Brimeyer Joinder (1/31/2024).

Plaintiffs filed their third Motion for Leave to Amend the Petition on January 31, 2024, seeking to include allegations that Preston is the sole beneficiary of the Estate. *See* D0048, Pltf's Third Motion for Leave to Amend (1/31/2024).

The district court held a hearing on the pending motions on February 2, 2024. *See* D0052, Ct. Rptr. Cert. (2/6/2024). Following the hearing, Plaintiffs submitted a proposed order that, besides rehashing arguments previously raised in their Resistances, argued for the first time that the district court should grant a continuance to allow Preston to obtain the assistance of licensed counsel. *See* D0053, Pltf's Proposed Order, p. 10-11 (2/13/2024).

The district court entered its order on February 2, 2024, granting the Defendants' motions to dismiss. *See* D0054, at p. 6. In doing so, the district court summarized the issues as follows: "[C]an Mr. Tornell advance claims for a person or entity other than himself without engaging in the unauthorized practice of law, or advance an individual claim that statutorily must be pursued by another? For the reasons that follow, *the well-settled answers to these questions is no*." *Id.* at p. 3 (emphasis added). Organizing its well-reasoned decision around the three separate plaintiffs listed in the Petition, the Court concluded: (1) *Li v. Rizzio*, 801 N.W.2d 351 (Iowa Ct. App. 2011) barred Preston from presenting claims on behalf of the Estate, (2) Iowa Code section 633.81 did not permit an administrator to pursue claims *pro se* on behalf of the Estate, and (3) Preston's individual claim for loss of consortium needed to be pursued by the Estate pursuant to Iowa Code section 613.15. *See id.* at p. 3-5. The district court also denied Plaintiffs' Motion for Leave to Amend because there was no valid petition to amend. *Id.* at 6.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED DEFENDANTS' MOTIONS TO DISMISS BECAUSE PRESTON WAS ENGAGED IN THE UNAUTHORIZED PRACTICE OF LAW

a. Standard of Review

Tornell incorrectly asserts the district court ruled on the Defendants' motions as motions to dismiss. *See* Appellant's Brief, at p. 13. The district court expressly stated in its order that, in its discretion, it was treating the Defendants' motions to dismiss as motions for judgment on the pleading. *See* D0054, at p. 1-2; *see also* Iowa R. Civ. P. 1.954 ("After the pleadings a party may move for judgment on the pleadings."). That said, "[i]n many respects a motion for judgment on the pleadings is reviewed in a similar manner to a motion to dismiss for failure to state a claim upon which any relief may be granted under rule 1.421(1)(f) of the Iowa Rules of Civil Procedure." *Meek v. State*, No. 01-1334, 2002 Iowa App. LEXIS 1349, at *4 (Iowa Ct. App. Dec. 30, 2002). "We review a district court's ruling on a motion for judgment on the pleadings for the correction of errors at law. The district court should only grant the motion if the pleadings, taken alone, entitle a party to judgment." *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 280 (Iowa 2018) (internal citation and quotation omitted).[3]

[3] Plaintiffs devote a significant amount of their briefing to describing the relatively stringent standard under which motions to dismiss are considered. *See* Appellant's Brief, p. 12-18. The arguments are irrelevant. The Defendants' motions address a

It is worth noting that Plaintiffs frequently present allegations that were not part of the pleadings as if they were facts the Court must accept as true. Nothing can be farther from the truth. Specifically, Plaintiffs assert the pleadings demonstrate Preston is the sole beneficiary of his late-wife's estate. But the only document including that allegation was Plaintiffs' January 31 Motion for Leave to Amend. *See* D0048, Pltf's M. Leave to Amend, at p.1 (1/31/2024). The Court expressly denied that motion. D0054, at p. 2 & 5. As a result, the allegations were never incorporated into the Petition and therefore fall outside the scope of this Court's review. *Griffioen*, 914 N.W.2d at 280 (motions on the pleadings are limited to the information contained within the pleadings); *see also In re Marriage of Keith*, 513 N.W.2d 769, 771 (Iowa Ct. App. 1994) ("We are limited to the record before us and any matters outside the record on appeal are disregarded"); *Curry v. State*, No. 23-0533, 2024 Iowa App. LEXIS 313, at *4 (Iowa Ct. App. Apr. 10, 2024) ("We condemn attempts to circumvent the rules of appellate procedure and improperly develop facts that must be properly litigated through the adversarial process.").

---

purely legal issue that is readily resolved by considering the parties' pleadings, thus making the issues amenable to consideration through a motion to dismiss under rule 1.421(1)(f) or a motion for judgment on the pleadings under rule 1.954. Indeed, doing so prevents significant expenditures of time and resources by both the litigants and the court when litigating a case only for the pro se litigant's actions to be voided, which, as explained below, is the proper remedy for the unauthorized practice of law.

b. Error Preservation

Plaintiffs did not preserve error on their claims. As explained in the following section, Preston's filings and oral argument before the court amounted to the unauthorized practice of law, rendering such filings and argument void. As such, Plaintiffs did not adequately raise their claims to the district court. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). To the extent this Court determines Preston's actions are not a legal nullity, Plaintiffs generally preserved error.

That said, regardless of how the Court determines the primary issues on appeal, Plaintiffs did not preserve error on their argument that the district court should have granted Preston time to obtain counsel. *See* Appellant's Brief, at p. 27. Plaintiffs only raised this argument in their Proposed Order following the hearing on the pending motions to dismiss. D0053, Proposed Order on Dismissal Motion at p. 10-11 (02/13/2024). Proposed orders do not preserve error. *See Woods v. Charles Gabus Ford, Inc.*, 962 N.W.2d 1, 5-6 (Iowa 2021) (finding that an appellant failed to preserve error on issue raised after bench trial through a proposed order); *Est. of Grossman v. McCreary*, 373 N.W.2d 113, 114 (Iowa 1985) (expressly concluding that proposed orders do not obviate the need to preserve error).

A proposed order does not comply with the purposes of error preservation in Iowa. Merely raising an issue in a proposed order does not afford the opposing party the opportunity to respond in the same manner in which motions permit. *See State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999) ("[T]he requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling."). Further, proposed orders do not require the Court to consider the merits of the arguments presented therein—they are merely tools to promote judicial efficiency that the Court is free to use as it sees fit. As another court has succinctly explained:

> A motion affords the trial court an opportunity to make a specific ruling, thereby preserving any alleged error on the part of the trial court for appellate review. A proposed order on the other hand is nothing more than a suggested order, which the trial court can either sign or reject by drafting a completely different order—which is precisely what occurred in this case. But, rejecting a proposed order is not the same as denying a motion, nor does the failure of a trial court to adopt a proposed order give rise to a right to appellate review or provide grounds to place a trial court in error.

Ex parte Harbor Freight Tools USA, Inc., 331 So.3d 88, 99 (Ala. 2021) (Sellers, J., concurring). Plaintiffs failed to preserve error on this issue.

Even if the proposed order could preserve error, the district court never addressed Plaintiffs' argument. The court's order is devoid of any analysis considering whether to permit a continuance to obtain licensed counsel to recast the

Petition. In the absence of a ruling on the issue, Plaintiffs' arguments are not preserved. *See Meier*, 641 N.W.2d at 537 ("When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal."). As such, this Court must conclude Plaintiffs failed to preserve error on their argument that the district court should have permitted Preston an opportunity to obtain new counsel to cure the invalid petition.

For similar reasons, Plaintiffs failed to preserve error regarding their assertions that as sole beneficiary of the Estate, Preston should be permitted to proceed *pro se*. *See* Appellant's Brief, p. 24-25. The district court's decision is entirely devoid of any consideration of this issue. In the absence of a ruling on the argument, error is not preserved. *See Meier*, 641 N.W.2d at 537.

c. The District Court Properly Concluded Plaintiffs' Petition was Void Due to Preston Engaging in the Unauthorized Practice of Law.

The district court properly concluded Plaintiffs' Petition was void because Preston was engaged in the unauthorized practice of law by presenting claims that, by statute, could not be presented by Preston as his own natural person. Because Plaintiffs' Petition was null and void, its as if the Petition were never filed. Thus, the district court properly dismissed Plaintiffs' claims against all the Defendants.

Iowa law has long restricted the ability to practice law. *See, e.g.*, Iowa Code § 602.10101. Generally, the Iowa Supreme Court requires "that persons desiring to

practice law in Iowa be admitted to the bar." *Bergantzel v. Mlynarik*, 619 N.W.2d 309, 312 (Iowa 2000). The restrictions on who may practice law are readily apparent due to the multitude of statutes and court rules prohibiting non-lawyers from practicing law. For instance, the Commission on the Unauthorized Practice of Law has the ability to seek an injunction prohibiting a person "who has not been admitted to practice law within the state [from] engaging in the practice of law." *See* Iowa Ct. R. 37.2. "Because our supreme court intended to prohibit people who are not licensed as attorneys from practicing law, an attempt to do so is unauthorized." *Li v. Rizzio*, 801 N.W.2d 351, 359 (Iowa Ct. App. 2011).

Of course, this rule is subject to an individual's ability to represent *themselves* in court. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 599 n. 2 (Iowa 1998) (recognizing the right to proceed pro se but limiting such right to presenting claims on the individual's own behalf). But the ability to proceed *pro se* is closely circumscribed. Generally, "*a natural person may appear [only] for himself*." *Hawkeye Bank & Tr., Nat'l Ass'n v. Baugh*, 463 N.W.2d 22, 23 (Iowa 1990) (quoting *Osborn v. United States Bank*, 22 U.S. 783, 830 (1824)) (emphasis added). The rule "protects the court and the public from ineptitude and delay at the hands of persons who are unskilled as well as unlicensed to practice the law." *Hawkeye Bank*, 463 N.W.2d at 24.

The Iowa Supreme Court, which is "vested with the inherent authority to define and regulate the practice of law in Iowa," has not provided an all-

encompassing definition of the "practice of law." *See Rizzio*, 801 N.W.2d at 359. However, the Court has provided many examples of acts that fall within its definition:

> [T]he practice of law includes, but is not limited to, representing another before the courts; giving of legal advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding. *Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer*. The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment.

Iowa Sup. Ct. Comm'n on Unauthorized Practice of Law v. Sturgeon, 635 N.W.2d 679, 681-82 (Iowa 2001) (emphasis added). Put another way:

> Professional judgment lies at the core of the practice of law. When lawyers determine what the issues are and use their knowledge of the law to solve them in an ethical way, they exercise professional judgment. When an unlicensed person goes beyond the role of a "scrivener" and engages in analysis of legal information, he or she practices law.

Iowa Sup. Ct. Comm'n on Unauthorized Practice of Law v. Sullins, 893 N.W.2d 864, 873 (Iowa 2017). Thus, an individual engages in the unauthorized practice of law when they (1) exercise professional legal judgment (2) on behalf of someone or something other than their natural person.

Plaintiffs do not appear to contest that Preston was engaged in the practice of law by filing the Petition, subsequent amendments to the Petition, and presenting argument at the hearing regarding the Defendants' motions to dismiss. Even if Plaintiffs did contest the issue, filing a petition clearly amounts to the practice of law. Crafting a petition requires a lawyer to "determine what the issues are and use their knowledge of the law" to identify, among other things: potential causes of action, the applicable statute of limitations, potential plaintiffs and defendants, which court or courts would have personal jurisdiction over such defendants, which venue is proper, and myriad other tactical considerations that could impact the case.[4] *Sullins*, 893 N.W.2d at 873. Indeed, the Iowa Court of Appeals has held the filing of a petition amounted to the practice of law. *Rizzio*, 801 N.W.2d at 360.

Preston engaged in the practice of law on behalf of someone other than his natural person by presenting claims to the Court that, by statute, can only be presented by the Estate's personal representative *as* the personal representative.[5] "Iowa recognizes no common law action for wrongful death. Power to maintain such actions is entirely statutory." *Egan v. Naylor*, 208 N.W.2d 915, 917 (Iowa 1973). The

[4] The same can be said for Preston's subsequent conduct in amending the petition and resisting the Defendants' motions.

[5] "Personal Representative" includes both an estate's administrator, who administers intestate estates, and executors, who administer testate estates. *See* Iowa Code § 633.3(33). "The estate representative vested with the power to bring the claim includes a personal representative, executor, and administrator." *Consul Gen. of the Rep. of Indonesia v. Bill's Rentals, Inc.*, 330 F.3d 1041, 1045-46 (8th Cir. 2003).

primary statutes pertaining to this issue—Iowa Code sections 611.20, 611.22, 613.15, and 633.336—have been extensively analyzed:

> We believe a right of action which survives a decedent is created by § 611.20; the person who may bring it is designated by § 611.22; the measure of recovery as to a spouse and parent is fixed by § 613.15; and the distribution of damages recovered is determined by § 633.336. The second sentence of § 613.15 delineates elements of damage recoverable including loss of services and support. The provisions that "recovery for these elements of damage may not be had by the spouse and children, as such, of any person who, or whose administrator, is entitled to recover same" confirms that the right of action for such damages is limited to the injured person or his estate representative.

Id. at 918. Put more succinctly: "Code §§ 611.20, 611.22 and 633.336 and their predecessors have consistently been held to vest the right to recover wrongful death damages *exclusively* in the estate representative." *Id.* (emphasis added).

The notion that Plaintiffs' claims can only be brought before a court by the estate's personal representative cannot seriously be contested. To the extent the law was not clear following *Naylor* in 1973, it was affirmed again in 1979. *See Wilson v. Iowa Power & Light Co.*, 280 N.W.2d 372, 373 (Iowa 1979) ("The cause of action for wrongful death damages belongs exclusively to the estate representative."). Then the Supreme Court reiterated the principle in 1982:

> Iowa recognizes no common law action for wrongful death and the power to maintain such action is entirely statutory. Iowa Code section 611.20, a survival statute, keeps alive for the benefit of the decedent's estate the cause of action which the deceased prior to his death could have brought had he survived the injury, with recovery enlarged to include the wrongful death. *Iowa Code section 611.22 provides that only the legal representative has authority to bring the action*, whereas

> Iowa Code sections 613.15 and 633.336 outline the measure of recovery and provide for the apportionment of the recovery between the spouse, parent, and the estate. In maintaining the wrongful death action the personal representative acts in the capacity of a trustee for the benefit of the recipient of the damages.
>
> *We have consistently held that these code sections vest the right to recover wrongful death damages exclusively in the estate representative.*

Troester v. Sisters of Mercy Health Corp., 328 N.W.2d 308, 312 (Iowa 1982) (internal citations omitted) (emphasis added). Yet again, in 1995, the Iowa Supreme Court repeated the principle:

> Iowa Code section 611.22 provides that an action within the scope of section 611.20 "may be brought . . . by . . . the legal representatives or successors in interest of the deceased." We have consistently held that the right to recover wrongful death damages vests exclusively in the estate representative.

Est. of Dyer by Lirot v. Krug, 533 N.W.2d 221, 224 (Iowa 1995).

As recently as 2016, the Iowa Supreme Court affirmed *Egan*'s analysis on this issue: "Code §§ 611.20, 611.22 and 633.336 and their predecessors have consistently been held to vest the right to recover wrongful death damages exclusively in the estate representative." *Roth v. Evangelical Lutheran Good Samaritan Society*, 886 N.W.2d 601, 605 (Iowa 2016). Thus, Preston was clearly presenting claims on behalf of someone other than his natural person—the claim could only lawfully be presented by the Estate through its personal representative.

Notably, the statutory requirement that these claims be presented by the estate's administrator does not provide Preston the authority to act as counsel for the Estate. Iowa Code section 633.81 provides, "Any fiduciary may sue, be sued and defend in such capacity." However, that provision "necessarily carries with it the right to retain counsel." *Swartzendruber v. Lamb*, 582 N.W.2d 171, 176 (Iowa 1998). The Iowa Court of Appeals analyzed an analogous authorization for one party to sue on behalf of another in *Li v. Rizzio*. In that case, a father sued and proceeded *pro se* in presenting his son's claim for wrongful injury. *Rizzio*, 801 N.W.2d at 353. The Iowa Court of Appeals found such representation amounted to the unauthorized practice of law and voided all of the father's actions, including filing the petition and presenting the claim in court. In doing so, the Court considered whether Iowa Rule of Civil Procedure 1.210 authorized the *pro se* representation of a child by their parent and next friend. *See* Iowa R. Civ. P. 1.210 ("An action of a minor . . . shall be brought by the person's conservator if there is one or, if not, by the person's guardian if there is one; otherwise the minor may sue by a next friend . . .."). The Court unequivocally rejected the argument:

> But the rule of civil procedure does not create an exception allowing a non-attorney parent to actually litigate the child's claim in court. "*The authority to represent another as a party*"—which rule 1.210 creates by allowing a minor to bring suit by a next friend—"*does not equal the authority to practice law on their behalf*."

Rizzio, 801 N.W.2d at 361 (quoting *Chisholm v. Rueckhaus*, 948 P.2d 707, 709 (N.M. Ct. App. 1997)) (emphasis added). The same is true here—Preston's authority to represent the Estate as a party under Iowa Code section 633.81 does not provide him the authority to practice law on the Estate's behalf.

Similarly, Plaintiffs' loss of consortium claims were required to be presented by the Estate, not Preston as a natural person. As an initial matter, Plaintiffs incorrectly assert that they were not raising loss of consortium claims on behalf of his children. *See* Appellant's Brief, p. 8. Plaintiffs' Resistance to CHI's Motion to Dismiss expressly contradicts that position. *See, e.g.*, D0043, at p. 4 ("[T]here is no reason to dismiss the claims of the children . . ."). Iowa law is unequivocal that loss of parental consortium is the child's cause of action, although it must be presented by the estate's personal representative pursuant to Iowa Code section 613.15.[6] *Clark v. Est. of Rice*, 653 N.W.2d 166, 174 (Iowa 2002). The same is true for loss of spousal consortium. *Id.* "To avoid a double recovery, section 613.15 designates the personal representative of the deceased as the proper party to bring a suit for the loss of consortium of the deprived spouse. The independent claim of the deprived spouse thus passes to the administrator on death of the injured spouse." *Nichols v.*

[6] Principles of feasible joinder are irrelevant to this case. It was clearly feasible to assert the children's and Preston's claims of loss of consortium along with the Estate's claims—the Estate simply needed to be represented by a licensed attorney. *See Roth*, 8866 N.W.2d at 607.

Schweitzer, 472 N.W.2d 266, 271 (Iowa 1991). Because the ability to present the loss of consortium claims vested in the position of the estate's personal representative, and not to Preston's natural person, Preston was practicing law on behalf of another before the court. That conduct amounts to the unauthorized practice of law.

Plaintiffs' analysis of this issue consistently conflates two distinct concepts: the right to recovery of damages and the ability to present the claim before the court. Plaintiffs are certainly correct that damages obtained through a wrongful death action are disposed of as property of the Estate, while loss of consortium damages are apportioned among the surviving spouse and children. *See* Iowa Code § 633.336. But section 633.336 does not authorize the spouse or children to present claims of wrongful death or loss of consortium directly. Rather, those claims *must* be presented by the estate's administrator *as* the administrator—the ultimate recipient of the damages is simply irrelevant. *See Madison v. Colby*, 348 N.W.2d 202, 209 (Iowa 1984) (describing the difference between who may present the claim and who ultimately receives the damages recovered through the action).

Plaintiffs' assertion that as the sole beneficiary of the Estate's claims, Preston is permitted to present the Estate's claims suffers from several fatal flaws. *See* Appellant's Brief, p. 24-25. First, as explained in the Error Preservation section, Plaintiffs did not secure a ruling on this issue. As such, it is unpreserved. *See Meier*,

641 N.W.2d at 537. Second, as explained in the preceding standard of review section, Plaintiffs' argument rests entirely on facts not in the record—namely, his allegations that he is the sole beneficiary of the Estate. The allegations Plaintiffs rely on are only found in his January 31 Motion for Leave to Amend—a motion that was denied by the district court. *See* D0048; D0054. The allegations are *not* contained in the Original Petition or the amendments thereto that were approved by the district court. As such, the Court cannot consider those facts because they fall outside pleadings and this Court's standard of review. *See Griffioen*, 914 N.W.2d at 280.

Additionally, the citations to other jurisdictions that Plaintiffs rely on are simply irrelevant. Iowa's Supreme Court is uniquely vested with the authority to define the practice of law in Iowa. *Rizzio*, 801 N.W.2d at 359. And the federal circuits Plaintiffs cite are discussing a federal statute that has no applicability to Iowa courts. *See Pridgen v. Andresen*, 113 F.3d 391, 393 (2nd Cir. 1997) (citing 28 U.S.C. § 1654). Thus, other jurisdictions' approaches do nothing to alter Iowa's longstanding law on these issues.

Even considering the other jurisdictions approaches to this issue, Plaintiffs arguments are unavailing. The Second Circuit Court of Appeals has been clear: "We now hold that an administrix or executrix of an estate may not proceed pro se when the estate has beneficiaries or creditors other than the litigant." *Pridgen*, 113 F.3d at 393. Again, the pleadings do not indicate whether Preston was the sole beneficiary

or how many creditors exist. As such, the *Pridgen* reasoning simply cannot apply. But even considering the facts that fall outside the record, by Plaintiffs own admission there is at least one other creditor to the Estate. D0043, p. 6. In the jurisdictions that recognize the exception outlined in *Pridgen*, the existence of even a single creditor renders Preston's conduct the unauthorized practice of law. *Id.* ("[W]hen an estate has beneficiaries or creditors other than the administrix or executrix, the action cannot be described as the litigant's own, because "the personal interests of the estate, other survivors, and possible creditors will be affected by the outcome" of the proceedings."); *see also Iriele v. Griffin*, 65 F.4th 1280, 1284-85 (11th Cir. 2023) (collecting cases).

More to the point, Iowa law does not recognize the exception articulated by *Pridgen*. Admittedly, this appears to be a matter of first impression in Iowa. But similar cases strongly suggest no such exception exists when the administrator is the sole beneficiary. For instance, the Iowa Supreme Court rejected a similar argument in *Hawkeye Bank*. There, a shareholder of a closely held corporation pursued an action on behalf of the corporation *pro se*. 463 N.W.2d at 23. The *pro se* litigant sought to justify his conduct by noting that he owned the vast majority of the corporation, essentially asking the Court to permit a "reverse piercing" of the corporate veil from within. *Id.* at 24-25. The Court rejected the argument, finding most jurisdictions do not follow the principle and highlighting the dangers of

blurring the careful legal separation drawn between a corporation and its shareholders. *Id.*

The same rationale applies equally here—personal representatives are legally distinct from the estate's they represent. Just like corporate officers, the appointment or removal of a personal representatives does not alter the existence of an estate. *See, e.g.*, Iowa Code §§ 633.63 et. seq. Unless specified by the decedent's will, an executor is not personally liable for the expenses related to maintaining property while the estate is pending. Iowa Code § 633.351. Unless the personal representative prosecutes or defends an action "without reasonable cause," they are not personally entitled to any damages or liable for the same. Iowa Code § 633.159. And, with limited exceptions defined by statute, personal representatives are not liable for any loss stemming from the estate unless it occurred due to negligently or willingly failing to execute the personal representative's duties. Iowa Code § 633.160; *see also* Iowa Code § 633.155 *et seq*. Permitting personal representatives to benefit from the legal formalities differentiating them from the estate while also allowing them to forgo such formalities by representing the estate *pro se* creates the very issue Iowa courts have for so long sought to avoid in similar contexts.

Moreover, the same policy considerations underpinning the general prohibition on the *pro se* representation of other persons or entities applies equally to cases in which the personal administrator is the sole beneficiary. A *pro se* personal

representative subjects the other parties and the judicial system itself to the unnecessary costs incurred due to "ineptitude and delay" that underpins the prohibition in other settings. *Hawkeye Bank*, 463 N.W.2d at 24. Already, Plaintiffs have filed three separate motions to amend their Petition, demonstrating the needless costs being imposed on the litigants and the court itself in addressing issues competent counsel may have prevented in the first place.

The district court properly concluded that Plaintiffs' claims needed to be dismissed due to Preston's unauthorized practice of law. Iowa courts routinely find court filings submitted by those engaging in the unauthorized practice of law are legal nullities that are void. *See, e.g.*, *Rizzio*, 801 N.W.2d at 363; *Est. of Steensma v. Buysman, Inc.*, No. 17-0693, 2018 Iowa App. LEXIS 507, at *15 (Iowa Ct. App. June 6, 2018) (finding "any pleadings or motions filed . . . should have been stricken and considered void"). Plaintiffs have not identified any precedent to the contrary. Because the Petition was void upon its filing, the district court properly concluded the pleadings did not entitle Plaintiffs to any relief. Dismissal of their claims was the proper remedy.

Finally, Plaintiffs incorrectly assert the district court should have provided them a continuance to obtain new counsel and recast the petition. Again, this issue is not preserved—the district court never addressed it, and Plaintiffs only raised the issue through a proposed order. *See Meier*, 641 N.W.2d at 537; *Woods*, 962 N.W.2d

at 5-6. Even on the merits, however, Plaintiffs are incorrect. While a few Iowa cases have permitted that remedy, their rationale relied on equitable principles not present here, such as the defendants waiting to "unexpectedly pull the rug out from under [the Plaintiff] on the day of trial." *See Hawkeye*, 463 N.W.2d at 26. And other jurisdictions agree that the defects created by the unauthorized practice of law cannot be remedied. For instance, the Court in *Jones v. Correctional Medical Services* found an estate's filing of a complaint amounted to a "nullity [that] never existed." 401 F.3d 950, 952 (8th Cir. 2005) (quoting *Davenport v. Lee*, 72 S.W.3d 85, 94 (Ark. 2002)); see also id. (quoting C.*E. Pope Equity Tr. v. United States*, 818 F.2d 696, 698 (9th Cir. 1987)) ("Because 'professional competence and professional responsibility are the sine qua non of federal litigation and effective judicial response,' the defect cannot be amended."). The Court should affirm the district court's conclusion that Plaintiffs' Petition was a legal nullity, resulting in judgment on the pleadings in favor of the Defendants.

II. THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' THIRD MOTION FOR LEAVE TO AMEND.

a. Standard of Review

"Denial of a motion to amend will only be reversed where a clear abuse of discretion is shown." *Daniels v. Holtz*, 794 N.W.2d 813, 817 (Iowa 2010).

b. Error Preservation

In the event the Court concludes that Preston did not engage in the unauthorized practice of law or that such practice does not require the Court to consider all filings void, Appellees generally concede Plaintiffs preserved error through his Motion for Leave to Amend and the district court's denial of the same.

c. The District Court Properly Denied Plaintiffs' Motion Because There Was No Valid Petition to Amend

The district court properly denied Plaintiffs' Motion for Leave to Amend because (1) such filing constituted the unauthorized practice of law and (2) the amendment was not permitted because the original Petition was void, meaning there was no petition to amend.

In the interests of brevity, Defendants fully incorporate herein the arguments set forth in Section I regarding Preston's unauthorized practice of law. The same legal principles apply here—amending a petition requires the application of legal skill to a particular problem, and Preston filed the motion on behalf of someone other than himself: the Estate. As such, the motion is void and the district court properly denied it. *See Midthun v. Pasternak*, 420 N.W.2d 465, 468 (Iowa 1988) ("[W]here a proposed amendment to a petition appears on its face to be legally ineffectual, it is properly denied."); *Forex Israel, VP Ltd. v. Cedar Rapids Bank & Tr. Co.*, No. 19-

0080, 2020 Iowa App. LEXIS 103, at *12 (Iowa Ct. App. Jan. 23, 2020) ("Justice does not require parties to be permitted to make futile amendments.").

Additionally, the motion to amend was properly denied because there was no original petition to amend. As explained above, filings submitted by those engaged in the unauthorized practice of law are considered void or null. *See Rizzio*, 801 N.W.2d at 363. The term "void" means "of no legal force or effect." Merriam-Webster, *Void*, https://www.merriam-webster.com/dictionary/void (last accessed September 27, 2024). The term "null" has a similar meaning—"having no legal or binding force." Merriam-Webster, *Null*, https://www.merriam-webster.com/dictionary/null (last accessed September 27, 2024). Thus, the district court order finding the original petition void means as a practical matter that it never had any effect in the first place. As such, there was nothing to amend—one cannot alter what never existed. *See* Merriam-Webster, *Amend*, https://www.merriam-webster.com/dictionary/amend (last accessed September 27, 2024) (defining "amend" to mean "to change or modify"). The district court's denial of Plaintiffs' Motion for Leave to Amend should be affirmed.

CONCLUSION

Preston Tornell engaged in the unauthorized practice of law when he represented Kara Tornell's Estate before the court. As such, the filings submitted to the district court are void. The district court properly concluded the same and

dismissed Plaintiffs' claims. Further, the district court properly denied Plaintiffs' request for leave to amend their Petition. This Court should affirm the district court's order in its entirety.

REQUEST FOR ORAL AGRUMENT

The Defendants respectfully request to be heard in oral argument on this matter.

/s/ *Ryan P. Tunink*
Ryan P. Tunink AT0014964
Frederick T. Harris AT0003198
LAMSON DUGAN & MURRAY LLP
6400 Westown Parkway, Suite 280
West Des Moines, IA 50266
Phone: 515-513-5003
Fax: 515 298-6536
Email: rharris@ldmlaw.com
rtunink@ldmlaw.com
ATTORNEYS FOR DEFENDANTS-APPELLEES CATHOLIC HEALTH INITIATIVES—IOWA CORP.

/s/ *Eric P. Martin*
JENNIFER E. RINDEN AT0006606
VINCENT S. GEIS AT0013055
ERIC P. MARTIN AT0014859
SHUTTLEWORTH & INGERSOLL,P.L.C.
235 6th Street SE
P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461
FAX: (319) 365-8443
E-mail: jer@shuttleworthlaw.com
vsg@shuttleworthlaw.com
epm@shuttleworthlaw.com

ATTORNEYS FOR DEFENDANTS-APPELLEES WILLIAM E. NOWYSZ, WILLIAM NOWYSZ, P.C., and DES MOINES RIVER PHYSICIANS, LLC.

/s/ *Peter R. Lapointe*

Stacie M. Codr AT0001502
Jeffrey R. Kappelman AT0012719
Peter R. Lapointe AT0014952
FINLEY LAW FIRM, P.C.
699 Walnut Street, Ste 1700
Des Moines, IA 50309
Telephone: 515-288-0145
Facsimile: 515-288-2724
E-mail: scodr@finleylaw.com
jkappelman@finleylaw.com
plapointe@finleylaw.com

ATTORNEYS FOR DEFENDANT-APPELLEES RYAN BRIMEYER, D.O. and THE IOWA CLINIC, P.C.

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(i)(1) because this brief contains 6200 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(i)(1). This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(g) and the type-style requirements of Iowa R. App. P. 6.903(1)(h) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: /s/ *Ryan P. Tunink*

CERTIFICATE OF SERVICE

The undersigned certifies a copy of Plaintiffs-Appellant's Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 9th day of October, 2024:

By: /s/ *Ryan P. Tunink*

S.P. Devolder
The Devolder Law Firm, PLLC
1228 Sunset Drive, Ste. C
Norwalk, IA 50211
Steven.devolder@devolderlawfirm.com

Jennifer E. Rinden
Vincent S. Geis
Eric P. Martin
SHUTTLEWORTH & INGERSOLL, P.L.C.

235 6th Street SE
P.O. Box 2107
Cedar Rapids, IA 52406
PHONE: (319) 365-9461
FAX: (319) 365-8443
jer@shuttleworthlaw.com
vsg@shuttlworthlaw.com
epm@shuttleworthlaw.com

Stacie M. Codr
Jeffrey R. Kappelman
Peter R. Lapointe
FINLEY LAW FIRM, P.C.
699 Walnut Street, Ste 1700
Des Moines, IA 50309
Telephone: 515-288-0145
Facsimile: 515-288-2724
scodr@finleylaw.com
jkappelman@finleylaw.com
plapointe@finleylaw.com

4895-3996-9771, v. 2