**IN THE SUPREME COURT OF THE**
**STATE OF FLORIDA**

**CASE NO. 95,841**

**FIFTH DCA CASE NO. 98-02024**
**L.T. CASE NO. 97-2313 CA**

**BECKY S. TORREY, Duly Appointed**
**Personal Representative of the Estate**
**of HELEN ROSE WOODARD, Deceased,**

**Plaintiff-Petitioner,**

**vs.**

**LEESBURG REGIONAL MEDICAL CENTER,**
**KENNETH KUPKE, M.D., and ROBERT**
**HUX, M.D., Jointly and Severally,**

**Defendants-Respondents.**
_______________________________________/

# ANSWER BRIEF ON THE MERITS OF RESPONDENTS, KENNETH KUPKE, M.D. AND ROBERT HUX, M.D.

On Appeal from the District Court of Appeal
for the State of Florida, Fifth District


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## **QUESTION PRESENTED**

WHETHER A PLEADING SIGNED BY A NON-FLORIDA ATTORNEY, IN VIOLATION OF FLORIDA RULE OF JUDICIAL PROCEDURE 2.060, CONSTITUTES A NULLITY, A NULLITY UNLESS THE PRODUCT OF EXCUSABLE NEGLECT OR A DEFECTIVE PLEADING CURABLE BY AMENDMENT.

**CERTIFICATE OF COMPLIANCE WITH TYPE SIZE-STYLE REQUIREMENTS**

In compliance with the requirements of the Administrative Order of this Court, the undersigned certifies that the Respondents' Brief on Jurisdiction is produced in 12 point Courier New, a font that is not proportionately spaced.


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## STATEMENT OF THE CASE AND FACTS

This action was commenced on September 16th, 1997, with the filing of a Complaint by Plaintiff, Becky S. Torrey, as personal representative for the Estate of Helen Rose Woodard, deceased ("Appellant/Petioner"), in the Circuit Court for the Fifth Judicial Circuit, in and for Lake County. The Complaint named as defendants, Leesburg Regional Medical Center ("LRMC"), Kenneth Kupke, M.D. ("Kupke") and Robert Hux, M.D. ("Hux"). The Complaint alleged an action for wrongful death arising out of medical treatment rendered to the deceased by the Defendants.

The Complaint was signed on the front page by William J. McHenry, an attorney from Southfield, Michigan (R.1). The Complaint alleged that the Plaintiff was appearing "by and through her attorneys, FIEGER, FIEGER & SCHWARTZ, P.C. by WILLIAM J. McHENRY..." (R. 1). Mr. McHenry signed the Complaint twice on the last page as follows:

FIEGER, FIEFER, & SCHWARTZ, P.C.

By:_________________/s/______________
WILLIAM J. McHENRY(P38458)

Attorney for Plaintiffs
19390 West Ten Mile Road
Southfield, Michigan 48075
(810)355-5555

The Complaint was dated August 21, 1997 (R. 6).

Because the Complaint alleged damages arising out of medical care and treatment, Mr. McHenry was required by Section 766.104, Florida Statutes to allege that a reasonable investigation gave rise to a good faith belief that grounds exist for an action against each named defendant. No such allegation was contained in the Complaint, nor did it allege that all conditions precedent had been satisfied prior to the commencement of the action. The Complaint did contain as Exhibit A an Affidavit of Norman Ernst, M.D., a board certified anesthesiologist (R. 7-9). In the Affidavit, Dr. Ernst opined that the decedent had died as a direct and proximate result of the negligence of the defendants (R. 8). The Affidavit was subscribed and sworn to on August 7, 1997 (R. 9).

In response to the Complaint, defendants filed a panoply of motions (R. 10 - 56). Appellee/Respondent Kupke filed a Motion to Dismiss (R. 10 - 12); a Motion to Dismiss for Failure to Comply with Pre-suit Screening Procedures (R. 13 - 19); a Motion to Strike (R. 20 - 22); a Motion for More Definite Statement (R.

23 - 25); and, a Motion to Disqualify (R. 26 - 28). In his Motion to Disqualify, Kupke objected to the appearance of Mr. McHenry because he was not a member of the Florida Bar and had failed to seek court approval for a special appearance in the action (R. 26 - 28).

Appellees/Respondents Hux and LRMC filed similar motions in which they requested relief from the court for the Plaintiff's failure to comply with various requirements of the pre-suit screening procedures applicable to medical negligence actions (R. 29 - 56).

On January 26 and 27, Plaintiff filed responses to the various motions. Plaintiff responded by admitting that he had failed to provide the pre-suit discovery requested by Kupke (R. 103). Plaintiff responded to the Appellee/Respondent's Motion to Disqualify by admitting that he was not admitted to practice law in the State of Florida (R. 105). In his response, Plaintiff further indicated that Geoffrey N. Fieger, "Plaintiff's trial counsel" is a member of the Florida State Bar. (R. 106).

These matters were argued before the Honorable G. Richard Singletary on January 29, 1998 (Supp. Index 1-60). During the hearing, Robert Craig, a member of the Florida Bar, entered an appearance on behalf of the Plaintiff. The motions were argued

and Judge Singletary reserved ruling. Following the hearing, Judge Singletary sent a letter to Mr. McHenry requesting an explanation for why Mr. McHenry signed the Complaint without applying for special permission to appear, pursuant to Florida Rule of Judicial Administration 2.060(b). In response, Mr. McHenry filed an Affidavit (R. 107 - 109). Therein, Mr. McHenry stated that he believed that the statute of limitations for this case would run on October 3, 1997 and he did not have Florida counsel. Mr. McHenry further stated that he signed the Complaint "under my employer's firm name" and filed it on September 16, 1997, two and one half weeks before he believed the statute of limitations would have expired. He further states that he had an extremely busy trial schedule during the month of September and therefore he felt he had no choice other than to file the Complaint signed by him. He also indicated that Geoffrey Fieger of his firm is a member of the Florida Bar, but failed to explain why Mr. Fieger could not have signed the Complaint.

Appellees/Respondents responded with a letter to Judge Singletary in which they provided pertinent case law regarding the obligation of qualified counsel to sign pleadings and the appropriateness of a dismissal for Mr. McHenry's failure to conform to this rule of law.

On June 22, 1998, the trial court entered an Order Dismissing Action Without Prejudice. In the order, Judge Singletary determined that Plaintiff had failed to prove excusable neglect for filing a Complaint that was not signed by a member of the Florida Bar (R. 111). That Order was rendered on June 30, 1998 (R. 112 - 113A). On July 29, 1998, the Plaintiff filed her Notice of Appeal to the Fifth District Court of Appeal(R. 114 - 118).

In a separate Order dated June 22, 1998, the trial court denied the various motions to dismiss based on the Plaintiff's failure to comply with pre-suit requirements. On August 3, 1998, Hux filed a Notice of Cross-Appeal regarding that Order (R. 119 - 121). On August 3, 1998, Kupke filed a Notice of Cross-Appeal regarding that Order (R. 122 - 127).

On April 1, 1999, the Fifth District Court of Appeal affirmed the trial court's dismissal of Appellant/Petitioner's Complaint. Appellant/Petitioner's Motion for Rehearing was denied on April 1, 1999. This Court accepted jurisdiction of this matter on October 29, 1999, pursuant to Art. V., § 3(b)(3), Fla. Const.

## SUMMARY OF ARGUMENT

Florida Rule of Judicial Administration 2.060 mandates that

a pleading signed by an attorney who is not a member of the Florida Bar is a nullity and must be stricken as void. Strict enforcement of this rule is strongly supported by the indispensable policy of promoting the integrity of the practice of law and protecting against the unauthorized practice of law. In the case at bar, Plaintiff's Complaint was a nullity as it was not signed by an attorney authorized to practice law in the State of Florida. Therefore, the trial court appropriately dismissed the action. Accordingly, Appellant/Respondents respectfully request that this Court affirm the decision of the Fifth District Court of Appeal upholding the trial court's decision.

## ARGUMENT

### I. A COMPLAINT SIGNED BY AN NON-FLORIDA ATTORNEY IS A NULLITY AND SHOULD BE STRICKEN AS VOID.

Appellant/Petitioner argues that a complaint filed by an attorney not licensed or admitted to the practice of law in Florida is merely defective and corrective by amendment. However, the Rules of Judicial Administration, case law and public policy mandate that a pleading signed by an attorney who is not a member of the Florida Bar is a nullity and must be stricken as void. See Fla. R. Jud. Admin. 2.060, Daytona Migi

Corp. v. Daytona Automotive Fiberglass, Inc., 417 So. 2d 272 (Fla. 5th DCA 1982); Quinn v. Housing Authority of City of Orlando, 385 So. 2d 1167 (Fla 5th DCA 1980); Gelkop v. Gelkop, 384 So. 2d 195 (Fla. 3d DCA 1980) and Nicholson Supply Co. v. First Federal Savings & Loan Assoc. of Hardee County, 184 So. 2d 438 (Fla. 2d DCA 1966).

Moreover, the courts of other jurisdictions also agree that pleadings signed by a non-attorney are a nullity and should be afforded no effect. See Ex Parte Ghafary, 738 So. 2d 778 (Ala. 1998)(Supreme Court of Alabama found a wrongful death complaint signed by the executrix of an estate, which is rendered the same standing as a corporation, was a nullity); Land Management, Inc. v. Dept. of Environmental Protection, 368 A.2d 602 (Me. 1977)(citing Nicholson dismissed as a nullity the complaint of the corporate plaintiff signed by its non-attorney President); and Berg and Berg Co. v. Mid America Industrial, Inc., 293 Ill. App.3d 731, 688 N.E.2d 699, 228 Ill. Dec. 1(Ill. App. 1997)(complaint filed by non-attorney on behalf of corporation null and void *ab initio*).

Furthermore, Appellant/Petitioner argues that this Court, in its rule making and regulatory capacity, is practicing "Protectionism" and hypocrisy by establishing attorney standards

for protection of the citizens of Florida. (Appellant/Petitioner Brief at page 4.) Florida Rule of Judicial Administration 2.060(d) sets forth that every pleading of a party represented by an attorney must be signed by an attorney who is duly licensed to practice law in Florida, or by an attorney who shall have received permission to appear in the particular case. Rule 2.060(b) prohibits attorneys of other states who are not members of the Florida Bar from engaging in the general practice of law in Florida. Such attorneys must first file a verified motion for permission to appear before the attorney's initial personal appearance or pleading.

Similarly, the above cited cases support that a pleading that fails to comply with Rule 2.060 will be stricken as void. In these cases, the courts have refused to permit amendment to allege compliance with Rule 2.060 because the original pleading is a nullity and therefore, by definition, cannot be cured. This strict rule of law has been enforced even though it results in the permanent loss of appellate rights, Daytona Migi Corp., supra; the vacating of a summary judgment, Quinn, supra; the vacating of a contempt order, Gelkop, supra; or, as in this case, the complete nullification of the initial complaint and dismissal of the action. Nicholson Supply Co., supra; Quinn, supra.

While at first glance, the rules seem to occasionally produce harsh results to noncompliant litigants, the court's vigilant enforcement of this rule upholds an essential policy of prohibiting the unauthorized practice of law in the State of Florida. As stated by this Court in The Florida Bar v. Moses, 380 So. 2d 412 (Fla. 1980):

> The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation. [citations omitted] It is in furtherance of this purpose that this Court maintains strict standards of competence and ethical responsibility to be reached prior to admission to practice law in Florida.

Id. at 417. This Court has sole jurisdiction and authority to regulate the practice of law and to enforce standards of admission and practice in our state. See Art. V, § 15, Fla. Const.; § 454.026, Fla. Stat. (1997). Our legislature has also supported this Court's efforts to regulate the practice of law by rendering the unauthorized practice of law a criminal act, punishable as a misdemeanor. See § 454.23, Fla. Stat. (1997).

This indispensable policy of promoting the integrity of the practice of law serves as the foundation for enforcing a rule of law that nullifies pleadings which fail to comply with Rule 2.060. This Court contemplated that attorneys from foreign jurisdictions may not be competent or ethical in representation

of the citizens of our state. As such, foreign attorneys, as a prerequisite for special permission to appear in a case, are required to verify that they are active members in good standing in a bar of another state. Fla. R. Jud. Admin. 2.060(b). Even though permission to appear may be granted for a certain case, foreign attorneys who have not passed the requirements for membership of the Florida Bar are not permitted to engage in a general practice of law in Florida. Id. These prudent requirements advance the courts' interest in protecting Florida's citizens from "incompetent, unethical, or irresponsible representation." Moses, 380 So. 2d at 417.

In the instant case, counsel for the Appellant/Petitioner blatantly failed to comply with these requirements. In doing so, counsel for Appellant/Petitioner engaged in the unauthorized practice of law. See Rules Regulating the Florida Bar, Chapter 10; Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, Section 10-2.1(a)("The unlicensed practice of law shall mean the practice of law, as prohibited by statute, court rule, and case law of the State of Florida.") Therefore, the Fifth District Court of Appeal correctly affirmed the trial court's determination that this noncompliance rendered the complaint a nullity.

## II. IF THIS COURT ADOPTS THE RULE THAT A PLEADING SIGNED BY A NON-FLORIDA ATTORNEY IS A NULLITY UNLESS IT IS THE PRODUCT OF EXCUSABLE NEGLECT, APPELLANT/PETITIONER'S COMPLAINT IS STILL RENDERED A NULLITY AS COUNSEL FOR APPELLANT/PETITIONER UTTERLY FAILED TO DEMONSTRATE ANY EXCUSABLE NEGLECT.

The First District Court of Appeal ruled that a pleading signed by a non-Florida attorney is a nullity unless it is the product of excusable neglect. See Lincoln American Life Ins. Co. v. Parris, 390 So. 2d 148 (Fla. 1st DCA 1980). In Lincoln, a Tennessee attorney who was not a member of The Florida Bar filed an answer on behalf of his corporate client. Id. at 149. The trial court treated this pleading as a nullity because it was not in compliance with Rule 2.060. Id. On appeal, the First District held that the default should be considered the result of excusable neglect, in light of the shortness of time available to arrange for Florida counsel to serve a timely answer and by counsel's apparent intention to secure Florida counsel for further appearances. Id. In light of this excusable neglect and a meritorious defense, the court allowed the default to be vacated pursuant to Fla. R. Civ. Pro. 1.540(b). Id.

In the case at bar, counsel for Appellant/Petitioner utterly failed to show any excusable neglect in arranging for Florida counsel or otherwise complying with Rule 2.060. Mr. McHenry initiated this action in February of 1997 with the service of a

notice of intent letter. Because of the numerous extensions provided by the presuit screening procedure, plaintiff's counsel had (or at least according to Mr. McHenry's affidavit, believed he had) until October 13, 1997 to commence an action with the filing of a complaint. (R. 107-109) Mr McHenry filed his Complaint on September 16, 1997, (R. 1-9), yet still no arrangements for compliance with Rule 2.060 had been made.

Appellant/Petitioner argues in her initial brief on the merits that the Complaint in this matter first lists as a principal attorney for plaintiff, an attorney who is licensed to practice in Florida. She then incorrectly argues that the signature of a non-Florida attorney employed by a Florida attorney is sufficient. However, the Fifth District correctly noted that "[i]t is a lawyer who has passed The Florida Bar examination that is authorized to practice in this state, not every lawyer in the firm with which he is connected." Torrey v. Leesburg Regional Medical Center, et al., 731 So. 2d 748, 749 n.1 (Fla. 5th DCA 1999).

Moreover, Appellant/Petitioner has failed to provide any explanation for why Mr. McHenry's employer, Mr. Fieger, who is a member of the Florida Bar, did not provide his signature for the Complaint. Appellee/Respondent Kupke immediately placed Mr.

McHenry on notice of his noncompliance with Rule 2.060 by service of his Motion to Disqualify. Still, no arrangements for compliance with the Rule were even attempted by Appellant/Petitioner until the belated appearance of Mr. Craig on the day of the hearing of the Motion to Disqualify. Such lack of diligence by Mr. McHenry could never be considered an excusable neglect of the indispensable requirements of Rule 2.060. Indeed, by extenuating this conduct, the court would be condoning the unauthorized practice of law. See Gelkop, 384 So. 2d at 202. ("We are unaware of any authority . . . which allows a party to make a general or special appearance before a court in this state through a person who is not authorized generally or specially to practice law in Florida. We decline to be the first court to so hold as such a result would, in effect, condone the unauthorized practice of law . . . .")

## III. COMPLIANCE WITH RULE 2.060 REQUIRES THE SANCTION OF VOIDING A NONCOMPLIANT PLEADING. THE SZTEINBAUM DECISION INAPPROPRIATELY RELAXES THIS REQUIREMENT BY ALLOWING AMENDMENT OF A COMPLAINT TO INCLUDE AN ATTORNEY'S SIGNATURE.

To seek mitigation of the unfortunate result of her counsel's substantial noncompliance with Florida's policy of protecting its citizens from the unauthorized practice of law, Appellant/Petitioner cites to Szteinbaum v. Kaes Inversiones y Valores, 476 So. 2d 247 (Fla. 3d DCA 1985). In Szteinbaum, a

corporate plaintiff filed a complaint signed by a non-attorney on behalf of the corporation. Id. at 247. The defendant moved to dismiss the complaint on the basis that it did not appear that the corporate plaintiff was represented by an attorney. Id. After the trial court granted the motion to dismiss, the corporate plaintiff amended the complaint to include the signature of an attorney. Id. at 248. Subsequently, the defendant moved to dismiss the amended complaint arguing that the original complaint constituted a nullity. Id.

Based upon these facts, the Third District Court of Appeal held that the complaint's defect was curable since the representation of the plaintiff corporation was "brief, minimal and essentially innocuous." Id. at 250. In so holding, the court reasoned that the defect was cured by the later appearance in the action of the corporate plaintiff's attorney and by amendment of the complaint to include an attorney's signature. Id. Additionally, the court stressed that there was a "strong indication that the plaintiff corporation acted with diligence in immediately obtaining counsel after being given leave to do so." Id. (Emphasis added). The court then noted that "under these circumstances" the trial court's allowance of the amendment would be affirmed. Id. (Emphasis added).

Appellees/Respondents submit the facts, holding and reasoning of Steinbaum are distinguishable from the issue to be determined by this Court. By its own terms, the Szteinbaum decision is limited to the facts of that case. Id. The sole issue decided by the Third District Court of Appeal in Steinbaum was whether a complaint signed by a non-attorney on behalf of a corporation may be amended to cure the deficiency. However, unlike the corporate plaintiff in Szteinbaum, Appellant/Petitioner is a natural person who could have signed the initial Complaint herself had her attorney not been able to arrange for Florida counsel.

In the alternative, if this Court agrees with Appellant/Petitioner that Szteinbaum is applicable to determining the case *sub judice*, this Court should also find Appellant/Petitioner's actions are not consistent with the criteria established for assessing whether the complaint is a nullity and not subject to amendment. In fact, Steinbaum recognized that the nature of the non-lawyer's (non-admitted lawyer) activity may result in nullifying his actions. Id. at 250 fn6.

There are no facts to support that Appellant/Petitioner's Counsel "acted with diligence in immediately" securing Florida

counsel. As previously discussed, Appellant/Petitioner initiated the instant action in February of 1997 with the service of a notice of intent to initiate litigation. Due to the numerous extensions provided by the presuit screening rules, Appellant/Petitioner's counsel believed he had until October 13, 1997 to file the initial Complaint. Even though he filed the Complaint on September 16, 1997, he made no attempt to comply with Rule 2.060. Accordingly, Appellant/Petitioner's failure to adhere to Rule 2.060(b) was by no means "brief, minimal and essentially innocuous." Id. at 250.

If not limited to its facts, the Szteinbaum decision flies in the face of Rule 2.060. Rule 2.060 expressly contemplates the sanction of declaring void a noncompliant pleading. Rule 2.060(d) states that "[i]f a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served." Clearly, if an unauthorized complaint is stricken, the court would be dismissing the action, as the trial court below did in this case. However, by allowing amendment of a pleading to add an attorney's signature, the Third District relaxed enforcement of Rule 2.060. This stands in direct conflict with the rule's requirements.

In the case *sub judice*, the trial court specifically dismissed the complaint "without prejudice" which would allow Appellant/Petitioner to re-file her action in accordance with the rules of Civil Procedure and Judicial Administration.[1] The effect of that dismissal and whether the applicable statute of limitations had expired should not govern this Court's determination. Had Appellant/Petitioner taken a voluntary dismissal and re-filed the complaint upon the initial notice by Respondent/Appellee Kupke, the statute of limitations would not be an issue.

The reasons for strict enforcement of Rule 2.060 and adherence to the Fifth and Second District decisions applying this rule are convincingly illustrated by the circumstances in this case. Although Appellant/Petitioner argues that the welfare of the client is no longer a consideration due to the current computer access to Florida law available to attorney's ability to comply with the statutory presuit requirements of Chapter 766 of the Florida Statutes.

Because Mr. McHenry was not a member of the Florida Bar, he

[1]In fact, Appellant/Petitioner filed a complaint (identical to the complaint dismissed below) on July 30, 1998 signed by an attorney admitted to the Florida Bar. That matter has been abated pending the resolution of this appeal.

was apparently wholly unfamiliar with the procedure requirements of Chapter 766 and utterly failed to comply with the presuit screening obligations imposed by Florida law. See Torrey, 731 So. 2d at 749 ("the total lack of plaintiff's compliance with the statutory presuit screening requirement, even after a second notice to do so, . . . points out the wisdom of rule 2.060(b) . . . .") This failure to comply with the pre-suit requirements prejudiced Kupke and Hux's ability to adequately perform their pre-suit investigation. Although the trial court denied Appellee's/Respondent's Motion to Dismiss in this regard, the Fifth District Court of Appeal did not address Appellee's/Respondent's cross appeal as it affirmed the dismissal on other grounds.

If the court had not dismissed this action, there would have been unnecessary and protracted litigation to determine the significance of Mr. McHenry's noncompliance with Florida law. The Plaintiff certainly deserved the protection of Rule 2.060 from "incompetent, unethical, or irresponsible representation" as much as any other citizen of the State of Florida. Moreover, because Mr. McHenry was not a member of the Florida Bar, the court had no jurisdiction to discipline him or otherwise enforce compliance with the rules of court. Thus, Mr. McHenry's

unauthorized appearance threatened not only the representation of his client in a Florida court, but also the very integrity of that court.

Strict enforcement of Rule 2.060 serves as a beacon to out-of-state counsel that will illuminate the vigilance of our courts in protecting the administration of justice in the State of Florida. The Plaintiff in this case (whose cause of action <u>may</u> now be barred) is a casualty not of the enforcement of this good rule, but of her counsel's failure to comply with an overriding policy of protecting the court system from the unauthorized practice of law. This Court should therefore affirm the decision of the Fifth District Court of Appeal upholding the dismissal of this action.

## CONCLUSION

The Rules of Judicial Administration require the striking of a pleading signed by a non-Florida attorney. Strict enforcement of this rule is necessary and appropriate in order to protect against the unauthorized practice of law. Accordingly, Respondents respectfully request that this Court affirm the decision of the Fifth District Court of Appeal upholding the dismissal of Plaintiff's action.

Respectfully submitted,


______________________

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this _____ day of December, 1999, to ROGER E. CRAIG, ESQUIRE, Roger E. Craig & Associates, 1250 North Tamiami Trail, Suite 201, Naples, FL 34102, WILLIAM J. McHENRY, ESQUIRE, 19390 West Ten Mile Road, Southfield, MI 48075 and G. FRANKLIN BISHOP, 111, ESQUIRE, John W. Bussey, III & Associates, P.A., P.O. Box 531086, Orlando, FL 32853-1086.

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**APPENDIX TO**
**ANSWER BRIEF ON THE MERITS OF RESPONDENTS,**
**KENNETH KUPKE, M.D. AND ROBERT HUX, M.D.**

On Appeal from the District Court of Appeal
for the State of Florida, Fifth District

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