IN THE COURT OF COMMON PLEAS
WOOD COUNTY, OHIO

STATE EX REL. Right to Life Action Coalition of Ohio, *et al.*, Plaintiffs, vs. CAPITAL CARE OF TOLEDO, LLC, *et al.*, Defendants.	Case No. 2021CV0084 Judge Matthew L. Reger **Defendants' Motion for Transfer of Venue under Civ.R.3(D) and Dismissal under Civ.R. 12(B)(6)**

I. Introduction

Apparently believing Wood County to be a friendlier forum for their transparently baseless effort to enjoin a women's-health clinic from offering abortion-related medical services through its duly employed and licensed medical professionals, Plaintiffs improperly filed suit in this Court against Toledo-based Defendants Capital Care, and its owner, Amelia Stower.

Not only is the complaint devoid of any allegations suggesting that this Court could be a proper venue for this case under Civ.R.3; Plaintiffs have also failed to plead R.C. 4731.341(B)'s basic requirements for standing to replace the State Medical Board in enforcing Ohio's statutory prohibitions against the unauthorized practice of medicine, and have effectively admitted to an unauthorized effort to usurp the Board's statutorily appointed duty and power to do the same.

Finally, even if Plaintiffs did have standing to bring this suit as "private attorneys general" under the statute (they do not), their claim for relief would depend entirely on the faulty notion that it somehow constitutes the unauthorized practice of medicine for a clinic to contract with doctors and to make public statements about those doctors' services, unless the clinic's owner is herself a

licensed doctor. But Ohio law expressly permits LLCs to both contract with medical professionals who will render medical services on its behalf, as well as to publicly advertise those services, whether or not abortion is involved, and whether or not those LLCs are owned by a doctor. And Plaintiffs have acknowledged in their Complaint that Capital Care is a duly registered LLC under Ohio law. Complaint, ¶ 15, Ex. A, C; ¶ 47, Ex. E. As such, Ohio law expressly permits Capital Care to provide, through its physicians, the very services Plaintiffs seek to enjoin, and also to issue public statements and advertisements about the availability of those services.

For these basic reasons, as set forth fully below, this thoroughly meritless case should be transferred to the Lucas County Common Pleas Court, where it should then be dismissed under Civ.R. 12(B)(6).

II. Law and Argument

A. The Court should transfer this case to Lucas County, where venue is proper, and assess costs and attorneys' fees against Plaintiffs for having filed this case in an improper venue.

Civ.R. 3, which governs the commencement of a civil action, provides that a "[p]laintiff may choose where to bring the action if any of the counties specified in Civ.R. 3(C)(1) through (11) are a proper forum under the facts of the case." *LaBounty v. Big 3 Automotive*, 6th Dist. Ottawa No. OT-18-022, 2019-Ohio-1919, ¶ 29, citing *Varketta v. Gen. Motors Corp.*, 34 Ohio App.2d 1, 6, 295 N.E.2d 219 (8th Dist.1973). If, however, "an action has been commenced in a county other than stated to be proper in division (C) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12, the court ***shall*** transfer the action to a county stated to be proper in division (C) of this rule." Civ.R. 3(D)(1) (emphasis added). "When a party successfully demonstrates that an action has been commenced in an improper venue, the trial court is required to transfer the case to the proper venue." *First Select Corp. v. Mullins*, 10th Dist. Franklin No. 00AP-1107, 2001 Ohio App. LEXIS 2497, *3 (June 5, 2001), citing Civ.R. 3(D)(1).

Upon transfer "to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (C) of this rule." Civ.R. 3(D)(2). Such awards are proper to accomplish Civ.R. 3(D)(2)'s purpose of "plac[ing] a curb upon the party who deliberately or heedlessly files an action in a county where venue is not proper thereby causing these additional expenses." Civ.R. 3, 1970 Staff Note.

As is evident from the face of Plaintiffs' complaint, venue in Wood County is not "a proper forum under the facts of the case." *LaBounty*, 2019-Ohio-1919, ¶ 29. Plaintiffs allege that Capital Care and Stower engaged in the unauthorized practice of medicine by operating its clinic in Toledo, Ohio, and fail to allege a single fact suggesting that venue is proper outside of Lucas County, where both Defendants reside, where Capital Care has its principal place of business, and where the conduct allegedly giving rise to the Plaintiffs' claims for relief occurred. Complaint, ¶ 13, ¶ 47, ¶ 50; Civ.R. 3(C)(1)–(3), (6). Moreover, because Civ.R. 3(C)(12) expressly states that venue is proper in a plaintiff's county of residence only if "there is no available forum in divisions (C)(1) to (C)(10) of this rule," Plaintiffs were not entitled to file in Wood County simply because Jeffrey Barefoot lives there. Complaint, ¶ 12.

This Court should thus transfer this case to Lucas County, where venue is proper, and order Plaintiffs to pay the costs and attorneys' fees incurred by Defendants in seeking transfer to a proper forum. *Buchholz & Behrman Grain Co. v. Spencer*, 3d Dist. Putnam No. 12-83-1, 1985 Ohio App. LEXIS 7496, *4 (Mar. 22, 1985), quoting MCCORMAC CIVIL RULES PRACTICE, Section 2.22 ("Since these expenses must be incurred by the defendant who must request transfer from an improper county, it is only fair that such costs should be paid by the party who negligently or willfully fails to file the action in the proper forum.").

B. This case should be dismissed under Rule 12(B)(6) because, even taking all of Plaintiffs' factual allegations as true, they are not entitled to the relief requested.

"Pursuant to Civ.R. 12(B)(6), a complaint may be dismissed for 'failure to state a claim upon which relief can be granted.'" *Ferner v. State*, 2020-Ohio-4698, 159 N.E.3d 917, ¶ 20 (6th Dist.). "In reviewing whether a motion to dismiss should be granted [under this rule, the court] accept[s] as true all factual allegations in the complaint." *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5, *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). "'Documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6).'" *State ex rel. Washington v. D'Apolito*, 156 Ohio St.3d 77, 2018-Ohio-5135, 123 N.E.3d 947, ¶ 10, quoting *NCS Healthcare, Inc. v. Candlewood Partners, LLC*, 160 Ohio App. 3d 421, 2005-Ohio-1669, 827 N.E.2d 797, ¶ 20 (8th Dist.). And while "all the factual allegations in the complaint must be taken as true for the purposes of a motion to dismiss, legal conclusions couched as factual allegations do not need to be accepted as true." *Jones v. Lucas Cty. Sheriff's Med. Dept.*, 6th Dist. Lucas No. L-11-1196, 2012-Ohio-1398, ¶ 12, citing *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209.

Dismissal is accordingly proper where, as is the case here as explained fully below, "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975), quoting *Conley v. Gibson*, 355 U.S. 41, 45 (1957).

1. This case should be dismissed because Plaintiffs lack standing under R.C. 4731.341.

The only way Plaintiffs would have standing to seek the injunctive relief requested in their complaint would be if they met the requirements of R.C. 4731.341(B). *See* Complaint, ¶ 28–30, ¶32, ¶ 63–64. They do not, nor do they even try to allege to the contrary. For this simple reason, this case should be dismissed.

To wit, 4731.341(B) states, in pertinent part, as follows:

> The attorney general, the prosecuting attorney of any county in which the offense was committed or the offender resides, the state medical board, or any other person having knowledge of a person who either directly or by complicity is in violation of division (A) of this section, may on or after January 1, 1969, in accord with provisions of the Revised Code governing injunctions, maintain an action in the name of the state to enjoin any person from engaging either directly or by complicity in the unlawful activity by applying for an injunction in the Franklin county court of common pleas or any other court of competent jurisdiction.
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> **Prior to application for such injunction, the secretary of the state medical board shall notify** the person allegedly engaged either directly or by complicity in the unlawful activity by registered mail that the secretary has received information indicating that this person is so engaged. **Said person shall answer** the secretary within thirty days **showing either that the person is properly licensed or certified for the stated activity or that the person is not in violation of Chapter 4723. or 4731**. of the Revised Code. **If the answer is not forthcoming within thirty days** after notice by the secretary, **the secretary shall request that the attorney general, the prosecuting attorney of the county in which the offense was committed or the offender resides, or the state medical board proceed as authorized in this section**.

(Emphasis added).

Thus, under the plain language of the statute—and consistent with the orderly operations of government, judicial economy, and basic common sense—a private citizen is not entitled to stand in for the State Medical Board to enforce Chapter 4723 or 4731 of the Revised Code unless and until *all* of the following occurs: (1) The secretary of the Medical Board provides the accused notice of the charges by registered mail, then (2) allows the accused 30 days to submit an answer "showing either that the person is properly licensed or certified for the stated activity or that the person is not in violation of Chapter 4723 or 4731 of the Revised Code," and (3) only if a satisfactory answer is *not* provided to the secretary of the Medical Board within 30 days after notice, the secretary then "request[s] that the attorney general, the prosecuting attorney of the county in which the offense was committed or the offender resides, or the state medical board proceed [to file for an injunction] as

authorized in this section [4731.341]," and (4) the attorney general, prosecuting attorney, or medical board do not timely file suit in response to the secretary's request that they do so.

In other words, "the statute clearly contemplates that a thirty-day response period be provided to the offender after written notice is given before a complaint requesting injunctive relief is maintained." *State Med. Bd. v. Mt. Sinai Hosp.*, 8 Ohio App.3d 105, 107, 456 N.E.2d 577 (8th Dist.1983). And for good reason, as "[t]his notice and answer requirement eliminates any unnecessary litigation by providing the alleged offender an opportunity to show that he is not in violation of [the statutes]." *Id.* Because "[i]f the board receives a satisfactory response, there will be no reason remaining to maintain an action." *Id.*

Here, again, Plaintiffs do not even try to allege that they have met RC. 4731.341's standing requirements. Indeed, Plaintiffs have admitted in the notice they filed in this case on March 15, 2021 that they only notified the State Medical Board of their accusations against Defendants last week. *See* Plaintiffs' 03/15/2021 "Notice of Filing Complaint with State Medical Board" (attaching 03/11/2021 email from Board acknowledging receipt of complaint from Plaintiffs' attorney Eugene Canestraro). And they do not and cannot legitimately allege that Defendants have failed to provide "a satisfactory response" to the Board's secretary, let alone that the Board or relevant prosecutorial authorities have refused a request by the secretary to institute proceedings under the statute to address the same. *Mt. Sinai* at 107. Plaintiffs' efforts to usurp the duty and power of these properly appointed authorities are thus premature at best, requiring dismissal for lack of standing.[1]

[1] Plaintiffs do not (and, according to the undersigned's research, likely cannot) cite a single court decision, binding or otherwise, in which a private citizen was held to have met 4731.341's standing requirements, let alone an instance where such standing was held to have attached without the secretary of the State Medical Board having requested that a governmental authority institute proceedings under the statute to address the allegedly offending conduct.

2. Even if Plaintiffs' claims were properly before this or the Lucas County Court, their allegations, even if proven, would fail to establish that Defendants are engaged in the unauthorized or unlicensed practice of medicine, thus requiring dismissal independently from Plaintiffs' lack of standing.

Finally, even if Plaintiffs' claims were properly before this or the Lucas County Court of Common Pleas (as explained above, they are neither), dismissal would still be warranted due to Plaintiffs' failure to set forth allegations that, even taken as true, would establish that Defendants have violated R.C. 4731's prohibitions against the unauthorized (R.C. 4731.34) and unlicensed (R.C. 4731.41) practice of medicine. As explained below, the alleged actions upon which Plaintiffs base their claims are entirely consistent with Ohio's statutory scheme regarding the practice of medicine by doctors who work for or on behalf of limited liability companies, and cannot, as a matter of law, constitute the unauthorized or unlawful practice of medicine.

First, even if Plaintiffs had met the basic standing requirements of R.C. 4731.341, such standing is only conferred to address "[t]he practice of medicine ... by any *person* not at that time holding a valid and current license or certificate as provided by Chapter 4723, 4725, or 4731[.]" R.C. 4731.341(A) (emphasis added). Likewise, with R.C. 4731.34, the "unauthorized practice" statute, the Ohio legislature limited the definition of unauthorized practice of medicine to acts taken by "a *person*." R.C. 4731.34(A) (emphasis added). These statutes thus do not apply to Capital Care because it is an LLC, not an individual person, and cannot engage in any of the acts described therein other than through its employees or agents. Nor could Capital Care possibly obtain a license to practice medicine from the state medical board. *See, e.g.*, R.C. 4731.09(A)(1)–(2) ("An applicant for a license to practice medicine ... must ... [b]e at least eighteen years of age ... [and] possess a high school diploma ..."). Because R.C. 4731.341 clearly regulates or otherwise "imposes duties only on *persons*," for conduct that could only be undertaken by a natural person, as opposed to a corporate entity, such relief could not be had against Capital Care. *Preterm-Cleveland, Inc. v. Kasich*, 153 Ohio St.3d 157, 2018-Ohio-441, 102 N.E.3d 461 ¶¶ 26-27 (holding that statutes applying to "persons who perform

or induce abortions" did not apply to an abortion clinic, because it is the clinic's physicians and not the clinic itself that performs abortions).

Second and more to the point, nowhere in their complaint do Plaintiffs allege that any of Capital Care's employees or representatives, including Defendant Stower or any doctor contracted by the clinic, have administered abortion-inducing drugs without a proper medical license or otherwise provided medical services in violation of Ohio law.

Indeed, the sum of Plaintiffs' allegations are that Defendant Stower owns and operates Capital Care, and that Capital Care advertises "the sale of abortifacients (Abortion Pills) and related medical services to the public." Complaint, ¶ 3. This, Plaintiffs argue, constitutes the "unauthorized practice of medicine" due to Capital Care's ownership and business structure. Complaint, ¶ 4, ¶ 14. More specifically, Plaintiffs rely on R.C. 1701 to assert that Defendants have engaged in the unauthorized practice of medicine because "an established 'any purpose' for-profit corporation formed under R.C. 1701.03(A) and owned by a non-licensed physician may not lawfully hire and employ a physician[,]" "lawfully offer medical services[,]" or "lawfully make a profit from a doctor's services." *Id.*, ¶ 41. *See also* ¶ 4 ("[N]either Capital Care, a mere general purpose LLC, nor its owner Amelia Stower, holds a medical license and therefore neither is permitted by Ohio law to advertise the provision of medical services").

But the very exhibits Plaintiffs have incorporated in their complaint, including business records from the Ohio Secretary of State, confirm that Capital Care is an LLC governed by R.C. 1705, *et seq.*, not R.C. 1701. Complaint, ¶ 15, Ex. A (articles of organization), Ex. C (record of subsequent agent appointment). *See also CapitalSource Bank v. Hnatiuk*, 8th Dist. Cuyahoga No. 103210, 2016-Ohio-3450, ¶ 26. As such, Ohio law expressly permits Capital Care to "[r]ender in this state and elsewhere a professional service, ... or a combination of the professional services of ... doctors of medicine and surgery ... authorized under Chapter 4731 of the Revised Code." R.C.

1705.03(C)(6); *See also* State Medical Board of Ohio, *Statement on Corporate Practice of Medicine* (March 15, 2012) ("By the clear language of the 1988 statutes [including R.C. 1705.03], professionals licensed under Chapter 4731, O.R.C., may be employed by a number of business entities ... The Ohio legislature has made it clear that the corporate practice of medicine doctrine no longer exists in Ohio.").[2]

Additionally, R.C. 4731.226(A)(1) provides that "[a]n individual whom the state medical board licenses, certificates, or otherwise legally authorizes to engage in the practice of medicine and surgery ... may render the professional services of a doctor of medicine and surgery ... within this state ***through ... a limited liability company formed under Chapter 1705*** of the Revised Code[.]" *Id.* (emphasis added). And R.C. 4731.226(B)(9) further makes clear that a "limited liability company ... described in division (A) of this section may be formed for the purpose of providing a combination of the professional services of ... individuals who are licensed, certificated, or otherwise legally authorized to practice their respective professions," including medical doctors. *Id.*

Thus, as confirmed by Plaintiffs' own pleading, Defendants were specifically authorized under R.C. 1705.03(C)(6) and R.C. 4731.226 to engage in all of the acts that form the basis of Plaintiffs' claims—contracting with doctors, offering medical services to be performed by those doctors through the clinic, advertising the provision of those services, and profiting from those services—whether or not Stower, as Capital Care's owner, has a medical license. Complaint, ¶ 20; ¶ 41. It is therefore "beyond doubt" that Plaintiffs can prove "no set of facts" showing that Defendants have engaged in the unauthorized practice of medicine by owning and operating the clinic, by advertising to the public that the clinic offers abortion-related services through its duly

[2] Available at https://med.ohio.gov/Portals/0/Laws%20%26%20Rules/Position%20Statements/Corporate%20Practice%20of%20Medicine%20Statement%20March%202012.pdf

contracted and licensed physicians, or by permitting those physicians to perform such services at Capital Care. *O'Brien*, 42 Ohio St.2d 242, 245.

III. Conclusion

Plaintiffs' efforts to (1) wrongly assert venue in Wood County, (2) prematurely assert standing to do the State Medical Board's job before the board has even had a chance to do the same, and (3) request that this Court enjoin conduct that the law expressly permits, are not only legally baseless, they are frivolous, and should be swiftly rejected under Civ.R.12(B)(6) upon transfer to the Lucas County Court of Common Pleas under Civ.R.3(D).

Respectfully Submitted,

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Certificate of Service

On March 16, 2021, the foregoing document was emailed to Plaintiffs' counsel (gcanestraro@ccw-law.com, tolp@thomasmoresociety.org) and filed using the Court's e-filing system, which will electronically serve copies on all necessary parties.

/s/ Peter Pattakos
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