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**IN THE COMMON PLEAS COURT, LUCAS COUNTY, OHIO**

E. Elaine Roebke, Admin. of the  
Estate of Allison Roebke,

Plaintiff,

v.

ADCO Firearms, LLC, et al.,

Defendants.

Case No. G-4801-CI-0202202926-000

Judge Lindsay D. Navarre

**DEFENDANTS' MOTION TO DISMISS**

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Now comes Defendants ADCO Firearms, LLC and Steven E. Thompson, by and through counsel, and submit their reply memorandum in support of their motion to dismiss.

Plaintiff's decedent died on July 8, 2020. The period of limitation for her wrongful death claim expired on July 8, 2022. On September 9, 2022, Plaintiff, not the Probate Court, moved to have the estate dismissed, not for any clerical error but because she no longer wished to pursue the present action, according to her motion. The estate was closed eliminating any authority on the part of Plaintiff to pursue the present wrongful death claim. Because Plaintiff had no authority to represent the estate, any action filed

by her is a nullity and should be dismissed as the Court has no jurisdiction over such a matter. *Burchett v. Larkin*, 192 Ohio App.3d 418, 2011-Ohio-684, 949 N.E.2d 516 (4<sup>th</sup> Dist.)

Plaintiff claims that she has solved the problem by re-opening the estate and having the Court issue a *nunc pro tunc* order that the re-opening relates back to the date the estate was closed. Plaintiff did not provide an affidavit explaining her actions in wanting to dismiss the estate or claiming that she made an error in doing so or that the Court erred in granting her the relief that she requested.

"A *nunc pro tunc* order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued. Thus, the office of a *nunc pro tunc* order is limited to memorializing what the trial court actually did at an earlier point in time. It can be used to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors.

A *nunc [\*\*\*15] pro tunc* order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. Its proper use is limited to what the trial court actually did decide."

*Alden v. FirstEnergy Corp.*, 8th Dist. Cuyahoga No. 100575, 2014-Ohio-3235, ¶ 10, quoting *Scaglione v. Saridakis*, 8th Dist. Cuyahoga No. 91490, 2009-Ohio-4702, ¶

9. And:

The trial court's use of a *nunc pro tunc* entry is restricted to placing upon the record evidence of judicial action that has been actually taken; thus, it can be exercised only to supply omissions in the exercise of merely clerical functions. *Jacks v. Adamson*, 56 Ohio St. 397, 402, 47 N.E. 48 (1897). The function of *nunc pro tunc* is not to change, modify, or correct erroneous judgments, but, rather, to have the record speak the truth. *Ruby v. Wolf*, 39 Ohio App. 144, 10 Ohio Law Abs. 79, 177 N.E. 240 (1931); *Dentsply Internatl., Inc. v. Kostas*, 26 Ohio App. 3d 116, 26 Ohio B. 327, 498 N.E.2d 1079 (8th Dist.1985). A court may not, therefore, by way of a *nunc pro tunc* entry, enter of record that which it intended but, in fact, was not made. *Pepera v. Pepera*, 8th Dist. Cuyahoga Nos. 51989 and 52024, 1987 Ohio App. LEXIS 6807 (Mar. 26, 1987), quoting *Myers v. Shaker Hts.*, 8th Dist. Cuyahoga Nos. 57005 and 58056, 1990 Ohio App. LEXIS 2278 (June 7, 1990).

Thus, the Probate Court's signing of the order crafted by Plaintiff's counsel is improper as it changes the Court's ruling on Plaintiff's Motion to Dismiss the Estate. In other words, the mistake was not that of the Probate Court, but the Plaintiff, if she did not mean to tell the Court that she wanted the Estate dismissed as she no longer wished to pursue the present action.

Providing an improper order to the Probate Court does not solve the problem with the lack of authority to pursue this action. And doesn't correct the problem with the fact that the period of limitations had expired when Plaintiff asked the Probate Court to dismiss the estate.

Plaintiff's effort to save this matter based upon a procedurally improper action in the Probate Court should not be accepted by this Court. Nor should either Court consider that there is a relation back of the *nunc pro tunc* order. Plaintiff dismissed the estate on its merits, not some procedural flaw. And make no mistake that it was Plaintiff that chose that course and cited her desire not to pursue this matter. There was no clerical error for the Probate Court to correct. The Probate Court's dismissal was, in truth, what Plaintiff requested. The Probate Court's order was not in error and the Court did not actually do something else that needed to be reflected in a *nunc pro tunc* order.

WHEREFORE, because the Plaintiff still lacks authority to pursue this action and this Court therefore lacks subject matter jurisdiction in the matter, the Court should dismiss Plaintiff's complaint.

Respectfully submitted,

/s/ *Robert J. Bahret*  
Robert J. Bahret  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing **Defendants' Reply Memorandum in Support of Motion to Dismiss** has been sent on this 13<sup>th</sup> day of April, 2023, by email transmission only to: Sean R. Alto, Esq. at seana@cooperelliott.com and Chelsea C. Weaver, Esq. at chelseaw@cooperelliott.com, attorneys for Plaintiff.

*/s/ Robert J. Bahret*  
Robert J. Bahret  
Attorney for Defendants