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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000472-MR

MICHAEL ANDERSON, JR.; AND
MALIK ANDERSON, THROUGH HIS
MOTHER AND LEGAL GUARDIAN,
ELIZABETH ANDERSON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU A. STEVENS, JUDGE
ACTION NO. 08-CI-013320

MICKIEL PETE; COCHRAN, CHERRY, GIVENS,
SMITH, SISTRUNK & SAMS, P.C., F/K/A
COCHRAN, CHERRY, GIVENS, SMITH &
SISTRUNK, P.C.; AND DENNIS C. BURKE — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; MOORE AND WINE, JUDGES.

WINE, JUDGE: Michael Anderson, Jr. and Malik Anderson, a minor, by and through his guardian and mother, Elizabeth Anderson, appeal from a summary

judgment of the Jefferson Circuit Court dismissing their professional negligence claims against the Honorable Mickiel Pete and the law firm of Cochran, Cherry, Givens, Smith, Sistrunk & Sams, P.C. (hereinafter, "Pete") with prejudice. Upon a review of the record, we reverse the summary judgment.

Factual and Procedural History

The present action is a professional negligence action which sprang from a prior action in which Pete filed a suit on behalf of the Estate of Michael Anderson in Jefferson Circuit Court for wrongful death. The facts of the previous action, as recited below, are not disputed by the parties.

On or about October 17, 2001, Michael Anderson was driving a van owned by his employer when he struck a retaining wall and was partially ejected from the vehicle. As a result, Anderson sustained fatal injuries. The employer-owned vehicle Anderson was operating at the time of his death was equipped with a pedestal-style driver's seat that had a locking mechanism, allowing the seat to tilt forward or backward and be locked into place. This locking mechanism was not operating properly on October 17, 2001, when Anderson struck the retaining wall.

Anderson had previously complained to maintenance technicians that the driver's seat locking mechanism was not functioning properly. The defendant in the prior action, Dixie Warehouse Services, LLC, was charged with maintaining the vehicles in the fleet of Anderson's employer, including the vehicle being driven by Anderson at the time of his death.

Pete was retained by the Estate to file a wrongful death action against Dixie. Pete made claims for wrongful death on behalf of Anderson's estate ("Estate"), and for loss of consortium on behalf of Elizabeth. However, Pete did not name Michael and Malik, the minor children, as plaintiffs in the action and did not include claims of loss of consortium/parental love and affection for the children.

In May of 2005, after deposing two expert witnesses retained by Pete, Dixie filed a motion to exclude the experts on the grounds that their testimony did not meet the standards espoused in *Daubert*[1] and Kentucky Rules of Evidence (KRE) 702. The Jefferson Circuit Court ruled in favor of Dixie and dismissed the wrongful death suit after excluding the experts, finding that the expert testimony "[did] not provide conclusive opinions on evidence demonstrating causation of Mr. Anderson's accident," and that the testimony "would only provide the jury with speculative theories."

Pete did not file an appeal on behalf of the Estate, although Elizabeth attempted to file an appeal herself, *pro se*. Elizabeth timely filed a notice of appeal but it was ultimately dismissed because of her failure to comply with procedures of the Court of Appeals.

On December 15, 2008, Malik, by and through Elizabeth, and Michael (now the age of majority) filed a professional negligence action against Pete based upon theories of negligence, gross negligence, breach of fiduciary duty, and

[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

negligent/fraudulent misrepresentation. Although Michael and Malik sought discovery, Pete moved for a protective order pending the outcome of a motion for summary judgment. On July 2, 2009, Pete filed a motion for summary judgment alleging the suit was barred because there was no attorney-client relationship between Pete and the children and because any other claims of the Estate had since been barred by the statute of limitations. The motion was granted by the Jefferson Circuit Court on the grounds that Michael and Malik did not have privity with Pete, and thus did not enjoy an attorney-client relationship with Pete and lacked standing to sue for professional negligence.

Michael and Malik now appeal to this Court. On appeal they allege that an attorney-client relationship did exist, or that they are entitled to sue absent privity, and that the statute of limitations was tolled due to their infancy.

Analysis

Upon review of a summary judgment, we bear in mind the principle that summary judgment is to be cautiously applied and should only be used to terminate litigation when it would be impossible for the responding party to produce evidence warranting judgment in his favor at trial. *Paintsville Hospital Company v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). The question for our purposes on review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Because

this inquiry presents a question of law, we review the matter *de novo*. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

Michael and Malik claim: (1) that an attorney-client relationship actually existed and is supported by Elizabeth's reasonable belief that Pete was representing her children as well as herself and the Estate; (2) that although the wrongful death claim was brought on behalf of the Estate, an estate is only a nominal party in a wrongful death action and the real parties in interest are the beneficiaries under the statute (which included Elizabeth, Malik, and Michael in the present case); and (3) in the alternative, even if privity did not exist, an attorney in this jurisdiction is liable for damage caused by his negligence to any party intended to be benefited by his performance.

Michael and Malik first argue that the factual existence of an attorney-client relationship is in dispute and, thus, not appropriate for summary judgment. Indeed, they argue that Elizabeth's sworn statements are not refuted by the facts of record. Elizabeth testified by affidavit, as follows:

> 7. In or around the summer of 2004, Mr. Pete met with me and my children, Michael and Malik, in person at my home to discuss the loss my children suffered as the result of the death of their father, Mr. Anderson.
>
> 8. On several occasions during the course of Defendants' representation in the Prior Action, Mr. Pete explained to me that a trust fund would be created for the benefit of my children, including Michael and Malik, should there be a recovery of money from Dixie Warehouse Services in connection with the Prior Action.

> 9. Because of the course of my dealings and communications with Defendants, I understood that Defendants were representing me, my children, and my husband's, Mr. Anderson, estate in the Prior Action.
>
> 10. Specifically, I understood that Defendants were representing any claims my children, including Michael and Malik, may have had against Dixie Warehouse Services in the Prior Action.

Michael and Malik argue that this affidavit directly supports the existence of a direct attorney-client relationship between them and Pete because of Elizabeth's expectations and, to the extent there is any dispute on that matter, it presents a jury question. Upon review, we must view the evidence in a light most favorable to Michael and Malik. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). As such, we consider Elizabeth's statements to be true and then ask whether, assuming those statements are true, Michael's and Malik's claims could prevail at law.

The existence of an attorney-client relationship "is a contractual one, either expressed or implied by the conduct of the parties." *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. App. 1978). Restated, the attorney-client relationship need not necessarily arise by contract, but may also arise through the conduct of the parties. *Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky. 1997). If the relationship is to arise through the parties' conduct, it must be born of a "reasonable belief or expectation" on the part of the would-be client that the attorney has agreed to undertake the representation. *Id*.

Our Supreme Court has recently laid to rest any dispute over whether an attorney may have an attorney-client relationship with a minor in the case of *Branham v. Stewart*, 307 S.W.3d 94, 95 (Ky. 2010). In *Branham*, the high Court held that an attorney representing a minor's next friend on behalf of a minor is in an attorney-client relationship with the minor as a real party in interest and owes professional duties to the minor. *Id. at* 95. The minor is also said to be in privity with the attorney, despite their minority. *Id. at* 99.

Thus, the question in this case is whether Pete was representing the Estate and Elizabeth personally, *as well as* next friend of Michael and Malik. Since Pete sought and was granted a protective order from discovery, it is unclear whether there was a written contract in the original client file, and, if so, whether the terms of the contract would have established if Pete was representing the Estate and Elizabeth solely or also as next friend to the children.[2] The only facts available at present are Elizabeth's statements in her affidavit. Elizabeth set out facts in her affidavit establishing that she believed Pete to be representing the children as well. Thus, the only remaining question is whether such a belief was reasonable. In the present circumstances, since Michael and Malik stood to be awarded one-half of any damages recovered in the wrongful death action, it seems quite reasonable that Elizabeth would have believed that Pete was representing the children and raising any and all available claims on their behalf.

[2] The protective order was originally sought in contemplation of Pete's filing a summary judgment motion on statute of limitation grounds. This might explain why the trial court would have halted discovery in this situation.

As such, we are compelled to reverse the trial court's summary judgment. It is of little concern for our purposes today that after discovery is allowed to proceed on remand, it may actually appear from documents in the original client file that the Estate and Elizabeth were being represented solely and not as next friend to the children. Summary judgment is not appropriate where a genuine question of material fact exists.

However, we also reverse on another ground, and, thus, now address the other issues raised in this appeal.

Michael and Malik's next argument is that in a wrongful death action brought on behalf of an estate, the administrator or administratrix of an estate is merely a nominal plaintiff under the rule set forth in *Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 316, 179 S.W.2d 441, 445 (1944). The real parties in interest are the beneficiaries whom the administrator represents. *Id*. Thus, Michael and Malik argue that it was error for the trial court to find no duty was owed to them. In support of this argument, Michael and Malik also point to *Robertson v. Vinson*, 58 S.W.3d 432 (Ky. 2001), which held that amounts recovered under the wrongful death statute do not necessarily inure to the benefit of the Estate of a decedent, but instead pass to the statutory beneficiaries under Kentucky Revised Statutes (KRS) 411.130(2). Thus, the Estate actually has no interest in the proceeds derived from such a suit. Under the action, Michael and Malik would have received one-half of the proceeds.

Michael and Malik argue that they were third-party beneficiaries intended to be benefited by Pete's performance. Michael and Malik claim on appeal that the trial court misinterpreted the rule under *Seigle v. Jasper*, 867 S.W.2d 476 (Ky. App. 1993), which holds that an attorney may be liable for his negligence to a third party in such circumstances. Because Michael and Malik were statutory beneficiaries under the wrongful death statute, they argue Pete's actions must be construed as intended for their benefit, irrespective of any lack of privity. We agree.

Indeed, there "is no privity requirement for legal malpractice actions in Kentucky." *Sparks v. Craft,* 75 F.3d 257, 261 (6th Cir. 1996). Instead, an attorney can be held "liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity." *Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. App. 1978), quoting *Donald v. Garry*, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

When an attorney is retained to file a wrongful death action by the administrator of an estate, the attorney clearly intends to benefit both the client estate and the individuals in the estate who will receive a share of the damages under KRS 411.130 should he successfully defend the suit. They are two sides of one coin that cannot be logically divided from one another. Indeed, the individuals named in KRS 411.130(2) are the real parties in interest in such a suit. *Vaughn's Adm'r*, 179 S.W.2d at 445.

Thus, on remand, even if Pete is found not to be in privity with Michael and Malik because discovery reveals that the parties contracted for him to represent Elizabeth solely and not the children, he will still have owed duties to Michael and Malik as intended beneficiaries of the wrongful death action. Thus, the result is inescapable that Pete owed a duty to Michael and Malik – whether as *attorney to client* or as *attorney to intended beneficiary*.

We do not speak to the issue of whether Pete's performance was actually negligent or otherwise deficient since that is a matter to be considered first by the trial court. However, we recognize that a plaintiff in a legal malpractice action bears the burden of proving an attorney-client relationship as well as failure to exercise the ordinary care of a reasonably competent attorney in the same or similar circumstances. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). We find it unorthodox enough that Pete failed to name Malik and Michael as parties, and that Pete failed to make loss of consortium claims for Malik and Michael, or to perfect an appeal in the original action, that the question should survive summary judgment.

Finally, as to the issue of the statute of limitations, so as to avoid repetition on remand, we note that all applicable statutes would have been tolled during the period of Michael and Malik's infancy. KRS 413.170.

In consideration of the foregoing, the summary judgment of the Jefferson Circuit Court is hereby reversed and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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