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Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001163-MR

DAVID T. REYNOLDS II;
WHITNEY ROSE REYNOLDS;
AMANDA KATHRYN REYNOLDS HARPER;
TERRY CLAYTON REYNOLDS; AND
ELYSHA MARIE REYNOLDS

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE GEORGE W. DAVIS III, JUDGE
ACTION NO. 14-CI-00854

SUSAN D. RANDOLPH;
HON. PAMELA H. POTTER; AND
HON. GARIS PRUITT

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

** ** * ** * **

BEFORE: JONES, KRAMER, AND D. LAMBERT, JUDGES.

JONES, JUDGE: The Appellants, David T. Reynolds II, Whitney Rose Reynolds,

Amanda Kathryn Reynolds Harper, Terry Clayton Reynolds, and Elysha Marie

Reynolds, bring this appeal as a matter of right. Having reviewed the record in

conjunction with all applicable legal authority, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Tragically, on December 15, 2003, David T. Reynolds was killed in a trucking accident. Reynolds died intestate. He was survived by his wife, Susan D. Randolph, and the Appellants, his five children.¹ The Boyd District Court appointed Randolph as the fiduciary of Reynolds's Estate. Randolph hired Pamela Potter ("Attorney Potter") to represent her in administering Reynolds's Estate. Randolph also hired Garis Pruitt ("Attorney Pruitt") to pursue a wrongful death action on behalf of Reynolds's statutory beneficiaries, Randolph and the five Appellants.

Attorney Pruitt filed a wrongful death claim against: (1) the seatbelt manufacturer, Indiana Mills & Manufacturing, Inc. ("Indiana Mills"), and (2) Freightliner, LLC ("Freightliner"), the truck manufacturer. The claim against Indiana Mills was settled before the claim against Freightliner. Even though the wrongful death statute is clear that wrongful death proceeds are not part of the decedent's estate, Attorney Pruitt sought and obtained approval from the district court to settle the Indiana Mills action for \$325,000 and to distribute the proceeds

¹ Randolph is not the children's mother.

of that settlement.² The settlement proceeds were forwarded to Attorney Pruitt. Attorney Pruitt deposited the funds into his IOLTA³ account. He then set about distributing the funds. He did so as follows: \$108,333.33 to himself for attorney's fees; \$75,000 to satisfy a workers' compensation subrogation lien; \$16,029.70 to Reynolds's Estate for litigation expenses it advanced for the wrongful death action; and \$3,342.94 for outstanding litigation costs owed to counsel. Before making a distribution to the statutory beneficiaries, Attorney Pruitt withheld \$50,000 for future litigation expenses he expected to incur in connection with the wrongful death claim pending against Freightliner. From the original \$325,000 settlement, Attorney Pruitt calculated that a total of \$72,293.99 was left for distribution to Randolph and the five Appellants. In accordance with Kentucky's wrongful death statute, KRS⁴ 411.130(2)(b), Randolph was entitled to one-half of that amount, \$36,146.98, and the Appellants were entitled to a pro-rata share of the other one-half, which amounted to approximately \$7,229.40 each.

² Attorney Pruitt claims he sought approval from the district court because the settlement involved minors; however, his motion indicates that he incorrectly assumed that approval was required because the wrongful death proceeds belonged to Reynolds's Estate. To the extent that approval was required before a settlement disbursement could be made to the minor children, approval should have been sought from the federal district court where the underlying wrongful death action was pending. *See* KRS 387.280 ("The court in which the action is pending . . . may order the sum to be paid to the person having custody of the minor or other person under disability."); *see also Robinson v. Fiedler*, 91 F.3d 144 (6th Cir. 1996) (applying a similar Michigan law and holding the federal district court was the court where the action was pending, and therefore, had jurisdiction to approve the settlement of a wrongful death claim).

³ Interest on Lawyers Trust Accounts.

⁴ Kentucky Revised Statutes.

Attorney Pruitt avers that he instructed his bookkeeper/paralegal, Ronda Nixon, to prepare the checks for distribution. On or about April 22, 2005, Nixon sent Attorney Potter an email attaching images of six checks from Attorney Pruitt ready for distribution to Randolph and the five Appellants. It is unclear why Attorney Pruitt's office directed the email to Attorney Potter. She was only hired to represent Randolph in her capacity as administrator of Reynolds's Estate. She did not represent any of the statutory beneficiaries. It is likewise unclear how Attorney Pruitt planned to actually deliver the checks to the beneficiaries. In any event, in the end, only Randolph received a distribution from the Indiana Mills settlement.

Instead of dispersing the funds to the Appellants, Nixon converted them for her own use. It appears that after Nixon sent the email to Attorney Potter, she altered the checks made out to Appellants to make herself the payee and then cashed them. Nixon was apparently able to accomplish her subterfuge due, in part, to the considerable responsibility Attorney Pruitt gave her over the firm's finances. Nixon was Attorney Pruitt's only employee. She served as both a paralegal and a bookkeeper. Attorney Pruitt allowed Nixon access to the firm's bank accounts, and she was also responsible for balancing the firm's books. Over a period of

time, Nixon embezzled approximately \$100,000 from Attorney Pruitt and his law firm.⁵

In early October 2006, Attorney Pruitt reached an agreement to settle the wrongful death claim against Freightliner for \$165,000. While Appellants never received their share of the wrongful death settlement obtained from Indiana Mills, they eventually received a portion of the Freightliner settlement. However,

⁵ The opinion of the United States Court of Appeals, Sixth Circuit, rendered in connection with the federal criminal action against Nixon, provides additional insight into the internal structure of Attorney Pruitt's practice and Nixon's actions. *See United States v. Nixon*, 694 F.3d 623, 626-27 (6th Cir. 2012). According to the Sixth Circuit:

As the bookkeeper, Nixon paid the firm's bills, kept track of the firm's finances in a general ledger, and purchased office supplies. To pay for the firm's expenses, she had authorized access to the firm's financial accounts, had the authority to sign checks for the firm, and was a signatory on the firm's American Express credit card. Pruitt relied on Nixon to review the firm's monthly account and to manage the cash flow into, out of, and between the accounts. He testified that Nixon was never authorized to write herself checks from the firm's bank accounts at Community Trust Bank (other than for her own salary) or to use firm funds for personal expenses.

According to Pruitt and Brandenburg, Nixon abused her authority. In June 2007, just after Nixon left the firm to attend law school, Pruitt was hospitalized for a month due to surgery and treatment for prostate cancer. Pruitt returned home to recuperate in mid-July, at which time he received a call from Community Trust Bank. The bank informed him that he was delinquent in paying back his line of credit, a line of credit that he had thought was paid off by Nixon some time ago. This call led to an investigation into the firm's finances by Pruitt and Brandenburg, and eventually by Robert Rufus, Ph.D., a forensic accountant. The investigation uncovered that Nixon had made thousands of dollars of personal charges on the firm's credit card and had borrowed thousands more from American Express Bank, all of which was unauthorized according to the testimony of Pruitt and Brandenburg.

Id. at 626.

the process through which this was accomplished is confounding to say the least. Even though KRS 411.130 requires wrongful death proceeds to be paid directly to the statutory beneficiaries, it took over six years for the Appellants to receive their share of the Freightliner settlement. This delay was largely created because Attorney Pruitt treated the wrongful death proceeds as assets of Reynolds's Estate.

On October 18, 2006, Attorney Pruitt filed a motion with the district court. Therein, Attorney Pruitt represented that after paying his attorney fees, \$54,112.50, and case expenses owed to his firm and others, a total of \$41,319.41 from the Freightliner settlement remained available for distribution. Instead of paying this amount directly to the statutory beneficiaries as clearly required by the wrongful death statute, Attorney Pruitt paid the entire sum to Reynolds's Estate for division "among the heirs as required by law when final settlement is accomplished with creditors."⁶

For reasons that are not entirely clear from the record, no action was taken for the next three years. At some point, Appellants retained counsel to represent their individual interests. In the summer of 2009, Appellants moved the district court to hold a status conference. The purpose of their motion was to determine why Appellants had never received any distribution from the wrongful death settlements. At this point, Attorney Pruitt finally revealed that Nixon had

⁶ This was incorrect. Reynolds's creditors had no right to recover from the wrongful death proceeds.

stolen the Indiana Mills settlement funds from his trust account before they were delivered to Appellants. In pertinent part, Attorney Pruitt stated:

I believed at the time that all of the money was sent to the heirs, but it now appears except for that amount sent to Susan Reynolds [Randolph], none was. The evidence is Nixon took it all. I have filed suit against her on behalf of my firm and my clients who were harmed. So far she refuses to appear at a deposition although she did file a general denial. We continue to attempt to prosecute that case. Even when we obtain a judgment it is likely to be a very long shot at being collectible. We stand ready to provide anything the Court may want or need in terms of such records we have. Although legally we do not have liability for her theft we will continue to attempt to recover anything we can for our clients and will cooperate in any manner the Court requires.

Following a hearing on the motion for a status conference, the district court entered an order directing Randolph to record the missing funds from the wrongful death settlement as “debt against the Estate.” It then ordered the probate matter “to be held in abeyance pending outcome of any civil/criminal action.” This order was entered on July 13, 2009. The pending actions referred to by the district court were apparently the federal criminal action pending against Nixon in the United States District Court for the Eastern District of Kentucky and Attorney Pruitt’s civil action against Nixon.⁷

⁷ The civil suit Attorney Pruitt filed against Nixon was unorthodox to the say the least. The caption from the judgment obtained against Nixon indicates that the plaintiffs were Pruitt and Thorner, Pruitt’s law firm, and “Garis L. Pruitt, individually and in his capacity as attorney for *various clients* in the law office of Pruitt and Thorner.” R. at 176 (emphasis added). There is no indication that Attorney Pruitt secured permission from these various unnamed and unidentified

Shortly thereafter, following additional research, Attorney Potter realized that Attorney Pruitt should not have made the proceeds from the Freightliner wrongful death settlement payable to Reynolds's Estate. Attorney Potter acknowledged that Reynolds's Estate had to turn over the wrongful death proceeds Attorney Pruitt incorrectly transferred to it. To this end, in correspondence to Appellants' counsel, Attorney Potter indicated that she was going to seek guidance from the district court as to how the Freightliner proceeds should be distributed.⁸ However, Attorney Potter resisted Appellants' efforts to make Reynolds's Estate liable for Appellants' portion of the Indiana Mills settlement. Attorney Potter explained to Appellants' counsel several times that the Estate had not received any funds from the Indiana Mills settlement, had no right to the funds, and was not responsible for making sure Appellants received their statutory share of the Indiana Mills settlement. Nevertheless, over the course of the next three years, it appears that Appellants, through their retained counsel,

clients before filing suit against Nixon or ever provided them with any notice related thereto. There is also no indication that the suit was certified as any sort of a class action. The certificate of service lists Attorney Pruitt as representing "himself, the firm, and the individual clients." *Id.*

⁸ In the letter, Attorney Potter affirmatively placed Appellants' counsel on notice that she believed Appellants might have a valid cause of action against Attorney Pruitt irrespective of his claim that Nixon was the sole culprit. This letter is dated August 5, 2009. However, for reasons we cannot fully understand, Appellants did not file any claims (breach of contract, unjust enrichment, malpractice, declaratory judgment or the like) against Attorney Pruitt for another five years.

continually attempted to recoup the wrongful death proceeds owed to them from Reynolds's Estate.⁹

Eventually, Attorney Potter, acting on behalf of Randolph in her capacity as administrator, sought approval from the district court to distribute the remaining assets in Reynolds's Estate, including the Freightliner wrongful death settlement proceeds Attorney Pruitt paid into the Estate. Confusingly, the proposed settlement and accounting listed the Indiana Mills settlement as a "receivable distributed to the children" from the Estate. This filing also stated that "except the account receivable due from Garis Pruitt to the children[,] all the Estate's debts had been satisfied. Several months later, on October 31, 2012, the district court entered an order regarding final settlement of Reynolds's Estate. As part of that order, the district court clarified that the wrongful death proceeds were not a part of the Estate, but that a portion of the proceeds had been incorrectly made payable to the Estate by Attorney Pruitt. The district court reviewed the proposed distributions to Randolph and Appellants. Those distributions included the wrongful death proceeds from the Freightliner settlement in addition to the net probate assets due to them. After having done so, the district court directed distributions in accordance with the proposed settlement. Ultimately, four of the

⁹ Appellants changed counsel at least once during this period.

five Appellants received distributions of \$7,096.77 each.¹⁰ No appeal was taken from this order.

Instead, exactly two years later, on October 31, 2014, the Appellants filed suit in Boyd Circuit Court against Attorney Pruitt, Attorney Potter, and Randolph. While the complaint cited KRS 394.240, a statute allowing an original action in circuit court after the district court has rendered a decision to either admit or reject a will, the substance of the complaint alleged that Appellants were seeking to hold Attorney Pruitt, Attorney Potter, and Randolph liable for breach of their professional and/or fiduciary duties. Following some initial discovery, each of the three defendants moved for summary judgment. Ultimately, the circuit court entered separate judgments in favor of each defendant. This appeal followed.

II. PRELIMINARY PROCEDURAL ISSUES

Before we address the merits of this action, we must briefly consider several alleged procedural deficiencies that Appellees contend merit dismissal. The first alleged deficiency concerns Appellants' notice of appeal. Appellees argue that the notice of appeal is ineffective because it does not identify the judgments being appealed with enough specificity. CR¹¹ 73.03(1) provides: "The

¹⁰ It is not clear why Amanda Kathryn Reynolds Harper did not receive a distribution.

¹¹ Kentucky Rules of Civil Procedure.

notice of appeal . . . shall identify the judgment, order or part thereof appealed from.” In their notice of appeal, Appellants identified the judgments as “three (3) summary judgments of the Boyd Circuit Court, Division 1 . . . entered herein on July 11, 2016, copies of which are attached hereto.” While Appellants should have identified each appeal separately and specified the defendant it related to, their description substantially complied with the rule. We are able to ascertain the judgments being appealed without any difficulty. This deficiency does not warrant dismissal of the appeal.

The other procedural deficiencies concern late filings by Appellants. These issues have already been called to the Court’s attention by way of motions to dismiss. Those motions were denied by motions panels of the Court. While we are not bound by those determinations, we do not see any reason to depart from them. Each late filing was eventually tendered and accepted by the Court. Moreover, the accompanying delays were relatively short and did not prejudice Appellees. They do not merit dismissal.

III. STANDARD OF REVIEW

Summary judgment shall be granted only if “the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law.” CR 56.03. The trial court must view the record “in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Further, “a party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” *Id.* at 482. On review, the appellate court must determine “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).

IV. ANALYSIS

This case is tragic on a number of different levels. It began, over fifteen years ago, with the tragic death of a husband and father. Even though Reynolds’s Estate was relatively modest, almost ten years passed before an order was entered by the district court approving a final settlement of the Estate. This delay was not caused by the parties’ inaction. To the contrary, it is apparent from the record that the parties labored over the probate matter. Unfortunately, for much of the time, the parties, their counsel, and the district court were laboring under a false assumption; *to wit*, that wrongful death proceeds are part of a decedent’s estate to be approved and distributed by the district court as part of the

probate matter. From the beginning, this misunderstanding plagued virtually every aspect of the litigation leading up to (and, to some extent, including) this appeal. It created confusion, caused delay, and prevented the attorneys from fully appreciating the scope of their fiduciary duties and responsibilities.

While this case is extreme in many ways, the misunderstanding involving wrongful death proceeds and how they interact with probate matters is relatively commonplace. Attorneys and parties often incorrectly assume that a wrongful death claim (and any recovery related thereto) belongs to the decedent's probate estate. Before we delve into the exact questions presented by this appeal, it is incumbent on us to review the scope and nature of wrongful death claims vis-à-vis the decedent's estate. We hope that this review will not only place the issues at hand in the proper context, but also dispel any lingering notion that a wrongful death action is pursued on behalf of the estate and for its benefit.

A. Wrongful Death Claims

There is no common law right to recover for the wrongful death of another. *Smith's Adm'r v. Nat'l Coal & Iron Co.*, 135 Ky. 671, 117 S.W. 280, 281 (1909). A cause of action for wrongful death exists only so far and in favor of such persons as the General Assembly may declare. *See Clements v. Moore*, 55 S.W.3d 838, 840-41 (Ky. App. 2000) (internal citations omitted).

Kentucky's modern-day statutory right of action for the wrongful death of another is codified in KRS 411.130.¹² It provides:

(1) Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it. If the act was willful or the negligence gross, punitive damages may be recovered. The action shall be prosecuted by the personal representative of the deceased.

(2) The amount recovered, less funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order:

(a) If the deceased leaves a widow or husband, and no children or their descendants, then the whole to the widow or husband.

(b) If the deceased leaves a widow and children or a husband and children, then one-half (1/2) to the widow or husband and the other one-half (1/2) to the children of the deceased.

(c) If the deceased leaves a child or children, but no widow or husband, then the whole to the child or children.

(d) If the deceased leaves no widow, husband or child, then the recovery shall pass to the mother and father of the deceased, one (1) moiety each, if both are living; if the mother is dead and the father is living, the whole

¹² KRS 411.130, evolved from chapter 1, § 6 of the Kentucky Statutes of 1903. *Giuliani v. Guiler*, 951 S.W.2d 318, 323 (Ky. 1997) (Cooper, J., dissenting). “[I]t provided first that an action for wrongful death premised upon the negligence or wrongful act of another could be brought only by the personal representative of the deceased, then provided how the damages recovered in that action would be distributed.” *Id.* at 324.

thereof shall pass to the father; and if the father is dead and the mother living, the whole thereof shall go to the mother. In the event the deceased was an adopted person, “mother” and “father” shall mean the adoptive parents of the deceased.

(e) If the deceased leaves no widow, husband or child, and if both father and mother are dead, then the whole of the recovery shall become a part of the personal estate of the deceased, and after the payment of his debts the remainder, if any, shall pass to his kindred more remote than those above named, according to the law of descent and distribution.

KRS 411.130.

1. A Wrongful Death Claim Belongs to the Statutory Beneficiaries

A wrongful death claim is “a distinct interest in a property right that belongs only to the statutorily-designated beneficiaries.” *Preferred Care Partners Mgmt. Grp., L.P. v. Alexander*, 530 S.W.3d 919, 921 (Ky. App. 2017) (quoting *Extencicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 314 (Ky. 2015)). The claim is created by the decedent’s death, but the claim never belonged to the decedent. *Moore v. Citizens Bank of Pikeville*, 420 S.W.2d 669, 672 (Ky. 1967). The statutory beneficiaries can only be determined at the decedent’s death because this is when the claim arises. *See Sharp’s Adm’r v. Sharp’s Adm’r*, 284 S.W.2d 673 (Ky. 1955); *Thomas’ Adm’r v. Maysville Gas Co.*, 23 Ky. L. Rptr. 1879. 66 S.W. 398, 400 (1902).

2. Prosecution

The wrongful death statute, KRS 411.130(1), states that “the action *shall* be prosecuted by the personal representative of the deceased.” KRS 411.130(1) (emphasis added). The decedent’s estate does not have standing to prosecute a wrongful death claim. Likewise, in most circumstances, the statutory beneficiaries also lack standing to sue.¹³ “The right of action is in the personal representative exclusively.” *Wheeler v. Hartford Accident & Indem. Co.*, 560 S.W.2d 816, 819 (Ky. 1978).

Even though the personal representative must prosecute the action, the action is pursued for “the benefit of those statutorily designated persons.” *Bennett v. Nicholas*, 250 S.W.3d 673, 675 n.1 (Ky. App. 2007). With no interest in the recovery, the personal representative is a “nominal” party, as the “real parties in interest are the beneficiaries whom [the personal representative] represents.” *Pete v. Anderson*, 413 S.W.3d 291, 299 (Ky. 2013) (quoting *Vaughn’s Adm’r v. Louisville & N.R. Co.*, 297 Ky. 309, 179 S.W.2d 441, 445 (1944)).

The duty the personal representative owes the statutory beneficiaries vis-à-vis a wrongful death claim is a limited one. The personal representative has a duty to prosecute the action. *See Pete*, 413 S.W.3d at 299. “In the context of the

¹³ Under Kentucky law, statutory “beneficiaries [may] bring [a wrongful death] action under two exceptional circumstances: (1) when the personal representative has refused to bring the action; or (2) where there is fraud and collusion on the part of the personal representative and the person sought to be made liable for the death.” *Smith v. McCurdy*, 269 S.W.3d 876, 878 n.4 (Ky. App. 2008) (citing *McLemore v. Sebree Coal & Mining Co.*, 121 Ky. 53, 88 S.W. 1062 (1905)).

statute as a whole, ‘prosecute’ necessarily means ‘to commence and carry out a legal action.’” *Id.* (internal citations omitted). However, if the personal representative is not a lawyer, she must retain the assistance of legal counsel to bring the action. *Thompson v. Jewish Hosp. & St. Mary’s Healthcare, Inc.*, No. 2017-CA-000676-MR, 2018 WL 2078008, at *2 (Ky. App. May 4, 2018).¹⁴ This rule makes sense because “one may represent himself or herself *pro se* but that ability is limited to one’s self.” *Baldwin v. Mollette*, 527 S.W.3d 830, 835 (Ky. App. 2017). A personal representative is not acting on her own behalf in filing a wrongful death claim; she is acting on behalf of the statutory beneficiaries.

3. Duties of Attorney Pursing a Wrongful Death Claim

While the attorney is hired by the personal representative, he owes fiduciary and professional duties to the statutory beneficiaries of the decedent. The statutory beneficiaries are first-party, primary beneficiaries of the contract between the attorney and the personal representative. *Pete*, 413 S.W.3d at 299-301. “Given their position as statutory beneficiaries, they need not rely on third-party beneficiary status.” *Id.* at 301 n.9. The attorney has a direct relationship with the statutory beneficiaries and owes them the same professional and fiduciary duties that the attorney owes to all his clients. *See id.* at 297-301. Professionally, the attorney owes the wrongful death beneficiaries the standard of “care and skill as

¹⁴ CR 76.28(4)(c) permits this Court to consider unpublished opinions as persuasive authority.

men of the legal profession commonly, or ordinarily, possess and exercise under the circumstances[.]” *Daugherty v. Runner*, 581 S.W.2d 12, 16 (Ky. App. 1978). Additionally, “[s]ince the relationship of attorney-client is one fiduciary in nature, the attorney has the duty to exercise in all his relationships with [the statutory beneficiaries] the most scrupulous honor, good faith and fidelity[.]” *Id.*

4. Disbursement of Recovery for Wrongful Death

“The recovery [from a wrongful death action] is *not* for the benefit of the estate, but is for the next of kin as determined under the statute.” *Moore*, 420 S.W.2d at 672 (emphasis added). The estate itself has no right to the recovery. The decedent had no interest in the claim while he lived, and his estate takes no interest in it at his death. *Napier’s Adm’r v. Napier’s Adm’r*, 210 Ky. 163, 275 S.W. 379, 380 (1925). Any amount recovered under the wrongful death statute goes “*directly* to the kindred of the deceased in the order in the statute.” *Rhodes v. Rhodes*, 764 S.W.2d 641, 643 (Ky. App. 1988) (emphasis added). So long as the decedent leaves behind a widow, a husband, a child, and/or a living parent, the wrongful death proceeds should never become part of the decedent’s estate.¹⁵ *Vaughn’s Adm’r*, 297 Ky. at 316, 179 S.W.2d at 445.

¹⁵ The only time wrongful death proceeds become part of the estate is “if the deceased leaves no widow, husband or child, and if both father and mother are dead[.]” KRS 411.130(2)(e). In that very limited situation, the recovery becomes “part of the personal estate of the deceased[.]” *Id.* After the estate’s debts are paid, the remainder passes to any kindred in accordance with the law of descent and distribution. *Id.*

There are two primary reasons why the recovery from a wrongful death claim should not pass into and become intermingled with the estate. The first reason is that proceeds from a wrongful death action are not subject to the decedent's debts. *See Emmerke's Adm'r v. Denunzio*, 196 S.W.2d 599, 600 (Ky. 1946) (“[T]he recovery for her death does not become part of her estate and is not subject to the payment of her debts.”).¹⁶ The second reason is that wrongful death proceeds must be distributed in accordance with statute. Even if the decedent died testate, wrongful death proceeds are distributed to the decedent's kindred in accordance with the wrongful death statute, not in accordance with the decedent's testamentary instructions. *See Smith*, 269 S.W.3d at 880; *see also Robertson v. Vinson*, 58 S.W.3d 432, 434 (Ky. 2001).

5. Jurisdiction to Direct Disbursement of Wrongful Death Proceeds

The district court only has jurisdiction over the property in the decedent's estate. *See* KRS 24A.120(2). Under KRS 411.130, wrongful death proceeds are to be paid directly to the beneficiaries as defined under the statute without passing through the estate or the probate process. In the ordinary course,

¹⁶ “Funeral expenses and the cost of administration and costs of recovery including attorney fees, not included in the recovery from the defendant,” are allowed to be deducted from the total recovery before disbursement to the kindred. KRS 411.130(2). The “legislative intent” behind allowing such expenses to be deducted from any wrongful death recovery is that “such expenses should be regarded as an element of damage” that flowed directly from the death. *Square Deal Cartage Co. v. Smith's Adm'r*, 307 Ky. 135, 145, 210 S.W.2d 340, 346 (1948). This makes sense because the debt itself was not incurred by the decedent during his life. The debt arose because of the decedent death and never actually belonged to the decedent.

the probate court does not have jurisdiction to settle disputes over the distribution of wrongful death proceeds or to resolve claims related thereto. *See Rutledge v. McKee*, No. 2007-CA-001667-DG, 2008 WL 4269855, at *5 (Ky. App. Sept. 19, 2008) (“The jurisdiction of the probate court to entertain the appellants’ motion for a share of the wrongful death proceeds in the first place is questionable[.]”).¹⁷ The only time wrongful death proceeds become part of the estate and, therefore, fall within the jurisdiction of the district court is “if the deceased leaves no widow, husband or child, and if both father and mother are dead[.]” KRS 411.130(2)(e).

If a wrongful death action has actually been commenced, the court where the action is pending is the most appropriate court to resolve disbursement disputes. If settlement occurs before an action is filed and the amount in controversy exceeds \$5,000, the circuit court, not the district court, has jurisdiction to settle the dispute. *See* KRS 23A.010(1) and KRS 24A.120(2).

B. Appellants’ Claims

Appellants’ complaint named three defendants: Randolph, who Appellants sued individually and in her capacity as administrator of Reynolds’s Estate; Attorney Potter, who was hired to represent Randolph in her official capacity as administrator of Reynolds’s Estate; and Attorney Pruitt, who Randolph hired to pursue the wrongful death claims arising out of Reynolds’s death.

¹⁷ *See* CR 76.28(4)(c).

Appellants asserted that the three named defendants breached their fiduciary duties to Appellants in the handling and disbursement of the wrongful death proceeds and in the Estate funds. Ultimately, the circuit court determined that each defendant was entitled to summary judgment.

1. Randolph

In their complaint, Appellants asserted that Randolph breached her fiduciary duties to the Appellants in her handling and administration of Reynolds's Estate, used funds in the Estate for her personal benefit, and failed to protect Appellants' interest in the wrongful death proceeds.

a. Administration of the Estate

“When a person dies intestate, the District Court which would have had jurisdiction to probate his will, had he made a will, shall have jurisdiction to grant administration on his estate.” KRS 395.030.

The court shall grant administration to the relations of the deceased who apply for administration, preferring the surviving husband or wife, or if the surviving husband or wife does not nominate a suitable administrator, then such others as are next entitled to distribution, or one (1) or more of them whom the court judges will best manage the estate.

KRS 395.040. The probate court appointed Randolph, Reynolds's surviving spouse, to administer the Estate. As administrator of Reynolds's estate, Randolph had a duty to “to marshal the assets of the estate and collect sums which might

have been due the decedent for benefit of the estate[.]” *Priestley v. Priestley*, 949 S.W.2d 594, 598 (Ky. 1997).

With respect to the actual assets of the Estate, Randolph filed a proposed final settlement of the estate in district court. Acting with the assistance of counsel, Appellants intervened and raised objections to Randolph’s proposed settlement. The district court held a hearing. Appellants were given notice of the hearing and participated in it with the assistance of private counsel.

On October 31, 2012, the probate court approved the settlement and ordered Randolph to make distributions in accordance with the proposed settlement. KRS 395.617(2) provides that: “An aggrieved party may, no later than thirty (30) days from the entry of the order upon the proposed settlement, institute an adversary proceeding in Circuit Court pursuant to KRS 24A.120(2).”

Appellants did not institute an adversary action in circuit court within thirty days. Instead, two years later, they filed the underlying action in circuit court.

Our Court encountered a similar situation in *Maratty v. Pruitt*, 334 S.W.3d 107 (Ky. App. 2011). In *Maratty*, the decedent died intestate. He was survived by his mother and his four children. The district/probate court appointed the decedent’s mother to administer the estate. Eventually, the mother moved the probate court to approve a settlement. One of the children objected claiming that the mother had mismanaged the estate. The district court ultimately determined

that the mother made an improper charge to the estate. Thereafter, it ordered disbursements. The mother appealed to circuit court. The circuit court affirmed. Approximately two years later, the children filed an original action in circuit court alleging the mother breached her fiduciary duties by failing to account for approximately \$29,000 in profit to the estate. The circuit court determined that the children's claims were barred by the doctrine of res judicata. Relying on KRS 395.617, we affirmed. Specifically, we held that the probate court's adjudication of the mother's "proposed final settlement precludes any additional litigation concerning the propriety of her actions." *Maratty*, 334 S.W.3d at 113.

After the district court approved the settlement, Appellants had thirty days to "institute an adversary proceeding in Circuit Court pursuant to KRS 24A.120(2)." KRS 395.617(2). This was the only remedy available to Appellants. *Maratty*, 334 S.W.3d at 112. Appellants did not take advantage of it. Because they failed to act, the district court's decision with respect to their charges regarding the administration of the Estate is binding and precludes any further litigation against the administrator. *Id.* at 113.

b. Wrongful Death Claim and Proceeds

The circuit court relied on KRS 395.617 as barring Appellants' claims against Randolph with respect to both the estate and the wrongful death proceeds. While it is true that the probate court's order directed disbursement of the wrongful

death proceeds, the probate court did not have subject matter jurisdiction over the wrongful death proceeds. The total settlement well exceeded the jurisdictional threshold of the district court and the settlement did not belong to the estate. Because the probate court did not have jurisdiction over the wrongful death proceeds, its ruling is not conclusive regarding Randolph's actions with respect to those proceeds. *Vega v. Kosair Charities Comm., Inc.*, 832 S.W.2d 895, 897 (Ky. App. 1992) (“The district court was therefore without jurisdiction to construe or interpret the will, and its ruling is not conclusive of the issue of whether Brian was a beneficiary.”).

Nevertheless, we are unable to identify anything in the record to support Appellants' claim that Randolph breached any fiduciary duty to Appellants with respect to the wrongful death actions. As the personal representative, Randolph had the duty to prosecute the wrongful death claims on behalf of the statutory beneficiaries. KRS 411.130(1). Because Randolph was not the sole beneficiary, she had to hire an attorney to assist in this effort. It is undisputed that Randolph acted promptly in prosecuting the wrongful death claims and in selecting an attorney to represent the statutory beneficiaries. There is no allegation that she was in collusion with either the companies sought to be made liable for Reynolds's death or with Attorney Pruitt. Likewise, there is nothing in the record to suggest that Randolph used poor judgment when she selected Attorney Pruitt. Attorney

Pruitt was licensed to practice law in the Commonwealth, and Randolph was entitled to presume that Attorney Pruitt was competent to perform the requested work.

Appellants also alleged a breach of fiduciary claim against Randolph in her personal capacity. Beneficiaries stand on equal footing with one another. The relationship between beneficiaries is not fiduciary. In fact, beneficiaries often have antagonistic interests. In her individual capacity, Randolph was entitled to receive her statutory share of the wrongful death settlements. In the end, Randolph received her share of the Indiana Mills settlement while Appellants did not. This was not Randolph's fault. Randolph received what she was entitled to under the law. Randolph, as a co-beneficiary, was not required to reduce her own recovery to lessen the losses of the other beneficiaries.

2. Attorney Potter

Randolph, acting in her capacity as administrator, hired Attorney Potter to assist her in settling Reynolds's Estate. Appellants' factual allegations against Attorney Potter are set forth in paragraphs 20-22 of their complaint. They allege that Attorney Potter: (1) failed to protect their interests in Reynolds's Estate "insofar as no monies were allocated for the benefit of the [Appellants] from the estate proper"; (2) improperly permitted the comingling of estate funds and wrongful death proceeds to Appellants' detriment; and (3) failed or refused to

respond to proper inquiries regarding the status of the estate and the monies owed to Appellants in a timely fashion, which could have enabled Appellants to avoid the disbursement of their funds to Randolph.

a. Administration of the Estate

Attorney Potter was hired by Randolph in her capacity as administrator. An attorney hired by a fiduciary (executor or administrator) does not represent either the estate or its beneficiaries. “In representing a fiduciary the lawyer’s client relationship is with the fiduciary and not with the trust or estate, nor with the beneficiaries of a trust or estate.” *Kentucky Bar Ass’n v. Roberts*, 431 S.W.3d 400, 416 n.13 (Ky. 2014) (citing KBA Ethics Op. E-401, at 2 (Sept. 1997)). “[I]n Kentucky, the lawyer is the lawyer of the executor [or administrator], not the estate itself, and thus any duties the attorney owes are to the executor [or administrator].” *Id.*; see also *Kentucky Bar Ass’n v. Fernandez*, 397 S.W.3d 383, 392 (Ky. 2013).

The relationship between Attorney Potter and the Appellants was not a fiduciary one. Additionally, with respect to the estate funds, as noted above, the proposed settlement Attorney Potter prepared was approved by the district court.

As such, the circuit court was correct to grant Attorney Potter summary judgment with respect to her representation of Randolph as administrator.¹⁸

b. Wrongful Death Claim

Attorney Potter was also entitled to summary judgment with respect to Appellants' claims against her as related to the mishandling of any wrongful death proceeds. Attorney Potter represented Randolph in her capacity as administrator. She was not retained to prosecute the wrongful death claims. While the wrongful death proceeds from the Freightliner settlement were incorrectly deposited into the Estate, Attorney Potter was not the one who caused this to occur. Attorney Pruitt motioned the probate court to allow him to deposit the funds into Reynolds's Estate. While Attorney Potter could have objected, we do not believe that her mere failure to object, in the course of representing the administrator of the Estate, is a sufficient basis upon which to hold her liable for breach of fiduciary duty to Appellants. We also note that Attorney Potter appears to be the first of several attorneys involved in this matter to understand that the Freightliner settlement was improperly paid into the Estate. Thereafter, she promptly notified Appellants' counsel and sought clarification from the probate court regarding how to handle the matter. Nothing about her conduct in this regard suggests a breach of duty.

¹⁸ This does not mean that a beneficiary can never assert a cause of action against an attorney employed by a fiduciary. Such a rule would go too far. In certain situations, an ordinary negligence or some other type of claim might be cognizable. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 (2000).

3. Attorney Pruitt

Attorney Pruitt was hired by Randolph, acting in her capacity as a personal representative, to pursue the wrongful death claims on behalf of the statutory beneficiaries, the five Appellants and Randolph, in her personal capacity. Appellants alleged that Attorney Pruitt breached his fiduciary duties to them in his handling of the settlement funds insomuch as they never received their share of the Indiana Mills settlement and did not timely receive their share of the Freightliner settlement.

The circuit court's first and primary basis for granting summary judgment to Attorney Pruitt was that "[Attorney] Pruitt is not vicariously liable for the criminal acts of his employee, Ronda Nixon." The circuit court based this conclusion on the reasoning set forth in *Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44 (Ky. 2008), and *Wood v. Se. Greyhound Lines*, 194 S.W.2d 81, 82 (Ky. 1946). While the circuit court's statement of law is technically correct, it has no application in this case.

Appellants did not allege a fraud, theft, or conversion claim against Attorney Pruitt that would require the jury to impute Nixon's fraud to Attorney Pruitt. Instead, Appellants alleged that Attorney Pruitt breached his fiduciary duties to them in his handling and disbursement of the wrongful death proceeds. In other words, Appellants alleged that Attorney Pruitt's independent actions were a

substantial factor in the damages they suffered. “A person conducting an activity through agents is independently subject to liability for harm resulting from his own conduct if he is negligent or reckless in supervising his agents.” *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 336 (Ky. 2014) (citing RESTATEMENT (SECOND) OF AGENCY § 213 (1958)).

However, an employer may be held liable for the negligent supervision of its employees “only if he or she knew or had reason to know of the risk that the employment created.” *Carberry v. Golden Hawk Transp. Co.*, 402 S.W.3d 556, 564 (Ky. App. 2013) (quoting *Booker v. GTE.net, LLC*, 350 F.3d 515, 517 (6th Cir. 2003)). Attorney Pruitt argues that even if it is *legally possible* to hold him liable under a supervision theory, Appellants have failed to demonstrate any facts necessary to establish that he knew or had reason to know that Nixon posed a risk to his clients.

While Attorney Pruitt may not have had actual knowledge of Nixon’s propensity to steal, the facts of this case present a scenario where a jury could determine that Attorney Pruitt had constructive knowledge that she was stealing from the firm and its clients.

[T]he Rules of Professional Conduct require lawyers to keep “[c]omplete records of such account funds and other property.” SCR^[19]3.130-1.15(a). Moreover, the lawyer must keep books and records “on a *current* basis . . . in

¹⁹ Rules of the Supreme Court.

accordance with generally accepted accounting practice.”
SCR 3.130-1.15(a) Supreme Court Commentary (1)
(2009) (emphasis added). At the very least, then, [the
lawyer] had *constructive knowledge* of the state of his
accounts because he, as a fiduciary, should have known
what was going on with them.

Mark D. Dean, P.S.C. v. Commonwealth Bank & Tr. Co., 434 S.W.3d 489, 503
(Ky. 2014); *see also Kentucky Bar Ass’n v. Lococo*, 54 S.W.3d 164, 167 (Ky.
2001). Whether Pruitt *reasonably* should have discovered Nixon’s theft is a
question for the jury. *Id.* However, the relevance of that question only emphasizes
the fact that there is a factual dispute in this case as to whether Attorney Pruitt
neglected his duty to exercise the ordinary care of a reasonably competent attorney.

Additionally, while knowledge that a particular employee presents a
danger is one way to prove liability, it is not the only way. “One who engages in
an enterprise is under a duty to anticipate and to guard against the human traits of
his employees which unless regulated are likely to harm others. He is likewise
required to make such reasonable regulations as the size or complexity of his
business may require.” RESTATEMENT (SECOND) OF AGENCY § 213, cmt. g.
Attorney Pruitt averred that Nixon was his sole employee and was in charge of
writing checks and balancing the firm’s bank account. It does not appear that
Attorney Pruitt reviewed the firm’s bank account or followed up with his clients to
confirm receipt of settlement funds. Based on these facts, a jury could determine

that Attorney Pruitt failed to take adequate protections to safeguard Appellants' property against theft.²⁰

Aside from the actual theft of the funds, the record also contains other conduct that could give way to a breach of fiduciary duty by Attorney Pruitt. It appears that Attorney Pruitt learned about Nixon's theft sometime as early as 2007, but did not notify Appellants that their funds had been stolen until 2009. He did so only after Appellants filed a motion seeking answers as part of the probate action. Attorney Pruitt's actions in paying the Freightliner settlement into the Estate instead of it dispersing it to the beneficiaries present serious issues as well. While Appellants eventually received their share of this settlement, the delay was substantial and unjustified.

Considering the facts in a light most favorable to Appellants, we cannot agree that Attorney Pruitt was entitled to summary judgment on Appellants' breach of fiduciary duty claims. It would be entirely possible for a jury to determine that Attorney Pruitt's conduct contributed to Appellants' losses and that his conduct both before and after the theft by Nixon fell short of his fiduciary duty to place the Appellants' interests ahead of his own.

²⁰ "There is no substitute for accounting and bookkeeping procedures that have been designed by accounting professionals to ensure that client funds are properly handled." Edward C. Brewer, III & Kelly S. Wiley, *Professional Responsibility*, 29 N. Ky. L. Rev. 35, 56 (2002).

The fact that Appellants have cognizable claims against Attorney Pruitt, however, does not mean that the circuit court was incorrect in granting summary judgment to Attorney Pruitt on the claims of all five of the Appellants. The circuit court alternatively determined that Attorney Pruitt was entitled to summary judgment as a matter of law as to claims of four of the five Appellants on statute of limitations grounds. To this end, the circuit court concluded that the statute of limitations began to run as early as July 9, 2009, when Attorney Pruitt told Appellants that Nixon had stolen their money, but no later than October 31, 2012, when the district court approved its final settlement. The circuit court then applied the one-year statute of limitations period for claims arising against attorneys for acts or omissions arising out of the rendition of professional legal services, and concluded that the claims of the four oldest Appellants were barred because they did not file their claims against Attorney Pruitt until October 31, 2014.

Appellants argue that the circuit court should have applied the five-year statute of limitations set forth in KRS 413.120 because they alleged breach of fiduciary duty claims against Attorney Pruitt. To this end, they assert because Attorney Pruitt represented the Estate, not Appellants, their claims cannot be governed by KRS 413.245 because they are not in privity with Attorney Pruitt.

As already discussed, however, Appellants were the real parties in interest in the wrongful death claim. *Pete*, 413 S.W.3d at 301. Attorney Pruitt owed professional and fiduciary duties directly to Appellants. *Id.* Attorney Pruitt’s “actions in litigating the claim[s] must be construed as having been undertaken for [Appellants’] benefit. [Appellants] had standing to bring [a] malpractice claim[.]” *Id.*

“Claims brought by clients or former clients against attorneys for acts or omissions arising out of the rendition of professional services are governed exclusively by the one-year limitation periods established by KRS 413.245.” *Abel v. Austin*, 411 S.W.3d 728, 739 (Ky. 2013). Appellants’ claims against Attorney Pruitt arose out of Attorney Pruitt’s actions in litigating and settling the wrongful death claims. Accordingly, they are governed by the one-year statute of limitations.

David Reynolds II, Amanda Reynolds, Whitney Reynolds Harper, and Terry Reynolds turned eighteen well over a year before this lawsuit was filed. Their claims are time barred. However, the fifth Appellant, Elysha Reynolds, did not turn eighteen until 2016, after this action had already been commenced. As such, her claims against Attorney Pruitt are not time barred. *See Pete*, 413 S.W.3d at 295.

IV. CONCLUSION

For the reasons set forth above, we affirm the Boyd Circuit Court with respect to all claims asserted against Susan D. Randolph and Hon. Pamela A. Potter. With respect to the claims against Hon. Garis Pruitt, we affirm as to the claims brought by David T. Reynolds, Whitney Rose Reynolds, Amanda Kathryn Reynolds Harper, and Terry Clayton Reynolds, but reverse and remand as to the claims brought by Elysha Marie Reynolds.

ALL CONCUR.

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