

SUPREME COURT OF KENTUCKY
2011-SC-000692-D
(2010-CA-000472)

FILED
OCT 16 2012
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APPELLANTS

MICKIEL PETE, ET AL.

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v.

MICHAEL ANDERSON, JR.
and MALIK ANDERSON

APPELLEES

APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 08-CI-13320
HON. OLU A. STEVENS, JUDGE, PRESIDING

BRIEF OF APPELLANTS

Submitted by



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CERTIFICATE OF SERVICE

It is hereby certified that a copy hereof was served via U.S. Mail on this 15th day of October, 2012 to Zachary Taylor and David Mour, Borowitz & Goldsmith PLC, 401 West Main Street, Suite 1100, Louisville, Kentucky 40202; Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601 and Hon. Olu A. Stevens, Judge, Jefferson Circuit Court, Division 6, Jefferson Judicial Center, 9th Floor, 700 West Jefferson Street, Louisville, KY 40202.



Scott A. Davidson

INTRODUCTION

This is an appeal by Appellants, Mickiel Pete; Cochran Cherry, Givens, Smith, Sistrunk & Sams, P.C. ("Cochran Cherry"); and Dennis C. Burke, of the Court of Appeals' reversal of the summary judgment granted by the trial court dismissing the legal malpractice action filed against them by Appellees, who had no standing to assert the underlying action in the first instance.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants believe oral argument would assist the Court, as the issue raised in the present appeal is novel.

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STATEMENT OF THE CASE

This is a legal malpractice claim filed by Appellees, Michael Anderson, Jr. and Malik Anderson, by and through his mother and legal guardian, Elizabeth Anderson, against Appellants, Dennis C. Burke, Mickiel Pete and Pete's Georgia law firm of Cochran Cherry, Givens, Smith, Sistrunk & Sams, P.C. alleging Appellants provided negligent representation in a wrongful death lawsuit that Mrs. Anderson filed as Administratrix of the Estate of her husband and Appellees' father, Michael Anderson. Appellees' legal malpractice claim is barred by the statute of limitations in KRS 413.245 because it was filed more than one year after the Kentucky Court of Appeals in the underlying wrongful death litigation dismissed the appeal of the summary judgment the trial court granted to the defendant.

The Court of Appeals in the present legal malpractice litigation erroneously held an attorney-client relationship existed between the Attorneys and Appellees, or alternatively, that Appellees were the third-party beneficiaries of the Attorney's legal services agreement with Mrs. Anderson as Administratrix of the Estate, such that the statute of limitations of an action against the Attorneys was tolled during the Appellees' infancy. While an attorney who is retained to assert a lawsuit on behalf of an injured minor owes duties to such minor, this case is different. Appellees are not the injured parties; Mr. Anderson was, and the Attorneys represented his Estate, not Appellees.

Appellees are merely the statutory beneficiaries of one-half of the potential recovery in a wrongful death lawsuit. As beneficiaries of Mr. Anderson's Estate, Appellees do not own the wrongful death action, the Estate owns it. Likewise, the Estate owns the legal malpractice action that arose out of the wrongful death action. Just as Appellees stood in the shoes of the personal representative with respect to the prosecution

of the underlying wrongful death action, they stand in her shoes with respect to the prosecution of the legal malpractice action. Appellees are therefore bound by the actions of Mrs. Anderson in both the wrongful death and legal malpractice actions. Because Mrs. Anderson failed to timely file the subject action, it is time barred for Appellees as well as Mrs. Anderson.

The underlying wrongful death action arose out of a single vehicle car accident when Mr. Anderson struck a retaining wall and was partially ejected from the vehicle, which was owned by his employer.¹ The vehicle was equipped with a pedestal-style driver's seat which had a locking mechanism that allowed the seat to tilt forward and backward where it could be locked in place.² At the time of the accident, the Estate alleged the locking mechanism was not operating properly.³ Mr. Anderson previously complained to maintenance technicians that the seat was not operating properly and would not stay in the locked position.⁴ Dixie Warehouse Services, LLC ("Dixie Warehouse") provided regular maintenance to the fleet of vehicles owned and operated by Mr. Anderson's employer.⁵

Mrs. Anderson initially retained local Kentucky attorney, George Carter, to file a lawsuit against Dixie Warehouse. Attorney Carter filed a wrongful death lawsuit in Jefferson Circuit Court on behalf of Mrs. Anderson, as Administratrix of the Estate of Mr. Anderson. The Estate alleged Dixie Warehouse failed to repair, or negligently

¹ R. at 3 (Complaint, ¶6, attached as Ex. B). (Per CR 76.12(4)(c)(vii), Ex. A is the Court of Appeals' Opinion Reversing and Remanding).

² R. at 3.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

repaired, the locking mechanism and that the failure of the mechanism to operate during the accident proximately caused Mr. Anderson's death.⁶

Attorney Carter subsequently withdrew as plaintiffs' counsel and Mrs. Anderson retained local attorney, Appellant, Dennis Burke, and Appellants, Mickiel Pete and the Georgia law firm of Cochran Cherry, Givens, Smith, Sistrunk & Sams, P.C., all of whom were substituted as counsel for the Estate.

Dixie Warehouse subsequently filed a motion to exclude the Estate's expert witnesses on the grounds that their testimony regarding the cause of the accident did not meet the evidentiary requirements of *Daubert* and KRE 702 for admissible expert opinion.⁷ The underlying trial court granted Dixie Warehouse's motion finding the Estate's experts failed to provide conclusive opinions establishing causation between Dixie Warehouse's repair work and Mr. Anderson's death in the accident.⁸ Because of the exclusion of the Estate's experts, the court granted Dixie Warehouse's motion for summary judgment and dismissed the Estate's lawsuit.⁹

Appellees allege Burke, Pete and the Cochran Cherry firm failed or refused to pursue an appeal "on behalf of Mrs. Anderson", and she timely filed an appeal *pro se*.¹⁰ However, the Court of Appeals ultimately dismissed the appeal on or before April 11, 2006 for failure to comply with the appellate procedures.¹¹

On December 15, 2008, more than two years after the appeal was dismissed, the present legal malpractice action was filed by Appellees, Michael Anderson, Jr. and Malik

⁶ R. at 3-4.

⁷ *Id.* at 4.

⁸ *Id.* at 4-5.

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.*

Anderson, by and through his mother and legal guardian, Elizabeth Anderson¹², against Burke, Pete and the Cochran Cherry firm (collectively, the “Attorneys”).¹³ Michael and Malik are Mr. Anderson’s children.¹⁴

In the Complaint, Appellees recounted the history of the underlying wrongful death action and allege the Attorneys owed legal duties not only to Mrs. Anderson in her capacity as personal representative of the Estate, but also to Michael and Malik “by virtue of their standing as beneficiaries of a portion of any sums that would have been received via the Prior Action” pursuant to KRS 411.130(2)(b).¹⁵ Appellees never alleged in the Complaint the Attorneys owed them any duties with respect to any rights and interests they had separate and independent from their statutory interest in the wrongful death recovery – namely their potential personal claims for loss of consortium. Rather, Appellees devoted the entirety of their Complaint to claims against the Attorneys for the loss of their one-half share of any recovery in the wrongful death action pursuant to Kentucky’s wrongful death statute.

Appellees assert claims for negligence, gross negligence, negligent and/or fraudulent misrepresentation and breach of a fiduciary relationship due to alleged breaches of the Attorneys’ duties to exercise reasonable care, skill, legality and diligence possessed and exercised by a Kentucky attorney practicing in similar circumstances.¹⁶

¹² Mrs. Anderson is not a named plaintiff in the legal malpractice action, presumably because she does not dispute that any claim she may have asserted against the Attorneys is barred by the one-year statute of limitations. KRS 413.245.

¹³ R. at 1-7. The Court of Appeals, throughout its Opinion, refers only to Pete as the party against whom Appellees asserted the legal malpractice action. Of course, the legal malpractice action was filed against local attorney, Burke, as well.

¹⁴ Appellees alleged in their Court of Appeals brief that at the time of Mr. Anderson’s death, both were minors, and that Michael reached the age of majority at the time the legal malpractice action was filed. (Brief of Appellants submitted to Court of Appeals, p. 5).

¹⁵ R. at 3, 5 (Complaint, ¶¶ 5, 12).

¹⁶ R. at 5-6 (Complaint, ¶¶ 13, 15, 16).

The Attorneys filed a motion for summary judgment arguing the Appellees' claims are barred by the one-year statute of limitations.¹⁷ The trial court granted the motion on February 25, 2010.¹⁸ The court held Mrs. Anderson, as personal representative of the Estate, "alone had the right to [file] the claim for wrongful death, and she alone had the right to file a claim for legal malpractice arising from the wrongful death action."¹⁹ Because "the [Appellees] stand in the shoes of the personal representative of the Estate, [they] are bound by the representative's actions," including Mrs. Anderson's failure to timely file the legal malpractice claim.²⁰ The trial court rejected Appellees' third-party beneficiary argument as well, distinguishing the cases they cited and holding the Attorneys' actions were primarily and directly intended to benefit not Appellees but the two parties who possessed the right to the initial action—Mrs. Anderson individually and as personal representative of the Estate.

The Court of Appeals reversed. The Court held there is a fact issue whether there was an attorney-client relationship between the Attorneys and Appellees with respect to the assertion of the wrongful death action.²¹ Regardless of the existence of such a relationship, the Court further held Appellees were intended third-party beneficiaries of the attorney-client relationship between the Attorneys and Mrs. Anderson, as personal representative of Mr. Anderson's Estate.²² The Court then stated, almost as an aside, that the question of the Attorneys' negligence, *including their failure to make loss of consortium claims for Appellees*, should survive summary judgment.²³

¹⁷ R. at 51-93.

¹⁸ R. at 130 (Trial court's Opinion and Order at 6, attached as Ex. C).

¹⁹ R. at 129, (Ex. C at 5).

²⁰ *Id.*

²¹ Ex. A (Court of Appeals' Opinion Reversing and Remanding at 5-8).

²² *Id.* at 8-10.

²³ *Id.* at 10.

As will be shown below, the Court of Appeals misconstrued and misapplied Kentucky law in holding the Appellees had standing to assert the legal malpractice action where they did not have standing to assert the underlying wrongful death action. This Court should correct such error and reinstate the summary judgment properly granted by the trial court.

ARGUMENT

I. **It is Undisputed the Subject Legal Malpractice Action was Filed Beyond the One-Year Statute of Limitations.**

Legal malpractice actions are subject to a one-year statute of limitations. KRS 413.245 provides that “a civil action, whether brought in tort or contract, arising out of any act or omission in rendering, or failing to render, professional services for others shall be brought within one (1) year from the date of the occurrence or from the date when the cause of action was, or reasonably should have been, discovered by the party injured.” A legal malpractice claim accrues, and thereby triggers the running of the statute of limitations, when the underlying claim is finally determined.²⁴ When an appeal has been filed in the underlying action, a legal malpractice claim accrues “when the result [o]f the appeal become[s] final and the trial court’s judgment become[s] the unalterable law of the case.”²⁵

In this case, the dismissal of the wrongful death claim was finally determined on April 11, 2006 when the Court of Appeals dismissed Mrs. Anderson’s appeal. The present legal malpractice action, however, was filed on December 15, 2008, more than two years after the underlying action was finally determined. Mrs. Anderson did not join in this action as a named plaintiff, presumably because she acknowledges any claim for

²⁴ *Michels v. Sklavos*, 869 S.W.2d 728, 730 (Ky. 1994).

²⁵ *Hibbard v. Taylor*, 837 S.W.2d 500, 502 (Ky. 1992).

legal malpractice she may have had individually and on behalf of the Estate is time barred. It is therefore undisputed that if Appellees stand in the shoes of Mrs. Anderson as personal representative of their father's estate for purposes of the subject action, they are bound by her failure to timely file such action, and the Court of Appeals' opinion must be reversed.

II. Appellees Lack Standing to Assert the Legal Malpractice Action, Which Precludes an Attorney-Client or Third-Party Beneficiary Relationship Between the Attorneys and Appellees.

A. The Court of Appeals Erroneously Held a Fact Issue Exists Regarding Whether the Attorneys and Appellees Had an Attorney-Client Relationship that Precludes Summary Judgment.

The Court of Appeals first held there is a fact issue regarding whether an attorney-client relationship existed between the Attorneys and Appellees such that the Attorneys were representing Mrs. Anderson as next friend of Appellees as well as Mrs. Anderson individually and the Estate. The Court relied on an affidavit of Mrs. Anderson in which she stated that based on conversations with the Attorneys, she understood they were representing her *and* Appellees in the underlying action.

Rather than addressing the issue of law at hand, the Court of Appeals begged the relevant question. If Appellees did not have standing to assert the wrongful death action, it is simply irrelevant whether Mrs. Anderson believed the Attorneys were representing her children as well as her individually or as personal representative of Mr. Anderson's Estate.

A minor has standing to assert a personal injury claim arising out of medical negligence²⁶, a car accident²⁷ or any other incident that results in bodily injury. If the

²⁶ See *Ferguson v. Cunningham*, 556 S.W.2d 164 (Ky.App. 1977).

²⁷ See *Lemmons v. Ransom*, 670 S.W.2d 478 (Ky. 1984).

attorney who represents the minor in any of these actions commits malpractice, the minor has standing to sue the attorney, and the statute of limitations on such claim is tolled until the minor reaches the age of majority.²⁸

In this case, however, Appellees' claim against the Attorneys does not arise out of any of the underlying actions referenced above. Rather, the underlying lawsuit in which the Attorneys provided legal services was a wrongful death action, which due to its nature is unique among the actions in which a minor may assert that the attorney committed malpractice. Indeed, unlike other underlying actions that may give rise to claims of legal malpractice, minor children do not own the wrongful death cause of action—the decedent's estate owns it. It naturally follows that the estate, not the minor children, owns a claim for legal malpractice committed in an underlying wrongful death action.

Courts have consistently held that under the statute, "the right of action is in the personal representative exclusively." *Wheeler v. Hartford Accid. & Indem. Co.*²⁹ While the surviving spouse and children split the amount recovered, case law is clear that the *estate* owns the wrongful death claim, not the beneficiaries of the estate.

In *Tennimon v. Bell Helicopter Textron, Inc.*³⁰ the decedent's wife brought a wrongful death action against a helicopter manufacturer eleven years after the husband died in a helicopter crash in Kentucky. The wife filed the action as the personal representative of the decedent's estate and as next friend of their minor children. The district court dismissed the plaintiffs' action as barred by the statute of limitations.

²⁸ KRS 413.170; KRS 413.245.

²⁹ 560 S.W.2d 816, 819 (Ky. 1978).

³⁰ 823 F.2d 68 (5th Cir. 1987) (applying Kentucky law).

On appeal, the plaintiffs argued that assuming the statute barred the wife's claims, it did not bar the claims of the minor sons because the statute is tolled during the period of their minority. In affirming the dismissal of the action as time barred, the Fifth Circuit held:

[U]nder the substantive law of Kentucky, Tennimon's minor sons have no cause of action for wrongful death; instead, Kentucky's wrongful death statute vests the right to bring suit exclusively in the personal representative of the decedent.³¹

Thus, because the children had no claim for wrongful death, the tolling provision suspending the limitations period during their infancy did not apply and failed to save the action from dismissal.³²

The fact that the beneficiaries have no rights in a wrongful death action separate and independent from the personal representative of a decedent's estate is made even clearer when examining the nature of a wrongful death action. It is "well settled" that the wrongful death statute gives the personal representative "the same cause of action that the deceased would have if he himself had brought the action."³³ Indeed, the measure of damages is the destruction of the decedent's power to earn money.³⁴

Thus, the damage for which recovery may be sought is damage sustained by the decedent himself by virtue of the destruction of the decedent's ability to earn money. Such damage inures to the estate and "[t]he existence and status of survivors has no bearing on the calculation of this value."³⁵ While the surviving spouse and children are

³¹ *Id.* at 73.

³² *Id.* at 74. *See also, Spangler's Adm'r v. City of Middlesboro*, 191 S.W.2d 414, 415 (Ky. 1945) ("The cause of action for wrongful death accrues to the *estate* of the deceased . . .") (emphasis added).

³³ *Nally v. Blandford*, 291 S.W.2d 832, 834 (Ky. 1956).

³⁴ *Spangler's Adm'r*, 191 S.W.2d at 415.

³⁵ *Birkenshaw v. Union Light, Heat & Power Co.*, 889 S.W.2d 804, 806 (Ky. 1994).

the beneficiaries of the recovery, the wrongful death statute contemplates that the decedent sustained the damage, not the beneficiaries.

It is clear that because minor children have no claim for the wrongful death of a parent, they stand in the shoes of the personal representative and are bound by the representative's actions and decisions in the prosecution of the action.³⁶ Because the personal representative owns and has the exclusive right to file a wrongful death action, it naturally follows that the personal representative also owns and must be the one to assert a legal malpractice claim that arises out of legal services rendered in the wrongful death action. Indeed, the beneficiaries cannot own the legal malpractice claim when they do not own the underlying claim in which the legal malpractice was allegedly committed. Just as the recovery in a wrongful death action is for the benefit of the surviving spouse and/or children despite that they do not own the action, the recovery in a subsequent legal malpractice claim also inures to the beneficiaries without vesting in them any ownership rights to such claim.

This case is on point with the decision in *Gresham v. Strickland*³⁷ in which the Florida Court of Appeals held that an attorney owes no duty to the beneficiaries of a wrongful death recovery where the beneficiaries had no standing to recover wrongful death damages individually. In that case, the decedent died in a train accident, and a child from the decedent's first marriage was appointed personal representative of the estate and filed a wrongful death lawsuit against the railroad.³⁸ Appellants were children from the decedent's second marriage, and retained attorney Strickland to represent their

³⁶ See *Wheeler*, 560 S.W.2d at 819 citing *Louisville & N.R. Co. v. Turner*, 162 S.W.2d 219 (Ky. 1942) (A settlement made by a personal representative in a wrongful death action "is binding upon the beneficiaries.").

³⁷ 784 So.2d 578 (Fla. App., 4th Dist. 2001).

³⁸ *Id.* at 579.

interests even though they understood that only their older half-sibling, as personal representative, could bring suit.³⁹ Subsequently, the attorney for the estate as a courtesy advised Strickland that the railroad proposed to stipulate to liability if the estate would agree to waive punitive damages, and requested Strickland's consent to agree to such proposal.⁴⁰ Strickland advised appellants of the proposal, and based on Strickland's representation that punitive damages were not recoverable under Florida law, the appellants consented to the proposal.⁴¹ The wrongful death action resulted in a recovery of \$400,000 per beneficiary.⁴²

Subsequently, the estate of another passenger killed in the train accident obtained a verdict that included \$50 million in punitive damages.⁴³ When the appellants learned of this verdict, they sued Strickland alleging he committed legal malpractice by erroneously advising them of the recoverability of punitive damages.⁴⁴ The trial court granted summary judgment to Strickland, and the Florida Court of Appeals affirmed.

The Court noted that under Florida law, the right to bring a punitive damages claim for wrongful death belongs exclusively to the personal representative of the estate.⁴⁵ Despite the fact that there indisputably was an attorney-client relationship between Strickland and the beneficiaries, because "[a]ppellants had no standing to bring an action to recover for punitive damages," the Court held "Strickland could not have neglected any duty to his clients by not personally investigating any punitive damages

³⁹ *Id.*

⁴⁰ *Id.* at 580.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* citing Fla. Stat. §768.20.

claim.”⁴⁶ The Court further noted that the personal representative (the older half-sibling to the appellants) sued the estate’s attorney for legal malpractice for failure to pursue the punitive damages claim, resulting in a settlement. The Court recognized that because the estate recovered a monetary amount, the appellants “will benefit as beneficiaries of the estate.”⁴⁷

In this case, Appellees did not own and had no right to file the wrongful death action against Dixie Warehouse, just as the beneficiaries in *Gresham* did not own and could not assert individual punitive damages claims against the railroad. Like attorney Strickland in *Gresham*, the Attorneys in this case owed no duties to Appellees individually in the prosecution of the wrongful death action against Dixie Warehouse. Appellees owed duties only to Mrs. Anderson as personal representative of the Estate.

As the holder of the exclusive right to bring the wrongful death action against Dixie Warehouse, Mrs. Anderson also had the exclusive right to file the present legal malpractice action against the Attorneys. As in Florida, under Kentucky law Appellees, as beneficiaries of the Estate, would benefit from any recovery of the legal malpractice action. However, Mrs. Anderson’s failure to timely file it within the one-year limitations period bars any claim against the Attorneys, and prevents Appellees from receiving any recovery that Mrs. Anderson may have received against the Attorneys. As the trial court aptly held, “[Appellees] cannot now try to circumvent the limitations period and revive the legal malpractice claim by arguing they were minors. They lacked standing to prosecute the initial action as a matter of law.”⁴⁸

⁴⁶ *Id.* at 580-81.

⁴⁷ *Id.* at 581.

⁴⁸ R. at 129 (Ex. C, p. 5).

In holding the Attorneys may have had an attorney-client relationship with Appellees personally that precludes summary judgment, the Court of Appeals relied on *Branham v. Stewart*⁴⁹ for the proposition 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.”⁵⁰ That decision is entirely distinguishable from the present action.

In *Branham*, the mother of an injured minor child retained the attorney to represent her individually as well as next friend of the child in an action arising out of injuries the child sustained in a car accident. The attorney eventually settled all tort claims, and Stewart, the child, through his guardian, later sued the attorney for legal malpractice and breach of fiduciary duty by paying the net proceeds of the settlement to the mother who allegedly dissipated the funds belonging to or intended to benefit the Stewart. The attorney filed a motion for summary judgment arguing Stewart could not maintain his claims because he was retained by his next friend and statutory guardian, and there was no attorney-client relationship between the attorney and Stewart. The trial court granted the motion and the Court of Appeals reversed.

The Kentucky Supreme Court affirmed holding that “the minor is the real party in interest in any lawsuit filed on his behalf by the minor’s next friend. Kentucky case law has long boldly proclaimed that the minor ‘himself’ is the plaintiff in cases filed by the minor’s next friend.”⁵¹

The present case would be analogous to *Branham* if Appellees sustained personal injuries and Mrs. Anderson retained the Attorneys to assert a claim on their behalf.

⁴⁹ 307 S.W.3d 94 (Ky. 2010).

⁵⁰ Ex. A, p. 7 citing 307 S.W.3d at 95 (Ky. 2010).

⁵¹ 307 S.W.3d at 97-98.

However, Mr. Anderson was the one who sustained personal injuries. Mrs. Anderson did not retain the Attorneys to assert the wrongful death action as next friend of Appellees. Indeed, the Attorneys could not have asserted the wrongful death action on Appellees' behalf because Kentucky statute mandates that such an action "shall be prosecuted by the personal representative of the deceased."⁵²

B. Appellees' Lack of Standing to Assert the Legal Malpractice Action Precludes a Third-Party Beneficiary Relationship, and Regardless, Appellees were not Third-Party Beneficiaries of the Attorneys' Legal Representation in the Wrongful Death Action.

The Court of Appeals next held as a matter of law that Appellees were third-party beneficiaries of the Attorney's representation of the Estate in the wrongful death action which permits them to maintain the present legal malpractice action.⁵³ However, Appellees' lack of standing as beneficiaries of a wrongful death recovery to maintain a legal malpractice claim arising out of the prosecution of the underlying action bars such a claim regardless of whether the beneficiaries assert a direct attorney-client relationship or third-party beneficiary status. Regardless, the Court erred when it held the Appellees were intended third-party beneficiaries.

The Court relied on the decision in *Vaughn's Adm'r v. Louisville & N.R. Co.*⁵⁴ That action did not involve a legal malpractice claim asserted by the beneficiaries of the recovery in a wrongful death lawsuit. Nor did it involve an analysis of third-party beneficiary law.

Rather, in that case, Robert Vaughn, Jr. was the driver of a truck when it was struck by a train as he was crossing a railroad crossing. Robert and two other young boys

⁵² KRS 411.130(1).

⁵³ Ex. A at 9-10.

⁵⁴ Ex. A at 8 citing 179 S.W.2d 441 (Ky. 1944).

riding in the truck were killed. The estates of the two boys sued Robert's parents on a vicarious liability theory, alleging Robert was their employee acting in the course of his employment at the time of the accident. The boys' estates also sued the railroad. At the trial, the jury found both the parents and the railroad were liable. While defending the action by the boys' estates, the parents brought their own action against the railroad for the wrongful death of Robert. The Court held the parents were collaterally estopped to relitigate the issue of Robert's negligence in light of the identity of parties between the parents as Robert's agent and as beneficiaries of any recovery in the wrongful death action.⁵⁵

Clearly, *Vaughn's Adm'r* is completely different from and does not involve any of the same issues that are involved in the present action. Nor does the *Robertson v. Vinson*⁵⁶ decision cited by the Court support imposing third-party beneficiary status on Appellees. In that case, the Kentucky Supreme Court addressed whether the proceeds of uninsured motorist coverage should be distributed to the sole beneficiary of the decedent's will (the decedent's live-in girlfriend), or to his intestate heirs (the decedent's children) under the wrongful death statute as damages for tort liability. In resolving this question in favor of the intestate heirs, the Court simply recognized the statutory recipients of any wrongful death recovery are the decedent's children in the absence of a surviving spouse.⁵⁷ That case hardly establishes that these statutory beneficiaries are intended third-party beneficiaries of the personal representative's retention of an attorney to prosecute such action.

⁵⁵ *Id.* at 444-45.

⁵⁶ Ex. A at 8 citing 58 S.W.3d 432 (Ky. 2001).

⁵⁷ *Id.* at 434.

The Court of Appeals also cited *Hill v. Willmott*⁵⁸ in which the Court held “[a]n attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity.” However, in such cases, the attorney’s services must have been “primarily and directly intended to benefit” the third party.⁵⁹

In *Hill*, a doctor sued an attorney for negligently filing a medical malpractice lawsuit against him which the attorney filed on behalf of one of the doctor’s patients. The doctor argued the attorney owed him a duty to comply with ethical rules not to file unauthorized lawsuits. The Court of Appeals held the attorney who filed the medical malpractice action did *not* owe the doctor a duty because the doctor was not the intended beneficiary of the attorney’s services.⁶⁰ Thus, *Hill* obviously fails to support the conclusion of the Court of Appeals in this case that the Attorneys owed Appellees a duty in maintaining the wrongful death action.

In analyzing whether the attorney owed the doctor a duty, the Court in *Hill* reviewed the decision in *Donald v. Garry*.⁶¹ In *Donald*, an attorney was employed by a collection agency to bring an action for the collection of a debt owed to a client of the agency. The creditor sued the attorney after the collection proceeding was dismissed for lack of diligent prosecution allegedly due to the attorney’s negligence. The California Court of Appeals held the attorney was liable to the creditor despite the absence of privity. In so holding, the Court stated the general rule that “[a]n attorney may be liable

⁵⁸ Ex. A at 8 citing 561 S.W.2d 331, 334 (Ky.App. 1978).

⁵⁹ *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 14 (Ky.App. 1998).

⁶⁰ *Id.* at 335.

⁶¹ 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (Cal.Ct.App. 1971).

for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity”⁶²

In *Donald*, the creditor was not simply the beneficiary of any recovery in the underlying collection action. Rather, the creditor *owned* the cause of action that its agent, i.e., the collection agency, retained the attorney to assert on its (i.e. the creditor’s) behalf. Here, pursuant to Kentucky law, Appellees did not own the wrongful death action – the Estate owned it.

In this case, the trial court correctly held the Attorneys’ sole duty was to represent the interests of the two parties with whom they had a contractual relationship: (1) the Estate, the party who, under KRS 411.130(1) and through its personal representative, Mrs. Anderson, owned and prosecuted the wrongful death action, and (2) Mrs. Anderson individually, who filed an individual claim for loss of consortium. Thus, the Attorneys’ legal services were “*primarily* and *directly* intended to benefit the two parties who possessed the rights to the initial action, not the Plaintiffs.”⁶³ Thus, even if Appellees had standing to assert the legal malpractice claim based on a third-party beneficiary theory, which they do not, Appellees’ claim fails as a matter of law.

III. Appellees are also Precluded from Maintaining Claims for Misrepresentation and Breach of Fiduciary Duty.

Appellees’ ancillary claims for misrepresentation and breach of fiduciary duty also fail for lack of standing. Kentucky law is clear that all causes of action arising out of the rendering of professional services are subject to the statute of limitations in KRS 413.245. That statute provides for a one-year statute of limitations to file a civil action

⁶² 561 S.W.2d at 334 citing *Donald*, 19 Cal.App.3d at 771.

⁶³ Ex. C, p. 6 (emphasis in original).

“whether brought in tort or contract” arising out of the rendering or failing to render professional services.

In *Matherly Land Surveying, Inc. v. Gardiner Park Development, LLC*⁶⁴, a subdivision developer sued an engineering and land surveying firm for negligence and breach of contract with respect to various services the firm was to provide incidental to the construction of a subdivision. The trial court held that both causes of action were barred by the one-year statute of limitations under KRS 413.245, rejecting the developer’s argument that the 15-year statute of limitations under KRS 413.090 applied to the breach of contract claim.

The Kentucky Supreme Court affirmed, holding that because KRS 413.245 applies to actions “whether brought in tort or contract” and the breach of contract claim stems for the performance or lack of performance of professional services, the one-year statute of limitations applied to the developer’s claim.⁶⁵

Thus, because Appellees’ claims for misrepresentation and breach of fiduciary duty are essentially melded into the legal malpractice claim, they suffer from the same fatal flaw from which Appellees’ legal malpractice claim suffers – lack of standing. The Estate, not Appellees, owns the ancillary claims for misrepresentation and breach of fiduciary duty arising out of the Attorneys’ legal representation in the wrongful death action. Therefore, Appellees lack standing to assert these claims, and they were properly dismissed along with the legal malpractice claim.

⁶⁴ 230 S.W.3d 586 (Ky. 2007).

⁶⁵ *Id.* at 590. See also *Collett v. Freid*, 2004 U.S. Dist. LEXIS 19937 (E.D. Ky., July 15, 2004) (holding that plaintiff’s medical malpractice and fraud claims against doctor are both subject to one-year statute of limitations in KRS 413.245).

IV. To the Extent the Court of Appeals' Decision is Based on a Duty of the Attorneys with Respect to the Assertion of the Children's Loss of Consortium Claims, the Court Erroneously Failed to Address the Attorneys' Waiver Argument.

After holding that Appellees may maintain the legal malpractice action, the Court of Appeals noted Appellees will have the burden to prove the Attorneys failed to exercise ordinary care of a reasonably competent attorney in the same or similar circumstances.⁶⁶ The Court then stated, "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."⁶⁷

Although it is not entirely clear, it appears the Court held a fact issue exists regarding whether the Attorneys owed Appellees a duty to assert loss of consortium claims on their behalf in the wrongful death action. However, the Court failed to address the Attorneys' argument that Appellees waived such a claim by failing to assert it in their Complaint.

Appellees failed to make any allegations whatsoever in the Complaint filed against the Attorneys that related to any personal claims they purportedly had against Dixie Warehouse, such as for loss of consortium. Rather, Appellees alleged the Attorneys owed them duties only "by virtue of their standing as beneficiaries of a portion of any sums that would have been received via the Prior Action" pursuant to KRS 411.130(2)(b).⁶⁸

⁶⁶ Ex. A at 10 citing *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003).

⁶⁷ Ex. A at 10 (emphasis added).

⁶⁸ R. at 5 (Complaint at ¶12).

Thus, Appellees have waived any claim against the Attorneys arising out of their purported representation of Appellees with respect to their potential loss of consortium claims against Dixie Warehouse.⁶⁹

CONCLUSION

It is simply nonsensical to allow one set of beneficiaries (Appellees) to bring a legal malpractice action to recover damages that the other beneficiary (Mrs. Anderson) is indisputably precluded from recovering when the interests of all beneficiaries were being represented by the same party (Mrs. Anderson as the personal representative of the Estate). Accordingly, the Attorneys respectfully request this Court to reverse the Court of Appeals Opinion thereby reinstating the summary judgment properly granted by the trial court.

⁶⁹ See *Miracle v. Bell County Emergency Medical Servs.*, 237 S.W.2d 555, 560 (Ky.App. 2007) (Court refused to consider appellants; contention that the appellee violated the Open Meetings Act where they failed to timely assert such claim in the trial court); *Florman v. MEBCO Ltd. Partnership*, 207 S.W.3d 593, 606 (Ky.App. 2006) (appellants waived claim for breach of fiduciary duty and could not argue claim on appeal where appellants failed to plead it in their cross-claim); *Cumberland Valley Rural Elec. Cooperative Corp. v. Public Service Comm'n*, 433 S.W.2d 103, 104-05 (Ky. 1968) (appellant could not raise on appeal claim that appellee violated a statute where such claim was not included in its original complaint).



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APPENDIX

- Ex. A Court of Appeals' Opinion Reversing and Remanding
- Ex. B Complaint
- Ex. C Trial court's Opinion and Order granting summary judgment