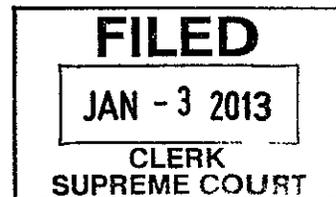


SUPREME COURT OF KENTUCKY
2011-SC-000692-D
(2010-CA-000472)



MICKIEL PETE, ET AL.

APPELLANTS

v.

MICHAEL ANDERSON, JR.
and MALIK ANDERSON

APPELLEES

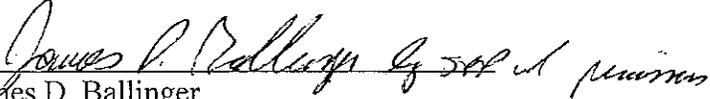
APPEAL FROM JEFFERSON CIRCUIT COURT
CASE NO. 08-CI-13320
HON. OLU A. STEVENS, JUDGE, PRESIDING
And
COURT OF APPEALS
NO. 2010-CA-000472

REPLY 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 2nd day of January, 2013 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

Appellees admit that unless the statute of limitations on their asserted legal malpractice claim is tolled during their minority, their action is time-barred. In arguing they have a right maintain a legal malpractice action independent of their mother, Elizabeth Anderson, who brought the underlying wrongful death action in the first instance, Appellees largely recite the same inapplicable decisions that the Attorneys distinguished in their Appellants' Brief.¹ Appellees' other arguments fail to justify allowing one set of beneficiaries (Appellees) to bring a legal malpractice action while another beneficiary (Mrs. Anderson) is time-barred from bringing it when the interests of all beneficiaries were being represented by the same party (Mrs. Anderson as the personal representative of the decedent's estate).

ARGUMENT

I. **The Trial Court Properly Held There is No Genuine Issue of Material Fact Regarding the Absence of an Attorney-Client Relationship.**

Appellees argue that the existence of a contract, including one for legal representation, is a fact issue for the jury. Thus, Appellees contend the trial court prematurely granted the Attorneys' Motion for Summary Judgment because discovery could provide a "complete story" regarding the existence and nature of an attorney-client relationship between Appellees and the Attorneys. Appellees' argument is misguided.

The issue raised by the Attorneys in their joint summary judgment motion, and the issue that is presently on appeal, is whether the Attorneys owed Appellees any duties when performing legal services in the wrongful death action and whether Appellees are bound by the actions of Mrs. Anderson in bringing the legal malpractice action as they

¹ See, e.g., Appellees' Brief at 8-9, 11-12, 14.

were bound in the wrongful death action. It is well settled that the existence of a duty is a question of law to be determined by the Court.² Similarly, the legal effect of Mrs. Anderson's failure to timely file the present action on Appellees' ability to maintain it is also a question of law for the Court to decide.

It is the Attorneys' contention that they owed no duties to Appellees because although Appellees would receive part of the proceeds of any recovery in the wrongful death action, they did not own the cause of action. Instead, the Attorneys owed duties to the decedent's estate, who owned the wrongful death action, and Mrs. Anderson as personal representative of the estate. The Attorneys further contend that Appellees stand in the shoes of Mrs. Anderson with respect to the legal malpractice claim like they stood with respect to the underlying wrongful death action such that the statute of limitations to assert the legal malpractice claim is not tolled during the period of their minority. These clearly are legal questions, the resolution of which could not be impacted by any amount of discovery.

Because of these are purely legal questions, purported evidence that Appellees offer to create a genuine factual issue are irrelevant. Regardless, even if they were relevant, such evidence fails to create a fact issue. Appellees cite to the "unrefuted" affidavit of Mrs. Anderson in which she expressed her belief that the Attorneys represented Appellees in the wrongful death action. She referenced a meeting at her home with the Attorneys to discuss the loss Appellees suffered as a result of their father's death, and statements by the Attorneys that a trust fund would be created for the benefit

² *Sheehan v. United Services Auto. Ass'n.*, 913 S.W.2d 4, 6 (Ky.App. 1996); *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992)

of Appellees if there was a recovery against Dixie Warehouse Services.³ Appellees similarly cite to statements the Attorneys made in pleadings filed in the wrongful death action that reference damages suffered by Appellees as a result of their father's death caused by the negligence of Dixie Warehouse Services.⁴

The loss Appellees suffered as a result of Mr. Anderson's death is not relevant in a wrongful death action in which damages are limited solely to the destruction of the decedent's power to earn money.⁵ The Attorneys' statements in the underlying pleadings and purportedly to Mrs. Anderson simply acknowledge that Appellees would receive part of the proceeds of a recovery in the wrongful death action. That Appellees would share in a recovery is an undisputed statement of the law based on Kentucky statute, and hardly establishes an attorney-client relationship. Even the Nebraska Supreme Court in *Perez v. Stern*, cited by Appellees, recognized that "an attorney's knowledge that the representation could injure or benefit an identified person will not, without more, create a duty to that person."⁶

Appellees next argue that the underlying files that Appellees admit the Attorneys produced to Appellees' counsel "while this appeal was pending" show the Attorneys understood they represented the Children's interests.⁷ It is wholly improper to refer to and rely on documents that are not part of the record on appeal, and this Court should not

³ Appellees' Brief at 6-7 citing Mrs. Anderson's Affidavit at ¶¶6-7.

⁴ Appellees' Brief at 10-11.

⁵ See *Birkenshaw v. Union Light, Heat & Power Co.*, 889 S.W.2d 804, 806 (Ky. 1994).

⁶ 777 N.W. 545, 552 (Neb. 2010).

⁷ While the trial court stayed discovery on the Attorneys' motion, the Attorneys voluntarily produced their underlying files during the pendency of the present appeal in the process of settlement discussions. The Attorneys strenuously dispute that the files evidence an attorney-client relationship with the Appellees.

consider Appellees' slanted and unsupported view that the files support their position that an attorney-client relationship existed.⁸

II. The Attorneys Did Not Owe Duties to Appellees.

In addition to relying on decisions the Attorneys distinguished in their Appellants' brief,⁹ Appellees cite to inapposite foreign decisions for the proposition that a beneficiary in a wrongful death action has standing to bring a legal malpractice claim against an attorney who negligently litigates such action. The decision in *Perez* actually supports the Attorney's position. In that case, the Nebraska Supreme Court denied the existence of an attorney-client relationship by confirming the "well-established principle that when an attorney is employed to render services for an estate, he or she acts as attorney for the personal representative" despite the fact that "the minor children would have benefited from a successful wrongful death claim. . . ."¹⁰

Although the Court in *Perez* nevertheless held the attorney owed duties to the beneficiaries, its holding was based on several factors that are not applicable under Kentucky law when determining whether an attorney owes a duty of care to a third party, including the foreseeability of harm, the degree of certainty that the third party suffered injury, the policy of preventing future harm and whether recognition of liability would impose an undue burden on the profession.¹¹

Appellees' attempt to distinguish *Gresham v. Strickland* is likewise unavailing. Appellees erroneously contend that unlike Kentucky's wrongful death statute, the decedent's estate under Florida's statutory scheme is solely entitled to an award of

⁸ *American Oil Co. v. Brooks*, 424 S.W.2d 831, 834 (Ky. 1967) (holding matters not included in the record will not be considered on appeal).

⁹ See, e.g., *Vaughn's Adm'r v. Louisville & N.R. Co.*, 179 S.W.2d 441 (Ky. 1944); *Branham v. Stewart*, 307 S.W.3d 94 (Ky. 2010).

¹⁰ 777 N.W.2d at 550.

¹¹ *Id.* at 550-51.

punitive damages, not the individual survivors. The wrongful death statutes in both states are similar in this regard. The right to bring a punitive damages claim for wrongful death in Florida and the right to bring a wrongful death claim in Kentucky generally both belong exclusively to the personal representative of the estate.¹²

CONCLUSION

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.



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¹² 784 So.2d 578, 580 (Fla. App. 2001); *Wheeler v. Hartford Accid & Indem. Co.*, 560 S.W.2d 816, 819 (Ky. 1978).