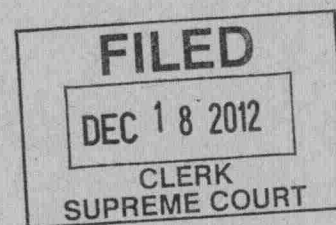


Commonwealth of Kentucky  
Supreme Court  
2011-SC-000692-D  
(2010-CA-000472)



MICKIEL PETE, et al

APPELLANTS

v.

APPEAL FROM COURT OF APPEALS  
(CIVIL ACTION NO. 08-CI-13320)

MICHAEL ANDERSON, JR.

APPELLEES

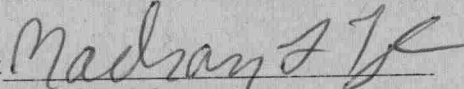
-and-

MALIK ANDERSON

**BRIEF OF APPELLEE**

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**CERTIFICATE OF SERVICE REQUIRED BY 76.36(1) and CR 5.03**

The undersigned does hereby certify that copies of this Brief were served upon the following named individuals by U.S. Mail first-class, postage prepaid on December 17, 2012: Hon. Olu A. Stevens, Circuit Court Judge, Jefferson County Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; James D. Ballinger, Esq., THE BALLINGER FIRM, 9720 Park Plaza Avenue, Suite 102, Louisville, KY 40241; Scott A. Davidson, Esq., BOEHL STOPHER & GRAVES, LLP, AEGON Center, Suite 2300, 400 West Market St., Louisville, KY 40202; and Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. The undersigned does also certify that the record on appeal has been returned to the Clerk of the Court of Appeals on or before this date.

  
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*Counsel for Appellees*

### **STATEMENT CONCERNING ORAL ARGUMENT**

Appellees, Malik and Michael Anderson, Jr., disagree with Appellants and do not believe oral argument would assist the Court in deciding the issues. The legal issues are clear from the briefs and the record from the Trial Court below is neither extensive nor complex.

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## COUNTERSTATEMENT OF THE CASE

On December 15, 2008, Appellees, Michael Anderson Jr. ("**Michael**") and Malik Anderson ("**Malik**"), a minor, by and through his next friend and mother, Elizabeth Anderson ("**Mrs. Anderson**") (Michael and Malik hereafter collectively referred to as the "**Children**"), by counsel, filed this professional negligence action against the Appellants, Dennis C. Burke, Esq. ("**Mr. Burke**"), Mickiel Pete, Esq. ("**Mr. Pete**"), and the law firm of Cochran, Cherry, Givens, Smith, Sistrunk & Sams, P.C. ("**Cochran**") (collectively, the "**Appellants**" or the "**Attorneys**"). The alleged negligence sprang from a prior civil action involving a motor vehicle accident resulting in the wrongful death of the Children's father, Michael D. Anderson, in *Anderson, et al. v. Dixie Warehouse Services, LLC* (Jefferson Circuit Court, No. 02-CI-07835) (the "**Prior Action**") (See Complaint, r. at 1-7).

Mr. Anderson's untimely death was caused by the negligence of Dixie Warehouse, the defendant in the Prior Action charged with the repair and maintenance of the vehicles in the fleet of Mr. Anderson's employer, including the vehicle driven by Mr. Anderson at the time of the accident. Specifically, Dixie Warehouse failed to repair a malfunctioning locking mechanism which stabilized and secured the driver's seat of the vehicle being operated by Mr. Anderson at the time of the fatal accident. The driver's seat jarred loose while Mr. Anderson was driving and caused Mr. Anderson to lose control of the vehicle, which struck a retaining wall. On impact with a retaining wall, Mr. Anderson's body was partially ejected from the vehicle, resulting in serious physical injuries and his death shortly thereafter. Mr. Anderson left behind a wife, Mrs. Anderson, and his two Children, Michael and Malik, the Appellees, then both minors.

On or about October 16, 2002, Mrs. Anderson, surviving spouse of Mr. Anderson, filed the Prior Action and thereafter retained the services of the Attorneys in connection with the wrongful death litigation. The Prior Action sought damages flowing from Mr. Anderson's wrongful death, which by statute, KRS 411.130(2)(b), would have passed one-half to Mr. Anderson's surviving spouse, Mrs. Anderson, and one-half to his Children, Michael and Malik. (*See* Complaint, r. at 1-6). Notably, the Attorneys asserted a loss of consortium claim on behalf of Mrs. Anderson as the surviving spouse, but neglected to assert claims for loss of society, services, love, affection, and parental consortium on behalf of the Children, Appellees.

On or about December 1, 2004, Dixie Warehouse filed a motion for summary judgment on all claims asserted against it in the Prior Action, including the wrongful death claim and Mrs. Anderson's loss of consortium claim. After review of all relevant facts and applicable laws, the court entered an order on August 30, 2004 in the Prior Action in favor of Dixie Warehouse on Mrs. Anderson's loss of consortium claim, however, the court reserved the remainder of claims asserted in the amended complaint filed therein for trial. (*Id.* at 4). On or about May 25, 2005, after conducting depositions of two expert witnesses retained by Attorneys in the Prior Action, Dixie Warehouse filed a motion to exclude said experts on the grounds their testimony regarding the cause of the accident did not meet the evidentiary requirements of *Daubert* and KRE 702 for expert opinion. Dixie Warehouse also claimed neither expert had "the knowledge, skill, expertise, training or education to testify as an expert in auto accident reconstruction." The court, after numerous filings of memoranda by both parties in the Prior Action, again ruled in favor of Dixie Warehouse, and dismissed the Prior Action, and in doing so, noted:

[I]t is proper to exclude [the Experts] because they do not provide conclusive opinions on evidence demonstrating causation or Mr. Anderson's accident. The Court finds that without expert testimony demonstrating the causal link between Dixie Warehouse's act or omission and Mr. Anderson's death, allowing their testimonies would only provide the jury with speculative theories.

(Opinion and Order, at 2, Prior Action, entered August 15, 2005; see also, r. at 4-5). The Attorneys then moved the court to reconsider the August 15, 2005 Order in light of new expert opinions procured by the Attorneys on the issue of causation. However, in an order dated September 28, 2005, the trial court declined the motion because the Attorneys had not timely disclosed the new expert opinions. (*See* September 28, 2005 Order, Ex. D).

Subsequently, the Attorneys failed and/or refused to pursue an appeal of the trial court's dismissal, and although Mrs. Anderson filed a notice of appeal *pro se*, it was ultimately dismissed on April 11, 2006 based on her failure to comply with the procedures of the Court of Appeals. (R. at 5). As noted above, Michael and Malik are the children of Mr. Anderson and Mrs. Anderson. At the time of their father's death, both were minors and Malik, as of the date of the filing of this Brief, remains an un-emancipated minor.

On December 15, 2008, the Children filed this professional negligence action against the Attorneys on theories of negligence, gross negligence, misrepresentation, and breach of fiduciary duty. (R. at 1-6). After the complaint was filed, the Children sought discovery from the Attorneys but the Attorneys resisted producing *any* information, including the original client file, pending the outcome of a contemplated motion for summary judgment, which they filed on July 2, 2009. As grounds for the summary judgment motion, the Attorneys argued the Children's claims were time-barred and should be dismissed with prejudice. Specifically, the Attorneys reasoned that the Children stood in the shoes of the



Administratrix of the Estate of Mr. Anderson and thus the one (1) year statute of limitation should not be tolled during the Children's minority. (R. at 51-93). The Jefferson Circuit Court agreed with the Attorneys and granted the motion for summary judgment on the grounds that the legal malpractice claim belonged to the Estate, and that the Children did not have privity with the Attorneys and thus did not have standing to sue for professional negligence. For obvious reasons, the dismissal was appealed to the Kentucky Court of Appeals.

On review *de novo*, the Court of Appeals reversed the summary judgment on two grounds. First, the Court of Appeals reversed because it found a genuine issue of material fact as to whether the Children were in privity with the Attorneys, relying on this Court's authority in *Branham v. Stewart*, 307 S.W.3d 94, 95 (Ky. 2010) for the proposition that an attorney representing a minor's next friend on behalf of the minor owes professional duties to the minor and that the minor is said to be in an attorney-client relationship the attorney, despite the minority. The Court of Appeals considered the affidavit of Mrs. Anderson of record, which was uncontested by the Attorneys, in deciding it was a reasonable for Mrs. Anderson to believe the Attorneys were also representing her Children, Michael and Malik, in connection with the Prior Litigation. Thus, the Court of Appeals reversed because of the existence of a factual controversy as to whether the Children were in privity with the Attorneys in the Prior Litigation.

Second, the Court of Appeals reversed on another, independent ground. Irrespective of whether the Children were in privity with the Attorneys, the Intermediate Court held the Attorneys nevertheless owed the Children duties as the Children were the intended beneficiaries of the Attorneys' professional legal services. The Court of Appeals recognized



the long-standing rule in Kentucky that a legal malpractice claim may be asserted by the intended beneficiaries of the attorney's services, and the Children here were the intended beneficiaries because one-half of the proceeds from the wrongful death action would have flowed to them under Kentucky's Wrongful Death Statute, KRS 411.130.

On motion of the Attorneys, this Court granted discretionary review of the Court of Appeals' decision.

### **STANDARD OF REVIEW**

A trial court's grant of summary judgment on a legal issue is subject to *de novo* review. *Branham v. Stewart*, 307 S.W.3d 94, 97 (Ky. 2010). Here, the trial court granted summary judgment based on a perceived lack of duty owed by the Attorneys to the Children, a legal question, and thus the applicable standard of review is *de novo*.

### **ARGUMENT**

#### **A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT DISMISSING THE CHILDRENS' CLAIMS.**

The Court of Appeals was correct in its determination the trial court erred by determining that the Attorneys owed no duties to the Children. Under the Kentucky Rules of Civil Procedure, summary judgment "shall be rendered forthwith 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. Although this procedural mechanism is "designed to expedite the disposition of cases and avoid unnecessary trials when no genuine issues of material fact are raised . . . the rule is to be cautiously applied." *Steelvest, Inc. v. Scansteel Svc. Ctr., Inc.*, 807 S.W.2d 476, 480 (Ky.

1991)(citations omitted). In ruling on a motion for summary judgment, “[t]he record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Id.* Moreover, “[t]he party moving for summary judgment has the burden of establishing the non-existence of any issues of material fact.” *Goff v. Justice*, 120 S.W.3d 716, 724 (Ky. App. 2002). Thus, “[s]ummary judgment is only proper where the movant shows that the adverse party **could not prevail under any circumstances.**” *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)(emphasis added). Because there were genuine issues of material fact which must be resolved by a jury regarding the existence of a fiduciary relationship between the Attorneys and the Children, the Court of Appeals correctly reversed the trial court’s award of summary judgment. Moreover, because the Attorneys owed the Children a legal duty of care, the Attorneys were not entitled to judgment as matter of law and thus the Court of Appeals correctly reversed the trial court on this point as well.

**i. The Trial Court Ignored The Existence of a Genuine Issue of Material Fact.**

The Court of Appeals correctly noted the trial court erred by ignoring the existence of a genuine issue of material fact. On appeal, the Court of Appeals correctly reversed based on the Affidavit of Mrs. Anderson, which the Attorneys failed to refute in any respect in the trial court, a copy of which is appended hereto as Exhibit C. In her Affidavit, Mrs. Anderson indicated she reasonably believed the Attorneys represented her Children’s interests:

6. In or around the summer of 2004, Mr. Pete met with me and my children, Michael and Malik, in person at my home to discuss the loss my children suffered as the result of the death of their father, Mr. Anderson.

7. On several occasions during the course of Defendants’ representation in the Prior Action, Mr. Pete explained to me that a trust fund would be created for the benefit of my children, including Michael and Malik, should there be

a recovery of money from Dixie Warehouse Services in connection with the Prior Action.

8. Because of the course of my dealings and communications with Defendants, I understood that Defendants were representing me, my children, and my husband's, Mr. Anderson, estate in the Prior Action.

9. Specifically, I understood that Defendants were representing any claims my children, including Michael and Malik, may have had against Dixie Warehouse Services in the Prior Action.

(Aff. Elizabeth Anderson, Ex. C)(emphasis added). Thus, these un-controverted facts of record should have precluded entry of summary judgment on the issue of whether an attorney-client or fiduciary relation existed between the Children and Attorneys. Further, from the court's record it is clear the Attorneys undertook representation of the Children's interests in the Prior Action, and then failed to meet the applicable standard of care for the protection and preservation of those interests.

Generally, the existence of an attorney-client relationship is a question of fact for the jury. *Marrs v. Kelly*, 95 S.W.3d 856, 860 (Ky. 2003). It is clear from the pleadings, affidavits of records, and the parties' memoranda that Attorneys undertook representation of the interests of the Children. However, because formal discovery has not yet taken place in this case, a complete story of the exact nature of the relationship between Attorneys and the Children is not yet of record. The Children require the Attorneys to produce the *entire* client file, including correspondence, pleadings, records, reports, notes, and other documents in their possession which the Children requested through interrogatories and requests for production of documents, to which the Attorneys have not formally responded.

However, while this appeal was pending, the Attorneys turned over approximately 2,460 documents in the file relating to their representation in the Prior Action. It is clear from

these documents that the Attorneys understood they represented the Children's interests.

The only facts of record, evinced in the Affidavit of Mrs. Anderson, establish and support the existence of a direct, attorney-client relationship between the Children, Michael and Malik, and the Attorneys. To the extent there is a dispute on this point, it is properly one for a jury to resolve. Thus, because the question of the existence of the attorney-client relationship is one of fact, the Intermediate Court correctly found the trial court erred in finding there was no genuine issue as to this fact. *Steelvest*, 807 S.W.2d at 480. Accordingly, this Court must affirm the Court of Appeals' reversal of the summary judgment entered below and remand with directions to the trial court to proceed with a trial on the merits.

**ii. The Attorneys Owed Duties To The Children.**

In Kentucky, the law is clear an attorney handling a wrongful death action represents the statutory beneficiaries, the real parties in interest under KRS 411.130. *Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 179 S.W.2d 441, 455 (Ky. 1944). Thus, it follows that the statutory beneficiaries in a wrongful death action have standing to sue an errant attorney who prosecuted the action, in their own right. However, this Court has not heretofore decided this issue in the context of Kentucky's wrongful death statute.

The general rule in Kentucky's sister jurisdictions is that a beneficiary in a wrongful death action has standing to bring a legal malpractice claim against an attorney who negligently pursues the claim on behalf of the beneficiaries, even in the absence of a direct, attorney-client relationship. *See, e.g., Leyba v. Whitley*, 907 P.2d 172 (N.M. 1995); *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989); *Oxendine v. Overturf*, 973 P.2d 417 (Utah, 1999); *Perez v. Stern*, 777 N.W.2d 545 (Neb. 2010). The rule should be no different here because Kentucky law has long recognized an attorney's duty to intended beneficiaries,

which are specifically identified in Kentucky's wrongful death statute. *See Branham v. Stewart*, 307 S.W.3d 94 (Ky. 2010).

In *Branham*, this Court held that an attorney pursuing a claim on behalf of a minor owed professional duties to the minor. In reaching its conclusion, this Court did not rely on a third-party beneficiary theory but rather adopted a "real party in interest" test, ruling that the minor enjoys an attorney-client relationship with the attorney, despite his or her minority, because the attorney undertook representation the minor's interests, the "real party with the legal interest warranting representation." In so holding, this Court rejected the argument that the minor's guardian or next friend, and not the minor, is the attorney's only client:

In this case, defendant acted as the attorney for plaintiff's guardian ad litem. But in doing so, he clearly undertook to represent plaintiff's interests. Plaintiff was the real party with the legal interest warranting representation. As the intended beneficiary of the relationship between her guardian ad litem and defendant, plaintiff also was in privity with defendant, despite her minority. **In cases like this, to suggest that the guardian alone is the attorney's client, and not the minor, is to ignore the *guardian ad litem's* representative capacity and the minor's direct interest.**

*Id.* at 99 (emphasis added). Thus, relying on *Branham*, the Court of Appeals correctly reversed the trial court on the issue of whether the Attorneys owed any professional duty of care to the Children, irrespective of the existence of privity. Indeed, even the trial court, as well as the Court of Appeals, acknowledged the rule that lawyers owe duties to intended beneficiaries. However, the trial court erroneously determined that the Attorneys' legal services were not "primarily" and "directly" intended to benefit the Children. This is flawed logic in light of the law of the Commonwealth which mandates that the Children would have recovered one-half the proceeds from the wrongful death action. KRS 411.130(2).

Certainly, the Attorneys were employed to provide services to directly benefit the

Children. Indeed, the Attorneys pursued, on behalf of the Children, a wrongful death action as a result of the death of Mr. Anderson. Although Kentucky law requires that such an action be prosecuted in the name of the personal representative of the decedent's estate, KRS 411.130(1), the estate actually has no interest in the proceeds derived therefrom by operation of KRS 411.130(2). Here, had proceeds been recovered in the Prior Action as the result of the death of Mr. Anderson, those proceeds would have belonged one-half to his surviving spouse, Mrs. Anderson, and the other half, to Mr. Anderson's Children, Michael and Malik. KRS 411.130(2). Thus, the "clients" to whom the Attorneys owed duties with respect to the services they rendered in the Prior Action were Mrs. Anderson, in her personal capacity and in her capacity as personal representative of the Estate of Mr. Anderson, *and* Michael and Malik, personally. Had the Attorneys made a recovery in the Prior Action and then absconded with the funds, can it be said the Children would not have had a direct right of action against the Attorneys to recover those funds? Accordingly, while any claim for negligence of the Attorneys arising out of the Prior Action would be barred as to Mrs. Anderson, this action, brought by her sons, clearly is not.

The Attorneys were in privity with, owed duties to, and thus had first-party liability to the Children. In addition, the Attorneys also failed to assert, on behalf of Michael and Malik, a cause of action for the loss of services of their father. It is clear from Mrs. Anderson's Affidavit that the Attorneys were representing Michael and Malik. In further support of this fact, it is clear Mr. Pete knew he was representing the interests of Michael and Malik based on an August 2, 2004 memorandum he filed in the Prior Action in response to a motion for summary judgment:

[T]here are genuine issues of material fact which are in dispute between the parties relating to the following . . .

Whether [Mrs. Anderson], **her children**, and the Estate of Michael Anderson have suffered damages? Yes . . .

(Pl.'s Resp. In Opposition to Def.'s Mot. For Summary Judgment, at 2, Prior Action)(emphasis added). If the Attorneys were not representing the Children's interests in the Prior Action, why would the Attorneys argue in the Prior Action that the Children's loss of their father precluded entry of summary judgment? Logic and the law clearly tell us the Attorneys were representing the interests of the Children and were well aware of that fact.

Further, in a later brief filed in the Prior Action on December 4, 2004, in opposition to the defendants' motion for summary judgment, Mr. Pete again rehashed his position that the Prior Action was "a suit in law authorized pursuant to the Tort laws of Kentucky on the ground that [Mrs. Anderson], **her four children**, and Mrs. Anderson's deceased husband has suffered damages due to the negligence of the Defendants." (Plaintiff's Brief of Law in Opp. To Def.'s Mot. For Summary Judgment, at 1)(emphasis added). Clearly, Mr. Pete knew he was representing not only the interests of Mrs. Anderson and the estate of Mr. Anderson, but also the Children, Michael and Malik, in the Prior Action, as well.

The Children submit it is quite clear the Attorneys owed them duties as their counsel, however, even if it is not the case that there was a direct attorney-client relationship, the law still operates to impose legal duties on the Attorneys. The courts of the Commonwealth have long held that certain persons who are not a lawyer's clients can recover for damages caused by the lawyer's negligence. *See Hill v. Willmott*, 561 S.W.2d 331, 334 (Ky. App. 1978) ("An attorney may be liable for damage caused by his negligence to a person intended to be



benefitted by his performance irrespective of any lack of privity . . .”). *Hill v. Willmott* was endorsed by the Kentucky Court of Appeals over 15 years ago in *Seigle v. Jasper*, 867 S.W.2d 476, 483 (Ky. App. 1993); *see also*, *Rose v. Davis*, 288 Ky. 674, 157 S.W.2d 284, 284-85 (Ky. 1941), *overruled on other grounds by Penrod v. Penrod*, 489 S.W.2d 524 (Ky. 1972). Here, it is clear Malik and Michael were intended to be benefitted by the performance of the Attorneys. That fact is supported by the judicial record in the Prior Action<sup>1</sup> and by Mrs. Anderson’s affidavit. Combining this law with the fact that the proceeds of any recovery that might have been had in the Prior Action leads to no other conclusion but that Michael and Malik have viable claims against the Attorneys; certainly, the Children have standing to bring this legal malpractice action.

Moreover, the Children have standing to bring this action as they were the real parties in interest in the Prior Action. As the Kentucky high Court long ago held, “the substance of [an action under KRS 411.130] is that the surviving beneficiaries are suing, since they only are entitled to the benefit of a recovery . . . The administrator is merely a nominal plaintiff. The real parties in interest are the beneficiaries whom he represents.” *Vaughn’s Adm’s*, 179 S.W.2d at 445. As above discussed, clearly Michael and Malik, as the children of Mr. and Mrs. Anderson, were beneficiaries of the wrongful death action pursuant to KRS 411.130(2)(b). The Administratrix in the Prior Action, Mrs. Anderson, was merely a nominal party. Thus, the Attorneys represented the Children in the Prior Action, as the Children were the real parties in interest.

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<sup>1</sup> The Children, as they have below, request this Court to take judicial notice of the facts contained in the judicial record

But for the Attorneys' negligence, misrepresentations, and breach of fiduciary obligations in connection with the Prior Action, the Children would have received their portion of the recovery awarded therein. In addition, in the Prior Action, the Attorneys pursued the recovery of damages for the Children in the Prior Action but failed to amend the complaint to assert loss of consortium claims on behalf of Michael and Malik. Because the Attorneys failed to meet the standard of care applicable to lawyers in the community in litigating the Prior Action, the Children are entitled to a trial by jury on the issues of Attorneys' negligence and the damages arising therefrom.

**B. THE ESTATE OF A TORT VICTIM DOES NOT OWN THE WRONGFUL DEATH ACTION.**

The Attorneys claim the Estate of Mr. Anderson, and it alone, "owned" the wrongful death claim, and thus the legal malpractice claim arising therefrom. The argument is unfounded and not well-taken. This Court recently rejected a similar argument in *Branham*, 307 S.W.3d at 99, which involved a child's malpractice suit against an attorney who represented the child's guardian. There, this Court stated, "[i]n cases like this, to suggest that the guardian alone is the attorney's client, and not the minor, is to ignore the *guardian ad litem's* representative capacity and the minor's direct interest." Applied to this case, the rule in *Branham* refutes Attorneys' argument that the Administratrix alone was their client. Holding otherwise would require the Court to ignore the representative capacity of the estate's personal representative and the Children's direct interest in the wrongful death action.

Indeed, under Kentucky law, a decedent's estate generally has no interest in a wrongful death action. To suggest that the estate "owns" the wrongful death claim is

technically incorrect. This is because by statute the proceeds of a wrongful death claim pass *outside the estate* to the statutory beneficiaries. KRS 411.130(2). *Only* if the decedent left no statutory beneficiaries would the wrongful death proceeds pass to the estate under KRS 411.130(2)(e). As Kentucky's high Court wrote long ago: "The recovery in an action for wrongful death is not for the benefit of the estate but for the next of kin." *Vaughn's Adm'r v. Louisville & N.R. Co.*, 297 Ky. 309, 179 S.W.2d 441, 444 (Ky. 1944).

In support of its argument that the Children lack standing to sue the Attorneys for professional negligence, the Attorneys rely on a Florida case, *Gresham v. Strickland*, 784 So.2d 578 (Fla. App. 4 Dist. 2001). The Attorneys' reliance on this case is misplaced and is contrary to the law of the Commonwealth. *Gresham* involved a legal malpractice claim against an attorney who represented the survivors of a decedent killed in a train accident, not the personal representative of the decedent's estate. The claim stemmed from negligent advice of the survivors' attorney regarding the availability of punitive damages against the defendant railroad. The estate was represented by separate counsel who joined in the negligence advice. Under Florida's statutory scheme, unlike Kentucky's wrongful death statute, the decedent's estate was solely entitled to an award of punitive damages, not the individual survivors. Thus, the survivors had no interest in the punitive damages claim. Rather, the estate had the only interest in the punitive damages claim, and the estate in fact sued its attorney over the negligent advice, which resulted in a settlement to the estate and ultimately to the survivors. Here, unlike *Gresham*, one-half the proceeds of the wrongful death claim flowed directly to the Children, *not the Estate*. In contrast, in *Gresham*, the attorney for the personal representative of the estate represented only the estate with regard

to the punitive damages claim, not the interests of the survivors. Here, the Attorneys prosecuted the wrongful death action and by operation of law were essentially required to represent the interests of the beneficiaries of the wrongful death proceeds, which by statute, included the Children.

The Attorneys also cite to *Tennimon v. Bell Helicopter Textron, Inc.*, 823 F.2d 68 (5<sup>th</sup> Cir. 1987) and other cases for the proposition that a beneficiary has no right to bring or prosecute a wrongful death claim. The statement of law is correct: under Kentucky's wrongful death statute, the personal representative has the exclusive right to bring a wrongful death suit. This is a procedural provision designed to prevent a multitude of lawsuits from being filed by a litany of survivors. The right to prosecute a cause of action does not equate to a right to recover damages, i.e., a pecuniary interest in an action. Thus, the fact that a personal representative has the exclusive right to institute and maintain a wrongful death action is immaterial to a beneficiary's entitlement to the proceeds of such an action. Neither the personal representative, nor the estate, "owns" a wrongful death action.

In the case at bar, Mr. Anderson was survived by his wife and his two Children, thus the proceeds would have passed directly to Mrs. Anderson and the Children, in equal parts, pursuant to KRS 411.130(2)(b). Thus, the Children, and *not* the Estate, have an interest in the wrongful death action. Accordingly, because the Children, *not* Mr. Anderson's Estate, would be entitled to half the proceeds of the wrongful death action, the Children have a direct, legal interest in a professional negligence claim arising from the wrongful death claim and thus have standing to sue. Because the Children were minors at the time of the legal malpractice, the claims against the Attorneys were tolled during the period of their minority.

**C. THE CHILDREN DID NOT WAIVE THEIR CLAIMS AGAINST THE ATTORNEYS ARISING FROM THE ATTORNEYS' FAILURE TO ASSERT LOSS OF CONSORTIUM CLAIMS.**

The Children did not waive the claims against the Attorneys arising from the Attorneys' failure to assert loss of parental claims against Dixie Warehouse by failing to cite the specific omission in their Complaint. In the Complaint, the Children pleaded generally that the Attorneys owed them a professional duty of care in connection with the handling of the wrongful death litigation and that the Attorneys breached this duty. Kentucky is a notice-pleading jurisdiction; negligence claims need not be pleaded with particularity. Moreover, below, no discovery has taken place, nor have the pleadings closed, thus the Children will have an ample opportunity to correct any deficiencies in the Complaint on remand prior to trial, without causing any prejudice to the Attorneys. Finally, below, in their response to the motion for summary judgment and in their appellant brief's filed with the Court of Appeals, the Children in fact raised their criticism of the Attorneys in failing to assert loss of parental consortium claims. There is no indication in the record the Children waived this incident of malpractice.

**CONCLUSION**

For all the aforementioned reasons, the Children, Michael and Malik Anderson, Appellees, respectfully request this Court to AFFIRM the Opinion and Order of the Court of Appeals, and REMAND for trial on the merits.

Respectfully submitted,

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