

RENDERED: MARCH 9, 2007; 10:00 A.M.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000322-MR

ELIZABETH STEWART, GUARDIAN OF
THE ESTATE AND THE PERSON OF GARY
RYAN STEWART, AN INCOMPETENT ADULT

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 04-CI-01190

IRA E. BRANHAM;
MILLER KENT CARTER; AND
BRANHAM & CARTER, P.S.C.

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR AND VANMETER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

TAYLOR, JUDGE: Elizabeth Stewart, as Guardian of the Estate and the Person of Gary Ryan Stewart, an Incompetent Adult, brings this appeal from a December 20, 2005, summary judgment of the Pike Circuit Court dismissing legal malpractice claims against

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Ira E. Branham, Miller Kent Carter, and Branham & Carter, P.S.C. We reverse and remand.

Gary Ryan Stewart was severely injured in an automobile accident in Pike County, Kentucky, on July 21, 1997.² Vicki Potter Backus, Gary's mother, contracted with Ira E. Branham to provide legal representation for claims arising from the accident. In August 1997, Branham filed a complaint in the Pike Circuit Court against the tortfeasor on behalf of Backus individually, as administratrix of the Estate of Adam Taylor Stewart,³ and as next friend of Gary Ryan Stewart. In the capacity of next friend of Gary, Backus asserted a tort claim seeking compensation for the injuries suffered by Gary as a result of the accident (the tort claim).

Backus subsequently filed an action in late 1997 in the Pike District Court seeking appointment as guardian for Gary. Branham allegedly prepared the application for Backus's appointment as guardian. Backus was ultimately appointed guardian of Gary and was required to post a \$5,000.00 bond. In early 1998, after being appointed guardian, Backus agreed to settle all tort claims arising out of the automobile accident, including Gary's claim. It appears that the claims settled for \$1.3 million; \$650,000.00 was purportedly allocated as compensation for Gary's injuries. The net proceeds for Gary's claims were paid by Branham to Backus as guardian.

² Gary Ryan Stewart was fifteen years old at the time of the accident and turned eighteen years old on January 19, 2000.

³ Gary, Gary's brother (Adam Taylor Stewart) and their father (Gary Stewart, Sr.) were in the automobile when the accident occurred. Adam and Gary Sr. were killed in the accident. Adam and Gary's parents, Gary Sr. and Vicki Potter Backus, were divorced at the time of the accident. Adam and Gary lived with their mother in Arkansas. Gary Sr. lived in Pike County, Kentucky. Adam and Gary were visiting Gary Sr. at the time of the accident.

Gary married Elizabeth Stewart on July 22, 2000. In 2003, Stewart was appointed guardian for Gary by the Scott County Circuit Court in Arkansas.⁴ The following year, Stewart filed the instant claim in the Pike Circuit Court against Branham, Miller Kent Carter, and Branham and Carter, P.S.C. Therein, Stewart alleged that Branham committed legal malpractice and breached various fiduciary duties to Gary arising from his legal representation of the tort claims. Branham denied having an attorney-client relationship with Gary. Specifically, Branham argued that his client was Backus, as next friend and as guardian of Gary. Branham claimed that no attorney-client relationship existed with Gary; therefore, Stewart had no standing to maintain the legal malpractice action. On December 20, 2005, the circuit court entered summary judgment dismissing Stewart's legal malpractice action. This appeal follows.

Stewart contends the circuit court committed error by entering summary judgment concluding there existed no attorney-client relationship between Branham and Gary. Summary judgment is proper where there exist no material issues of fact and movant is entitled to judgment as a matter of law. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Summary judgment is only proper:

“[T]o terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.”

Id. at 483 (quoting *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985)).

For the reasons hereinafter stated, we hold summary judgment was improperly granted.

⁴ Hereinafter, Elizabeth Stewart, in her capacity as guardian for Gary Ryan Stewart, will be simply referred to as Stewart.

The relationship of attorney and client is contractual in nature and may be created by either an express or an implied contract. *Daugherty v. Runner*, 581 S.W.2d 12 (Ky.App. 1978). Generally, the attorney-client relationship is considered personal and may not be vicariously asserted. However, our courts have recognized an exception—an attorney may be liable in negligence to a third party if that third party was intended to be benefited by the attorney’s performance. *Hill v. Willmott*, 561 S.W.2d 331 (Ky.App. 1978).⁵

As a result of the automobile accident, Backus initiated and pursued the tort action in her capacity as next friend of Gary and later in her capacity as guardian for Gary. Any professional duties Branham owed Gary must be analyzed in the context of these “agency-type” relationships that existed between Backus and Gary. *See Kash v. Kash’s Guardian*, 260 Ky. 377, 85 S.W.2d 866 (1935). Consequently, we must decide whether an attorney-client relationship extended to Gary when Branham represented Backus in her capacity as next friend of Gary and when Branham represented Backus in her capacity as guardian of Gary. Stated differently, resolution of this appeal centers upon two questions of law—(1) whether an attorney-client relationship exists between an attorney and an infant when the infant’s next friend pursues legal action on behalf of the infant, and (2) whether an attorney-client relationship exists between an attorney and a ward when a guardian pursues legal action on behalf of the ward. These questions will be addressed *seriatim*.

⁵ This is consistent with the law in this Commonwealth that no stranger to a contract may sue for its breach unless the contract was made for his benefit. *Sexton v. Taylor County*, 692 S.W.2d 808 (Ky.App. 1985).

It has been recognized that “next friend” is a procedural device that enables an infant’s legal claim to be asserted in court. *Jones v. Cowan*, 729 S.W.2d 188 (Ky. 1987). More importantly, the next friend is considered a nominal party, and the infant is regarded as the “true litigant.” *Kash*, 85 S.W.2d 866; *Jones*, 729 S.W.2d 188. Indeed, the next friend merely represents the interests of the infant in any legal action. *Kash*, 85 S.W.2d 866.

Upon the foregoing legal principles, we believe that an attorney-client relationship necessarily extended to Gary when Branham represented Backus in her capacity as next friend of Gary. Backus, as next friend, possessed no independent legal interests in the tort action; rather, Backus, as next friend, simply promulgated the legal interests of the “true litigant,” Gary. As such, Branham’s professional duties, as an attorney, naturally encompassed the infant, Gary, who possessed the actual legal interests being vindicated.⁶ We, thus, hold that an attorney-client relationship exists between an attorney and an infant when the infant’s next friend pursues legal action on behalf of the infant.⁷ We now turn to the issue of whether an attorney-client relationship existed with Gary when Branham represented Backus in her capacity as guardian of Gary.

⁶ Our opinion does not pass upon the question of what, if any, legal duties are owed by an attorney to a next friend.

⁷ Our Courts have extended an attorney’s duty to third parties in other analogous situations. *See, e.g., Seigle v. Jasper*, 867 S.W.2d 476 (Ky.App. 1993)(holding that when an attorney performed a title examination for a bank to secure a mortgage loan for the bank’s customer, the attorney’s duty to exercise ordinary care was extended to the customer, who paid for the attorney’s services).

A guardian is appointed by the court and vested with legal authority over the care of the ward⁸ and of the ward's property. KRS 387.065. In this Commonwealth, a guardian is statutorily empowered to institute a legal action to "protect" the ward's estate and to settle such action upon court approval. KRS 387.125. In such an action, the guardian merely preserves and protects the interests of the ward. When an action is pursued by the guardian on behalf of the ward, the ward is recognized as the "real party in interest." 39 C.J.S. *Guardian & Ward* § 261 (2003).

In the case at hand, Backus, as guardian, pursued the tort action on behalf of her ward, Gary. In fact, Gary, as ward, was the real party in interest, and Gary's legal interests were being vindicated in the tort action. Consequently, Branham's professional duties would necessarily extend to Gary. Accordingly, we hold that an attorney-client relationship exists between an attorney and a ward when a guardian pursues legal action on behalf of the ward.⁹

In sum, we are of the opinion that an attorney-client relationship existed between Branham and Gary, as an infant and as a ward. Therefore, the circuit court erred by entering summary judgment dismissing the legal malpractice claims.¹⁰

For the foregoing reasons, the summary judgment of the Pike Circuit Court is reversed and this cause remanded for proceedings not inconsistent with this opinion.

⁸ The term "ward" is defined as an "individual for whom a guardian has been appointed." 39 C.J.S. *Guardian & Ward* § 261 (2003).

⁹ We do not pass upon the question of what, if any, legal duties are owed by an attorney to a guardian.

¹⁰ Our opinion does not address the merits of the legal malpractice claims asserted by Stewart, which are not before this Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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