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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001469-MR

DONNA YEAGER, AS THE EXECUTRIX OF
THE ESTATE OF STACEY CLISE — APPELLANT

APPEAL FROM GRANT CIRCUIT COURT
v. HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 08-CI-00238

RICHARD CLISE — APPELLEE

AND NO. 2008-CA-001576-MR

DONNA YEAGER, ADMINISTRATRIX OF
THE ESTATE OF STACEY CLISE AND DONNA
YEAGER, AS MOTHER AND NEXT FRIEND OF
JACOB CLISE, A MINOR CHILD — APPELLANTS

APPEAL FROM GRANT CIRCUIT COURT
v. HONORABLE ROBERT W. MCGINNIS, JUDGE
ACTION NO. 07-CI-00072

ANGELA YOUNG-HOWE; GRANT
COUNTY BOARD OF EDUCATION;
BILLIE CAHILL; TRACEY GOE; JIM
COLSON; THERESA RUMP; JACKIE

YOUNG; DON MARTIN; RICHARD CLISE; AND JACOB CLISE APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: Donna Yeager, Executrix of the Estate of Stacey Clise and Mother and Next Friend of Jacob Clise, hereinafter the "Estate," appeals from orders of the Grant Circuit Court dismissing the Estate's tort claims arising from a school bus crash and for a declaratory judgment regarding a contingency fee agreement. Concluding that the trial court committed no error, we affirm.

On January 17, 2007, Jacob Clise, the son of Richard and Stacey Clise, was seriously injured in a school bus crash in Grant County. At the time of the crash, Richard and Stacey were divorced and shared joint custody of their son. On January 25, 2007, Stacey executed a contingency fee agreement for legal services with Counsel Eric Deters, and Richard executed a separate and unrelated legal services agreement with another law firm several days later.

On February 6, 2007, Stacey filed civil actions against various defendants arising out of her son's injuries from the bus crash. Stacey filed her suit individually and as the mother and guardian of Jacob.[1] Stacey's claims were based on negligence; negligence *per se* based on alleged violations of statutes and

[1] It is undisputed that Stacey was never appointed the statutory guardian of Jacob.

regulations; parental loss of a child's services; loss of consortium; and negligent infliction of emotional distress. Richard filed a separate civil action on the same day for damages arising from the bus crash.

Subsequently, Richard and Stacey engaged in legal proceedings regarding which parent would exercise greater custody of their son. Following a custody hearing, on March 23, 2007, Stacey was found unconscious in her residence from an overdose and later died. After Stacey's death, Donna Yeager, Stacey's mother, was appointed executrix of her daughter's estate and was substituted by name for Stacey as the plaintiff in the bus crash lawsuit. The Estate's amended complaint named it as next friend of Jacob. Further, Richard was awarded sole custody and appointed the statutory guardian of Jacob.

On January 4, 2008, Richard moved to intervene and dismiss the action filed by the Estate for damages stemming from the bus crash. He contended that he was the only party entitled to bring an action on his son's behalf. After the Estate filed a response, the trial court issued an order dismissing the Estate's claims brought on behalf of Jacob. Then, Angel Young-Howe, the bus driver who was held criminally responsible for the bus crash, and the remaining defendants filed a motion to dismiss the Estate's claims for parental loss of a child's services, loss of consortium, and negligent infliction of emotional distress.[2] These motions for dismissal were granted on August 1, 2008.

[2] In Case No. 2007-SC-000524-MR, the Kentucky Supreme Court affirmed Young-Howe's conviction and sentence of twenty-two years' imprisonment for crimes related to the bus crash.

Meanwhile, on May 2, 2008, the Estate and Mr. Deters filed a declaratory action, requesting that the trial court "make a declaratory judgment on which contract rights were created, which ones exist, what are the rights of the parties," regarding the parties' contingency fee agreement. Citing CR[3] 12.02, Richard moved to dismiss the declaratory action, arguing *res judicata* and failure to state a claim for which relief can be granted. Finding that the declaratory action did not state a relievable ground, the trial court dismissed. This appeal followed.

The Estate argues that the trial court erred by granting Richard's motion to intervene and dismissing its claims brought on behalf of Jacob. The Estate argues that Richard's appointment as Jacob's guardian after Stacey's death did not extinguish its right to pursue an action on Jacob's behalf. We disagree.

CR 24.01(1) provides the following:

> Upon timely application anyone shall be permitted to intervene in an action ... (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

Before a party can intervene pursuant to CR 24.01(1), he must satisfy a four-prong test. *Carter v. Smith*, 170 S.W.3d 402, 409 (Ky.App. 2004). The applicant's motion for intervention must be timely; he must have an interest in the action; his ability to protect his interest must be in jeopardy; and none of the existing parties

[3] Kentucky Rules of Civil Procedure (CR).

must be able to adequately represent his interests. *Id*. at 409-10. We review the trial court's ruling under the clearly erroneous standard. *Id*. at 409.

After reviewing the record, we conclude that the trial court's ruling permitting Richard to intervene in the Estate's action was not clearly erroneous. The record does not demonstrate, and the Estate has not argued, that the timeliness of Richard's motion caused prejudice to the Estate's case. Second, Richard was appointed Jacob's guardian and, as his lone surviving parent, had an interest in the litigation. Next, Richard's and the Estate's claims were predominately premised on the same factual and legal issues, so adverse outcomes in the Estate's case could negatively impact Richard's case. *Yeoman v. Com., Health Policy Bd.*, 983 S.W.2d 459, 464-65 (Ky. 1998) (when the factual and legal claims are identical, issue and claim preclusion can prevent a party from litigating matters previously decided in another party's case). Finally, the Estate could not adequately represent Richard's interests, because Richard as guardian and the lone surviving parent had superior interests to the Estate as merely Jacob's next friend. *Vinson v. Sorrell*, 136 S.W.3d 465, 468 (Ky. 2004); KRS 405.020(1). Therefore, the trial court's granting of the motion to intervene was not clearly erroneous.

The Estate next contends that the trial court erred by dismissing its claims brought on behalf of Jacob. It contends that Richard's motion to dismiss its claims should have been denied because Stacey had an equal right relative to Richard to pursue an action on Jacob's behalf. We disagree.

Under KRS 405.020(1), a father, if he is the lone surviving parent and is a fit parent, shall "have the custody, nurture, and education of the children who are under the age of eighteen (18)," except under circumstances inapplicable in Jacob's case. *Rice v. Hatfield*, 638 S.W.2d 712, 714 (Ky.App. 1982). Moreover, a next friend of a child is merely an agent who does not have the independent authority to settle a claim and receive and account for the minor's proceeds. *Jones By and Through Jones v. Cowan*, 729 S.W.2d 188, 190 (Ky.App. 1987). Rather, this authority rests exclusively with a child's statutory guardian. *Id*.

Accordingly, Richard was properly awarded sole custody of his son when Stacey died and there were no circumstances present requiring the award of custody to another person. KRS 405.020(1). Richard then became the child's statutory guardian and was in a superior position to bring Jacob's civil action compared to the Estate as Jacob's next friend. *Cowan*, 729 S.W.2d at 190.

While we recognize that Stacey loved her son and had an immeasurable interest in his care and custody, the legal effect of her death required that Richard, the sole surviving parent and statutory guardian of Jacob, be granted a superior right to make all decisions on his son's behalf relative to any other party. *Id*. Thus, the dismissal of the Estate's claims brought on Jacob's behalf was proper.

The Estate next contends that the trial court erred by granting Young-Howe's and the other defendants' motions to dismiss Stacey's claims for loss of

Jacob's services, loss of consortium, and negligent infliction of emotional distress. We disagree.

KRS 405.010 provides, in pertinent part, the following:

> The father and mother of a child under the age of eighteen are equally entitled to its services and earnings. If one of the parents is dead, or has abandoned the child, or been deprived of its custody by court decree, the other is entitled to its services and earnings. The parents jointly may maintain an action for loss of the services or earnings of their child under the age of eighteen when the loss is occasioned by an injury wrongfully or negligently inflicted upon the child. But if either the father or mother is dead, or has abandoned the child, or has been deprived of its custody by court decree, or refuses to sue, the other may sue alone.

This recovery is predicated on the loss of the infant's services and for the nursing and taking care of the child by the parent before he reaches majority. *Smith v. Geoghegan and Mathis*, 333 S.W.2d 254, 256 (Ky. 1960).

The history behind the parental entitlement to obtain the services of their children rests with the notion that parents have a co-existent obligation to provide for their children's support and well-being. *Jewell v. Jewell*, 255 S.W.3d 522, 524 (Ky.App. 2008) (recognizing the long-standing policy of imposing a duty on parents to support their children). However, as provided in KRS 405.010, certain situations can result in the waiver of a parent's right to obtain his child's services. *Smith*, 333 S.W.2d at 256.

In this case, Stacey died two months after the bus crash that severely injured her son and a month and a half after bringing her action. Under KRS

405.010, if one parent is dead or is deprived custody by court order, the "other [parent] is entitled to [the child's] services and earnings." While the Estate argues for a different interpretation of the statute, we must be guided by the plain language of the statute and its legislative purpose. *Sweasy v. Wal-Mart Stores, Inc.*, 295 S.W.3d 835, 838 (Ky. 2009). Accordingly, from our interpretation of KRS 405.010, Richard, who was awarded sole custody of Jacob and who is solely responsible for his support and care, is the only party who can bring this action because he alone remains entitled to Jacob's services.

The trial court further dismissed the Estate's claim for loss of consortium and our precedent compels that we uphold this dismissal. In *Bayless v. Boyer*, 180 S.W.3d 439 (Ky. 2005), the court reaffirmed the holding of this Court in *Humana of Kentucky, Inc. v. McKee,* 834 S.W.2d 711 (Ky.App.1992), wherein we disallowed parental loss of consortium claims outside of a wrongful death action. *Bayless*, 180 S.W.3d 449. Thus, "despite proof of serious and permanent injury to a child," a parental suit for loss of consortium will not lie. *Id*. Accordingly, the Estate's loss of consortium claim was properly dismissed.

The trial court further dismissed the Estate's claim for negligent infliction of emotional distress incurred by Stacey due to Young-Howe's conduct. This ruling was proper because it was in accordance with Kentucky's requirement that a negligent infliction of emotion distress action must include physical contact or injury as an element of the tort. *Deutsch v. Shein*, 597 S.W.2d 141, 145-46 (Ky. 1980). Unquestionably, Stacey suffered emotional distress, but her emotional

distress did not flow as a direct result from a physical impact as required by law. *Steel Technologies, Inc. v. Congleton*, 234 S.W.3d 920, 928-29 (Ky. 2007). Although the Estate asks that we expand Kentucky law to permit damages for negligent infliction of emotional distress when there is no physical contact, we are not at liberty to depart from holdings of our Supreme Court. *Murphy v. Kentucky Farm Bureau Mut. Ins. Co.*, 116 S.W.3d 500, 502 (Ky.App. 2002).

The Estate and Mr. Deters, collectively the "Estate," contend that the trial court erred by dismissing their declaratory judgment action for a declaration of their legal rights under their contract for legal representation. The Estate contends that its declaratory judgment action contained a justifiable controversy, which was ripe for adjudication. We disagree.

CR 12.02(f) provides that the failure to state a claim upon which relief can be granted is a sufficient ground for dismissal of a claim. When a trial court considers matters outside of the pleadings, the ruling to dismiss must be treated as a motion for summary judgment by the trial and appellate court. *Richardson v. Rees*, 283 S.W.3d 257, 262 (Ky.App. 2009). "'The standard of review on appeal of a summary judgment is 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.'" *Id*., citing *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996). We further review summary judgment rulings *de novo*. *Id*.

KRS 418.040 provides that "[i]n any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an

actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked."

The Estate argues that Mr. Deters completed many hours of work on bringing this claim on behalf of Stacey and Jacob and that Richard should not be able to vitiate Mr. Deters's rights under his contract with Stacey. The Estate contends that "[t]he still valid contingency fee agreement stipulated that counsel's fee would be removed from any successful recovery in the Grant County Bus Crash litigation." Further, the Estate states that it "is not asking for the entire contingency fee, the equitable result would be to split the fee between the two competing law firms or a compensation scheme the Court deems appropriate."

We first note that the Estate's brief on this issue contains numerous arguments regarding why it should be entitled to directly participate in the lawsuit regarding Jacob's injuries resulting from the bus crash. However, we have previously addressed these issues in this opinion in great detail and will not further analyze Stacey's and the Estate's right to participate directly in the bus crash case. With regard to the Estate's declaratory action claim, we conclude that the trial court's dismissal of the Estate's action was not erroneous.

The attorney-client relationship is very personal in nature and the relationship requires that attorneys exercise great fidelity to their client. *American Continental Ins. Co. v. Weber & Rose, P.S.C.*, 997 S.W.2d 12, 13 (Ky.App. 1998). Due to the personal nature of this relationship, a client can dismiss an attorney

without cause and the attorney generally will not be entitled to a fee based on the terms of the contingency fee agreement. *Baker v. Shapero*, 203 S.W.3d 697, 699 (Ky. 2006) (*quantum meruit* fees would be available). Notwithstanding this distinction from ordinary contracts, all contracts, including for legal representation, require mutual assent and consideration between the contracting parties. *Cuppy v. General Accident Fire & Life Assurance Corp.*, 378 S.W.2d 629, 632 (Ky. 1964).

In this case, Stacey and Mr. Deters reached a written agreement regarding Stacey's legal representation, including Jacob's legal representation to the extent of Stacey's authority to manage Jacob's affairs. Richard executed a contingency fee agreement with separate counsel thereby choosing not to be a party to Stacey and Mr. Deters's legal agreement. Therefore, Richard neither contracted with the Estate nor Mr. Deters and this lack of privity of contract precludes the Estate's action against Richard based on a contract claim. *Presnell Const. Managers, Inc. v. E.H. Const., LLC*, 134 S.W.3d 575, 579 (Ky. 2004). Accordingly, the trial court's dismissal order was not erroneous.

Based on the foregoing reasons, the orders of the Grant Circuit Court's dismissing the Estate's two civil actions are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Eric C. Deters
Independence, Kentucky

BRIEF FOR APPELLEE, RICHARD CLISE:

Alice G. Keys
Philip Taliaferro
Robert W. Carran
Covington, Kentucky

Benjamin R. Harter
Butler, Kentucky

BRIEF FOR APPELLEE, ANGELA YOUNG-HOWE:

Michael E. Lively
Glenn A. Markesbery
David G. Richardson
Cincinnati, Ohio

BRIEF FOR APPELLEES, GRANT COUNTY BOARD OF EDUCATION, BILLIE CAHILL, TRACEY GOE, JIM COLSON, THERESA RUMP AND JACKIE YOUNG:

William A. Hoback
Mark S. Fenzel
Louisville, Kentucky

BRIEF FOR APPELLEE, DON MARTIN:

Barbara A. Kriz
Lexington, Kentucky