

THE COMMONWEALTH OF KENTUCKY
OFFICE OF THE CLERK OF THE SUPREME COURT
CASE NO. 2009-CA-002378-AB

FILED
MAY 11 2009
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SUPREME COURT

THE STATE OF KENTUCKY, PETITIONER

VS.
Case No. 2009-CA-002378-AB
Appellate Court of the First Appellate Court No. 08-CI-04291

MICHAEL JOSEPH FLANNERY, APPELLANT

Michael Joseph Flannery

Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was mailed on May 27, 2009, first class postage guaranteed to Hon. D. Brenton Linn, Norton Bank at Law, P.C., 130 Dudley Road, Suite 250, The Woodlands, Kentucky, 40377 and E. Andre Hasard, Bus 380 Frank Zandy, PSC 226, Main Street, P.O. Box 6910, Florence, Kentucky, 41042, and Hon. Thomas D. Clark, Fayette Circuit Court, Fayette Co. Courthouse, Room 511, 120 N. Limestone, Lexington, KY 40507, and THE SUPREME COURT OF KENTUCKY, State Capitol Room 257, 700 Capitol Avenue, Frankfort, Kentucky, 40601. I further certify that the record on appeal has been returned to the Fayette Circuit Court Clerk's office.

Jennifer T. Zander
Jennifer T. Zander

APPELLANT'S BRIEF

I. INTRODUCTION

This is a case in which a civil defendant appealed from a Judgment entered by the Fayette County Circuit Court, but which appeal was dismissed by the Court of Appeals prior to the case being heard on its merits due to issues with the Notice of Appeal filed in this matter.

II. STATEMENT CONCERNING ORAL ARGUMENT

Appellant does not request oral argument in this matter.

III. STATEMENT OF POINTS AND AUTHORITIES

The following cases and authorities are referenced in this Brief:

Lassiter v. American Express Travel Related Services Company Inc., 308 S.W.3d 714

(Ky 2010),

CR 73.03,

Morris v. Cabinet for Families and Children, 69 S.W.3d 73, 74 (Ky. 2002).

Section 115 of the Kentucky Constitution.

IV. STATEMENT OF THE CASE

This case, which was heard by a Jury in the Fayette Circuit Court, was brought by the Estate of Christina Wittich, by its Administrators, Judith Wittich and Frederick Wittich against Michael Joseph Flick, a man who had been convicted in a criminal case of murdering Christina Wittich, for monetary compensation to Christina Wittich's estate for the loss of her life at the hands of the Defendant/ Appellant. There are several issues

that the Appellant sought to have heard on appeal, none of which are relevant to the present Appeal to this Court. This is because the Appellant has not been able to have his appeal heard by the Kentucky Court of Appeals because the Court of Appeals dismissed his appeal, almost immediately after it was filed, due to the "failure to join necessary or indispensable parties to the appeal." (09/13/2010 Order, Kentucky Court of Appeals) (Attached, Appendix Document No. 1).

Prior to the Appeal being dismissed, the Court of Appeals had filed an Order to Show Cause why the appeal should not be dismissed for failing to join necessary or indispensable parties to the appeal (Appendix Document No. 2). Counsel filed a response to this Show Cause order (Appendix Document No. 3) as well as a Motion in the Court of Appeals to Join Necessary and Indispensable parties to the Appeal, (Appendix Document No. 4). Counsel explained how the Notice of Appeal ended up without the names of the Administrators being set forth, stated that the reason that the omission was one of inadvertence and mistake of counsel of not listing the full and complete name of the Appellee. Counsel requested that the Court of Appeals allow an Amendment to the Notice of Appeal setting forth the entire proper name of the parties to the appeal. However, the Kentucky Court of Appeals dismissed the appeal.

V. **ARGUMENT**

In this case, Michael Joseph Flick, has been effectively denied his right to an appeal based on the fact that his attorney inadvertently left out the full name of the Appellee, by not specifically naming the Administrators to the Estate of Christina Wittich. Counsel for the Appellant caught the mistake and made her best efforts to

remedy the mistake without prejudice to her client, Michel Joseph Flick. The Court of Appeals took a much more strict view of the situation, and without any explanation for its denial of Counsel's previously discussed Motions to Amend the Notice of Appeal, and Motion to join Necessary and Indispensable Party, the Court of Appeals dismissed Mr. Flick's appeal. This Motion for Discretionary Review was taken to ask the Kentucky Supreme Court to reverse the Court of Appeals, and remand back to the Court of Appeals for consideration of the appeal on its merits.

The Kentucky Court of Appeals was not required to dismiss the appeal under the facts of this case. In a similar case, Lassiter v. American Express Travel Related Services Company Inc., 308 S.W.3d 714 (Ky 2010), the Kentucky Supreme Court reversed the Kentucky Court of Appeals when it dismissed Lassiter's appeal for failure to name an indispensable party to the appeal. In her appeal, Lassiter had named the Department of the Treasury, but had not named the State Treasurer, who was considered an indispensable party to the appeal by the Court of Appeals. The Kentucky Supreme Court stated that if the Notice of Appeal gives fair notice to the opposing party then the objective of the notice is satisfied. Id. at 718.

Furthermore, the Kentucky Supreme Court followed the precedent set in other cases that "official-capacity suits ... generally represent only another way of pleading an action against an entity of which an officer is an agent." Lassiter at 718-719. The Court found that by naming the Department of the Treasury, i.e., the agency to a lawsuit, "is equally the functional equivalent of naming the agency's head in his official capacity." Id. at 719.

The Notice of Appeal at issue in the current case, in the caption, listed the parties as follows:

THE ESTATE OF CHRISTINA WITTICH, ET AL.	PLAINTIFFS
v.	
MICHAEL JOSEPH FLICK	DEFENDANT

The notice did not further identify any parties in the body of the notice. However, it is well established that naming a party in the caption of the notice, standing alone, is sufficient to satisfy the rule that the notice of appeal shall specify by name all appellants and all appellees. CR 73.03; Morris v. Cabinet for Families and Children, 69 S.W.3d 73, 74 (Ky. 2002).

This Notice of Appeal used the term "et. al" which has been specifically disapproved of by CR 73.03, however, the term was used incorrectly as there are no missing specific parties to the appeal or to the case. Rather, the et. al. was used in place of the actual names of the Administrators that are parties to the appeal. However, those parties, even though not listed specifically, were implied by the listing of "The Estate of Christina Wittich" as the Estate must be represented by its Administrators. The Notice was given to the Administrators' attorney, and there was certainly no prejudice or lack of fair notice to the opposing party. This is likewise similar to the situation in Lassiter, described above, which held that the naming of an agency to a lawsuit is the "functional equivalent of naming the agency's head in his official capacity." Lassiter at 719. The "agency" in the case at bar is the Estate of Christina Wittich, and the agency heads are the Co-Administrators, Judith Wittich and Frederick Wittich in their duly appointed capacities as Co-Administratrix and Co-Administrator.

As in Lassiter, the opposing party certainly had fair notice of the appeal, and therefore the objective of the Notice of Appeal has been satisfied. The error made, which was to put in "et. al" rather than the specific names of the Administrators, should not have been considered a fatal error in this appeal. The Administrators have been given notice of the appeal, they have been named, albeit by reference, as parties to the appeal, and clearly were intended as parties to this appeal. Furthermore, Counsel for the Appellant requested the right to Amend the Notice of Appeal to properly list the entire name of the parties' to the appeal, which request was denied without explanation. Counsel's error in preparing the appeal documents was a mistake that can and should be remedied, and such remedy is allowed under the law. The Kentucky Court of Appeals, by denying the Appellant's Motion to Join Necessary and Indispensable parties to the Appeal, has effectively taken away the Appellant's right to an appeal as the issues that were to be heard on appeal will now not be heard.

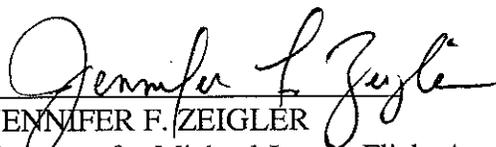
Finally, this appeal which has been dismissed was brought under Mr. Flick's statutory right to an appeal. Section 115 of the Kentucky Constitution provides in pertinent part that in all civil and criminal cases, there shall be allowed as a matter of right, at least one appeal to another court. This was his appeal that he brought from Fayette Circuit Court. His right to an appeal has been denied based on a document preparation error made by his counsel and without his knowledge or participation, a mistake which certainly is correctable under the law. Counsel for Mr. Flick made her best efforts to correct error, yet for undisclosed reasons, the Kentucky Court of Appeals held that there was not "sufficient cause" for this mistake to be corrected, and therefore dismissed Mr. Flick's one appeal that he had the right to have heard under the Kentucky

Constitution. This decision by the Kentucky Court of Appeals was arbitrary and unreasonable, especially in light of the Kentucky Constitution's right to an appeal. Furthermore, if the Kentucky Court of Appeals has no means by which correcting defective Notice of Appeals, especially when cause exists for allowing those corrections, then such a rule is in every case prejudicial to the legal right to an appeal of the party that brought the appeal. This kind of automatic dismissals of appeals are denying litigants' rights to an appeal, as in most cases, there is no procedural means to re-file a notice of appeal with the circuit court clerks' office, as the deadline for filing a notice of appeal will have long since passed.

VI. CONCLUSION

In conclusion, the Appellant and Movant, Michael Joseph Flick, moves this Court to reverse the Court of Appeals' dismissal of his appeal, and to remand this matter back to the Court of Appeals for a consideration of the appeal on the merits.

Respectfully Submitted:


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VII. APPENDIX

1. Order, Kentucky Court of Appeals, 09/13/2010
2. Order, Kentucky Court of Appeals, 04/14/2010
3. Response of Appellant to Court's Order to Show Cause, 05/03/2010
4. Motion to Join Necessary and Indispensable Party, 05/03/2010