

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000598-MR

NAN GOHEEN AND
GEORGE ROUBAL

APPELLANTS

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE STEPHEN L. BATES, JUDGE
ACTION NO. 05-CI-00174

JAMES LEE CARRICO, JR.

APPELLEE

OPINION AND ORDER
DISMISSING APPEAL

** ** * * * * *

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

THOMPSON, JUDGE: Nan Goheen and George Roubal purchased a home from
James Carrico and Tracie Carrico, husband and wife, in March 1997. After they

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

discovered that a toilet in the residence was incorrectly installed, which they believed caused mold in the residence, they filed an action against the Carricos alleging negligent design and construction, breach of implied warranty of habitability, breach of express warranties and strict liability. In October 2005, the appellants amended their complaint asserting identical claims against Fred Hennies, who allegedly constructed the residence.

On October 2, 2006, the circuit court dismissed all claims against Hennies as barred by the statute of limitations, and on April 11, 2008, dismissed the appellants' personal injury claims against the Carricos as also barred by the statute of limitations. In June 2008, the circuit court dismissed the strict liability and implied warranty claims against the Carricos finding that the appellants could not prove the required elements of either claim because the Carricos were not professional builder-sellers and a loose toilet connection was not a major structural defect.

Following a pretrial conference, on March 2, 2009, the circuit court dismissed the remainder of the claims against the Carricos and excluded the testimony of the appellants' proposed expert, Paula Vance.

On April 1, 2009, the appellants, *pro se*, filed a notice of appeal wherein they identified the appellees as "James Lee Carrico Jr. Et. Al." James Carrico argues that because Tracie Carrico and Fred Hennies are not named in the notice of appeal, they are not parties to the appeal and, consequently, the appeal must be dismissed for failure to name an indispensable party.

CR 73.03(1) provides that a “notice of appeal shall specify by name all appellants and all appellees (“et al.” and “etc.” are not proper designation of parties). . . .” In *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990), the Court explained that the requirement is jurisdictional:

A notice of appeal, when filed, transfers jurisdiction of the case from the circuit court to the appellate court. It places the named parties in the jurisdiction of the appellate court. . . . Therefore, the notice of appeal transfer[s] jurisdiction to the Court of Appeals of only the named parties. [citation omitted.]

If an appellant fails to name an indispensable party to an appeal, dismissal of the appeal is the appropriate action. *Id.*

Tracie Carrico and Fred Hennies are not specifically named in the notice of appeal, thus, they are not parties to the appeal. The question remains whether Tracie Carrico or Fred Hennies is an indispensable party to the appeal. If so, the appeal must be dismissed. *Id.*

“For purposes of appeal, a person is a necessary party if the person would be a necessary party for further proceedings in the circuit court if the judgment were reversed and a remand could result in the imposition of inconsistent obligations.”

McBearty v. Kentucky Community and Technical College System, 262 S.W.3d 205, 211 (Ky.App. 2008); CR 19.01. We agree with James Carrico, that his wife, Tracie Carrico, is an indispensable party.

Appellants request that this Court reverse the summary judgments in favor of the Carricos but since Tracie is not named as an appellee, the judgments entered

favorable to her are final. Thus, if the appellants prevailed in this appeal, a remand could result in inconsistent obligations by James and Tracie since only James could be liable to the appellants yet both were the sellers of the residence. Because Tracie is not a party to this appeal and would be a necessary party to the proceedings in the circuit court if the summary judgments were reversed, the appeal must be dismissed.

For the foregoing reasons, it is ORDERED that this appeal be, and is hereby DISMISSED.

MOORE, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ENTERED: December 10, 2010

/s/ Kelly Thompson
JUDGE, COURT OF APPEALS

LAMBERT, SENIOR JUDGE, DISSENTING: I respectfully dissent from this Court's dismissal of the appeal for failure of Appellants to name Tracie Carrico as a party appellee. I agree with the majority that Mrs. Carrico should have been a party appellee, but I do not believe that her absence prevents appellate review of the trial court's summary judgment.

Appellants brought this claim against James Carrico, Tracie Carrico, and later amended their claim to include Fred Hennies. Following an adverse summary judgment, Appellants filed a Notice of Appeal which named only James

Lee Carrico. Thus the final judgment in favor of Tracie Carrico and Fred Hennies became final without appellate review being sought.

It does not necessarily follow, however, that appellate review is precluded in the absence of the missing appellees. Appellants asserted various theories relating to claimed defects in a home they had purchased from the Carricos. They sought damages and other relief. It may be that the claim cannot proceed in the absence of Mrs. Carrico and Fred Hennies, but that may not be so. In my view, this Court's assumption that Mrs. Carrico, in particular, is an indispensable party is premature. A better approach would be to review the merits of the appeal and if reversal and remand is called for based on the merits, remand the case for further consistent proceedings, including a trial court determination of whether Mrs. Carrico is an indispensable party. Simply stated, that determination is better made in the trial court than in this Court, and I would so hold.

BRIEF FOR APPELLANT:

Daniel J. Canon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Elizabeth E. Nicholas
John W. Hays
Lexington, Kentucky