RENDERED: APRIL 17, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001460-MR

MARY ROWE, ADMINISTRATRIX
OF THE ESTATE OF TOMMY ROWE,
DECEASED — APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 11-CI-00350

BIG SANDY REGIONAL DETENTION CENTER — APPELLEE

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: KRAMER, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Mary Rowe, as Administratrix of the Estate of Tommy Rowe, has appealed from the July 22, 2013, order of the Johnson Circuit Court denying her motion to file an amended complaint wherein she sought to name

previously unknown defendants. Following a careful review, we must dismiss this appeal.

Tommy Rowe passed away on October 4, 2010, from complications associated with Stage 4 melanoma, approximately six months after his release from incarceration in the Big Sandy Regional Detention Center ("BSRDC"). On July 21, 2011, Tommy's mother, Mary, filed suit in Johnson Circuit Court against Dr. Sarah Belhasen; Belhasen Family Care Center, PSC; Dr. Rano S. Bofill; and Caremore Pain Management, LLC, alleging their negligence in treating Tommy proximately caused his death. On October 4, 2011, Mary filed a second suit—this time in Magoffin County—against BSRDC, its administrator and assistant administrator in their individual and official capacities, a correctional facility nurse, and "Unknown Employees of Big Sandy Regional Correctional Center," alleging they failed to procure and provide adequate medical care for Tommy which ultimately resulted in his death. Due to a conflict of interest involving BSRDC, Mary's attorney in the original Johnson County case—Hon. Donald McFarland—was unable to represent her in the Magoffin County action. Mary was instead represented by Hon. Jeremy R. Morgan in Magoffin County and McFarland represented her solely on the Johnson County complaint.

In early February 2012, the Magoffin County action was transferred to Johnson Circuit Court. On May 21, 2012, the transferred action was consolidated with the original Johnson County action, although Mary continued to be

represented by separate counsel. Ultimately, a jury trial was scheduled for April 1, 2013.

Between May of 2012 and January of 2013, several orders were entered dismissing various defendants. By February of 2013, the only remaining defendants were Dr. Belhasen, Belhasen Family Care Center, and the Unknown Employees of BSRDC. On or about February 26, 2013,[1] the trial court entered an Agreed Order of Dismissal stating as follows:

> [c]ome the parties, Plaintiff Mary Rowe, Administratrix of the Estate of Tommy Rowe, by counsel, and the Defendants, Dr. Sarah Belhasen, individually and as an employee of Belhasen Family Care Center, P.S.C., and Belhasen Family Care Center, P.S.C., by counsel, as evidenced by the signatures below, having together agreed to dismiss ***all claims, actions and damages within this litigation*** without payment being made, and the court being sufficiently advised,
>
> IT IS HEREBY ORDERED that this matter is dismissed, with prejudice, each party to pay their own respective costs, expenses and fees. This is a final and appealable order, there being no just cause for delay.
>
> HAVE SEEN AND AGREED UPON:
>
> /s/ Donald McFarland, Esq.
> /s/ David A. Zika, Esq.

(emphasis added). The certificate of service indicates copies of the Agreed Order were served upon "counsel for all parties in each case," and specifically named McFarland and Morgan as counsel for plaintiffs, Zika as counsel for the Belhasen

[1] The same order appears twice in the record, one bears an entry date of February 26, 2013, and the other an entry date of March 1, 2013. Aside from these differences, the orders are identical. No explanation is given for the duplication and none is apparent.

defendants, and Hon. Jonathan C. Shaw as attorney for "Defendants Big Sandy Regional Detention Center, et al." The Agreed Order did not refer to the trial scheduled for April 1, 2013, and the record contains no further mention of that date. No appeal was taken from the Agreed Order and no motions were filed seeking clarification or amendment thereof.

On June 17, 2013, Mary moved the trial court for leave to file an amended complaint seeking to add a named party in place of the unknown employees of BSRDC.[2] The trial court denied the motion upon determining the March 1, 2013, agreed order operated as a dismissal of all pending claims, no motion seeking to amend the order to retain claims against the unknown defendants was filed, and no motion to continue the trial or retain the case on the docket had been tendered. Mary attempted to appeal the trial court's ruling by filing a notice of appeal appearing as follows:

> MARY ROWE, ADMINISTRATRIX
> OF THE ESTATE OF TOMMY ROWE,
> DECEASED PLAINTIFF
>
> VS.
>
> BIG SANDY REGIONAL DETENTION
> CENTER, ET AL. DEFENDANT
>
> ---
>
> NOTICE OF APPEAL
>
> ---

[2] Mary sought to name Nancy Allison as a party defendant. Allison was a nurse who had worked at BSRDC during Tommy's incarceration. Her name and/or signature appeared on medical records produced during discovery, and her identity was discussed during discovery depositions of the Assistant Administrator and former Administrator of BSRDC conducted on December 5, 2012, some six and one-half months prior to Mary's attempt to add her as a party.

> Notice is hereby given that, Mary Rowe, Administratrix of the Estate of Tommy Rowe, Deceased, appeals to the Court of Appeals of Kentucky the Order entered on July 22, 2013.
>
> The name of the Appellant is Mary Rowe, Administratrix of the Estate of Tommy Rowe, Deceased. The name of the Appellee against whom this appeal is taken is Big Sandy Regional Detention Center, et al.
>
> This the 21st day of August, 2013.
>
> /s/
> Jeremy R. Morgan

The caption of the Notice of Appeal contained no mention of any party other than BSRDC, and the body of the Notice likewise refers to no other party. A copy of the Notice was sent to all counsel of record. Mary's prehearing statement filed with this Court on September 11, 2013, was captioned

> Mary Rowe, Administratrix of the Estate of Tommy Rowe, deceased, APPELLANT
>
> vs.
>
> Big Sandy Regional Detention Center, et al., APPELLEE

The prehearing statement was sent only to counsel for BSRDC. The only issue listed for resolution was whether the trial court erred in refusing to permit amendment of the complaint. Our review reveals Mary's Notice of Appeal contains a fatal defect as she has failed to name an indispensable party, thereby necessitating dismissal of this appeal.

The Supreme Court of Kentucky recently spoke at length on the issue of indispensable parties to an appeal and the necessity of strictly complying with CR[3] 73.03 in *Browning v. Preece*, 392 S.W.3d 388 (Ky. 2013).

> [W]hether a party is indispensable is *not* determined by whether that party will be *adversely* affected by a court's judgment; instead, an indispensable party is defined as a party "whose absence prevents the Court from granting complete relief among those already parties." *Milligan v. Schenley Distillers, Inc.*, 584 S.W.2d 751, 753 (Ky. App. 1979) (citing CR 19.01), superseded on other grounds by statute, KRS 342.285. Unlike proceedings in the trial courts, where failure to name an indispensable party may be remedied by a timely amendment to the complaint, "under the appellate civil rules, failure to name an indispensable party in the notice of appeal is 'a jurisdictional defect that cannot be remedied'" after the thirty-day period for filing a notice of appeal as provided by CR 73.02 has run. *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 626 (Ky. 2011) (*quoting City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990)).
>
> We recognize that upon occasion a party who was necessary and indispensible (sic) in the trial court may not be necessary and indispensible (sic) to a subsequent appeal. In determining whether a party is truly necessary on appeal, the court must ask "who is necessary to pursue the claim. . . . If a party's participation in the appeal is unnecessary to grant relief, and requiring its participation would force unnecessary expense on the party, then . . . such a party is not indispensable." *Id.* at 625.

Browning, 392 S.W.3d at 391 (internal footnote omitted). The only relief sought in this appeal pertains to the unknown employees of BSRDC—the claims against all other parties to the case below were dismissed with prejudice and no challenge is

[3] Kentucky Rules of Civil Procedure.

levied against those decisions. Naming the unknown employees in the Notice of Appeal was necessary to vest this Court with jurisdiction over their interests. Mary's Notice of Appeal did not do so.

Pursuant to the plain language of CR 73.03, "[t]he notice of appeal shall specify by name all appellants and all appellees ('et al.' and etc' are not proper designation of parties) . . . ." The *Browning* Court addressed a similarly defective Notice of Appeal; that resolution applies with equal force to the instant matter.

> A notice of appeal is the "means by which an appellant invokes the appellate court's jurisdiction" and as noted above, "failure to name an indispensable party in the notice of appeal is 'a jurisdictional defect that cannot be remedied.' Neither the doctrine of substantial compliance nor the amendment of the notice after time had run could save such a defective notice because the appellant 'cannot . . . retroactively create jurisdiction.'" *Nelson County Bd. of Educ.*, 337 S.W.3d at 626 (*quoting City of Devondale*, 795 S.W.2d at 957). We have held that "naming a party in the caption of the notice is, standing alone, sufficient to satisfy the rule, even though the party is not named in the body of the notice." *Lassiter v. American Exp. Travel Related Servs. Co., Inc.*, 308 S.W.3d 714, 718 (Ky. 2010). In *Lassiter,* we reasoned that, "although a party may not be named in the body of the notice, by listing the party in the caption, fair notice is given . . . and thus the objective of the notice is satisfied." *Id.* Therefore, Brooksie Horn was properly named as a party to the appeal.
>
> However, it is obvious beyond dispute that Tammie Horn was *not* made a party to the appeal. . . . The only argument available to Appellant that would capture Tammie Horn as a party to the appeal is that she was included in the "et al." designation in the caption of the Notice. CR 73.03, however, explicitly states that "'et al.' and 'etc.' are not proper designation of parties" and this Court has recognized that "[t]he term 'et al.' as used in

> the caption is a practice specifically disapproved by CR 73.03." *Lassiter*, 308 S.W.3d at 718. Accordingly, Tammie Horn was not named as a party to the appeal.

Browning, 392 S.W.3d at 392.

In the case *sub judice*, the only parties properly before this Court are Mary and BSRDC. Our jurisdiction is limited to resolution of claims between those two parties. However, the issues presented do not lie within those parameters and we are without authority to review them. Therefore, because the proper and indispensable parties are not before the Court, and no relief can be granted in their absence, it is ORDERED that this appeal be, and hereby is, DISMISSED.

ALL CONCUR.

ENTERED: April 17, 2015

/s/ C. Shea Nickell
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Jeremy R. Morgan
Hazard, Kentucky

BRIEF FOR APPELLEE, BIG SANDY REGIONAL DETENTION CENTER:

Jonathan C. Shaw
Paintsville, Kentucky