FILED
JUL 31 2012
CLERK
SUPREME COURT

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2010-SC-664D

THE ESTATE OF CHRISTINA WITTICH, by and through Judith Wittich and Frederick Wittich in their duly appointed capacities as Co-Adminstratrix and Co-Administrator, **APPELLEES**

COURT OF APPEALS NO. 2009-CA-002378
FAYETTE COUNTY CIRCUIT COURT
CASE NO. 08-CI-4294

v.

MICHAEL JOSEPH FLICK **APPELLANT**

APPELLEES' BRIEF

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the foregoing to the following on this the 30th day of July, 2012 and the original was filed by registered mail in accordance with CR 76.40(2) with the Supreme Court of Kentucky, Clerk of Supreme Court of Kentucky, Capital Building, Room 235, 700 Capital Avenue, Frankfort, Kentucky 40601; with copies to Jennifer F. Ziegler, P.O. Box 34192, Lexington, Kentucky 40588; and Honorable Thomas L. Clark, Fayette Circuit Court, Fayette County Courthouse, Room 511, 120 N. Limestone, Lexington, Kentucky 40507. I further certify that I have not removed the record from the Fayette Circuit Court.

Respectfully submitted,

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STATEMENT CONCERNING ORAL ARGUMENT

Appellees do not request oral argument in this matter.

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COUNTERSTATEMENT OF THE CASE

Christina Wittich was shot to death by Michael Joseph Flick in Fayette County, Kentucky. Michael Joseph Flick was convicted of her murder by a jury in the case styled *Commonwealth of Kentucky v. Michael Joseph Flick*, in the Fayette Circuit Court, Case No. 05-CR-00818.

This appeal arises from a civil suit filed in Fayette Circuit Court by Estate of Christina Wittich, by its Administrators, Judith Wittich and Federick Wittich against Michael Joseph Flick, Appellant for damages suffered by Estate. A Fayette County jury entered a verdict for Appellees and judgment in their favor was entered in the amount of $2,900,000.00 for compensatory damages and $53,000,000.00 for punitive damages.

Appellant filed his Notice of Appeal on December 18, 2009. The Court of Appeals entered an Order to Show Cause why the appeal should not be dismissed for failing to join the legal representatives of the Estate as necessary or indispensable parties to the appeal on April 14, 2010. (Appellant's Brief, Appendix Document No. 2). Appellant responded to the show Cause Order citing counsel's "inadvertence" and "mistake" in improperly filing its Notice of Appeal. In an attempt to cure the defect and avoid dismissal, Appellant also filed a Motion to Join Necessary and Indispensable Parties to the Appeal. (Appellant's Brief, Appendix Document Nos. 3 and 4).

The Court of Appeals dismissed the appeal by Order entered September 13, 2010 due to Appellant's failure to join necessary or indispensable parties. (Appellant's Brief, Appendix Document No. 1).

Appellant filed a Motion for Discretionary Review on November 5, 2010. (Appendix

Document No. 1). In his Motion, Appellant urged that this Court should grant discretionary review because "counsel simply made a very basic error, which is definitely related to counsel's lack of experience in filing and bringing appeals" in failing to name necessary and indispensable parties in his Notice of Appeal. (Motion, page 2). Appellant further urged that he should not have been deprived of his statutory right to appeal when his right to appeal was denied based on counsel's incompetence. (*Id.* at 3). Appellant asserted that this Court should reverse the Court of Appeals' decision to dismiss the appeal and permit counsel to proceed with a Motion to Join Necessary and Indispensable Parties. (*Id.*). This Court granted discretionary review to consider these specified issues.

ARGUMENT

A. APPELLANT DID NOT PRESERVE ANY ARGUMENT CONCERNING THE ALLEGED SUFFICIENCY OF THE NOTICE OF APPEAL AND, THEREFORE, THE NEWLY RAISED ARGUMENT IS NOT SUBJECT TO DISCRETIONARY REVIEW.

The primary thrust of Appellant's argument in his Brief on discretionary review is that although his counsel failed to specifically identify the Administrators of Christina Wittich's Estate as parties to the appeal, the notice of appeal provided fair notice to the opposing party of the identities of the proper parties to the appeal and, therefore, the objective of the notice requirements were satisfied. Appellant reasons therefrom that the Court of Appeals erred in dismissing his appeal.

It is axiomatic that to preserve an issue for review by the Supreme Court, the complaining party is required to urge the argument before the Court of Appeals or, at a minimum, identify the issue as a ground for discretionary review. In fact, CR 76.20 requires that a party requesting discretionary review provide "[a] clear and concise statement of (i)

the material facts, (ii) the questions of law involved, and (iii) the specific reason or reasons why the judgment should be reviewed." Wholly absent from Appellant's filings with the Court of Appeals and his motion for discretionary review is any assertion that the notice of appeal provided sufficient notice of the parties against whom the appeal was taken. To the contrary, in the Court of Appeals, Appellant contended that the appeal should be prosecuted not withstanding counsel's error and, further, that he be allowed to amend his notice of appeal to specifically name the parties who were necessary and indispensable to the appeal. Similarly, in his request for discretionary review, Appellant urged that he should not be deprived of his statutory right to appeal due to counsel's incompetence and requested reversal of the Court of Appeals' Order dismissing the appeal so that he could proceed with a motion to join the indispensable parties.

Appellant failed to argue adequate notice in his briefing before the Court of Appeals and failed to identify adequate notice as a specific reason for requesting discretionary review. Even assuming and substance existed to support the argument (which is denied), the issue was not preserved for discretionary review. Appellant's failure to preserve the issue deprives this Court of jurisdiction to determine the adequacy of notice. *Fischer v. Fischer,* 348 S.W.3d 582, 588 (Ky. 2011); *see also, Combs v. Knott County Fiscal Court*, 141 S.W.2d 859, 860 (Ky. 1940) ("[A]ppellant is precluded from raising that question on appeal because it was not raised or relied upon in the court below. It is an unvarying rule that a question not raised or adjudicated in the court below cannot be considered when raised for the first time in this court."). Accordingly, Appellant's adequate notice argument is not properly before the Court.

B. EVEN ASSUMING APPELLANT PRESERVED THE SUFFICIENCY OF THE "NOTICE" GIVEN IN THE NOTICE OF APPEAL FOR DISCRETIONARY REVIEW, APPELLANT IS NOT ENTITLED TO REVERSAL OF THE COURT OF APPEALS' DECISION.

Appellant urges that the Court of Appeals was not required to dismiss his appeal because the Notice of Appeal placed the opposing party on sufficient notice of the proper parties to the appeal and the use of "et al," which has been specifically disapproved of under the Rules of Procedure, "was used in place of the actual names of the Administrators" and the intent to join the Administrators was"implied by the listing of 'The Estate of Christina Wittich' as the Estate must be represented by Administrators." A review of the case law cited by Appellant establishes that his argument is legally defective.

First, this Court's decision in *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73 (Ky. 2002), lends no support to the proposition that a notice of appeal is sufficient where, as here, the proper parties to the appeal are not named anywhere in the notice. In *Morris*, parental rights were involuntarily terminated based on a petition filed by the Kentucky Cabinet for Families and Children. The parents appealed to the Court of Appeals and named the minor child in the caption but not in the body of the notice of appeal. This Court noted that case law established that a notice of appeal was adequate under CR 73.03 if it contained a listing of parties sufficient to give the opposing party adequate notice of the parties against whom the appeal was filed. According to the Court, that objective was met by naming the minor child in the caption of the notice of appeal, coupled with serving the guardian ad litem with copies of relevant pleadings. Here, the Administrators were not named in the caption or body of the notice of appeal and, therefore, the notice contemplated in *Morris* is lacking.

Appellant also incorrectly analogizes this case to *Lassiter v. American Express Travel Related Services Co.*, 308 S.W.3d 714 (Ky. 2010). In *Lassiter,* this Court reversed the Court of Appeals' dismissal of an appeal based on the grounds that the Budget Director failed to name an indispensable party to the appeal. This Court's decision in *Lassiter* hinged on application of the holding in *Kentucky v. Graham,* 473 U.S. 159, S. Ct. 3099 (1985). In *Graham*, the Court held that naming of an agency head in his official capacity serves as the functional equivalent of naming the agency itself. This case is distinguishable because the Appellee is not a governmental agency. The Appellee is not even a legal entity, which was correctly noted by the Court of Appeals in its Order of April 14, 2010, citing *Kentucky Farm Bureau Mutual Insurance Co. v. Cook*, 590 S.W.2d 885 (Ky. App. 1978), *rev'd in part on other grounds, Kentucky Farm Bureau Mutual Ins. Co. v. Cook*, 590 S.W.2d 875 (Ky. 1979).

Moreover, in reaching its decision in *Lassiter*, this Court explained that Kentucky follows a policy of substantial compliance "except for tardy appeals and the naming of indispensible [sic] parties." 308 S.W.3d at 718. A party is an indispensable party on appeal if the party is necessary in order to grant relief. *Nelson County Board of Education v. Forte*, 337 S.W.3d 617 (Ky. 2011).

Judith Wittich and Frederick Wittich in their capacity as the legal representatives of the Estate were necessary and indispensable parties to the appeal. As the legal representatives of the Estate, Judith Wittich and Frederick Wittich are vested with the capacity to pursue claims on behalf of the Estate. Furthermore, administrators owe a fiduciary duty to the estate to collect assets and distribute them. *Kaufman v. Kaufman's Adm'r*, 166 S.W.2d 860 (Ky. 1942). The Administrators are necessary in order for the Estate to collect the damages

awarded in this case. Thus, the Court of Appeals properly dismissed the appeal in this case due to Appellant's failure to include the indispensable parties Judith Wittich and Frederick Wittich, the legal representatives of the Estate. As more fully discussed below, the Court of Appeals lacked jurisdiction over the administrators; therefore, any relief granted to Appellant would be incomplete. Furthermore, any action by the Court of Appeals that would deny the Administrators the ability to fulfill their fiduciary duties owed to the Estate would expose the Administrators to personal liability for breaching their duties. The Administrators are necessary and indispensable parties to this action involving the Estate, and their exclusion from the Notice of Appeal was a fatal defect.

C. FAILURE TO JOIN NECESSARY AND INDISPENSABLE PARTIES IN A NOTICE OF APPEAL IS A JURISDICTIONAL DEFECT THAT CANNOT BE REMEDIED BY AMENDMENT.

Appellant argues that he was denied his constitutional right to appeal based on counsel's incompetence and unfamiliarity with the Rules of Procedure in prosecuting an appeal. Appellant's failure to name Judith Wittich and Frederick Wittich, the legal representatives of the Estate, in compliance with CR 73.03, divested the Court of Appeals' of jurisdiction over the appeal. It cannot be said that Appellant was denied his right to appeal. The Court of Appeals' dismissal was not "capricious" or "arbitrary" because Appellant's error required dismissal.

CR 73.03 explicitly outlines the required format for filing a notice of appeal from a judgment. The Rule explicitly states: "The notice of appeal **shall** specify by name all appellants and all appellees **("et al." and "etc." are not proper designation of parties)**..." (emphasis added). Appellant's Notice of Appeal listed "THE ESTATE OF CHRISTINA

WITTICH, ET AL." in the case caption, using the "et al." format specifically disapproved by CR 73.03(1).

By failing to comply with the requirements of CR 73.03, Appellant transferred jurisdiction over the Estate, but not its legal representatives, from the Fayette Circuit Court to the Court of Appeals. *City of Devondale v. S.J. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990). Contrary to counsel's assertion, the error in identifying the parties against whom the appeal was being taken cannot be cured by amendment. *Id.* (substantial compliance doctrine cannot be applied to retroactively create jurisdiction). Without jurisdiction over the legal representatives of the Estate, the Court of Appeals could not grant any adequate relief and could not proceed. *McBrearty v. Kentucky Cmty. & Tech. College Sys.*, 262 S.W.3d 205, 210 (Ky. App. 2008). Dismissal was appropriate because "[f]ailure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal." *Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d 241, 243 (Ky. 1983).

CONCLUSION

In conclusion, Appellees respectfully request this Court to affirm the decision of the Court of Appeals dismissing Appellant's appeal for failure to name Judith and Frederick Wittich as indispensable parties.

Respectfully submitted,

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APPENDIX

DOCUMENT NO. 1: APPELLANT'S MOTION FOR DISCRETIONARY REVIEW