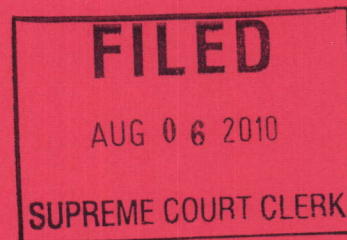


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-00149-DG
(TO BE HEARD TOGETHER WITH
2009-SC-000715-DG)



GENE A. FORTE

APPELLANT

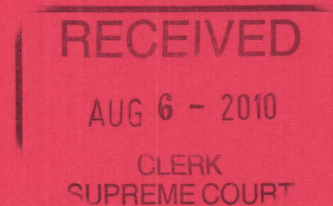
V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2009-CA-001635-MR
NELSON CIRCUIT COURT NOS.
07-CI-00164 AND 07-CI-003385

NELSON COUNTY SCHOOL DISTRICT

APPELLEE

BRIEF FOR APPELLANT



Submitted by:

FULTON, HUBBARD & HUBBARD

LARRY D. RAIKES
117 E. Stephen Foster Avenue
Bardstown, Kentucky 40004
(502) 348-6457
(502) 348-8748 (fax)
lraikes@bardstown.com
Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this Brief were served upon the following individuals by regular U.S. Mail, postage prepaid, on August 4th, 2010: Hon. Charles C. Simms, III, Judge, Nelson Circuit Court, 200 Nelson County Plaza, Bardstown, KY 40004; Hon. Aaron J. Silletto, Goldberg Simpson, LLC, 9301 Dayflower Street, Prospect, KY 40059; and to Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229.

INTRODUCTION

This Court granted discretionary review of the decision of the Court of Appeals where that Court dismissed Appellant Forte's appeal for failure to add an indispensable and necessary party thereto. The Kentucky Court of Appeals ruled that Appellant Forte's appeal to that Court was defective because he did not name the Nelson County Board of Education as a necessary or indispensable party in the notice of appeal.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant does not believe oral argument would be necessary in this case, the briefs being sufficient to outline and describe the issues involved in the appeal.

STATEMENT OF POINTS AND AUTHORITIES

Introduction i

Statement of Points and Authorities.....ii

Statement of Case1

Argument.....2

 I. The Nelson County Board of Education is Neither a Necessary
 nor Indispensable Party to this Appeal.....2-4

 CR 19.01

West v. West, Ky. 830 S.W.2d 379 (1992)

 II. The Appellee, Nelson County School District, Cannot Now
 Complain of the Failure to Name the Nelson County Board of
 Education as a Necessary or Indispensable Party Because it Has
 Not Moved Either the Trial Court or the Court of Appeals to Make
 the Nelson County Board of Education a Party to this Appeal.....3-4

Nelligan v. Community General Hospital of
 Sullivan County, 240 F.R.D. 123; 2007 U.S.
 Dist. Lexis 9868 (2007)

Tri-county National bank v. Greenpoint Credit, LLC
 Ky. App. 190 S.W.3d 360 (2006)

Cabinet for Human Resources v. Kentucky State
 Personnel Board, Ky. App. 846 S.W.2d 711 (1992)

Conclusion4

Appendix

STATEMENT OF THE CASE

Carole Forte, a teacher at Cox's Creek Elementary School in Nelson County, Kentucky, died on May 19, 2006. She died from multiple blunt force injuries sustained in a one car motor vehicle accident. The accident occurred as she was leaving school grounds, when an unsecured pole gate regulating traffic at a school driveway was blown by the wind into her car and struck her in the head.

On June 20, 2006, Nelson District Court appointed Mrs. Forte's husband, Gene A. Forte, to act as administrator of her estate. Mr. Forte filed a tort action in the Nelson Circuit Court (Case No. 07-CI-00164) against the Nelson County Board of Education, who was Mrs. Forte's employer and other Defendants. The Complaint filed in the tort action alleged negligence on the part of the Board of Education in installation, testing, inspection and operation of the pole gate that had caused Mrs. Forte's death.

A summary judgment was entered in favor of the Board of Education on governmental immunity grounds on August 7, 2009. Mr. Forte appealed this tort action to the Court of Appeals (Case No. 2009-CA-001635-MR). On February 5, 2010, the Court of Appeals dismissed the Appellant's appeal for failure to join the Nelson County Board of Education as a party, stating that the Board of Education was a necessary or indispensable party to the appeal. This Court granted Appellant's motion for discretionary review and this brief is being presented in support of Appellant's position herein.

QUESTIONS OF LAW PRESENTED
AND REASONS SUPPORTING REVIEW

- I. Under CR 19.01, the Nelson County Board of Education is neither a necessary nor indispensable party to this appeal.

Appellant Forte named the Nelson County School District as the Appellee in his Notice of Appeal. The Nelson County Board of Education is a part of the Nelson County School District. In other words, the Nelson County Board of Education is subsumed by the Nelson County School District.

When you apply the factors set forth under CR 19.01, the failure to specifically add Nelson County Board of Education is not a violation of the rule requiring joinder of necessary or indispensable parties to an appeal. Since the Nelson County Board of Education is a part of the Nelson County School District, complete relief can be accorded to existing parties without the necessity of specifically adding Nelson County Board of Education.

Throughout the lower court proceedings, the Nelson County Board of Education and the Nelson County School District were represented by the same counsel, being that same counsel herein. Moreover, prosecution of the case at the trial level was on the basis that any judgment obtained against the Nelson County School District would, in addition, be a judgment against the Nelson County Board of Education. For these reasons and since the same counsel represented both the Nelson County School District and the Nelson County Board of Education, as a practical matter, the Nelson County Board of Education's ability to protect its interests will be satisfied by the actions of the Nelson County School District.

Lastly, the failure to name the Nelson County Board of Education would not subject the

Nelson County School District to any risks of incurring double, multiple or otherwise inconsistent obligations by reasons of any claims of the Nelson County Board of Education. In other words, the Nelson County Board of Education's claims are identical to those of the Nelson County School District. Thus, by naming the Nelson County School District as an Appellee, Appellant Forte has substantially complied with the requirements of CR 19.01. West v. West, Ky. 830 S.W.2d 379 (1992).

- II. Appellee cannot rely upon the failure of Appellant Forte to name the Nelson County Board of Education as an Appellee in his Notice of Appeal due to the fact that the Appellee Nelson County School District has not moved to make the Nelson County Board of Education a party to this appeal.

It is a long standing principle of federal law that a Plaintiff does not need to include all joint tortfeasors as Defendants in a single lawsuit. Nelligan v. Community General Hospital of Sullivan County, 240 F.R.D. 123; 2007 U.S. Dist. Lexis 9868 (2007). Moreover, the Kentucky Court of Appeals has ruled that a party who believes an indispensable party should be joined has the obligation of filing an appropriate motion or other pleading with the trial court in an attempt to join that party. Tri-County National Bank v. Greenpoint Credit LLC, Ky. App. 190 S.W.3d 360 (2006).

In Cabinet for Human Resources v. Kentucky State Personnel Board, Ky. App. 846 S.W.2d 711 (1992), the Court held as follows:

“ When one litigant believes there to be an indispensable party it should request the Court to order joinder by the simple expedient of filing a motion. If the Court concurs then service of process shall issue, but in any event, it should be accomplished by a pleading or motion and a brief is neither.”

Since the Appellee Nelson County School District did not preserve the issue before the Court of

Appeals, this question should not be reviewed by the Kentucky Supreme Court.

CONCLUSION

In conclusion, Appellant Forte moves this Court to reverse the Court of Appeals opinion and remand this case to the Court of Appeals for full consideration of his appeal.

Submitted by:

FULTON, HUBBARD & HUBBARD

A handwritten signature in black ink, appearing to read 'L. Raikes', is written over a horizontal line.

LARRY D. RAIKES

117 E. Stephen Foster Avenue
Bardstown, Kentucky 40004

(502) 348-6457

(502) 348-8748 (fax)

lraikes@bardstown.com

Counsel for Appellant Forte