COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-000149-DG

GENE A. FORTE, Individually and as
Administrator of the Estate of Carole Forte — APPELLANT

v.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2009-CA-001635-MR
NELSON CIRCUIT COURT NOS. 07-CI-00164, 07-CI-00338

NELSON COUNTY SCHOOL DISTRICT — APPELLEE

** ** ** ** ** **

BRIEF FOR APPELLEE

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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 23, 2010: Hon. Kelly M. Easton, Special Judge, Nelson Circuit Court, Nelson County Justice Center, 200 Nelson County Plaza, Bardstown, KY 40004; Larry D. Raikes, Esq., Fulton, Hubbard & Hubbard, 117 East Stephen Foster Ave., P.O. Box 88, Bardstown, KY 40004-0088; Clerk of Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601-9229.

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Statement Concerning Oral Argument

The Appellee agrees with the Appellant that oral argument is not necessary in this particular case, owing particularly to the relatively simple legal issue involved. However, this statement should not be construed as a waiver of the Nelson County Board of Education's request for oral argument in case no. 2009-SC-000715-DG, in which oral argument will be of benefit to the Court.

Counterstatement of Points and Authorities

Counterstatement of the Case

The facts of this case are identical to those at issue in case no. 2009-SC-000715-DG. Therefore, the Appellee incorporates by reference the facts as stated in the "Statement of the Case" found in the "Brief for Appellant" filed in case no. 2009-SC-000715-DG, as if set forth more fully at this point. Except where contradicted or expanded upon below, the Appellee does not take issue with Mr. Forte's statement of the case found on page 1 of his brief.

Gene A. Forte, Individually and as Administrator of the Estate of Carole Forte, commenced this tort action in the Nelson Circuit Court against the Appellee, the Nelson County School District; the Nelson County Board of Education; and others. The circuit court granted the motion of the Appellee and the Board of Education for summary judgment on August 7, 2009, on governmental immunity grounds. (*See* Appx. 3.) Mr. Forte appealed that judgment to the Court of Appeals. (*See* Appx. 2.) Prior to briefing and on the Appellee's motion, on February 5, 2010, the Court of Appeals dismissed Mr. Forte's appeal due to his failure to name an indispensable party in his notice of appeal, namely the Board of Education. (*See* Appx. 1.) This Court granted discretionary review on June 9, 2010.

Argument

I. The Nelson County Board of Education is a necessary and indispensable party to this appeal.

The Court of Appeals correctly held that the Nelson County Board of Education was a necessary or indispensable party to this appeal and that the appeal should be dismissed due to the Mr. Forte's failure to include the Board of Education in his notice of appeal. This Court should affirm its February 5, 2010 order.

The Court of Appeals granted the Respondent's motion to dismiss the appeal on the basis of that court's holding in *Slone v. Casey*, 194 S.W.3d 336 (Ky. App. 2006). The *Slone* court held that the failure to name an indispensable party in a notice of appeal is a jurisdictional defect that results in the dismissal of the appeal. *Slone*, 194 S.W.3d at 337 (citing CR 19.02; *City of Devondale v. Stallings*, 795 S.W.2d 954 (Ky. 1990)). A notice of appeal transfers jurisdiction from the trial court to the appellate court of only the parties specifically named in the notice. *City of Devondale*, 795 S.W.2d at 957. The substantial compliance doctrine cannot save an appeal that suffers from a jurisdictional defect. *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." *McBrearty v. Kentucky Community & Tech. Coll. Sys.*, 262 S.W.3d 205, 211 (Ky. App. 2008).

In his notice of appeal to the Court of Appeals, Mr. Forte named as the only appellee the "Nelson County School District." (Appx. 2.) However, the Appellee is not a legal entity or a corporate body capable of being sued in its own name. The Appellee, as named, is merely a geographical area of the Commonwealth, coextensive with the boundaries of Nelson County. KRS 160.010. All of the governmental functions performed on the Appellee's behalf are performed by the Board of Education. *See* KRS 160.160(1) (setting forth the powers and duties of the Board). There is no statutory authority allowing the Appellee to be sued in its own name. The Appellee has no more capacity to be sued than a Congressional district, a judicial district, or a state house or senatorial district; just as an appropriate action must be brought against the relevant Member of Congress, judge, or legislator, so must this action and appeal be prosecuted against the Board of Education.

In *Mock v. Board of Ed. of Nelson County*, 145 Ky. 715, 141 S.W. 38 (1911), the plaintiff, a teacher, filed a wrongful termination action against the Board of Education, an educational district within Nelson County, a particular school within that educational district, and a trustee of the school. *Mock*, 141 S.W. at 38. There the Court held, "Plaintiff did not sue the individual trustees of the educational division who, it is claimed, unlawfully dismissed her; she simply sued the educational division itself, which is unincorporated, and cannot be sued. ... [W]e think the county board of education was properly made a party defendant." *Id.* Under the holding of *Mock*, a county board of education, and

not a geographic educational district, is the proper defendant in a civil action, and thus would be a necessary or indispensable party to an appeal of that case.

Similarly, the highest court in the Commonwealth held, in *Howell v. Haney*, 330 S.W.2d 941 (Ky. 1959), that a county board of education is a corporate body, with power to sue and be sued in its corporate name. *Howell*, 330 S.W.2d at 943. Therefore, in an action seeking a recount and to contest the legality of an election to approve a school tax, "[i]nasmuch as the Larue County School District embraces the same geographical area as does Larue County, the 'district' is under the control of and is governed by the Board of Education of Larue County. It would follow, therefore, that the County Board of Education as well as Larue County have an important interest in the subject matter of this action and are indispensable parties to the suit." *Id.* The county board of education was an indispensable party to that case, and the suit was properly dismissed by the trial court, even though the suit named the county school superintendent and all of the individual members of the board of education. *Id.* at 942.

Mr. Forte argues, without citation to any authority, that "[t]he 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." (Brief for Appellant at 2.) This *ipse dixit* argument is contrary to the holdings in both *Mock* and *Howell*. *Mock* specifically holds that a geographical school district is not capable of being sued and is therefore not a

proper party to a civil action; the county board of education is the proper party to be sued. *Howell* upheld the dismissal of an action where the county board of education was not named in the suit, even though all the individual members of the board of education were sued and thus had knowledge of the pendency of the action.

Because the Board of Education is the only corporate entity that can act on behalf of the Appellee, it would be a necessary party to any further litigation in the circuit court, and it is therefore also a necessary party to this appeal. The fact that the Appellee and the Board of Education were both represented by the same counsel in the circuit court (*see* Brief for Appellant at 2) is insufficient to cure the jurisdictional defect of not naming the Board of Education in Mr. Forte's notice of appeal.

Mr. Forte further argues that the Appellee, rather than moving to dismiss his appeal, should instead have moved the circuit court or the Court of Appeals to join the Board of Education as a party to this case or to the appeal. (Brief for Appellant at 3-4.) This argument ignores two pertinent facts. First, the Board of Education was included as a party defendant in Mr. Forte's complaint in the circuit court. (Appx. 3, pp. 1-2: "Civil Action No. 07-CI-338 named several defendants: Nelson County School District, Nelson County Board of Education, Indiana Insurance, the Attorney General of Kentucky and Unknown Defendants.") Thus, there was no need for the Appellee to move to join the Board of Education as a party in the circuit court under CR 19.01.

Second, Mr. Forte ignores this Court's precedent that a notice of appeal transfers jurisdiction from the trial court to the appellate court of only the parties specifically named in the notice. *City of Devondale*, 795 S.W.2d at 957. Because of the jurisdictional nature of the notice of appeal, the Court of Appeals is powerless to join an additional party not named in the notice. "The failure to name an indispensable party in the notice of appeal is considered a jurisdictional defect." *Slone*, 194 S.W.3d at 337. The only course available when an appellant fails to name an indispensable party in his notice of appeal is dismissal, not joinder under CR 19.01. *Id.* The Court of Appeals correctly dismissed Mr. Forte's appeal for failure to name an indispensable party to the appeal and its judgment should be affirmed by this Court.

II. Even if this Court holds that the Nelson County Board of Education is not a necessary and indispensable party to this appeal, it may still affirm the judgment of the Court of Appeals.

In the event this Court concludes that the Board of Education is not a necessary or indispensable party to Mr. Forte's appeal, this Court may still affirm the judgment of the Court of Appeals in this case. An appellate court may affirm a trial court for any reason sustainable by the record. *Kentucky Farm Bureau Mut. Ins. Co. v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991). Therefore, if the circuit court's summary judgment in this case is sustainable on any basis, it must be affirmed. *Fischer v. Fischer*, 197 S.W.3d 98, 103 (Ky. 2006).

The facts of this case are not in dispute. In the circuit court and in the briefs filed in this court (as well as in the Board of Claims and in the briefs filed in the

Court of Appeals and this Court in case no. 2009-SC-000715-DG), the parties have shown complete agreement as to the operative facts. The parties have differed only as to the legal implications of those facts. The Appellee has consistently argued that the installation, testing, inspection, and operation of the pole gate at issue are governmental functions entitling the Appellee and the Board of Education to governmental immunity; Mr. Forte has argued instead that those are proprietary functions to which no immunity applies.

This Court, in *Breathitt County Bd. of Ed. v. Prater*, 292 S.W.3d 883 (Ky. 2009), held that the county board of education's "employment of a night watchperson to reside on school grounds falls within the management discretion conferred by [KRS 160.290(1)] and directly serves the Board's definitive educational function. Because the Board was engaged in a governmental rather than a proprietary function, it is entitled to immunity from damages claims arising from that function." *Prater*, 292 S.W.2d at 888. At issue in *Prater* was the claim of the night watchperson's friend, who was injured when "a 'structure' collapsed causing Prater to fall and suffer permanent injury." *Id.* at 885. The plaintiff's complaint asserted that the county board of education was negligent in its maintenance of the night watchperson's residence, which was located on school grounds. *Id.* This Court found that protecting the school's physical facilities and the management of school property were both governmental functions. *Id.* at 888.

Just as the employment of a night watchman and providing her with on-campus housing were found to be governmental functions in *Prater*, the installation, testing, inspection, and operation of the Appellee's and the Board of Education's traffic gate at issue in this case are also governmental functions. In both *Prater* and this case, the actions of the county board of education constituted a reasonable means of exercising its authority to maintain and protect school property. Under this Court's reasoning in *Prater*, the circuit court below properly determined that the Appellee and the Board of Education were entitled to summary judgment.[1] The circuit court's judgment should be affirmed by this Court.

Conclusion

The Court of Appeals properly dismissed this appeal because the Nelson County Board of Education, a necessary and indispensable party to this appeal, was not included in Mr. Forte's notice of appeal. On that basis alone, this Court should affirm the decision of the Court of Appeals. In addition, because the Nelson Circuit Court correctly determined that the Appellee was entitled to governmental immunity under the facts of this case, summary judgment was proper.

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[1] Because the Appellee's and the Board of Education's acts are entitled to governmental immunity, the Board of Claims correctly determined that it had jurisdiction of Mr. Forte's claim (case no. 2009-SC-000715-DG), and it therefore was correct in dismissing Mr. Forte's claim with prejudice under the applicable statute of limitations.

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