

RENDERED: AUGUST 20, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000740-MR

SETTLEMENT FUNDING, LLC; AND
ULYSSIS R. HARBIN, ANNUITANT
AND "PROTECTED PARTY"

APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 98-CI-006813

COMMONWEALTH GENERAL ASSIGNMENT
CORPORATION; AND COMMONWEALTH LIFE
INSURANCE COMPANY, N/K/A MONUMENTAL
LIFE INSURANCE COMPANY, "PROTECTED
PARTIES"

APPELLEES

* * * * *

OPINION AND ORDER DISMISSING APPEAL

BEFORE: BUCKINGHAM, HUDDLESTON, AND KNOPF, JUDGES.

BUCKINGHAM, JUDGE. The "Protected Parties", SAFECO Life Insurance Company and SAFECO Assigned Benefits Service Company (hereinafter the SAFECOs) filed a motion to dismiss the appeal to which appellants responded; appellants filed a motion to allow amended notice of appeal and/or to substitute parties; the SAFECOs filed a motion for leave to file reply to response, treated as motion for enlargement of time in which to respond to appellants' motion; appellants responded to that motion and, in the alternative, filed a motion to file a reply to the SAFECOs'

response to their motion. The Court, being sufficiently advised, ORDERS the motion for enlargement of time and the alternate motion to file a reply be GRANTED. The tendered response and the tendered reply are ORDERED FILED and were considered by the panel. The motion to allow amended notice of appeal and/or to substitute parties is DENIED. The motion to dismiss appeal is GRANTED.

Appellant, Ulyssis R. Harbin, suffered personal injury and settled all his claims arising from any tortious conduct. He wished to assign his payments to appellant, Settlement Funding, LLC (hereinafter SF) in exchange for a lump sum. SF filed a notice of intention to transfer pursuant to KRS 454.430. The SAFECOs, (the annuity issuer and the structured settlement obligor) opposed the assignment based on a clause of the settlement agreement. The Jefferson Circuit Court held that the transfer would contravene applicable contract law and denied the application for transfer. SF and Harbin filed a notice of appeal from that decision on March 30, 1999. The body of the notice of appeal designates as appellees, "protected parties" Commonwealth General Assignment Corporation and Commonwealth Life Insurance Company, n/k/a Monumental Life Insurance Company.¹ In their motion to dismiss appeal, the SAFECOs contend the named appellees have no connection to the action below or to this appeal, and that the SAFECOs have been omitted as appellees but are indispensable to this appeal that will affect their rights as

¹The caption of the notice of appeal merely reads: In Re: Ulyssis R. Harbin, Annuitant and Settlement Funding, LLC, Petitioner.

"protected parties". They contend the notice of appeal does not comply with CR 73.03, which requires that the notice specify by name all appellants and all appellees. Since they have not been identified as appellees in the notice of appeal, they are not before the Court on appeal and, therefore, "there simply is no appeal for this Court to adjudicate, and the appeal must be dismissed."

In response, appellants contend the notice of appeal did not violate CR 73.03 because its purpose is to give notice to the opposing party that an appeal of right is being pursued against it. Appellants rely on Blackburn v. Blackburn, Ky., 810 S.W.2d 55 (1991), which appellants contend "implicitly overruled or modified the old rule that parties to an appeal must be specifically named as either appellants or appellees." According to them, notice is the key and CR 73.03 provides the mechanism for inclusion of parties to an appeal. They argue that they satisfied the Rule by timely serving a copy of the notice of appeal upon counsel of record for the two only parties below that opposed the transfer, i.e., the SAFECOs, which, in addition, were the only two parties that were not otherwise named in the notice of appeal. Thus, appellants conclude that, as happened in Blackburn, the designation of the Commonwealth Companies in their notice of appeal instead of that of the SAFECOs was a typographical error.

Appellants further argue that, even if their notice of appeal did violate CR 73.03, the violation would only be a procedural one, controlled by CR 73.02(2), which extends the

doctrine of substantial compliance to violations of "other rules relating to appeals", one of those rules being CR 73.03(1). They contend that, under the current version of CR 73.02(2), the only defect which is automatically fatal to an appeal is an untimely notice of appeal. Appellants' notice of appeal was timely filed. Although appellants note that the Kentucky Supreme Court held in City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990), that the omission of a party from a notice of appeal is a jurisdictional defect and that only the parties designated in the notice of appeal are subject to the appellate court's jurisdiction, they add that this principle was changed by more recent case law, relying on Johnson v. Smith, Ky., 885 S.W.2d 944 (1994), which established that the filing of a notice of appeal "is not a matter of jurisdiction, but only of procedure." Johnson at 949. Appellants recognize that Johnson specifically denies application of the doctrine of substantial compliance to the failure to name indispensable parties, but contend that the matter is resolved if the parties were named below. Any other interpretation of the aforequoted language would be illogical since CR 73.02(2) does not include the automatic dismissal of an appeal for a violation of CR 73.03.

The Court has thoroughly reviewed the parties' arguments and cited authorities and is of the opinion that this appeal must be dismissed.

It is clear that appellants' notice of appeal violates CR 73.03(1) and that this violation is fatal to the appeal. The SAFECOs do not appear anywhere in the notice of appeal, which

distinguishes this case from Blackburn, and prohibits this Court from treating the omission of the SAFECOs as a clerical mistake. While the Court agrees with appellants that Blackburn emphasizes that fair notice to the opposing party is the key, the Court disagrees that notice was satisfied by mere service of the notice of appeal upon the SAFECOs' counsel of record. Notice on counsel who happens to represent a party is not notice to that party that it is an intended appellee where that party was entirely omitted from the notice of appeal.

This Court does not construe the import of Blackburn in the expansive fashion espoused by appellants. We believe Blackburn created only a narrow exception applicable to the unique facts of a situation where the requirement of notice to opposing parties was satisfied, in spite of poor drafting of the notice of appeal, by the actual designation of all parties to the action somewhere in the document.² Here, the specific designation of the Commonwealth Companies, "protected parties" - which have nothing to do with the case - as appellees cannot operate as a substitute for the actual designation of the SAFECOs, even though the SAFECOs are the only two "protected parties" which could possibly be appellees herein.

²In addition, the Blackburn parties' conduct allowed the conclusion that the notice of appeal had met its objective of fair notice. All filings made in the appeal included the names of all the parties, and no party ever questioned having been properly designated as a party. This is not the case here, as demonstrated by the motion to dismiss appeal. Appellants contend that the filing of that motion is "overwhelming proof that [the SAFECOs] did, in fact, get notice." We disagree. The "protected parties" having knowledge of the appeal (be it through service of the notice of appeal on their counsel, or through some other source of information) is not the equivalent of their having legal notice of it as intended by CR 73.03, and, thus, the filing of the motion to dismiss does not qualify as the conduct which saved the appeal in Blackburn.

The SAFECOs were omitted as parties to this appeal that would affect their rights as "protected parties", thus making them indispensable as appellees. In addition, it has been held that the failure to specify in a notice of appeal any party the absence of which prevents the appellate court from affording complete relief among the named parties is fatal to an appeal. See, e.g., Braden v. Republic-Vanguard Life Insurance Co., Ky., 657 S.W.2d 241 (1983). Since the Commonwealth Companies have no connection to this case, there are, in fact, no appellees herein, thus, "there simply is no appeal for this Court to adjudicate. . . ."

We also disagree with appellants that, even if their notice of appeal violates CR 73.03, the violation is only procedural and is eligible for the remedial provisions of CR 73.02(2). Johnson, supra, clearly maintains the principle of strict compliance as it pertains to the failure to name indispensable parties. While CR 73.03(1) is one of those "other rules relating to appeals" when the defect in the notice of appeal relates to the failure to properly designate the final judgment³, it is not one of those "other rules" when the defect relates to the failure to name indispensable parties. As the SAFECOs correctly point out, the "[f]ailure to name indispensable parties is a defect that makes the notice of appeal untimely. . . ." City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990); Johnson at 949. Appellants' notice of appeal neither timely nor properly invoked this Court's jurisdiction with regard to the

³Ready v. Jamison, Ky., 705 S.W.2d 479 (1986).

SAFECOs. The time has expired for an amendment to add or substitute them as appellees. Therefore, the strict compliance/automatic dismissal provision of CR 73.02(2) shall apply to this appeal.

It is ORDERED that Appeal No. 1999-CA-000740-MR be DISMISSED.

ALL CONCUR.

ENTERED: August 20, 1999

/s/ David C. Buckingham
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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