

RENDERED: JANUARY 13, 2012; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-000076-MR

DEBORAH JONES THEISEN,  
EXECUTRIX AND INDIVIDUAL  
HEIR OF THE ESTATE OF DEWEY  
JONES, DECEASED

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT  
HONORABLE JEFFREY T. BURDETTE, JUDGE  
ACTION NO. 99-CI-00994

CLEO WILSON

APPELLEE

### OPINION AND ORDER DISMISSING

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BEFORE: ACREE, CLAYTON, AND STUMBO, JUDGES.

ACREE, JUDGE: The question presented is whether the appellant, Deborah Jones Theisen, proved by clear and convincing evidence that Dewey Jones' signature on the deed at issue was forged. Because Theisen failed to name an indispensable

party on appeal, her notice of appeal is jurisdictionally flawed. Accordingly, we lack jurisdiction to consider Theisen's claim of error and dismiss the appeal.

### ***Facts and Procedure***

In the fall of 1989, appellee Cleo Wilson and his siblings, Clayton Wilson and Paul Wilson (collectively, the "Wilson siblings"), and Dewey Jones executed several deeds to divide jointly-held real property which the parties inherited from Edmond Wilson.<sup>1</sup> Edmond was the father of all the parties except Dewey, who was married to the Edmond's daughter. Dewey's wife pre-deceased Edmond, and her rights to Edmond's estate devolved to Dewey pursuant to her will.

On November 20, 1989, the Wilson siblings conveyed a 33-acre tract of land (the "Homestead Tract") to Dewey ("First Homestead Deed"). This deed was recorded in the Pulaski County Clerk's office on November 29, 1989. On the same date the First Homestead Deed was recorded, another deed was executed and recorded in which Dewey purportedly conveyed the Homestead Tract to Clayton Wilson ("Second Homestead Deed"). Thereafter, also on November 29, 1989, a third deed was executed and recorded in which Clayton conveyed approximately six-and-seven-tenths acres of the Homestead Tract back to Dewey.

Nine years later, Clayton died intestate and Cleo Wilson, as the administrator of Clayton's estate, sought to sell the Homestead Tract. On December 1, 1999, Dewey filed this action in the Pulaski Circuit Court against the Wilson siblings, among others, seeking to have the Second Homestead Deed set

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<sup>1</sup> Cleo Wilson's wife, Margaret June Wilson, was also a party to all the deeds executed during the time period at issue in this matter.

aside on grounds that Dewey's signature had been forged. On January 12, 2000, the Pulaski Circuit Court held a bench trial to resolve the claim.

At the conclusion of the bench trial, the circuit court took the case under submission. Prior to the circuit court's ruling, Dewey died on July 16, 2001. On October 28, 2002, the circuit court dismissed the matter because Dewey's heirs failed to file a motion to revive or for substitution of parties pursuant to KRS 395.278. On appeal, the Kentucky Supreme Court determined "revival and substitution of parties was not necessary for this case to proceed because the action was submitted to the trial court for judgment before Dewey Jones died." *Deborah F. Theisen v. Estate of Clayton C. Wilson, et al.*, 226 S.W.3d 59, 62 (Ky. 2007). Additionally, the Supreme Court remanded the matter back to the circuit court to determine whether Theisen had standing to proceed in the action following Dewey's death. *Id.* at 61-62.

On June 10, 2008, the circuit court concluded that Theisen had standing to proceed because Dewey quitclaimed to her his interest, if any, in the Homestead Tract. Thereafter, the parties agreed the case was ripe for final disposition by the circuit court. On July 21, 2009, the circuit court issued its findings of fact, conclusions of law, and judgment that Dewey failed to prove by clear and convincing evidence that his signature on the Second Homestead Deed was a forgery. On July 31, 2009, Theisen filed a motion to alter, amend, or vacate the judgment. The circuit court denied Theisen's motion. Thereafter, Theisen filed a timely notice of appeal.

## *Discussion*

When Theisen filed her Notice of Appeal, she apparently used the caption from a prior pleading in the case which simply identified “CLEO WILSON ET AL” as the “Defendant” while identifying no one, including Cleo Wilson, as an appellee either in the caption or the body of the Notice. Use of the phrase “et al.” in the caption of the notice of appeal was insufficient to invoke this Court’s jurisdiction over any party. None of the parties to the circuit court action, including Cleo, were identified in any way in the body of the Notice of Appeal. Therefore, our most liberal reading of the Notice allows us to exercise jurisdiction only as to Cleo Wilson in his individual capacity.<sup>2</sup>

Kentucky Rules of Civil Procedure (CR) 73.03 provides, in pertinent part, “[t]he notice of appeal shall specify by name all appellants and all appellees (*‘et al.’ and ‘etc.’ are not proper designation of parties*)[.]” CR 73.03(1) (emphasis added). The Kentucky Supreme Court has interpreted CR 73.03(1) such that “other parties are not included in the appeal unless specifically named.” *Nelson County Bd. of Educ. v. Forte*, 337 S.W.3d 617, 626 (Ky. 2011). Stated differently, unless the appellant identifies, by name, the appellees in the body of the notice of appeal, the use of the phrase “et al.” in the caption of the notice of appeal is

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<sup>2</sup> Dewey Jones filed his complaint naming Cleo Wilson as a defendant both in his individual capacity and in his capacity as Executor of the Estate of Clayton Wilson. However, in the notice of appeal, Theisen listed the caption as “Cleo Wilson et al” without specifying whether she was identifying Cleo as an appellee in his individual or representative capacity. We are persuaded that Theisen’s decision not to specify otherwise in either the caption or the body of the notice of the appeal reveals she was identifying Cleo only in his individual capacity.

insufficient to invoke this Court’s jurisdiction over any appellee except the particular one named. *See id.*; *Yocum v. Franklin County Fiscal Court*, 545 S.W.2d 296, 298 (Ky. App. 1976) (“It has long been the rule that a party may not be designated [in a notice of appeal] by the expression ‘et al.’”).

The question then becomes whether naming only Cleo Wilson in the Notice excluded any indispensable party. If so, dismissal of the appeal is mandated. *Slone v. Casey*, 194 S.W.3d 336, 337 (Ky. App. 2006) (“It is well-established that failure to name an indispensable party in the notice of appeal results in dismissal of the appeal.”).

In an appeal, the notice of appeal is the means by which an appellant invokes the appellate court's jurisdiction. Under the appellate civil rules, 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.

*Forte*, 337 S.W.3d at 626 (citations and internal quotation marks omitted).

Because the Notice of Appeal transfers jurisdiction to this Court only as to the named parties, the failure to name an indispensable party is fatal to the appeal. *See McBrearty v. Kentucky Community and Technical College*, 262 S.W.3d 205, 210-11 & fn. 9 (Ky. App. 2008).

What, then, constitutes an indispensable party? A party is indispensable if his or her “participation in the appeal is [necessary] to grant [complete] relief.” *Forte*, 337 S.W.3d at 625; *Braden v. Republic-Vanguard Life Ins. Co.*, 657 S.W.2d

241, 243 (Ky. 1983) (explaining an indispensable party is one “whose absence prevents the appellate court from granting complete relief among those already parties . . . to the appeal”). That is, the party is necessary “to the decision of the appeal.” *Braden*, 657 S.W.2d at 244. Of course, only “parties that are truly necessary to the appeal,” as opposed to necessary at trial, are deemed indispensable under CR 73.03. *Forte*, 337 S.W.3d at 625.

Here, we are convinced that the Estate of Clayton Wilson is an indispensable party. Before the circuit court, Theisen sought to recover the Homestead Tract memorialized in the Second Homestead Deed purportedly conveying the property to Clayton Wilson from Dewey Jones (who claims his signature was forged). Upon Clayton’s death, the property became entrusted to his estate. Therefore, at the time of the filing of the Notice of Appeal, the Estate of Clayton Wilson had an interest in the property.<sup>3</sup> If we granted the relief sought by Theisen, we would be adjudicating the rights of a party not before this Court – the Estate of Clayton Wilson. And we should note, no appellee’s brief has been filed in this case by anyone.

Theisen was required to name all indispensable parties in the Notice of Appeal; she failed to do so. The notice of appeal is, therefore, jurisdictionally defective. *Forte*, 337 S.W.3d at 625-26. Lacking jurisdiction, we have no authority but to dismiss the appeal.

### ***Conclusion***

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<sup>3</sup> The record reflects that Dewey Jones quitclaimed his interest in the property to Theisen.

This Court does not have jurisdiction to review the Pulaski Circuit Court's July 21, 2009 judgment because Theisen failed to name any party as an appellee with the exception, arguably, of Cleo Wilson. Therefore, we dismiss this appeal.

ALL CONCUR.

ENTERED: January 13, 2012

/s/ Glenn E. Acree  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Bruce W. Singleton  
Somerset, Kentucky