

RENDERED: AUGUST 15, 2014; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2012-CA-001055-MR

ROBERT FRAUSTO; CAROL  
FRAUSTO; AND FELICIA FRAUSTO

APPELLANTS

v. APPEAL FROM GREEN CIRCUIT COURT  
HONORABLE DAN KELLY, JUDGE  
ACTION NO. 12-CI-00048

COMMONWEALTH OF KENTUCKY,  
TRANSPORTATION DEPARTMENT

APPELLEE

### OPINION AND ORDER AFFIRMING

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BEFORE: COMBS, MAZE, AND NICKELL, JUDGES.

NICKELL, JUDGE: Robert Frausto, Carol Frausto and Felicia Frausto have appealed from the Green Circuit Court's dismissal of their action based on their failure to name an indispensable party. We affirm.

On September 24, 2010, Carol was driving along Kentucky Highway 61 in Green County, Kentucky, with her husband Robert, in a car belonging to the

couple's daughter, Felicia. Unbeknownst to Carol, a period of heavy rain had caused flooding along the route. The couple collided with "a sudden river of water," pushing the vehicle backwards. The vehicle sustained significant damage.

The Fraustos sought relief in the Board of Claims, alleging negligence by the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways in the failure to assure drivers were made aware of potentially hazardous roadway conditions. Following a hearing, the Hearing Officer submitted his "Recommended Findings of Fact, Conclusions of Law and Recommended Order" to the parties for the filing of exceptions. The Fraustos filed no exceptions. The Hearing Officer recommended a finding in favor of the Fraustos. The Board rejected the Hearing Officer's recommendation and issued a Final Order in favor of the Highway Department. The order advised the parties of their right to bring an appeal pursuant to KRS<sup>1</sup> 44.140, specifically noting "the Board is a necessary party to the appeal."

The Fraustos timely sought relief in the Green Circuit Court, naming the Transportation Cabinet as the sole defendant. Jurisdiction and venue were alleged to be proper by virtue of KRS 44.140. The Cabinet moved the trial court to dismiss the action for failure to name an indispensable party, the Board of Claims. Following a hearing, the trial court granted the motion and dismissed the action *in toto*. This appeal followed.

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<sup>1</sup> Kentucky Revised Statutes.

The Fraustos contend the trial court erred in dismissing their complaint based on their failure to name the Board of Claims as a party. They claim strict compliance with the statutory mandates is not required in this case because they named the real party in interest—the Commonwealth—as a defendant in their complaint. They believe they substantially complied with the statutes and request reversal of the trial court’s dismissal. Based on our review, such relief is inappropriate.

The trial court’s decision being purely a matter of law, our review must proceed *de novo*. *Frear v. P.T.A. Industries, Inc.*, 103 S.W.3d 99, 105 (Ky. 2003). The statute providing for judicial review of a final order of the Board of Claims, KRS 44.140, states in pertinent part:

(2) Any claimant whose claim is one thousand dollars (\$1,000) or greater may within forty-five (45) days after receipt of the copy of the report containing the final decision of the board, file a proceeding in the Circuit Court of the county wherein the hearing was conducted to review the decision of the board. A copy of the filing and complaint shall be served on the Attorney General in the manner provided by the rules of civil procedure.

(3) The board, the state agency and the claimant shall be necessary parties to such appeals. It shall not be necessary for the board to file responsive pleadings unless it so desires.

Under the clear and unambiguous language of the statute, the Fraustos may appeal the Board’s adverse determination. The question then becomes whether their failure to follow the other mandates of the statute are fatal to their

claim as the trial court concluded. The well-settled law of this Commonwealth requires that question to be answered in the affirmative.

Contrary to the Fraustos contention, substantial compliance with the statutory provisions is insufficient in appeals from administrative decisions.

There is no appeal to the courts from an action of an administrative agency as a matter of right. When grace to appeal is granted by statute, a strict compliance with its terms is required. Where the conditions for the exercise of power by a court are not met, the judicial power is not lawfully invoked. That is to say, that the court lacks jurisdiction or has no right to decide the controversy. *Kentucky Utilities Co. v. Farmers Rural Electric Corporative Cooperation*, Ky., 361 S.W.2d 300 (1962); *Roberts v. Watts*, Ky., 258 S.W.2d 513 (1953).

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It is as plain as a billboard that the legislature has granted to persons aggrieved by the final action of the board of adjustments the grace of appeal to the circuit court provided they perfect that appeal by filing it in the circuit court, including the planning commission as a party, within thirty days. Here the appeal was filed within the thirty-day limitation, but no effort was made to include the Commission as a party until sixty-eight days after the final action of the Board. Consequently, one of the conditions precedent to the exercise of judicial power by the circuit court was not met and it was required to dismiss the appeal for want of jurisdiction. *Kentucky Utilities Co. v. Farmers Rural Electric Cooperative Corporation, supra*. Cf. *City of Danville v. Wilson*, Ky., 395 S.W.2d 583 (1965); *Howell v. Haney*, Ky., 330 S.W.2d 941 (1960).

*Board of Adjustments of City of Richmond v. Flood*, 581 S.W.2d 1, 2 (Ky. 1978).

*See also Kentucky Unemployment Ins. Commission v. Carter*, 689 S.W.2d 360, 361

(Ky. 1985) (finding no authority authorizing the doctrine of substantial compliance in case where appeal process is statutorily created and implemented).

As in *Flood*, the Fraustos perfected their appeal in a timely manner. However, they completely failed to include the Board as a party. Thus, a specific condition precedent to the trial court's exercise of jurisdiction was not satisfied. The trial court was, therefore, required to dismiss the complaint, an action it completed correctly in its May 16, 2012, order.

For the forgoing reasons, the judgment of the Green Circuit Court is affirmed. Furthermore, based on our resolution of this matter, the Cabinet's pending Motion to Dismiss this appeal<sup>2</sup> is rendered moot and is therefore DENIED.

ALL CONCUR.

ENTERED: August 15, 2014

/s/ C. Shea Nickell  
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE:

Derrick G. Helm  
Jamestown, Kentucky

Geraldine M. Guerin  
Elizabethtown, Kentucky

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<sup>2</sup> The Cabinet requested dismissal based on the failure to name the Board as a party to the appeal, the use of incorrect nomenclature in designating it as an appellee, and the inclusion of an "et al" designation in the notice of appeal.